

Neutral Citation Number: [2026] UKUT 406 (AAC)
Appeal No. UA-2025-001010-GIA

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

His Majesty's Treasury

Appellant

- v -

Adrian Finch

First Respondent

and

Information Commissioner

Second Respondent

Before: Upper Tribunal Judge Citron
Decided on consideration of the papers

Representation:

Appellant:	Matt Lewin of counsel, instructed by Government Legal Department
First Respondent:	barred from participation in the proceedings
Second Respondent:	Ben Mitchell of counsel, instructed by ICO Legal Service

On appeal from:

Tribunal:	First-tier Tribunal (General Regulatory Chamber) (Information Rights)
Judge/Panel:	Judge Stephen Roper, Member Stephen Shaw, Member Emma Yates
Tribunal Case No:	EA/2023/0454
NCN:	[2025] UKFTT 00411 (GRC)
Decision mode:	decision made on the papers
Decision Date:	3 April 2025

SUMMARY OF DECISION

93 INFORMATION RIGHTS

93.5 Freedom of information - qualified exemptions
93.10 Information rights: practice and procedure

This case is about certain information in a paper written for a meeting of a 'loan charge steering group', comprised of officials from HM Revenue & Customs and from HM

Treasury, in 2019. The paper was considering "options for concessions" by the government in response to an independent review of the 'loan charge', a piece of tax policy (and legislation) targeting a certain kind of tax avoidance ('disguised remuneration'). The "options" paper had been disclosed to Mr Finch, the First Respondent in these proceedings, by HM Treasury, in response to an information request. However, certain text in the paper, opposite the "Legal" and "Legislation" headings in the analysis of various options contained in the paper, had been withheld, relying on section 42 of the Freedom of Information Act 2000, the exemption for information covered by legal professional privilege.

The Information Commissioner, the Second Respondent in these proceedings, had issued a decision notice to the effect that HM Treasury was entitled to rely on section 42 to withhold the text in question; but on appeal by Mr Finch to the First-tier Tribunal, the First-tier Tribunal decided that this was wrong in law, as the text in the paper was not, itself, legal advice given by lawyer to client, and there was "insufficient evidence" that the text was covered by legal advice privilege.

On HM Treasury's appeal to the Upper Tribunal, the Upper Tribunal holds that the First-tier Tribunal erred in law: the case law authorities are clear that legal advice can, without losing privilege, be disseminated within an organisation, or even externally to an organisation, to allow for its consideration by the client; and in doing so it can be summarised, as opposed to communicated verbatim; the fact that the withheld text in the "options" paper was not, itself, legal advice from lawyer to client, was not therefore a reason to conclude that it was not covered by legal advice privilege, as a summary of the legal advice given by HM Revenue & Customs lawyers.

As to whether there was otherwise an "insufficiency of evidence" that legal advice privilege attached to the text in question, the relevant evidence before the First-tier Tribunal was the text itself in the "closed" bundle, and the evidence of a HM Treasury official to the effect that the text was summaries of advice given by HM Revenue & Customs lawyers. The Upper Tribunal holds that the First-tier Tribunal erred in law in rejecting the evidence of the HM Treasury witness, given that he was the only witness in the proceedings, that his evidence had been treated as reliable and credible in all other respects, that Mr Finch had not challenged the witness' reliability or credibility, and that the First-tier Tribunal had determined the appeal without holding a hearing, on the basis that it could properly determine the issues without a hearing (being the test in the relevant procedural rule of the First-tier Tribunal). In all the circumstances, it was procedurally unfair to have rejected the witness' evidence on the specific point about it summarising legal advice, without giving the witness a chance to respond to the tribunal's concerns, in a hearing, or by written submissions.

In view of this legal error, the Upper Tribunal sets aside the First-tier Tribunal's decision as regards section 42 of the Freedom of Information Act 2000 and re-makes the decision, holding that, on the evidence before both the First-tier Tribunal and the Upper Tribunal, the withheld text comprised summaries of confidential legal advice given by HM Revenue & Customs lawyers, and was covered by legal advice privilege, and that, in all the circumstances, the public interest in disclosing that text was outweighed by the public interest in maintaining the exemption based on legal advice privilege.

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

DECISION

The decision of the Upper Tribunal is to **allow** the appeal of His Majesty's Treasury. The decision of the First-tier Tribunal involved an error of law in its consideration of section 42 of the Freedom of Information Act 2000. Under section 12(2)(a) and (b)(ii) of the Tribunals Courts and Enforcement Act 2007, I set that aspect of the decision aside and re-make it.

The **re-made decision** is that the decision notice of the Information Commissioner dated 27 September 2023, reference IC-226473-M2G7, was correct to conclude that His Majesty's Treasury was entitled to rely on the exemption in section 42 of the Freedom of Information Act 2000 in respect of the information it withheld in reliance on that section and that the public interest test, pursuant to section 2(2)(b) of that Act, favoured maintaining that exemption.

Paragraph 2 of the substituted decision notice issued by the First-tier Tribunal is amended to as to read as follows: "2. His Majesty's Treasury was entitled to rely on section 42 of the Freedom of Information Act 2000 in respect of the information it withheld in reliance on that section."

REASONS FOR DECISION

Introductory

1. This appeal concerns the First-tier Tribunal (**FTT**)'s application of s42, the exemption in the Freedom of Information Act 2000 for information subject to legal professional privilege. References in what follows to **sections** or **s** are to sections of that Act.

2. Mr Finch's appeal to the FTT related to information he had requested from HM Treasury (the Appellant in these proceedings) (**HMT**) connected with HMT's involvement with the 'loan charge review'. The 'loan charge review' was an independent review by Lord Morse, commissioned by the Chancellor of the Exchequer in 2019, of a tax policy (enacted into legislation) known as the 'disguised remuneration loan charge' (or, for short, the 'loan charge').

3. In responding to Mr Finch's information request, HMT withheld certain information based on a number of exemptions, including s42. Following an application to the Information Commissioner by Mr Finch, the Information Commissioner's decision notice upheld HMT's reliance on s42 and a number of other exemptions.

4. On Mr Finch's appeal to the FTT, the FTT found that the Information Commissioner's decision notice:

    a. was correct to conclude that HMT was entitled to rely on the exemptions in sections 31(1)(a) (qualified exemption where information likely to prejudice prevention or detection of crime), 31(1)(d) (qualified exemption where information likely to prejudice assessment or collection of tax) and 35(1)(a) (qualified exemption for information relating to formulation or development of government policy) in respect of the information it withheld in reliance on

those sections, and that the public interest test favoured maintaining those exemptions; but

b. involved an error of law in concluding that s42(1) was engaged in respect of the information which was withheld in reliance on that section.

