IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2012/0110
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice dated 31 March 2011
FS50290504

Appellant: **Ministry of Justice**

First Respondent: **Information Commissioner**

Second Respondent: **Dr Chris Pounder**

Heard at Field House London on 11 February 2013

Date of decision: **23 July 2013**

Before
John Angel
(Judge)
and
Pieter de Waal and Narendra Makanji

Attendances:

For the Appellant: Iain Christie
For the First Respondent: Robin Hopkins
For the Second Respondent: In person

Subject matter: s.27(1)(b)(c)(d) & (2) international relations and s.35(1)(a) formulation and development of government policy
Cases: *London Borough of Camden v IC &YV* [2012] UKUT 190 (AAC)
Pounder v IC and MOJ (EA/2011/0116)
APPGER v IC and MoD [2011] UKUT 153 (AAC), [2011] 2 Info LR 75

APPGER v IC & FCO (EA/2011/0049-0051), [2012] 1 Info LR 258
Hogan and Oxford City Council v IC (EA/2005/0026, EA/2005/0030), [2011] 1 Info LR 588)
Campaign Against the Arms Trade v IC (EA/2007/0040)
Department of Health v IC & Healey (EA /2011/0286 & 0287)
WWF v Commission [1997] ECR II-313
Burt v IC and MOD (EA/2011/0004)

Decision

The Tribunal upholds the appeal in part and substitutes the following decision notice.

Substituted Decision Notice

Dated 23 July 2013

Public authority: **Ministry of Justice**

Address of Public authority: **102 Petty France**
London
SW1H 9AJ

Name of Complainant: **Dr Pounder**

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 31 March 2011

1. The exemptions under section 27(2) and 35(1)(a) FOIA are engaged.
2. The public interest balance under section 27(2) FOIA only favours maintaining the exemption.

Dated this 23 day of July 2013

Signed

Judge

Reasons for Decision

BACKGROUND

1. The background to this case is complex. It involves a number of decision notices, as well as a previous Tribunal decision.

2. In a letter dated 9 July 2004, the European Commission ("EC") wrote to the UK government concerning prospective infraction proceedings against the UK government due to what the EC considered to be deficiencies in the UK's transposition of the EU's Directive 95/46/EC ("the Data Protection Directive") in national law by means of the Data Protection Act 1998 ("DPA"). The UK government formally responded in a letter dated 17 November 2005. On 4 April 2006, the EC again wrote to the UK government explaining its concerns about the UK's implementation of the Data Protection Directive.

3. The contents of these two letters from the EC to the UK government comprise the "disputed information" in this appeal.

4. On 22 December 2004, the requester Dr Pounder contacted the Department for Constitutional Affairs ("DCA"), the predecessor to the Appellant in this case the Ministry of Justice ("MOJ") requesting copies of the first of those letters, as well as the initial letter of response from the UK. This request was made prior to FOIA coming into force (1 January 2005) but was treated as a request under FOIA. The DCA refused the request, relying on a number of exemptions under FOIA. In decision notice FS500110720 issued on 18 September 2006 ("1st DN"), the Information Commissioner ("IC") found that sections 27(1)(b) (prejudice to relations between the UK and any international organisation) and 41(1) (actionable breach of confidence) were not engaged. He agreed with the DCA, however, that sections 27(1)(c) (prejudice to the interests of the UK abroad) and 35(1)(a) (formulation or development of government policy) were engaged. He also found that – while the case was "unusually difficult" (see paragraph 5.8.3) – the public interest on balance favoured the maintenance of those exemptions. He did, however, note the requester's forceful arguments in favour of disclosure.

5. The IC's view at that time (18 September 2006) was that it would not be feasible for summaries of the requested letters – including the EC's first letter – to be disclosed (paragraph 5.8.2 of the 1st DN). The requester had in any event not requested summaries at that stage.

6. On 2 January 2005 – the day after FOIA came into force – Dr Pounder also asked the IC for copies of the same letters. The IC had been provided with these letters in his capacity as supervisory authority for the DPA. In decision notice FS50091810 also issued on 18 September 2006 ("2nd DN"), the IC upheld his office's reliance on section 36(2) of FOIA – prejudice to the effective conduct of public affairs – in refusing to disclose the contents of the two letters. In essence, this was because disclosure of this information would be prejudicial to the exchange of information between the DCA and the IC.

7. The two decision notices from 2006 were not appealed.

8. Several years passed. On 2 October 2009, Dr Pounder contacted the MOJ requesting summaries of the dispute between the EC and the UK, as opposed to the full contents of relevant documents. In particular, he asked for:

(i) a list of the Articles in the Data Protection Directive which the EC alleged had been inadequately implemented by the UK,
(ii) summary information as to why the EC had made that claim,
(iii) summary information as to why the UK government thought the EC was wrong, and
(iv) summary information on whether or not those differences of opinion had been resolved as at the date of the request.

Parts (i) and (ii) are relevant to the present appeal.

9. In FS50290504, issued on 31 March 2011 ("3rd DN"), the IC found where relevant that:

(i) When considering a request for information in summary form, the starting point (by application of section 11(1)(c) of FOIA) was to assess the underlying information itself. Only if that information fell to be disclosed (i.e. if no exemptions applied or the public interest favoured disclosure) would the duty arise to provide information in summary form where reasonably practicable: see paragraph 16. In other words, the IC's analysis was based on the status of the underlying information rather than on the status of the summaries per se.

(ii) As regards part (i) of the request, neither of the exemptions relied on by the MOJ – namely sections 27(1)(c) and 27(2) (confidential information received from an international organisation) – were engaged. This information (the list of Articles at issue) had in fact already been disclosed by the time of the MOJ's refusal by the EC on 16 December 2010 following an investigation by the European Ombudsman.

(iii) The underlying information referred to in part (ii) of the request fell within sections 27(1)(c) and 27(2), but the public interest favoured disclosure.

(iv) The IC's view was that the underlying information held by the MOJ on 2 October 2009 setting out the EC's position was not exempt from disclosure under FOIA. That information was entirely or largely made up of the two letters from the EC which are in dispute in the present appeal. The IC ordered disclosure of a summary of that information rather than of the underlying information itself. This was because that was what Dr Pounder had asked for on that occasion.

