



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2009/0123

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50147508
Dated: 30 November 2009**

Appellant: Public and Commercial Services Union

Respondent: Information Commissioner

Additional Party: Ministry of Justice

Heard at: Bedford Square on 2nd July 2010 and subsequently on a paper determination.

Date of decision: 9 November 2010

**Before
CHRIS RYAN
(Judge)**

**and
ROSALIND TATAM
DAVID WILKINSON**

Attendances at hearing:

**For the Appellant: Mr Bob Rollings
For the Respondent: Anneliese Blackwood
For the Additional Party: Ben Lask**

Subject matter: - Inhibition of free and frank provision of advice s.36(2)(b)(i)

**Cases: Roberts v IC (EA/2009/0035)
Student Loans Company v IC (EA/2008/0092))**

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal save that it finds, on admission, that the Additional Party failed to disclose to the Appellant information, falling within the scope of the Appellant's information request, which it held at the time. The Tribunal makes no order for the disclosure of information made available to it after the date of the Decision Notice and for which exemption was claimed under section 36(2)(b) of the Freedom of Information Act 2000.

SUBSTITUTED DECISION NOTICE

Dated: 9 November 2010

Public authority: Ministry of Justice

Address of Public authority: 102 Petty France, London, SW 1H 9AJ

Name of Complainant: Public and Commercial Services Union

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal substitutes, in place of the Decision Notice dated 30 November 2009, a decision notice in identical form save that it finds that, in respect of the information produced to the Tribunal by the Public Authority as a result of a search undertaken in July 2010, the Public Authority did hold information falling within the scope of the Complainant's request for information which, in breach of section 1 of the Freedom of Information Act 2000 ("FOIA"), it failed to communicate to the Complainant. However, in light of the release to the Complainant of part of the information generated by the search and the Tribunal's decision that the Public Authority was entitled to refuse to release the remainder pursuant to FOIA sections 36(2)(b) and 2(2)(b), it makes no order for further action to be taken.

Dated this 9 day of November 2010

Signed

Chris Ryan
Judge

REASONS FOR DECISION

Introduction

1. At the time that the request for information covered by this Appeal was made the organisation to which it was directed, the National Offender Management Service was an executive agency under the control of the Home Office. In May 2007 responsibility for its activities passed to the Ministry of Justice. We will refer to it as "NOMS".
2. We have decided that NOMS was entitled to claim that information on certain aspects of its relationship with a trade union representing some members of its staff fell within the qualified exemption provided by section 36(2)(b)(i) of the Freedom of Information Act 2000 ("FOIA"), being information that, in the reasonable opinion of a qualified person (in this case the relevant Minister), would or would be likely to inhibit the free and frank provision of advice.

Background Facts

3. NOMS is responsible for what the Information Commissioner referred to in his Decision Notice as "correctional services" in England and Wales. Part of that role is to provide prisoners with vocational training, provided by prison service instructional officers, over a wide range of subjects. Instructional officers are civilians who work in prisons with prisoners. In or around 2001 the government, seeking to make changes to the terms, conditions and working practices of those members of staff, was in negotiation with various unions, including the Public and Commercial Services Union ("PCS"), the Appellant on this Appeal.

The request for information

4. In a letter dated 3 January 2006 Mr Bob Rollings a negotiations officer with PCS wrote to NOMS requesting the following information :
 - All information generated between October to December 2001 between a Mr. D, and a member of the Prisons Board and/or the Prison Board concerning the review of instructional grades.

- A paper, regarding the review of instructional grades, from Mr. D to the Prison Board generated in January 2002.
- All information generated by (and including) correspondence between the Prison Board, its members and four named individuals relating to the 2002 pay round/review of instructional officers for given dates between 6 June 2002 and March 2003.
- Any information held by the Prison Board or its members relating to the 2002 pay round with PCS.

5. In a second letter to NOMS, also dated 3 January 2006, PCS further requested:

Any correspondence / papers exchanged between, or on their behalf, the Right Honourable Hilary Benn MP and the prison service management in relation to letters from PCS to them dated 19 February 2003 and 1 April 2003.

- All information held by the then Prisons Minister, the Right Honourable Hilary Benn MP, generated by a meeting with the PCS on 6 March 2003.

- All information held by the then Prisons Minister, the Right Honourable Paul Goggins MP, generated by a PCS 2002 pay deal and its impact on Instructional Officers in the month before and after the meetings with the PCS on the 17 September 2003 and 23 March 2004.