The FTT therefore allowed Mr Finch's appeal in part. HMT was ordered to disclose the information withheld under s42 within 35 days of the promulgation of the FTT's decision, or (if there was an application to appeal the FTT's decision) within 28 days after being notified of an unsuccessful outcome to such application or any resulting appeal.

5. It was against the element of the FTT's decision involving s42 that HMT appealed to the Upper Tribunal.

The background in more detail

The 'loan charge review' of 2019

6. The terms of reference to the 'loan charge review' of 2019 said this by way of introduction, summarising the government's view of the 'loan charge' legislation and of the independent review it was setting up:

> The Loan Charge is a policy designed to tackle contrived tax avoidance schemes where a person's income is paid as a loan and not repaid. The government is clear that these schemes do not work, that wages paid in this way have always been taxable, and that the underlying tax avoidance behaviour is unfair to the 99.8 percent of taxpayers who did not use these schemes. The Loan Charge was introduced following 20 years of action against these schemes, which despite considerable action continued to proliferate and be used.
>
> However, the government recognises that concerns have been raised about the Loan Charge policy as a mechanism for drawing a line under these schemes, including claims that the policy is retrospective; the government is therefore commissioning this independent review to consider the impact of the Loan Charge on individuals who have directly entered into disguised remuneration schemes.
>
> While the Review is ongoing, the Loan Charge remains in force, in line with current legislation; the government will consider the outcome of the Review once concluded and will respond in due course.

7. The scope and objectives of the 'loan charge review' were expressed in the same document as follows:

> The Reviewer, with the support of a secretariat, is being asked to draw on the available evidence and their expertise, engaging as appropriate with stakeholders, to consider:
>
> - whether the Loan Charge, as it applies to individuals who have directly entered into disguised remuneration schemes, is an appropriate response to the tax avoidance behaviour in question;

> - whether changes announced by the government in advance of, and since, the Loan Charge came into effect address any legitimate concerns that have been raised about the impact on individuals, including affordability for those affected.
>
> The Review is focused on the impact of the Loan Charge on individuals who have directly entered into disguised remuneration schemes.
>
> In considering its recommendations, the Review must also take account of:
>
> - the impact on wider taxpayer fairness;
>
> - HMRC's ability to tackle tax avoidance effectively in the future.

Mr Finch's information request to HMT and their response

8. Mr Finch's original information request to HMT was in the following terms:

> Please disclose the minutes, and any other recorded information, of all Loan Charge Review meetings which were held on the dates below –
> 18th September 2019
> 2nd October 2019.

9. Following a request for clarification from HMT, Mr Finch clarified his information request as follows:

> The Loan Charge Review was commissioned by the Chancellor of the Exchequer, who has overall responsibility for the work of Her Majesty's Treasury.
>
> Whether these were meetings held by Her Majesty's Treasury on the subject of the Loan Charge Review, or whether they were meetings held by one or more members of the Loan Charge Review team on either of those two dates is incidental. I have asked you to provide the minutes, and any other recorded information you hold, which relates to any of those meetings on the two dates mentioned. That recorded information will include printed documents, computer files, letters, emails, photographs, and sound or video recordings.

10. On 12 June 2023 HMT provided what it said was "the majority of the in-scope information" but stated that it had made some redactions pursuant to sections 21(1), 31(1)(a), 31(1)(d), 35(1)(a), 40(2) and 42. "Annex B" included, most relevantly to this appeal, a 46-page paper prepared for a meeting of the 'loan review steering group' in early October 2019, entitled *Loan Charge Review: Options For Concessions* (the **"options" paper**).

11. As the "options" paper contained the text that was withheld under s42, it is helpful to say a little more about it at this stage. It started as follows:

> This paper covers the considerations for potential recommendations from the Loan Charge Review. It is intended to build on, and borrow from, earlier work by colleagues in August 2019 (and earlier). It covers the following potential recommendations, including those requiring primary legislation.

12. Further down on the same page, it stated that what was said in the executive summary that followed, "was expanded on in the full paper to cover

> • a description of the option
> • how the option might address the concerns of MPs and campaigners
> • a description of the key design choices and the considerations
> • an overview of the advantages and disadvantages
> • the operational considerations and impacts
> • legal considerations
> • the legislative requirements
> • the illustrative Exchequer impact (where possible)
> • the illustrative types and number of individuals and employers benefiting (where possible)
> • the impact on HMRC's ability to tackle tax avoidance in the future

13. The FTT had a witness statement from a Deputy Director for Personal Taxation in HMT, whom it referred to as "the witness". This was the 16-page witness statement of Oliver Haydon, dated 29 May 2024, which was in the FTT's open bundle. Mr Haydon made some observations about the "options" paper, and the 'steering group' for whose meeting (in early October 2019) it was prepared, which are uncontroversial; as regards the 'steering group', he said:

> 25. … The Loan Charge Steering Group was set up by HMT. The meetings were designed to explore the policy options relating to the Loan Charge Review and prepare associated advice for ministers on these options in response, and the future strategy of the policy. It was attended by HMT and HMRC officials (both senior and junior officials). This meeting took place not long after the Loan Charge Review had been commissioned.

14. As regards the "options" paper, Mr Haydon said this – this is, again, largely uncontroversial, although the passages I have underlined are in contention, as will be further explained below:

> 26. … The purpose of [the "options"] paper was to consider the potential recommendations that Lord Morse might make. Three "cross-cutting issues" and nine potential recommendations were identified in the paper. Each issue or potential recommendation was analysed under various headings. The relevant headings for this appeal are:
>
> > (a) "Legal": <u>a summary of legal advice from HMRC solicitors</u> on the implications of the issue or potential recommendation;
> >
> > (b) "Litigation": <u>a summary of legal advice from HMRC solicitors</u> on whether the issue or potential recommendation could be implemented under existing legislation or whether new legislation would be required; and
> >
> > (c) "Impact on HMRC's ability to tackle tax avoidance in the future": a summary assessment completed by HMRC and HMT policy officials on the implications of the issue or potential recommendation for HMRC's ability to tackle tax avoidance in the future

15. In his witness statement, Mr Haydon refers at times to the "Litigation" headings in the "options" paper – this appears to be a typographical error, as the headings he appears to be referring to are "Legislation" rather than "Litigation".

