FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2026] CSIH 15
XA29/25

Lord President
Lord Malcolm
Lord Clark

OPINION OF THE COURT

delivered by LORD MALCOLM

in the appeal under section 56 of the Freedom of Information (Scotland) Act 2002

by

THE SCOTTISH MINISTERS

Appellant

against

THE SCOTTISH INFORMATION COMMISSIONER

Respondent

Appellant: C O'Neill KC (sol adv), D Welsh; Scottish Government Legal Directorate
Respondent: Johnston KC; Anderson Strathern LLP

26 March 2026

Introduction

[1] This appeal concerns the extent to which freedom of information legislation in Scotland has innovated on the common law protection of material which is subject to legal professional privilege (LPP). No judge has the power to invoke the public interest in order to override the confidentiality of information subject to LPP. Lord Hoffmann has described the plea of privilege as "a fundamental human right". For centuries the view of the common law has been that the proper administration of justice depends on those who seek legal

advice having the assurance that what is said between them and their lawyer will always remain private unless they choose to reveal it. Effective legal advice requires that the adviser be in possession of the full and unvarnished facts, which may not be provided if the client has no guarantee as to the sanctity of their discourse. At common law this absolute assurance extends to material prepared for or in contemplation of litigation. It is a right enjoyed equally by individuals and corporations.

[2] The Freedom of Information (Scotland) Act 2002 establishes a general right of access to information held by Scottish public authorities. This is subject to a framework of absolute or qualified exemptions, along with enforcement powers designed to balance transparency against competing public interests. Material subject to a qualified exemption cannot be withheld if "in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption", see section 2(1)(b). The Scottish Information Commissioner supervises compliance with duties under the Act and has the power to require disclosure to the public of withheld material.

[3] Section 36(1) provides: "Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information." This is one of the qualified exemptions and is thus subject to the section 2 public interest test. A wide range of different types of communications can be protected as confidential in legal proceedings; LPP is but a sub-set of them, though one given a particular status by long-standing case law. Nonetheless, it is clear that the Scottish Parliament has decided that such material cannot be withheld by a public authority unless the public interest in maintaining the confidentiality outweighs that in its disclosure. In this regard the model of the earlier statute south of the border was adopted.

[4] A related feature of the legislation concerns the Commissioner's power to obtain the withheld information for the purpose of assisting him in the exercise of his responsibilities. If it is not volunteered, the Commissioner can force its receipt by serving an information notice in terms of section 50(1). However, a public authority is not obliged to comply with a notice if the withheld information consists of communications between a professional legal adviser and client "in connection with the giving of legal advice to the client with respect to that client's obligations under this Act", see section 50(5)(a). The same applies to such communications, including those with third parties, "made in connection with or in contemplation of proceedings under or arising out of this Act and for the purpose of such proceedings", section 50(5)(b).

The circumstances which have led to this appeal

[5] In January 2023 the Commissioner decided that information gathered during an investigation by an independent adviser on the Scottish Ministerial Code, namely James Hamilton, as to whether the then First Minister had breached the code was "held" by the Scottish Ministers in terms of section 3(2) of the Act (Decision Notice 004/2023). This meant that it was susceptible to a freedom of information request made by Mr Benjamin Harrop. An appeal against that decision was refused by this court, see *Scottish Ministers* v *Scottish Information Commissioner* [2023] CSIH 46; 2024 SC 159.

[6] The day after the judgment, which was 7 December 2023, Mr Harrop made a further freedom of information request for disclosure of "all emails, text messages, whatsapps, minutes, and other forms of communications of/between Ministers, SPADs, civil servants and other Scottish Government officials regarding/referencing/discussing (the said appeal)

up to and including the date of the court's judgment". The present appeal concerns that request.

[7] On 17 December 2023 Mr Harrop made a separate request for "all legal advice given to the Authority (the Scottish Ministers) relating to its appealing Decision 004/2023 of the Commissioner to the Court of Session". The Ministers relied on the section 36(1) exemption and in due course that matter came before the Commissioner. On 9 September 2024 he issued Decision Notice 193/2024 ordering disclosure of the requested material. Though maintaining that the Commissioner had erred, on 26 October 2024 the Ministers nonetheless complied and published the legal advice given to them. (The parties have agreed that this material is excluded from the request presently under consideration and the Commissioner undertook not to be influenced by the disclosure in his determination of the current dispute.)

