IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2013/0127
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:
The Information Commissioner's Decision Notice No: FS50477229, dated 3 June 2013

Appellant:	JONATHAN BRAIN
First Respondent:	INFORMATION COMMISSIONER
Second Respondent:	MINISTRY OF JUSTICE

Determined on the papers

Date of decision: 24 February 2014

Before

Andrew Bartlett QC (Judge)
Rosalind Tatam
Melanie Howard

PRELIMINARY DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal has determined the meaning and scope of the information request. See paragraphs 44 to 57 below.

The Tribunal has determined the application of FOIA s40(2) to the materials in the current closed bundle. See paragraphs 58 to 62 below.

The Tribunal orders:
A. The MOJ shall make available to the appellant forthwith an unredacted copy of p207 of the bundle and a copy of closed Document 3.
B. The MOJ shall make a further reasonable search for information held by the MOJ that is within the scope of the information request. See paragraphs 44 to 55 below. Such search shall be made and completed no later than 24 February 2014.
C. By no later than 10 March 2014, any further information found by such search shall be disclosed to the Information Commissioner and to the appellant; or, in so far as the MOJ wishes to rely on exemptions, shall be disclosed to the Commissioner in confidence and shall be made the subject of a notice stating the reasons relied on by the MOJ for non-disclosure to the appellant under FOIA.
D. The Commissioner shall make any desired further written submissions by no later than 17 March 2014.
E. The MOJ shall make any desired further written submissions by no later than 24 March 2014.
F. The appellant shall make any desired further written submissions by no later than 31 March 2014.
G. Any application that the Tribunal's further consideration of the appeal be at an oral hearing, instead of on documents only, shall be made no later than 17 March 2014.
H. The parties may by mutual agreement vary the time periods and sequence set in the above procedural directions, provided that the last step prior to the Tribunal's further consideration of the appeal shall not be later than 11 April 2014.
I. For the avoidance of doubt, the above directions do not prevent any party applying to the Tribunal for permission to put in additional evidence on the matters remaining to be decided.

REASONS FOR PRELIMINARY DECISION

Introduction

1. This appeal is concerned principally with the application of the Freedom of Information Act (FOIA) exemption relating to formulation of government policy (s35) to information about the Government's response to recommendations made by the Senior Salaries Review Body (SSRB) regarding salaried Employment Judges.

2. The constitution of the present Tribunal does not include an Employment Judge. It is not clear to us whether the fate of the SSRB recommendations might in some way affect our own remuneration at some point in the future. The parties are in at least as good a position to assess this as we are. Since no objection has been taken to our considering the appeal, we take it that, if

there would be any legitimate objection open to the parties to take, such objection has been waived.

3. This is a preliminary decision only. We are not yet in a position to issue our final decision on the merits of the main issue in the appeal, because we consider that there are further steps which need to be taken by the parties in order to enable us to deal with the matter properly. In this preliminary decision we find facts, determine matters of scope and the application of FOIA s40(2), and give directions. We reserve for future consideration:

   a. such further findings of fact as may arise from the parties' compliance with the directions;

   b. the application of s35(1)(a) to the material in the current closed bundle, and the application of s35(1)(a) and any other exemption that may be relevant to further disputed information not contained in the current closed bundle;

   c. the public interest balance, as between disclosure or maintaining the s35(1)(a) exemption and/or any other qualified exemption which may be relied on as a result of compliance with the directions.

The request

4. The appellant is a salaried Employment Judge. The SSRB provides independent advice to the Government on the remuneration of the judiciary and certain other groups. The SSRB's 33rd report was issued in March 2011 and the 34th in March 2012. On 20 September 2012 the appellant requested information from the Ministry of Justice (MOJ) regarding:

   [1] Any decision not to implement the recommendations of the SSRB in their 33rd Report that the role of salaried Employment Judge be re-graded to judicial salary band 6.2.

   [2] Any decision not to implement the recommendations of the SSRB in their 34th Report that the role of salaried Employment Judge be re-graded to judicial salary band 6.2.

   [3] If no decision has yet been taken as to whether to implement the recommendations of either Report, considerations of the Reports to date and the outcome of those considerations, the process by which such decisions will be taken upon them, by whom such decisions will be made and when.

   [4] The government's policy and/or position on the difference (if any) between re-grading of a post to a higher salary band and a salary increase and the rationale for such policy and/or position.

