Neutral citation number: [2025] UKFTT 00351 (GRC)

Case Reference: FT/EA/2024/0197 and 208

First-tier Tribunal

(General Regulatory Chamber)

Information Rights

Decided in the absence of the parties

Heard on: 31 January 2025

Decision given on: 26 March 2025

Before

DISTRICT JUDGE WATKIN

MEMBER SCOTT

MEMBER SAUNDERS

Between

PROFESSOR BARNIE CHOUDHURY

Appellant

and

THE INFORMATION COMMISSIONER (1)

THE JUDICIAL APPOINTMENTS COMMISSION (2)

Respondents

Decision: The Appeals are allowed in part.

Substituted Decision Notice:

1. By 5pm on 16 May 2025, the JAC must disclose the following information held by it:
    a. All situational and other questions, specimen answers and the scoring framework utilised in the following exercises:
        i. the Deputy High Court selection exercises for 2021, 2022 and 2023.
        ii. The Specialist Circuit Judge selection exercises held in 2021, 2022 and 2023.
    b. Communications leading to the retirement of Dr Jarvis.

REASONS

The following terms will be abbreviated:

The Data Protection Act 2018	DPA
The Freedom of Information Act 2000	FOIA
The Information Commissioner	IC

Where this decision refers to section numbers, the reference is to sections within FOIA (unless otherwise stated).

BACKGROUND

1. The Tribunal has considered two appeals (the "**Appeals**"), **FT/EA/2024/0197** ("**Appeal 1**") and **FT/EA/2024/0208 (" Appeal** by Professor Barnie Choudhury (the "**Appellant**") are both dated 20 May 2024 and arise following various requests for information (the "**Requests**") made to the Judicial Appointments Commission ("**JAC")** between 30 April 2023 ("**Request 1**"))(page 105), 5 June ("**Request 2**"))(page 174), 5 July 2023 ("**Request 3**"))(page 203), and 28 September 2023 ("**Request 4**") (page 58 Bundle 2)

2. The JAC provided responses in their letters dated 26 May 2023 ("**Response 1**") 27 June 2023 ("**Response 2"**) on page 175 and 26 July 2023 ("**Response 3"**) on page 186 and 8 November 2023 (page 60 Bundle 2) ("**Response 4")**

3. Following the submission of the Requests to the JAC, an amount of information was provided but some was withheld relying on various exemptions. The Appellant requested internal reviews and subsequently submitted complaints to the IC, all of which were upheld by the IC. The IC provided decision notices (the "Decision Notices") dated 29 April 2024 ("**DN1**") (page 70), 13 May 2024 ("**DN3**") (page A5) (page A70), and 21 May 2024 (page 5 Bundle 2) ("**DN3"**). The IC upheld the decisions of the JAC.

4. It is not considered to be proportionate or necessary for the Requests, Responses of Decision Notices to be set out in detail.

5. The Appellant, an editor-at-large of the Asian Media Group, *Eastern Eye* has followed proceedings brought by Mr Abbas Mithani against the IC and the JAC under references EA/20220229, EA/2022/0300 and EA/2022/0310 (the "*Mithani Proceedings*") and had full access to the open bundle within those proceedings. The Appellant is concerned that the JAC is withholding documents which he considers should be publicly available and seeks the disclosure of those documents through these proceedings.

6. Save where documents are provided by the parties to this Appeal, the Tribunal, in deciding this Appeal, has not had access to the documents within or knowledge of the *Mithani Proceedings.*

The Role of the Tribunal

7. The role of the Tribunal in relation to the Appeals is to consider only whether the Decision Notices are in accordance with the law or whether the IC ought to have exercised his discretion differently.

THE GROUNDS OF APPEAL

8. The Appeals each consist of various grounds of appeal which are set out within two documents entitled "Appeal Against Decision Notice" and dated 20 May 2024 (for Appeal 1) and 29 May 2024 (for Appeal 2). There are eight grounds sent out in Appeal 1 and two in Appeal 2. For the purposes of this decision, the grounds are numbered from 1 to 10 with Ground 1 and from Appeal 2 being referred to as Grounds 9 and 10. Ground 2 in Appeal 2 has been considered together with Ground 1.

9. The Grounds are summarised as follows:

Ground 1 – **Communication leading to the grant of the authorisation to Dr Jarvis**

Whether the JAC is permitted to withhold communications containing legal advice in relation to the s.36 qualified person authorisation, requested in Request 1.

Ground 2 – Information contained in an exhibit

Whether the JAC is permitted to withhold the exhibits to one of the documents provided in response to question b) in Request 1.

Ground 3 – Information relating to the Head of Corporate Services

Whether the JAC is permitted to withhold information in relation to the terms and conditions of employment of the JAC's former Head of Corporate Services.

Ground 4 – information relating to other parties legal costs

Whether the JAC is permitted to withhold information relating to the costs of parties challenging the JAC's decision-making processes.

Ground 5 – Information relating to assessments

Whether the JAC is permitted to withhold information relating to the situational questions/role play and scoring framework used in judicial selection competitions pursuant to s.36(2)(c).

Ground 6 – Diversity information

Whether the JAC is permitted to withhold information regarding the diversity of applicants for judicial selection exercises pursuant to s.40(2).

Ground 7 – information about Dr Jarvis' retirement

Whether the JAC is permitted to withhold information about the retirement of Dr Jarvis pursuant to s.40(2).

Ground 8 – Information provided not answering request

The Appellant complains that the information provided by the JAC in its annual reports is generic and not sufficiently specific.

Ground 9 – Information relating to the JAC's s.36 authorisation

Whether the JAC is permitted to withhold information relating to whether the IC and/or requesters had been informed that the JAC did not hold authorisation to act as a qualified person pursuant to section 36.

Ground 10 – Communications relating to the use of the section 36 exemption without authorisation

Whether the JAC is permitted to withhold information relation to whether it is required to inform any other body about its use of the section 36 exemption without authorisation and details of the legal advice.

DOCUMENTS

10. Prior to the hearing, the Tribunal was provided with a 282-page open bundle and a closed bundle for Appeal 1 and a 133 page open bundle and a closed bundle in Appeal 2.

11. Any references to page numbers within this decision are to page numbers within the open bundles. To differentiate between the bundles, page numbers within the bundle for Appeal 1 are referred to by page number only, whereas the documents in the bundle for Appeal 2 to will be referred to as a page number followed by "(Bundle 2)".

CASE MANAGEMENT ISSUE

12. At a Case Management Hearing on 3 October 2024, at the request of the parties, the Tribunal determined that the Appeal would be decided on the documents in the absence of the parties.

13. Within the Case Management Directions made on 3 October 2024, the Tribunal included the following direction:

> *"If the Tribunal finds that it needs further submissions from the parties prior to making a fair determination, the Tribunal may write to the parties requesting written submissions in relation to any specific matters or requesting that a short hearing takes place."*

14. The Appeals were considered on 31 January 2025. However, at that time, it became apparent that certain documents which the Appellant had intended to rely on had not been provided to the Tribunal. Therefore, an order was made requesting the production of these documents. Those documents were those referred to within the Appellant's Skeleton Argument as:
    a) the *Mithani* Submissions referred to at paragraph 4 of the Appellant's Skeleton Argument; and
    b) The Appellant's Responses to the JAC's Responses (referred to at paragraph 5 of the Appellant's Skeleton Argument.

    (the "Missing Documents").

15. The Tribunal sent case management directions, dated 17 February 2025, to the parties requesting that the Appellant produce the Missing Documents by 28 February 2025. Whilst the Appellant subsequently sent the Tribunal a copy of an email showing that he had already sent the documents to the Tribunal in November 2024 (without applying for them to be included within the bundle), as the link to the documents embedded in an email had expired, the documents were not received.

16. To ensure that the position was clear to the Appellant, the Tribunal sent a further order, dated 6 March 2025, highlighting that the decision would be made without reference to the Missing Documents. Thereafter, as it appeared from a separate application made by the Appellant, that he may have misunderstood that the Tribunal could not access the documents from the expired link and a further order was made dated 13 March 2025, giving the Appellant a final opportunity to provide the documents by 18 March 2025.

17. At 9.20pm on Thursday 13 March 2025, the Appellant sent a further email to the Tribunal again attaching the documents within another link that was set to expire after 3 days. As it was sent on a Thursday evening, this allowed the Tribunal only

one day to retrieve the documents from the link. The email was not picked up and processed by the administration staff at the Tribunal until Monday 17 March 2025 (shortly after 1 working day of receipt). Therefore, after the link had expired and the Missing Documents have not been considered by the Tribunal in reaching this decision. However, the Tribunal is satisfied that the parties have all had a full opportunity to provide the documents on which they rely to the Tribunal.

THE RELEVANT LAW

Jurisdiction

18. The Tribunal's jurisdiction is set out at section 58(1) which provides that the Tribunal shall allow the appeal or substitute such other notice as could have been served by the IC, and in any other case the Tribunal shall dismiss the appeal where the Tribunal considers that the notice is not in accordance with the law or that the Commissioner should have exercised his discretion differently.

19. Section 58(2) gives the Tribunal power to review any finding of fact on which the notice was based.

Freedom of Information

20. Section 1

> "(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."

21. Section 1(4) provides that "*the information …is the information in question held at the time the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.*"

The Exemptions

22. Section 2(2) provides that the public authority is not obliged to provide the information as required by section 1(1) where:
    a) an absolute exemption applies (as listed in section 2(3)); or
    b) one of the exemptions set out in Part II (and not listed in section 2(3)) applies and the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

23. Section 21, 32 and 40(2) are listed at section 2(3) as having absolute exemption and, therefore, the public interest test does not need to be applied to them.

24. The following exemptions are relevant to these Appeals:
    a) Information accessible by other means - section 21
    b) Court Records – section 32
    c) Prejudice to Effective Conduct of Public Affairs – section 36
    d) Personal information – section 40(2)
    e) Legal professional privilege – section 42

Accessible Information

25. Information that is reasonably accessible by other means is exempt pursuant to section 21. This applies even if it is necessary for a payment to be made for the information (subsection 21(2)(a) or where it is information that the public authority or any other person is obliged to to communicate to members of the public on request whether free of charge or on payment (subsection 21(2)(b)).

