DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to dismiss the appeal by the Appellant.

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) dated 20 June 2018 under file reference EA/2017/0264 does not involve any material error on a point of law. The First-tier Tribunal's decision stands.

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Introduction

1. This is an appeal by the United Kingdom Independence Party Ltd ('UKIP') against the decision of a First-tier Tribunal ('the Tribunal'), which had dismissed UKIP's appeal against an information notice issued by the Information Commissioner. For the reasons that follow, I am also dismissing UKIP's further appeal to the Upper Tribunal.

2. Information notices have been on the statute book for the past 20 years. However, this is the first case in which the Information Commissioner's power to issue an information notice under the Data Protection Act 1998 has been the subject of an appeal to the Upper Tribunal. To the best of my knowledge, it is also the first time that a substantive challenge to an information notice in England and Wales has been before any superior court of record.[1]

The Upper Tribunal oral hearing

3. I held an oral hearing of this appeal on 30 January 2019. The Appellant, UKIP, was represented by Mr Adam Richardson of Counsel. The Respondent, the Information Commissioner, was represented by Mr Christopher Knight of Counsel, instructed by Ms Elizabeth Malloch, Solicitor (Enforcement) to the Commissioner.

The legal framework

4. The relevant statutory provisions were contained at the material time in the Data Protection Act 1998 ('DPA 1998'). Although this legislation has now been replaced by the Data Protection Act 2018 (see Part 6 and especially sections 142-145), for convenience this decision refers to the provisions of the DPA 1998 in the present tense.

5. The Commissioner's power to serve a data controller with an information notice is set out in section 43 of the DPA 1998. In particular, if the Commissioner "reasonably requires any information for the purpose of determining whether the data controller has complied or is complying with the data protection principles" then she "may serve the data controller with a notice (in this Act referred to as "an information notice") requiring the data controller to furnish the Commissioner with specified

[1] The Information Commissioner's service of an information notice was part of the factual context of *R (on the application of Secretary of State for Home Department) v Information Tribunal* [2006] EWHC 2958 (Admin); [2008] 1 WLR 58, but that case turned on the inter-relationship with DPA 1998 s.28 relating to national security.

information relating to the request or to compliance with the principles" (section 43(1)(b)). The data controller's right of appeal against such a notice, set out in section 48(1), is to the Tribunal (the default definition for that being the First-tier Tribunal: see section 70(1)). The Tribunal's powers on deciding an appeal are provided for by section 49(1):

> **49.** – (1) If on an appeal under section 48(1) 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 or decision as could have been served or made by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

6. The full text of sections 43, 48 and 49 of the DPA 1998 is set out in the Appendix to this decision.

The background to the Information Commissioner's information notice

7. As was widely reported in 2017, the Information Commissioner launched a formal investigation into the use of data analytics for political purposes.[2] The aim was to establish whether such use of data was compliant with data protection legislation. She wrote to all the major political parties with a series of questions designed to "help us establish the facts in order that we may make an informed decision about what further action if any, is necessary" (letter dated 7 August 2017). She requested the following information from UKIP (Mr Knight's understanding was that all the major parties had been asked the first 10 questions in this list):

> *(1) What types of personal data are held by your organisation, including electoral register information;*
> *(2) How (and where) has that data been processed and for what purpose(s);*
> *(3) Is that data currently being processed and, if so, for what purpose(s);*
> *(4) What are the sources of the personal data processed by your organisation;*
> *(5) What, if any, personal data has been shared with other political parties or campaign groups and for what purpose(s);*
> *(6) What information was, and is currently being, provided to individuals to assist them in understanding what data are being gathered about them and how, and for what purpose(s), they are being used;*
> *(7) For what purpose(s) has data extracted from social media platforms been used, and /or is continuing to be used, by your organisation;*
> *(8) What data analytics/microtargeting techniques have been/are being used by your organisation;*
> *(9) What data analytic, microtargeting or research services provided by third parties have been/ are currently being used for campaigning purposes by your organisation? Please describe these relationships in detail;*
> (10) *Please provide any other information you feel may assist us in our investigation.*
>
> *In addition, following review of the Electoral Commission Spending and Donation Register we request your answer to the following specific question:*

[2] See ICO *Democracy Disrupted? Personal information and political influence* (11 July 2018). This investigation appears to be ongoing: see https://ico.org.uk/your-data-matters/political-campaigning-practices-data-analytics/.

(11) What services were provided to The UK Independence Party by:

(a) Constituency Polling Ltd;
(b) Vote Leave;
(c) Leave.EU Group Limited;
(d) Better for the Country; and
(e) Rock Services Limited?

8. Rather optimistically, given the letter was sent in the middle of the summer holidays, the Commissioner asked for a response by 25 August 2017. UKIP did not reply by the requested date. The Commissioner's office followed up her enquiry by an e-mail of 31 August 2017, giving a new deadline of 15 September 2017. Mr Richardson acknowledged the request by e-mail dated 6 September 2017, undertaking to "answer this forthwith". The new deadline came and went and in the absence of a reply, the Commissioner's office sent a further reminder asking for a response by 19 September 2017. In a thinly veiled warning, the e-mail from the Commissioner's office reminded UKIP of her powers under section 43 of the DPA 1998, expressing the hope "that we will not need to exercise our information notice powers in relation to this matter and your full co-operation is therefore appreciated".

