

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 13 March 2018

**Public Authority:** Attorney General's Office

**Address:** AGO.Correspondence@attorneygeneral.gov.uk

### Decision (including any steps ordered)

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1. The complainant requested information concerning the Kampala amendments to the Statute of Rome. The Attorney General's Office (AGO) refused the request and cited the exemptions provided by sections 27(1) (international relations), 35(3) (Law Officers' advice) and 42(2) (legal professional privilege) of the FOIA.
2. The Commissioner's decision is that the AGO cited these exemptions correctly and so was not obliged to comply with the complainant's information request.

### Request and response

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3. On 10 and 14 April 2017 the complainant wrote to the AGO and requested information in the following terms:

*"i) confirmation that the UK's obligations, as a signatory state of the Statute of Rome (International Criminal Court), with respect to the Kampala Amendments for prosecuting acts of state aggression, which come into force in 2017, has strongly informed any recent legal advice having a bearing upon the initiation of military force- whether unilateral or in coalition with other state powers- against another sovereign state;*

*ii) disclosure of the latest legal assessments of how the UK would be affected, as a signatory of the Statute of Rome, under the Kampala Amendments, if its government decided to initiate military force, or join with other powers initiating military force, against another*

*sovereign state outwith the conditions laid down by the above mentioned Amendments which determine the lawfulness or legality of such military force;*

*iii) disclosure of any recent legal advice recommending the use of the Kampala Amendments' opt out clause (Article 15) with respect to the exercise of military force which bears the risk of prosecution in the International Criminal Court as 'aggression'."*

*" ...I seek...disclosure of all information relating to advice being prepared or submitted to government by the Attorney General's Office concerning any duty or expectation that the UK- as a signatory party to the Statute of Rome- should incorporate 'aggression', as defined by the Kampala Amendments, into UK domestic law, accompanying other war crimes incorporated in such a way. I am also interested in whether this potential advice discusses the issue of incorporating the legal concept of aggression for prosecution retrospectively."*

4. After a delay the AGO responded substantively on 12 June 2017. It confirmed that it held information within the scope of the requests, but withheld it under sections 35(1)(a) (formulation or development of government policy), 27(1) (prejudice to international relations) and 40(2) (personal information) of the FOIA. It also refused to confirm or deny whether it held any further information and cited the exemptions from the duty to confirm or deny provided by sections 35(3) and 42(2) (legal professional privilege) of the FOIA.
5. The complainant responded on 18 June 2017 and requested an internal review. The AGO responded with the outcome of the review on 14 July 2017. The conclusion of this was that the refusal of the requests was upheld on the same grounds as given in the refusal notice.

## **Scope of the case**

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6. The complainant contacted the Commissioner on 16 July 2017 to complain about the refusal of his information request. The complainant set out detailed grounds as to why he did not agree with the reasoning given by the AGO for the refusal of his request and as to why his view was that the requested information should be disclosed.
7. On 30 January 2018 the AGO made a limited disclosure of information to the complainant, whilst maintaining that the large majority of the information within the scope of the complainant's information request should continue to be withheld. At this stage the AGO also informed the complainant of two further exemptions that it was now citing; sections 27(2) (confidential information obtained from another State or from an

international organisation or international court) and 42(1) (legal professional privilege) of the FOIA.

8. The analysis below covers the exemptions provided by sections 27(1), 35(3) and 42(2). Owing to the findings below, it was not necessary to also consider the other exemptions cited by the AGO.

