IN THE UPPER TRIBUNAL **Appeal No. UA-2021-001703-GIA**
ADMINISTRATIVE APPEALS CHAMBER **[2024] UKUT 107 (AAC)**

On appeal from the First-tier Tribunal (General Regulatory Chamber)

Between:

Mr J Barrett

Appellant

- v -

The Information Commissioner

1st Respondent

&

Financial Ombudsman Service

2nd Respondent

Before: Upper Tribunal Judge Mitchell

Decision date: 20 April 2024

Hearing: 9 September 2023 at which all parties appeared by remote video link through the Cloud Video Platform.

Representation:

Appellant:	represented himself.
1st Respondent:	Leo Davidson, of counsel, instructed by the Solicitor to the Information Commissioner.
2nd Respondent:	Jennifer Thelen, of counsel, instructed by Legal Counsel to the Financial Ombudsman Service.

DECISION

The decision of the Upper Tribunal is to allow the appeal.

This appeal **succeeds**. The decision of the First-tier Tribunal, taken on 2 December 2021 under case reference EA 2020/0039, involved an error on a point of law. Under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal sets aside the First-tier Tribunal's decision and remits to that tribunal for redetermination the Appellant's appeal against the Information Commissioner's decision notice, in accordance with the following directions:

(1) If any party wants the First-tier Tribunal to hold a hearing before it redetermines the Appellant's appeal, the Tribunal must receive that party's written request for a hearing within **one month** of the date on which this decision is issued.

(2) The First-tier Tribunal is to determine the composition of the panel that redetermines the Appellant's appeal.

(3) As soon as possible, arrangements are to be made by the First-tier Tribunal for a salaried judge of that Tribunal to consider the need for case management directions in connection with its redetermination of the Appellant's appeal.

REASONS FOR DECISION

What this appeal is about

1. Where the Information Commissioner decides that the Freedom of Information Act 2000 (FOIA) does not require a public authority to disclose information to an individual, that individual faces an inherent disadvantage on an appeal to the First-tier Tribunal against the Commissioner's decision. The appellant cannot see all the material before the Tribunal because that normally includes the disputed information. It may also include submissions that cannot be disclosed to the Appellant because they cannot be understood without reference to the withheld information. Where an appeal is determined at a hearing, the Tribunal sometimes conducts a 'closed' session in order to hear submissions on the withheld information. The Tribunal has adopted a procedure to minimise the prejudice that may result from an appellant's exclusion from a closed session which involve a 'gist' of the closed session being disclosed to the

appellant in open session. This appeal considers the requirement to minimise the prejudice faced by an appellant where a FOIA appeal is determined on the papers.

Background

2. The Appellant made the following request for information to the Financial Ombudsman Service (FOS):

> "This is a request…in relation to changes introduced (with effect from July 2015) by DISP Rule 3.3.4AR ['*DISP' refers to the dispute resolution provisions of the Financial Conduct Authority's Handbook*]…
>
> Please provide copies of any documentation complying with both A) and B) below, namely:
>
> A) That were exchanged between the FOS and the FCA before or at the time of the implementation of the changes introduced by DISP Rule 3.3.4AR; and
> B) That relate (in whole or part) to the actual, or any proposed or otherwise discussed, changes to be introduced by DISP Rule 3.3.4AR, in particular changes to the grounds on which the ombudsman may dismiss a complaint without considering its merits."

3. The FOS refused the request for information, relying on the qualified exemption from disclosure under sections 36(2)(b)(ii) and (c) of FOIA. Since section 36 was in issue, it was necessary for FOS to obtain the opinion of a "qualified person" as to the likely consequences of disclosure for free and frank provision of advice and/or exchange of views and whether disclosure would be prejudicial to the effective conduct of public affairs. The qualified person was the FOS' Director of Engagement whose opinion was that disclosure would be likely to prejudice the free and frank exchange of views or otherwise prejudice the conduct of public affairs. FOS went on to decide that the public interest in maintaining the exemption from disclosure outweighed the public interest in disclosure.

4. The Appellant complained to the Information Commissioner. The Commissioner agreed that the withheld information fell within section 36(2) of FOIA:

> "21. FOS said that the emails [*that preceded changes to the DISP rules*] that fell within the scope of the request contained policy considerations about whether the

changes to the dismissal rules were necessary, views and debates about whether the grounds for dismissing a complaint were non-exhaustive and confidential drafts about changes to the legislation…HM Treasury were also involved in the ongoing discussions…These discussions were considered highly confidential and were only available to a small number of individuals at the FCA [*Financial Conduct Authority*], HM Treasury and FOS.

22. FOS acknowledged that the communications between its service and the FCA were exchanged some years ago. However, the qualified person considers that the disclosure of the information would be likely to inhibit the process of exchanging views with the FCA for the purposes of deliberation.

23. FOS highlighted that the process of complying…is an ongoing one…The exchanges are therefore relevant to ongoing communications between the FCA and FOS.

24…the withheld information reflects free and frank exchanges of views regarding the changes to the dismissal rules…Given that the withheld information was considered highly confidential and was only available to a small number of individuals at the FCA, HM Treasury, the Commissioner does consider that the opinion of the qualified person is reasonable and…section 36(2)(b)(ii) was correctly engaged to all of the withheld information."

5. The Commissioner went on to find that the public interest in maintaining the section 36 exemption from disclosure outweighed the public interest in providing the Appellant with the information sought. The Appellant appealed to the First-tier Tribunal against the Commissioner's decision notice.

Proceedings before the First-tier Tribunal

6. The Appellant's notice of appeal to the First-tier Tribunal was accompanied by an application for directions to require FOS to disclose the written submissions that they provided to the Commissioner during his investigation together with any supporting documentation. The Appellant said that the Commissioner's decision was based on "a number of new points and factual allegations" which he had had no opportunity to address because he was not invited, during the Commissioner's investigation, to comment on FOS' submissions. The Appellant argued that, as matters stood, he was

unable effectively to reply to the Commissioner's anticipated response to his appeal beyond making 'simple generic statements'.

7. On 31 January 2020, a Tribunal Registrar refused the Appellant's request for directions. The directions notice enclosed 'Help Sheets' and added, "by reading those he will understand that he will, at an appropriate time, receive the documents he asks for and that he will be able to make submissions about them". That was never going to happen, it seems to me, and did not in fact happen, because the Appellant sought disclosure of the FOS' written submissions to the Commissioner in an unredacted form. At some point, FOS provided the Appellant with a redacted copy of their written submissions to the Commissioner (this is recorded in the Appellant's application for directions made on 17 June 2020).

8. A Tribunal Caseworker gave case management directions on 13 March 2020. The directions drew the parties' attention to the Tribunal's Practice Note on Closed Material but did not, at this stage, deal with disclosure of documents within the proceedings. These directions also made FOS a party to proceedings, as the Second Respondent.

9. On 20 April 2020, the Appellant emailed the Tribunal:

> "I am quite willing for this matter to proceed as if it will be dealt with as a determination on paper. However, I reserve my right to ask for an oral hearing once I have seen the evidence from the FOS' witness and once I know the gist of any closed evidence and/or arguments."

10. On 17 June 2020, the Appellant applied for directions to require FOS to disclose to him their communications with, and documents provided to, the section 36 qualified person (other than the 'withheld documents'). The application also sought disclosure of all documents relating to FOS' analysis of the factors relevant to the application of the public interest test under section 2 of FOIA to the withheld information, and relating to 'the outcome of that test'. On 18 June 2020, a Tribunal Registrar refused to give the direction sought because it was considered premature (before making his application, the Appellant had invited FOS to provide the documentation sought by 22 June 2020 and that date had not passed when the Appellant applied for directions).

11. There were discussions between the Appellant and FOS about disclosure within the tribunal proceedings. On 6 July 2020, FOS informed the Tribunal that they would disclose various items including documentation put before the qualified person, FOS'

analysis of relevant public interest factors, and any other documentation that might support the Appellant's case. From that were excluded the withheld information and any material attracting legal professional privilege. FOS invited the Tribunal to give case management directions about disclosure. FOS also informed the Tribunal that they intended to apply to the Tribunal 'to withhold that redacted information from the Appellant'.

