**IN THE UPPER TRIBUNAL** **Case No:** GIA/3331/2015
**ADMINISTRATIVE APPEALS CHAMBER**

**DECISION BY THE UPPER TRIBUNAL**
**(ADMINISTRATIVE APPEALS CHAMBER)**

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

**The decision of the First-tier Tribunal (General Regulatory Chamber) dated 22 July 2015 did not involve an error on a point of law. The appeal is therefore dismissed.**

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

**REASONS**

Introduction

1. This appeal raises an important point of principle about directions given pursuant to rule 14(6) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ["the Rules"], namely whether, having directed that it would accept "closed" material from a public authority on condition it would not disclose such documents or information to other persons or specified other persons, the First-tier Tribunal ["the FTT"] was then at liberty to vary that condition by including such material in its publicly available reasons without the consent of the public authority concerned.

2. I have concluded that:
a) a Rule 14(6) direction is capable of variation by the FTT at a later date even if the original direction did not explicitly state that it might be varied in due course;
b) the FTT's decision was not made following a private hearing from which the public was excluded. The FTT alone had the responsibility to decide what was to be disclosed and what was to remain confidential/closed. No consent to the disclosure ordered by the FTT is required from the party proffering the confidential/closed material;
c) the analogy which the Cabinet Office ["the CO"] sought to draw with the procedures adopted in the Special Immigration Appeals Commission (Procedure) Rules 2003 was misplaced; and

d) the procedure adopted by the FTT in this case was not unfair. The FTT was not obliged to follow the course advocated in the letter from the CO dated 22 May 2015.

3. I have not expressed a view as to whether Rule 14(6) directions should routinely state that they are capable of variation at a later date. That strikes me as a matter best left to the Chamber President of the General Regulatory Chamber. I do however suggest that the Practice Note on Closed Material in Information Rights Cases dated May 2012 and in use at First-tier in the General Regulatory Chamber ["the Practice Note"] should be amended as follows. When dealing with closed material where there is no excluded party, it would be prudent and indeed necessary for the FTT to canvass with the parties at the end of each closed session what material could be made publicly available and, if necessary, for the FTT to rule on the same in default of agreement.

4. Permission to appeal was granted by the FTT on 9 October 2015. The determination of this appeal has been delayed by the non-availability of counsel instructed to represent the parties. Eventually I held an oral hearing of this appeal on 1 February 2017. The CO was represented by Mr Dunlop of counsel and the Information Commissioner ["the IC"] was represented by Ms Laura John of counsel (both of whom appeared before the FTT). I am grateful to both of them for their written and oral arguments which I found enormously helpful. I have read the First-Tier Tribunal and the Upper Tribunal bundle carefully (including the material handed to me at the hearing and that sent to me after the hearing) before coming to my conclusions.

5. The hearing was conducted without the need for me to go into closed session and thus these reasons are complete in themselves and may be read by the world at large.

Background

6. What follows is a summary pertinent to this appeal.

7. The appeal concerns the decision by the FTT in respect of a request made on 2 December 2013 pursuant to s.1 of the Freedom of Information Act 2000 ["FOIA"] for the disclosure of the full contents of a document entitled "*Getting your bill through the House of Lords - A guide for bill teams by the Government Whips' Office, House of Lords*" ["the Guide"].

8. The Guide reproduces or summarises much of the explanation of procedural rules and information on the operation of the House of Lords, some of which appears in a number of publicly available documents published by the Cabinet Office and House of Lords. However, in addition to this, the Guide provides commentary and advice on management of each stage of a bill's passage through the House.

9. The CO refused to comply with the request for disclosure of the Guide, relying on exemptions under s.35(1)(a), s.35(1)(b) and s.40 FOIA to withhold the Guide in its entirety. The CO's basis for withholding the Guide was, broadly, that it included sensitive material known only to certain officials and members of the House of Lords, the disclosure of which would lead to a number of problems.

10. A complaint was made to the IC, who issued a Decision Notice on 22 July 2014. He held that the exemption under s.35(1)(a) FOIA (formulation of government policy) was engaged in respect of most of the information, but that s.35(1)(b) (Ministerial Communications) was not engaged at all. He found that the public interest favoured disclosure of most of the material. In addition, s.40(2) applied to a small amount of the information. On that basis he allowed the CO to withhold a relatively small part of the information in the Guide, but ordered that the rest of it be disclosed.

11. The CO appealed this decision. The appeal was heard by the FTT on 12 February 2015, with a decision being published on 22 July 2015.

12. At the appeal, the FTT was asked to determine:
a) whether FOIA s.35(1)(b) was engaged on the basis that the Guide was, or related to, a Ministerial Communication (in that it related to the handling strategy produced for each bill, each of which was itself a Ministerial Communication);
b) whether the Guide, or parts of it, related to the operation of any Ministerial private office so as to engage the exemption under FOIA s.35(1)(d);
c) in the light of the exemption found to have been engaged in the Decision Notice [s.35(1)(a)] and any other exemptions which the FTT accepted were engaged, whether the public interest factors in maintaining the exemptions (either alone or in aggregation) outweighed the public interest in disclosure;
d) whether the cumulative effect of the public interest factors in favour of maintaining the exemptions was such that the whole Guide should be withheld (as opposed to it being disclosed with appropriate redactions); and
e) whether certain information in the Guide about individuals working in the office of the Government Chief Whip should be withheld on the grounds that it constituted the personal data of those individuals.

13. At the appeal hearing, the FTT received evidence in both open and closed sessions from Julia Labeta, the Principal Private Secretary to both the Leader of the House of Lords and the Government Chief Whip in the Lords. This evidence was received in the form of a witness statement with one part being open and the other being closed. This was supplemented by oral evidence, in both open and closed sessions, provided in response to questioning by counsel for the CO, the IC and the FTT. Further, given the size of the document in question, the CO provided an annotated version of the Guide to the FTT to assist the

panel in its consideration of the appeal, on the understanding that it would be received on a closed basis. This version of the Guide highlighted the most sensitive information and examples of the application of the exemptions relied upon by the CO. Ms Labeta gave confidential evidence in closed session on the assurance from the FTT that such evidence would remain confidential.