9. Mr Richardson e-mailed the Commissioner's office with a response on 18 September 2017. He apologised for the delay, explaining that UKIP had lost 20% of its staff, so making the exercise "more difficult than expected". He added that "it turns out we hardly use data at all". His e-mail, when printed, ran to just under two sides of A4. I agree with Mr Knight's description of the Commissioner's questions, as set out above, as being clear but broad in scope. Despite this, UKIP's answers to the Commissioner's questions varied in length from one short sentence to at most four lines of text. For example, the response to Question 3 ("Is that [personal] data currently being processed and, if so, for what purpose(s)?") was a curt and unhelpful one-liner: "Occasionally memberships will lapse and we will call to ask for a renewal". UKIP's response to Question 11 was no more forthcoming. For example, the answer to Question 11(a) was nil, when the Electoral Commission's register showed that nearly £4,000 had been paid to Constituency Polling Ltd in April 2015. Likewise, UKIP's response to Question 11(b) was "militantly nil - Vote Leave refused to work with UKIP". The strained relationship between the two main camps in the Leave campaign is, of course, a matter of public record, but again the Electoral Commission's register included a series of (admittedly modest) payments by UKIP to Vote Leave in April and May 2016. Moreover, the data for the entries on that register, which underpinned Question 11, had all been provided by UKIP itself.

10. The Commissioner in turn responded on 11 October 2017 by issuing an information notice under section 43 of the DPA 1998. The material parts of the notice itself read as follows

1. *The Information Commissioner (the "Commissioner") has launched an investigation into the use of data analytics for political purposes. The Commissioner's investigation is aimed at assessing the data processing practices of, amongst others, political parties and campaigns, data companies and social media platforms as well as how companies operating internationally deploy such practices with impact or handling of data in the UK.*
2. *As UKIP Limited ("UKIP") had an MP elected as a result of the 2015 General Election, it was brought into the scope of the Commissioner's investigation.*

3. *The Commissioner reasonably requires information from UKIP to determine whether UKIP's use of personal data during the General Election Campaign complied/complies with the data protection principles set out in the Data Protection Act 1998.*
4. *A letter was originally sent to UKIP by email on 7 August 2017. A response was received from Adam Richardson of UKIP via email on 18 September 2017. The resulting responses require further clarification in order for the Commissioner to make a determination as to whether UKIP has complied or is complying with the Data Protection Act 1998. Specifically, more detailed and definitive responses are required to the questions already posed along with some clarification on discrepancies between UKIP's response and information obtained from the Electoral Commission Spending and Donation Register.*
5. *In order to determine whether UKIP has complied or is complying with the data protection principles, the Commissioner hereby gives notice that in exercise of her powers under section 43(1)(b) of the Act, she requires UKIP to provide her with the information set out in Annex 1 within 30 days of the date of this Notice.*

11. Annex 1 of the information notice, headed **INFORMATION REQUIRED TO BE FURNISHED TO THE COMMISSIONER**, comprised a series of 11 bullet points. For the most part these replicated the questions posed in the original letter of 7 August 2017. However, there were three adjustments to the questions in the Commissioner's original letter. First, although the first nine bullet points were identical to the first nine questions, they included one minor modification. Question (8) had asked "what data analytics/microtargeting techniques have been/are being used by your organisation". UKIP's answer had been (in full) as follows: "In the past we have used targeted ad [sic] on facebook during the referendum and we have used the boost service for our ads. We have not granulated data any further than that". Bullet point no.8 in Annex 1 to the information notice now included the additional comment that "We require further information than that provided within your response dated 18 September 2017". Second, the very open-ended Question (10) was not replicated in Annex 1, but rather replaced by the specific and focussed question "What services are provided by 'NationBuilder' to the UK Independence Party?". Finally, Question (11) was repeated but with the inclusion of further details, so that it read as follows:

- *Following a review of the Electoral Commission Spending and Donation Register, we are aware of the below spending and donations. In relation to each organisation, please provide detailed information in relation to the services provided to The UK Independence Party:*
  (a) 'Constituency Polling Ltd' - £186,613.13 spent during the 2015 general election;
  (b) 'Vote Leave' - £497.56 spent during the EU referendum;
  (c) 'Leave.EU Group Limited' - £72.00 spent during the EU referendum;
  (d) 'Better for the Country' - £67,236 spent during the EU referendum; and,
  (e) 'Rock Services Limited' - £64,762.73 spent during the 2015 general election and £1,048,619.69 donated between October 2014 and March 2016.

12. On 1 November 2017 Mr Richardson, signing himself as UKIP Party Secretary, lodged an in-time appeal with the Tribunal. He expressed UKIP's willingness to co-operate with the Commissioner and its disappointment that the Commissioner had seen fit to issue an information notice with the threat of criminal sanctions. He added "it would have been preferable if the ICO could simply have written back to me and asked for further clarification of specific details, which I would have been happy to

supply". He repeated that UKIP was now "a relatively small, modestly funded organisation with a largely part-time staff… UKIP does not have great resources and does the best it can with that it has".