## **Background**

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9. The AGO summarised the matter referred to in the complainant's information request as follows:

*"3. [The complainant's] requests focus on the Government's policy concerning the crime of aggression and what are referred to as the Kampala amendments. The Rome Statute established the International Criminal Court ("ICC") and came into force on 1 July 2002. It gave the Court jurisdiction over the crime of aggression. However, it also provided that the jurisdiction over that crime should be postponed until it had been defined in accordance with the provisions of Article 121 (for amendments) and 123 (for a review of the Statute).*

*4. In accordance with Article 123 a review conference was held in Kampala in 2010. On 11 June 2010, Resolution RC/Res.6 was adopted at Kampala setting out a definition of the crime of aggression and a provision for the exercise of jurisdiction over that crime. However, States Parties agreed to suspend jurisdiction over the crime until at least 30 States had ratified or accepted the amendments, and until a decision of the Assembly of States Parties ("ASP") to activate jurisdiction with that decision not to take place before 1 January 2017.*

*5. The annual session of the ASP took place in December 2017 in New York. The key issue prior to activation was whether the International Criminal Court would be able to exercise jurisdiction over nationals of a State or on the territory of a State that had not accepted or ratified the aggression amendments. The UK has not ratified the amendments and the UK's position, that the Court cannot exercise jurisdiction over nationals of a State or on the territory of a State unless that State accepts or ratifies the aggression amendments, was set out in a position paper submitted jointly with Canada, Colombia, France, Japan, Norway.*

*6. At the ASP, resolution ICC-ASP/16/Res.5 was adopted activating the ICC's jurisdiction over the crime of aggression as of 17 July 2018 and confirming at paragraph 2 that:*

'...the amendments to the Statute regarding the crime of aggression adopted at the Kampala Review Conference enter into force for those States Parties which have accepted the amendments one year after the deposit of their instruments of ratification or acceptance and that in the case of a State referral or proprio motu investigation the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments.'"

## Reasons for decision

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### Section 27

10. The Home Office cited sections 27(1)(a) and (b) for a large majority of the information it withheld from the complainant. It identified one document where it did not cite section 27 for the entire content, although it still withheld that document in its entirety under other exemptions. The Commissioner's view, however, is that it is not necessary to separate that small portion of the withheld information when considering section 27 in relation to the remainder. The following analysis therefore covers the entirety of the withheld information.
11. Section 27(1)(a) provides an exemption in relation to information the disclosure of which would, or would be likely to, prejudice relations between the UK and any other State. Section 27(1)(b) provides the same where prejudice would, or would be likely to, occur between the UK and any international organisation or international court. Consideration of these exemptions is a two stage process. First the exemptions must be engaged as prejudice relevant to the exemptions would be at least likely to occur as a result of disclosure of the requested information. Secondly, these exemptions are qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemptions does not outweigh the public interest in disclosure.
12. Covering first whether the exemptions are engaged, the reasoning from the AGO for the citing of both sections 27(1)(a) and (b) is very similar, with the prejudice being between the UK and other States for 27(1)(a) and between the UK and the International Criminal Court (ICC) for 27(1)(b). These exemptions are covered jointly here.
13. For the Commissioner to accept that prejudice would be likely to occur, there must be a real and significant chance of that prejudice occurring, rather than it being of remote likelihood. The issue here is, therefore, whether disclosure of the information in question would lead to a real

and significant likelihood of prejudice to relations between the UK and any other State and between the UK and the ICC. The test for section 27(1) has been further clarified by the Information Rights Tribunal stating the following on where prejudice to international relations can be considered real and significant:

*"if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary."*<sup>1</sup>

14. The withheld information in this case consists of email exchanges between officials of the AGO and other departments, submissions to the Foreign Secretary in draft and finalised form and a paper supplied by another State and commented on by officials. Having reviewed this information, the Commissioner has considered the following three grounds for arguing that prejudice to international relations would be likely to result through disclosure of this information.
15. First, prejudice to various other States, which are named within the withheld information. The content includes references to a number of other States, including the position that they have taken on the ICC jurisdiction on the crime of aggression and commentary on their contributions to the discussions on that matter. The Commissioner considers it clearly the case that the authors would not have expected the other States named to be privy to the content of these exchanges, hence they have been drafted in a frank manner, including critiques of the contributions made by other States.
16. The Commissioner is of the view that there is clear potential for the disclosure of this content to necessitate a diplomatic damage limitation exercise. Whilst the Commissioner does not believe that disclosure of this information would lead to catastrophic damage to relations with any other State, the Tribunal's clarification of what can constitute harm to international relations applies here. The Commissioner considers it conceivable that, for example, disclosure of this information could necessitate communications with other States to mitigate any resentment resulting from learning of this content. Such an exercise would be sufficient to engage section 27(1)(a).
17. Secondly, prejudice between the UK and another State that provided a paper on the crime of aggression. Whilst section 27(2) may appear a closer fit for this reasoning, and has been cited by the AGO for this