Court Records

26. Section 32 provides:

"(1) Information held by a public authority is exempt information if it is held only by virtue of being contained in—

(a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,

(b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or

(c) any document created by—

(i) a court, or

(ii) a member of the administrative staff of a court,

for the purposes of proceedings in a particular cause or matter.

(2) Information held by a public authority is exempt information if it is held only by virtue of being contained in—

(a) any document placed in the custody of a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration, or

(b) any document created by a person conducting an inquiry or arbitration, for the purposes of the inquiry or arbitration.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of this section."

Prejudice to Effective Conduct of Public Affairs

27. Section 36 applies to information which is held by a government department (or the Welsh Government) and is held by any other public authority (provided that it is not exempt by virtue of section 35 – *formulation of policy*). Pursuant to section 36(2)(c), this information is exempt if, in the reasonable opinion of a qualified person, disclosure would prejudice, or would be likely to prejudice, the effective conduct of public affairs.

28. Section 36(5) sets out who a qualified person might be in relation to information held by different bodies. This includes:

> *"(o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means—*
>
> *(i) a Minister of the Crown,*
>
> *(ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or*
>
> *(iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown."*

29. In accordance with the view of the Upper Tribunal in ***Information Commissioner v Malnick and ACOBA*** **(GIA/447/2017) (1 March 2018),** the opinion expressed must be "*in accordance with reason, not irrational or absurd, ",* "substantively reasonable and not *procedurally reasonable*".

30. The Upper Tribunal also noted that the clear distinction between the two tests to be carried out in determining whether an exemption under section 36 applies. They described the test as to whether the qualified person's opinion was reasonable as the threshold question and stressed the importance of not conflating the threshold question with the balance of public interests.

31. In considering an exemption under section 36(3), it is the qualified person who must decide whether disclosure would prejudice or would be likely to otherwise prejudice the effective conduct of public affairs. If the opinion in reasonable, even if the Tribunal does not agree, the threshold is crossed, and the public interest test must be applied. *"The QP is not called on to consider the public interest test for and against disclosure."* (paragraph 32). Equally, the Information Commissioner (or the Tribunal) is not required to determine whether prejudice will or is likely to occur.

32. Section 36 does not confer absolute exemption, unless the information is "*held by the House of Commons or the House of Lords*" (section 2(3)(e), neither of which apply in the present context.

Personal Information

33. In short, by Section 40(2), information is exempt if the data constitutes personal data of which the appellant is not the subject and disclosure of it to a member of the public would contravene any of the data protection principles (section 40A).

34. Section 3 of the DPA states:

> *"(2) 'Personal data' means any information relating to an identified or identifiable living individual …*
>
> *(3) 'Identifiable living individual' means a living individual who can be identified, directly or indirectly, in particular by reference to –*
>
> *(a) an identifier, such as a name, an identification number, location data, or an online identifier, Or*
>
> *(b) one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual."*

35. *Department of Health v Information Commissioner [2011] EWHC 1430*, Cranston J:

> *"…. anonymised data which does not lead to the identification of a living individual does not constitute personal data."*

36. The six data protection principles are summarised at section 34(1) of the DPA:

> *"(a) section 35(1) sets out the first data protection principle (requirement that processing be lawful and fair);*
>
> *(b) section 36(1) sets out the second data protection principle (requirement that purposes of processing be specified, explicit and legitimate);*
>
> *(c) section 37 sets out the third data protection principle (requirement that personal data be adequate, relevant and not excessive);*
>
> *(d) section 38(1) sets out the fourth data protection principle (requirement that personal data be accurate and kept up to date);*
>
> *(e) section 39(1) sets out the fifth data protection principle (requirement that personal data be kept for no longer than is necessary);*
>
> *(f) section 40 sets out the sixth data protection principle (requirement that personal data be processed in a secure manner).*

37. Regulation (EU) 2016/679 (GDPR) is retained by virtue of s.3 the European Union (Withdrawal) Act 2018 (modified by the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019/419 (known as UK GDPR).

38. Article 5(1) UK GDPR states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."

39. Article 6(1) UK GDPR states that processing shall be lawful only if and to the extent that at least one of 6 provisions applies. As it is none of the first six provisions apply, the Tribunal will consider whether the following applies

> *"(f) processing is necessary for the purposes of the legitimate interests pursued by the Controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data…"*

40. Article 9 stipulates that, save in specific circumstances (Article 9(2)(a) to (j)), the processing of data is to be prohibited where it reveals:

> *"racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural persons sex life or sexual orientation"*.

41. Pursuant to section 2(3)(fa), the exemption is absolute where the information sought is not the personal data of the Appellant.

42. The meaning of "*necessary*", for the purposes of article 6(1)(f) is not defined in the UK GDPR or DPA 2018 but has been considered in case of ***Heinz Huber v Bundersrepublik Deutschland C-524/06*** in which the Court imported the test of proportionality. Thus, it would be necessary to show that the "*processing*" or disclosure was the minimum necessary for achieving the legitimate aim.

43. In ***Corporate Officer of the House of Commons v IC*** **(*[2008] EWHC 1084 (Admin)*** (the "**House of Commons case**") at [43] the High Court accepted that "*necessary* "should reflect the meaning attributed to it by the ECtHR when justifying an interference with a recognised right, namely that there should be "*a pressing social need and that the interference was both proportionate as to means and fairly balanced as to ends".*

Legal Professional Privilege

44. Section 42 is the exemption which applies where the information is subject to legal professional privilege. It is not listed in section 2(3), therefore, it is subject to the public interest test.

45. Section 42 states:

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

46. In the case of **Regina v Derby Magistrates' Court ex parte P [1996] 1 AC 487**, the question of legal privilege was considered by the House of Lords. Lord Taylor of Gosforth stated:

> *"The principle which runs through all these cases and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence,*

limited in its application to the facts of the particular case. It is a fundamental condition on which the administration of justice as a whole rests."

47. Lord Nicholls of Birkenhead in **Re L (a minor) (Police Investigation: Privilege) {1997] AC 16** stated (page 32E):

"public interest in a party being able to obtain informed legal advice in confidence prevails over the public interest in all relevant material being available to courts when deciding cases and period."

48. In **Regina (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax & another [2003] 1 AC 563,** Lord Hoffman stated (at 606H-607B):

"LPP [legal professional privilege] is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to its prejudice."

49. In the case of ***Department for Business, Enterprise and Regulatory Reform v O'Brien and Information Commissioner [2009]EWHC 164 (QB)*** Wyn Williams J states (paragraph 41):

"It also common ground, however, that the task of the tribunal, ultimately, is to apply the test formulated in section 22B. A person seeking information from a government department does not have to demonstrate that "exceptional circumstances" exist which justify disclosure. Section 42 is not to be elevated "by the back door" to an absolute exemption. Ms Proops submits in her skeleton argument, it is for the public authority to demonstrate on the balance of probability, that the scales weigh in favour of the information being withheld. That is as true of a case in which Section 42 is being considered as it is in

relation to a case which involves consideration of any other qualified exemption. Under FOIA, section 42 cases are different simply because the inbuilt public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the documents in question."

The Public Interest Test

50. The public interest test is to be carried out on the date that the request for information is decided (***Montague v IC and DIT*** [2022] UKUT 104 (AAC) at [47]-[90]).

51. In ***O'Hanlon v IC*** [2019] UKUT 34 (AAC) at [15], the Upper Tribunal considered:

> *"The first step is to identify the values, policies and so on that give the public interests their significance. The second step is to decide which public interest is the more significant. In some cases, it may involve a judgment between the competing interests. In other cases, the circumstances of the case may (a) reduce or eliminate the value or policy in one of the interests or (b) enhance that value or policy in the other. The third step is for the tribunal to set out its analysis and explain why it struck the balance as it did*".

52. The Tribunal will weigh up the actual harm that the proposed disclosure may cause with the potential benefits of its disclosure ***APPGER v IC*** [2013] UKUT 560 at [74]-[76] and [146]-[152]. In doing so, the Tribunal will consider the content of the information and the possible consequences of disclosure or non-disclosure.

Advice and Assistance

53. Pursuant to section 16, a public authority is required to provide advice and assistance:

"(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by the subsection (1) in relation to that case."

Jurisdiction

54. The Tribunal's jurisdiction is set out at section 58:

"(1) If on an appeal under section 57 the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

THE GROUNDS

55. The Tribunal has considered each of the grounds in turn.

GROUND 1 – Communication leading to the grant of the authorisation to Dr Jarvis

56. Ground 1 relates to the request set out within Request 1 (page B105) as:

"*Please provide copies:*

(a) of all communications passing between the JAC (or any person on its behalf) leading to the grant of the authorisation on 10 October 2022."

57. The JAC responded within Response 1 and confirmed that the communications sought include two email chains and a submission.

58. The JAC withheld the first email chain under section 42(1) and the second was disclosed (B115-B128) with the names of individual staff members and any specific legal advice having been redacted. The submission (B113-114) was provided. The Tribunal has been provided with these documents within the closed bundle (CB A4-A16) in unredacted form.

59. Within DN1, the IC considers a similar request that was previously considered. It provides the case reference number but does not repeat the reasoning. Nonetheless, it does state that it concluded that the balance of the public interest favoured maintaining the exemption.

60. The IC considered that there was a *"in-built public interest in this exemption: that is the public interest in the maintenance of legal professional privilege".*

Grounds of Appeal and Appellant's Submissions

61. The Appellant accepts that the documentation was provided save for communication between the JAC and its legal advisers (paragraph 11 Appellant's Skeleton Argument).

62. The Appellant contends that information provided with the *Mithani Proceedings* demonstrated that the JAC had sought to mislead the Tribunal and the public and that *"if correct, it is vital for the public to know how readily officials at the JAC will distort the truth to protect their egregious conduct and how those officials are*

prepared to spend substantial sums of public money on behalf of the JAC to protect themselves."