14. The "rulings and arrangements" for written and oral closed evidence from Ms Labeta were made under Rules 14 and 35 of the Rules. In particular Rule 14(6) directions were made:
a) in case management notes dated 21 January 2015 and 10 February 2015;
b) under cover of an email dated 11 February 2015 at 10:04:33 from the Registrar to Mr Kevin Brooks of the Treasury Solicitor's Department (as was); and
c) at the appeal hearing, where the FTT agreed to receive evidence from Ms Labeta in a closed hearing on a confidential basis.

15. On 5 May 2015 the FTT submitted a draft of its decision and two appendices [A and B] for the CO and the IC to consider prior to publication.

16. The FTT explained that Appendix B was to be treated as a confidential appendix, whereas Appendix A would, in due course following the exhaustion of all rights of appeal, become publicly available.

17. Upon consideration of the Decision and Appendices, the CO made representations to the FTT in respect of Appendix A [set out in a confidential letter to the FTT dated 22 May 2015], to the effect that Appendix A referred to evidence that had been provided to the FTT on a closed basis - either by way of the closed witness statement, the annotated version of the Guide on a closed basis, and/or through oral evidence provided during the closed sessions of the appeal. The letter pointed out that the FTT had not discussed with the CO at the hearing what parts of the evidence could be gisted or disclosed [as required by paragraph 13 of the Practice Note]. Additionally Ms Labeta was not asked if any of the evidence she had given in closed sessions could, or should, be gisted into an open document.

18. In the letter of 22 May 2015 [referred to in paragraph 13 of the Decision], the CO invited the FTT to refer to the closed evidence in confidential Appendix B, rather than Appendix A, and also to remove a number of references to closed material from the body of the judgement and from Appendix A. The FTT was asked to allow the CO the opportunity to have sight of and consider any revised decision made on the basis of their letter. The CO also requested that the FTT (a) provide its reasons for the decision to include closed material in Appendix A and (b) allow the CO 7 days from receipt of any revised decision to offer agreed gists of the closed material.

19. On 22 July 2015, the FTT provided its decision. At paragraph 13, the FTT stated:
*"A draft of this decision, submitted to the Cabinet Office and the Information Commissioner before promulgation to enable them to check for inadvertent disclosure of confidential information, included the gist of some of the closed evidence at a level of generality which we believed struck the correct balance between the Cabinet Office's claim to closed status and the interests of open justice. The Cabinet Office disagreed with that approach in respect of several passages and argued, in a written submission, that those passages should be removed. We have adopted the following procedure to address the Cabinet Office's concerns:*
*a) Part 1 of Appendix A to this decision sets out those parts of the disputed information which the tribunal has decided are not exempt from disclosure and should be disclosed. In addition to identifying the relevant passages this part of the Appendix also reflects our reasoning in respect of each item and includes references to parts of the closed evidence which we believe are not required to be kept confidential and should also be recorded in an open decision.*
*b) In Part 2 of Appendix A we set out a Ruling providing our reasons for including references to the relevant parts of the closed evidence in Part 1 of the Appendix.*
*c) Appendix A is to remain confidential until either the time for appealing this decision has expired without an appeal being lodged or, in the event that such an appeal is lodged, the appeal has been dismissed.*
*d) Appendix B to this decision reflects those parts of the disputed information which the tribunal has decided are exempt from disclosure and may be withheld. By its nature, Appendix B is to remain confidential and will not be made public unless and until the Upper Tribunal or a Court hearing a further appeal on this case from the Upper Tribunal shall order otherwise."*

20. In a new Appendix A, the FTT set out its reasons for deciding that some of the evidence provided in closed session should be made public.

21. The CO was not permitted an opportunity to address the FTT further in respect of a suggested approach to the closed material.

The Applicable Law

22. The Rules are adopted pursuant to section 22 and Schedule 5 of the Tribunals, Courts and Enforcement Act 2007. There are four Rules which are relevant to the issues in this appeal. I deal with each in turn.

23. First, the FTT has broad case management powers, with which it may regulate its own procedure. Rule 5 of the Rules states as follows:
*"**Case management powers***
*5(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.*

*5(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction ending, suspending or setting aside an earlier direction.*
*…"*

24. Second, the FTT may make an order that prevents the disclosure of documents and information. Rule 14 states:
*"**Prevention of disclosure or publication of documents and information***
*14(1) The Tribunal may make an order prohibiting the disclosure or publication of –*
*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).*
*(4) If the Tribunal gives a direction under paragraph (2) which prevents disclosure to a party who has appointed a representative, the tribunal may give a direction that the documents or information be disclosed to that representative if the Tribunal is satisfied that –*
*a) disclosure to the representative would be in the interests of the party; and*
*b) the representative will act in accordance with paragraph (5).*
*(5) Documents or information disclosed to a representative in accordance with the direction under paragraph (4) must not be disclosed either directly or indirectly to any other person without the Tribunal's consent.*
*(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.*
*(9) In a case involving matters relating to national security, the Tribunal must ensure that information is not disclosed contrary to the interests of national security.*
*(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) or the duty imposed by paragraph (9).”*

25. Third, the FTT may conduct a hearing, or part of a hearing, in private where it is necessary to do so. Rule 35 of the Rules states:
*“**Public and private hearings***
*35(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) The Tribunal may give a direction excluding a witness from a hearing until that witness gives evidence.”*

26. Fourth, the FTT must provide reasons for its decisions, subject to any directions made under Rule 14. Rule 38 states:
*“**Decisions (a)***
*38(1) The Tribunal may give a decision orally at a hearing.*
*(2) Subject to rule 14(10) (prevention of disclosure or publication of documents and information), the Tribunal must provide to each party as soon as reasonably practicable after making [a decision (other than a decision under Part 4) which finally disposes of all issues in the proceedings or a preliminary issue dealt with following a direction under rule 5(3)(e)] –*
*a) a decision notice stating the Tribunal’s decision;*
*b) written reasons for the decision; and*
*c) notification of any right of appeal against the decision and the time within which, and the manner in which, such right of appeal may be exercised.*
*3) The Tribunal may provide written reasons for any decision to which paragraph (2) does not apply.”*