[8] Meanwhile Mr Harrop's first request, which sought "all of the written evidence submitted to Mr Hamilton as part of his investigation", remained outstanding. It was to include any evidence from the then First Minister, her Chief of Staff and any other individuals within the Scottish Government. (The background to this is that Mr Hamilton decided that the First Minister did not breach the code, however when it was published his report was subject to redactions made by the government.) The court having held that this material was held by the Ministers, the Commissioner ordered that it required to be disclosed, see Decision Notice 279/2025. That decision is now the subject of a separate and pending appeal to this court by the Ministers.

[9] Reverting to the freedom of information request with which this appeal is concerned, namely that of 7 December 2023, a small amount of redacted correspondence was disclosed. Other information was withheld. Of that, some of it was said to be subject to LPP. This view

was maintained by an internal review, after which Mr Harrop applied to the Commissioner for a decision as to whether his request had been dealt with in accordance with the Act. Without serving an information notice, the Commissioner asked for sight of the withheld information. It was provided under exception of the material over which LPP was claimed, the Ministers pointing to the terms of section 50(5). Thereafter, having considered representations made by Mr Harrop and the Ministers, the Commissioner resolved the disputed issues in favour of Mr Harrop, see Decision Notice 065/2025 of 18 March 2025. This appeal concerns only one aspect of that decision, namely his conclusion that the Ministers should disclose the LPP information, see paragraphs 99 – 118.

A summary of the Commissioner's decision on the section 36(1) exemption

[10] The Commissioner accepted that the withheld material fell within the scope of legally protected confidential information under and in terms of section 36(1). He therefore had to address the public interest test. He noted that in correspondence to him on behalf of the government the information was described as "standard official level correspondence of a type expected when preparing for litigation". Thus, he assumed that it contained nothing unusual or unexpected. In the light of that description, he took the view that the arguments for maintaining confidentiality may be less compelling than if the full set of communications relating to the appeal case was being considered. By the time of the decision to withhold, the appeal had been concluded in his favour. Particularly given the said description of it, the Commissioner could not see what practical value it would have had for him. In any event, he was concerned with whether disclosure would serve the interests of the public as a whole.

[11] The public interest in disclosure had already been served to some extent by the release of legal advice received following his earlier decision (193/2024). However, Mr Harrop had expressed a specific interest in material which, as yet, had not been made public. Whether disclosure would contribute to a debate on a matter of public interest was a factor. The subject matter of the request was well-known and had been at the centre of sustained and extensive discussion in the legal, media and political landscape for several years. (At the hearing it was confirmed that this was a reference to the investigation into whether the former First Minister had breached the Scottish Ministerial Code.) It remained a matter in which there was a clear public interest which could only be satisfied by disclosure.

[12] The Commissioner considered that the disclosure of certain legal advice concerning the appeal proceedings had reduced the significance of the withheld material, but for present purposes this had to be ignored because it occurred after the refusal of the current request. In any event, disclosure would cast further light on a subject of clear and sustained interest to the public. None of Mr Harrop's public interest arguments could be dismissed. (This is the only reference in the reasoning to those arguments which are set out at paragraph 84; there is no engagement with the content of them, perhaps because the Commissioner shares the court's view that they carry little weight.)

[13] The Commissioner stated that even a meritorious legal challenge does not exempt the relevant decision-making or public expense from scrutiny. There is a strong public interest in maintaining the exemption justified on administration of justice grounds, but the public interest test must still be applied with the same rigour as with any other qualified exemption. The Commissioner acknowledged that his task was not helped by lack of access to the withheld information; however, no higher bar requiring exceptionally compelling

reasons for disclosure was involved. Having considered the submissions and given that the Ministers had refused to provide him with the withheld information, he could not conclude that they had demonstrated that the public interest in maintaining the exemption outweighed that in disclosure.