The First-tier Tribunal proceedings: the adjournment and the final decision

The adjournment

13. The Tribunal first considered UKIP's appeal at a paper hearing on 20 March 2018. The Tribunal adjourned the appeal with various directions. These included directions that the Information Commissioner reconsider the wording of the statements required in the information notice by section 43 (Direction 1) and reconsider the details of some of the specific questions (Direction 2). In addition, the Tribunal directed the Information Commissioner to serve a revised information notice on UKIP, or explain why it had decided not to do so (Direction 4). Finally, UKIP was given a further 30 days to comply with any such amended notice, or to submit any further evidence for the appeal (Direction 5).

14. In its reasoning with those directions, the Tribunal acknowledged that UKIP's answers "are brief and, at best, appear to be incomplete and, in some respects, possibly inaccurate as they do not reflect the information included in the Tribunal bundle" (paragraph 8). (This was reference to two Electoral Commission spreadsheets. The first, running to 5 pages, contained dozens of expenditure entries for 2015 and 2016, most of which were payments to Facebook or Facebook Ireland Limited. The second listed donations from Rock Services Ltd between 2014 and 2016, the largest of which was for £394,253.70 (in December 2014) for the provision of what were described as "consultancy services"). In its reasons the Tribunal also recognised that UKIP had expressed its willingness to co-operate in the process (paragraph 9). The Tribunal concluded:

> "10. However, the Information Notice is unclear as to its scope, refers to undocumented sources and has inaccuracies. The Tribunal does not consider it fair to decide this appeal in those circumstances. The adjournment also gives UKIP a further opportunity to consider its response in ought of its stated wish to co-operate and provide the requested information".

15. As requested, the Information Commissioner provided a further submission to the Tribunal, focussing on Direction 4. In short, the Commissioner explained that she was not able to reconsider and serve a revised information notice on UKIP in the light of the reasoning in the Upper Tribunal's decision in *Information Commissioner v Malnick and ACOBA* [2018] UKUT 72 (AAC). The Upper Tribunal had decided there that the Commissioner was *functus* once she had issued a decision notice under section 50 of FOIA, and so was not able to revisit or revise such a notice. This meant that the Tribunal could not remit a decision notice to the Information Commissioner. She submitted that the same reasoning applied to the issue of an information notice under the DPA 1998. Instead, the Commissioner argued, the Tribunal had to determine the appeal as it stood, if necessary by substituting such other information notice as it saw fit.

The final decision

16. The Tribunal reconvened on 20 June 2018; again, at the parties' behest, this was a hearing on the papers. The Tribunal's decision was to uphold the Information Commissioner's information notice and dismiss the appeal. The Tribunal's decision was divided into three parts. The first section (*Factual background*, paragraphs 1-9) was a short account of the history of the appeal and is not in issue. The second part (*Request, Decision Notice [sic] and Appeal*, paragraphs 10-16) set out the Information Commissioner's questions to UKIP in detail. It also summarised the

parties' submissions – UKIP's argument being that the information notice was unjust, disproportionate and unnecessary while the Commissioner's argument was that the information notice was properly issued as UKIP's initial answers "were not comprehensive, were unclear and did not tally with information published by the Electoral Commission" (paragraph 14). The final passage (*Conclusion*, paragraphs 17-27) set out the Tribunal's findings and reasoning. I agree with Mr Knight that the critical findings and reasons are in paragraphs 19 and 22-25:

> "19. In the view of the Tribunal, the expressed intention of the UKIP to provide information and co-operate with the Commissioner is at odds with the information provided by UKIP. The answers are brief and, at best, appear to be incomplete and, in some respects, possibly inaccurate.
> …
> 22. The Tribunal find that the information provided by UKIP does not provide sufficient information and does not explain the discrepancies. The Notice requiring information is in accordance with the legislation. UKIP accepts that the request, in principle, is legitimate.
> 23. However, in its further submission, it states that its appeal should be upheld because the notice contains deficiencies placing it outside the Statute. This is based on the Tribunal's Directions requesting further information.
> 24. Although the Tribunal was unclear about the information contained in the appeal on the spreadsheets (pages 9-15) and how it related to the information requested in the Notice, this has now been explained. The Commissioner has explained that the spreadsheet information comes from the Electoral Commission website and is publicly available. UKIP should have records of all donations/expenditure as these have to be provided to the Electoral Commission. The relevant timeframe to be covered is also clear to UKIP from the Notice. It is not therefore appropriate for the Tribunal to issue its own amended Notice.
> 25. The Notice, of itself, is clear. The Information Commissioner issued the Notice because of the failure of UKIP to adequately respond to her earlier letter requesting this information. The reasons put forward by UKIP do not provide grounds for allowing this appeal."