(v) As regards the EC's 2004 letter, the IC's position had thus moved on since the 1st and 2nd DNs. The second EC letter had not been considered by the IC in these decision notices. The 3rd DN was therefore the IC's first assessment of that letter.

(vi) The underlying information referred to in parts (iii) and (iv) of the request was exempt on the basis of section 27(1)(c). The balance of the public interest favoured the maintenance of that exemption. This information is not directly relevant to the present appeal.

(vii) As regards section 27(2), the IC also found that *"the confidentiality of information is predicated on the possibility that disclosure could undermine investigations and not merely because it relates to possible infraction proceedings against a Member State"* (paragraph 48). The IC maintained that position in the present case until seeing the evidence before this Tribunal.

10. Dr Pounder appealed to the Tribunal against the 3rd DN. In particular, he challenged the IC's decision not to order the disclosure of the summaries he requested under parts (iii)

and (iv) of the request of 2 October 2009. He did not challenge the IC's assessment of the underlying information.

11. The MOJ did not appeal against the IC's decision concerning parts (i) and (ii) of that request.

12. On 24 June 2010, the EC issued its Reasoned Opinion on the issue of the UK's implementation of the Data Protection Directive. Infraction proceedings remained ongoing, but had progressed substantially since April 2006.

13. On 16 December 2010, the EC disclosed to Dr Pounder (in response to requests made directly to the EC) a summary of the problems it had identified in the UK's implementation of the Data Protection Directive. This disclosure appears to have been prompted by an investigation by and draft recommendations of the European Ombudsman following a complaint by Dr Pounder (ref. 3196/2007(BEH)VL).

14. On 31 March 2011, the Tribunal issued its decision in ***Pounder v IC and MOJ*** (EA/2011/0116). The Tribunal largely upheld the IC's 3rd DN, except that it ordered disclosure – in redacted form – of information held by the MOJ dated June 2009 which fell within part (iv) of the request.

15. For clarification we would point out that this Tribunal is not bound by the decision of another Tribunal[1], but we note that it provides background to this case.

16. Under cover of a letter dated 5 May 2011, the MOJ disclosed to the requester the information falling within parts (i) and (ii) of his request of 2 October 2009, in accordance with the 3rd DN upheld by the Tribunal in ***Pounder***. This sets out the list of Directive Articles at issue between the EC and the UK, and summarises the EC's complaint with respect to each Article. As noted above, this information had already been disclosed 5 months earlier by the EC.

17. In December 2011, a draft of the new Data Protection Regulation – the EC's proposal to replace the Data Protection Directive ("the Regulations") – was made public, apparently as a result of a leak. In January 2012, the official draft of the proposed new Regulation was made public. It is currently the subject of a public consultation exercise.

THE REQUEST

18. On 12 May 2011, Dr Pounder requested the full information the IC considered in relation to his earlier FOIA request made to the MOJ on 1 October 2009 - see paragraph 8 above.

19. MOJ clarified with Dr Pounder that his request was for "the letters of formal notice in which the European Commission alleged that the Directive 95/46/EC have not been implemented properly by the UK Government" and he agreed. In other words he requested full disclosure of the disputed information.

20. On 7 July 2011 the MOJ wrote to Dr Pounder refusing to disclose the information relying on the exemptions in sections 27(1) (b) (disclosure would prejudice relations between the UK and an international organisation), 27(1) (c) (disclosure

[1] *London Borough of Camden v The Information Commissioner &YV* [2012] UKUT 190 (AAC)

would prejudice the interests of the UK abroad), 27(1) (d) (disclosure would prejudice the promotion or protection by the UK of its interests abroad), 27(2) (confidential information provided by the EU as an international organisation) and 35(1) (formulation of government policy).

21. On 17 July 2011 Dr Pounder asked for an internal review of the decision. On 12 August 2011 the MOJ informed him that the refusal notice would stand.

COMPLAINT TO THE COMMISSIONER

22. On 17 August 2011 Dr Pounder made a complaint to the IC.

23. The IC issued a decision notice dated 15 May 2012 ("4th DN"). He found that:

    (i) none of the exemptions claimed by the MOJ were engaged, and
    (ii) the disputed information should be disclosed.

APPEAL TO TRIBUNAL

24. The MOJ appealed to the First-tier Tribunal ("the Tribunal") on 26 June 2012.

25. The Tribunal joined Dr Pounder as a party.

26. The Tribunal allowed the disputed information and other evidence to be considered on a closed basis following an application by the MOJ under rule 14 of the Rules of Procedure. However following the evidence provided at the hearing the ruling was revised and the three paragraphs redacted from a letter dated 2 October 2012 provided by the EC for this case were disclosed.

27. The Tribunal also allowed the MOJ and Dr Pounder to lodge supplementary evidence at a late stage in the proceedings. There were no objections to this from any party.

28. The hearing was held in both open and closed sessions. However because of the disclosure of the redacted paragraphs it is apparent that some evidence in closed session should also be disclosed and is set out in the reasons for this decision.

THE EVIDENCE

29. John Bowman gave evidence in several witness statements and orally before us. He has been a member of the Civil Service for 23 years and is currently employed as a Band A Civil Servant within MOJ in the post of Head of EU and International Data Protection Policy. He has been leading the Government's negotiations in relation to the infraction proceedings since 2011 around about the time of the request to which the disputed information relates. He also became responsible for the negotiations in relation to the Regulations.

30. He says that it is absolutely vital that documents relating to infraction proceedings stay confidential throughout the infraction process. The process is conducted

through diplomatic channels and has no equivalent in domestic court proceedings.

31. Infraction proceedings are covered by Article 258 of the Treaty on the Functioning of the European Union (TFEU) which states:

> 'If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.'

32. Mr Bowman explained that infraction proceedings are brought by the EC against a Member State ("MS") which the EC considers has infringed EU law. Proceedings are always heard by the Court of Justice ("CoJ"). Proceedings take the form of a three stage process:
    (i) After being notified of an infraction a MS is given the opportunity to submit observations on the Commission's view that the MS has infringed EU law. (The EC often writes a 'pre Article 258' letter to the MS concerned).
    (ii) Following these observations the EC delivers a reasoned opinion, setting out the EC's views on the infraction and steps to be taken by the MS.
    (iii) If the MS fails to comply with the reasoned opinion, an application to the CoJ is made by the EC.