5. The MOJ replied that there had been no decision not to implement the recommendations, which meant that information regarding questions 1, 2 and 4 was not held. As regards question 3, the MOJ stated that information was held, but was exempt under s35(1)(a), and gave reasons why the MOJ considered that the public interest balance favoured withholding the information. The appellant sought internal review, setting out detailed reasons for not accepting what the MOJ had said. Upon review, the MOJ confirmed its initial response, with some variations of reasoning.

The complaint to the Information Commissioner

6. The appellant complained to the Information Commissioner. The MOJ gave a fuller explanation of its position in a letter to the Commissioner dated 12 April 2013.

7. The Commissioner's Decision Notice (3 June 2013) upheld the MOJ's position. He accepted that the MOJ did not hold information within the scope of parts 1, 2 and 4 of the request. In regard to part 3, he regarded 'the public interest in enabling the government to develop its pay policy, without significant disruption' as 'the overwhelming factor in the circumstances of this case'.

The appeal to the Tribunal

8. The appellant appealed to the Tribunal, initially in regard to part 3 of his request only. The Registrar subsequently permitted him to broaden the appeal to encompass parts 1, 2 and 4 also. The MOJ contests all elements of the appeal and additionally relies on s40(2) (personal data exemption) to redact certain references to individuals in the disputed information.[1] The Commissioner generally supports the MOJ's position.

9. The questions for the Tribunal on this appeal presently appear to us to be:

   a. The extent of the information which was held by the MOJ at the time the request was answered and which fell within the scope of the request.

   b. The extent of the application of s35(1)(a), and the public interest balance.

   c. The application of s40(2).

Evidence

10. The evidence we received consisted of relevant documents, a witness statement by the appellant, and a witness statement by Mr Ian Gray, the

[1] The MOJ first relied on s40(2) during the Commissioner's investigation.

Deputy Director, Judicial Reward and Pension Reform at the MOJ. We have also examined the relevant SSRB reports (of which extracts were supplied to us) as necessary. In the open bundle there are some redactions to the MOJ's letter to the Commissioner dated 12 April 2013; the closed bundle contains the full letter.

11. The closed bundle consists of documents labelled numbers 1 to 6. Document 5 can be ignored, since it is merely a duplicate of one of the other documents. With the benefit of a fuller examination of the documents and issues, our views differ in some respects from the rulings previously made by the Registrar concerning the closed materials.

12. It is good practice for the index to the closed bundle to be made available to the complainant in a form which gives as much information about the closed bundle as can properly be given without prejudging the result of the appeal or revealing anything which needs to be kept confidential. See paragraphs 8-9 of the Practice Note *Closed Material in Information Rights Cases* May 2012. We consider this practice could and should have been followed in the present case.

13. The MOJ's letter to the Commissioner dated 12 April 2013, although marked 'Unclassified', contains a paragraph expressly requiring confidentiality for the policy information referred to. The first two paragraphs of the third page of the letter (p206) are properly redacted because they quote part of the disputed information. However, we disagree with the redaction of the table on the 5th page of the letter (p207), and can see no sufficient reason for it. The table sets out an anodyne general description of Documents 1-6, indicating which exemptions are relied on and why, and contentions about certain parts of documents being out of the scope of the request. It does not reveal any specific content of policy discussions, but gives an indication of the general nature of the information which may be useful to the appellant in making submissions.

14. We can (and consider it right to) summarise the contents of the closed bundle, without thereby revealing anything specific that was said in the closed documents, as follows:

Document 1 – a submission by Mr Duncan Rutty (MOJ, Pensions and Judicial Reward) to the Lord Chancellor and Secretary of State for Justice[2] dated 14 May 2012 relating to the SSRB review of judicial salaries and what judicial pay policy should be for 2013-14 and 2014-15 (4 pages, marked 'Restricted')

Document 2 – an annex to the submission, giving background relating to the SSRB review (2 pages, unmarked)

[2] The posts of Lord Chancellor and Secretary of State for Justice are held by the same person; for brevity we refer below to the Lord Chancellor only.

Document 3 – a letter from the Council of Employment Judges (CEJ) to the Lord Chancellor dated 25 April 2012 (2 pages)

Document 4 – a submission sent by Mr Rutty and apparently written by or with the witness, Mr Gray, to the Lord Chancellor dated 14 May 2012 relating to the CEJ letter, (3 pages, marked 'Restricted – policy')

Document 6 – a minute concerning judicial pay policy from April 2013 and the MOJ's evidence to go to the SSRB, from Mr Gray to the Permanent Secretary, dated 15 August 2012 (2 pages, unmarked).