The Information Commissioner's decision notice as regards the application of s42

16. The Information Commissioner's decision notice included the following as regards the application of s42:

> 66. The complainant advised that the withheld information refers to considerations for potential concessions and nothing else, they therefore did not believe the information could constitute legal advice, but rather a "high level comment" on legal considerations and legislative requirements.
>
> 67. Having considered the withheld information, the Commissioner is satisfied that the information does contain legal considerations and also contains advice on legal remedies to potential issues. The information is therefore subject to privilege and the exemption is engaged. He will now go onto consider the public interest test.
>
> 68. HMT advised that there would be a public interest in transparency and accountability, including of those in legal profession advising the Government. HMT also acknowledged that as the requested information related to Loan Charges, it recognised that there may be a further interest due to the impact on individuals
>
> 69. The complainant referred to the Tribunal decision *Mersey Tunnel Users' Association v Information Commissioner and Merseytravel* EA/2007/00525 where it was decided that due to the amounts of money involved and numbers of people affected, the passage of time, the absence of litigation, and crucially the lack of transparency in the authority's actions and reasons, that the public interest in disclosing the information clearly outweighed the strong public interest in maintaining the exemption.
>
> 70. HMT advised that to disclose the requested information, would mean disclosure of legally privileged information, which would likely impact on confidentiality and trust between HMRC and their legal advisors. It further noted that legal professional privilege protects confidential communications between lawyers and clients: it is a fundamental principle of English law.
>
> 71. HMT added that there is a strong public interest in withholding the information to ensure frankness and openness between HMT, HMRC and their legal advisers is maintained. This trust and openness are fundamental to the administration of the justice system.
>
> 72. The Commissioner notes that the *Mersey Tunnel User's Association* case is more than a decade old. More recent case law, including from higher courts, has emphasised the inherent weight to be afforded to the public interest in favour of protecting the principle of privilege [see, for example, *Robin Callender Smith v Information Commissioner and Crown Prosecution Service* [2022] UKUT 60 (AAC)]. The advice remains current and the fact that there may be no immediate prospect of further litigation does not mean that litigation could not arise in future.

> 73. The Commissioner considers that the balance of public interest lies in withholding the information and protecting HMT's ability to seek and receive high quality professional legal advice without the fear of exposing itself to legal risk. Whilst the Commissioner has considered the complainant's public interest arguments, he does not consider that they are sufficiently compelling to justify disclosure of such information to the world at large.
>
> 74. The Commissioner has concluded that the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure. …

Mr Finch's notice of appeal as regards the application of s42

17. Mr Finch's notice of appeal to the FTT said this as regards the application of s42:

> There is no evidence that the entries labelled as 'legal' and 'legislation' contain any actual legal advice which would justify use of this exemption. Those entries labelled 'legal' and 'legislation' which have not been withheld refer to 'considerations' during the course of discussions about the options for potential concessions - nothing else. I do not accept or believe that this constitutes legal advice - as highlighted on page 60 of the annex, it is simply a high-level comment on legal considerations and the legislative requirements - and not legal advice which has been received. I requested that the ICO asked to see these withheld entries, and to determine whether or not the entries constituted actual legal advice - if they did not, then they should be disclosed.
>
> I also referred the ICO to the Tribunal decision in EA/2007/0052 (*Mersey Tunnel Users Association v Information Commissioner and Merseytravel*), where in paragraph 51 it concludes that "Weighed in the round, and considering all the aspects discussed above, we are not persuaded that the public interest in maintaining the exemption is as weighty as in the other cases considered by the Tribunal; and in the opposing scales, the factors that favour disclosure are not just equally weighty, they are heavier. We find, listing just the more important factors, that considering the amounts of money involved and numbers of people affected, the passage of time, the absence of litigation, and crucially the lack of transparency in the authority's actions and reasons, that the public interest in disclosing the information clearly outweighs the strong public interest in maintaining the exemption, which is all the stronger in this case because the opinion is still live. To quote *Bellamy [v SSTI* EA/2005/23]: "there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that public interest". In our judgment, the countervailing considerations adduced here are not equally strong; they are stronger. the opinion should be disclosed."
>
> The Tribunal will be able to see for itself from the disclosure already made that the withheld information refers to considerations for potential concessions and nothing else, and therefore does not constitute legal advice, and, as highlighted on page 60 of the annex, it is simply a high-level comment on legal considerations and the legislative requirements - and not legal advice which has been received.

18. "Page 60 of the annex" is a reference to the first page of the "options" paper.

19. Mr Finch's notice of appeal, as just quoted, makes the point that the text opposite the headings "Legal" or "Legislation" was not redacted, in respect of some of the

issues presented in the "options" paper. For completeness, the instances of this appear to be:

a. For "cross-cutting issue C: reverting to litigation", text opposite "Legal" is disclosed, as follows: "• There is no legal bar, other than for unprotected years, to further litigation "

b. For "option 1: automatic minimum guarantee of time to pay", text opposite "Legislation" is disclosed, as follows: "More radical options like "student loan" one would require primary legislation."

c. For "option 2: don't apply to unprotected years", text opposite "Legal" is disclosed, as follows: "• Defining sufficient disclosure very difficult and leads to fact-dependent litigation."

d. For "option 3: reduce time period", text opposite "Legal" is disclosed, as follows: "Would strengthen HMRC's case in JRs seeking to challenge the Loan Charge is disproportionately retrospective. Likely does not require notification to the Law Officers." Text opposite "Legislation" is disclosed as follows: "• This would require primary legislation and introduces a risk of a wider amendment."

e. For "option 4: do not add outstanding loans to a single year", text opposite "Legal" is disclosed, as follows: "• Would undermine the narrative that the Loan Charge is not retrospective and does not affect the tax position of any previous year. • We may need authorisation from the Law Officers as the retroactive effect is greater than the current measure. They may decline our request. • Presentational retrospection may significantly increase the risk on the JR • There may be issues with HRA if we change the basis as it would be retrospective and may, depending on how some customers have configured their 2018-19 income, therefore have losers.".

f. For "option 6: don't apply to those who didn't receive a benefit from entering into disguised remuneration schemes", text opposite "Legislation" is disclosed, as follows: "Would most probably require primary legislation."