12. On 6 July 2020, the Appellant informed the Tribunal that he agreed with the FOS' letter of the same date save that he reserved the right to challenge any redactions said to be necessary to preserve privilege.

13. On 9 July 2020, the Tribunal gave case management directions which recorded FOS' agreement to disclose to the Appellant the documentation sought by his 17 June 2020 application. FOS were directed to disclose the documentation by 27 June 2020 subject to any redactions that "would give away the context, nature or substance of the withheld information". The directions notice also recorded that FOS were to make an application under rule 14 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (GRC Rules) "to withhold that redacted information from the Appellant". The Tribunal further directed that documents for inclusion in the tribunal bundle were to be provided 14 days after determination of FOS' rule 14 application. An open bundle was to be supplied by the Commissioner and a closed bundle by FOS.

14. On 28 July 2020, the Appellant emailed the Tribunal asking, "At what stage, and in what form, should a challenge to the (non-privileged) redactions take place?".

15. On 29 July 2020, a Tribunal Register considered the application of rule 14 to appeal documentation. It had been anticipated that FOS would make a rule 14 application but there is no copy of an application within the First-tier Tribunal's bundle nor does the Registrar's directions notice refer to an application. The 'Case Management Directions' given by the Registrar included the following:

(a) *paragraph (1)* – in due course, the Tribunal would receive copies of the 'disputed information' which "will be received, pursuant to rule 14(6), on the basis that it will not be disclosed to anyone" except the Commissioner and FOS because "to do otherwise would defeat the purpose of the proceedings";

(b) *paragraph (3)* – the Tribunal had received a 44-page document described as 'FOS internal correspondence about section 36 opinion' an edited version of which had been supplied to the Appellant. The version before the Tribunal was described as a 'less edited version' which highlighted the passages which FOS wished to place before the Tribunal but withhold from the Appellant;

(c) *paragraph 3.1* – the 'less edited document' would be held pursuant to rule 14(6) and not disclosed to anyone except the Commissioner and FOS;

(d) *paragraph 3.2* – this dealt point-by-point with the redactions to the 'less edited document' and recited, "I am satisfied that disclosure of the parts edited in yellow…will prematurely reveal the nature / content of disputed information or otherwise defeat a purpose of the appeal";

(e) *paragraph 3.3* – this addressed whether it would be necessary for the Tribunal Panel to consider the entire content of the 44-page 'less edited document'. The Panel did not need to see duplicate copies of certain emails, which is fair enough, but the Registrar went on to identify certain other 'less edited' emails which it was "totally unnecessary" for the Panel to see because the emails either would not assist the Panel in "considering the section 36 opinion" or "any issue in the appeal". These emails could appear in the open bundle in edited form but "must not appear elsewhere" and were to be excluded from the closed bundle;

(f) under the heading '*On-going duty under rule 14'*, the notice stated:

> "4. The duty to ensure fairness in dealing with closed proceedings is a dynamic one. Nothing I am saying at this stage is intended to limit the ability of the Panel to act compliantly with ***Browning*** when considering the appeal.
>
> 5. Any other application in respect of Rule 14 should be made promptly."

16. The Registrar's document of 29 July 2020 nowhere states, 'I direct, under rule 14(6), that these documents must be disclosed to the Tribunal on the basis that the Tribunal will not disclose the documents to other persons'. However, the intention clearly was to give directions under rule 14(6).

17. The document ended with the following words:

> "This decision was made by the Tribunal Registrar. A party is entitled to apply in writing within 14 calendar days of the date this document is sent for this decision to be considered afresh. If you apply later than 14 days you must explain why you are late."

18. I observe that those words were more significant for what they failed to say than what they did. The notice failed to mention, as provided for by rule 4 of the GRC Rules, that the party's right is to apply for reconsideration by a *judge*.

19. The Registrar, on 29 July 2020, also responded to the Appellant's query of the previous day about what steps to take to challenge redactions. The notice said:

> "I decided not to invite Mr Barrett to make submissions about word/s he is unable to see (because they are withheld from him under rule 14). My task as Registrar is to consider whether rule 14 applies and whether it is necessary for the Panel to see words which have been withheld from Mr Barrett. That is what I have done above – determined which parts can, and more to the point cannot, be seen by the Judge/Panel. To have invited submissions from Mr Barrett who is unable to comment on the actual words withheld from him seemed to me to introduce unnecessary delay into the appeal".

20. I think it is necessary to comment on the description of the Registrar's task as including making decisions about which information *cannot* be seen by the Tribunal Panel. The point does not arise for determination, but I am not aware of any proper basis on which a Tribunal Registrar may act as guardian of the material which may, or may not, be seen by the panel and/or judge that is to decide the appeal. Judicial official holders are surely able to decide for themselves what material is or is not relevant and should not have that discretion removed by a Tribunal Registrar acting as gatekeeper of the material to be placed before them.

21. The Appellant did not exercise his right to have the Registrar's directions reconsidered (by a judge), but he did, on 7 August 2020, send an email to the Tribunal in which he set out at length the submissions he would have made about the application of rule 14(6) had he been permitted to do so.

22. Ms Enever, FOS' Head of External Relations, gave a detailed witness statement on 14 August 2020. The statement was effectively FOS' evidential case before the First-tier Tribunal. The closed statement ran to 44 pages but, in the open version, nine

or so pages of text were redacted. The extensive attachments to the statement included a handful of emails parts of which were redacted in the open bundle. The redacted statement was served on the Appellant on 17 August 2020.

23. The Appellant's written submissions of 21 September 2020 said that he would welcome the opportunity to raise with the Tribunal Panel the question of rule 14(6)'s application to the 'redacted items', which he noted the Registrar had refused to consider. The Appellant also wrote:

> "If this appeal cannot be disposed of on the basis of the following (limited) submissions, then I ask that the Panel provides me with (at the least) the gist of the closed material, so that I may make complete submissions…[and]…I thereafter be permitted to make further submissions to assist the Panel in this appeal".

24. On 22 September 2020, a Tribunal Registrar gave a directions notice which provided that the closed bundle, Ms Enevers' closed witness statement and a closed annex to FOS' written submissions were to be held "pursuant to rule 14(6), on the basis that [they] will not be disclosed to anyone, except the Information Commissioner and [FOS]". As with the earlier rule 14(6) directions, this notice failed to inform the parties that they were entitled to apply for the Registrar's decision to be considered afresh by a judge only that the Appellant could apply for the decision to be 'reconsidered'.

25. On 29 September 2020, a Tribunal Registrar gave case management directions which informed the Appellant that if he had "anything further to say" on the application of rule 14(6), he should provide his written submissions within 14 days. The Appellant says in these proceedings that he was due to depart for Brazil on a business trip on 1 October and so, on 29 September, he emailed the Tribunal reiterating the terms on which he wished to be provided with a 'gist' and stating that, if the Panel required, he would explain his reasons for not making rule 14(6) submissions about redactions "at this stage". That was the Appellant's last communication with the Tribunal before it decided his appeal on the papers.

First-tier Tribunal's decision

26. The Tribunal decided the Appellant's appeal on the papers. Its statement of reasons records, at paragraph 2, that "the parties opted for paper determination of the

appeal" and "The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of [the 2009 Rules]."

27. The Tribunal's reasons refer to material not disclosed to the Appellant as the 'closed material. They were documents containing the withheld information; Ms Envers' unredacted witness statement and "closed written submissions from FOS".

28. The 'issues' for determination, identified at paragraph 16 of the Tribunal's reasons, were all substantive questions about the application of FOIA to the Appellant's request for information, but at paragraph 30 the Tribunal said:

> "The appellant has asked for a gist of the closed material. He also says that the Decision Notice provides some information about the content of the closed material, so this is already public information. He has asked to provide further submissions after the closed material or a gist of the redactions has been provided to him."