27. The Court of Appeal considered the FTT's power to conduct a closed procedure, namely to receive closed evidence pursuant to directions under Rule 14 and to conduct a closed hearing pursuant to Rule 35, in the case of Browning v IC [2014] EWCA Civ 1050. It held as follows:
*"[33] 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. In my judgement, the approach adopted in this case and originating in the BUAV case does precisely that, having regard to the unique features of appeals under FOIA where issues of third-party confidentiality and damage to third-party interests loom large. The features to which reference was made in the BUAV case - the expertise of the tribunal, the role of the IC as guardian of FOIA etc - make it permissible to exclude both and Appellant and his legal representative except in circumstances where the FTT:*
*"cannot carry out its investigatory function of considering and testing the closed material and give appropriate reasons for its decision on a sufficiently informed basis and so fairly and effectively in the given case having regard to the competing rights and interests involved."*
*In associating myself with this formulation I am accepting that there are features surrounding a case such as this which merit the description of the procedure as being at least in part investigatory as opposed to adversarial.*
*[34] In the BUAV case, the FTT opined that this approach might be departed from but only "in exceptional cases". It seems to me that it was there using the word "exceptional" in a predictive sense rather than as positing a substantive test of exceptionality. What is important is that each case should be considered in its particular factual context.*
*[35] 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 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. Having been taken by counsel to the contemporaneous notes written during the proceedings, I am satisfied that this was achieved in the present case. Parenthetically, I should add that Mr Coppel's complaints about having been bounced out of the Upper Tribunal hearing peremptorily and unfairly seem to me, on proper investigation, to be unfounded.*
*[36] It follows from what I have said that, in my judgement, the Tribunal Procedure Rules, properly construed, do permit the course that was taken by the FTT and upheld by the UT in the present case. There are sound reasons why their natural meaning should be maintained so that justice can be achieved to the fullest extent possible, having regard to the conflicting interests which arise in a unique statutory context."*

28. The preference for as open an approach as the circumstances permit is reflected in the FTT's Practice Note. The Practice Note reiterates the general principle 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 also seen by all the other parties. However it acknowledges that, in the information rights jurisdiction, there are some cases in which this principle must be modified. In these cases, the law permits the tribunal to deviate from the normal rule but only so far as is necessary [original emphasis] to ensure that the purpose of the proceedings is not defeated. Any such deviation must be authorised by a judge [paragraph 4, Practice Note].

29. The Practice Note states as follows:
*"10. Once the judge makes a direction under Rule 14(6) the Tribunal must conduct the proceedings so as not to undermine its effect. All parties must cooperate in this. The judge will also be vigilant as to whether, as events unfold, the direction might require amendment.*
*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.*
*15. We are still perhaps working out the practical effects of Rules 38(2) and 14(10). They do not mean that a closed part of the decision is always needed whenever closed material has been seen. Where the Tribunal orders disclosure it may be necessary for part of the decision to remain closed until after the period for an appeal has expired.*
*16. It may be prudent in complex cases for a draft of the decision to be shared with the public authority/IC in advance to reduce the risk of inadvertent disclosure."*

30. The Supreme Court in Bank Mellat v HM Treasury (No 1) [2013] UKSC 38 held, with respect to closed procedures, as follows:
*"[68] First, where a judge gives an open judgment and a closed judgment, it is highly desirable that in the open judgment, the judge (i) identifies every conclusion in that judgment which has been reached in whole or in part in the light of points made or evidence referred to in the closed judgment, and (ii) that the judge says that this is what he or she has done. This was a point made by Carnwath LJ, in a judgment given*

*after Mitting J's judgments in this case, in AT v Secretary of State for the Home Department [2012] EWCA Civ 42, para 51.*
*[69] Secondly, a judge who has relied on closed material in a closed judgment, should say in the open judgment as much as can properly be said about the closed material which he has relied on. Any party who has been excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and arguments it received. Further, the more the judge can say about the closed material in the open judgment, the less likely it is that a closed hearing will be asked for or accorded on an appeal. In cases where judges have to give a closed judgment, they should say in their open judgment, as far as they properly can, what the closed material has contributed to the overall assessment they have reached in their open judgment."*

31. The decision in Bank Mellat v HM Treasury (No1) also listed a number of important principles of relevance to the tension between open justice and natural justice [see paragraphs 2-6]. I set these out in full here as I have had them to the forefront of my mind when reaching my decision in this appeal.

32. Paragraphs 2-6 read as follows:
*"[2] The idea of a court hearing evidence or argument in private is contrary to the principle of open justice, which is fundamental to the dispensation of justice in a modern, democratic society. However, it has long been accepted that, in rare cases, a court has inherent power to receive evidence and argument in a hearing from which the public and the press are excluded, and that it can even give a judgement which is only available to the parties. Such a course may only be taken (i) if it is strictly necessary to have a private hearing in order to achieve justice between the parties, and, (ii) if the degree of privacy is kept to an absolute minimum – see, for instance A v Independent News & Media Ltd [2010] EWCA Civ 343, [2010] 3 All ER 32, [2010] 1 WLR 2262, and JH v News Group Newspapers Ltd [2011] EWCA Civ 42, [2011] 2 All ER 324, [2011] 1 WLR 1645. Examples of such cases include litigation where children are involved, where threatened breaches of privacy are being alleged, and were commercially valuable secret information is in issue.*
*[3] Even more fundamental 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 even 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 arguments on behalf of one party without the other party ("the excluded party") knowing, or being able to test, the contents of that evidence and those arguments ("the closed material"), or even being able to see all the reasons why the court reached its conclusions.*

*[4] In Al Rawi v Security Service [2011] UKSC 34, [2012] 1 AC 531, [2012] 1 All ER 1, Lord Dyson made it clear that, although "the open justice principle may be abrogated if justice cannot otherwise be achieved" (para 27), the common law would in no circumstances permit a closed material procedure. As he went on to say at [2012] 1 AC 531, para 35, having explained that, in this connection, there was no difference between civil and criminal proceedings "[T]he right to be confronted by one's accusers is such a fundamental element of the common law right to a fair trial that the court cannot abrogate it in the exercise of its inherent power. Only Parliament can do that."*
*[5] The effect of the Strasbourg Court's decisions in Chahal v United Kingdom (1996) 23 EHRR 413, 1 BHRC 406, [1996] ECHR 22414/93 and A and others v United Kingdom [2009] ECHR 301 is that art 6 of the European Convention on Human Rights ("art 6", which confers the right of access to the courts) is not infringed by a closed material procedure, provided that appropriate conditions are met. Those conditions, in very summary terms, would normally include the court being satisfied that:*
*(i) for weighty reasons, such as national security, the material has to be kept secret from the excluded party as well as the public,*
*(ii) a hearing to determine the issues between the parties could not fairly go ahead without the material being shown to the judge,*
*(iii) a summary, which is both sufficiently informative and this fall as circumstances permit, of all the closed material has been made available to the excluded party, and*
*(iv) an independent advocate, who has seen all the material, is able to challenge the need for the procedure, and, if there is a closed hearing, is present throughout to test the accuracy and relevance of the material and to make submissions about it.*
*[6] The importance of the requirement that a proper summary, or gist, of the closed material be provided is apparent from the decision of the House of Lords in Secretary of State for the Home Department v AF (No 3) [2009] UKHL 28, [2010] 2 AC 269, [2009] 3 All ER 643. At para 59, Lord Phillips said that an excluded party "must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations", and that this need not include "the detail all the sources of the evidence forming the basis of the allegations". As he went on to explain:*
*"Where, however, the open material consist purely of general assertions and the case against the [excluded party] is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be."*