63. The Appellant complains that the JAC does not give any reason as to why the information is subject to privilege and, as such, the Appellant challenges the claim to privilege and the acceptance of it. It is noted that the Appellant refers to *"all communication passing between the JAC leading to the grant of the authorisation".*

64. The Appellant relies on the case of **Bellamy v Information Commissioner** (EA/2005/0023) (4 April 2006) in which Deputy Judge Marks said:

> *"As can be seen from the citation of the legal authorities regarding legal professional privilege, there is a strong element of public interest in built into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest. It may well be that in certain cases, of which this might have been one, were the matter not still live, for example, where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight."*

65. The Appellant considers that the IC has failed to demonstrate that the importance of withholding legal advice obtained from a public authority's lawyers exceeds the importance to the public of making that advice freely available. The Appellant considers that the issue of the authorisation is now "*redundant*" or "*completely stale*". As the validity of the authorisation is no longer challenged, the Appellant considers that the disclosure of the information would show to the Appellant whether any other material has been withheld and what explanations were given

for the JAC's previous failure to comply with its obligations under FOIA and whether full and frank disclosure was given in the *Mithani Proceedings*.

66. The Appellant contends that there is no public interest in maintaining the exemption due to the issue of the authorisation now being stale and that the disclosure should extend to all file notes, legal opinions and other documents generated in connection with the JAC's failure to obtain authorisation prior to 10 October 2022.

JAC Response and Submissions

67. The JAC's submissions focus on the email chain which has been provided within the closed bundle and does not acknowledge the existence of any other information or potential information which may be relevant.

68. Whilst the JAC acknowledges that the exemption at section 42 was subject to the public interest test and accepts that there was a general public interest in favour of disclosing information "*as greater transparency makes Government more open and accountable*", it also considers that it is in the public interest for the principle of legal privilege to be protected as it ensures that organisations can seek legal advice which can be given freely and frankly. It considers that the interest in protecting legal privilege outweighs the public interest in disclosure.

69. The JAC contends that no specific, clear or compelling public interest justification has been put forward for disclosure and, as such, the merits of disclosure do not outweigh preservation of the exemption.

Analysis and Decision of the Tribunal

70. The Tribunal has considered:

a) What information is sought and is it limited to the email chain provided within the closed bundle.
b) Whether the information is subject to legal professional privilege for the purpose of section 42 and, if so:
    i. What are the public interest factors in favour of disclosing the information;
    ii. What are the public interest factors in favour of maintaining the exemption; and
    iii. Does the public interest in maintaining the exemption outweigh the public interest in disclosure.

71. The Appellant seeks *"all communications passing between the JAC (or any person on its behalf) leading to the grant of the authorisation on 10 October 2022".* Whilst is not clear whether the Appellant accepts that the only relevant information held by JAC is the two email chains and the submission, these are the only documents which the JAC state exist.

72. From considering the information within the closed bundle, it is not evident that any other information exists. As such, the Tribunal considers that, on the balance of probabilities, that the two emails and the submission are likely to be the only documents containing information relevant to the request.

73. The Tribunal is satisfied that the email chain that has been provided is protected by legal professional privilege and, therefore, is subject to the exemption at section 42.

74. The Tribunal had considered and adopts the description of legal professional privilege as set out within **Bellamy** which is quoted above.

75. As section 42 is a qualified exemption, the public interest test set out at section 2(2)(b) must be applied. The Tribunal must determine the weight to be attributed to public interest in maintaining the exemption and the public interest in disclosure.

76. Whilst the Tribunal does not consider the legal advice provided to the JAC within the email chain to be stale or redundant, as it continues (and will continue indefinitely) to be applied, the advice has now been given and applied. It is unlikely that anything further will change as a result of it. This is particularly as the purpose for which the advice was obtained and the outcome of it is known. Therefore, the Tribunal does not consider that any significant harm would arise from the disclosure of the communication.

77. However, the Tribunal does accept that legal professional privilege is a fundamental human right. Whilst the rights to be protected by the exemption in the present matter are those of a public authority (and not an individual), it is well recognised that there is an inbuilt public interest in the protection of the principle of legally privilege and, therefore, the protection of communications between a client and its lawyers.

78. In relation to the public interest in disclosure, the Tribunal notes the words of Sir Geoffrey Vos MR in the case of R (on the Application of Kate Thomas) v JAC [2024] EWCA Civ 665 :

> *"I have borne in mind the importance of this case and the public interest in maintaining a scrupulously fair and transparent judicial appointment process."*

79. The Tribunal is also aware of the public interest in the affairs of the JAC, in particular, as listed by the Appellant:
    a) Widespread criticisms of the JAC and the public perception that it is not fit for purpose and is institutionally discriminatory.

b) Press coverage in relation to the JAC.

c) A Report by the Judicial Support Network to the Equality and Human Rights Commission.

d) The Lammy Report and observations made by various bodies about institutional discrimination.

e) Media coverage of the head of the JAC.

80. The Tribunal has not been provided with copies of any of the aforementioned reports or press articles and the Appellant does not link any of the above directly to the issue of the authorisation provided to Dr Jarvis. However, the Tribunal accepts that the matters raised are serious and that it is in the public interest for there to be transparency and accountability to ensure that members of the judiciary, applicants and members of the public who need to have confidence in the judicial system can have confidence in the JAC.

81. The Tribunal must, however, take all of the circumstances into consideration. It is noted that the situation that gave rise to the obtaining of legal advice is known from the detailed emails that have been provided, as is the outcome of the advice. The Tribunal has also had an opportunity to read the email chain. As such, the Tribunal is not persuaded that the disclosure of the email chain or other communications relating to the authorisation of Dr Jarvis will be of any assistance in assuaging any of the public concerns.

82. It is suggested that providing the disclosure would, at the very least, reduce speculation as to any potential suspicion arising from the manner in which the advice was sought or as to whether the JAC was properly discharging its public functions. The Tribunal is not persuaded that the disclosure of the email chain or other communications will assist with this. However, if there were cause for

concern arising from the information within the closed bundle, the Tribunal would have also considered that as an important factor favouring disclosure.

83. The Appellant suggests that it is for the Respondent to prove that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Tribunal considers that the inbuilt significance which applied to information which is subject to legal professional privilege is sufficient, in this case, for the public interest in maintaining the exemption to prevail. Therefore, the Tribunal accepts that the exemption applies.

GROUND 2 – Copies of FOIA Requests

84. This ground relates to the request which was set out within Request 1 (page B105) as:

> *"Please provide copies:*
>
> *(b) Copies (sic) of all FOIAs and answers given by the JAC prior to the grant of the authorisation where the "qualified person" exemption was used or specific links to them under your disclosure programme. A link to your disclosure log is not enough. I seek specifically those requests where the JAC used sec. 36.* ***This should not be an exemption under sec. 12.*** *You should, as a matter of best practice, keep a record of when you have used sec. 36 or any exemptions."*

85. The JAC responded to the request in Response 1 and confirmed that it had relied on section 36 on five occasions since 2018 (the date from which records are retained). The JAC provided the replies given to the requests with personal information redacted. However, 95 documents that had been provided with one of the original responses were not disclosed as they were considered to contain personal information which would need to be redacted.

86. In its response to a request for an internal review, dated 1 August 2023 (page 160 at 162) the JAC indicates that the documents are considered to be exempt under section 40(2), as they contain personal data.

87. The Appellant seeks disclosure of the 95 documents redacted to remove personal data and any other documents where the exemption was used prior to 10 October 2022. Copies of the documents have not been provided to the Tribunal.

88. The IC does not deal with this part of the request within DN2 although it does consider section 40(2) in relation to other aspects of the complaint and sets out the position in relation to disclosure under UK GDPR/DPA.

Ground of Appeal/Appellant's Submissions

89. It is the Appellant's position that the JAC will withhold disclosure if it is likely to expose the failings of its workings and believes that the documents had previously been provided to a requester in redacted form and may be available to the JAC in that form.

90. The Appellant adds that the reliance on section 40(2) is misconceived and requests that the JAC provides the 95-document redacted to remove any personal data.

JAC Response and Submissions

91. JAC states that it was entitled to withhold the information for the following reasons:
    a) It is not within the scope of the original request which was expressly about previous FOIA requests which had been refused under section 36.

b) It was provided to the original requester under subject access principles, not freedom of information principles.

c) Section 40(2) applies. The information is exempt due to being personal data of an individual.

Analysis and Decision of the Tribunal

92. The FOIA response dated 27 May 2020 provided to the Appellant in response to this request which had 95 documents attached to it has been provided to the Tribunal (page 133). This letter sets out the JAC's response to the request and indicates that certain information cannot be provided due to the application of the section 36 exemption. However, it also indicates that some information can be provided as it falls outside the exemptions. This is the 95 documents.

93. The Appellant's request was for

> (b) *Copies (sic) of all FOIAs and answers given by the JAC prior to the grant of the authorisation where the "qualified person" exemption was used or specific links to them under your disclosure programme. …"*

94. The Tribunal's power is set out at section 58. It provides that the Tribunal may allow an appeal, substitute a decision notice or dismiss the appeal where the Tribunal considers that the IC's decision notice is not in accordance with the law or that any discretion should have been exercised differently. In relation to this request, the IC did not make a decision or exercise his discretion. Therefore, it is arguable that the Tribunal has no jurisdiction until the IC has determined the complaint and that the complaint should have been referred back to the IC. However, if the matter would appear to have been referred to the IC, it could be argued that it was not lawful for the IC not to have considered the matter.

95. As the Tribunal has considered the matter in the process of dealing with this Appeal generally, it is in the interests of all parties for the Tribunal's view to be set out – albeit it may be not more than indicative if there has been no reference to the IC.

96. The Tribunal considers that the JAC has responded to the request by providing the FOIA requests and answers. Request 1 does not specify that documents produced with the answers should be provided. The reply given is complete for the purposes of providing the reply without the additional documents. The context of the request was that the Appellant was seeking information in relation to the responses and not in relation to the substance of the requests.