29. The Tribunal then said:

> "31…It is normal practice to provide a gist of the evidence given in closed proceedings to the parties who were excluded from that part of the hearing. This is covered in the Practice Note on Closed Material in Information Rights Cases (2012), which states that after a closed hearing the Tribunal should discuss with the remaining parties what summary of the closed hearing can be given to the excluded party without undermining the Rule 14(6) direction [*for information not to be disclosed to a party*]. It is not normal practice to provide a gist of closed material in a paper case."

30. The Tribunal provided a limited description of the closed material in the following terms:

> "32. We note that the Decision Notice does give some additional information about the content of the information, in particular at paragraphs 21 and 24. This is now public information. Having viewed the withheld information, we can confirm the following:
>
> (a) There are emails containing policy considerations about whether the changes to the dismissal rules were necessary, views and debates about whether the

grounds for dismissing complaints were non-exhaustive, and confidential drafts about changes to the legislation (FSMA) and the DISP rules.

(b) HM Treasury were involved in the ongoing discussions between FOS and FCA, and the material includes information about HM Treasury's approach to the changes.

(c) These discussions were between a small number of individuals at FOS, FCA and HM Treasury.

(d) The material reflects a free and frank exchange of views about proposed changes to the dismissal rules.

33. The closed material in Ms Enver's statement provides further detail about the participants in these discussions and the nature of those discussions. The statement also provides an explanation in relation to each item of the withheld information."

31. The Tribunal's reasons for refusing to provide the Appellant with further details of the closed material were as follows:

"34. It would defeat the purpose of the proceedings to disclose further details about the closed material, and undermine the effect of the Rule 14(6) direction. We are satisfied that we can deal with these proceedings fairly without providing the appellant with more information or the opportunity to make further submissions. The Tribunal has an investigatory function which involves considering and testing the closed material itself, having regard to the competing rights and interests involved (see *Browning v Information Commissioner*, [2014] EWCA Civ 1050). In this case, we can view the closed material and make a decision based on this material together with the already extensive submissions from both parties."

32. In dealing with the substantive issues, the Tribunal also stated, when discussing in paragraph 43 the Appellant's argument that the qualified person's opinion was irrational, that "it is not necessary to provide a detailed gist".

33. The Tribunal's reasons go on to deal with the substantive issues on the appeal. In the following description of the Tribunal's analysis, I focus on those aspects of the reasons that are connected to the closed material:

(a) in determining whether the qualified person's opinion was reasonable, the issue was the potential "chilling effect", that is the effect of disclosure of past discussions on "full and frank exchanges of views between FOS and FCA in the future". At paragraph 40, the Tribunal referred to FOS' evidence about the importance of a full and frank exchange of views, and went on:

> "We have also considered the nature of the communications in the withheld information. As noted above, these do reflect a free and frank exchange of views about proposed changes to the dismissal grounds, and were confidential communications between a small circle of personnel.";

(b) the Tribunal found that it was reasonable to hold the opinion that, if the withheld information were made public, "this would be likely to inhibit future discussions between FOS and FCA of this nature – whether on this topic or other topics. Individuals would be less likely to communicate so openly in writing if they thought their communications might be made public" (paragraph 40);

(c) the nature of the FOS and FCA's joint responsibilities for DISP, and FCA's role in ensuring FOS' compliance with "ADR Regulations", necessitated ongoing communications between the two bodies "including [about] the application of the DISP rules and the dismissal grounds". It would be reasonable, found the Tribunal, to hold the opinion that such communications could be inhibited by disclosure of the withheld material and despite it being "some years old" it might still be relevant to current discussions (paragraph 41). Examples of how communications might be inhibited were given in paragraph 47;

(d) it would also be reasonable to hold the opinion that disclosure would be likely to prejudice free and frank discussions about matters other than DISP given the linked nature of FOS' and FCA's statutory responsibilities. The Tribunal accepted Ms Envers' opinion that "good early discussions about all kinds of matters" might be inhibited were the withheld information to be disclosed (paragraph 42);

(e) the Appellant sought a gist of the closed material so that, as the Tribunal described it, he could make submissions about the rationality of the qualified person's opinion.

The Tribunal ruled "it is not necessary to provide a detailed gist" and it was able fairly to assess rationality after considering all the evidence including the closed material. The qualified person saw all the withheld information and challenged FOS' original opinion before giving her view (paragraph 43);

(f) in discussing the competing public interests, the Tribunal said it took into account the matters discussed in paragraphs 40 to 44 of its reasons, "and [had] seen the nature of the withheld information ourselves" (paragraph 46);

(g) in the light of the Tribunal's finding that disclosure would be likely to prejudice free and frank exchange of views, the Tribunal found there was "considerable public interest in maintaining the exemption in this case". FOS' and FCA's statutory responsibilities required them to communicate, and their discussions should be as free and frank as possible. The public interest was also served by speedy decision making which would be likely to be inhibited by disclosure; on my reading, this finding relates to what the Tribunal described as FOS' "statutory dispute resolution functions" [49];

(h) transparency-related public interests in disclosure were discussed at paragraphs 50 and 51, and the Appellant's specific concern about FOS dismissing cases on the ground of 'commercial judgement' at paragraphs 52, 53 and 57. The Tribunal found there was limited public interest in the withheld information given the material already within the public domain (paragraph 57);

(i) the Tribunal concluded its public interests analysis with the following passage:

> "58. We have also made this assessment after considering the withheld information. We cannot give the appellant details of what is contained in that information. However, if there were communications in that information which did indicate any wrongdoing or misconduct, that might tip the balance in favour of disclosure. There is not any indication of wrongdoing or misconduct in the information we have seen. There is no "smoking gun" in relation to the application of the commercial judgement dismissal ground."

Grounds of appeal

34. Initially, the Appellant was granted permission to appeal against the First-tier Tribunal's decision on two grounds.

35. The first ground was described as follows in the Upper Tribunal's permission determination:

> "I grant the Appellant permission to appeal to the extent that ground 1 is comprised of the arguments in paragraphs 11 to 17 of his written submissions. In my judgment, the Appellant has made out an arguable case that he was not given a fair opportunity to make submissions as to whether rule 14(6) of the tribunal's rules should be applied and, if so, to what extent."

36. Briefly, paragraphs 11 to 17 of the Appellant's submissions recounted his attempts to make submissions to the First-tier Tribunal about the application of rule 14(6) and the Registrar's refusal to allow this; argued that his 21 September 2020 written submissions had to be prepared without including comment on the 'redacted evidence'; pointed out that he had been willing to make rule 14(6) submissions if the Tribunal so required; and, despite having on a number of occasions requested a 'gist', was not provided with one. The Appellant that the Tribunal unfairly proceeded to determine the appeal without having permitted him to make submissions on the application of rule 14(6) and, once the Tribunal had decided that it was not persuaded by his written submissions prepared by reference to the open material, by failing to provide him with the gist that he had requested on a number of occasions.

37. The second ground was described as follows in the Upper Tribunal's grant of permission to appeal:

> "Arguably, the First-tier Tribunal erred in law in failing to consider whether, despite this being an appeal determined on paper, the Closed Material Procedure, which seems to me to anticipate a hearing before the First-tier Tribunal, should have been adapted to ensure that the Appellant was treated fairly in accordance with the principles underlying that procedure. On the face of it, there is no obvious reason why the 'gist' procedure should be left out of account on an appeal determined on paper, especially if an Appellant requests provision of a paper gist before an appeal has been determined, and it is arguably no good reason simply to say, as the tribunal did in paragraph 31 of its statement of reasons, that "it is not normal practice to provide a gist of closed materials in a paper case". If fairness calls for the provision of a gist in at least most appeals determined at a hearing, why should is not call for the provision of a gist in an appeal determined on paper?"