The Arguments of the Parties

33. I do no more than summarise these at this stage of my Reasons.

34. The CO contended that, in the circumstances of this case, the FTT had erred in law by breaching its own Rule 14(6) direction. In particular, the Rule 14(6) direction limited disclosure of the annotated closed version

of the Guide supplied by the CO to the FTT and to the IC alone. The same also applied to the evidence given in closed session by Ms Labeta. The limited disclosure proposed by the FTT in Appendix A would undermine the effect of both the Rule 14(6) directions and the CO's expectation of confidence for this material whilst subject to proceedings. The FTT had not varied the original Rule 14(6) direction and, if it nevertheless had the power to do so, that power should be exercised sparingly and only where there were compelling reasons to do so. No such reasons existed in this case. Finally, the FTT should have offered the CO the opportunity either to withdraw the closed evidence/material or alternatively to provide a gist of it with which the CO was content. Thus, the CO asked me not to order disclosure of Appendix A.

35. In contrast, the IC submitted that the thrust of the CO's submissions were without merit. The submission that a party to the proceedings must consent to the terms of the FTT's exposition of its reasons in an open decision – that it has effectively a right of veto over the grounds of an open decision – had only to be stated to be dismissed. Further, once a Rule 14 direction had been made, it was for the FTT to determine and rule upon (a) whether that direction should be varied; and/or (b) whether certain evidence heard orally should have been given in open session and should now be relayed openly; and/or (c) how the evidence heard orally should be gisted. In this case the FTT acted entirely in accordance with the law. It provided the CO with an opportunity to comment on an embargoed draft judgment and the CO availed itself of that opportunity as demonstrated by its letter dated 22 May 2015. The FTT considered the CO's submissions and provided a detailed statement of reasons for accepting/rejecting them in each particular instance [see Appendix A Part 2].

The Status of the Rule 14(6) Direction

36. The CO's first argument was that an unqualified Rule 14(6) direction – such as those made in this case - may not later be broken. Thus, if the FTT promised to receive evidence in confidence, it could never break that confidence. Mr Dunlop for the CO accepted in his revised skeleton argument dated 25 January 2017 that the CO did not need to advance this line of argument to its fullest extent given its other submissions but nevertheless maintained the point. He accepted however that a gist of closed evidence may be provided **where such a gist was agreed** [his emphasis] with the party proffering the closed evidence.

37. Since this is the CO's position, I should determine this issue.

38. In this case a Rule 14(6) direction was made by the FTT Registrar on 11 September 2014 in respect of the disputed information and the confidential annex to the IC's Decision Notice. This direction stated that this material would not be disclosed to anyone except the IC and the

CO as to do so would defeat the purpose of the proceedings. Another Rule 14(6) direction was made on 21 January 2015 in respect of Ms Labeta's closed witness statement and on 10 February 2015 a further Rule 14(6) direction was made in respect of the IC's Updating Note prior to the hearing. On 11 February 2015 the FTT Registrar wrote to the CO's solicitor to say that it was unnecessary to have an additional Case Management Note giving permission for the withholding of the annotated version of the disputed information as this was already prevented from disclosure. The Registrar confirmed that the annotated version would not be disclosed to anyone except the IC and the CO as this would defeat the purpose of the proceedings. That email also constituted a Rule 14(6) direction. Finally, the FTT acknowledged in paragraphs 5 and 6 of Appendix A Part 2 that when it made directions for Ms Labeta's evidence to be heard "in closed", it was making a direction under rule 14(6) that it would hear her closed evidence on condition it was not disclosed to other persons.

38. None of the Rule 14(6) directions made in this case contained provision for their variation. However the Case Management Note made on 11 September 2014 [referred at the foot of the page] to the "*Practice Note – Closed Material*" as being of potential assistance to the parties. Whilst the Practice Note does not have the same status as the Rules, it is clear that both the parties and the FTT were guided by the approach to closed material set out therein.

39. Was the CO correct to assert that an unqualified Rule 14(6) direction may never be broken? I prefer the term "varied" for reasons which I hope will be clear from what follows. The CO argued that the FTT had the power to bind itself by giving an irrevocable direction that evidence given in a closed session would never be disclosed to the public. I was referred to the Supreme Court's decision in W (Algeria) v Secretary of State for the Home Department [2012] UKSC 8 as authority for that proposition. I did not find this submission persuasive as W (Algeria) was a case concerned with the deportation of a foreign national on the grounds of national security. Such cases before the Special Immigration Appeals Commission ["SIAC"] are subject to procedural rules and practices which are very different in application and effect from those which governed the FTT in this case. In those circumstances, I do not consider that the decision of the Supreme Court is of real assistance to me in determining the issues in this case.

40. I was equally unpersuaded by the CO's submission that, where there is no party to an appeal who will be excluded from any information and an irrevocable direction is likely to obtain the fullest and most candid evidence from the witness, an irrevocable direction would be a good idea. It was further contended that, properly construed, the FTT made irrevocable rule 14(6) directions in this case. I find that the first of those submissions simply ignores the reality that, irrespective of the parties' status and submissions within the litigation, the entirety of the

FTT's eventual decision and reasons were likely to be read by the world at large.

41. Secondly, irrevocable directions of the sort envisaged by the CO are, by their nature, incapable of adapting to the ebb and flow of litigation. Put simply, an irrevocable Rule 14(6) direction made at the start of proceedings might produce injustice or have other unexpected disadvantages as the litigation develops. That is a powerful factor which militates against Rule 14(6) directions being on their face irrevocable.