33. If the MS's response to the Article 258 letter is not satisfactory, or if there is no response within the deadline, the relevant Directorate General within the EC may recommend the commencement of the next stage of the procedure: the issuing of a reasoned opinion.

34. The reasoned opinion defines the scope of the judicial proceedings; the application to the Court must be founded on the same grounds of complaint as those set out in the opinion. If the MS gives no evidence of intending to comply with the reasoned opinion, the EC will likely take the matter to the CoJ. The Court proceedings are not a review of the reasoned opinion: the Court considers de novo whether an infringement of the kind alleged in the reasoned opinion has occurred.

35. On the other hand, if the MS indicates that it is willing to comply with a reasoned opinion, the EC will normally be willing to discuss the method and timing of implementation and may defer referral to the Court while genuine efforts are made to take the necessary action.

36. The whole infraction process is one that requires negotiations and discussions to take place between the EC and the MS so that matters can develop and change as the process evolves. It is therefore vital, Mr Bowman says, that the EC is able to express any concern it has about implementation of EC law in the State and the MS is able to set out, in a free and frank way, its view on the points raised by the EC. This is why throughout, he says, the process is confidential to allow the MS and EC to seek to reach an agreement.

37. Almost 90% of infringement cases are settled amicably without having to submit the case to the CoJ. Settlements of this kind, Mr Bowman says, would be difficult to reach if these free, frank and open discussions were unable to take place between the EC and the MS confidentially.

38. The letters of formal notice (of which the disputed information in this case comprises) and reasoned opinion constitute the two formal steps of the administrative phase of infringement proceedings under Article 258 TFEU. In this procedure, no third party has the right of access to the EC's file. With that in mind, it is Mr Bowman's view that if the MOJ were ordered to release the infractions letters to Dr Pounder it would be contrary to the EC's current practice and would directly undermine an administrative phase designed to keep such material confidential between the UK and the EC. Also in his view it would harm the UK's ability to have frank and open discussions with the EC as officials would have to keep in mind that the UK's position (and the EC's views) may be made public.

39. Negotiations and the exchanges of views necessary to resolve them can take many years and the infraction proceedings in this case, Mr Bowman explains, are not at all unusual in that respect. The infraction proceedings in this case are still live and the EC has not recommended they be discontinued and put on the closed list. They could be referred to the CoJ for formal court proceedings at any time. Therefore, in Mr Bowman's view, information which may have been disclosed by one of the parties several years ago may not have lost any of its relevance to the current proceedings. The importance of information germane to the proceedings does not, in Mr Bowman's view, diminish over time just because the proceedings have become protracted.

40. Mr Bowman considers that releasing the disputed information whilst these proceedings are still live would potentially have wide reaching ramifications for the UK's ongoing relationship with the EC. It could adversely affect the UK's negotiating position in infraction proceedings and also the effectiveness of the process by which the UK and the EC are able to discuss, debate and refine the extent to which any subsequent infraction proceedings are necessary. It is important, he says, for the UK to have maximum flexibility in such negotiations and, in his view, to conduct them in the public domain would be likely to prejudice both the UK's position and the extent to which the EC is able to investigate and ascertain whether any infraction proceedings are in fact necessary, which is, ultimately, in the interests of ensuring that EU law is properly implemented.

41. By letter dated 6 July 2011 in relation to the request in these proceedings the EC indicated that it objected "to disclosure of a document originating from it" in infraction proceedings, but that a "response it gives ….may be ….quoted in" any response given to Dr Pounder in this case. By letter dated 2 October 2012 in relation to these proceedings the EC explained why it was not in favour of the release of the disputed information which, in effect, supported the evidence given to us by Mr Bowman that resolution of infraction proceedings relied on confidentiality. At the hearing we were provided with a draft email upon which the request for the October letter was based. We note that it was worded in a way which elicited the response we have seen.

42. Mr Bowman considers that it is in the public interest that the UK be able to work with the EC to ensure that it has properly implemented EU law. Any decision to release information which could have an adverse effect on the continuation of the current procedure would therefore ultimately be of detriment to the public interest in ensuring the UK is able to have a positive dialogue with the EC on such matters.

43. He drew our attention to the following from the EC's letter dated 2 October:

> "The disclosure of correspondence between the Commission and a Member State in an ongoing infringement case would jeopardise this climate of mutual trust and would undoubtedly reduce the number of cases that can be solved out of Court."

44. It is therefore important, he says, that the Tribunal has in mind not just the effect any decision to order disclosure of the disputed information could have on the current infraction proceedings but also on the UK's relationship with the EC in any other ongoing or future proceedings.

45. Mr Bowman also says it is the MOJ's position that these arguments are capable, in an appropriate case, of applying even after infraction proceedings have come to an end.

46. In evidence before the Tribunal Mr Bowman explained that he was unaware (until just before the hearing) of the EC's press release of 24 June 2010 which stated that stage 2 of the infraction proceedings had been reached in this case and that a reasoned opinion had been served on the UK Government. The press release indicated that a number of issues had been resolved but several still remained. Therefore his evidence set out above was largely given on the basis that he did not know what was in the public domain at the time of the request.

47. Following the Tribunal's revised ruling (see paragraph 26 above) the following redacted paragraphs in the letter of 2 October 2012 were disclosed:

> *Regarding this particular infringement case, the last formal step has been the sending of a reasoned opinion to the UK Government on 24 June 2010.*
> *From the more than 20 issues considered as being not in conformity with the Data Protection Directive, eight have been retained in the reasoned opinion, out of which 4 grievances have been solved afterwards.*
> *The Commission is currently considering whether the case should be closed or, on the contrary, referred to the Court of Justice. Public release at this crucial stage in the proceedings would inevitably jeopardise the chance to resolve the last four outstanding issues and thus avoid lengthy Court proceedings.*

48. He was aware before this letter that, of the original 20 issues considered in the disputed information, only 8 remained at stage 2 of the proceedings.