38. Subsequently, and after all parties' written appeal submissions had been received, I decided to introduce a third ground of appeal. While this has prolonged these proceedings, I felt that I could not ignore the issue raised by the third ground which is described in directions given by the Upper Tribunal on 22 March 2023:

> "there is to be an additional ground of appeal, which is that the First-tier Tribunal's decision may have involved an error of law because its case management of the proceedings on Mr Barrett's appeal against the Commissioner's decision notice involved directions purportedly given under rule 14 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 by a Registrar when the Senior President of Tribunal's Practice Statement *Delegation of Functions to Registrars and Tribunal Caseworkers on or after 25 September 2017 in the First-tier Tribunal (General Regulatory Chamber)* arguably provided no authority for a Registrar to be authorised to give directions under rule 14."

Legal framework

Freedom of Information Act 2000

39. Section 1(1) of FOIA confers a right on a person who requests a public authority to provide information to be informed whether the information is held and, if so, to have that information communicated to the person. However, this right is subject to section 2, which gives effect to the various exemptions provided for by Part II of FOIA.

40. Section 2 of FOIA gives effect to the qualified and absolute exemptions from disclosure provided for by Part II of FOIA. The present case concerns qualified exemptions. In the case of information subject to a qualified exemption, section 2(2) provides that section 1(1)(b) (a requestor's entitlement to information) does not apply:

> "…if or to the extent that –
>
> …(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

41. Section 36 of FOIA applies to most information held by a public authority, including information held by the FOS (section 36(1)). Section 36(2) identifies which information held by a public authority is exempt information under that provision:

"(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –

…(b) would, or would be likely to, inhibit –

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

42. Section 36(5) defines "qualified person". A specific definition applies to certain public authorities but not the FOS. This means that section 36(5)(o) applies:

"(5) In subsections (2) and (3) "qualified person" –

…(o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means--

(i) a Minister of the Crown,

(ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or

(iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown."

43. No party contends that the FOS' Director of Engagement fell outside the definition of qualified person in section 36(5)(o).

Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (GRC Rules)

44. The overriding objective of the GRC Rules is "to enable the Tribunal to deal with cases fairly and justly" (rule 2(1)). That includes "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings" (rule 2(2)(c)). The Tribunal must seek to give effect to the overriding objective when exercising any power under the Rules or interpreting any rule or practice direction (rule 2(3)).

45. Rule 4 provides, insofar as relevant, as follows:

> "(1) Staff appointed under section 40(1) of the 2007 Act (tribunal staff and services)…may, if authorised by the Senior President of Tribunals under paragraph 3(3) of Schedule 5 to the 2007 Act, carry out functions of a judicial nature permitted or required to be done by the Tribunal.
>
> …(3) Within 14 days after the date that the Tribunal sends notice of a decision made by a member of staff . . . under paragraph (1) to a party, that party may apply in writing to the Tribunal for that decision to be considered afresh by a judge."

46. Rule 5(3)(d) confers a specific power on the First-tier Tribunal to "permit or require a party…to provide documents…or submissions to the Tribunal".

47. Rule 14, headed "Prevention of disclosure or publication of documents and information", provides as follows:

> "(1) The Tribunal may make an order prohibiting the disclosure or publication of—
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> (a) specified documents or information relating to the proceedings; or
>
> (b) any matter likely to lead members of the public to identify any person whom the Tribunal considers should not be identified.
>
> (2) The Tribunal may give a direction prohibiting the disclosure of a document or information to a person if—
>
> (a) the Tribunal is satisfied that such disclosure would be likely to cause that person or some other person serious harm; and
>
> (b) the Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction.
>
> (3) If a party ("the first party") considers that the Tribunal should give a direction under paragraph (2) prohibiting the disclosure of a document or information to another party ("the second party"), the first party must—
>
> (a) exclude the relevant document or information from any documents that will be provided to the second party; and
>
> (b) provide to the Tribunal the excluded document or information, and the reason for its exclusion, so that the Tribunal may decide whether the document

or information should be disclosed to the second party or should be the subject of a direction under paragraph (2).

…(6) The Tribunal may give a direction that certain documents or information must or may be disclosed to the Tribunal on the basis that the Tribunal will not disclose such documents or information to other persons, or specified other persons.

(7) A party making an application for a direction under paragraph (6) may withhold the relevant documents or information from other parties until the Tribunal has granted or refused the application.

(8) Unless the Tribunal considers that there is good reason not to do so, the Tribunal must send notice that a party has made an application for a direction under paragraph (6) to each other party.

…(10) The Tribunal must conduct proceedings and record its decision and reasons appropriately so as not to undermine the effect of an order made under paragraph (1), a direction given under paragraph (2) or (6)…".

48. The Senior President of Tribunals exercises his power under rule 4(1) by way of a Practice Statement to authorise staff to exercise certain functions of a judicial nature under the GRC Rules. The applicable authorisation when this case was before the First-tier Tribunal was that given on 25 September 2017. Headed *Delegation of Functions to Registrar and Tribunal Caseworkers on or after 25 September 2017 in the First-tier Tribunal (General Regulatory Chamber)*, the Statement provided:

"…2. In accordance with rule 4(1) of the [Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the GRC Rules")], the Senior President of Tribunals hereby approves that a legally qualified member of staff appointed under section 40(1) of the [Tribunals, Courts and Enforcement Act 2007] ("the 2007 Act") and designated by the GRC President as a "GRC Registrar" to carry out the following functions to the extent that that Registrar has been authorised to exercise those functions by the GRC President:

…(g) under rule 14, to make orders prohibiting the disclosure or publication of documents or information…".

49. After the Upper Tribunal had granted the Appellant permission to appeal, the Practice Statement of 25 September 2017 was replaced by the Statement of 7 December 2022 in which paragraph 3(f) deals with the authority of a GRC Registrar:

> "3. In accordance with rule 4(1), the Senior President of Tribunals hereby authorises a legally qualified member of staff appointed under section 40(1) of the [2007 Act]…and designated by the GRC President as a "GRC Registrar" may carry out the following functions to the extent that that Registrar has been authorised to exercise those functions by the GRC President:
>
> …(f) under rule 14, to make any order or direction concerning the disclosure or publication of documents or information…"

50. That Practice Statement was itself replaced by one given on 3 July 2023 but paragraph 3(f)'s wording is unaltered in the present Statement.

51. It may be observed that the current Practice Statement expressly authorises a GRC Registrar to make orders and directions concerning the disclosure of documents etc whereas the 2017 Statement expressly authorised only the making of orders.

52. Rule 32(1) provides as follows:

> "(1)…the Tribunal must hold a hearing before making a decision which disposes of proceedings unless—
>
> (a) each party has consented to the matter being determined without a hearing; and
>
> (b) the Tribunal is satisfied that it can properly determine the issues without a hearing."

53. Subject to rule 35(4), each party is entitled to attend any hearing (rule 33(1)). Given the provision made in rule 35, it is clear that absent a direction under rule 35, a party is entitled to attend the entire hearing.

54. Rule 35 provides as follows:

> "(1) Subject to the following paragraphs, all hearings must be held in public.
>
> (2) The Tribunal may give a direction that a hearing, or part of it, is to be held in private.
>
> (3) Where a hearing, or part of it, is to be held in private, the Tribunal may determine who is permitted to attend the hearing or part of it.
>
> (4) The Tribunal may give a direction excluding from any hearing, or part of it—

> …(c) any person who the Tribunal considers should be excluded in order to give effect to the requirement at rule 14(10) (prevention of disclosure or publication of documents and information); or
>
> (d) any person where the purpose of the hearing would be defeated by the attendance of that person.
>
> (5) …".

Browning v the Information Commissioner

55, As a general rule, the requirements of justice call for disclosure to a party to proceedings any document provided to the court or tribunal as part of another party's case. If this principle were applied without qualification in FOIA cases before the First-tier Tribunal, it would negate the dispute before that tribunal because the Information Commissioner invariably supplies the tribunal with a copy of the information that a public authority refused to disclose to the requestor. The dispute would also be negated if the disputed information were the subject of submissions at a public hearing (or a private hearing attended by the Appellant).