42. I find that the FTT did not make irrevocable Rule 14(6) directions in this case. None of the directions stated that no further variation was possible, thereby disapplying both the effect of Rule 5(2) which gives the FTT the general power to amend, suspend or set aside an earlier direction and the effect of Rule 6(5) which allows a party an opportunity to challenge a direction by making an application for another direction to amend, suspend or set aside the original direction. There are no words in the Rules qualifying the application of either Rule 5(2) or Rule 6(5) to directions made pursuant to Rule 14. Had irrevocable directions been made, I would have expected explicit wording to make clear that variation was not possible, especially in circumstances where the parties were operating pursuant to a Practice Note which stated that the tribunal would keep under active review the possible amendment of the Rule 14(6) direction.

43. It thus follows that I reject the submission that the FTT had made a series of irrevocable Rule 14(6) directions in this case. The reference to the Practice Direction at the foot of the Case Management Note dated 11 September 2014 supports my overall analysis that the Rule 14(6) directions made in this case were capable of variation during the course of the proceedings. The FTT's subsequent decision to include carefully worded material in its decision from Ms Labeta's closed evidence was entirely within its case management powers.

44. The IC submitted that, if the CO was correct, the FTT could never order disclosure of any evidence given in closed session even if there was an open party who, out of fairness, should receive it. The CO's solution to that problem was for the FTT to make clear in any Rule 14(6) direction before a closed session takes place that it may change its mind and that any evidence given in closed session may be disclosed to open parties. Counsel for the CO said that he had seen examples of Rule 14(6) directions which made it clear on their face that they might be varied when the evidence has been heard.

45. At the conclusion of the hearing, I invited the parties to submit the wording of a Rule 14(6) direction which made plain on its face that it was capable of variation. The CO submitted a direction which read as follows (save for my addition of paragraph numbers):
*"[1] Pursuant to Rule 14(6), the Tribunal will not disclose* [insert the particular documents or information for which a direction is sought]

*("the closed information") to any party other than the Information Commissioner pending the hearing before the First-tier Tribunal. The First-tier Tribunal may revisit this direction before, during or at the end of the hearing.*
*[2] However, the First-tier Tribunal will not vary the Rule 14(6) direction or refer in an open hearing or open decision to any of the closed information unless it has (i) given reasonable warning to* [insert name of relevant party] *and the Information Commissioner of its intention to vary the said direction and/or to refer, in open, to some of the closed information; (ii) heard the submissions those parties may wish to make (if necessary, in a closed hearing); and (iii) either (a) reached an agreement with* [insert name of relevant party] *as to what parts of the closed information may be disclosed in open (whether in full or by way of a gist) or (b) if no such agreement can be reached, allowed* [insert name of relevant party] *the opportunity to withdraw any of the closed information."*
Whilst the IC did not, in broad terms, object to the contents of this model Rule 14(6) direction, Miss John submitted that paragraph 2 part (iii) was problematic for reasons which were canvassed during the hearing before me.

46. Leaving aside paragraph 2 part (iii) which I regard as wholly unsatisfactory for reasons which will become apparent later in this decision, the model direction strikes me as unobjectionable in that it makes explicit to the parties both the effect of the Rules and what the Practice Direction makes clear, namely that Rule 14(6) directions are capable of variation by the FTT. Whether a direction in this format should be adopted as a matter of course by the FTT is not a matter for me to dictate. It seems to me that the Chamber President of the General Regulatory Chamber is in a better position than I am to come to a view about whether such a model direction would be routinely helpful to the parties involved in proceedings of the type where Rule 14(6) directions are often made.

47. I turn to the remainder of Mr Dunlop's arguments in support of this ground.

48. The CO submitted that the FTT's decision to disclose in an open decision a gist of closed evidence without the CO's agreement was in breach of paragraph 14 of the Practice Note – and incidentally Rule 14(10) - because this undermined the FTT's earlier Rule 14(6) direction. Mr Dunlop submitted that such a decision would inhibit the willingness of future witnesses in closed proceedings to speak candidly if they knew that what they said might be disclosed by the FTT to the public at large against their wishes and despite a Rule 14(6) direction. It was in the public's interest that tribunals should be able to hear frank and candid evidence in closed session. He relied on Ranger v HOLAC [2015] EWHC 45(QB) in support of that proposition. He also sought to distinguish Bank Mellat v HM Treasury (No 1) on the basis that (a) the decision in Bank Mellat did not arise out of a FOIA appeal to the FTT

and (b) paragraphs 68-69 of that decision did not require tribunals to reveal closed evidence or a gist of that evidence whenever that evidence was important to the arguments or the decision-making. Only *"as much as possible"* should be disclosed. Where disclosure would breach a Rule 14(6) direction, Mr Dunlop argued that such disclosure was not or should not be possible.

49. I will address in detail the issue of whether the consent of a party who provided closed evidence is required before the FTT can disclose the same in an open decision later on in these Reasons. It suffices now to say that I firmly reject that submission.

50. The CO's attempt to distinguish Bank Mellat misunderstands the guidance given in paragraphs 68 and 69 of that decision because it divorces that guidance from the Supreme Court's overall approach to closed material procedures in the courts and tribunals of England and Wales. That approach is clearly set out in paragraphs 2 to 6 [see above] and is pithily summarised in paragraph 51 as follows:
*"Having said that, any judge, indeed anybody concerned with the dispensation of justice, must regard the prospect of a closed material procedure, whenever it is mooted and however understandable the reasons it is proposed, with distaste and concern. However such distaste and concern do not dictate the outcome in a case where statute provides for such a procedure; rather they serve to emphasise the care with which the courts must consider the ambit and effect of the statute in question."*
Applying the principles so clearly enunciated in Bank Mellat, I find that the FTT's disclosure of parts of the closed material was necessary in order to explain to the world at large – the ultimate audience for this decision – why it reached the decision it did. It struck a very careful balance in so doing as is apparent from its reasoning. Had it left the closed material to one side in the manner contended for by the CO, the FTT's reasons would have constituted nothing more than assertions pitched at a level of generality which would not have adequately explained why it reached the decision that it did. I observe that reasons of this type would have been highly susceptible to appeal by the IC on grounds of inadequacy.