49. However he said that until the letter of 2 October 2012 he was unaware that, of the 8 issues retained in the reasoned opinion, only 4 still remained to be solved. He did not know which 4 these were.

50. He explained that most of his attention was concerned with negotiations on the new Regulations. The EC was aiming to complete the negotiations by 2014 so that Member States would have two years in which to adopt these by 2016.

51. He did not seem to be knowledgeable about the 8 issues in the reasoned opinion and seemed to have little idea which 4 still remained, despite the fact it was obvious to the Tribunal that some of the 8 issues had been resolved because changes to the law had been or were about to be implemented. This was surprising in view of his lead position in negotiations on behalf of the UK but

lends weight to the fact that Mr Bowman was concentrating on the Regulations rather than the infraction proceedings. This is something we will comment on later when we consider the public interest test.

52. Mr Bowman also informed us that the EC was equally immersed in negotiating the Regulations and the infraction proceedings did not appear to be foremost in its mind. The emphasis was on negotiating the new Regulations.

53. He also said that the EC officials and UK officials dealing with the Regulations were the same people who were dealing with the infraction proceedings on both sides.

54. When asked about the likelihood of infraction proceedings now that the Regulations seem to be taking priority, Mr Bowman seemed to accept that it was unlikely but he really did not know what was in the EC's mind and could not afford to take the risk that proceedings would not be brought before the CoJ if the 4 remaining issues were not resolved.

55. Since learning that 4 issues remained he had not sought to clarify which these were, although he had been informed in October 2012.

56. Mr Bowman was of the view that if the disputed information was disclosed then it would defocus his team from the main job at hand, namely the negotiations of the new Regulations.

57. Mr Bowman could not recall whether the EC had been consulted about partial disclosure of the disputed information relating to the resolved issues. It was certainly not apparent to us from the MOJ's correspondence with the EC and its replies.

58. Mr Bowman said that it was not in the UK's interests to raise what was happening to the outstanding issues and that "we should let it ride while we can". He considered that if he enquired too firmly it could trigger court proceedings. Although the clear emphasis was on co-operation in relation to the Regulations, he could not rule out the risk that if he sought to reinstigate negotiations on the outstanding infringements it could provoke an adverse reaction.

59. He accepted that there was no likelihood of infringement proceedings in relation to resolved matters but the unresolved issues were still live.

SECTION 11

60. Before considering whether any exemptions are engaged we would like to deal with an argument by Dr Pounder as to whether he should be entitled to the disputed information under section 11(1)(c) of FOIA, which provides:

> *Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely –*
> *(c) the provision to the applicant of a digest or summary of the information in a permanent form or in another form acceptable to the applicant*.

61. In respect of a previous request (mentioned in the summary of the history of this case above), Dr Pounder argues that he did not receive a summary of the disputed information in the form in which he considers he was entitled.

62. Unfortunately this is not something we are able to deal with in this appeal. In this appeal Dr Pounder has asked for full disclosure of the two letters which comprise the disputed information. He has not asked for a summary or digest in this case, so section 11 is not relevant.

63. If he was unhappy with the response to a previous request then he should have appealed at the time. We do not have jurisdiction to deal with such matters as part of this appeal.

ARE ANY EXEMPTIONS ENGAGED?

64. The MOJ have claimed a number of exemptions and we deal with them in turn.

International Relations

65. The first exemption relied upon is section 27(2) of FOIA, which must be read together with section 27(3). It provides that:

> *(2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.*
>
> *(3) For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.*

66. Unlike the other section 27 exemptions relied on by the MOJ, section 27(2) is 'class-based', i.e. it is not subject to a prejudice test. The IC now accepts, in light of the EC's letter of 2 October 2012 and the evidence of the MOJ in this case, that the circumstances in which these letters were obtained make it reasonable for the EC and the UK to expect that they would be held in confidence. Dr Pounder did not disagree with this change of position. On hearing the evidence we accept the position of the parties and accept that this exemption is engaged.

67. At this point we would like to deal with an argument by the MOJ that because of the IC's concession in relation to this exemption we should allow the appeal under section 58 and not consider the merits of the case. The MOJ sets out at length its position in its skeleton argument and closing submissions. We consider its position to be grossly misconceived, largely for the reasons set out by the IC in his skeleton argument and closing submissions. We have decided not to set these respective arguments out in detail in this decision, but we set out our main reason for coming to this conclusion.

68. We have various powers under section 58 as to how we can deal with cases before us, as the MOJ concedes. We can allow the appeal and/or substitute a decision notice and undertake a merits review. The IC quite rightly has conceded in our view that the exemption is engaged on seeing new evidence not available to the IC during his

investigation. This does not mean that we should simply exercise our discretion to allow the appeal without hearing the merits of the case. If we did it would mean ignoring what Dr Pounder, as the requester and other party to the case, has to say and this would be a breach in our view of his fundamental right to have a fair and just consideration of his case. We have therefore decided to exercise our power to consider the merits of this case.

69. The second set of exemptions relied upon are set out in section 27(1) of FOIA which provide in relevant part that:

> *(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—*
> *...*
> *(b) relations between the United Kingdom and any international organisation or international court,*
> *(c) the interests of the United Kingdom abroad, or*
> *(d) the promotion or protection by the United Kingdom of its interests abroad.*

70. Unlike section 27(2), these are prejudice-based exemptions. The MOJ says the higher threshold ("would prejudice") applies here, which means it faces a correspondingly greater evidential burden than would be the case if this were a "would be likely to" case. If it discharges that greater burden, then this carries greater weight in the public interest balance.

71. The IC submits that, in all the circumstances of this case, the 'prejudice' threshold is not met.

72. Although we are not bound by other decisions of the FTT, "previous decisions are of persuasive authority and the tribunal is right to value consistency in decision-making. However, there are dangers in paying too close a regard to previous decisions. It can elevate issues of fact into issues of law or principle". (*London Borough of Camden v The Information Commissioner &YV* [2012] UKUT 190 (AAC) §12.) With this in mind we refer to decisions of the FTT which the parties have brought to our attention as well as decisions of higher courts to which we are bound.