Mr Haydon's witness statement

20. Mr Haydon's witness statement included the following views:

> 45. The "legal" and "Litigation" headings in the papers included within Item 23 of Annex B contain a summary of legal advice from HMRC solicitors on the legal implications of the issue/potential recommendations and the extent to which that issue/potential recommendations could be accommodated within existing legislation. It is therefore confidential legal advice which is subject to legal advice privilege
>
> 46. I believe the public interest in withholding this privileged advice is very strong. The withheld information is high-level, and as a result the disclosure of this information would not significantly aid public understanding. There is strong public interest in this information not being disclosed given the information provided is confidential and the importance placed

> on full and frank communications between client and lawyer to ensure frank advice, which is fundamental to the administration of justice. Furthermore, I repeat the points already made … about the very strong public interest in not enabling tax avoidance.

The FTT's decision in further detail

Procedural matters

21. The FTT did not hold an oral hearing: the parties consented to this and the FTT considered that the appeal was suitable for determination on the papers in accordance with rule 32 of its procedure rules and was satisfied that it was fair and just to conduct the appeal in that way. ([22-23] (this and other references to **numbers in square brackets** are (unless otherwise indicated by the context) to the **numbered paragraphs of the FTT's decision**)).

22. The closed bundle before the FTT contained the unredacted version of the information provided by HMT on 12 June 2023 and some unredacted aspects of information which had been redacted in the open bundle. A separate written gist of the closed material had been provided by HMT following case management directions from the FTT. ([24])

Issues

23. Mr Finch's grounds of appeal focussed on the findings in the decision notice that HMT was entitled withhold information pursuant to sections 31(1)(a), 31(1)(d), 35(1)(a) and 42(1). The FTT's decision accordingly addressed these aspects ([16-19]).

24. Relying on Mr Haydon's evidence, the FTT provided this additional context at [6]: the 'loan charge' was a policy announced by the Chancellor in the 2016 Budget to tackle disguised remuneration tax avoidance schemes; following concerns that had been raised about the policy as a mechanism for drawing a line under those schemes, in September 2019 the Chancellor commissioned the independent 'loan charge review' by Lord Morse.

Section 31(1)(a) (qualified exemption where information likely to prejudice prevention or detection of crime)

25. The FTT found, relying on Mr Haydon's evidence (see [44]) that s31(1)(a) was engaged in respect of the relevant information on the basis that the disclosure of it would be likely to prejudice the prevention of crime – namely, measures to prevent cyber-crime relating to potential attacks on HMT's systems ([45]). In respect of the public interest test, the FTT took into account the public interest in transparency as a factor favouring disclosure but considered that this was outweighed by the public interest in maintaining the exemption in s31(1)(a). This was because the FTT found there to be a significant public interest in protecting HMT (and HMRC) from the risk of cyber-crime. In contrast, the FTT found that there was negligible public interest in disclosing the relevant information (such as hyperlinks to HMT's (and HMRC's) remote meeting software and storage locations or the dial-in details for joining conference calls). ([46-48]).

Section 31(1)(d) (qualified exemption where information likely to prejudice assessment or collection of tax)

26. The information withheld under the exemption in s31(1)(d) comprised analysis by and discussion among HMT officials about HMRC's ability to detect disguised remuneration tax avoidance schemes and potential policy options (including their merits) for tackling such schemes. The FTT found that the relevant information addressed potential policies to tackle tax avoidance schemes, including consideration of possible limitations or weaknesses associated with those policies, as well as descriptions of the characteristics of tax avoidance arrangements. It also covered mechanisms which HMRC were able to use to take a person's financial situation into account when agreeing and settling any outstanding tax liabilities. The FTT found that if such information were disclosed, it would be likely to be exploited by taxpayers or their advisers to develop arrangements, or to change or manipulate their affairs, in order to avoid or lessen their tax liability or to alter a settlement outcome with HMRC. The FTT found that disclosure of this information would be likely to prejudice the assessment or collection of tax and accordingly that s31(1)(d) was engaged. Turning to the public interest test, the FTT accepted that there was public interest in disclosure of the relevant information for the reasons referred to by the parties (greater public understanding of the 'loan charge'; accountability for the implementation and enforcement of tax rules; improving understanding of HMRC's settlement procedures; providing greater transparency, including with regard to how taxpayers can settle their affairs); the FTT stressed that there was a significant amount of disclosed material, such that the public interest in transparency and understanding regarding the 'loan charge' had already been achieved to some extent. However, taking all the factors into account, the FTT found that the factors favouring disclosure were outweighed by the factors favouring maintaining the exemption in s31(1)(d). In particular, the FTT considered that there was greater public interest in withholding the information so as to avoid the risk of it being used to facilitate tax avoidance or to lessen the amount of tax which might otherwise lawfully be collected by HMRC. ([53-56]).

Section 35(1)(a) (qualified exemption for information relating to formulation or development of government policy)

27. The FTT, having accepted Mr Haydon's evidence on the point (see [60]), found that the information withheld under the exemption in s35(1)(a) related to the formulation or development of government policy (namely, government policy on tackling the promotion and use of disguised remuneration tax avoidance schemes), as the material described and considered policies on tackling promotion and use of disguised remuneration tax avoidance schemes generally (not limited to the 'loan charge'); and the activity relating to the formulation or development of government policy was still in progress at the time of Mr Finch's information request and HMT's response to it. Section 35(1)(a) was therefore engaged ([60-61]). In respect of the public interest test, the FTT considered that there was a public interest in transparency regarding the 'loan charge' and in understanding how HMRC enforced against tax avoidance generally; however, it found that there was a greater public interest in withholding the relevant information, given the risk of the information being used to avoid tax; this was particularly pertinent having regard to the nature of the relevant information, which related to how existing policies could be refined,

as well as future tax avoidance prevention options and an analysis of the risks involved with each. The FTT considered it clearly contrary to the public interest to disclose information revealing the advantages and disadvantages of the policy options, at a time that they were still being considered, which could be exploited by taxpayers or their advisers to avoid or reduce tax payments which would otherwise lawfully be due. Accordingly, taking all the factors into account, the FTT found that the public interest test favoured maintaining the exemption in s35(1)(a). ([65-66])

Section 42

28. The information withheld under the exemption in s42(1) comprised most of the 'Legal' and in some cases the 'Legislation' sections of the "options" paper. HMT had stated that the information was legal advice from HMRC's solicitors on the legal implications (including the need for legislation) of various policy options being considered as part of the government's response to potential recommendations made by the 'loan charge review'. The FTT found that this element of the appeal was concerned with the potential application of legal advice privilege (rather than litigation privilege) for the purposes of s42(1), as the relevant information did not relate to existing or prospective litigation.