6. Each letter constituted a request for information under FOIA section 1, which reads, in material part:

“(1) Any person making a request for information to a public authority is entitled-

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

7. The two letters were treated as a single freedom of information request and by letter dated 1 March 2006, NOMS responded stating that all the requested information was being withheld because it was exempt information under FOIA section 35(1)(a) (formulation of government policy) and the public interest in maintaining that exemption outweighed

the public interest in disclosure. Although NOMS acknowledged that there was a general public interest in greater transparency and openness in government it argued that this was out weighed by the public interest in officials being able to advise freely and to provide candid risk assessment to ministers of their policies and programmes.

8. On 13 March 2006, the complainant requested an internal review of the decision. In response, NOMS conceded that some of the requested information could be released and stated that it no longer relied on section 35(1)(a), but maintained that FOIA section 36(2)(b)(i) (prejudice to free and frank advice) justified the withholding of the rest (“the Originally Withheld Information”).

9. Section 36(2)(b)(1), provides that:

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act - ...

... (b) would, or would be likely to, inhibit

(i) the free and frank provision of advice, or...”

10. The review findings (along with the released information) were conveyed to PCS in a letter dated 29 August 2006. The change in the exemption relied on was said to be because the requested information related to operational matters, the pay and grading of Instructional Officers, rather than the formulation of wider policy. It was accepted that the exemption relied on was a qualified one and that it was therefore necessary for NOMS to show that, pursuant to FOIA section 2(2)(b), the public interest in maintaining the exemption outweighed the public interest in disclosure. However, NOMS argued that the public interest for officials and Ministers to be able to consider fully all options on changing the pay and grading of staff would be stifled if the withheld information were to be released and that this outweighed the public interest in accountability and transparency.

11. The Originally Withheld Information is contained in the following five documents:

- a. A document entitled "Proposed Changes to the Working Arrangements of the Instructional Officer Grade", dated 11 October 2001, which was sent to the Deputy Director General of HM Prisons Service ("HMPS") as guidance for negotiations with PCS.
- b. A document entitled "Review of Instructional Grades", dated 26 October 2001, which set out HMPS' position on the negotiations at the time.
- c. A document entitled "Review of instructional Grades — Proposal to PCS", dated 16 October 2001, which set out the HMPS position in preparation for a meeting with PCS scheduled for 2 November 2001.
- d. A document entitled "Meeting with the Prison Service Trade Union Side (PSTUS)", dated 23 October 2003, which was sent to the then Prisons Minister summarising the HMPS stance on certain points that had been raised during a pay negotiation meeting with PSTUS about Instructional Grades
- e. A draft reply to the President of the PCS, Prison Service Group from the then Prisons Minister following a meeting on 17 September 2003

The complaint to the Information Commissioner and his Decision Notice

12. On 12 January 2007 PCS lodged a complaint with the Information Commissioner about NOMS' decision in respect of the Originally Withheld Information. In the course of his investigation the PCS told the Information Commissioner that it believed that a particular civil servant, who it declined to name, had been guilty of misleading the Minister and undermining the discussions at the time. The PCS laid particular stress on the argument that disclosure would either prove that to have been correct or not and that non-disclosure would mean that doubts would continue to exist.
13. Also in the course of the investigation it became apparent that the circumstances in which the ministerial certificate was provided under

section 36(2)(b)(i) were that Tony McNulty MP, who was the relevant minister at the time, was sent a written submission from NOMS on 25 August 2006 seeking his opinion on the applicability of the exemption to the complainant's request. On the 29 August 2006 the Home Office received an email from the office of the Minister stating that he was of the opinion that section 36(2)(b)(i) was engaged.

14. In a Decision Notice issued on 30 November 2009 the Information Commissioner considered that the exemption was engaged, in that Mr McNulty had been the appropriate individual to perform the role of the "qualified person" for the purpose of section 36 and that his opinion had been one that had been both reasonably arrived at and was reasonable in substance. The Information Commissioner then considered a number of public interest factors for and against disclosure and decided that the public interest in maintaining the exemption outweighed the public interest in disclosure. The withheld information concerned the tactics and the stance to be taken in negotiations over pay and conditions. Disclosure would cause an imbalance in those negotiations and was contrary to the public interest, even after the negotiations had been concluded, as the information had remained relevant and sensitive up to the time, approximately 4 years after the events in question, when NOMS had refused to release it. The Information Commissioner considered that those public interests were not equalled or outweighed by the public interest in disclosure put forward by PCS, which he considered to be of greater interest and benefit to PCS than to the public as a whole.
15. In addition (but not the subject of any challenge on the Appeal) the Information Commissioner also found that NOMS had failed to comply with sections 10(1) and 17(1) FOIA.