[14] The Commissioner held that the public interest in disclosure was of sufficient substance to outweigh the in-built public interest in maintaining the exemption. It followed that the Ministers had failed to comply with their duty under the Act and disclosure of the LPP material was ordered. The Ministers now appeal to this court under section 56 of the Act which limits its scope to points of law.

A summary of the Scottish Ministers' grounds of appeal and the submissions in their support

[15] The Commissioner adopted an erroneous approach to the public interest in maintaining LPP in the withheld information. Reliance was placed on the analysis in *Department for Business, Enterprise and Regulatory Reform* v *O'Brien* [2009] EWHC 164 (QB). In effect, the Commissioner paid only lip service to the importance of the protection afforded by LPP which has been described as "a fundamental human right on which the administration of justice as a whole depends". The Commissioner seemed unaware of the consequences of diluting it. He gave LPP less weight than other privileged material, apparently because the information had been described as "standard official level correspondence of a type expected when preparing for litigation". He ignored an earlier submission explaining why the exemption was claimed, in summary by reference to it containing advice from in-house lawyers and having been prepared for the purpose of the court case. In placing so much emphasis on the "standard official level" phrase, the

Commissioner wrongly minimised the weight which should have been attached to the privilege applying to the information. Furthermore, the proceedings involved the Commissioner himself as a party and triggered the terms of section 50(5).

[16] The Commissioner mischaracterised and, in any event, failed to engage with the Ministers' justifications for the exemption. There was inadequate reasoning in support of the conclusion on the public interest test. His assessment was undermined by a conflation of that which is of interest to the public and that which is in the public interest.

[17] Standing section 50(5), and given his direct interest in the previous appeal and the outcome of his adjudication on the current dispute, the Commissioner ought to have required exceptionally compelling reasons for ordering disclosure of this material. Reference was made to *Ministry of Justice* v *Information Commissioner*, EA/2007/0016, 6 August 2007. The Commissioner's decision resulted in him receiving the material to which section 50(5) says he is not entitled. He wrongly treated the fact that he was not provided with it for the purposes of his adjudication as a factor in favour of disclosure.

[18] The public interest in the Hamilton investigation is not relevant to the current dispute. The withholding of material concerning the Hamiton investigation is the subject of a separate request still before the Commissioner. This appeal is concerned only with the section 36 exemption claimed for LPP material relating to the earlier appeal on a point of statutory interpretation.

A summary of the submissions for the Commissioner

[19] The decision should be read fairly and as a whole. The Commissioner adopted the proper approach in line with that desiderated in *O'Brien*. He asked himself the correct questions balancing the respective public interests. A broad view of the public interest in the

disclosure of information relating to a matter of clear public interest should be taken. The Ministers disagree with the outcome, but they have not identified any error in law. There was no minimisation of the weight to be given to preserving the privacy of the withheld information. The strong public interest in LPP protection was emphasised by the Commissioner. Given that the Ministers chose not to allow him to see the withheld material, he had no option other than to proceed on the basis of their description of it as "standard official level correspondence of a type expected when preparing for litigation".

[20] The Commissioner properly considered the Ministers' submissions without any mischaracterisation of them. He did not require to comment on each of them. They were generic in nature. The decision is adequately reasoned, leaving the reader in no doubt as to why disclosure was ordered. Reference was made to *Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345 at 348. It is clear that the Commissioner had regard to the withheld material's contribution to a debate on a matter of public interest.

[21] The argument based on section 50(5) was considered by the Commissioner; however, since he did not serve an information notice, the court is not in that territory. The section 36(1) exemption and the applicability of the section 2 public interest test are not qualified by that provision. The circumstances here are distinguishable from those in *Ministry of Justice* v *Information Commissioner*. It concerned an information notice which sought generic legal advice given by the Attorney General; material which might well be relevant in subsequent appeals. The present case relates to a request for legal advice tendered for proceedings which are now completed. To use the phrase mentioned in *Ministry of Justice*, the Commissioner will not gain an "unfair advantage" from seeing the LPP information. He can still be an impartial adjudicator on the current and future disputes. No weight was placed on the Ministers' decision to withhold the LPP material pending the decision. The

Commissioner simply recognised that he had to assess the public interest without having seen it.