15. We make the following further comments on the closed materials in this case:

    a. It is not clear to us why the CEJ letter was placed in the closed bundle by the MOJ. There is no marking on it or anything in its contents which suggests that it was intended to be private or confidential, and we have seen no other evidence to support such a suggestion.

    b. In Mr Gray's witness statement the names of two of his colleagues who attended a meeting with the CEJ on 13 July 2012 are redacted. (They are also redacted from the copy minutes attached to Mr Gray's statement.) We see no sufficient basis for this redaction. They were fulfilling a public-facing role at the meeting. There is no evidence before us that the meeting was confidential in nature. Their names are in any event given in the copy of the minutes of the meeting which was supplied by the appellant as an attachment to his grounds of appeal, so they are known to the appellant. Mr Rutty's name is also on important documents in the public domain, such as the MOJ's evidence to the SSRB.

    c. We have concerns over whether it is probable that the closed bundle represents the whole of the information held by the MOJ within the scope of the request. We address this further below.

Facts

16. Having reviewed all the materials so far made available to us by the parties, we make the following findings of fact.

17. The Judiciary Website states: 'Judicial salaries are decided following the recommendation of the Senior Salaries Review Body (SSRB), and are a matter of public record'.[3] This is an ambiguous statement, since 'following' could either mean 'in accordance with' or 'after'. The MOJ states that under applicable legislation decisions on judicial remuneration are taken by the

[3] http://www.judiciary.gov.uk/about-the-judiciary/judges-magistrates-and-tribunal-judges/terms-of-service/salary

Lord Chancellor, with the concurrence of Treasury Ministers. We take this to be correct.

18. The SSRB came into existence (under a different name) in 1971. Among other things, it advises on the remuneration of holders of judicial office.[4] Its terms of reference set out the matters to which it is required to have regard. These include 'the need to recruit, retain and motivate suitably able and qualified people' and 'the funds available to departments as set out in the Government's departmental expenditure limits'. It receives evidence for the purpose of carrying out its duties. This includes evidence about the affordability of its recommendations.

19. Our understanding of the regular modus operandi is that the SSRB receives evidence in the autumn of each year and formulates its conclusions after the New Year. These are seen and considered by Government. The annual report is published, together with the Government's response, in March each year. About every four to five years the SSRB carries out a major review of judicial salary structure. This may include research, commissioned by the SSRB, on job evaluation. Such research and review sometimes results in recommendations for re-grading.

20. The SSRB acknowledges: 'The quality of the judiciary and of its judgments is essential to a modern, well-functioning state.'[5] Remuneration is relevant not only to quality but also to independence. In 2003 the UK Government, as a member of the Commonwealth, adopted the Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government. The Principles expressly acknowledge that, to secure the independence of the judiciary, arrangements for 'protection of levels of remuneration must be in place'. The Principles were adopted 'in the spirit of' the Latimer House Guidelines prepared by various representatives in 1998. Under the heading of 'Preserving Judicial Independence' the Guidelines state:

> Appropriate salaries ... are essential to the proper functioning of the judiciary.
>
> As a matter of principle, judicial salaries and benefits should be set by an independent body and their value should be maintained.

21. The appellant is employed on a set of terms and conditions formulated by the MOJ. We take it that they are standard terms. The appellant states, and the MOJ does not contest, that they do not provide any form of grievance procedure through which issues between judges and the MOJ may be aired.

22. At the time of the SSRB's 33rd report (March 2011) the Coalition Government had announced (following the General Election in 2010) a two year pay

[4] The other groups within its remit are senior civil servants, senior offices in the armed forces, and very senior managers in the NHS.
[5] SSRB 35th Report, paragraph 5.43.

freeze for relevant public sector workers[6]. As at 2010 the SSRB was already engaged in a major review of the judicial pay structure, and the new Government decided to allow that review to continue.

23. In its 33rd report the SSRB provided the conclusions of its major review and recommended various changes including, in Recommendation 2, that the role of salaried Employment Judge within the Tribunals Service be moved up from salary group 7 to salary group 6.2. The reasons for this change, which were based on job evaluation undertaken by PwC, were explained in paragraphs 4.44-45 of the report. In normal circumstances the SSRB would have expected its proposed new structure to be introduced at the next salary review date, ie, 1 April 2011. However, in recognition of the announced pay freeze, Recommendation 9 was 'that the proposed new salary structure be implemented once that is consistent with public sector pay policy' (see paragraph 4.72).