73. The approach to the prejudice threshold is very well established, but its classic formulation (from *Hogan and Oxford City Council v IC* (EA/2005/0026, EA/2005/0030), [2011] 1 Info LR 588) is worth recalling in some detail here (particularly given its drawing on High Court authority in the form of *Lord*). The following extracts are particularly relevant (emphasis added):

> "27. Under FOIA, disclosure of certain categories of information is exempt if such disclosure 'would, or would be likely to, prejudice' specified activities or interests...
>
> 28. The application of the 'prejudice' test should be considered as involving a number of steps.
>
> 29. First, there is a need to identify the applicable interest(s) within the relevant exemption...
>
> 30. Second, the nature of the 'prejudice' being claimed must be considered. An evidential burden rests with the decision maker to show that some causal relationship exists between the potential disclosure and the prejudice and that

the prejudice is, as Lord Falconer of Thornton has stated "real, actual or of substance" (*Hansard HL*, Vol.162, April 20, 2000, col.827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected. There is therefore effectively a de minimis threshold which must be met.

...

34. A third step for the decision-maker concerns the likelihood of occurrence of prejudice. A differently constituted division of this Tribunal in *John Connor Press Associates Limited v Information Commissioner* (EA/2005/005) interpreted the phrase "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk . That Tribunal drew support from the decision of Mr. Justice Munby in *R (Lord) v Secretary of State for the Home Department* [2003] EWHC 2073 (Admin) [[2011] 1 Info LR 239], where a comparable approach was taken to the construction of similar words in the Data Protection Act 1998. Mr Justice Munby stated that 'likely':

> " connotes a degree of probability where there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not."

35. On the basis of these decisions there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not. We consider that the difference between these two limbs may be relevant in considering the balance between competing public interests... In general terms, the greater the likelihood of prejudice, the more likely that the balance of public interest will favour maintaining whatever qualified exemption is in question."

74. In *Campaign Against the Arms Trade* (EA/2007/0040) the Tribunal applied that approach in the context of section 27(1) as follows (emphasis added):

> "80. As a matter of approach the test of what would or would be likely to prejudice relations or interests would require consideration of what is probable as opposed to possible or speculative. Prejudice is not defined, but we accept that it imports something of detriment in the sense of impairing relations or interests or their promotion or protection and further we accept that the prejudice must be "real, actual or of substance" as described in *Hogan* (EA/2005/0026/30 para 30).
>
> 81. However, we would make clear that in our judgment prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage. For example, in our view there would or could be prejudice to the interests of the UK abroad or the promotion of those interests if the consequence of disclosure was to expose those interests to the risk of an

> adverse reaction from the KSA or to make them vulnerable to such a reaction, notwithstanding that the precise reaction of the KSA would not be predictable either as a matter of probability or certainty. The prejudice would lie in the exposure and vulnerability to that risk. Similar considerations would apply to the effect on relations between the UK and the KSA (compare the approach of the Australian Administrative Appeal Tribunal in *Maher* at para. 14 (AATAD No V.84/291(B)). Finally in this respect we note that it is the relations of the UK and the interests of the UK with which section 27(1) is concerned and not directly the interests of individual companies or enterprises as such."

75. This approach was endorsed by a differently constituted Tribunal in *APPGER v IC & FCO* (EA/2011/0049-0051), [2012] 1 Info LR 258 and also in *Burt v IC and MOD* (EA/2011/0004). It was also considered in *APPGER v IC and MoD* [2011] UKUT 153 (AAC), [2011] 2 Info LR 75 a decision by which we are bound.

76. The MOJ argues that section 27(1)(b)(c) and (d) are engaged because disclosure of the disputed information would prejudice

    (i) Our relations with the EC
    (ii) Our interests abroad
    (iii) The promotion or protection of our interests abroad.

77. The MOJ largely accepts that we should approach the prejudice test as set out above. It argues there is causal connection between the conduct of infraction proceedings and these exemptions. This appears to be accepted by all parties.

78. The MOJ then argues that a compelling case for the necessary prejudice to engage the section 27(1) exemptions is presented by the evidence of Mr Bowman set out above and by the following reasons identified by the EC in its letter of October 2012, namely:

> The infringement proceedings are ongoing.
>
> The ability of the Commission to properly carry out its core task of ensuring correct application of EU law in Member States (a matter of major public interest) would be put at risk.
>
> The ability of the Commission and Member State to supply information and exchange views in a climate of mutual trust, which requires a certain degree of confidentiality, would be jeopardized.
>
> The number of infringement cases that are settled amicably without having to submit the case to the Court of Justice (currently almost 90%) would undoubtedly be reduced and lead to more litigation, entrenched positions and a considerable slowdown in the proper implementation of EU law (contrary to the interests of EU citizens).
>
> Discussion between Members States and the Commission on the data protection reform would be adversely affected.

The MOJ also relied on the subsequent EC submission (when given the opportunity to reconsider its position in February 2013) that:

> Access to the documents which you list is not in the overriding public interest and would have negative effects on the investigation and inspection activities of the Commission in the

> framework of this infringement proceeding as a whole. There is a need in infringement proceedings, even when the case has been brought before the Court of Justice of the European Union, to treat information confidentially and to create an atmosphere of mutual trust between the Commission services and the competent services of the Member States. It is only in such a climate that both parties are able to discuss openly with a view to resolution of the dispute.

79. The MOJ goes on to argue that we should give particular weight to the expertise and experience of Mr Bowman and here the MOJ relies on the discussion of section 27 in *APPGER v IC and MoD* [2011] UKUT 153 (AAC), [2011] 2 Info LR 75 at paragraph 21, where the Upper Tribunal gave significant weight to the executive's "expertise and experience in relation to foreign policy matters".

80. We can summarise the MOJ's case that disclosure of the disputed information would damage the UK's relations with EC in three main respects:

(i) First, it would compromise the resolution of the infraction proceedings.
(ii) Second, it would undermine the UK's negotiating position with respect to the proposed new Data Protection Regulations (at the time of Dr Pounder's request, the draft Regulations had not yet been published, but these negotiations were imminent);
(iii) Third, it would be prejudicial to the general relationship of mutual trust and confidence between the EC and the UK government.