UKIP's original grounds of appeal

17. In its original application for permission to appeal to the Upper Tribunal, UKIP put forward three grounds of appeal. The first was that the Tribunal had failed to consider material submissions made by UKIP and had made errors of fact. The second was that the Tribunal's final decision, given its remarks made on adjourning, was legally irrational. The third was that the Tribunal had acted *ultra vires* in issuing its adjournment directions. These were the same grounds of appeal as had been set out in the original application for permission, as made to the First-tier Tribunal, which had been rejected in the Tribunal Judge's ruling of 26 July 2018. In a subsequent ruling dated 30 August 2018 I gave UKIP permission to appeal. In some provisional observations in that grant of permission I queried whether the Tribunal had adequately explained its approach to the exercise of discretion under section 49(1)(b) of the DPA 1998. I also questioned whether the relevant timeframe for the details required under the information notice was indeed sufficiently clear.

18. I can dispose of the first and third of the three original grounds of appeal in summary terms.

19. The first ground was that the Tribunal had failed to consider material submissions made by UKIP and had made certain errors of fact. Having reviewed and scrutinised the Tribunal file, I am entirely satisfied that the Tribunal considered all

relevant submissions. I am also confident – contrary to the suggestion by Mr Richardson at the hearing – that the Tribunal certainly did not receive any further submissions on behalf of the Commissioner which were not also copied to UKIP. The original bundle of documents prepared for the Tribunal hearing comprised a total of 33 pages, ending with the Commissioner's response dated 27 November 2017. The file also included UKIP's reply and further submissions dated 7 December and 13 December 2017 respectively, as well as both parties' responses to the Tribunal's adjournment directions (acknowledged in paragraph 21 of the Tribunal's reasons). The Tribunal both took into consideration UKIP's submissions and saw nothing that UKIP had not also seen. This ground of appeal also asserted that the Tribunal had made incorrect factual findings as to the position adopted by UKIP in response to the information notice. I consider that UKIP is reading too much into the Tribunal's rather compressed summary of the parties' respective submissions. In any event there is no arguable material error of law disclosed in this ground.

20. The third ground was that the Tribunal had acted *ultra vires* in issuing its adjournment directions. The obvious and fatal difficulty with this argument is that the Tribunal remedied its jurisdictional error in its final decision. In fairness to the Tribunal, I note the Upper Tribunal's decision in *Malnick* was not issued until March 2018, the very same month as that in which the Tribunal had first adjourned the UKIP appeal, and so that decision was probably (if not almost certainly) not available to the Tribunal when it sat. In sum, the Tribunal had adopted what it considered to be a fair and pragmatic way forward in a relatively unfamiliar jurisdiction, but one which on closer examination was not consistent with the statutory machinery governing the respective functions of the Information Commissioner and the Tribunal. It corrected its jurisdictional *faux pas* in the final decision and so there was no material error of law.

21. This leaves the second of the original grounds of appeal, namely that the Tribunal's final decision, given its remarks made on adjourning, was legally irrational. I will subsume this in my consideration of UKIP's submissions as they were further developed and advanced by Mr Richardson at the oral hearing, when he set out four heads of appeal. These were that the Tribunal had erred in law in terms of (1) its approach to the exercise of the Information Commissioner's discretion in issuing the information notice; (2) the scope of the information notice; (3) the timeframe for the information notice; and (4) irrationality. Mr Knight very fairly took no point on the grounds of appeal being re-worked in this way, not least as none of them raised issues which had not already been the subject of the written submissions. I will take these four points in a slightly different order, as it seems to me more helpful to start with the challenge to the contents of the information notice itself (heads (2) and (3) above) before considering the exercise of the Commissioner's discretion (head (1)) and finally the charge of irrationality (head (4)).

The Upper Tribunal's analysis

Did the Tribunal properly address the scope of the Commissioner's information notice?

22. Mr Richardson's submission was that the Tribunal had erred in law in concluding that the scope of the information notice was clear. This was a case in which the Commissioner was purporting to act under section 43(1)(b), namely that she "reasonably requires any information for the purpose of determining whether the data controller has complied or is complying with the data protection principles". This was thus the basis on which she had served UKIP with an information notice, requiring it to "furnish the Commissioner with specified information relating to the request or to compliance with the principles". The expression "specified information" means "information—(a) specified, or described, in the information notice, or (b) falling within

a category which is specified, or described, in the information notice" (see section 43(1A)). In addition, in any such case proceeding under section 43(1)(b) the information notice must contain "a statement that the Commissioner regards the specified information as relevant for the purpose of determining whether the data controller has complied, or is complying, with the data protection principles and [her] reasons for regarding it as relevant for that purpose" (section 43(2)(b)). Furthermore, clarity was essential given the protection afforded to avoiding self-incrimination (see section 43(8)). In short, and at least as he put it at the permission hearing, Mr Richardson characterised the Commissioner's approach in issuing the information notice as being "We are looking into political parties; You are a political party; Give us all your data".