56. The question of how to manage disclosure in FOIA cases before the First-tier Tribunal, so as to minimise unfairness to the Appellant, came before the Court of Appeal in *Browning v The Information Commissioner and The Department for Business, Innovation and Skills* [2014] EWCA Civ 1050 ("Browning"). However, the Court's analysis was predicated on there being a hearing before the First-tier Tribunal, as is shown by Maurice Kay LJ's introductory remarks:

> "1…This appeal raises an important procedural issue in relation to the Freedom of Information Act 2000. When the First-tier Tribunal (FTT) is hearing an appeal against a decision of the Information Commissioner (IC), in what circumstances (if any) can it lawfully adopt a closed material procedure (CMP) in which a party and his legal representatives are excluded from the hearing or part of it?"

57. The precise issue in *Browning*, as described at [8], was whether the First-tier Tribunal unfairly rejected the Appellant's submission that his counsel should "be permitted to attend and participate in the closed hearing [at which submissions would be made by reference to the disputed information] pursuant to an undertaking as to confidentiality". The Appellant did not dispute that the Tribunal was entitled to exclude him from a closed hearing session at which submission were to be made in relation to the disputed information ([29]).

58. At [29], the Court referred to the Supreme Court's decision in *Bank Mellat v Her Majesty's Treasury (No 2)* [2013] 3 WLR 179 in which Lord Neuberger said:

> "3. Even more fundamental [*than a public hearing*] to any justice system in a modern, democratic society is the principle of natural justice, whose most important aspect is that every party has a right to know the full case against him, and the right to test and challenge that case fully. A closed hearing is therefore more offensive to fundamental principle than a private hearing. At least a private hearing cannot be said, of itself, to give rise to inequality or even unfairness as between the parties. But that cannot be said of an arrangement where the Court can look at evidence or hear argument on behalf of one party without the other party ...knowing, or being able to test, the contents of that evidence and those arguments,… or even being able to see all the reasons why the Court reached its conclusions."

59. At [33], Maurice Kay LJ said that "The crucial task is to devise an approach, in the context of a specific case, which best reconciles the divergent interests of the various parties." His Lordship held that the steps taken by the First-tier Tribunal in Mr Browning's case did achieve that reconciliation of divergent interests. Those steps followed the approach described in the First-tier Tribunal's decision in *British Union for the Abolition of Vivisection v ICO and Newcastle University* EA 2010/0064 ("BUAV"), which the Court approved. The Tribunal's reasons in BUAV included:

> "14…(h) In appeals which involve consideration of the requested information in closed session, the role of the Commissioner's counsel is of particular importance. Counsel is able to assist the Tribunal in testing the evidence and arguments put forward by the public authority.
>
> (i) However, irrespective of the assistance of the Commissioner, the Tribunal, as a specialist tribunal, can be expected to be able, at least in some cases, to assess for itself the application of the provisions of FOIA to the closed material…the extent to which the tribunal will be in a position to do this will depend upon the particular circumstances.
>
> (j) Until the Tribunal has decided whether the information is to be disclosed under FOIA section 1, it must proceed on the basis that it may decide against such

disclosure. The Tribunal must therefore be careful not to do anything which might prejudice that outcome."

60. At [35], the Court added:

> "What is also important is that when the FTT excludes both a party and his legal representative it does its utmost to minimise the disadvantage to them by being as open as the circumstances permit in informing them of why the closed session is to take place and, when it has finished, by disclosing as much as possible of what transpired in order to enable submissions to be made in relation to it. The same commitment to maximum possible candour should also be adopted when writing the reasoned decision."

61. The First-tier Tribunal has issued a Practice Note *Closed Material in Information Rights Cases*, which states:

> 1. It is a general principle of tribunal practice that hearings are in public with all parties entitled to be present throughout; and that the documents provided to the tribunal by any party are seen also by all the other parties.
>
> 2. In the information rights jurisdiction, there are some cases in which this principle must be modified.
>
> 3. In some appeals, the tribunal is able to make its decision without looking at the information whose disclosure is disputed. These can and do proceed normally. Sometimes however, the public authority cannot properly explain its case without showing the disputed information to the tribunal. Put another way, sometimes the tribunal cannot check, on behalf of the citizen, that the public authority is entitled to an exemption under the Freedom of Information Act 2000 or the Environmental Information Regulations 2004, without seeing the disputed information for itself. Obviously, though, disclosure of the information to everyone in the proceedings would defeat the object of the exercise…Similar difficulties can occur with supporting evidence and arguments.
>
> 4. In these circumstances the law permits the tribunal to deviate from the normal rule but only so far as is necessary to ensure that the purpose of the proceedings is not defeated. Any such deviation must be authorised by a judge.

5. Rule 14(6) GRC Rules empowers the tribunal to give a direction that certain documents or information be disclosed to the tribunal but not to the other parties to the appeal. The Information Commissioner and the public authority are normally under a duty to disclose to the tribunal all the material they hold which is relevant to the appeal. Should they wish any of that material to be withheld from the requester then one of them must apply to the judge for a direction to that effect.

6. The application must be in writing. It should include a draft of the requested direction and enclose a copy of material which the applicant seeks to withhold. The reasons for withholding the information must be given. In respect of the disputed information it will be sufficient to say that the tribunal needs to see it in order to evaluate the evidence properly. In the case of other material, greater explanation may be required. On receipt of the application, tribunal staff will, unless there is good reason not to do so, tell all the other parties that it has been made; but they will send a copy of the application only to the judge.

7. When considering the application, the judge will first ask whether it is possible for a hearing to take place within the normal rules of disclosure. If yes, (s)he will give directions accordingly. If not, the judge will make a direction under Rule 14(6) stating the information which is to be withheld. It is common to refer to the withheld information as “closed material”.

8. Care must be taken, when drafting the direction, not to give away the nature or content of the withheld information. That said, it may be possible, by providing an index to the documents, for example, to give an idea of what material has been withheld. The public authority and the Information Commissioner will be expected to assist the Tribunal in this respect.

9. The judge will limit non-disclosure to what is necessary. For example, it may be possible to edit a document so that at least some of it is disclosed even though some has to be withheld…

10. Once the judge makes a direction under Rule 14(6) the Tribunal must conduct the proceedings so as not to undermine its effect…

11. There are likely to be consequences for any hearing which takes place. It may be that all the parties being present for all of the hearing would undermine the

effects of a Rule 14(6) direction. If so, Rule 35(4)(c) permits the tribunal to exclude one of the parties for some of the time.

12. If this happens, the judge will explain to the excluded party, usually the citizen, what is likely to happen during the closed part of the hearing. The judge may ask if there are any particular questions or points which (s)he would like put to the other parties while (s)he is absent.

13. Before the closed part of the hearing ends, the tribunal should discuss with the remaining parties:-

(a) What summary of the closed hearing can be given to the excluded party without undermining the Rule 14(6) direction.

(b) Whether, in the course of the closed session, any new material has emerged which it is not necessary to withhold and which therefore should be disclosed.

14. The tribunal's final decision and reasons must also be recorded so as not to undermine the effect of any Rule 14(6) direction.

[…]"

62. As I understand it, the summary of a closed hearing provided for by paragraph 13 of the Note has become known as a 'gist'.

The arguments

63. The Commissioner informs the Upper Tribunal that he adopts a 'neutral stance' on this appeal because it concerns procedural matters rather than substantive legal issues about the operation of FOIA. His submissions are intended to assist the Upper Tribunal, but he is generally neutral as to the outcome.

Ground 1

64. The Appellant argues that the Tribunal's determination of 29 July 2020, made by its Registrar, that he would not be permitted to make submissions on the application of rule 14(6) was inconsistent with the GRC Rules' overriding objective of dealing with cases fairly and justly, in particular that aspect of the objective which refers to

"ensuring, so far as practicable, that the parties are able to participate effectively in the proceedings". The Registrar relied on the need to avoid delay but the time that would have been taken in dealing with the issue was unlikely to be material given "the two month delay already imposed by the Tribunal's COVID suspension". In any event, the requirement to avoid delay is subject to the reservation "so far as compatible with proper consideration of the issues" (rule 2(2)((e)). The Tribunal's refusal to permit him to make submissions was not so compatible. At the hearing before myself, the Appellant also argued that there had been little point in him seeking to make rule 14(6) submissions once the Registrar had told him that the rule 14(6) direction prevented him from making meaningful submissions.