24. Given the terms of Recommendation 9 and the imposed pay freeze, no decision was required from the MOJ for 2011-2012 on Recommendation 2. However, the SSRB also issued an invitation to the Government, at paragraph 4.73, to correct some or all of the anomalies identified in the report 'sooner rather than later'.

25. The Government's formal response to the 33rd report, contained in a Written Ministerial Statement by the Prime Minister on 21 March 2011 was (so far as concerns judicial remuneration):

> Given in particular the two-year pay freeze that will be in place for public servants earning over £21,000 from April 2011, the Government are not announcing any immediate changes to judicial salaries, but are considering the detail of the report overall and will respond at an appropriate time.

26. We infer that prior to 21 March 2011 the Government had given preliminary consideration to the suite of restructuring recommendations made by the SSRB and had decided that the pay freeze must prevail. This inference is supported by Mr Gray's witness statement[7].

27. The Government announced in the Autumn Statement 2011 that its public sector pay policy would be to limit pay increases to an average of 1% for each of the two years following the freeze. For the judiciary this would mean a 1% limit covering the period April 2013 to March 2015.

28. At the time of the 34th report (March 2012), the pay freeze for the relevant groups still had another year to run, ie, to March 2013. In the chapter of the 34th report dealing with the judiciary the SSRB complained that most of its

[6] This followed on from a one year freeze of judicial salaries under the previous Government, effective April 2010 to March 2011.
[7] Paragraph 10.

recommendations concerning the judicial salary structure had not been addressed and stated:

> [4.3] We understand why the Government has not implemented recommendations for salary increases during the pay freeze but where job evaluation has shown that posts are wrongly graded, we cannot see why this should not be corrected immediately.
>
> [4.7] We urge that Government to address all the outstanding recommendations from the major review of judicial salary structure as soon as possible.
>
> [4.8] We make no recommendations for changes to judicial salaries for 2012-2013. This is because ... this is the second year of the Coalition Government's pay freeze ...

29. Taken on its own, the intended meaning of paragraph 4.3 is not clear. It could mean that the SSRB considered that the re-grading should take place subject to the pay freeze – ie, the posts would be re-graded but the individuals affected would continue at their existing remuneration until the pay freeze ended, or it could mean that the SSRB considered that the affected judges should be re-graded and forthwith paid at the higher rate applicable to the new grade. Reference to the following year's Report shows that the SSRB intended the latter meaning.[8] We note that the SSRB did not embody its comments in paragraph 4.3 in a formal recommendation.

30. The Government's formal response to the 34th report, contained in a Written Ministerial Statement by the Prime Minister on 13 March 2012 was (so far as concerns judicial remuneration):

> The Government continues to consider the recommendations that the Review Body made last year following its most recent major review of the judicial salaries structure, and in the context of the announcement in the Autumn Statement in November 2011, that public sector awards will average 1% for the two years following the implementation of the current two-year pay freeze. As such, the Government will respond to the major review recommendations as a whole, rather than individually, when able to do so. It would not be right to implement new judicial pay increases during a period of pay freeze.

31. This shows, in our view, both that the Government correctly understood paragraph 4.3 of the SSRB's 34th report and that a Government decision was made, before 13 March 2012, not to act in accordance with it at least during the pay freeze period to March 2013.

[8] The SSRB 35th Report paragraph 5.2 stated: "In our 2012 report we ... ... urged the Government ... at least to implement those [recommendations] which concerned posts shown by job evaluation to be wrongly graded or which would not add to the judicial paybill". This implies an acknowledgment that the re-grading would add to the paybill.

32. On 28 March 2012 the appellant wrote to Mr Duncan Rutty, a civil servant with responsibilities for pensions and judicial reward at the MOJ, asking for an explanation of the Government's position which, unlike the position taken by the SSRB, equated a re-grading with a salary increase. Mr Rutty replied on 12 April 2012, declining to respond, on the ground that the SSRB's recommendations were 'under consideration'.