23. However, that is in my assessment a crude caricature rather than a fair and proper characterisation of the Commissioner's approach. The Commissioner's original letter of 7 August 2017 set the context and made it clear that she as initiating a broad-ranging enquiry "into the use of data analytics for political purposes". That context was reiterated in paragraph 1 of the information notice, which indicated that rather than being confined to political parties, the scope of the investigation had been extended to include "data companies and social media platforms". Paragraph 2 of the information notice explained that as UKIP had had an MP elected in the 2015 General Election "it was brought into the scope of the Commissioner's investigation". Paragraph 3 further explained that the information was required "to determine whether UKIP's use of personal data during the General Election Campaign complied/complies with" the DPA 1998. I return to the issue of the significance, if any, of the references to General Election campaigns under the second head of challenge. However, the obvious implication is that UKIP fell within the scope of the inquiry as it was a "grown-up political party" with (at that time) an elected MP. As Mr Knight put it, it would have been wholly disproportionate for the Commissioner to be asking the same questions of the Official Monster Raving Loony Party (or for that matter, I might add, of Lord Buckethead). Paragraphs 4 and 5 then explained that "further clarification" is needed from UKIP, as "more detailed and definitive responses are required to the questions already posed along with some clarification on the discrepancies between UKIP's response and information obtained from the Electoral Commission Spending and Donation Register". That explanation was perfectly clear – it was saying that UKIP's initial response simply did not square with other data in the public domain and indeed previously provided by UKIP.

24. Taken together, the first five paragraphs of the information notice are sufficient to comply with the requirement in section 43(2)(b), not least as that provision requires a "statement" and not a "detailed explanation". Given the wide-ranging nature of the Commissioner's investigation, any section 43(2)(b) statement was necessarily going to be put at a fairly high level of generality. In addition, UKIP was not being asked for "all its data" as Mr Richardson suggested – it was being asked to answer the (admittedly broad) questions about its use of data as set out in the Commissioner's original letter and as tweaked slightly in the information notice. Those were requests for "specified information" within the terms of section 43(1A). It is true that the Tribunal did not reason out this point as fully as I have here. However, it is tolerably clear that the Tribunal was satisfied that the information notice complied with the requirement for a statement within section 43(2)(b). Any deficiency in its reasoning was not material to the outcome of the appeal. As I said in *UCAS v Information Commissioner and Lord Lucas* [2014] UKUT 557 (AAC); [2015] AACR 25, "it is unrealistic to expect a Tribunal to set out every twist and turn in its assessment of the evidence and its consequential reasoning" (at paragraph 58). Rather, applying the guidance of the Supreme Court in *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48, the question is "whether the Tribunal

has done enough to show that it has applied the correct legal test and in broad terms explained its decision".

Did the Tribunal properly address the timeframe of the information notice?

25. On first impression this was potentially a more promising ground of appeal. Although it is not entirely clear, it seems that uncertainty as to the relevant timeframe may have been a factor in the Tribunal's initial decision to adjourn the appeal. It was undoubtedly a factor that influenced my decision to give UKIP permission to appeal (see paragraph 17 above). Mr Richardson certainly complained that the timeframe for the information notice was unclear, although he thought it appeared to be focussed on the 2015 General Election – but then there were also questions relating to the EU Referendum campaign in 2016. He argued a clear understanding of the relevant timeframe was necessary because, as Mr Richardson himself put it, UKIP had undergone a series of "dramatic regime changes" over the period in question.[3] Mr Richardson accordingly contended that the FTT was wrong to find, as it had, that "the relevant timeframe to be covered is also clear to UKIP from the notice" (at paragraph [24] of the reasons, see paragraph 16 above).

26. The root of the difficulty over the timeframe, insofar as there is indeed a difficulty, lies in paragraphs 2 and 3 of the information notice, set out above, which refer specifically to the 2015 General Election (paragraph 2) and to "during the General Election campaign" (paragraph 3). It might therefore be thought that the latter was defined by reference to the former. However, it is also true to note that paragraph 3 refers to whether UKIP's use of personal data "during the General Election Campaign complied/complies with" the DPA 1998 principles (emphasis added). The use of the present tense in the alternative was surely a strong clue that the Commissioner was not launching a purely historic investigation. There is nothing in the opening paragraph 1 of the information notice to suggest that the inquiry was time-limited to the 2015 General Election. In addition, paragraph 4 explains that the inadequacy of UKIP's original responses necessitated further clarification to assess whether "UKIP has complied or is complying with" (emphasis added) the DPA 1998. The same language in the alternative is used in the formal recital in paragraph 5 of the notice. The first ten bullet points in Annex 1 are all expressed in the *present* tense (or in the past and present tense in the alternative). The specific funding questions in the final bullet point are each given their own timeframe, which were not coincident with the 2015 General Election.

27. I would accept that some of the drafting of the information notice is not ideal. Mr Knight acknowledged as much as regard paragraph 3. I also recognise that non-compliance with an information notice may put the recipient at risk of criminal sanctions.[4] That said, the information notice is an instrument in the Information Commissioner's civil toolbox for ensuring compliance with statutory data protection principles. It is not, in and of itself, a weapon in her armoury of criminal sanctions, which are at one step removed. An information notice should not be read as though it were a criminal indictment. On a fair and objective reading of the information notice, taken as a whole, the information it sought was plainly not confined to the 2015 General Election; rather it related to the ongoing processing of personal data for

[3] These changes, which are a matter of public record, began with the resignation of Mr Nigel Farage as UKIP leader (following the EU Referendum in June 2016) and the 18-day tenure of Ms Diane James in September 2016, followed by further leadership turmoil.