The appeal to the Tribunal

16. PCS launched an appeal to this Tribunal from the Information Commissioner's Decision Notice on 24 December 2009. At that stage its grounds of appeal were simply "The I.C. Notice is factually incorrect and

does not take into account the passage of time.” However, it subsequently expanded those grounds by a letter dated 7 January 2010. The letter:

- a. Criticised certain factual inaccuracies that were said to be evident in the Decision Notice
- b. Provided the name of the individual who it believed had deliberately misled the Minister
- c. Expressed surprise that the search for information in response to the Request had brought to light only five documents; and
- d. Argued that there was strong public interest in favour of disclosure due to:
 - i. A lack of consistency which PCS perceived in the approach adopted by management in the discussions, leading to conclusions having been reached which, in its view, were not justified, had been based on misleading information provided to the Minister and were imposed on staff in a rushed manner;
 - ii. The fact that time had passed since the events likely to be reflected in the requested information, with the result that disclosure would not restrict officials’ freedom to (in the words of the Decision Notice) “think outside the box”;
 - iii. The undermining of public confidence likely to result from the perception of a lack of transparency if the information were to be withheld.

17. We do not believe that the factual inaccuracies had any impact on the Information Commissioner’s decision and have not commented on them further in this decision. We deal later in this decision with each of the other arguments set out in the letter.

18. The Information Commissioner filed a Reply to the original Grounds of Appeal, which was subsequently replaced by a supplementary Reply to take into account the expanded Grounds of Appeal. Directions were subsequently given for the joinder of the Additional Party and for the parties to prepare for the determination of the Appeal at an oral hearing. In

the course of those preparations NOMS filed a reply in which it confirmed that the information disclosed to PCS, together with the information withheld from it, constituted all of the information that was identified during the internal review as falling with the terms of the original request.

19. The hearing was scheduled to take place on 2 July 2010. Approximately two weeks before the hearing NOMS notified the Tribunal and the other parties that it considered that certain parts of the documents comprising the withheld information were entitled to protection under legal professional privilege. It therefore asked that, in the event that its arguments under FOIA section 36 did not prevail, the Tribunal should permit it to argue that certain passages should be redacted under FOIA section 42, which provides that information in respect of which a claim to legal professional privilege could be maintained may be exempt from the disclosure obligations imposed by FOIA.

20. The Information Commissioner objected to the late introduction of this additional exemption claim. However, in view of our decision that section 36(2)(b)(i) justified NOMS in withholding all of the Originally Withheld Information (see paragraphs 39 and 41 below), it is not necessary for us to consider either the late raising of the section 42 exemption or its applicability to any information under consideration.

21. As appears from the Representation details at the start of this decision PCS was represented at the hearing by Mr Bob Rollings. He had also filed a witness statement, on which he was cross examined. At the time of the discussions in question Mr Rollings had been Assistant Secretary to the PCS Prison Service Group and Group Secretary to the National Prison Instructional Officers Group. He had played a leading role for PCS in those discussions and explained that, although they had originally been conducted with good humour and an apparently positive attitude on both sides, he perceived a change when a particular individual became involved on the employer's side. As a result no agreement was reached and the employer sought to impose terms on the staff in question.

Subsequently, he believed, the relevant Minister at the time took a more liberal approach on certain issues, leading Mr Rollings to suspect that accurate and honest advice had not previously been made available to him. His evidence included the opinion that mistrust about the advice given would prevail unless the withheld information were disclosed. He was cross examined on his evidence but did not move from that position.