Discussion

General

[22] This appeal concerns how best to reconcile the tension between the legislative decision that LPP information in the hands of a public authority sought by a freedom of information request is subject to a public interest balancing test and the concern of the common law to prioritise the privacy of such material in order to avoid harm to the proper administration of justice. To what extent has the policy of transforming a previous culture of public body secrecy to one of openness and accountability superseded the sanctity of legal advice given to public authorities and the confidentiality of their preparations for litigation?

[23] The courts have always understood the public interest in the disclosure of official information, albeit to be balanced against competing considerations such as commercial confidentiality and personal privacy; for an example, see the discussion in *British Steel Corp* v *Granada Television Ltd* [1981] AC 1096. However, long-standing and well understood considerations have bestowed a special and largely inviolable common law status on information subject to LPP. In *R (Morgan Grenfell & Co Ltd)* v *Special Commissioner of Income Tax* [2003] 1 AC 563, [2002] UKHL 21, at paragraph 7 Lord Hoffmann characterised the plea as a "fundamental human right". In *R* v *Derby Magistrates' Court, Ex Parte B* [1996] AC 487, at page 507 Lord Taylor CJ said that it is "a fundamental condition on which the administration of justice as a whole rests".

[24] Legal advice privilege is not limited to that related to or arising in the context of legal proceedings. It can be asserted against any demand, even from the police, regulators and

statutory inquiries. It has been recognised that it may mean that a tribunal is deprived of useful evidence, see *Three Rivers DC* v *Bank of England (No 6)* [2005] 1 AC 610, [2004] UKHL 48, Lord Rodger at paragraph 54. His Lordship said that since at least the 18th century, and so that clients are candid and in receipt of effective advice, "the public interest in people being properly advised on matters of law is held to outweigh the competing public interest in making that evidence available". This is not time limited; the aphorism is "once privileged, always privileged". The plea is not confined to legal advice; it also covers material prepared for or in contemplation of litigation.

[25] Freedom of information legislation on both sides of the border has removed these guarantees from public authorities. In England and Wales LPP information is the subject of a qualified as opposed to an absolute exemption, see section 42(1) of the Freedom of Information Act 2000. In Scotland the section 36(1) qualified exemption covers a broader range of material, in particular communications in respect of which a claim to confidentiality could be maintained in legal proceedings. LPP is but a sub-set of such communications, albeit one uniquely subject to the special protection mentioned earlier. It follows that not all claims for a section 36(1) exemption will trigger the specific issues involved in this case.

[26] Both statutes pursued similar policy aims. Public authorities should develop and maintain an ethos and culture of openness, transparency and accountability. Disclosure of information held by them would allow the public access to information held about themselves; it would help in making public bodies accountable for their decisions and avoid cover-ups; aid public participation in policy issues; and lead to better decision-making.

[27] It is reasonable to assume that in respect of freedom of information requests made to authorities there will be instances where the public interest in disclosure outweighs or at least counter-balances the public interest in maintaining the confidentiality of information

subject to LPP; in other words, where, as per the public interest test, it is held that the latter does not outweigh the former. Coppel, *Information Rights*, 5th ed, vol 1, provides examples at paragraph 30-021 as follows: where there is reason to believe there has been illegality, fraud, corruption, malfeasance, misrepresentation or the ignoring of legal advice; on the facts there is an overriding interest in disclosure; the harm caused is likely to be slight; and where advice on the topic has already been disclosed. We can add that when assessing the likely harm, the passage of time may be important.

Standard official level correspondence of a type expected when preparing for litigation

[28] In paragraph 101 of his decision the Commissioner stated that he "accepts that there is a considerable, in-built, public interest in maintaining the ability of the Authority (the Ministers) to receive full, unhindered legal advice". He required to weigh on the other side of the balance the public interest in disclosure of the withheld LPP material. And he had to carry out the exercise without the benefit of seeing it. The considerations which led the Commissioner to the view that the public interest favoured disclosure were summarised earlier. A major factor was the description of the withheld material as being contained in "standard official level correspondence of a type expected when preparing for litigation". This led the Commissioner to the assumption that it contained nothing particularly unusual or unexpected; that the arguments for confidentiality may be less compelling than if all communications relating to the appeal hearing were being considered; and that he could not see what practical value obtaining it would have for him. (This last matter arose from submissions pointing out that he was (a) the Ministers' adversary in the proceedings and (b) the regulator regarding future freedom of information disputes involving the Ministers.)