81. The IC does not accept that the necessary "prejudice" threshold is met.

82. The IC points out that when the EC was consulted about the potential disclosure of these letters at the time of Dr Pounder's request, it said that it would not itself have disclosed those letters if asked Otherwise, its short letter did not articulate or press any particular concerns about disclosure. In its more recent letter of 2 October 2012, the EC says it is not in favour of disclosure: it emphasises the EC's ability to carry out its functions, the importance of a climate of mutual trust to the successful resolution of infraction proceedings without resort to litigation, and current discussions about reform to data protection law.

83. Importantly, however, the EC's letter of 2 October 2012 was elicited by a request from the MOJ in terms which, the Commissioner submits, constituted a firm invitation from the MOJ for the EC to support its case before this Tribunal.

84. Moreover, the IC argues, the EC's concerns are expressed at a high level of generality. It is not explained, for example, how disclosure of these particular letters at the time of Dr Pounder's request would impact upon the infraction proceedings. There can be no blanket principle under FOIA, the IC argues, that information relating to infraction proceedings automatically engages section 27(1) throughout the duration of such proceedings. What matters, he submits, is how and to what extent the EC's general concerns are likely to materialise from public disclosure of the requested letters in the particular circumstances of this case.

85. Therefore, viewed in context, the Commissioner submits that while the EC's letter should be given due weight, it is not sufficient to engage section 27(1). The Tribunal should, in the Commissioner's submission, carefully examine how the "prejudice" case has been explained by Mr Bowman in evidence and by the MOJ in its submissions.

86. On this point, the MOJ relies on the discussion of section 27 in *APPGER v IC and MoD* [2011] UKUT 153 (AAC), [2011] 2 Info LR 75 at paragraph 21, where the Upper Tribunal gave significant weight to the executive's "expertise and experience in relation to foreign policy matters".

87. The Commissioner submits that this degree of deference is not appropriate in the present case, because Mr Bowman and the MOJ have been unable to assist the Tribunal with specific or detailed insights into the EC's thinking on the matters relevant to this case.

88. The MOJ simply does not know, for example, how the EC has evolved its stance on the infraction proceedings such that there are now only four issues in dispute. Nor does the MOJ know what those four issues are. It has taken no steps to try to identify what those four issues are, as the MOJ's approach is not to re-activate interest in the infraction proceedings (see paragraph 49 above).

89. The likely reaction of the EC to disclosure of these letters the IC argues thus remains largely a matter of speculation.

90. The Commissioner submits that, on a fair assessment of the evidence, there was a possibility that disclosure of these letters in June 2011 would prejudice the UK's relations with the EC and/or its interests (namely in resolving the infraction proceedings and negotiating on the new Regulations) or the promotion of those interests – but not a very significant and weighty chance.

91. More particularly, the IC submits, by reference to the three factors relied on by the MOJ in support of section 27(1) being engaged:

    (i) While the general relationship between the EC and the UK (leaving aside the infraction proceedings and the negotiations on the Regulations) is an important one, the IC says the evidence does not show it to be either intimate or delicate as regards negotiations on data protection matters for the following reasons:
        (1) The relationship might well be damaged by routine disclosure of such letters (particularly given the confidentiality expectation), but matters should not be judged by reference to routine disclosure. This appeal is about case-specific disclosure, not the setting of precedents.
        (2) The EC is likely to grasp that point, particularly given its familiarity with freedom of information regimes. The UK gave it the opportunity to make submissions in this case. The Commissioner has and the Tribunal will give those submissions due weight (both those bodies being independent of the UK government).
        (3) There is no significant and weighty chance that disclosure of these particular letters in mid-2011 would have caused the EC to share less information with the UK, to listen to the UK any less carefully or otherwise to approach its relationship with the UK in a revised way.

(ii) As to the risk of disclosure compromising a negotiated resolution of the infraction proceedings, the Commissioner sees how routine disclosure of infraction correspondence may disrupt negotiations. This would particularly be so where letters are relatively recent and/or where the issues in dispute are still confidential between the parties. However it submits none of these factors are relevant here for the following reasons:

(1) The Commissioner sees no significant and weighty chance of disclosure of these letters changing the behaviour or approach of either the UK or the EC to the resolution of these particular infraction proceedings.

(2) This is reinforced by the fact that the majority of the contents of the disputed letters do not relate to issues which remain live in the infraction proceedings. Disclosure of these disputed letters would not amount to public identification of which issues do remain live: the MOJ itself is unable to deduce what the four outstanding issues are (see paragraph 51 of its closing submissions).

(3) When assessing the weight to be given to this factor (in terms of significant and weighty chances of real, actual or substantial prejudice), the Tribunal should also take account of the fact that the MOJ and the EC have, since work on the new Regulations has begun, significantly "de-prioritised" the infraction proceedings (see point 2 of the Annex to the Tribunal's Further Directions of 25 February 2013). At the time of Dr Pounder's request, negotiations on the draft Regulations were imminent. In terms of the section 27(1) analysis, the infraction proceedings attract much less weight than may have been the case at an earlier stage.

(iii) As to discussions about the new data protection Regulations, the Commissioner argues it does not see any likely causal relationship between disclosure of these letters and a weakening of the UK's ability to put its case to the EC on the contents of that new law. A large number of states are involved in those discussions. The UK government has published its points of disagreement with the proposal. In the Commissioner's view, it is very unlikely that this particular disclosure (of letters from 2004 and 2006 dealing with issues the majority of which do not remain live in the infraction proceedings) would weaken the UK's hand in these discussions.

92. The Commissioner accepts that the causal link between disclosure and the relevant prejudices posited by the MOJ in this case is not implausible. It is plausible that disclosure could "annoy" the EC (to use the MOJ's term at paragraph 29 of its closing submissions). The Commissioner submits, however, that upon careful application of the law on "prejudice" to the evidence before the Tribunal about this particular case (as opposed to routine disclosure of such letters), the section 27(1) exemptions are not engaged.

93. We have considered these arguments. The first point we would make is that there has been no attempt to distinguish between the three exemptions by the MOJ. They have been in effect lumped together and we have been left with the job of trying to determine which if any are engaged. Secondly we find the arguments of the IC more persuasive.