97. In so far as the request did request the information, the Tribunal would need to consider whether the 95 documents contained personal data and, if so, whether the exemption at section 40(2) applied. Whilst the exemption is absolute, for the exemption to apply, it would not apply if the data was necessary for the purpose of a legitimate interest and not overridden by the interests or fundamental rights of the data subject.

98. The Tribunal notes that the documents were provided to an individual following a request for: "*internal and external communications regarding myself…. regarding recruitment and selection processes".* As such, the Tribunal determines, on the balance of probabilities, that the information is likely to relate to the individual requester and the recruitment and selection processes applied for by him. Therefore, the Tribunal concludes that the information within the 95 is personal data belonging to the requester.

99. As such, the Tribunal needs to consider whether the information should be provided under the UK GDPR principles. That is, whether disclosure of the

documents would amount to processing that is lawful, fair and transparent (Article 5 UK GDPR). For the disclosure to be lawful, it would need to be necessary for the purpose of a legitimate interest (except when overridden by the interests or fundamental rights of the data subject) (Article 6(1)(f) UK GDPR)

100. The Tribunal does not consider that the Appellant has provided a legitimate interest that would make it necessary for the 95 documents to be disclosed. Whilst the Tribunal understands the reasons for the Appellant requesting the FOIA requests and the responses, there is no clear reason given for requiring 95 documents that pertain to an individual. Additionally, the Tribunal has not had sight of the documents. The interest of the Appellant is in showing that the section 36 exemption has not been correctly applied, the Appellant does not express any basis as to how the 95 documents produced to the requester might be necessary for that as the section 36 exemption did not apply to those documents.

101. In the absence of any clear legitimate purpose for which the documentation is necessary, the Tribunal does not consider that the exemption at section 40(2) applies.

GROUND 3 – Information relating to the Head of Corporate Services

102. This ground relates to the second part of Request 1 (page B105) and relates to then the Head of Corporate Services. There were 5 requests in relation to this. It is understood that some information was provided in Response 1 (B107) but that it refused to respond to request 5 under this heading which was:

"Please provide details of his or her current terms and conditions of employment."

103. Response 1 (page 107) was written by the then Head of Corporate Services who confirmed that the information was held by the JAC but that it would not be provided as it is exempt under section 40(2) as it is the personal information of another person. The JAC states that as this is an absolute exemption it is not obliged to carry out the public interest test. The JAC does not then consider whether the exemption actually applies following the application of the data protection principles, as required by section 40, and as set out in the UK GDPR/DPA. The JAC did not refer to whether release of the information would cause any harm or distress to the data subject, despite it having been written by him.

104. Following a request for a review, this request was considered further by the JAC in a letter dated 1 August 2023 (page 160), written by Mr Robert Aldridge, where consideration was given to UK GDPR and section 34(1) DPA. Mr Aldridge stated:

> *"I believe that releasing this information has the potential to cause both harm and distress to the individual and I see no wider public interest in this information being provided. It is also my view that this individual has a reasonable expectation that this information would be kept private and not provided to the wider public. The nature of the disclosure would likely cause damage under stress to the individual concerned and outweighs any legitimate interest in disclosure."*

105. Mr Aldridge also explains that the Civil Service has an established practice of releasing salary bandings of senior civil servants, which is why Dr Jarvis' remuneration has been released but that no such policy exists in relation to the Head of Corporate Services and the individual would not have expected publication of his terms when he was appointed.

106. Within the DN1, the IC confirmed that the commission was satisfied that the individual would have a general expectation of privacy and would have a reasonable expectation of their terms not being disclosed. Reference is made to IC published guidance where it is stated that "*exceptional circumstances*" are needed to justify the disclosure of exact salaries and that there is insufficient legitimate interest in this case to outweigh the data subject's rights and freedoms. He did not, therefore, consider whether disclosure would also need to be fair and transparent.

Grounds of Appeal/Appellant's Submissions

107. The Appellant suggests that "*given the catalogue of serious and serial failings of the JAC., much of which… has to lie at the door of Mr Thomson. It is unacceptable that the public should not know his package of remuneration and the terms and conditions of his employment., particularly as generic information of this nature is usually provided by public bodies in their annual accounts."*

108. The Appellant considers that the approach of the JAC within the letter 1 August 2023, is an attempt to stifle public scrutiny. Whilst the Appellant suggests that part of the information sought may amount to personal data, he believes that there is an overwhelming public interest for the information requested by him to be provided.

109. The Appellant refers to the institute for government website which states:
"Grades 6 and 7 civil servants tend to be experienced officials with significant policy responsibilities."

110. The Appellant also references the IC Guidance entitled "*Requests for personal data about public authority employees"* which he considers that the JAC did not comply with. However, he does not set out the basis of non-compliance. The Guidance

states on page 11, in relation to the potential harm or distress that may be caused by disclosure:

> *"You must consider the likely consequences of disclosure in each case. Personal information must not be used in ways that has unjustified adverse effects on the employee concerned. Although your employee may regard the disclosure of personal information about them as an intrusion into their privacy, often this may not be a persuasive factor on its own, particularly if the information is about their public role rather than their private life. You must be able to argue that adverse consequences would result from disclosure of the personal data. You must show that there is a connection between the disclosure of the requested information and the adverse consequences. For example, you have a strong argument for refusing a subsequent disclosure, if a previous disclosure of similar information has led to the targeting of individuals.2 You must therefore consider the nature of the information and judge the level of distress or damage likely to be caused. The greater this is, the more likely that the interests of the employee will override any legitimate interests in disclosure."*

111. The guidance also states:

> *"**Seniority***
>
> *It is reasonable to expect that you disclose more information about senior public authority employees than more junior ones. Senior employees should expect their posts to carry a greater level of accountability, since they are likely to be responsible for major policy decisions and the expenditure of public funds. For example, a junior employee who is not accountable for their submissions to a senior government minister has no expectation that their name will be disclosed in response to an FOI request.*

However, the terms 'senior' and 'junior' are relative. It is not possible to set an absolute level across the public sector below which personal information is not released. It is always necessary to consider the nature of the information and the responsibilities of the employee in question."

112. The Appellant disputes that any possible prejudice could arise as a result of the disclosure of the information requested and the public is entitled to know how much public officials are paid for doing their jobs, particularly where there are allegations of incompetence made against them.

JAC Response and Submissions

113. The JAC's has provided the Tribunal with the terms and conditions which are the subject of the request. The JAC submits that the terms and conditions of an employee's appointment, including remuneration is personal data.

114. The JAC does not accept that there is any lawful or fair basis for the information to be disclosed but does not comment on the Appellant's contention that there has been criticism of the Head of Corporate Services which has led to speculation in relation to his performance and his role or to the suggestions that the criticism results in public interest and curiosity into his terms and conditions, save to say that it is irrelevant.

115. The JAC compares the Head of Corporate Services with the position of the Chief Executive but does not consider the position of Head of Corporate Services in isolation.

Analysis and Decision of the Tribunal

116. The Tribunal accepts that as the information sought relates to the terms and conditions of an individual, the exemption at section 40(2) is engaged. The Tribunal, therefore, needs to consider whether the disclosure of the information would be lawful, fair and transparent processing (Article 5(1) and DPA 34(1)).

117. For the processing to be lawful, it would have to be necessary for the purpose of a legitimate interest and not overridden by the interests and fundamental rights and freedoms of the data subject (Article 6(1)(f).

118. The Appellant seeks the disclosure for the legitimate interest of calling the Head of Corporate Services and the JAC to account. He states that there have been serious and serial failings which give rise to a public interest in his terms and conditions of employment. The Tribunal accepts that this is a legitimate public interest.

119. However, in considering whether disclosure of the information is necessary to achieve the desired purposes, the Tribunal needs to consider whether the purpose is achieved without the disclosure.

120. The Tribunal has had the opportunity to review the terms and conditions contained within the closed bundle and does not consider that knowledge of those terms and conditions will particularly assist that public interest, particularly as he is known to be a grade 7 and, therefore, the salary range is in the public domain.

121. As the Tribunal does not consider the information to be necessary for the legitimate interest, it does not need to consider whether the interest is overridden by the interests of the fundamental rights of the data subject.

122. The Tribunal, therefore, does not consider disclosure would be lawful pursuant to section 34 DPA or Article 6(1)(f) and there is no reason for it to address whether the disclosure would be transparent and fair.

GROUND 4 – Information relating to other parties legal costs

123. This ground relates to question 6 of Request 2 (page 174). The Information requested in question 1 to 6 in Request 2 is information relating to claims that had been brought against the JAC during the period 1 January 2019 and 31 May 2023.

124. Question 6 reads:

> *"Please let me know the amount of legal costs (actual or notional incurred by the JAC) in dealing with the costs of such claims, complaints and appeals, setting out separately profit costs (actual or notional), counsels fees, and all disbursements."*

125. In Response 2 (page B175), the JAC responded as followings:

> *"The JAC receives its legal support through the Government Legal Division, who may instruct counsel to act of (sic) JAC's behalf on cases. Below is the amount the JAC has incurred in legal costs invoiced by the Government Legal Division for the above cases. Details of individual counsel's costs are not recorded.*

Mason	*£19,235.89*
Rackham	*£51,258.00*
Malek	*£9,133.60*
Ghosh	*£101.973.0 (sic)*
Thomas	*£30,380.08*

126. There is no reference to information being withheld due to an exemption within Response 2. The request for an internal review dated 5 July 2023 appears to only make further requests and the JAC responds to indicate that the letter will be dealt with as a further request.

Grounds of Appeal/Appellant's Submissions

127. The Appellant contends that the JAC is deliberately withholding information about how much money is wasted by it *"often, defending cases that are indefensible and cases which ought to be mediated through to an acceptable outcome."*

128. The Appellant contends that as some of the information has been provided, the rest should be provided. The JAC indicated in a letter dated 3 October 2023 (page 231) that it does "*hold some information*" but that it is exempt under section 40(2).

JAC Response and Submissions

129. The JAC states that it complied with requests based on the information available to it at the time regarding the costs incurred by it, not costs incurred by others. The JAC does not comment on whether the cost in relation to all claims, complaints and appeals have been provided.