[29] Counsel for the Ministers criticised the emphasis placed on this description. It was contained in a letter dated 13 November 2014 from an officer in the government's freedom of information unit to one of the Commissioner's enforcement officials in answer to a request to describe the withheld information. Counsel noted that in an earlier letter of 10 June to the same official the head of reviews and appeals in the unit explained that it consists of communications between in-house legal advisers acting in their professional capacity and the government as their client in which legal advice was being sought and provided as to obligations under the Act and which were made in relation to the appeal against the Commissioner's decision. "Release of the material would breach legal professional privilege by divulging information about the points being considered by lawyers, the extent of their comments and the issues being flagged up for further consideration. All of the necessary conditions for legal advice privilege to apply are satisfied." Counsel told the court that in the later letter the "standard official level correspondence" phrase was simply a catch-all used by the officer to avoid waiving the privilege by referring to the contents of the communications in a litigation file. It was submitted that, in any event, none of the Commissioner's assumptions and conclusions properly flowed from its use. Essentially, he indulged in unwarranted speculation.

[30] We see force in these submissions. Once it is accepted that the withheld information is subject to the claimed LPP exemption, what does it matter that it is set out in what had been described as official level correspondence? And even if, which we doubt, the assumption of nothing unusual or unexpected is well made, why does this dilute the importance of maintaining the privilege? We have difficulty in understanding why the Ministers' argument would have been more compelling if all communications regarding the appeal hearing were being considered. Advice from in-house lawyers and internal

documents prepared for the purpose of litigation do not fall into a secondary or inferior category of LPP. The Commissioner faced the considerable difficulty that he required to carry out the public interest test without seeing the withheld communications. This may have led him into placing more weight on the said description than it can reasonably bear.

[31] Though it does not emerge from the terms of the decision or the written submissions, and perhaps to buttress the use of the said phrase, at the hearing on the appeal counsel for the Commissioner asserted that all of the legal advice pertaining to the appeal proceedings was disclosed in response to the earlier decision. This is contradicted by the Ministers' submissions to him as recorded in his decision, and also by those made to us when counsel for the Ministers replied to this contention. In both, reference was made to the material containing in-house lawyers' legal advice. Given that the Commissioner does not resile from acceptance that the section 36(1) exemption is engaged, this quarrel may not matter. However, it seems likely that the explanation is that the earlier decision addressed a request for advice "given" to the government. That would cover input from counsel and law officers.

The balancing exercise inherent in the public interest test

[32] When carrying out the balancing exercise inherent in the public interest test it is important that the harm to the common good risked by disclosure of LPP information is properly understood and weighed. There are clear indications in this decision, and also in his earlier ruling on section 36 (193/2024 at paragraphs 60 and 62), that the Commissioner took the view that the importance of maintaining the exemption was diminished by the conclusion of the previous appeal proceedings. We do not agree. LPP is justified not only by protecting legal advice from the immediate adversary during the particular proceedings

while they are live, but also by the general chilling effect if advice cannot be sought without any guarantee of confidentiality. It is this which has led to the aphorism that "once privileged, always privileged". We appreciate that for public authorities the legislation has taken away that absolute assurance, but it has not removed the well-established and frequently explained damage to the proper administration of justice *in the future* when, without the consent of the client, legal advice or litigation material is disclosed to the public. If a public authority is being ordered to do this, it must follow a decision-making process in which it is clear that this important factor is appreciated and fully taken into account. We are not satisfied that this can be said about the decision and associated reasoning under challenge.

The public interest in the Hamilton investigation

[33] The nub of the Commissioner's conclusion that maintaining the exemption did not outweigh the public interest in disclosure was that it would contribute to the long-standing and sustained public interest in the Hamilton investigation into whether the former First Minister breached the Scottish Ministerial Code in relation to matters concerning allegations against her immediate predecessor. However, in what way will communications relating to whether material gathered during that investigation was "held" by the government in terms of section 3 of the Act contribute to that debate, either at all, or to such an extent as to justify overriding the strong public interest in LPP? At the hearing, counsel for the Commissioner was unable to provide a clear and compelling explanation. We appreciate that anything relating, however indirectly, to the Hamilton investigation will be of intense interest to many members of the public, but as has often been said, that is not the test.