65. The Appellant disagrees with FOS' argument that he should have sought to appeal to the Upper Tribunal against the direction of 29 July 2020 and his failure to do so prevents him from now arguing that he did not have a fair opportunity to make rule 14(6) submissions. That would have involved a delay of several months. Given the Tribunal's stated acceptance of the need to conduct proceedings compatibly with *Browning*, the Appellant saw no point in trying to persuade the Registrar to change her mind and was content to leave it to the Panel to decide whether it required submissions on the application of rule 14(6). The same reasoning explains his response to the 29 September 2020 direction that, if he had anything further to say on rule 14(6), he was to do so within 14 days.

66. FOS submit that, if the proceedings before the First-tier Tribunal are considered in their entirety, and in their proper context, it is clear that the Appellant had a fair opportunity to make submissions on the application of rule 14(6). Indeed, he *did* provide written submissions on 7 August and 21 September 2020, and his arguments were addressed in the Tribunal's decision. The Appellant disputes FOS' argument that he did in fact make rule 14(6) submissions. That he did not was clear from the terms of his emails of 7 August and 21 September 2020.

67. Opportunities to provide rule 14(6) submissions were extended to the Appellant following the 29 July 2020 directions, argue FOS, but he did not take them up. In any event, what the Appellant really wanted was the opportunity to make further, or "full", submissions following disclosure of either the Closed Materials or a significant gist (one which would provide him with the substance of the redactions) of them. That explains why the Appellant was offering to make further submissions rather than actually making them.

68. FOS submit that the Appellant did not challenge the rule 14(6) direction of 29 July 2020 whether by way of an application for reconsideration, despite the notice informing him of his right to request reconsideration, nor did he apply for permission to appeal against the directions decision to the Upper Tribunal. He now seeks to challenge a case management determination having failed to persuade the First-tier Tribunal of the merits of his appeal.

69. The Appellant now relies, argue FOS, on the point that his email of the Tribunal of 29 September 2020 was influenced by his impending departure on a business trip to Brazil. The Appellant could have asked for more time to prepare submissions but chose not to.

70. The Commissioner submits, and FOS agree, that the Tribunal's supposed failure to allow the Appellant to make submissions on the application of rule 14(6) was 'two steps removed from the outcome'. Even if the Appellant was not permitted during the initial stages of the proceedings to make rule 14(6) submissions, it is doubtful that ultimately made any difference. The Tribunal Panel itself decided that disclosing the disputed information would have defeated the purpose of the proceedings. The Tribunal effectively decided for itself that rule 14(6) directions in the terms previously described by the Registrar were called for.

Ground 2

71. The Appellant submits that it is of note that the Commissioner, who has more experience of dealing with FOIA issues than FOS, does not rely on supposed practical difficulties in providing a gist in a case determined on paper. The Tribunal did not either, he submits, simply observing in its reasons that a gist was not 'normal practice' in a paper case. The Commissioner argues that the purpose of a 'paper hearing' is to reduce the burden on the parties and the Tribunal, and "an attenuated procedure follows from that". FOS accept that, in accordance with *Browning*, "the requirement to disclose as much as possible applies equally to a paper hearing as it does to an oral hearing". However, there are practical distinctions. At an open hearing, there is a spontaneous giving of evidence and taking of submissions. The gisting process that follows a closed session is the equivalent of a review of the rule 14(6) direction given earlier in the proceedings, "which ensures that as much as possible is moved from Closed to Open". At the hearing, Ms Thelen argued that, in relation to a closed session of a FOIA hearing, the gist anticipated by *Browning* is shorthand for the application of

rule 14(6) to what was said in the closed session. But in a paper case the application of rule 14(6) will have already been addressed during the initial stages of proceedings.

72. It is necessary, submit FOS, to consider what is actually meant by 'gist'. It is not, as the Appellant seems to assume, a summary of the Closed Material and that he was entitled to such a summary. That is not the purpose of a gist. A gist summarises what can be told to an Appellant without revealing the nature and/or content of the disputed information or otherwise defeating a purpose of the appeal. In short, a gist is not prepared by reference to a different standard than applicable under rule 14(6). The Tribunal provided what summary they could of the closed material but this was limited and reflective of publicly available information, and it determined that there was no need for further submissions from the Appellant, which was not unfair and well within the Tribunal's discretion.

73. FOS do not accept that the Tribunal refused the Appellant a gist because his appeal was determined on the papers. The Tribunal made a specific finding that a gist was "not necessary in this case" (paragraph 36 of the Tribunal's reasons).

74. FOS observe that, in the present case, there was no hearing to 'gist' but it is nevertheless clear from the Tribunal's reasons that it "considered the documents which were before it to ensure that as much as possible was disclosed into Open". The Tribunal revisited the documents that were subject to rule 14(6) directions "to determine if more could be said about them in Open", which showed that it was applying its mind to *Browning* "in particular that the Appellant be told as much as possible about the Closed Material". The Tribunal is an investigative body and it was "with this hat that the First-tier Tribunal considered the Closed Material, and in particular if those materials lent support to the case advanced by the Appellant".

75. The Commissioner submits that the Appellant did in fact have the benefit of a gist of the closed material, provided not by the Tribunal but through the contents of the Commissioner's decision notice. The Appellant submits that the terms of the Commissioner's decision notice cannot properly be considered as amounting to a gist. Moreover, there was nothing that could be considered a gist of the redacted parts of Ms Enevers' witness statement. Such a gist, without revealing the withheld information, might for instance have indicated whether withheld documents were marked 'highly confidential' and whether there was a restricted circulation list. This point undermines the argument that the absence of a gist (or a gist beyond that inferred from the Commissioner's decision notice) could have made no difference to the outcome.

76. FOS agree with the Commissioner that the Tribunal's approach was consistent with *Browning*. That the Tribunal turned its mind to the need for as much information as possible to be disclosed is shown by paragraph 32 of its reasons 'in which a further summary of the Closed Material was provided'. The Appellant was not subject to a lesser standard of openness because his appeal was determined on the papers rather than at a hearing.

77. The Appellant submits that Commissioner's argument that there is nothing to suggest that the Tribunal failed to test the evidence, in the light of the Appellant's absence, is contrary to the Tribunal's reasons which disclose no actual 'testing'. The argument also fails to acknowledge that the Commissioner made no written submissions on the evidence so that nothing was done by the Commissioner synonymous with the role of counsel for the Commissioner, as described in *Browning*, in minimising unfairness where a FOIA hearing involves a closed session.

78. The Appellant disputes that the Tribunal's decision was consistent with *Browning*. Nothing in the Tribunal's reasons indicates that it considered the need to minimise any disadvantage faced by him attributable to the Closed Material Procedure. The need to do so was heightened in this case in the light of the observation in the Commissioner's decision notice that the issues were 'extremely finely balanced'.

79. The Appellant argues that the redacted material could, and should, have been disclosed to him for the purposes of proceedings before the First-tier Tribunal. Placing the material in the Tribunal's open bundle would not have been disclosure under FOIA. The Appellant relies on the Upper Tribunal's reasoning in *DVLA v The Information Commissioner* [2020] UKUT 310 to argue that restrictions could have been placed on his onward disclosure of the material in the open bundle, and thus allow him properly to participate in the proceedings, but without releasing to the world the information which FOS considered needed to remain private. At the hearing, Ms Thelen argued that *DVLA* was concerned with publication of material within a tribunal's open bundle and was of no assistance regarding disclosure of contested material within tribunal proceedings.