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<sup>1</sup> EA/2007/0040

information, in the interest of ensuring this notice is as proportionate and understandable as possible, this has been covered under section 27(1)(a) along with the majority of the remainder of the withheld information.

18. Elsewhere within the withheld information reference is made to the importance of maintaining the confidentiality of that paper. Having reviewed this paper, the Commissioner is also of the view that this supports the position that the other state in question would have expected it to be held in confidence, and certainly not disclosed into the public domain.
19. Again, the potential for disclosure of this information against the wishes of the confider State to necessitate a diplomatic damage limitation exercise is clear. Indeed, the view of the Commissioner is that such an exercise would be an inevitable consequence of disclosure in contravention of an expectation of confidence.
20. Thirdly, prejudice between the UK and the ICC, which would engage section 27(1)(b). The withheld information contains content that comments on the role and history of the ICC and on the issue of its jurisdiction on the crime of aggression. Similarly to the content relating to other States, it is clear that the authors of this material did not anticipate the ICC being privy to it, hence it includes frank content.
21. The clarification on international relations by the Tribunal can also apply to section 27(1)(b); if disclosure would result in a diplomatic exercise to limit damage to relations between the UK and an international court, this could engage section 27(1)(b). Similarly to in relation to the States covered above, the Commissioner considers it conceivable, and indeed likely, that disclosure of the information in question would necessitate communications with the ICC to mitigate any harm caused as a result.
22. Part of the complainant's arguments relate to timing – in relation to section 27 he would likely argue that the likelihood and severity of prejudice would be reduced as the issue of the Kampala amendments was not ongoing at the time of his request. The Commissioner's view on timing is that this would not necessarily have a significant impact on the likelihood or severity of prejudice. Prejudice to international relations could clearly result from becoming privy to content that relates to a resolved process if it is the nature of the content that would result in the prejudice, rather than the effect on any particular process. In any event, the complainant's information request pre-dated the resolution referred to in the Background section above, which indicates that there was an ongoing process at the time of the request.

23. The Commissioner's finding is that disclosure of this information would result in a real and significant likelihood of prejudice to international relations. This prejudice would be to relations between the UK and the several other States referred to in the withheld information, between the UK and the other State that supplied a paper and between the UK and the ICC. The conclusion here is, therefore, that the exemptions provided by sections 27(1)(a) and (b) are engaged.
24. Having reached the above conclusion, the next step is to consider the balance of the public interests. In reaching a conclusion here, the Commissioner has taken into account the inherent public interest in section 27(1); that is the public interest in avoiding prejudice to international relations. She has also taken into account factors relating to the specific information in question, including arguments from the AGO and from the complainant.
25. Covering first arguments in favour of disclosure of the requested information, the complainant's arguments focussed on the public interest in disclosure. Very broadly, the complainant argued that the non ratification of the Kampala amendments by the UK was a controversial and questionable decision, that it had a detrimental effect on the ICC and called into question the UK's support of the ICC. As the complainant put it when requesting an internal review: *"There can be no greater public interest than in war and peace and the legal prevention of aggression which causes war"*.
26. The Commissioner agrees with the complainant that the subject matter of this information means there is a significant public interest in its disclosure. The issue of the UK's position on the ICC and the suggestion that the position it has adopted on the Kampala amendments has called into question the extent of its support for the ICC is a matter of legitimate public interest, which extends to the information in question. Disclosure would be in the public interest in order that the public can understand more about how the position on the Kampala amendments was formed and the detail of the view taken by the UK Government on the legality of that position.
27. The complainant also referred to the 2003 Iraq invasion and suggested that the continuing debate about the legality of that action further enhances the public interest in the information in question. The Commissioner agrees; following 2003 the legal basis for the UK participation in military action remains a matter of controversy and debate and the withheld information is relevant to that debate. On the basis set out in this and the preceding paragraph, the Commissioner agrees that there is a weighty public interest in disclosure of the information in question.