130. In relation to the sums paid by the JAC to a third party, the JAC refuses to provide this information on the basis that it is personal data as it reflects the costs incurred by that third party.

131. The JAC also states in its skeleton argument (paragraph 70) that the information was not available to it at the time of Response 2 and that it is not obliged to put information held by it into a different form (paragraph 21, page A101),

therefore, it is not information that could have been produced in response to Request 2.

Information Commissioner

132. The Tribunal cannot identify a Decision Notice that deals with this matter as a complaint within any of the bundles that are before the Tribunal.

Analysis and Decision of the Tribunal

133. Unfortunately, the Appellant's position at Ground 4 is not clear. A request was made to the JAC for details of legal costs incurred in relation to claims, complaints and appeals over the period 1 January 2019 to 31 May 2023.

134. A figure for costs was provided in relation to five matters. These are all given case references and the Court or Tribunal is mentioned. Therefore, each of these five are claims or appeals (not complaints). As the Tribunal considers that it is likely that the JAC has received complaints that did not amount to claims within the same period, the information provided may not be complete.

135. In so far as the Appeal relates to the question of whether the JAC can withhold details of the sums paid by way of reimbursing a third party's costs, consideration would need to be given to whether the information was personal data and, if so, whether disclosure was necessary in order to pursue a legitimate interest. It would then be necessary to weigh up whether the data subject's fundamental rights and freedoms outweigh the legitimate interest.

136. Importantly, however, as there is no reference to this request having been referred to the IC, the Tribunal has no jurisdiction to consider whether the IC's decision notice was correct or whether the IC should have exercised its

discretion differently and it would not be appropriate for the Tribunal to consider the matter further.

GROUND 5 – Information relating to assessments.

137. The heading to Ground 5 within the Appellant's documentation refers to Questions 7 to 9 relating to the scoring framework. These are set out in Request 2 (at question 7):

> "*7. Please provide it all situational and other questions and specimen answers for the following exercises:*
>
> *a. Deputy High Court selection exercises for 2021, 2022 and 2023.*
>
> *b. Specialist CJ. Selection exercises held in 2021, 2022 and 2023.*
>
> *8 Please provide the scoring framework to mark candidates. In respect of the above selection exercises.*
>
> *9 Please provide details of how each of the candidates (anonymised appropriately) appointed or interviewed for the above selection exercises scored in each selection exercise."*

138. In relation to question 9, the JAC stated in Response 2, that it did not have the information relating to how the candidates scored in selection exercise 131 as the exercise had not yet concluded. In relation to the other exercises the JAC claimed that the information was exempt under section 40(2) due to containing personal data but on acknowledged on 13 January 2023 that information relating to recruitment for salaried and fee-paid roles for courts and tribunals (both legal and non-legal posts) had been provided to the SSRB. The website where the information could be viewed was provided. The content of the Appellant's

submissions relates only to questions 7 and 8. Therefore, the Tribunal has considered questions 7 and 8 only.

139. In Response 2, the JAC confirms that there were three relevant exercises for the position of Deputy High Court Judge ("DHCJ") (with reference numbers 024, 086 and 0131) and one competition for Specialist Circuit Judge ("SCJ") (reference 092). The JAC stated that situational questions are used in the SCJ competition but in the DHCJ competition candidates take part in role play. The JAC considered the material in relation to both to be exempt from disclosure under section 36(2)(c) as "*in a qualified person's reasonable opinion, the release of this information would otherwise prejudice or would be likely otherwise to prejudice the effective conduct of public affairs.*"

140. The reasons given for this were that there was a good likelihood that the information may be used in future judicial appointment exercises. If the material had been disclosed, the JAC considered that this would not be possible.

141. The JAC confirmed that the qualified person for this purpose was Alex McMurtrie who was stated to have reviewed the request and approved the decision not to release the information.

142. The JAC concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information as disclosure would mean that the material could not be utilised to assist in future exercises, thus placing additional burden on judicial resources that produce the information.

143. Within the DN1, the IC also concluded that section 36(2)(c) was engaged and that the public interest test weighed in favour of the exemption being upheld. However, no clear reasons are given with DN1 stating only that the public interest

considerations were similar to those in a different case and gave the case number as IC -268295-K8Q1 (page A78 to A86). A link to case number IC -268295-K8Q1 has been provided, which refers to a different decision in which it had previously dealt with a similar issue – case number IC -181733-R3TO. The Tribunal does not consider it helpful for the IC to refer to numerous decisions for reasoning. In the interests of clarity for complainants and the public who may read published decisions, it would be preferable for the entire reasoning in any case to be set out within the decision notice for that case.

144. In IC -268295-K8Q1, the IC records the complainant's view which is that it is in the public interest to provide the withheld information given "*intense scrutiny*" of the JAC in relation to how it operates and for the public to understand whether the JAC takes a consistent approach across all candidates who are interviewed.

145. The IC weighed up the contention that disclosure would mean that the test materials were in the public domain and available to all future candidates, such that the tests cannot be re-used and concluded that the public interest lies in favour of not disrupting future selection exercises or affecting judicial availability and not in favour of disclosure.

Ground of Appeal/Appellant's Submissions

146. The Appellant accepts that there was a qualified person for the purpose of s.36(2) and that he gave his opinion confirming that disclosure of the information would or would be likely to prejudice the effective conduct of public affairs. The Appellant challenges whether that opinion was reasonable.

147. The Appellant gives the following reasons as to why the opinion is not reasonable:

a) No evidence has been produced about how often the situational questions are re-used,
b) The re-use of situational questions infringes the "merit" and "diversity" requirements of ss.63 and 64 CRA 2005.
c) There is a substantial body of opinion that the JAC is not fit for purpose, is institutionally discriminatory and routinely blocks requests for information to avoid scrutiny.
d) Real examples of situational questions are regularly given at outreach events.
e) The public is entitled to judge whether the situational questions for an exercise were appropriate and whether specimen answers were correct.

148. The Appellant also challenges the application of the public interest test.

JAC Response and Submissions

149. The JAC states within its skeleton argument (paragraph 71) that disclosure would prevent the re-use, forcing the JAC to require sitting judges to generate fresh material. The skeleton argument continues to refer to "*the fact that such questions and answers are often reused, in whole or in part, on the disclosure under FOA would prevent such reuse".* The JAC refers to its letter dated 27 June 2023 in support of this comment (B177). However, in the letter, the statement is: *"This is because there is a good likelihood that the information requested, ie, the situational questions, specimen answers and scoring framework, may be used or referred to, in part or in full, in future judicial appointment exercises."* This Tribunal does not consider a likelihood of the material being re-used as being the same as "*the questions and answers are often re-used".*

150. The JAC notes that the Appellant contends that materials should not be re-used and points out that is not his decision and that the JAC and IC are correct to conclude that the qualified opinion was reasonable.

Analysis and Decision of the Tribunal

151. To consider whether the section 36(2) exemption applies, the Tribunal needs to consider whether the opinion given by Mr McMurtrie was reasonable in concluding that disclosure of used situational questions, answers and the marking framework "*would prejudice, or would be likely to prejudice, the effective conduct of public affairs*".

152. Whether the opinion was reasonable must be assessed objectively based on the circumstances in existence at the time the opinion was given.

153. If the Tribunal finds the opinion to have been reasonable, the Tribunal needs to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

154. The basis of the opinion given by Mr McMurtrie is known from the letter provided to him by the Head of Corporate Services and dated 23 June 2023 (page 215) ("Recommendation Letter"). The Recommendation Letter sets out:

a) The background to the legislation and the role of the qualified person in providing the opinion.
b) The basis of reasonableness and the importance that relevant factors are considered, and irrelevant factors are not taken into account.
c) That the decision is based on evidence but that there does not need to be evidence of the prejudice which would or would be likely to be caused by the disclosure.

d) That he must record which limb of the test that he has made his decision under. That is whether the disclosure *would* cause prejudice or would be *likely* to cause prejudice.

e) The information that is requested.

f) The following are set out for Mr McMurtrie as reasons why prejudice might occur if the information is disclosed (underlining added):

> *"If we were to disclose the requested papers and/or information, it is argued that the JAC would be prejudiced in its effective conduct of public affairs as follows:*
>
> - *Should the questions/material and/or marking schedules be disclosed, the JAC will be unable to use any part or parts of these in any subsequent exercise, whether in their original or an amended format, as this would provide any applicant who had previously sat the questions with a significant advantage over others.*
> - *JAC officials will be inhibited in the delivery of future exercises for this and other jurisdictions if judicial colleagues are less willing to become involved or inhibited in the scope of their involvement in the development of situational questions, as at present they are the single point of provision for this aspect of the JAC selection process."*

155. The Recommendation Letter continues (underlining added):

> *"There is an argument the likelihood of using this material is remote. Whilst this could be the case, the JAC can be called on at short notice to run an exercise and it must have the flexibility to deploy old tests in order to meet these needs" (Page B216)*

Likelihood of event that may result in prejudice

156. No evidence has been provided to the Tribunal to show whether the JAC does or does not re-use material. The Tribunal considers that such evidence could have been easily provided. The Recommendation Letter suggests that no evidence of this was provided to the qualified person either. Nonetheless, the Recommendation Letter ends with a recommendation that the qualified person agrees to the application of the section 36 exemption.

157. It is the Tribunal's considered view that the Recommendation Letter actually suggests that the information is not re-used but that there is an argument that it might be *if* the JAC is called on at short notice. There is no indication of whether that is likely. There is certainly no mention of the re-use ever having occurred. In fact, the Recommendation Letter acknowledges that the chance of the information being reused "*could be remote*".

158. Based on the information that is set out within the Recommendation Letter and the absence of any other evidence, the Tribunal cannot conclude, on the balance of probabilities, the materials are re-used or likely to be re-used.

159. Essentially, the Recommendation Letter was recommending that the qualified person concludes that an outcome would either occur or be likely to occur in circumstances where the event that might lead to the outcome "*could be remote*". Based on the Recommendation Letter, the conclusion of the qualified person does appear to be irrational.