51. I do not find the decision in Ranger v HOLAC supports the argument propounded by the CO either. That case concerned disclosure of documents sent to the House of Lords Appointments Commission ["HOLAC"] for consideration by it of the appointment of a Dr Ranger as a life peer. Dr Ranger asked for the disclosure as he had been unsuccessful in his application for appointment. Knowles J rejected Dr Ranger's application for disclosure, holding that paragraph 3(b) of Schedule 7 of the Data Protection Act 1998 helped to ensure the confidentiality of information provided to HOLAC about those being considered for appointment to the House of Lords. That provision, when coupled with section 40(1) of FOIA, made it clear that a nominee for a peerage would not be entitled to access his or personal data from

HOLAC. Knowles J commented that transparency as a means of providing reassurance to applicants for a peerage had drawbacks in that it might inhibit frank contributions of information about matters as important as membership of the legislature.

52. The difficulty for the CO is that the two legislative provisions in play in Ranger v HOLAC are absolutely clear in their effect. As Knowles J observed in paragraphs 31 and 32, the public interest question had been decided rather than left to be addressed when a request for disclosure was made pursuant to FOIA. That was simply not the same as in this case where it was for the FTT to determine where the public interest was engaged in a request for the disclosure of information from a public authority. Had Parliament intended that the disputed information and/or information generally emanating from the House of Lords should not be available to the public, FOIA would have contained a provision to that effect. It does not and therein lies the difference. The observations of Knowles J as to the limits of transparency were specific to the situation with which he was concerned and carry, in my view, little weight in the determination of this appeal.

53. Mr Dunlop's argument that witnesses in future proceedings would be inhibited from speaking candidly if they knew that Rule 14(6) directions were capable of variation strikes me as catastrophising. The Practice Note sets out a clear and sensible method of dealing with the evidence of witnesses who give evidence in closed session [see paragraph 13, Practice Note]. The FTT's discussion with the parties about what may be disclosed without undermining the effect of any Rule 14(6) direction will sometimes result in material being disclosed which a witness might have preferred to have remained confidential. I observe that the Practice Note recognises that, in the course of a closed session, new material may have emerged which it was not necessary to withhold and which therefore should be disclosed.

54. The IC submitted that the suggestion it was necessary for everything said in a closed session to be cloaked under Rule 14(6) usurped impermissably the FTT's power to determine the question of what evidence was properly covered by that Rule. Mr Dunlop submitted that, if Rule 14(6) directions were capable of variation in the manner for which the IC contended, Rule 14(10) would have no traction at all. I disagree. The underlying purpose of Rule 14(6) direction in information rights cases is to prevent disclosure of the requested information [or of evidence detailing or explaining that information] at an interlocutory stage since to do so would reveal to the requester that which it is disputed should be disclosed. Rule 14(10), which requires the tribunal to conduct proceedings and record its decision and reasons appropriately so as not to undermine, amongst other matters, the effect of a Rule 14(6) direction, does not imply that it is beyond the FTT's jurisdiction to vary a Rule 14(6) direction. Variation is permissible as long as the **effect** of the Rule 14(6) direction is respected. How the

FTT adheres to Rule 14(10) is a matter for it to determine having regard to the purpose for which any Rule 14(6) direction was made.

55. In summary, I have concluded that Rule 14(6) directions of the type given in this case are capable of being varied by the FTT at a later date. I have expressed no firm view as to whether Rule 14(6) directions should make it plain on their face that variation at a later date is possible.

The Tribunal's Variation of the Rule 14(6) Direction

56. The CO's argument was that, in the circumstances of this case, it was unfair and inappropriate for the FTT to have varied the Rule 14(6) directions. There were no compelling reasons to disappoint the expectations of the CO that the closed material – Ms Labeta's written and oral evidence and the annotated copy of the Guide - would remain confidential and would not be disclosed in the tribunal's open judgment.

57. The CO argued that the closed session was in effect a private hearing since (a) both parties were present to hear all of the closed evidence and (b) the requester chose not to be a party. The duty to do justice and to give reasons were fulfilled by giving both parties a closed judgment referring to the closed evidence and there was thus no need for the open judgment to refer to evidence given in closed session. The FTT should not have retrospectively converted a private hearing into a public hearing. The CO sought to distinguish the cases of Browning v ICO and Bank Mellat v HM Treasury (No 1) on the basis that both were concerned with a wholly different situation, namely where there was a party who had been excluded from part of the proceedings.

58. The CO submitted that the FTT could not vary a Rule 14(6) direction to disclose the information covered by such a direction without the consent of the party providing that information. A gist of closed evidence could be provided **where such a gist was agreed** with the party proffering such evidence. If agreement about the disclosure of closed material was not possible, the party proffering such evidence should be permitted to withdraw that evidence from the FTT at the hearing.

59. Those submissions were vigorously opposed by the IC who submitted that it was for the FTT to determine and rule upon the procedural questions of (i) whether a Rule 14(6) direction should be varied; and/or (ii) whether certain evidence heard orally should have been given in open session and should now be relayed openly; and/or (iii) how the evidence heard orally should be gisted. The IC accepted the importance of proceedings before the FTT being conducted in a way which ensured that information properly characterised as confidential should remain so. However the need to ensure appropriate confidentiality did not necessitate permitting public authorities to dictate exactly what information was withheld from the public either during the

course of the proceedings or in the preparation of the FTT's open decisions. When it ruled on such matters, the FTT balanced the parties' competing submissions and the competing public interests that are at stake.

60. I do not find the CO's argument about the retrospective conversion of what was a private hearing into a public hearing persuasive. First, whilst the FTT had directed that some of Ms Labeta's evidence was to be heard in closed session and had made a Rule 35(2) direction to that effect, this was not the same as deciding that all of the hearing was to be private. Indeed Ms Labeta gave some evidence in an open session, a session which members of the public could have attended had they so wished. The absence of the requester did not mean that, as a matter of principle, the FTT should have treated the entire hearing as private and should have dealt with the closed material by including all of it in a closed judgment. To have done so would, in my opinion, have offended against the principles of open justice so clearly set out in paragraphs 2-6 of Bank Mellat v HM Treasury (No 1). The approach contended for by the CO would have been neither strictly necessary nor in accordance with the need to keep the degree of privacy to an absolute minimum. Moreover that approach ignored the FTT's duty to strike the balance between the competing public interests at play where striking that balance might require the FTT's open judgment to refer to some of the closed material. Finally, this was not a private hearing from which members of the public were wholly excluded. The CO's submission simply overlooked that reality.