94. Mr Bowman's evidence particularly emphasises the fact that if routine disclosures were made this would prejudice the subject matter of the section 27(1) exemptions. As the IC argues this is a single case being considered on its own merit. We have no powers to order general disclosure of such letters in infraction proceedings. In any case our decision is not binding on other Tribunals or the IC in relation to other complaints. We can find no other evidence which leads us to find that disclosure of the disputed information would prejudice international relations. However is there evidence to show that such disclosure would be likely to prejudice international relations?

95. At the time of the request it appears from the evidence that most issues had been resolved and there was very little if any negotiation taking place in relation to the infraction proceedings. The emphasis was then moving to the Regulations which we can reasonably assume was because the negotiations would be likely to cover any remaining issues and dealt with in the new Regulations. As Mr Bowman explained there was only a possibility of infraction proceedings on the matters remaining outstanding. We are not sure from the evidence whether at the time of the request this was 8 or 4 issues or somewhere in between. Mr Bowman admitted he was not familiar with the outstanding issues and had not sought to clarify what they were. To us it looks as if the outstanding issues were in the process of being parked by both sides as they prepared for the introduction of the Regulations. The likelihood of infraction proceedings being taken in this case does not seem to us to be real, unless there is a failure to introduce the Regulations. We were not presented with any evidence to suggest this might happen.

96. For this principal reason we find it difficult to accept that there was a very significant and weighty chance of prejudice to our relations with the EC or that any prejudice in the circumstances of this case was real, actual or of substance.

97. We therefore find that the section 27(1) exemptions are not engaged.

Formulation and development of policy

98. The final exemption relied upon is section 35(1)(a) which provides that

> *Information held by a government department….is exempt information if it relates to –*
> *(a) the formulation or development of government policy.*

99. This is another class based exemption and has been given a wide interpretation by tribunals. It has been recognised that government needs to be given a "safe space" to formulate and develop policy. In *Department of Health v IC & Healey* (EA /2011/0286 & 0287) the Tribunal found:

> 28. We are prepared to accept that there is no straight line between formulation and development and delivery and implementation. We consider that during the progress of a government introducing a new policy that the need for a safe space will change during the course of a Bill. For example while policy is being formulated at a time of intensive consultation during the initial period when policy is formed and finalised the need for a safe space will be at its highest. Once the policy is announced this need will diminish but while the policy is being debated in

Parliament it may be necessary for the government to further develop the policy, and even undertake further public consultation, before the Bill reflects the government's final position on the new policy as it receives the Royal Assent. Therefore there may be a need to, in effect, dip in and out of the safe space during this passage of time so government can continue to consider its options. There may also come a time in the life of an Act of Parliament when the policy is reconsidered and a safe space is again needed. Such a need for policy review and development may arise from implementation issues which in themselves require Ministers to make decisions giving rise to policy formulation and development. We therefore understand why the UCL report describes the process as a "continuous circle" certainly until a Bill receives the Royal Assent. However the need for safe spaces during this process depends on the facts and circumstances in each case. Critically the strength of the public interest for maintaining the exemption depends on the public interest balance at the time the safe space is being required.

29. We would also observe that where a Bill is a Framework Bill we can understand that even after it receives the Royal Assent there will be a need for safe spaces for policy formulation as secondary legislation is developed. We note in this case that the Bill, although suggested by DOH to be a Framework Bill, is prescriptive of economic regulation, and cannot be described purely in framework terms.

100. The DPA implementing the Directive received the Royal Assent in 1998. After this the need for a safe space diminished. However once infraction proceedings were started in 2004 this would have required the MOJ to reconsider the DPA in light of the issues raised. Some of these issues would almost certainly have involved reviewing policy so as to see how best to implement any changes necessary to the DPA in order to avoid infraction proceedings. We know that data protection law has developed since 1998 and it is likely that this may have been influenced by these infraction proceedings. This development of data protection law would have required from time to time a safe space to consider any policy issues. At the time of the request, discussions on the Regulations were starting or at least imminent. Again government would require a safe space to consider its policy in relation to the Regulations and in our view there would clearly be a causal connection, at the time of the request, between any outstanding infraction issues and how the UK might have adapted its policy considerations in relation to the Regulations for which a safe space for deliberations would be likely to have been needed. For these reasons we conclude that in the circumstances of this case the exemption is engaged.

101. Once an exemption is engaged (whether a class based or prejudice based exemption) then the public interest test under section 2(2)(b) has to be applied. In other words we have to determine whether "in all the circumstance of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information".

PUBLIC INTEREST TEST - factors in favour of maintaining exemptions

102. We are concerned with the public interest factors existing at the time of the request which is roughly between the date of the request (12 May 2011) and the resolution of the internal review (12 August 2011). Public interest factors existing at the time of Dr Pounder's other requests which were considered by the IC (and another Tribunal) in previous decision notices may or may not be relevant, but if relevant the weight given may now be different.

103. The MOJ argues that section 27(2) as a class based exemption recognises an inherent public interest in maintaining the confidences of the EC in infraction proceedings. The EC made clear in its letter of 2 October 2012 the reasons for this, in particular the fact that 90% of such proceedings are resolved amicably with the MS without having to resort to the CoJ. This is clearly a weighty public interest factor in favour of maintaining this exemption.

104. The requirement for both the EC and the MS to have a degree of confidentiality while they undertake negotiations has been recognised in EU case law. *WWF v Commission* [1997] ECR II-313 stated, 'the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure…The preservation of that objective, namely an amicable resolution of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, justifies refusal of access to the letters of formal notice and reasoned opinions'.

105. The IC argues that this expectation of confidentiality carries less weight in this case because:

(i) At the time of the request the disputed information was at least 5 years old;
(ii) Summaries of the issues in dispute between the parties had been made public – this was apparently a departure from the general confidentiality principle, but nothing bad seems to have happened;
(iii) The EC is familiar and comfortable with freedom of information regimes (its own and those of its MSs);
(iv) Disclosure in this case would not set a precedent for routine disclosure of such documents.