Likelihood of prejudice

160. However, there is a further limb to the provision of the opinion as it is not just a question of whether the events that would give rise to prejudice are likely to occur, but the qualified person also has to conclude that, if those events do occur

(that the JAC would be called on to hold a competition at short notice and then re-use questions), that prejudice would follow or be likely to follow.

161. The Tribunal notes from the Recommendation Letter that if the JAC is called on to hold a competition at short notice, it is suggested that prejudice may arise:
    a) If disclosure gives rise to an unfair advantage to some candidates due to the questions being within the public domain
    b) If judicial colleagues are less willing to be involved or inhibited in the scope of their involvement in the development of situational questions"

162. In relation to the question of whether certain candidates will gain an unfair advantage as a result of disclosure, the Tribunal notes the following wording at the first bullet point within the Recommendation Letter (underlining added for emphasis):

> *"Should the questions/material and/or marking schedules be disclosed, the JAC will be unable to use any part or parts of these in any subsequent exercise, whether in their original or an amended format, as this would provide any applicant who had previously sat the questions with a significant advantage over others."*

163. This does not suggest that unfairness would arise because of the questions being in the public domain but suggests that unfairness will arise where an applicant had previously applied and "*sat the questions*". This is not a prejudice that would arise because of disclosure but a prejudice that would arise if the questions were re-used without them having been disclosed. Therefore, not only does it point strongly to the fact that the questions are unlikely to be re-used (as it shows a recognition that re-use would create an unfairness) but it suggests that, if

questions are re-used, it may be preferable if those questions were in the public domain so that all applicants are then on an equal footing. The Tribunal does not consider that the disclosure of the questions would create prejudice if the questions were to be re-used but that it is the re-use that creates the prejudice (as seems to be recognised by the Recommendation Letter).

164. The second factor that might lead to prejudice is where there are no "*judicial colleagues"* available to write the questions. There is no indication of whether it is likely that judicial colleagues would or would not be available.

165. Therefore, if the qualified person was reasonable in reaching the conclusion that questions would or would be likely to re-used, he would also have to reasonably conclude, on an objective basis, that prejudice would result either arising from unfairness to candidates or from the lack of judicial availability. From the information set out, and in the absence of any other evidence, the Tribunal cannot conclude that the qualified person was reasonable in reaching that conclusion.

166. In relation to the additional factor of any additional burden being placed on judges due to them being removed from their judicial roles to prepare material, as this is not part of the recommendation within the Recommendation Letter, the Tribunal does not consider that it formed part of the qualified person's decision.

167. In any event, the Tribunal considers that the preparation of materials (irrespective of how they are prepared) for a recruitment competition, in order to ensure that properly qualified and able judges are recruited, is part of the JAC's core business. The Tribunal finds that it was not in accordance with reason for the qualified person to conclude that the JAC's obligation to carry out its core duties would or would be likely to be prejudicial to the effective conduct of public affairs.

168. The Tribunal is mindful that a finding that the opinion of Mr McMurtrie was not reasonable is a high bar. For the opinion to be reasonable, it doesn't have to be the only possible opinion in the circumstances but must be within a range of reasonable responses and the process for reaching the decision must be reasonable. The Tribunal finds that the high bar is met and that based on the factors considered by Mr McMurtrie, his opinion was not reasonable and was not an opinion that could have been made by a reasonable person.

169. On this basis, the Tribunal is not required to consider the public interest test or to assess whether the public interest in maintaining the exemption outweighs the public interest in disclosure. However, the Tribunal considers that, on this occasion, it may be helpful to the parties for the Tribunal's conclusions to be set out.

170. There is an important public interest at stake. It is important for the public, the world at large, to have faith in the judiciary of England and Wales. Therefore, it is in the public interest for there to be transparency in the systems giving rise to appropriate levels of accountability. Where exam papers/situational questions and their score sheets are available for public and wider judicial scrutiny, the public can have faith in the processes. This is important and is in the public interest.

171. Furthermore, if it is the case that materials are re-used in judicial exercises, the Tribunal considers that it would be detrimental to the public interest for candidates who have previously applied and not been successful to have an advantage over first time candidates. If the questions are re-used but not made available to the public, then there will be a clear advantage to previous candidates. In circumstances such as judicial recruitment when only certain candidates are qualified to apply, repeat candidates are likely. This unfairness could be eradicated by the materials being placed in the public domain as all

candidates would then be on an equal footing. Therefore, the Tribunal concludes that the public interest balance lies in favour of disclosure of the information.

172. Thus, not only is the reasonable opinion threshold not met but the Tribunal is not aware of any public interest reason for previous materials not to be disclosed and, in so far as there is one, it is outweighed by the advantage of ensuring transparency and accountability in relation to recruitment processes and ensuring that candidates are on an equal footing in the event that materials are re-used, albeit that the Tribunal concludes, reflecting the words of the JAC in the Recommendation Letter, that this could be remote.

Ground 6 – Diversity information

173. This ground is summarised in the Appellant's Grounds of Appeal as:

> *"This question concerns information sought by the Appellant relating to the race, background, and other characteristics of candidates (sought in completely anonymised form) in relation to the selection exercises referred to in the FOIA."*

174. The relevant request is set out in Request 2 dated 5 June 2023 (question 10) (page 174):

> *"10 Please provide information about how many individuals from a BAME background or identifying as lesbian, gay or bisexual in respect of the selection exercise referred to above:*
>
> *a. applied to be appointed to the position specified in respect of the above selection exercises.*
>
> *b. were appointed to those positions.*

175. The selection exercises referred to at paragraph 7 of the letter of 5 June 2023 were the following:

    a) Deputy High Court selection exercises for 2021, 2022 and 2023.

    b) Specialist CJ selection exercises held in 2021, 2022 and 2023.

176. The JAC responded in the letter of 27 June 2023 (page 175) confirming that there were three relevant exercises for the position of Deputy High Court Judge (reference numbers 024, 086 and 0131) and one competition for Specialist Circuit Judge (reference 092).

177. The JAC indicated that it does not hold the information in relation to exercise 0131 as the exercise was still ongoing at the time of the request. It stated that the information in relation to exercise 024 was exempt under section 21 as it has been published in July 2022 and is available on the JAC website. The information in relation to exercise 0131 and 086 is also exempt pursuant to section 22 as it is due to be published in the future – the next publication date being July 2023.

178. The issue in contention, therefore, relates to exercise 092, the JAC stated that as there had been fewer than 10 applications and recommendations the information is personal data – relying on the exemption at s.40(2). The JAC contend that the publication of the data might lead to the identification of one or more of the candidates. Where this was the case, the JAC states that the information is aggregated and provided on a combined basis.

Grounds of Appeal and Appellant's Submissions

179. As the information does not identify the individuals but is provided on an anonymous basis, the Appellant contends that it cannot constitute personal data.

180. The Appellant does not accept that disclosing the information would lead to the identification of any individual. The Appellant relies on **Common Services Agency v Scottish Information Commissioner [2008] UKHL 47** and **NHS Business Services Authority v Information Commissioner and Spivak [2021] UKUT 192 (AAC).**

181. The Appellant suggests that as disclosure has been provided since the complaint, this shows that the JAC's stance is not correct. The Appellant reports that there was a change in position of the JAC in December 2022, when a letter sent by Dr Jarvis to the SSRB dated 21 December 2022 was disclosed to the public. Whilst this letter has not been provided, the letter, presumably, was the document providing the information which was later included as part of the SSRB's annual review of pay.

182. Within the Appellant's Skeleton Argument, it also states that as it could not download information which the JAC had advised was on the website that this was a breach of section 16.

183. The Appellant also indicates that further information relating to the diversity of candidates in the smaller competitions was provided in response to a Freedom of Information request by the GMB Union and in a letter dated 16 April 2024 (page B198).

184. The letter of 16 April 2024 indicates that details of diversity will not be disclosed in relation to the Specialist Circuit Judge exercise as there were fewer than 10 candidates and, therefore, that disclosure would be exempt pursuant to section 40(2) but that details of applicants for all exercises are included in the Combined Statistical Report. Other information was not disclosed due to it either having been published or as it was intended that it would be published.

185. The Appellant suggests in the Grounds of Appeal that the disclosures within the letter of 16 April 2024 show that the JAC was incorrect in failing to provide information sooner and in response to the Requests.

JAC Response and Submissions

186. The JAC indicates within its Skeleton Argument that issues arose in relation to data concerning appointed Deputy High Court Judges, as the names are published and the number of LGB candidates recommended in those exercises was small.

187. Also, in relation to the Specialist Circuit Judge competition, as fewer than 10 recommendations are made in total, diversity statistics are grouped together with other information in the public domain and were published in announcements in 2022.

188. The JAC also pointed out that as the number of applicants was also low and as they would be drawn from a narrow pool, revealing diversity data may also result in the applicants being matched up to their protected characteristics.

Information Commissioner

189. Within DN1 (dated 13 May 2024), the IC considers that the information requested is personal data as due to the low number of applicants there is a strong possibility of an individual being identified. The IC considers the "*motivated intruder*" test and concludes that as the pool of applicants is small and all will come from judicial community and have the relevant skills, the test is met.

190. The IC considers the data to be special interest data for the purposes of Article 9 and that none of the Article 9 exceptions apply.

Analysis and Decision of the Tribunal

191. As the requested information relates to the diversity of candidates, if it is personal data, Article 9 provides that processing of it is prohibited. Therefore, the information may only be disclosed if the Tribunal is satisfied that the information is not personal data.

192. The information will be personal data for the purposes of section 40(2) if it meets the definition within section 3. The individual to which the information refers must be either identified or identifiable from the data or from other factors.

193. Section 3 of DPA requires that for an individual to be identifiable, it must be possible to identify them directly or indirectly with reference to an identifier or one or more factors specific to the individual's identity.

194. Recital 26 to the GPDR states that:

> *"The principles of data protection should apply to any information concerning an identified or identifiable natural person. Personal data which have undergone pseudonymisation, which could be attributed to a natural person by the use of additional information should be considered to be information on an identifiable natural person. To determine whether a natural person is identifiable, account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person to identify the natural person directly or indirectly. To ascertain whether means are reasonably likely to be used to identify the natural person, account should be taken of all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments. The principles of data protection should therefore not*

apply to anonymous information, namely information which does not relate to an identified or identifiable natural person or to personal data rendered anonymous in such a manner that the data subject is not or no longer identifiable. This Regulation does not therefore concern the processing of such anonymous information, including for statistical or research purposes.