29. The law as to legal advice privilege was set out thus at [70]:

> Case law [*Three Rivers District Council and others v Governor and Company of the Bank of England* [2004] UKHL 48] has established that the relevant principles which must apply if legal advice privilege attaches to any particular material are that the material:
>
> > a. must be between a qualified lawyer acting in their professional capacity and a client;
> >
> > b. must be created with the sole or dominant purpose of obtaining or providing legal advice; and
> >
> > c. must be confidential.

30. The FTT set out its analysis thus (omitting, for the moment, [72], which it described as "incidental" observations):

> 71. HMT submitted that the relevant information was subject to legal professional privilege. However, we find that there was insufficient evidence to support that argument. The relevant material comprised part of the [information disclosed by HMT on 12 June 2023] (with the relevant information redacted in reliance on section 42(1)) and it covered matters such as the policy options we discussed above in respect of section 35(1)(a). Based on our assessment of the relevant material and the other evidence relating to it, we find that the document in question does not comprise communications between a lawyer and their client.
>
> …
>
> 73. … as we have stated, we find that there was insufficient evidence to support HMT's assertion that the relevant information was subject to legal professional privilege. The witness statement included the witness's view that the relevant information was "a summary

> of legal advice from HMRC solicitors" and they considered that "it is therefore confidential legal advice which is subject to legal advice privilege" but no evidence was provided in support of their views. In particular, there was no evidence as to the origin of the relevant information, including no evidence to demonstrate that the material satisfied the three limbs of the principles set out in paragraph 70.
>
> 74. Paragraph 64 of the Decision Notice correctly reflected the principles we outlined in paragraph 70 which must apply if legal advice privilege attaches to any particular material. However, in our view the Commissioner did not properly analyse whether the relevant information was in fact caught by the exemption. As we stated, the material itself does not comprise communications between a lawyer and their client. The Commissioner should have given further consideration as to whether the relevant information revealed the substance of a privileged communication such that legal professional privilege could still be asserted in respect of it.
>
> 75. The Commissioner stated in paragraph 67 of the Decision Notice that he was satisfied, having considered the relevant information, that it "*does contain legal considerations and also contains advice on legal remedies to potential issues*". The Commissioner therefore concluded that the information was "*subject to privilege*". However, material is not necessarily subject to legal advice privilege simply because it contains 'legal considerations and advice'; the test for legal advice privilege would need to be met and (as we have stated) there was insufficient evidence to support the conclusion that the test was met. We therefore find that the Commissioner erred in concluding that the relevant information was legally privileged such that the exemption in section 42(1) was engaged.

31. In addition, the FTT found, at [72], that the material in question was advice from HMRC's lawyers (not HMT's lawyers) that had been circulated by email to a number of people within HMT and HMRC; although it was marked 'official-sensitive' it was not expressly stated to be confidential; it had been circulated to junior officials in addition to senior officials; the FTT found that these factors could mean that legal professional privilege (if it existed) was lost in respect of the relevant information, although the FTT acknowledged the concept of 'common interest privilege' and recognised the possibility that material which reveals the substance of a privileged communication can still be subject to legal professional privilege.

32. The FTT thus found that s42(1) was not engaged in respect of the relevant information. Given that finding, the FTT did not go on to consider the public interest test ([71-77]).

HMT's grounds of appeal to the Upper Tribunal

33. HMT's grounds of appeal (for which permission was given by the Upper Tribunal) were that the FTT was wrong to conclude that the withheld information was not subject to legal professional privilege and therefore that the exemption under s42(1) was not engaged:

    a. the FTT's conclusions (at [73]) that

        i. there was no evidence to "support" Mr Haydon's witness statement, to the effect that the relevant information was "*a summary of legal*

advice from HMRC solicitors" and *"it is therefore confidential legal advice which is subject to legal advice privilege*"; and

ii. there was "no evidence as to the origin of the [withheld] information"

was irrational, given the express (and unchallenged) evidence that it was a summary of advice that had been provided by HMRC's solicitors;

b. the FTT misdirected itself in concluding that circulation of the "options" paper beyond HMRC officials meant that it was no longer "between" HMRC's solicitors and their "client"; and

c. the FTT misdirected itself in concluding that circulation of the "options" paper to junior as well as senior officials within HMT as well as HMRC, without an explicit "confidential" marking, meant that the withheld information ceased to be confidential.

34. HMT submitted that it was self-evident from the content of the withheld information – which was generally concerned with the risks arising from potential legal challenges to the various policy options under considerations and whether proposed options were within existing legislative powers – that this was information provided by a government lawyer in order to advise a client department working on policy development.

35. HMT submitted that the fact that the withheld information was a summary of legal advice from HMRC's solicitors – rather than the original advice itself – does not mean that it ceased to be privileged: privilege extends to documents (including internal documents) which "reproduce legal advice for dissemination to those who need it" (*A v B and the Financial Reporting Council* [2020] EWHC 1492 (Ch) (Trower J) at [5], relying on *Jet2* (see below) at [45]).

36. HMT noted that they and HMRC were both departments of the same government and therefore all officials were carrying on the business of "the Crown": see *Town Investments Ltd v Department of the Environment* [1978] AC 359.

37. The FTT acknowledged at [72] that the "options" paper was marked "official sensitive" – it would have been readily apparent to anyone reading the paper that it contained confidential information and therefore an equitable duty of confidence arose (see *Primary Group (UK) Ltd v RBS plc* [2014] EWHC 1082 (Ch)). Therefore, to the extent that the FTT did reach this conclusion, it was wrong to find that the withheld information was not confidential.

38. HMT submitted that the appeal should be allowed, that the FTT's decision in respect of s42 should be set aside and that the Upper Tribunal should re-make the decision by dismissing Mr Finch's appeal in its entirety.

Information Commissioner's position on HMT's appeal to the Upper Tribunal

39. The Information Commissioner submitted that the appeal to the Upper Tribunal should be allowed, the decision of the FTT should be set aside to the extent it

decided that HMT was not entitled to rely on the exemption in s42(1), and the Upper Tribunal should remake the decision, finding that the exemption was engaged and the public interest favoured maintaining the exemption.

Court of Appeal authority on legal advice privilege

40. *Civil Aviation Authority v Jet2.com Limited* [2020] EWCA Civ 35 (***Jet2***) is relatively recent Court of Appeal authority on the law relating to legal advice privilege. At [42], the court said that it was necessary for a party seeking to rely on this privilege to

> satisfy the criteria of each of four elements: there must be (a) a communication (whether written or oral); (b) between a client and a lawyer, or a lawyer and his client; (c) made in confidence; (d) for the purpose of giving or obtaining legal advice.