[4] Incidentally, Mr Richardson's suggestion at the hearing that non-compliance with an information notice under the DPA 2018 does not carry criminal sanctions appears to be misplaced – see DPA 1998 s.47 and now DPA 2018 s.144.

political purposes. The Tribunal's reasoning on the timing issue was brief but again any deficiencies in its reasoning did not amount to a material error of law. The information notice was undoubtedly demanding in terms of the information it sought, but the proper functioning of the political process in a democratic society may involve regulators asking searching questions in relation to the use of personal data over time by key players in that process.

Did the Tribunal properly consider the Commissioner's exercise of discretion?

28. As Mr Richardson correctly observed, the Tribunal enjoys a two-pronged appellate jurisdiction on a section 43 appeal. The Tribunal may allow an appeal if either "the notice against which the appeal is brought is not in accordance with the law" (section 49(1)(a)) or, alternatively, where "to the extent that the notice involved an exercise of discretion by the Commissioner, that [she] ought to have exercised [her] discretion differently". Mr Richardson's submission, very simply, was that there was no need for the Commissioner to issue an information notice. UKIP was willing to co-operate if it knew what was required of it and why. If the Commissioner had not been satisfied with UKIP's initial response, she could have opened a dialogue by simply writing a letter seeking further details. Mr Richardson accepted that UKIP's replies may have been, as he expressed it, "sub-optimal" but it had done the best it could in the circumstances. He reiterated that at the time in question UKIP had about 10 members of staff, and even fewer full-timers, had had a total of four Treasurers in office over the period in issue and some of the questions could only now be addressed by people who had since resigned from the Party. As to the exercise of the Commissioner's discretion, he also relied on proposition 5 from *Goldsmith International Business School v Information Commissioner and the Home Office* [2014] UKUT 563 (AAC), where it was stated that "the test of reasonable necessity itself involves the consideration of alternative measures, and so 'a measure would not be necessary if the legitimate aim could be achieved by something less'; accordingly, the measure must be the 'least restrictive' means of achieving the legitimate aim in question" (at paragraph 38). Mr Richardson further contended that the Tribunal had failed to address the issue of the exercise of the Commissioner's discretion in its final decision.

29. I deal first with the submission based on *Goldsmith* proposition 5.[5] As Mr Knight pointed out, this does not assist UKIP. *Goldsmith* proposition 5 was developed in a very different statutory context, namely the proper test to be applied under condition 6(1) of Schedule 2 to the DPA 1998. That test is concerned with the proportionality analysis required where there is a projected interference with the privacy rights of a data subject. There may be a degree of commonality in that both issues happen to arise under the DPA 1998, but the contexts are very different, meaning a read across is inappropriate. In short, one scenario is concerned with protecting the rights of data subjects. The other is concerned with the issue of an information notice designed in part to see whether or not those rights are being infringed.

30. As for Mr Richardson's argument that UKIP lacked the resources to provide a satisfactory response to the Commissioner's original letter, being "very thin on the ground when the letter was received", the fact that UKIP may have lacked effective

[5] As these are already known in the case law as the *Goldsmith* propositions (see e.g. *Oxford Phoenix Innovation Limited v Information Commissioner and Medicines and Healthcare Products Regulatory Agency* [2018] UKUT 192 (AAC) at paragraph 99, *per* Upper Tribunal Judge Markus QC), I recognise it may now be too late to refer to them as the Knight principles, being the true progeny of counsel for the Commissioner in both *Goldsmith* and this case.

leadership or was organisationally challenged can hardly be a valid defence to an information notice. Indeed, one might well argue that those are very good reasons for the Commissioner's discretion to be exercised *in favour of* issuing an information notice, not least to concentrate minds and emphasise the seriousness of the issues at stake. As Mr Knight noted, where the Commissioner is seeking information from a data controller she can always write another letter. Sometimes that will be an appropriate course of action, sometimes it will not.

31. The reality in this case was that UKIP, along with all the other mainstream parties, had been asked a series of broad questions about its data processing policies and practices. Its answers arrived late and were brief and unsatisfactory, not least in being inconsistent with publicly available information previously supplied by UKIP itself. Overall, UKIP's response gave the Commissioner the clear impression that the Party was not taking the request seriously. An analogy may assist. If it had been a piece of homework, UKIP's response of 18 September 2017 was a clear Fail. In such circumstances the teacher then has a broad discretion: s/he may simply require the homework to be re-submitted. Or s/he may require resubmission with a threat of detention if the work remains unsatisfactory. The choice as to the most appropriate approach is a classic issue of discretion, as here.

32. In the present case the Tribunal summarised the background to the information notice. It noted that the notice was issued in the light of the inadequate initial response by UKIP. It accepted that its own queries about the notice had been addressed following the adjournment directions. It recognised the Commissioner was engaged in the exercise of a discretion and by necessary implication did not consider that "the Commissioner … ought to have exercised [her] discretion differently" (see, for example, paragraphs 19 and 22, as well as 25 and 26 of its decision).

Was the Tribunal's final decision irrational in legal terms?