61. Examination of what might have happened had the requester been present but excluded from the closed session throws into sharp relief the unacceptable implications of the CO's submission. In those circumstances the FTT would have been obliged to provide a summary or gist of what was said in the closed session to the requester which was both sufficiently informative and as full as the circumstances permitted. There would also have been the need for a judgment dealing with the FTT's conclusions about the closed material which would have to have been available to the requester even if the FTT decided that some closed material had to remain closed. Why should the process be any different and indeed more secretive in the absence of the requester? The CO's submission came perilously close to the sanctioning of a cosy secret hearing process involving only the public authority and the IC and the production of a decision whose reasoning would remain hidden irrespective of the competing public interests in play.

62. I turn now to the most controversial submission made by the CO, namely that, in the presence of a Rule 14(6) direction, the public authority proffering closed material must consent to the terms of any gist of that material provided by the FTT either at a hearing or in its judgment. I have already indicated my firm rejection of this submission and I now give my reasons for doing so.

63. First, the Rules as presently drafted place responsibility with the FTT alone in deciding what is to be disclosed and what is to remain confidential. There is no veto, either express or implied, for the party proffering the closed or confidential material.

64. Second, were the consent of the party proffering the closed or confidential material required before the FTT could communicate either a summary of the same at a hearing or mention that material in the reasons for its decision, this would drive a coach and horses through the FTT's jurisdiction to rule on matters pertaining to requests made of public authorities for information. The FTT would thereby be rendered impotent if the public authority could veto the communication of disputed information by the FTT which was subject to a Rule 14(6) direction.

65. Mr Dunlop's submitted that, as in this case, if there was no agreement between the FTT and the party proffering the closed/confidential material about how the same was to be communicated to a requester or indeed to the world at large in the FTT's open judgment, the party proffering the material in dispute should be allowed to withdraw it. He relied by analogy on the Special Immigration Appeals Commission (Procedure) Rules 2003 which provide, in certain circumstances, that the Secretary of State for the Home Department shall not be required to serve material germane to the matter under appeal before the Commission or to rely on that material [see Rules 38 and rule 38(9) in particular].

66. The argument based on an analogy with the Special Immigration Appeals Commission (Procedure) Rules 2003 does not compare like Rules with like Rules. It strains to import processes specially developed to deal with those foreign nationals thought to pose a grave threat to national security to the wider and somewhat less troubled landscape of information rights decision making. I did not find that particular submission by the CO helpful.

67. In this context, Ms John referred me to APPGER v IC and FCO [2015] UKUT 68 (AAC), a case management decision by a Three Judge Panel of the Upper Tribunal's Administrative Appeals Chamber. That decision was concerned, in part, with an application by the Foreign and Commonwealth Office for a Rule 14 direction in respect of certain confidential material at issue in the appeal. Ms John relied on paragraphs 13 and 14 of the decision and I set those paragraphs out in full as follows:
*"[13] The argument identified a difference between the FCO and the Information Commissioner on the one hand and APPGER on the other as to what directions or information the tribunal could make or give about the closed material once we had seen it. The difference arose in the following possible scenarios, namely after the closed material had been examined on a closed basis (a) the Rule 14 application was*

*refused and (b) the Rule 14 application was granted in whole or in part. As to (b) a similar situation could arise after the closed material was considered at the substantive hearing. The FCO and the Information Commissioner submitted that the party advancing the closed material (here the FCO) has a right to withdraw and could exercise that right in both scenarios if the tribunal indicated that the material should be disclosed or gisted and the FCO objected to that disclosure or the terms of the gist. APPGER invited us to look at the material the FCO wanted us to consider on a closed basis and submitted that once we had done so in both scenarios it was open to us to direct its disclosure or that it should be gisted in a particular way. In support of this submission APPGER relied on Rule 15 and the investigative nature and aspects of the tribunal's jurisdictions and procedure. The FCO and the Information Commissioner argued that a party should at any time be allowed to withdraw evidence it advanced to support its case and the tribunal should and could out it out of its mind if it did so, for example, to observe a duty of confidence to the provider of the information.*

*[14] We expressed a preliminary view that we did not accept the submission of the FCO and the Information Commissioner and that if they invited us to see the closed material the FCO was at risk that we would direct its disclosure or that it be gisted in a way they did not agree with."*

It should be noted that the Upper Tribunal did not hear further argument on whether the Foreign and Commonwealth Office had a right to withdraw the closed material even if the Upper Tribunal was of the view it should be disclosed or gisted. That was because the Upper Tribunal came to the view that the material in question did not bolster the FCO's case and did not assist APPGER. It ruled the FCO should not be permitted to introduce the evidence in closed session because it added nothing to what was in the public domain and the FCO was entitled to withdraw it because (a) it was provided to the FCO in confidence and (b) its disclosure or gisting would not assist APPGER [see paragraphs 24-27].

68. Ms John relied on the passages I have cited in support of her submission that the views of a public authority on the issue of what could or should have been gisted would not be determinative.

She also drew a distinction between (a) this appeal and (b) the matters under consideration in APPGER and the SIAC Rules to which I was referred by Mr Dunlop. In APPGER the closed material was ruled to be irrelevant to the issues in that appeal and thus the FCO was permitted to withdraw it prior to the substantive hearing. The SIAC Rules also provided for a process of evidential consideration prior to the substantive hearing taking place which might lead to relevant material being no longer relied on by the Secretary of State if it was required to be summarised to the other parties. Both those instances were quite different to what was envisaged by the CO in this appeal which was the withdrawal of relevant evidence at the substantive hearing after it had been given where the withdrawing party – the CO - disagreed with the

FTT's gisting of that evidence and with the references made to that evidence in the FTT's open judgment.

69. Upon reflection I have come to the conclusion that Ms John's carefully drawn distinction has merit. Withdrawal of relevant evidence at the substantive hearing by the party proffering that evidence is very different indeed to what occurred in APPGER and to what is provided for by the SIAC Rules, both of which can be fairly described as either an interlocutory decision or as an interlocutory process. Further, withdrawal of relevant albeit closed material by the party proffering it offends against that party's duty to co-operate with the FTT pursuant to Rule 2(4)(b); undermines the overriding objective of the Rules which is to enable the FTT to deal with cases fairly and justly [see Rule 2(1) and Rule 2(4)(a)]; and moreover runs the risk that the FTT will make poorly founded decisions about information held by public authorities which will be vulnerable on appeal. I observe that, had the closed material in this appeal been withdrawn after the hearing as Mr Dunlop suggested should be possible, this might well have resulted in the disclosure of even more of the Guide than actually occurred as the FTT would not have been able to take into account and accept some of the objections to disclosure raised by the CO and its witness.