Ground 3

80. The Appellant argues that the fact that the Senior President of Tribunals considered it necessary to revise the Practice Statement, and include an express reference to

directions under rule 14, reinforces the concerns expressed by the Upper Tribunal in adding the third ground of appeal. Taking into account the literal wording of rule 14(6) and the Closed Material Procedure's indication that rule 14 determinations are to be taken by judges, the Appellant submits that the present GRC Registrar's purported rule 14(6) directions were given outside her authority.

81. The Commissioner argues that the 2022 revision of the Practice Statement cannot retroactively legitimise anything done under the 2017 Statement. However, it may shed light on the construction of the 2017 Statement. FOS argue that the 2022 revision of the Practice Statement indicates the absence of any policy rationale for an interpretation of the 2017 Statement under which a GRC Registrar could be authorised to give a rule 14 order but not a direction.

82. The Commissioner argues that the absence of an express reference to directions under rule 14(6), in the 2017 iteration of the Practice Statement does not necessarily indicate that a Registrar could not, under the 2017 Statement, be authorised to give rule 14(6) directions. What matters is the legislator's intention (*R (Secretary of State for the Home Department) v Immigration Appeal Tribunal* [2001] QB 1224). In *Ryanair Holdings Ltd v OFT* [2011] EWCA Civ 1579 the Court of Appeal said, "to differentiate between making an 'order', under rule 61(1), and giving a 'direction' under rule 61(2), would be to attribute far too much significance to a semantic point with no real substance". And in *Anwer v Central Bridging Loans Ltd* [2022] EWCA Civ 201 the Court remarked, "save in an exceptional case, there can be no practical difference between any of the possible formulations (namely 'determination', 'judgment', 'order' or 'direction'). Both Respondents submit that the authorities support their case that the Practice Statement always provided for a GRC Registrar to be authorised to give rule 14(6) directions.

83. If the 2017 Practice Statement is construed as a whole, submits the Commissioner, it is apparent that the Senior President of Tribunals intended to permit a GRC Registrar to be authorised to exercise any function under rule 14:

(a) had the Senior President intended to limit authorisation to orders under rule 14(1), he could have limited its application to rule 14(1) rather than specifying, as he did, "rule 14";

(b) rule 14 refers to "prohibits" in paragraphs (2) and (3) and "prevents" in paragraph (4). This indicates that those terms are used interchangeably in rule 14.

84. FOS argue that the reference to "order" in paragraph 4(f) of the 2017 Practice Statement embraces both orders and directions under rule 14 because the terms are used interchangeable or, alternatively, a direction is a type of order. The 2009 Rules do not take a consistent approach in their use of the terms 'direction' and 'order'. For the most part, 'direction' is used "when discussing orders made to regulate the conduct of the parties to proceedings". However, 'order' is also used for matters such as costs and production of information and documents. Rule 14(1) is the only part of that rule that refers to orders but that may be explained because it is the only part that it 'outward-looking' (potentially applicable to non-parties) whereas the directions provided for by rules 14(2) and (6) are directed at parties. This demonstrates that a direction under rule 14(6) is a type of order, one which is directed at regulating conduct of the parties to proceedings.

85. The Commissioner refers to the Upper Tribunal's decision in *DVLA v The Information Commissioner and Williams* [2021] UKUT 334 (AAC) in which it noted that, unlike a Tribunal Caseworker, a GRC Tribunal Registrar is authorised to do more than determine routine case management issues. The Commissioner also submits that the Upper Tribunal has not previously doubted the authority of a GRC Registrar to give a direction under rule 14(6), and submits that settled practice may, in certain cases of ambiguity, be a legitimate aid to statutory construction (*R (ZH) v London Borough of Newham* [2014] UKSC 62).

86. FOS argue that, in the light of the wide scope of a GRC Registrar's authority under the 2017 Practice Statement, it would be 'odd' were a Registrar's powers under rule 14 restricted to taking action under rule 14(1) especially in the light of the 2009 Rules' provision for decisions taken by staff to be reconsidered by a judge.

87. Even if the Registrar's rule 14(6) directions exceeded her authority, FOS argue that there was no resultant unlawfulness in the Tribunal's decision because it reviewed and confirmed the Registrar's directions.

88. The Appellant does not agree that, if the GRC Registrar acted outside her authority, it made no difference because, as the Respondents argue, the Tribunal Panel reviewed and confirmed the Registrar's approach to disclosure. The Registrar's directions notices all recorded that the duty to ensure fairness in closed proceedings was ongoing, and were not intended to limit the Panel's ability to act compliantly with *Browning*. However, the Panel approached its task on the assumption that rule 14(6)

issues had been dealt with (see paragraph 34 of the Tribunal's reasons and its statement that disclosure of further information would "undermine the effect of the Rule 14(6) direction"). The Appellant does not accept that the Tribunal Panel itself made a rule 14(6) direction but, if it did, its validity was undermined by its failure to act in accordance with the overriding objective as the Appellant argues under ground 1.

Conclusions

Ground 1

89. Assuming, for the time being, that the Registrar was authorised to give rule 14(6) directions, the way in which the Registrar dealt with the Appellant's request to make rule 14(6) submissions was flawed.

90. The reason given by the Registrar for refusing to allow the Appellant's request to make submissions was not simply delay. It was that his submissions would cause unnecessary delay because they would be pointless. The Registrar said:

> "I decided not to invite Mr Barrett to make submissions about word/s he is unable to see (because they are withheld from him under rule 14)…To have invited submissions from Mr Barrett who is unable to comment on the actual words withheld from him seemed to me to introduce unnecessary delay into the appeal".

91. I shall assume that the Registrar considered the Appellant's request to make submissions before deciding whether to give a rule 14(6) direction. The alternative is that the Registrar waited until the rule 14(6) direction was in place before using the effect of the direction as justification for refusing representations which would have been clearly improper.

92. There were obvious flaws in the Registrar's reasoning. First, the information was not withheld from the Appellant under rule 14 until after the Registrar had made the direction which was the very act in relation to which he wished to make submissions. The Registrar relied on an irrelevant consideration (or a non-existent consideration). Of course, the information was in practice withheld from the Appellant but this because it was FOS' information and, absent any tribunal direction, it was up to FOS to decide who could see the information.

93. So, by one means or another, the information was withheld from the Appellant at the point at which he wished to make representations. Perhaps, then, it did not matter that the Registrar mistakenly relied on a non-existent rule 14(6) direction (as I have said, I assume that the Registrar considered the Appellant's request to make rule 14(6) representations before giving a rule 14(6) direction). That cannot be right because the approach, if taken to its natural conclusion, would prevent any party from making representations about the application of rule 14(6). It will always be the case that the Appellant in FOIA proceedings is unable to 'see the words' within the information that is the reason for the proceedings. The Registrar's reasoning is wrong because it amounts to a categorical bar on an Appellant making representations about the application of rule 14(6). It also nullifies the utility of rule 14(8)'s general requirement for the Tribunal to notify the other parties if one party applies for a rule 14(6) direction.

94. The Registrar's flawed approach was exacerbated, in my judgment, by the incorrect recitation at the foot of the directions notice as to the Appellant's right to reconsideration. The Appellant was only told that he had the right to apply for the decision to be reconsidered. He was not told that the right was to apply before reconsideration before a judge which is the whole point of conferring a right to reconsideration of a decision make by a member of the tribunal's staff.

95. However, as both Respondents submit, the directions notice given on 29 July 2020 was not the last word on the application of rule 14(6). As the history of the Tribunal proceedings recounted above demonstrates, following the 29 July 2020 directions a number of invitations were extended to the Appellant to make representations as to the application of rule 14(6) – without indicating that it was pointless for him to make representations about information that he could not see. The Appellant may have preferred to have the issue addressed by the Tribunal panel but that was his choice. I am satisfied that, over the course of proceedings, the Appellant had a fair opportunity to make representations as to the application of rule 14(6) to the withheld material. Ground 1 fails.