41. The focus of the appeal in *Jet2* was whether the 'purpose' in (d) above must be the dominant purpose; but some aspects of the other elements were also pertinent. The court elaborated five 'propositions' which it said arose from the authorities (the first three were uncontroversial; the other two required greater consideration).

42. Proposition 1 was that legal advice privilege applies to communications, not only with a lawyer in independent practice, but also with an in-house lawyer (see [44]).

43. Proposition 2 was stated thus at [45]:

> Although the privilege attaches to communications between a lawyer and his client, the law recognises that legal advice is not given for hypothetical purposes, but to be considered and (insofar as accepted) applied by the client. It is therefore well-established that it covers, not only a document from the lawyer containing advice and the client's own written record of advice (whether given in writing or orally), but also any communication (again, whether written or oral) passing on, considering or applying that advice internally (*Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Limited (The Good Luck)* [1992] 2 Lloyd's Rep 540 ("*The Good Luck*") at pages 540-1 per Saville J, and *USP Strategies Plc v London General Holdings Limited* [2004] EWHC 373 (Ch) ("*USP Strategies*") at [19(c)] per Mann J). Indeed, there are circumstances in which the privilege will attach to the dissemination of advice to third parties (*USP Strategies* and *Gotha City v Sotheby's* [1998] 1 WLR 114). ….

44. Proposition 3 was that the privilege applies to communications only for the purpose of obtaining or giving legal advice, and not (e.g.) other professional or commercial advice.

45. The judgement introduced proposition 4 as follows, at [47]:

> The second proposition to which I referred concerns the extent to which legal advice, privileged when given, can be disseminated internally and externally without the loss of privilege, where the law has taken a flexible and realistic approach, reflecting the realities of modern corporate and commercial arrangements. However, the law has taken a somewhat different approach to the collection of material, internally and externally, for the purpose of obtaining legal advice, …. The fourth proposition derived from the authorities is that material collected by a client (or by his lawyer on his behalf) from third parties or

> independent agents for the purposes of instructing lawyers to give advice is not covered by [legal advice privilege]; and, further, where the relevant client is a corporation, documents or other materials between an employee of that corporation and a co-employee or the corporation's lawyers, even if required or designed to equip those lawyers to give legal advice to the corporation, do not attract [legal advice privilege] unless the employee was tasked with seeking and receiving such advice on behalf of the company …..

46. Proposition 5 was introduced as follows, at [60]:

> The focus therefore turns to the scope of 'legal advice' for these purposes, and the fifth proposition namely that, for [legal advice privilege] to apply, the communication must be made 'in a legal context' (the first limb), but otherwise 'legal advice' is widely defined (the second limb).

47. In *USP Strategies*, one of the cases cited with approval in *Jet2*, Mann J summarised the position thus:

> 20. The position therefore seems to me to be as follows. Where privileged advice is disclosed to a third party the privilege is capable of attaching to the third party communication because that communication is evidence of the privileged advice within the formulation in *Three Rivers*. It does not matter whether that third party communication is of the whole of the advice … or a paraphrase of or extract from the advice. … The proper analysis, consistent with *Three Rivers*, is to continue to afford privilege to material which evidences or reveals the substance of legal advice (subject, of course, to waiver). The possibility of inaccuracy is not a reason for departing from this principle. If the passed on "advice" were so inaccurate that it could no longer be properly described as a summary of the advice, then it might be that that communication would not be privileged (though even then it might attract privilege if it tended to reveal instructions given, which it might well), but there is no suggestion that that is the case here and I need not consider it further. Short of that, I do not see why some degree of inaccuracy, even if it exists, should necessarily destroy the privilege; so there is all the more reason for saying that the possibility of inaccuracy should not destroy the privilege which would otherwise exist in paraphrases or summaries.

The Upper Tribunal proceedings

48. In a decision issued by the Upper Tribunal on 14 September 2025, I gave permission to appeal and suspended the effect of the FTT's decision, pending the determination of the appeal to the Upper Tribunal.

49. In a ruling issued by the Upper Tribunal on 9 January 2026, I barred Mr Finch from taking further part in the proceedings. The background to this was that Mr Finch did not comply with a direction, accompanying the Upper Tribunal's grant of permission to appeal, to provide a response to the appeal within one month; nor did he comply with subsequent directions, issued on 12 December 2025, for Mr Finch to come into compliance within 14 days, and warning that failure to comply could lead to his being barred.

50. I have made this decision on the papers as, in all the circumstances – including that I had clear written submissions from both HMT and the Information Commissioner, and Mr Finch was barred – it seemed to me fair and just to do so. I have kept this

determination (not to hold a hearing) under review during the course of my deliberations, as indicated in the analysis which follows.

Analysis: did the FTT err in law in its consideration of s42?

51. The issue in this appeal is whether the FTT erred in law in finding that the withheld information – being certain text in the "options" paper opposite the "Legal" and "Legislation" headings in the analysis of three issues and nine potential recommendations of the 'loan charge review' – was not covered by legal advice privilege.

52. The analysis of this issue at [71] and [73-75] had two recurring themes: one, that the "options" paper was not, itself, legal advice given by lawyer to client; and, second, that there was "insufficient evidence" to support HMT's assertion that the text in question from the "options" paper was covered by legal advice privilege.

53. The first of these points is no reason to conclude that the text in question was not covered by legal advice privilege: this is made clear by what was said by the Court of Appeal in *Jet2* at [45] and again at [47]: legal advice can be disseminated within an organisation, or even externally to an organisation, to allow for its consideration by the client. *USP Strategies* (cited with approval in *Jet2*) deals expressly with the situation in this appeal, where legal advice has been summarised, as opposed to communicated verbatim.

54. In my view, this authority also deals with the point raised in Mr Finch's notice of appeal to the FTT about the withheld text being, in Mr Finch's terms, "high-level comment" on legal considerations and the legislative requirements as opposed to "actual" legal advice: the case law makes it clear that consideration and application of legal advice by its recipient is within scope of legal advice privilege.

55. Turning to the second point in the FTT's analysis – "insufficiency" of evidence to support the proposition that legal advice privilege applied – the starting point is to say that the relevant evidence before the FTT was (a) the "options" paper (in redacted form in the open bundle and in unredacted form in the closed bundle) and (b) Mr Haydon's witness statement, giving the context for the "options" paper, and stating that the withheld information comprised summaries of advice given by HMRC (in house) lawyers.