106. We find there is some merit in the IC's arguments particularly when most of the issues in dispute had been resolved between the parties and infraction proceedings would appear to have been going through the process of being parked with the start or imminent start of discussions on the Regulations. Mr Bowman was never in negotiations with the EC in relation to the infraction proceedings, only in relation to the Regulations. He did not even know the details of which issues remained outstanding.

107. In respect of the section 35(1)(a) exemption, there is a public interest in maintaining a safe space to allow the government to formulate or develop any policy issues relating to outstanding infraction issues at the time of the request. But the evidence here is not very clear. We do not know whether the outstanding infraction issues involved policy or policy development considerations. What we do know is that Mr Bowman who took over responsibility for negotiating with the EC in relation to the outstanding infraction proceedings appears to have parked

the matter and focused on the new Regulations. The fact he did not appear familiar with the outstanding issues would suggest they were not important to any policy considerations at the time of the request, although we cannot be sure. However it does lead us to the conclusion that we cannot give much weight to this public interest given the evidence before us.

Public interest factors in favour of disclosure

108. The IC argues that there is very considerable public interest in disclosure of the details of why, in 2004 and 2006, the EC considered that the UK had fallen short of its obligations in terms of full implementation of the Data Protection Directive 95/46/EC, thereby failing (in the EC's view) to provide UK citizens with the full protection for the processing of their personal data which that Directive intends. Data protection is a crucial component of protection of privacy. It is increasingly important with the volume and complexity of data now held about individuals (financial and medical information for example) and rapid advances in technology (the internet, mobile telephones, social networks and other aspects of 21st century life which rely heavily on the processing of personal data). In short, data protection issues affect everyone, in numerous aspects of day-to-day life. If the European authorities responsible for supranational data protection consider that the UK's transposition of the Directive into national law has – for many years – failed fully to protect its citizens' interests in such matters, then there is very strong public interest in understanding the details of its concerns.

109. The MOJ seems only prepared to concede that there is public interest in "data protection matters in broad terms". The Commissioner disagrees. He submits that there is strong public interest in the detail of the disputed letters.

110. At the time of the request a summary comprising the list of Directive Articles about which the EC was concerned (and a roughly one-sentence synopsis of the concern in each case) had been disclosed, but the EC's reasoning had not been. Without the contents of these letters the IC argues that members of the public could not properly understand the case against the UK. They could not properly engage with whether or not the EC's concerns were well founded. They were and are limited in their ability to hold their elected representatives and civil servants to account about any perceived data protection deficiencies. Members of the public could not make properly informed representations seeking to influence the UK government's position on data protection.

111. Mr Bowman's evidence was that this public interest would be served by the (eventual) closure of the infraction proceedings or by the resolution of any ensuing litigation. There is no clarity on when this might be. This means that it is likely that transparency could only be delivered many years after the EC aired its concerns: over a decade, assuming the infraction process is not resolved within the next year, which appears highly unlikely given that the infraction process has been "de-prioritised". It would also mean that the public could only be informed about the details of the arguments (even those which are no longer live) once it is too late for them to try to influence their representatives, for (hypothetical) example by persuading them that the EC might be right on some of its points.

112. In contrast, the Commissioner submits that meaningful public interest would have been served in a timely way by disclosure of the contents of the disputed letters at the time of Dr Pounder's request.

113. The public interest in improving transparency on these issues is all the more important given that the EC and MSs were, at the time of the request, preparing to negotiate over a proposal for a fundamental overhaul of data protection law (the proposed Data Protection Regulations, intended to replace Directive 95/46/EC, having been published in draft form in January 2012). The public's ability to participate in the shaping of the new law (and to influence its government's stance on that new law) would be very significantly enhanced by properly understanding what was thought to be wrong with the old law as applied in the UK.

114. For these reasons, the IC argues, the public interest in disclosure of these letters is very weighty. It outweighs – or at the least equals – the public interest in maintaining section 27(2) or such other exemptions as the Tribunal considers to have been engaged at the time of the request.

Public interest balance

115. The Tribunal having considered these arguments makes the following findings in relation to the two engaged exemptions.

116. In respect of the section 35(1)(a) exemption there is a public interest in maintaining a safe space to allow the government to formulate or develop any policy issues relating to outstanding infraction issues. However in this case the evidence leads us to the conclusion that at the time of the request the outstanding issues were not being pursued. Although there is likely to be a causal connection between these issues and the new Regulations at the time of the request the evidence leads us to the conclusion that the negotiations had at the very best only just started and that Mr Bowman was not considering the issues when negotiating the Regulations. Therefore it does not appear to us that there was much of a need for a safe space to consider the outstanding infrastructure issues at that time. There is no evidence before us that these represented live policy issues at the time. The Tribunal does not consider therefore that the public interest in withholding disclosure of the disputed information in this case under section 35(1)(a) outweighed the public interest in transparency of the letters at the time of the request.

117. In relation to the section 27(2) exemption there is a very weighty public interest in maintaining confidentiality. However this is not an absolute exemption. Parliament decided to make this a qualified exemption subject to a public interest test.

118. The MOJ is very concerned that if disclosure of infraction letters became routine then this would undermine the ability of the UK to negotiate an amicable resolution of infraction proceedings.

119. This Tribunal however has to consider the facts and circumstances of this particular case. Infraction proceedings started in 2004. They have been largely resolved. It appears the outstanding issues have been parked and that the Regulations will replace the DPA in the foreseeable future. Draft Regulations are now out for consultation. The public interest in transparency and openness in knowing the outstanding issues could contribute considerably to understanding whether and how the draft Regulations deal with them and help provide meaningful public responses to the consultation on such an important area of human rights.

120. However that is the position now and was not necessarily the position at the time of the request which was some two years earlier. At that time the negotiations of the Regulations had at best just started and there was no public consultation. However there was a need for confidentiality as explained above. Therefore we find the need for transparency at the time of the request cannot be given significant weight.

121. We find having weighed the public interest factors to and for disclosure that at the time of the request the balance narrowly favours maintaining the exemption. If the request was made today we may have come to another conclusion but we are bound by the law to consider the public interest test as at the time of the request.

CONCLUSION

122. We therefore find that the disputed information should not be disclosed. We have substituted a decision notice to reflect our findings.

Signed on the original

Professor John Angel
Judge

23 July 2013