Ground 2

96. While ground 2 was framed by reference to the Tribunal's arguable failure to adapt the Closed Material Procedure to a FOIA appeal decided on paper, the issue is really whether the Tribunal minimised, to the fullest extent possible (or, in the language of *Browning*, to 'the utmost'), without revealing the withheld information, the disadvantages inherent in the Appellant's position as a party not privy to all the

evidence and submissions before the Tribunal. And that is how ground 2 has been argued.

97. The Appellant clearly expected to be provided with a gist of the withheld information/material. Before the Tribunal decided his appeal, he requested from the Tribunal a gist on three occasions (20 April 2020, 21 and 29 September 2020). The Tribunal did not respond to any of those requests until it gave its reasons for refusing the appeal.

98. The Respondents argue that the Tribunal did not proceed on the basis that a gist are inapt where a FOIA appeal is determined on the papers. However, the Tribunal's reasons are not without ambiguity. While it found in paragraph 34 of its reasons that it was not necessary to provide the Appellant with further details about the closed material in order to decide the appeal fairly, in paragraph 31 of its reasons, the Tribunal said it was not normal practice to provide a gist of closed material in a paper case. The Tribunal also found that it was not necessary to provide a 'detailed gist' (although no one had provided the Appellant with any type of gist at all).

99. While the First-tier Tribunal gave both an open and closed judgment, neither Respondent sought a closed session or made closed submissions in these proceedings before the Upper Tribunal. And so I cannot have regard to the Tribunal's closed judgment in deciding this appeal. This makes it difficult for me to assess whether the Tribunal minimised, so far as possible, the disadvantages inherent in the Appellant's position as a party who could not consider and makes submissions on all of the evidence and submissions before the First-tier Tribunal. But I can assess the information about the withheld information identified by the Tribunal which was, presumably, why it considered a 'detailed gist' unnecessary.

100. The Tribunal noted that the Commissioner's decision notice, in particular at paragraphs 21 and 24, gave some additional information about the content of the withheld information. It then went on to say, in paragraph 32, that, "having viewed the withheld information, we can confirm the following". However, all the Tribunal did was confirm the description given in the Commissioner's decision notice. Given the Appellant's multiple requests for a gist during the Tribunal proceedings, I think it may safely be assumed that he considered the description in the Commissioner's notice insufficient.

101. FOS' reliance on the Tribunal having provided a further description of the closed material in its reasons is irrelevant. By then, the appeal had failed so that nothing said in the Tribunal's reasons was capable of minimising the disadvantages faced by the Appellant in seeking to make out his case.

102. Where a FOIA appeal is determined at an appeal which involves a closed session, the subsequent gist delivered in open session is not necessarily restricted to a limited description of the withheld information. Closed submissions will also be made at the closed session and the subsequent gist is intended also to relate to these, in order to minimise the prejudice faced by an Appellant who is not privy to certain of the arguments presented to the tribunal by the other party or parties. In this case, FOS provided the Tribunal with reasonably extensive closed submissions. The Tribunal's reasons do not address whether it might have been necessary to 'gist' FOS' closed submissions. The description that seems to have served as a gist – the description in the Commissioner's decision notice – could not have sufficed because proceedings were not underway when that description was given.

103. I accept that there are practical distinctions between an appeal determined at a hearing and one determined on paper. However, the requirement to minimise the disadvantages faced by a FIOA appellant is uniform. The Respondents do not argue that something akin to the gisting process carried out at a hearing can never be required for a paper case. I do not propose to prescribe, or give guidance, about how the Tribunal should do this, in cases where it is necessary in order to minimise the disadvantages faced by an appellant. I do not have sufficient knowledge of the Tribunal's internal processes, and the resources at its disposal, to enable me to do so with any confidence. In any event, the First-tier Tribunal is master of its own procedure.

104. So far as gisting and the withheld information was concerned, one reason given by the Tribunal for refusing to disclose further details about the closed material was that this would "undermine the effect of the Rule 14(6) direction". In my judgment, that was not a proper basis for refusing to consider whether further details of the withheld information should be disclosed. If fairness required such further details to be disclosed to the Appellant, the rule 14(6) direction could (and should) have been amended. I do, however, agree with FOS that the Upper Tribunal's decision in *DVLA* is not relevant because it was not concerned with the management in proceedings of closed material.

105. When I take the above matters into consideration (no consideration of the need to gist closed submissions and the mistaken view that the rule 14(6) direction barred

further disclosure) alongside the Tribunal's reluctance to concede the need for a gist in a paper case, I am forced to conclude that it failed to minimise, to the fullest extent possible, the disadvantages faced by the Appellant. FOS argue that, in a paper case, the gisting process is an aspect of the application of rule 14(6) during the initial stages of proceedings but, if that is so, it does not assist the Respondents because the Registrar's and the Tribunal's approaches were identical.

106. The Tribunal proceedings were conducted unfairly. Ground 2 succeeds. The Tribunal's decision involved an error on a point of law, and it is set aside.

Ground 3

107. It is not strictly necessary to consider ground 3, now that ground 2 has succeeded. However, I shall address it because it has been fully argued and the issues raised may of practical interest for the First-tier Tribunal.

108. The 2017 Practice Statement is an instrument which provides for judicial functions to be exercised by a person who is a civil servant and not a judge. Such a person is part of the executive branch of government and not therefore subject to the constitutional protections which, in the case of the judiciary, are designed to secure judicial independence. If there is doubt as to the meaning of a provision of the Statement, this feature favours a restrictive interpretation of the scope of the provision.

109. On the face of it, the 2017 Practice Statement identifies with care precisely which judicial functions may be delegated to a member of tribunal staff. It does this by tracking the language used by the 2009 Rules to describe various formal acts, such as give 'orders' and 'directions', done by the Tribunal. This strongly suggests that, in paragraph 2(g), the Senior President of Tribunals meant what he said when he provided for members of staff to be authorised "under rule 14, to make orders prohibiting the disclosure or publication of documents or information". That is, the Senior President did not intend to authorise members of staff to give directions under rule 14.

110. The Respondents effectively argue that the Upper Tribunal should, in construing the 2017 Practice Statement, depart from the literal meaning of paragraph 2(g). I do not find any of their arguments persuasive especially when it is borne in mind that, for the reasons given above, in the case of doubt a more restrictive interpretation of the Statement is be preferred.

111. The authorities relied on by the Respondent do not establish some general proposition of law that whenever a legislative instrument refers to an order or direction it intends ‘order or direction’ (or vice versa). None of the authorities were concerned were delimiting the scope of judicial powers. The argument that it has been recognised by the Upper Tribunal that GRC Registrars are authorised to do more than deal with routine case management issues misses the point. That recognition is a consequence of the breadth of the Senior President’s Practice Statement not a principle to be followed in interpreting the Statement.

112. It is not necessary for me to consider the question whether, if the Registrar had no authority to give a rule 14(6) direction, that deficiency was cured by the Tribunal giving its own direction in the same terms. However, there is some force in the Appellant’ argument that the Tribunal approached the Registrar’s direction as a fixed reference point. His argument is supported by the Tribunal’s observation that to provide the Appellant with more information would “undermine the rule 14(6) direction”.

Conclusion

113. Neither Respondent disagrees with the Appellant’s suggestion that, if his appeal succeeds, his appeal should be remitted to the First-tier Tribunal for re-determination. The appeal will now be considered afresh by the Tribunal. I have not, as requested by FOS, directed redetermination by the same panel. The composition of the panel is for the First-tier Tribunal to determine.

114. Finally, I should apologise for the delay in bringing these proceedings to an end. In large part, this is due to my decision to introduce a third ground of appeal when the original grounds were nearly ready to be decided. It has also taken too long for me to write this decision following the hearing in September 2023. Much of my time in the latter part of 2023 was taken up with a judicial recruitment exercise and, more recently, I have had to be absent from my duties after being injured in an accident. Despite that, the parties should not have had to wait this long for my decision and for that I apologise.

Upper Tribunal Judge Mitchell

Authorised for issue on 20 April 2024.