22. Mr Rollings presented himself, both as advocate and witness, with dignity and clarity of expression. He faced the twin disadvantages of being faced with experienced advocates supported by fully resourced legal teams and of being asked to leave the room from time to time to enable evidence or argument to be presented on the substance of the withheld information. Clearly this was inevitable, if the outcome of the Appeal were not to be pre-judged by the hearing arrangements, but it nevertheless hampered Mr Rollings in presenting his case. The Tribunal panel itself did its best to ensure that the PCS position was protected during closed sessions but this evidently still left Mr Rollings with a sense of frustration.
23. In addition to Mr Rollings' evidence we were provided with two witness statements filed on behalf of NOMS. Both were by Colin Harnett the Deputy Director in the Human Resources Directorate of NOMS. One was open and the other closed as it dealt with the detail of the withheld information. Mr Harnett had not been involved in either the original discussions with PCS or the response to its information request. However he repeated, what had been stated in NOMS' Reply, that the information disclosed to PCS, together with the information withheld from it, constituted all of the information that was identified during the internal review as falling within the terms of the original request. He also commented at length on a number of matters going to the balance of public interest. We will revert to that topic later in this decision. We deal at this stage only with Mr Harnett's evidence to the effect that NOMS did not hold any other information for the purposes of FOIA section 1. That was a position that was effectively abandoned by NOMS after Mr Harnett had been cross examined about the enquiries on which his statement had

been based and had been asked various questions about the depth of his knowledge by the Tribunal. At that stage NOMS offered to carry out further searches. Directions were given to enable this to be done and for the parties to make submissions on what transpired. It was left open at the time as to whether a further hearing would then be necessary or if any issues arising at that stage could be disposed of on the papers. In the event the parties had a full debate at the hearing on the application of the section 36 exemption in general and its application to the Originally Withheld Information.

24. The further searches undertaken by NOMS did result in further information coming to light. On 30 July 2010 Mr Harnett signed a second open witness statement in which he explained in detail the searches he had carried out and the documents that had come to light as a result. The result was that a further four documents were released to PCS but, in respect of three others, NOMS sought to rely on the same exemptions as it had in respect of the original information, namely FOIA section 36 and, if and to the extent that was not accepted by the Tribunal, section 42 (for certain passages). The basis of the section 36 exemption claim was an opinion of the Attorney General to the effect that, in his opinion, disclosure would be likely to prejudice the effective conduct of public affairs in respect of pay and progression strategies and negotiations on them with employee representatives.

25. The material withheld at this stage ("the New Withheld Information") was identified by Mr Harnett in his second open witness statement as follows:

- a. A document entitled "New Pay Progression Proposals" (reference PSMB 181102/2) written by Steve Carter (a civil servant in the Pay and Employee Relations Group of HM Prison Service) and submitted to the Prison Service Management Board in 2002. The paper sets out proposals for a new pay progression scheme for three groups of staff in HM Prison Service;

- b. A document entitled "Industrial Relations — Meeting with PCS Representatives", written by Gareth Hadley, Director of Personnel, HMPS, dated 4 March 2003, which was sent to the then Prisons Minister as briefing for a meeting that he was due to have with PCS representatives on 6 March 2003;
- c. A document entitled "Instructional Officers 'Opt In/Opt Out' Forms", written by Colin McConnell, head of Pay and Employee Relations Group of HMPS, dated 5 March 2003, which was sent to the then Prisons Minister as additional briefing for the Minister's meeting with PCS representatives on 6 March 2003;

26. NOMS also filed a witness statement by Michael Evans, who was the case adviser within the Ministry of Justice who dealt with the internal review of NOMS' initial refusal of the request for information and was therefore in a much better position than Mr Harnett appears to have been to provide detail about the 2006 searches. Mr Evans also explained the file destruction policy that NOMS had in place at the time and submitted that it might explain why the 2006 search only produced a small number of documents.

27. NOMS has submitted that, in light of the further searches carried out, and having regard to the MOJ's policy on retention and destruction, it is unlikely that it now holds any further information covered by the original request.

28. The parties agreed that written submissions on that question, on the application of the section 36 exemption to the New Withheld Information and on the public interest balance would be sufficient and, with their approval, the final stage of determining the appeal was therefore conducted without a further hearing.

The question for the Tribunal

29. As the matter came before the Tribunal for paper determination:

- a. it had been conceded by NOMS that it failed to disclose to the PCS all the information it held in 2006, which fell within the scope of the original request;
- b. it had been conceded by PCS that the section 36 exemption had been engaged in respect of the Original Withheld Information by virtue of the opinion expressed by Mr McNulty;
- c. no challenge has been made by PCS as to the engagement of the section 36 exemption in respect of the New Withheld Information by virtue of the opinion of the Attorney General in July 2010.