56. It seems the aspect of the evidence that the FTT found "insufficient" to show that legal advice privilege was satisfied, was that the FTT did not have before it *direct evidence* of what it referred to at [73] as the *origin* of the information in question - the legal advice (said to have been) given by HMRC's lawyers e.g. a copy of their written advice, or, to the extent the advice was given orally, a witness statement from someone who had received the oral advice. In articulating it in this way, I am putting the point more clearly, and explicitly, than the FTT did – but this seems to me the issue the FTT was getting at.

57. Seen with this point in focus, the question for the FTT was whether, on the evidence before it, it was more likely than not that the withheld text in the "options" paper was indeed summaries of advice given by HMRC lawyers. It is argued in this appeal that

the FTT erred in law in deciding that question in the negative, given the circumstances that

a. Mr Haydon's was the only witness evidence before the FTT, and he stated that the withheld text in the "options" paper *was* summaries of advice given by HMRC lawyers;

b. there was no inherent implausibility in this statement by Mr Haydon, given the context and contents of the "options" paper, including the content of the withheld information itself, as disclosed in the closed bundle (nor, on my reading of the FTT decision, was there any suggestion that the FTT thought that Mr Haydon's statement was inherently implausible);

c. the appellant before the FTT, Mr Finch, had consented to the appeal being determined without a hearing; and

d. the FTT itself had determined that it could "properly determine the issues without a hearing" – being the test in the relevant rule of its procedure, rule 32 – and that this was consonant with the overriding objectives of its procedural rules, fairness and justice.

58. HMT in this appeal contends that the FTT's legal error was making a finding (that the withheld information was *not* a summary of advice given by HMRC's lawyers) that was irrational or perverse. HMT says that, by consenting to the appeal being determined on the papers, Mr Finch had accepted Mr Haydon's evidence that the withheld text in the "options" paper opposite the "Legal" and "Legislation" headings *was* summaries of advice given by HMRC lawyers.

59. I would not go quite this far: Mr Finch was not legally represented, and he ticked the box for a "paper decision" in his notice of appeal (page A32 of the FTT open bundle), which was prior to Mr Haydon's witness statement being filed in evidence. In my analysis, the FTT was not bound to accept Mr Haydon's statement, just because Mr Finch had ticked the box for a "paper decision". However, given

a. the inherent plausibility of Mr Haydon's evidence on this point,

b. that the FTT, in accepting, and relying on in determining issues in contention, other evidence of Mr Haydon (see [44] and [60]), clearly regarded the other parts of Mr Haydon's evidence as credible and reliable,

c. the fact that Mr Finch, having ticked the "paper decision" box in his notice of appeal, did not give any indication, later in the FTT proceedings, that he did want to have a hearing, or otherwise challenge the credibility or reliability of the contents of Mr Haydon's statement, and

d. the fact that the "gist" of the closed bundle provided by HMT (in compliance with the FTT's directions) also stated that the text in question was summaries of legal advice given by HMRC's lawyers – and Mr Finch did not make any submissions in response to the gist, although invited to do so by the FTT's directions,

it seems to me the FTT fell into error in rejecting Mr Haydon's statement about the origin of the withheld text opposite the "Legal" and "Legislation" headings, without giving Mr Haydon a way of responding to the FTT's doubts about this particular aspect of his evidence (by convening a hearing or inviting written submissions on the point) – or explaining how, in the light of the relevant circumstances as just enumerated, it was fair and just to proceed without doing so.

60. My analysis here is based in part on authorities cited in a recent Upper Tribunal information rights decision, *Warner v IC* [2026] UKUT 198 (AAC), at [9] and [11]:

> It is well established that where a court or tribunal has a discretion as to whether or not to hold a hearing, the test is whether 'fairness requires such a hearing in the light of the facts of the case and the importance of what is at stake': *R (Osborn) v Parole Board* [2014] AC 1115 at [2(i)]. It is not a question of whether a decision can be made on the papers but whether the particular decision can fairly be made on the papers: see *BV v SSWP* [2018] UKUT 444 at [29]-[30] per Judge Poynter.
>
> ….
>
> It is also important to appreciate that the decision whether or not hold a hearing is not answered simply by considering whether or not a hearing might make a difference to the substantive outcome: see [88] of *Osborn*. Rather, it is necessary to consider the party's legitimate interest in being able to participate in a decision with important implications for them (see [82]). The Tribunal needs to consider the nature of the case, fairness to the parties and the wider interests of justice, including participation and the open justice principle: see the guidance I gave in my judgment in *SC v SSWP (PIP)* [2025] UKUT 390 (AAC) at [26]-[32]

61. These authorities fortify me in the view that the FTT erred in this case by failing to consider (or reconsider in the course of its proceedings), or alternatively, not adequately explaining, the fairness of its decision that the appeal could properly be decided without holding a hearing, given the FTT's doubts about the clear, important and inherently plausible evidence of the only witness to provide evidence to the FTT, Mr Haydon.

62. The FTT advanced at [72] possible alternative reasons as to why the withheld text from the "options" paper might not attract legal advice privilege, even if the FTT had accepted Mr Haydon's evidence that the text summarised legal advice given by HMRC's lawyers. The points were made tentatively (as they were "academic" in the context of the FTT having found that the text in question was *not* summaries of such legal advice). What was said was that legal advice privilege may have been lost by reason of the legal advice being communicated beyond HMRC, to HMT, and/or by reason of its not being expressly stated to be confidential, and/or by reason of its being circulated to junior officials as well as senior officials. The relevance of this here is that, if this analysis that privilege in legal advice was subsequently "lost" is compelling, it may mean that the legal error just identified (the rejection of Mr Haydon's evidence as to the origin of the text), was not material.

63. I am not persuaded by any of these (admittedly tentative) arguments. In my view, legal advice privilege in the advice given by HMRC lawyers was not lost by reason

of its being communicated to a 'loan charge steering group' comprised of HMT as well as HMRC officials (both "junior" and "senior"). The essential principles were summarised shortly in *Jet2* at [45]; in this case, the relationship of HMT to HMRC does not readily fit into the categories, referred to there, of being either "internal" or "external" – rather, the relationship, as different departments of government, is somewhere in between (though closer, I would say, to different parts of the same "organisation"); but even if they were to be considered as different entities, it is clear on the evidence presented to the FTT that the advice from HMRC's lawyers was passed on in confidence: as well as the "options" paper being itself labelled "official-sensitive", the email that forwarded it stated that it and its attachments were confidential (and may be subject to legal professional privilege) (see page D269 of the FTT open bundle); moreover, it is readily inferable from the circumstances as a whole, that the advice was to be kept confidential as between the two departments.