195. The Tribunal has considered the cases referred to by the Appellant.

196. In the case of **NHS Business Services Authority v Information Commissioner and Spivak [2021] UKUT 192 ("Spivak"),** the Upper Tribunal considers that deciding whether an individual can be identified directly or indirectly is a binary test. Either a living individual can be identified or not. The Upper Tribunal considered that the test must be applied on the basis of "*all the information that is reasonably likely to be used, including information that would be sought out by a motivated inquirer."* However, there is no mention of any test of remoteness or likelihood.

197. The other case referred to by the Appellant, **Common Services Agency v Scottish Information Commissioner [2008] UKHL 47 ("CSA"),** is considered by the Upper Tribunal in **Spivak.** CSA is a case that refers to a system of anonymisation known as Barnardisation in which it was held by the House of Lords that the information should not be disclosed. The Upper Tribunal did not consider that it was of any application to the case of Spivak. On reading CSA, the Tribunal agrees that it does not add anything to the present matter which is, in essence, more similar to Spivak. However, CSA also sets out that "other information" which can assist with identification of the individual is not limited to information held by the data controller, it can include information held by others.

198. The Tribunal, therefore, must consider whether, based on all the information that is reasonably likely to be used, including information that would be sought by a motivated inquirer, the individual or individuals can be identified.

199. The Tribunal has been provided with the requested information within the Closed Bundle. Whilst the Tribunal accepts the Appellant's contention that the fact that there were fewer than 10 recommendations does not necessarily mean that the anonymised data is personal data, based on the nature of the information, the Tribunal does conclude, on this occasion, that if the data was released, it would result in factors specific to the identity of one or more individuals being released.

200. Therefore, the Tribunal finds that the section 40(2) exemption is engaged and, in accordance with Article 9, the processing of the information is prohibited in relation to exercise 0092.

Section 16 Advice and Assistance

201. Finally, in relation to this ground, the Appellant complains that some of the information which should have been available from the JAC website (it is not clear which information) could not be downloaded. It is suggested in the Appellant's Skeleton Argument that this was a breach of s.16 FOIA.

202. The Appellant states: *"Despite asking for assistance from the JAC (to supply information in a different format), it was refused, including on review".* From the documentation provided, without any clear indication from the Appellant as to where this request for assistance was made, the Tribunal can only conclude that the request referred to is the one at page B184 where the Appellant refers to "*no drop-down menu*". This was then answered within the letter of 24 July 2023 (page 186) in which the JAC stated at paragraph 4:

"I have visited section of our website and have downloaded and checked the information contained within the spreadsheet. I can confirm that a "drop down menu" is Available from Selby One in tab 2.2. The selling question is highlighted. Redan is titled "Legal Exercises completed in 2022/ 23". You may firstly need to ensure you have correctly downloaded the spreadsheet and have enabled editing. However, I am satisfied the "drop down" is present."

203. The Tribunal considers that the above amounts to advice and assistance. In the absence of further contact from the Appellant to the JAC, the JAC would not have been aware of a need to provide any further assistance. No further information is provided. On balance, the Tribunal considers that the JAC has provided advice and assistance *"so far as it would be reasonable to expect the authority to do so."*

GROUND 7 – information about Dr Jarvis' retirement

204. Ground 7 relates to whether the JAC is permitted to withhold Information about the retirement of Dr Jarvis pursuant to s.40(2).

205. The request was set out in Request 3 (page 203) (at questions 3(d), (d) and (f) (page B204) as follows:

"(d) Please let me know if Dr Jarvis resigned or retired as CEO in June 2023. Please provide all communication leading to his resignation or retirement, including his letter of resignation or retirement.

(e) Did Dr Jarvis retire or resign before his term as CEO had ended?

(f) Does he continue? To be employed or otherwise engaged or continued to have any association. (direct or indirect) with the JAC?"

206. The JAC's substantive response was contained in Response 3 (B207) which states that Dr Jarvis retired from 30 June 2023, which was before his term ended and

that, following his retirement, he is no longer employed or otherwise engaged with the JAC.

207. The JAC confirms that the date of retirement is published in the JAC's annual report. The JAC adds that it holds no further information regarding "*his notification on his retirement, including any letter of resignation nor retirement*" but that if it did hold the information, it would consider it to be exempt under section 40(2) (personal data). Reference is made to Article 5(2) of the UK GDPR and section 34(1) DPA.

208. The Appellant requested an internal review (9 August 2023) and included a revised request for the information under 3(d):

> *"Please supply any documents pertaining to discussion of the retirement, either via email, HR records or texts."*

209. The JAC maintained this position in its review letter dated 3 October 2023 (page 231), but also adds that releasing the information would have the potential to cause harm and distress to the individual which would outweigh any legitimate interest in disclosure. The JAC adds that the individual had a reasonable expectation that the information would be kept private and not provided to the wider public.

210. Within DN1 (dated 13 May 2024), the IC refers to the general social need for transparency but also recognises that any interference with data protection rights must be proportionate.

211. Whilst public bodies publish information about the pay of senior public officials, the IC notes that the balance between transparency and privacy is usually met by the publication of salary ranges and increments.

212. The IC accepts that the information is personal data, and that the individual would reasonably expect that such information would not be disclosed to the wider world.

213. The IC accepts that the general interest in transparency is legitimate (paragraph 124, page 23) but considers that it is sufficient for the JAC to confirm that the individual has retired in order to meet the public interest and that it would be intrusive for the circumstances of that retirement to be known and, therefore, that the disclosure would not be lawful. He does not then consider whether disclosure would be fair or transparent.

Grounds of Appeal and Appellant's Submissions

214. The Appellant considers that the JAC must have more information in relation to the retirement/termination of Dr Jarvis and that the JAC is breach of the IC guidelines and s.16 for failing to indicate which authority holds the information if it is not held by the JAC.

215. The Appellant notes that Dr Jarvis was subject to criticism prior to retirement and states that the public is entitled to have the information requested, including information about his severance package and whether he was paid compensation.

JAC Response and Submissions

216. The JAC submissions in their Skeleton Argument repeat the position taken by the JAC as set out above.

Analysis and Decision of the Tribunal

217. The JAC states that it holds no further information regarding "*his notification on his retirement, including any letter of resignation nor retirement*". However, the wording of Request 3 was: "*Please provide all communication leading to his resignation or retirement, including his letter of resignation or retirement."* Request 3 is not limited to information in relation to notification on retirement but is to all communication leading to his retirement. Whilst the Tribunal accepts that this does not cover all communications prior to his retirement, the Tribunal does consider that this covers all communication relating to his retirement in the period prior to his retirement.

218. Information has been provided to the Tribunal within the Closed Bundle that the Tribunal considers is "*communication leading to …retirement*". However, the Tribunal accepts that as the information sought relates to the terms of retirement of an individual, the information is personal data and, therefore, that the exemption at section 40(2) (personal data) needs to be considered.

219. The Tribunal, therefore, needs to consider whether the disclosure of the information would be lawful, fair and transparent (Article 5(1) and 6(1)(f).

220. For the processing to be lawful, it would have to be necessary for the purpose of a legitimate interest and not overridden by the interests and fundamental rights and freedoms of the data subject (Article 6(1)(f).

221. The Appellant raises concerns in relation to failings within the JAC and the way Dr Jarvis discharged his duties.

222. The IC considers that it is sufficient for it to confirm that the individual has retired in order for the public interest to be met. However, this does not reflect the precise legitimate interest which is being put forward which is that the detail (if any) needs to be known to either eradicate or inform any suspicion arising from the circumstances of the retirement.

223. The individual was a senior official within the JAC**,** the Tribunal notes the statement on the Institute for Government website shared by the Appellant which states:

> "*It is reasonable to expect that you disclose more information about senior public authority employees than more junior ones".*

224. The Tribunal notes that the JAC does not explain why the individual would not reasonably expect that information would be disclosed to the wider world. This is despite the fact that the individual is a senior employee whose salary and, therefore, financial information, is usually published.

225. No direct evidence has been provided to show that the individual will suffer harm or damage as result of disclosure, over and above any harm or damage that may have been suffered by him as a result of the usual disclosure of his financial details. Whilst it is not essential for such evidence to be provided, in the absence of any evidence, in the present circumstances, where the individual was a senior officer, whose salary is likely to have been in the public domain, the Tribunal does not consider that he had any expectation that the information would not be released. He will have been aware of the potential risk of disclosure in circumstances where a legitimate interest might render it necessary. This is supported by the words of Charles J in *Department of Health v Information Commissioner and Lewis [2015] UKUT 0159*:

> *"28 ….any properly informed person will know that information held by a public authority is at risk of disclosure in the public interest."*

226. Thus, on balance, the Tribunal considers that as the individual was aware that he was a senior official and will have been aware of the risk that the information might be disclosed, there was no reason for him to believe that it would not be disclosed in response to an FOIA request.

227. The Tribunal has considered whether there is a "*pressing social need*" for the information to be disclosed and whether disclosure would be a proportionate way of satisfying that legitimate purpose. The Tribunal considers that reducing speculation and scrutiny of any public body is important and that the sooner any speculation is quashed the better. The same applies in relation to exposing any malpractice or unprofessional conduct, if it existed. In the present context, where the individual was concerned with the recruitment of judges who must be respected, the Tribunal considers that there is even more of a "*pressing need"* for any concerns to be dealt with. Therefore, the Tribunal concludes that there is a "*pressing social need*".

228. On balance, therefore, the Tribunal considers that, in so far as there is some information held by the JAC in relation to the retirement of Dr Jarvis, there is a legitimate interest in satisfying public concerns and scrutiny in relation to the circumstances in which a senior official left employment prior to the end of his term. The Tribunal is also not satisfied that the individual will not have had any expectation of the information being kept confidential. Therefore, whilst the Tribunal recognises that the information is his personal data, it is not considered that protection of his rights and freedoms overrides the public interest in disclosure.