70. I also remain of the view that to allow a public authority to withdraw closed material in the manner contended for by the CO would profoundly undermine the FTT's jurisdiction in information rights cases.

71. Thus, for all these reasons, I reject the CO's submission that the FTT's variation of the Rule 14(6) direction in the circumstances of this appeal was either unfair, inappropriate or unlawful.

The Tribunal's Unfair Procedure

72. The CO submitted that it was unfair of the FTT to disclose the closed evidence without giving the CO an opportunity to formulate an acceptable gist of what its witness had said. At the end of the oral hearing, the FTT did not ask the CO or Ms Labeta whether they could provide an acceptable gist of her evidence which could be included in an open judgment. Although an embargoed draft of the judgment was provided, the CO's letter dated 22 May 2015 pointed out that the draft judgment referred to closed evidence and asked for all such evidence to be excluded from the open judgment. In the alternative, the CO asked for seven days from receipt of the FTT's reply in which to offer acceptable gists. The FTT did not grant the CO seven days in which to offer acceptable gists and in so doing, the CO submitted it acted unfairly.

73. The IC accepted that, in the ordinary course of events, the FTT would usually ask the parties at the conclusion of the hearing about the extent to which and the manner in which the closed material might be gisted. It was unfortunate that this did not happen in this case. However the

FTT circulated an embargoed draft of its judgment on 5 May 2015 so as to provide the parties with an opportunity to comment on (a) whether the draft complied with Rules 38(2) and 14(10) and (b) whether any inadvertent disclosures had been made. The CO was able to respond in the letter dated 22 May 2015 by making detailed submissions about the closed material which it said should be removed from the open judgment. It chose not to submit gists of the closed evidence in the letter dated 22 May 2015 though it would have had the time to have taken instructions and to have formulated such gists. The FTT was not obliged to take the steps suggested by the CO in the letter dated 22 May 2015. There was nothing which was materially unfair to the CO in the procedure adopted by the FTT in this appeal.

74. It is apparent that, because there were only two parties to the proceedings privy to open and closed material, both the parties and the FTT failed to discuss at the end of closed sessions the content of what might be said publicly at the start of each open session. The FTT made no rulings varying the Rule 14(6) directions and it was only when the FTT produced its draft judgment and Appendices that the FTT's use of the closed material became problematic. All of this is acknowledged by the FTT in paragraphs 10 and 11 of Part 2 of Appendix A. Though paragraph 13 of the Practice Note is written on the basis that there is an excluded party who has not heard the closed evidence, there is no doubt in my mind that, had the FTT followed the guidance given in paragraph 13 and discussed with the parties what summary of the closed hearing could be made publicly available without undermining the Rule 14(6) direction, many of the difficulties engaging me in this appeal would have been avoided. I consider it desirable that the Practice Note should be amended so as to advise tribunals that, when dealing with closed material where there is no excluded party, it would be prudent and indeed necessary to canvass with the parties at the end of each closed session what material could be made publicly available and, if necessary, to rule on the same in default of agreement.

75. It is also clear to me that, following receipt of the letter dated 22 May 2015 from the CO, the FTT accepted some of the submissions made by the CO and thus (a) altered some of what was included in Part 1 of Appendix A and (b) placed some parts of Part 1 of Appendix A into Appendix B.

76. I find that the FTT's refusal to adopt the proposals made by the CO in the letter dated 22 May 2015 was entirely within its jurisdiction as master of its own procedure [see Rule 5(1)]. There was nothing unfair about what happened since the CO was able to make detailed submissions about the content of the draft judgment and Appendices. In the fortnight which elapsed between 5 May 2015 when the FTT's draft was first available and 22 May 2015, the CO had clearly had the time to take detailed instructions on the content of the

draft judgment and could, in my view, have also chosen to offer gists of the closed material in the letter of 22 May 2015.

77. The course adopted by the FTT was in accordance with paragraph 16 of the Practice Note. This states that: "*It may be prudent in complex cases for a draft of the decision to be shared with the public authority/IC in advance to reduce the risk of inadvertent disclosure*". The process set out in paragraph 16 is analogous to the correction of clerical mistakes and accidental slips or omissions provided for by Rule 40. This Rule allows the FTT to correct such errors in a decision by sending the parties notification of the amended decision or by making any necessary amendment to any information published in relation to a decision. Though Rule 40 does not provide explicitly for an exchange between the FTT and the parties about the contents of a draft decision, it circumscribes the types of changes envisaged as a result of that exchange. What the Practice Note and Rule 40 do not contemplate, in my opinion, is a drawn-out process enabling the parties to make further submissions either on matters of law or on the merits of their respective positions. The request by the CO that it might be permitted to offer agreed gists of the closed material after it had seen the FTT's revised decision strayed close to that impermissible process. I find that the approach adopted by the FTT set out in paragraph 19 above was an appropriate response to the concerns raised by the CO which eliminated the need for further exchanges between it and the parties.

78. It thus follows that I reject this ground of appeal.

Conclusions

79. Having rejected each ground of the CO's appeal, it follows that this appeal must fail.

80. The FTT directed that Appendix A of its decision which is in two Parts should not be disclosed pending the outcome of this appeal. Given the reasoning set out above, Appendix A in its entirety – both Part 1 and Part 2 - should now be disclosed. For the avoidance of doubt, Appendix B of the FTT's decision shall remain confidential and shall not be made public.

81. However I am conscious that it would be premature for disclosure of Appendix A to take place until the time for appealing my decision has elapsed. Accordingly I direct that, until the expiry of the time for appealing my decision pursuant to Rule 44(4) of the Tribunal Procedure (Upper Tribunal) Rules 2008 or alternatively the outcome of an application to the Court of Appeal for permission to appeal my decision, Appendix A of the FTT's judgement should not be disclosed.

**Gwynneth Knowles QC**

**Judge of the Upper Tribunal**
**19 May 2017.**

[signed on original as dated]