30. The only issues that are therefore left to be resolved are:

- a. Does NOMS hold information today, in addition to the New Withheld Information which it has not either disclosed or claimed exemption for?
- b. In respect of the Originally Withheld Information, did the public interest in maintaining the section 36 exemption in March 2006 outweigh the public interest in disclosure of some or all of it at that time?
- c. Is it open to NOMS to rely on a section 36 opinion in respect of the New Withheld Information issued only in July 2010?
- d. If so, (there being no dispute about the engagement of the section 36 exemption) does the public interest in maintaining the exemption outweigh the public interest in disclosure of all or part of the New Withheld Information?

As we have indicated in paragraph 20 further issues that might have arisen under section 42 do not in the event need to be considered.

Further information held by NOMS

31. It has, of course, been conceded that the original search for information in 2006 was inadequate. And it is evident from the outcome of the second, 2010 search, that the Information Commissioner's investigation of the PCS complaint did not identify the inadequacy. However, we are still troubled about the outcome of the 2010 search. We are particularly concerned that, even though the original request for information made specific reference to a meeting or meetings in March 2003, the 2006 search did not bring to light any material in respect of it and the 2010 search has disclosed only a pre-meeting briefing note. We have seen no minute or other record of what happened at the meeting itself, even though it was at ministerial level, at which the taking and retention of a full record might have been expected. It seems, also, that it is not the case that all records were destroyed at a particular date but that either archiving was sporadic (itself a surprising conclusion in the case of a government ministry) or that the searches have still not brought to light all relevant information.

32. It is also a concern that nothing has yet been traced in respect of later meetings in September 2003 and March 2004 (although they were, again, referred to in the original request). Those records would have been of fairly recent date at the time of the original request. They seem also to have formed part of the materials required for the effective management of union meetings taking place at six monthly intervals. It is therefore particularly surprising that those preparing for such meetings appear not to have had access to the records of what had been said or agreed in previous meetings or of the tactical planning that lay behind any such statements or agreements, especially when, as previously noted, the minister at the time appears to have been closely involved from time to time.

33. The evidence placed before us describing the searches did not include any log or other record of the destruction of relevant materials. Yet we observed, from the copy of the destruction policy referred to in Mr Evans witness statement, a requirement for a “disposal schedule” or “destruction log” to be kept for a number of years. If the policy had been complied with we would have expected that the 2010 search would have uncovered either the documents that might reasonably be expected to have been created at the relevant time, or a record of their destruction.
34. Although, therefore, the reports we have been given of the 2010 search do not fully allay our concerns about NOMS’ ability to trace its own archive material, we do not think that it would be appropriate for us to either require further searches to be made or to test further the NOMS’ conclusion that other materials which have come to light fall outside the terms of the original request. We reach that conclusion on two bases. First, the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 require us to maintain focus on the overriding objective of dealing with cases in a way that is proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and that avoids unnecessary delay. Secondly, as we make clear below, we consider that NOMs was entitled to rely on the section 36 exemption in respect of all the withheld information. It therefore seems highly likely that the same exemption would apply to any other material falling within the scope of the original request that may come to light. Accordingly, we consider that it would be disproportionate, in the circumstances of this particular case, to require the search for information to be pursued further.

Public interest balance in respect of the Originally Withheld Information

35. As we have stated previously Mr Rollings was particularly concerned that a particular individual had behaved inappropriately during the negotiations. He argued that there was in those circumstances a strong public interest in disclosure in order to bring wrongdoing to the public attention. This was in addition to the general interest in disclosure aiding public understanding of how government operates and ensuring an appropriate degree of

transparency and accountability. In the event our inspection of the documents in question, which we conducted having in mind what Mr Rollings had said in cross examination and during the course of the hearing, has demonstrated to us that there is no evidence of any individual having misled the Minister or any of his colleagues or having generated any significant change in the NOMS' negotiating stance.

36. Mr Rollings argued further that, even if there had been no wrongdoing in fact, it was in the public interest to disclose material which, in those circumstances, would allay its fears. We are not convinced that the argument carries any significant weight. First, it suggests only that PCS had an interest in the information, not that the public as a whole would have a justifiable interest. But secondly, and more significantly, it is an argument that could be used to justify disclosure, in all circumstances, of all information held by a public authority. It is clearly not the intention of the FOIA to provide absolute assurance that public authorities are at all times acting properly and in good faith by releasing all of their records for public inspection.