229. The Tribunal, therefore, requires that any information held by the JAC is disclosed and, otherwise, that appropriate advice and assistance is provided to the Appellant to enable him to make the appropriate request to any other public authority that may hold the information.

GROUND 8 – Information provided not answering request

230. The Ground is stated to refers to Request 3 (page 203). The request is made at the end of the letter (page 206):

> *"Please provide details of all other costs incurred by the JAC in defending claims, complaints or appeals of whatever nature, whether or not relating to a decision not to appoint an unsuccessful candidate in the last five years 1 Jan 2019 to 30 June 2023, other than those already provided in your reply."*

231. However, in Response 3 (page 207), the JAC states only "*The JAC does not hold any information in relation to your request."* A review was requested on 9 August 2023 (227) and on 3 October 2023 (page 231), the JAC replies stating that, following an investigation, the JAC does hold information but that it is exempt under section 21 as it is reasonably accessible and a list of links to the JAC Annual Reports are provided.

232. The IC deals with the requests considered in the internal review letter dated 3 October 2023 in DN1 but it does not comment on this request. The Appellant contends that this is due to the exemption at section 21 not having been engaged.

JAC Position

233. The JAC contends that it has provided the details of legal costs invoiced by GLD. It is presumed that it may be referring to the information referred to at ground 4 above. The JAC also states that it has indicated that it does not have any further information.

Analysis and Decision of the Tribunal

234. The Tribunal considers that this ground has been dealt with at Ground 4 above, the Appellant should refer to Ground 4 above for its decision.

235. The Tribunal's jurisdiction is conferred by section 58. This provides that the Tribunal only has jurisdiction where there a decision notice has been provided by the IC. As no such notice exists in relation to this ground, the Tribunal does not have jurisdiction.

GROUND 9

236. This is ground 1 within Appeal 2. It relates to a request made at paragraphs 1(b), (c) and (d) within Request 4 (page 58 Bundle 2). These all relate to FOIA requests in which the JAC had relied on the section 36 exemption in responses made prior to 10 October 2022. The requests were as follows:

> *"a) Has the information commissioner [IC] been informed of this?*
>
> *b) If he has been informed, please state how.*
>
> *c) If the IC were informed in writing, please let us have all communication passing between the JAC or any person on behalf of the JAC and the IC, both leading to the IC being informed and subsequently up to and including the date when you send your response to this request., including*

any advice or guidance given to the JC by the IC to remedy these situations.

d) If he were informed orally, please state when and what he was told and any communications. (whether oral or in writing) passing by or between the JAC and the icy. If the IC were not informed, please state why. If this was based on advice received from the JAC lawyers, please provide details of that advice."

237. The Appellant considers that he is entitled to know whether the JAC has informed the senior management at the IC and requesters (against whom section 36 was used) that of its error in stating that section 36 applied when it cannot have done so.

238. The JAC responded to Request 4 on 8 November 2023 and relies on the exemption at section 32(1) as the information is held in a Court record and in relation to legal advice sought under question 1(d), section 42(1). The JAC did not specify which court record the information was held on. There is no reference to the public interest test.

239. The Appellant responded to the JAC on 10 November 2023 requesting an internal review. He stated that he had checked the bundle relating to the *Mithani Proceedings* but that he was unable to locate the information. He also challenged the weighing up of the public interest factors in relation to the reliance on section 42 (section 32 being an absolute ground (section 2(3)(c)).

240. The JAC responded on 21 December 2023 (page 82 Bundle 2) indicating that it did not consider that the information requested under 1(a) and 1(b) or the substance of questions 1(d) or (e) were requests for information held by the JAC. This was not explained.

241. The JAC then added that it considered that section 32(1)(a) applies but confirmed that the IC had been informed of the section 36 authorisation issue (thereby answering question 1(a) and (e)). Therefore, the reliance by the JAC on section 42 falls away. Otherwise, the JAC confirmed its response to questions 1(b) to (d) were correct.

Information Commissioner

242. The IC's decision confirms the application of section 32 as set out by the JAC.

Grounds of Appeal and Appellant's Submissions

243. The Appellant considers that, if the documents requested were filed with the Tribunal, in relation to the *Mithani Proceedings*, that the JAC should provide the page numbers from the redacted open bundle or, alternatively, confirmation of whether the documents have been provided within a closed bundle. The Appellant considers that it is a breach of section 16 for the JAC not to provide this information.

JAC Response and Submissions

244. The JAC indicated, within its response to the Appeal, that the IC had been informed of the issue in relation to the authorisation within the *Mithani Proceedings* in correspondence sent by the Appellant (filed by him with the Tribunal and served on the JAC) and in witness statements and written submissions contained within the open bundle. The JAC states that the IC had acknowledged that he was aware of the position in his own submissions. Within the Response, the JAC does not set out whether the IC had been separately informed of the issue by the JAC, as may have been expected. However, the

position is clarified in the JAC's skeleton argument where it indicates that the IC became aware during the *Mithani Proceedings*.

245. The JAC contends that as it relies on section 32 which is an absolute exemption, there is no obligation on the JAC to comply with section 16 or to even confirm or deny whether the information is held.

Analysis and Decision of the Tribunal

246. This ground relates to questions 1(b) to (d) within Request 4. The JAC claims an exemption under section 32.

247. If section 32 applies, the Tribunal accepts that, in accordance with section 32(3), there can be no obligation on the JAC to provide advice or assistance as confirmation that the information exists goes beyond that obligation.

248. This ground appears to have resulted from a misunderstanding that has arisen as a result of the way the question at 1(a) of Request 4 was formulated and, in turn, the manner in which the request was answered by the JAC. The questions were:

> *"a) Has the information commissioner [IC] been informed of this?*
> *b) If he has been informed, please state how.*
> *c) If the IC were informed in writing, please let us have all communication passing between the Jac or any person on behalf of the JAC and the IC, both leading to the IC being informed and subsequently up to and including the date when you send your response to this request., including any advice or guidance given to the JC by the IC to remedy these situations.*
> *d) If he were informed orally, please state when and what he was told and any communications. (whether oral or in writing) passing by or between the JAC*

and the icy. If the IC were not informed, please state why. If this was based on advice received from the JAC lawyers, please provide details of that advice."

249. The questions at 1(b) to (e) all stem from question 1(a). The response provided was "*The information Commissioner (IC) is aware of the JAC's position. However, the information is considered exempt from disclosure under section 32(1) of the FOA*".

250. Whilst the question does not ask for confirmation of whether the IC was informed by the JAC but just asks whether the IC had been informed, the question did not require an answer that declared whether the JAC had informed the IC. However, by responding by simply saying that the IC was aware and not providing further information, the implication was that it had done so. This left the Appellant looking through Tribunal bundles searching for documentation which showed the JAC informing the IC of the situation in relation to the section 36 authorisation.

251. It was only in the Skeleton Argument provided by the JAC (paragraph 27) that the position was clarified. In light of the clarification, which is that the IC was not informed of the issue by the JAC, it becomes understandable that there may not be any other information held by the JAC in relation to the informing of the IC regarding the section 36 authorisation issue.

252. The Tribunal, therefore, accepts that it is more likely than not that the section 32 exemption, which is an absolute exemption applies. Furthermore, based on the way the questions were formulated, questions (d) and (e) do not require a response. Therefore, issues in relation to whether legal advice sought under those questions is exempt under section 42 do not arise.

Ground 10 – Communications regarding the use of the section 36 exemption without authorisation

253. Ground 10 relates to the request set out in Request 4:

> *"(4) Does the JAC consider that it is required to inform any other body about (the use of the section 36 exemption without authorisation), such as the Ministry of Justice? If it is, please provide evidence that it has.*
>
> *(5) If the JAC has obtained legal advice in relation to the above, please provide full details of that advice."*

254. The JAC responded within Response 4 (page 60 Bundle 2). In response to the first question, the JAC provides an email chain and a submission to the relevant minister. It is understood that these documents are those at (B115-B128) and (B113-114). In response to the second question, the JAC relies on exemption at section 42 (legal advice privilege).

255. The JAC indicated within its Skeleton Argument that the information sought is the same information as is sought in relation to Ground 1 above.

256. The Tribunal considers that, for the same reasons as set out within its analysis of the position in relation to Ground 1 above, that exemption at section 42 is engaged and that the inbuilt significance which applied to information which is subject to legal professional privilege is sufficient to result in the public interest in maintaining the exemption prevailing over the public interest in disclosure. Therefore, the Tribunal accepts that the exemption applies.

SUMMARY OF DECISION

257. In summary, for the reasons set out above Tribunal concludes:

a) Ground 1 – The information is exempt under section 42 (Legal professional privilege)
b) Ground 2 - The information is exempt under section 40(2) (personal data)

c) Ground 3 - The information is exempt under section 40(2) (personal data)
d) Ground 4 – the Tribunal cannot identify a decision notice dealing with the issue raised and, therefore, the Tribunal does not have jurisdiction.
e) Ground 5- The situational questions and scoring framework requested at questions 7 and 8 of the request dated 5 June 2023 are not exempt from disclosure.
f) Ground 6 - The diversity data relating to exercise 0092 is exempt from disclosure pursuant to section 40(2) (personal data).
g) Ground 7 - The JAC must disclose the information that it holds in relation to the retirement of Dr Jarvis to the Appellant.
h) Ground 8 – the Tribunal cannot identify a decision notice dealing with the issue raised and, therefore, the Tribunal does not have jurisdiction.
i) Ground 2(1) – the information is exempt from disclosure under section 32.

258. In the circumstances, the Tribunal provides the Substituted Decision set out above.

APPEAL

If either party is dissatisfied with this decision, an application may be made to this Tribunal for permission to appeal to the Upper Tribunal, Administrative Appeals Chamber, against decisions of the First-tier Tribunal in Information Rights Cases (General Regulatory Chamber). Any such application must be received within 28 days after these reasons have been sent to the parties under Rule 42 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

Judge R Watkin