33. On 25 April 2012 the CEJ wrote to the Lord Chancellor (the Rt Hon Kenneth Clarke, PC, QC, MP) expressing concern and asking for a meeting to discuss 'arrangements for implementation' of paragraph 4.3. On 14 May 2012 officials gave advice to the Lord Chancellor on the relevant topics as noted in paragraph 14 above. A delegation from the CEJ met with Mr Gray and other officials on 13 July 2012.

34. We are constitutionally bound not to question any proceedings in Parliament. This does not prevent us from considering the intended meaning of the Prime Minister's statement of 13 March 2012, which presents certain difficulties of understanding because of the apparent inconsistency between the first and last sentences quoted above. The record of the discussion at the July 2012 meeting enables us to understand that what was meant by it was that the SSRB's recommendations for re-grading would not be implemented in the period 2012-2013 but that they were being considered for the purposes of pay from 2013 onwards, including in the course of the formulation of the Government's evidence to the SSRB for the purposes of the SSRB's March 2013 report.

35. Points made at the July 2012 meeting included:

    a. The CEJ considered that employment judges were not being treated correctly, that the Government should recognise the distinction between a re-grading and a pay increase, and that the Government should provide a rational response to the SSRB's recommendations.

    b. The Government's position was that it would not do anything about the re-grading recommendation while the pay freeze lasted; in the succeeding years the Government would have to make choices within the announced 1%.

    c. The participants knew of no prior instance of the Government not accepting a re-grading recommendation made by the SSRB, except for phasing it in.

    d. The reasoning and strength of feeling communicated by the CEJ in the meeting would be included by Mr Gray in the advice to Ministers for them to consider after the summer recess.

    e. The CEJ would in due course see the Government's evidence to the SSRB for the next pay round.

f. Mr Gray said he would be very surprised if recommendations made by the SSRB were held over for consideration at a later date.

36. The SSRB's timetable required the Government's evidence to be submitted by about the end of September 2012. On 15 August 2012 Mr Gray submitted to the Permanent Secretary of the MOJ a minute concerning proposed judicial pay policy from April 2013 and the MOJ's evidence to go to the SSRB. The appellant's information request was made on 20 September 2012. The appellant states, and we accept, that the disappointment among Employment Judges that the Government regarded the pay freeze as impacting on and taking priority over the recommendation for re-grading was and remains profound.

37. In the event the MOJ's evidence for the next round was submitted to the SSRB by Mr Gray's colleague, Duncan Rutty, on 16 October 2012. This stated that there should be an across the board pay settlement of 1% for the judiciary. It took the line that it would not be possible to implement the SSRB's review recommendations and stay within the stipulated 1% average increase in paybill. This line must have been decided upon in about September 2012. The CEJ gave its own views to the SSRB. The Lord Chief Justice said to the SSRB that any increase should be the same percentage for all judges and that action on the major review recommendations should be deferred until uncertainty surrounding pending judicial pension reforms had been resolved.

38. The appellant invited us to find as a fact that it was possible to implement the SSRB's re-grading recommendations without breaching the 1% figure. We are not persuaded that the evidence permits such a finding.

39. The SSRB's 35th Report was published on 14 March 2013. It stated at paragraph 5.41 that the Government should implement the outstanding review recommendations before the start of the next major review, which would be completed in 2016. Further delay in implementation would, in the SSRB's view, adversely affect the motivation of existing members of the judiciary and make it harder to recruit suitably able and qualified people at each level of the judiciary in the future, especially at High Court level and above. It recommended:

a. that judicial salaries be increased from April 2013 by 1%;

b. that the Government address all the outstanding recommendations from the 2011 major review of the judicial salary structure by 2015, before the start of the next major review; and

c. that each salary group in the new judicial salary structure proposed in 2011 be increased by 1%.

40. The Government's formal response to the 35th report, contained in a Written Ministerial Statement by the Prime Minister on 14 March 2013 was (so far as concerns judicial remuneration):

> The Government have accepted the recommendation that the salaries of the judiciary should be increased by 1%. As a result of the current fiscal challenge and public sector pay policy it is not possible at present to respond to the SSRB's latest recommendations about the major review. The Government note the proposals but will not be able to respond at this time.

41. We understand this to mean that the Government's position was that it would not respond to the re-grading recommendations because the public sector pay policy announced in November 2011 made them impossible to implement in any event while the limit to a 1% increase remained in force. In our view this understanding is confirmed by Mr Gray's witness statement. This position must have been decided upon before 14 March 2013.