64. I have found it instructive, in coming to this view, to look at another authority cited with approval in *Jet2* at [45]: in *Gotha City v Sothebys and anor*, an earlier Court of Appeal decision, the issue was: were certain documents and information disclosed by one party to another (both defendants in civil proceedings) in confidence? (The case concerned legal advice privilege, as litigation was not in contemplation at the time the relevant documents were created.) There was no express agreement as to confidentiality. But the court held that the circumstances of the case were "the sort of situation where, in the ordinary way, one would expect confidentiality to be assumed by all present rather than expressly agreed upon". Staughton LJ said this (at 122E and F):

> … Whether or not there is sufficient community of interest to justify common interest privilege is not a matter upon which I express any view. What I do say is that both Cobert Finance and Sotheby's [the two defendants] were presumably anxious that there should be a sale of this picture with a good title by Sotheby's at their auction house. They have a common interest, not in the technical sense but in plain ordinary language, to that extent. One can see that pursuit of that interest might well require that the legal advice received by Cobert Finance should remain confidential between them.
>
> That, accordingly, means that I do not agree with the conclusion of the deputy judge when he held that privilege had been waived in relation to these two documents. …

65. I am clear that the situation here, like that in *Gotha City*, was of a kind where one would clearly expect confidentiality as between the two government departments to be assumed.

Conclusion on error of law, and decision to re-make (not remit)

66. I conclude that, in considering s42, the FTT decision erred materially in point of law, and decide that, for that reason, that element of the FTT decision falls to be set aside.

67. In deciding whether to re-make the decision (on the application of s42) myself, or to remit the case to the FTT for reconsideration, I bear in mind that, whilst the FTT ordinarily has primacy as the fact-finding tribunal, it has been necessary for me, in deciding this appeal, to consider the relevant evidence before the FTT in some

detail (and that the evidence before the FTT was entirely documentary, as it did not hold a hearing). I am therefore, in effect, in the same position that the FTT was, as regards the evidence, when it decided the appeal. On balance, therefore, it seems to me more fair, just and proportionate that I re-make the decision, rather than remit it.

Re-making of the decision as regards s42

68. My decision, made on the balance of probabilities and the evidence before the FTT (and before me), is that the withheld text in the "options" paper opposite the headings "Legal" and "Legislation" was, consonant with Mr Haydon's witness statement, summaries of legal advice given by HMRC's lawyers. I come to this view because:

    a. Mr Haydon's was the only witness evidence before the FTT

    b. Mr Haydon's statement in this respect was inherently plausible, given both the content of that text (which is in the closed bundle) and the context

    c. Mr Finch made no indication in the course of the FTT proceedings that he wished to challenge Mr Haydon's reliability or credibility

    d. Mr Haydon's witness statement was treated as reliable and credible by the FTT in all other aspects.

69. In coming to this view, I have kept under review my decision to make this decision without holding a hearing. It continues to seem to me fair and just to do so, as I consider the evidence before me, including Mr Haydon's witness statement in its entirety, to be strong; Mr Finch had a fair opportunity to challenge the evidence in the FTT proceedings; and Mr Finch is now barred from further participation in these proceedings.

70. It will be evident from my preceding analysis, that I do not consider that the legal advice privilege in HMRC's legal advice was lost on its being summarised and included in the "options" paper made available to the 'loan charge steering group'.

71. Having found that the information in question is exempt information by reason of s42(1), I now go on to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld text. It is well-established that the built-in public interest in legal professional privilege carries significant, but by no means determinative, weight. As was said in *DBERR v O'Brien & IC* [2009] EWHC 164 (QB) (Wyn Williams J) at [41], in a case involving s42

> A person seeking information from a government department does not have to demonstrate that "exceptional circumstances" exist which justify disclosure. Section 42 is not to be elevated "by the back-door" to an absolute exemption. As [counsel] submits …, it is for the public authority to demonstrate on the balance of probability that the scales weigh in favour of the information being withheld. That is as true of a case in which section 42 is being considered as it is in relation to a case which involves consideration of any other qualified

> exemption under FOIA. Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question.

72. The point was recently re-made, in a Scottish context (but with the same underlying principles), in *Scottish Ministers v Scottish Information Commissioner (No 1)* [2026] CSIH 15 (Court of Session, Inner House) at [32]: when carrying out the public interest balancing test,

> it is important that the harm to the common good risked by disclosure of [legal professional privilege] information is properly understood and weighted. … [Legal professional privilege] is justified not only by protecting legal advice from the immediate adversary during the particular proceedings while they are live, but also by the general chilling effect if advice cannot be sought without any guarantee of confidentiality. It is this which has led to the aphorism 'once privileged always privileged'. We appreciate that for public authorities the legislation has taken away that absolute assurance, but it has not remove the well-established and frequently explained damage to the proper administration of justice in the future when, without the consent of the client, legal advice or litigation material is disclosed to the public. If a public authority is being ordered to do this, it must follow a decision-making process in which it is clear that this important factor is appreciated and fully taken into account. …

73. The public interest in the text opposite the headings "Legal" and "Legislation" in the "options" paper, where it has been withheld, is the general one, considered in other parts of the FTT's decision, of transparency and public understanding of how the government departments with responsibility for tax go about considering and designing tax policy, and tackling tax avoidance, as well as the more specific one in the 'loan charge' in particular, which was the subject of considerable public interest (as the setting up of the 'loan charge review' in 2019 illustrates). As was noted in the FTT decision when considering other exemptions, the weight to be assigned to that public interest falls to be discounted by the fact that there was very considerable disclosure of information about the 'loan charge', and, in particular, the "options" paper itself was in very large part disclosed. In my view, the public interest in disclosing the specific pieces of text in question, opposite certain of the "Legal" and "Legislation" headings in the "options" paper, is light; it is quite clearly outweighed by the public interest in maintaining the exemption for legal advice privilege which, as the authorities just cited illustrate, has a built-in significance. The decision notice of the Information Commissioner on this point was, in my view, entirely correct.

74. I have therefore re-made this element of the FTT's decision, to the effect that the decision notice of the Information Commissioner was correct to find that the exemption in s42 applied to the information in question.

Zachary Citron
Judge of the Upper Tribunal
Authorised by the Judge for issue on 20 October 2026