[34] We note the terms of the earlier Decision Notice 193/2024. In particular, the Commissioner held that there was a strong public interest in understanding whether the appeal on the "held" issue was taken against legal advice, not least given the significant expenditure of public funds and the use of judicial time. In contrast to the reasoning in the decision under challenge, the justification for disclosure was focussed on the request for advice given to the government concerning the appeal proceedings. Although the Ministers did not accept that it was correct, the order was not appealed and the information was published.

[35] However, in the decision now under challenge there is no hint of a similar public interest justification based on finding out whether the Ministers acted against legal advice. Rather the view is that there is such a prolonged and high level of interest in the Hamilton investigation that even LPP protection of legal advice on a tangential matter of the proper interpretation of section 3 of the Act must defer to it. In our view this reveals an unwarranted degradation of the administration of justice concerns which underpin the confidentiality of communications covered by LPP. Litigation involving public authorities will often involve matters of intense public interest. In such cases, if anything, it is even more important that effective and frank legal advice can be sought and received.

[36] We appreciate that many will regard the freedom to be made aware of information held by public authorities as the paramount consideration, even in the context of legal advice and preparation for litigation. However, generations of judges have guarded the administration of justice against the dangers inherent in the inhibition of the open and candid discussion necessary for sound legal advice; and likewise in relation to the confidential communications essential to the proper preparation for and conduct of legal

proceedings. We find nothing in the Act which dilutes the fundamental importance of these considerations, which apply to LPP for both private individuals and public authorities.

[37] This is not to say that the exemption is elevated to an absolute status in respect of LPP. There will be occasions when any harm risked by disclosure will not outweigh the public interest in publication of information held by a public authority. However, we endorse the following passage in Coppel, *Information Rights*, at paragraph 30-020: "Some clear, compelling and specific justification for disclosure must be shown so as to override the obvious interest in legal professional privilege." We have not identified anything which could reasonably be so described in the Commissioner's reasoning and have concluded that this constitutes an error in law which justifies upholding the Minister's challenge to his decision.

Section 50(5)

[38] The above is sufficient for resolution of this appeal. However, there is another feature of it which deserves mention. Section 50(5) disabled the Commissioner from enforcing his receipt of the LPP material for the purpose of aiding his deliberations. This was because it related to the Ministers' obligations in terms of the Act and was for the purpose of proceedings thereunder. The identical provision in the 2000 Act, namely section 51(5), was considered in *Ministry of Justice v Information Commissioner*, cited earlier. It concerned a freedom of information request for the Attorney General's advice as to the public interest test and its interpretation under the Act. The authority withheld it, invoking the qualified exemption for advice from a law officer. It refused to comply with an information notice served by the Commissioner because the advice fell within the scope of section 51(5).

[39] The Commissioner challenged that refusal. The tribunal accepted the authority's submissions on the implications of the subsection. They can be summarised as follows. Having regard to the role of the Commissioner in adjudicating on disputes under the Act, and then potentially being a party to proceedings on appeal, section 51(5) is concerned to prevent an authority from being required to disclose to the Commissioner legal advice and related information which may compromise its position before the Commissioner and conceivably against the Commissioner. In this limited category, which concerns questions in respect of which the Commissioner is "judge" and potential opposing party, this is consistent with the absolute nature of LPP and its priority over competing public interest considerations. It prevents the Commissioner from ruling in cases where he has an interest and can no longer be regarded as an impartial adjudicator. Once such information is disclosed to the Commissioner, it cannot be undisclosed. The Commissioner is not a "one-off" litigant. He is the regulator and is in a continuing relationship with the public authority. He may have to rule on future cases in which it is involved. Legal arguments do not come in discrete, neatly packaged boxes limited to each case. Advice in one case may have direct implications in other cases.

[40] The argument for the Commissioner was that the subsection does not protect generic advice of the kind provided by the Attorney General. It was designed for advice aimed at a specific case.