42. After the publication of the 35th report, the appellant made two further information requests to the MOJ asking about policies on implementation of re-grading recommendations by the SSRB and other matters. In a letter of 28 August 2013 the MOJ stated that a salary increase and a re-grading were different 'as a matter of fact rather than policy'.

43. The appellant contends that, given the time that has now elapsed without the recommendations being implemented, the reality is that a further decision has now been taken that the recommendations should be 'kicked into the long grass'. We cannot indicate either agreement or disagreement with, or comment upon, that proposition in an open judgment, because to do so could potentially reveal what is or is not in the disputed information. We do not consider that it is necessary for us to comment on it, because the allegation seems to us to relate to the situation which is said to have come into existence subsequent to the time of the information request. Our concern in the appeal is with the information and circumstances at the time the request was made and answered.

Extent of information within the scope of the request

44. The first two parts of the appellant's request concern information regarding any decision not to implement the recommendations of the SSRB in their 33rd and 34th reports that the role of salaried Employment Judge be re-graded.

45. Having regard to the full wording of the request and against the background of the contacts between the appellant and the CEJ with the MOJ, we consider that the term 'recommendations' was reasonably to be understood as relating not only to formal recommendations properly so called but also to the strong advice and urging at paragraph 4.73 of the 33rd report and paragraphs 4.3 and 4.7 of the 34th report that the Government should implement the re-grading irrespective of the pay freeze. It seems to us quite clear that from the start the appellant's concerns included the failure to

implement the re-grading in the years 2011/2012 and 2012/2013. If there had been any doubt about it, it was made entirely clear in the appellant's request by letter of 9 November 2012 for internal review. In our judgment the MOJ took too narrow a view of the appellant's request, in construing it to relate only to a final decision on whether to implement the re-grading recommendations at all.[9]

46. On the evidence it is plain that the Government took decisions not to accede to the SSRB's urgings. As Mr Gray pithily expressed it at the meeting with the CEJ on 13 July 2012, the Government was 'not in a position to offer anything in a pay freeze. It said no.' The first such decision was taken before 21 March 2011, for the purposes of 2011/2012. The second such decision was taken before 13 March 2012, for the purposes of 2012/13.

47. There is no material in the closed bundle dated before 13 March 2012. We appreciate that those decisions will have involved Treasury Ministers, and that the appellant's request related only to the MOJ's (not the Treasury's) consideration of the 33rd and 34th reports. But we consider it very unlikely indeed that in September 2012 the MOJ did not hold any recorded information from the period to 13 March 2012 concerning those two decisions.

48. Accordingly, we consider that it will be necessary, before we can finally dispose of this appeal, for the MOJ to carry out a proper search for information which it holds falling under the first two parts of the request, and to provide such further information as is found to the Commissioner and to the Tribunal in confidence, together with its submissions about whether it should have been disclosed to the appellant pursuant to FOIA. The appellant should receive the open submissions, and an appropriate description of the information, so that he can also make further submissions. We would expect the Commissioner also to make further submissions.

49. The fourth part of the information request was for information regarding the Government's policy and/or position on the difference (if any) between re-grading of a post to a higher salary band and a salary increase and the rationale for such policy and/or position. The MOJ's position is that at the time of the request in September 2012 it held no information falling within this request, because no final decision had been made on whether to implement the SSRB recommendations. The MOJ's post-internal review response dated 4 December 2012 stated that there had been no decision about re-grading and therefore there was no policy.

50. The appellant argues that the MOJ's position is not correct, because decisions were taken in 2011 and 2012 not to implement the recommendations in those years. This was a departure from the ordinary practice of accepting SSRB recommendations for judicial pay. It is therefore reasonable to infer that the Government gave some consideration to departing from that practice, and to whether the factual difference between a

[9] The Commissioner arrived at a similar view to ours in his further response to the appeal dated 1 October 2013, but seems to have changed his mind again in his submissions dated 27 November 2013 (at paragraphs 37-41).

re-grading and a salary increase was such that the re-grading should or should not proceed having regard to the pay freeze.

51. We accept the principle of the appellant's argument on this point but the current evidence is insufficient to enable us to reach a confident conclusion on whether in fact the MOJ held information falling within the fourth part of the request. If such information exists, it should be found by the further search which we require for recorded information from the period to 13 March 2012 concerning the decisions taken for 2011-2012 and 2012-2013.

52. Information from the period to 13 March 2012 may also fall within the scope of the third part of the request. For example, it would be surprising if there were not some documentation equivalent to Document 6 dated about 12 months earlier.