37. The public interest in disclosure does not in our view come close to equalling the quite significant public interest in maintaining the exemption. At the time of the original request some four years had passed since the information had come into existence. The PCS argued that the passage of time materially weakened the public interest in maintaining the exemption and that insufficient weight had been given to the need for transparency. However, the process of government/union negotiations continued on a regular basis. The consideration of policy and its implementation was therefore a continuous process, involving considerations that were likely to reappear year on year. It cannot be said, in those circumstances, that management thinking had a clearly defined time frame, after which disclosure of materials recording or influencing it could safely be disclosed. Their availability to those on the other side of the negotiating table would create an imbalance between the two sides in those negotiations, even if only by disclosing the approach that the employer may be expected to adopt (and the concessions it might be

willing to make) in the event of similar or related issues coming up for discussion in the future. It follows from this and from the continuation in post of some of those affected by the issues under negotiation in 2001/2, that the passage of time had not greatly reduced the public interest in maintaining parity between the negotiating parties in this respect at the time when the decision was made to refuse to disclose the Originally Withheld Information.

38. NOMS also argued that record keeping would deteriorate if those given that task feared that the materials they created would be prematurely released. We do not attach great weight to that factor. The introduction of a freedom of information regime should not lead to discussions or advice being inadequately recorded, because this would ultimately undermine the decision-making process itself. We do not believe that civil servants should or would resort to such behaviour to undermine a law that Parliament has created in a form that includes adequate protection for information that justifies continuing confidentiality.

39. Overall, our conclusion is that the public interest in maintaining the section 36 exemption in respect of the Originally Withheld Information outweighs the public interest in its disclosure.

Section 36 opinion in respect of New Withheld Information

40. The Minister's opinion in respect of the New Withheld Information was issued on 28 July 2010 some considerable time after the original request for information had been refused. The Tribunal has ruled in two previous cases (Roberts v IC (EA/2009/0035) and Student Loans Company v IC (EA/2008/0092)) that an opinion issued after the date when a public authority refuses to disclose information does not operate to engage the section 36 exemption in respect of that information. However, NOMS has argued, we think correctly, that as the New Withheld Information was not identified until July 2010 and the decision to refuse its disclosure was not made and communicated to the Tribunal and the other parties until after the opinion had been issued, NOMS is entitled to rely on it.

Public interest balance in respect of the New Withheld Information

41. As in the case of the Originally Withheld Information, Mr Rollings did not challenge the reasonableness of the Minister's opinion but concentrated instead on its argument that the public interest in maintaining the exemption did not outweigh the public interest in disclosure. In this case the balance was required to be struck as at July 2010, the date on which NOMS gave notice that it considered that the three documents identified in paragraph 25 above, should not be disclosed. By then, of course, over six years had passed since the events mentioned in the documents comprising the New Withheld Information. However, we consider that the principles that led us to our conclusion on the public interest in maintaining the exemption in respect of the Originally Withheld Information continued to apply to the New Withheld Information in 2010. As we have stated previously, rounds of negotiations on pay and conditions take place regularly and the issues arising or likely to arise will frequently be the same or closely related. The strength of the argument in favour of maintaining an equal balance of information on the counterparty's likely negotiating stance is as great today, in our view, as it was in 2006. In addition NOMS provided closed evidence dealing with the particular content of the New Withheld Information, which demonstrated to our satisfaction that there were particular circumstances affecting employee relations, both currently and in the immediate future, that would have given rise to particular prejudice if disclosure had been made in July 2010. The result is that the public interest in maintaining the exemption in respect of the New Withheld Information continues to outweigh the public interest in its disclosure.

Conclusion and remedy

42. We have concluded that NOMS was not obliged to disclose any part of either the Originally Withheld Information or the New Withheld Information. The Information Commissioner's decision notice was therefore correct in respect of the Originally Withheld Information and there is no need to issue a supplemental decision notice in respect of the New Withheld

Information. However, in view of the admitted failure by NOMS to comply with FOIA section 1 in 2006 we are issuing a Supplemental Decision Notice to record that fact.

43. Our decision is unanimous

44. An appeal against this decision may be submitted to the Upper Tribunal. A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal within 28 days of receipt of this decision. Such an application must identify the error or errors of law in the decision and state the result the party is seeking. Relevant forms and guidance for making an application can found on the Tribunal's website at www.informationtribunal.gov.uk.

Signed

Chris Ryan
Judge

Date 9 November 2010