28. As mentioned above, the complainant advanced arguments relating to whether the withheld information related to a live process. His reasoning included that the issue of how the Kampala amendments will apply to States that have not ratified them was an issue for the ICC to resolve, rather than being a matter for individual States. The relevance of that to the public interest balance is that this would mean that there would be no public interest in avoiding prejudice to a matter of ongoing discussion between States, as that process would be outside the jurisdiction of those States.
29. On this point, the Commissioner notes that the AGO and others would argue that individual States did have a role in settling this jurisdictional question. She also notes again that the resolution referred to in the Background section above was passed after the date of the complainant's request and that the process leading to that resolution was something that individual States would have aimed to influence, at least. The Commissioner does not agree, therefore, that the public interest in disclosure should be regarded as enhanced on the basis that the UK and other States mentioned in the withheld information had no role in deciding the question of ICC jurisdiction on the crime of aggression.
30. The complainant also argued that there was already much information relating to the subject matter of his request in the public domain. The Commissioner notes this, but is aware of no evidence or suggestion that the specific information in question here is in the public domain, so does not regard that point as directly relevant.
31. Turning to arguments in favour of maintenance of the exemptions, these are focussed on the interest inherent in the exemptions; avoiding prejudice to international relations. The Commissioner recognises that the damage caused to relationships between the UK and other States and the ICC through disclosure of this information could be considerable. In the case of the information for which section 27(1)(a) is engaged, this damage would be to relationships with States that had discussed their position with the UK and that would have expected the detail of those discussions to remain confidential, and with the other State that supplied a confidential paper to their UK opposite numbers. It would also result to relationships with those States whose position and approach are critiqued within the withheld information. For the information for which section 27(1)(b) is engaged, the harm would be to the relationship between the UK and the ICC.
32. The prejudice resulting to the UK's reputation would be of considerable scope. It would result to the relationship between the UK and a number of other States and the ICC. That prejudice would take a number of forms; to the UK's reputation as a trusted partner in discussions, to the



reputation of the UK as a trustworthy recipient of sensitive materials and as a supportive and influential participant in the ICC.

33. The Commissioner also considers the timing of the request to be relevant here. The evidence from the date of the request and the content of the withheld information, as well as the date of the previously mentioned ICC resolution, is that the issue of the Kampala amendments was a matter of ongoing discussion at the time of the request. This means that the prejudice that the Commissioner has accepted would be likely to result through disclosure would have had the potential to impact directly on that process, as well as prejudicing the UK reputation more widely. The Commissioner's view is that the public interest in avoiding the prejudice inherent in the exemptions is a factor of very significant weight in favour of maintenance of the exemptions.
34. In conclusion, the Commissioner has recognised very significant public interest in favour of disclosure owing to the subject matter of the information and that disclosure would add to public knowledge and debate on this matter. However, her view is that the weight of this public interest is outweighed by that in avoiding prejudice to the international relations of the UK, which in her view would be of significant scope as a result of disclosing information relating to a live and ongoing matter. For these reasons, the conclusion of the Commissioner is that the public interest in the maintenance of the exemptions outweighed the public interest in disclosure. The AGO was not, therefore, obliged to disclose the information covered by sections 27(1)(a) and (b).
35. Having reached this conclusion, it has not been necessary to go on to also consider sections 27(2), 35(1)(a) or 40(2).