[41] The tribunal rejected the Commissioner's submissions. It found the authority's arguments "very persuasive". The basis of the exemption from compliance with the information notice was to prevent the Commissioner from gaining an unfair advantage by being able to inspect legal advice given to an authority relating specifically to the Act (paragraph 39). A contrast was drawn with advice concerning some other matter, such as a

planning appeal. Thus, the authority was entitled to refuse to allow the Commissioner to see the material before he adjudicated upon whether it should be disclosed. However, the tribunal observed that none of this prevented the Commissioner from ruling on whether the qualified exemption claimed was engaged, and if so, on the public interest test.

[42] The *Ministry of Justice* case concerned the prevention of material of a general nature coming into the hands of the Commissioner which would compromise his ability to rule in future cases. A noteworthy feature of the present case is that the Commissioner was the actual opposing party in the litigation and has now ordered disclosure of legal advice covered by section 50(5) tendered to his adversary in respect of those proceedings. A substantial part of the submissions for the Ministers focussed on the implications of the provision and of the *Ministry of Justice* judgment. The contention was that it followed that "even weightier reasons than usual" were required to tip the public interest balance in favour of disclosure, described as "exceptionally compelling reasons".

[43] Unless some contrary implication can be read into the legislation, it appears that it does allow for circumstances in which the Commissioner investigates and determines a dispute of the present kind when he has a direct interest in the matter and without having seen the withheld information. This puts the Commissioner in a difficult position, not least in assessing whether the exemption covers any or all of the material. If he has doubts on this, how is he to resolve them? It seems clear that the Commissioner was unhappy that the Ministers did not volunteer the documentation to him, and that this was a factor, in our view an illegitimate factor, influencing his decision on the public interest test, see paragraph 116 of his decision.

[44] The Commissioner rejected the suggestion that the public interest in maintaining the exemption was strengthened by the material being covered by section 50(5). Plainly an

order for disclosure would result in him receiving material which Parliament had decided he should not see. However, in the Commissioner's view no higher bar of exceptionally compelling reasons was required. We have already said that weighty reasons specific to the circumstances of the case are required to overcome the public interest whenever LPP is properly invoked. However, the Commissioner does not appear to have weighed in the balance the implications of the no doubt unusual background circumstances here and the "unfair advantage" considerations underpinning section 50(5). This would appear to be because, and wrongly in our view, he could not see what the advantages for him could be if he had the advice and other litigation documentation.

[45] It was submitted that section 50(5) is of no present relevance because no information notice was served to recover the withheld material. As noted earlier, under exception of that subject to the section 36(1) exemption, the withheld material was provided voluntarily for the purpose of the Commissioner's investigation and adjudication. The LPP information was retained under reference to the subsection. But for that provision, all of the withheld material would have been provided either freely or in compliance with a section 50 notice. It was only the subsection which forced the Commissioner to form a view on the LPP issue without the benefit of seeing the information in question. In these circumstances the Ministers' submissions on the topic were germane and relevant.

[46] We are not aware of any Parliamentary consideration in either jurisdiction on the apparent conflict between (a) the exemption from compliance with an information notice seeking information covered by section 50(5) or its equivalent south of the border, and (b) the absence of an absolute exemption covering the same information. In any event, as stated earlier our decision does not depend on this aspect of the case, so we will say no more about it.

Decision

[47] For the above reasons, the appeal is upheld. At the hearing there was no discussion as to the appropriate order should the appeal succeed. There are three possibilities. The court might reduce the whole decision, including the unchallenged parts unrelated to the claim for LPP exemption, and remit to the Commissioner for a fresh decision. Alternatively, only the LPP aspect of the decision is reduced with a remit confined to it. Another option might be for the court simply to quash the decision so far as it ordered disclosure of the LPP information, with no remit to the Commissioner. We shall put the case out by order for a discussion of the appropriate disposal. In post hearing correspondence our attention was drawn to the terms of section 42(10) of the Act. It provides that any function of the Commissioner may be exercised by any person so authorised by the Commissioner. In the event of a remit, it would be for the Commissioner to decide whether to exercise that power.