53. The third part of the request commenced with the words 'If no decision has yet been taken as to whether to implement the recommendations of either Report ... ...'. To make sense of the request as a whole, it is necessary to read this as meaning 'If no decision or no final decision has yet been taken ... ...'. The MOJ's position was that no final decision had been taken, so that it was incumbent on the MOJ to provide a response to the third part of the request. We agree that the MOJ was required to respond.

54. The substantive elements of the third part of the request sought:

    a. 'considerations of the Reports to date and the outcome of those considerations' [element A];

    b. 'the process by which such decisions will be taken upon them' [element B];

    c. 'by whom such decisions will be made and when' [element C].

55. As we have noted above, element A may well include such further material as may be found. In our view it also includes Documents 1, 2, 3, 4 and 6 of the closed bundle. We find it surprising that there are no recorded responses to Documents 1, 4 or 6. MOJ should carry out a reasonable search to see if something has been missed.

56. Various paragraphs of Document 1 are marked 'out of scope' by MOJ. We do not agree with this characterisation. They are part of the document and in our view are plainly relevant to and within the information request. Document 2 is part of Document 1 and is similarly relevant and within scope. Document 3 (which in any event has not been shown to be confidential) is relevant and within scope because it is annexed to Document 4.

57. The MOJ failed to deal with elements B and C in its initial refusal notice or on internal review, but answered them in paragraph 7 of its response to the appeal dated 19 August 2013. We do not understand the appellant to pursue any further complaint about this answer, and we need not consider these elements further.

Reliance on s40(2)

58. In various of the Documents the MOJ wishes to redact certain names of individual civil servants pursuant to s40(2) (exemption for personal data). In this context we draw attention to what the Tribunal said in *Dun v IC and National Audit Office* EA/2010/0060, 18 January 2011, at [40]:

> The Tribunal does not accept that there is a blanket level at which all junior civil servants are shielded from disclosure of their personal data. This has to be decided on a case by case basis, through consideration of the role and responsibilities of the individual and the information itself.[10]

59. We can see no ground for redacting the names of Mr Gray or Mr Rutty wherever they appear, in view of their public-facing roles.

60. The MOJ indicates reliance on s40(2) for paragraphs 19 and 21 of Document 1. We do not agree that this is appropriate. These paragraphs do not in our view contain biographical information of which individuals are the focus, amounting to 'personal data' within the meaning of the Data Protection Act.

61. We also disagree with the MOJ's application of s40(2) to paragraph 22. This refers to things said by the Lord Chief Justice in pursuance of his public duties. We strongly doubt that this information is properly regarded as personal data but, even if it were, we do not consider that it would be a breach of data protection principles to disclose it. It reflects his publicly stated position.

62. We note that in the table on p207 the MOJ indicates that it wishes to take a blanket 'non-senior civil servants' approach to redactions under s40(2). This is not a correct approach. Ordinarily we would expect to see (in closed material) details of the job title, grade, and a summary of the role, in order to justify the redactions. However, in the present case we do not consider that the further names are of interest for the purposes of the request, and in the interests of proportionality we are prepared to accept the MOJ's reliance on s40(2) in the particular circumstances of this case, save to the extent set out above.

[10] And see also *McGonagle v IC and MOD* EA/2011/0104, 4 November 2011.

Conclusions and remedy

63. The Tribunal has determined the meaning and scope of the information request as set out in paragraphs 44 to 57 above and has determined the application of FOIA s40(2) to the materials in the current closed bundle as set out in paragraphs 58 to 62 above.

64. The Tribunal gives the further directions set out at the head of this decision. By means of an advance confidential draft of this decision, copied also to the Commissioner, the MOJ was given an opportunity to object to Direction A and paragraphs 12-14 and 15a-b. The MOJ confirmed on 21 February 2014 that it did not object to that direction or to those paragraphs.

65. The Tribunal reserves for future consideration:

a. such further findings of fact as may arise from the parties' compliance with the directions;

b. the application of s35(1)(a) to the material in the current closed bundle, and the application of s35(1)(a) and any other exemption that may be relevant to further disputed information not contained in the current closed bundle;

c. the public interest balance, as between disclosure or maintaining the s35(1)(a) exemption and/or any other qualified exemption which may be relied on as a result of compliance with the directions.

Signed on original:

Andrew Bartlett QC

Judge of the Tribunal