## **Section 35**

36. The AGO refused to confirm or deny whether it held any further information and cited section 35(3) of the FOIA. This section provides an exemption from the duty to confirm or deny for any information that, if it were held, would be exempt by virtue of any of the subsections of section 35(1). Similarly to section 27, consideration of this exemption involves two stages; whether the exemption is engaged and where the balance of the public interest lies.
37. The AGO has specified that it is citing section 35(3) with reference to section 35(1)(c), which provides an exemption for information that relates to the provision of advice, or any request for the provision of advice, by any of the Law Officers. On the issue of whether the exemption is engaged the question is, therefore, whether it is reasonable to find that any further information falling within the scope of

the requests that is held by the AGO would relate to Law Officers' advice, or the request for such.

38. The Law Officers as referred to in section 35(1)(c) are specified in section 35(5) of the FOIA and include the Attorney General. The Commissioner considers that it is clear from the wording of the requests that it is reasonable to expect that information falling within their scope would relate to Law Officers' advice or to a request for such. The exemption provided by section 35(3) is, therefore, engaged.
39. The next step is to consider the balance of the public interests. The question here relates to the public interest in provision of the confirmation or denial. In forming a conclusion on this public interest balance, the Commissioner has taken into account the matter inherent to section 35(1)(c), which is the public interest in avoiding harm to government decision making processes and in preserving the convention of confidentiality in relation to Law Officers' advice. The Commissioner has also taken into account factors specific to the confirmation or denial in question.
40. Covering first factors in favour of provision of the confirmation or denial, the main point of the complainant's arguments as covered above is relevant here. That point being that there is a strong public interest in the provision of the confirmation or denial owing to the subject matter of the request and the issues that surround that matter. The Commissioner regards this as a weighty factor in favour of disclosure of the confirmation or denial.
41. Turning to factors in favour of maintenance of the exemption, as noted above the main issue here is the avoidance of harm to government decision making and to the convention of confidentiality in relation to Law Officers' advice. There are situations where citing section 35(3) in relation to the Law Officers will be clearly necessary; in the main where it is clear that disclosure of whether Law Officers' advice has been sought or given would prejudice the government position in some way, or where it would undermine the convention of confidentiality for Law Officers' advice.
42. The AGO argued there is a strong public interest in ensuring that a government department is able to act free from external pressure in deciding what sort of legal advice it obtains, at what stage, from whom, and in particular whether it should seek advice from the Law Officers. This strong public interest is reflected in the long-standing convention, observed by successive governments, that neither the advice of Law Officers, nor the fact that their advice has been sought, is disclosed outside government. This convention is recognised in paragraph 2.13 of the Ministerial Code. It is also an interest which is recognised by the

particular form of words used in section 35(1)(c), which recognises the sensitivity in disclosing even whether or not such advice was sought in respect of a given matter.

43. The AGO further argued the purpose of this convention, as recognised in section 35(1)(c), is to provide the fullest guarantee that government business will be conducted in a way that facilitates fully informed legal advice, where Ministers and the Law Officers are fully open with each other. This protection of the confidentiality of the conditions in which legal advice is sought is essential in allowing the Law Officers to discharge their responsibility to advise the government on complex legal matters, and in supporting the government in acting within the rule of law. The convention also promotes democratic accountability, by ensuring that the focus of public scrutiny and debate is on a decision (which may include a legal position) taken collectively by the elected government, rather than on the internal process by which that decision is reached. There is thus a strong public interest in protecting the confidence provided by the convention.
44. In this case the Commissioner's view is that any harm resulting through disclosure of the confirmation or denial would be limited. She does, however, accept that the wording of the request means that disclosure of the confirmation or denial would breach the convention of confidentiality relating to Law Officers' advice and that this means there is a strong public interest in favour of maintaining the exemption.
45. In conclusion, the Commissioner has recognised a weighty public interest in providing the confirmation or denial for similar reasons as covered at paragraphs 25 to 27 above. However, she has also noted the public interest in maintaining the convention of confidentiality in relation to Law Officer's advice and that provision of the confirmation or denial in this case would amount to a breach of that convention. The Commissioner's view is that this tips the balance of the public interests in favour of maintenance of the exemption and so the AGO was not obliged to confirm or deny whether it held any information that would be covered by section 35(1)(c) of the FOIA.