33. Mr Richardson's remaining submission was that the Tribunal's final decision was legally irrational. He rightly accepted this is a high hurdle to surmount. However, he pointed out that the Tribunal had first described the information notice as "unclear as to its scope" and as referring "to undocumented sources" and containing "inaccuracies" (see paragraph 14 above). In its final decision, however, the Tribunal characterised the information notice as "clear" (paragraph 16 above). Mr Richardson contended that irrespective of UKIP's willingness to co-operate the information notice was either sufficiently clear or it was not.

34. I have already addressed the arguments about the clarity of the information notice. The fundamental problem with this last ground of appeal is that the alleged inconsistency or irrationality evaporates on closer scrutiny. The Tribunal was expressing an initial and provisional view in paragraph 10 of the reasons for its adjournment directions. In its final decision, the Tribunal explained that at the outset it had been "confused about apparent discrepancies between the spreadsheets in the appeal bundle and the Information Notice and the Tribunal was unclear as to the source of the spreadsheet information" (paragraph 17). It then explained that it accepted the Commissioner's explanation as provided in the further submission (see paragraph 24, set out at paragraph 16 above). That was ultimately a question of fact for the Tribunal. At the oral hearing Mr Richardson also rightly accepted that the Tribunal was entitled to change its mind. As such this ground of appeal essentially amounted to, or morphed into, a reasons challenge. I would accept that the Tribunal's reasoning is perhaps rather sparse in places but it is sufficient in the circumstances, not least given its findings of fact about the deficiencies in UKIP's original response to the Commissioner's questions.

One final matter: the impact of *Malnick*

35. Finally, Mr Knight made detailed written submissions on the effect of the Upper Tribunal's decision in *Malnick* (see paragraph 15 above) on the Commissioner's section 43 jurisdiction. He noted that the Upper Tribunal had held in *Malnick* that a decision notice issued under section 50 of FOIA exhausted the Commissioner's functions in respect to that particular complaint, and as such the Commissioner was not entitled to revisit or revise such decision notices: see *Malnick* at paragraphs 78-86. Given the similar statutory architecture as between the DPA 1998 and FOIA, Mr Knight submitted that the logic of the reasoning in *Malnick* applies in the same way to the DPA 1998. Thus, it is initially for the Commissioner to determine whether to issue an information notice and, if so, to settle its terms (*Malnick* at paragraph [78]). There is nothing in the DPA (or in FOIA) which enables the Commissioner to amend or supplement a notice (*Malnick* at paragraph 81). Indeed, while section 43(9) of the DPA 1998 empowers the Commissioner to cancel an information notice, there is no provision permitting her to revise its terms and keep it in place.

36. Mr Knight advanced two reasons why the *Malnick* reasoning applies as strongly, if not more strongly, in the DPA 1998 context. The first is that as non-compliance with an information notice carries the possibility of criminal penalties under section 47, the principle against doubtful penalisation would imply that the Commissioner cannot 'move the goalposts' after an information notice has been issued. She can cancel a notice under section 43(9) as that favours the recipient, but she cannot 'fix it' by an amendment and carry on regardless. The second is that elsewhere the DPA 1998 does make express provision for a notice to be varied after its issue and without any involvement by the Tribunal – see the provision for monetary penalty notices under section 55A of the DPA 1998, as inserted by section 144(1) of the Criminal Justice and Immigration Act 2008, and article 4 of the Data Protection (Monetary Penalties) Order 2010 (SI 2010/910). However, section 43 includes no express provision for such a variation facility.

37. Mr Richardson made no submissions on this rather technical jurisdictional issue, given it did not directly assist his argument in any way. I have therefore not had the benefit of full argument on the point, but the logic of Mr Knight's submissions on the *Malnick* point do seem persuasive. However, as to one specific issue Mr Richardson did highlight that the Commissioner in this case could have cancelled the information notice and then issued a new albeit revised but clearer information notice. Mr Knight's response was that such a course of action was not appropriate once an appeal had been lodged, as that would cut across the Tribunal's jurisdiction to conduct a full merits review. I express no decided view on that particular point, as I think that is best left to be determined in a case in which the point arises.

Conclusion

38. I conclude that the decision of the First-tier Tribunal involves no material error of law. I therefore dismiss the appeal; the decision of the Tribunal stands (Tribunals, Courts and Enforcement Act 2007, section 11.

39. The Commissioner's original information notice required compliance within 30 days of 11 October 2017. However, once UKIP had lodged its appeal, section 43(4) of the DPA 1998 provided that "a period specified in an information notice … must not end, and a time so specified must not fall, before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, the information need not be furnished pending the determination or withdrawal of the appeal". It follows that the 30-day requirement was suspended while the appeal was under way. UKIP must therefore now comply with the information notice within 30 days of the date of issue of this decision by the Upper Tribunal office (not the date

below, when it was signed off). The normal time limit for lodging with the Upper Tribunal an application for permission to appeal to the Court of Appeal is one month (rule 44(4) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698)). To ensure full alignment and avoid confusion, and applying rules 2 and 5(3)(a), I direct that the time limit for lodging such an application is also to be 30 days, rather than one month.