## **Section 42**

46. The AGO also cited section 42(2), apparently in respect of different aspects of the request than for which section 35(3) was cited. Section 42(2) provides an exemption from the duty to confirm or deny where to do so would involve the disclosure of information covered by legal professional privilege (LPP). Similarly to the other exemptions covered in this notice, section 42 is qualified by the public interest so consideration of it involves two stages.

47. Covering first whether the exemption is engaged, there are two types of legal professional privilege (LPP); advice privilege and litigation privilege. In this case advice privilege is relevant, which is described in the Commissioner's published guidance on this exemption<sup>2</sup> as follows:

*"Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant (main) purpose of seeking or giving legal advice."*

48. In correspondence with the Commissioner the AGO stated that it cited this exemption particularly in response to the three requests made by the complainant on 10 April 2017. Those requests are worded in a detailed way, which means that confirmation or denial in response to them would be revealing. As to whether what would be revealed would be subject to LPP, the reasoning from the AGO was that the confirmation or denial "would indicate the scope and/or content of any legal advice we hold". The Commissioner accepts that confirmation or denial would reveal a significant amount about the substance of any advice. This means that the confirmation or denial can in itself can be subject to LPP and the Commissioner finds that section 42(2) is engaged.
49. The next step is to consider the balance of the public interest. In forming a conclusion here, the Commissioner has taken into account the general public interest in the openness and transparency of the AGO and the public interest in the maintenance of LPP, as well as those factors that apply in relation to the specific information in question here.
50. Covering first factors in favour of provision of the confirmation or denial, the complainant's reasoning as covered above is again relevant here. That point being that there is a strong public interest in the provision of the confirmation or denial owing to the subject matter of the request and the issues that surround that matter. The Commissioner regards this as a weighty factor in favour of disclosure of the confirmation or denial.
51. As to the public interest in favour of maintenance of the exemption, in any case where section 42 is found to be engaged, it is necessary to take into account the inbuilt public interest in this exemption; that is the public interest in the maintenance of LPP. The inbuilt public interest in legal professional privilege was noted by the Information Tribunal in the

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<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1208/legal\\_professional\\_privilege\\_exemption\\_s42.pdf](https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf)

case *Bellamy and Secretary of State for Trade and Industry* (EA/2005/0023):

*"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."* (paragraph 35).

52. However, in *DBERR v Dermot O'Brien* (EWHC 164 (QB)) the High Court noted that the inbuilt public interest in legal professional privilege should not mean that section 42 is, in effect, elevated to an absolute exemption. This means that, whilst the inbuilt weight in favour of the maintenance of legal professional privilege is a weighty factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is outweighed by the factors favouring disclosure.
53. In this case whilst the Commissioner has recognised significant public interest in favour of provision of the confirmation or denial, she does not believe that this is of sufficient weight to outweigh the in-built public interest in favour of the maintenance of LPP. Her conclusion is, therefore, that the public interest in the maintenance of the exemption outweighs the public interest in disclosure. The AGO was not, therefore, obliged to confirm or deny whether it held information falling within the scope of the three requests of 10 April 2017.

## **Other matters**

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54. The delay in the AGO responding to the request has been recorded separately. This issue may be revisited should evidence from other cases suggest that this is necessary.

## Right of appeal

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55. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

56. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
57. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

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