Signed on the original
on 18 February 2019

Nicholas Wikeley
Judge of the Upper Tribunal

APPENDIX

Sections 43, 48 and 49 of the Data Protection Act 1998

Information notices

43. – (1) If the Commissioner—

(a) has received a request under section 42 in respect of any processing of personal data, or

(b) reasonably requires any information for the purpose of determining whether the data controller has complied or is complying with the data protection principles,

he may serve the data controller with a notice (in this Act referred to as "an information notice") requiring the data controller to furnish the Commissioner with specified information relating to the request or to compliance with the principles.

(1A) In subsection (1) "specified information" means information—

(a) specified, or described, in the information notice, or

(b) falling within a category which is specified, or described, in the information notice.

(1B) The Commissioner may also specify in the information notice—

(a) the form in which the information must be furnished;

(b) the period within which, or the time and place at which, the information must be furnished.

(2) An information notice must contain—

(a) in a case falling within subsection (1)(a), a statement that the Commissioner has received a request under section 42 in relation to the specified processing, or

(b) in a case falling within subsection (1)(b), a statement that the Commissioner regards the specified information as relevant for the purpose of determining whether the data controller has complied, or is complying, with the data protection principles and his reasons for regarding it as relevant for that purpose.

(3) An information notice must also contain particulars of the rights of appeal conferred by section 48.

(4) Subject to subsection (5), a period specified in an information notice under subsection (1B)(b) must not end, and a time so specified must not fall, before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, the information need not be furnished pending the determination or withdrawal of the appeal.

(5) If by reason of special circumstances the Commissioner considers that the information is required as a matter of urgency, he may include in the notice a statement to that effect and a statement of his reasons for reaching that conclusion; and in that event subsection (4) shall not apply, but the notice shall not require the information to be furnished before the end of the period of seven days beginning with the day on which the notice is served.

(6) A person shall not be required by virtue of this section to furnish the Commissioner with any information in respect of—

(a) any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client with respect to his obligations, liabilities or rights under this Act, or

(b) any communication between a professional legal adviser and his client, or between such an adviser or his client and any other person, made in connection with or in contemplation of proceedings under or arising out of this Act (including proceedings before the Tribunal) and for the purposes of such proceedings.

(7) In subsection (6) references to the client of a professional legal adviser include references to any person representing such a client.
(8) A person shall not be required by virtue of this section to furnish the Commissioner with any information if the furnishing of that information would, by revealing evidence of the commission of any offence, other than an offence under this Act or an offence within subsection (8A), expose him to proceedings for that offence.
(8A) The offences mentioned in subsection (8) are—
(a) an offence under section 5 of the Perjury Act 1911 (false statements made otherwise than on oath),
(b) an offence under section 44(2) of the Criminal Law (Consolidation) (Scotland) Act 1995 (false statements made otherwise than on oath), or
(c) an offence under Article 10 of the Perjury (Northern Ireland) Order 1979 (false statutory declarations and other false unsworn statements).
(8B) Any relevant statement provided by a person in response to a requirement under this section may not be used in evidence against that person on a prosecution for any offence under this Act (other than an offence under section 47) unless in the proceedings—
(a) in giving evidence the person provides information inconsistent with it, and
(b) evidence relating to it is adduced, or a question relating to it is asked, by that person or on that person's behalf.
(8C) In subsection (8B) "relevant statement", in relation to a requirement under this section, means—
(a) an oral statement, or
(b) a written statement made for the purposes of the requirement.
(9) The Commissioner may cancel an information notice by written notice to the person on whom it was served.
(10) This section has effect subject to section 46(3).

…

Rights of appeal
48.— (1) A person on whom an enforcement notice, an assessment notice, an information notice or a special information notice has been served may appeal to the Tribunal against the notice.
(2) A person on whom an enforcement notice has been served may appeal to the Tribunal against the refusal of an application under section 41(2) for cancellation or variation of the notice.
(3) Where an enforcement notice, an assessment notice, an information notice or a special information notice contains a statement by the Commissioner in accordance with section 40(8), 41B(2), 43(5) or 44(6) then, whether or not the person appeals against the notice, he may appeal against—
(a) the Commissioner's decision to include the statement in the notice, or
(b) the effect of the inclusion of the statement as respects any part of the notice.
(4) A data controller in respect of whom a determination has been made under section 45 may appeal to the Tribunal against the determination.
(5) Schedule 6 has effect in relation to appeals under this section and the proceedings of the Tribunal in respect of any such appeal.

Determination of appeals
49. – (1) If on an appeal under section 48(1) 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 or decision as could have been served or made by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

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

(3) If on an appeal under section 48(2) the Tribunal considers that the enforcement notice ought to be cancelled or varied by reason of a change in circumstances, the Tribunal shall cancel or vary the notice.

(4) On an appeal under subsection (3) of section 48 the Tribunal may direct—

(a) that the notice in question shall have effect as if it did not contain any such statement as is mentioned in that subsection, or

(b) that the inclusion of the statement shall not have effect in relation to any part of the notice,

and may make such modifications in the notice as may be required for giving effect to the direction.

(5) On an appeal under section 48(4), the Tribunal may cancel the determination of the Commissioner.