DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

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

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) dated 27July 2017 under file reference EA/2016/0137 involves no material error on a point of law. The First-tier Tribunal's decision stands.

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

REASONS FOR DECISION

The two central issues in this Upper Tribunal appeal

1. There are essentially two issues raised by this information rights appeal.

2. The first issue is whether the general public interest in transparency, and in particular the public interest in the disclosure of the names of public officials exercising public functions and powers in the public interest, is necessarily a "legitimate interest" at the first stage of the test for the fair processing of personal data for the purpose of paragraph 6 of Schedule 2 to the Data Protection Act 1998.

3. The second issue can be expressed more shortly. It relates to the use to which evidence that is disclosed in the course of open proceedings before the First-tier Tribunal can subsequently be put and the basis for any restrictions on such use.

The background to this appeal

4. Mr Cox is concerned with the development and application of Home Office policy in relation to migration from the Horn of Africa. He made an information request to the Home Office under the Freedom of Information Act 2000 (FOIA) for details of meetings between Home Office civil servants and government officials from relevant countries in that region. In particular, his request asked for (i) the dates of such meetings; (ii) the names of all those present; and (iii) the notes of such meetings.

5. The only meetings that fell within the scope of the FOIA request were with the Government of Eritrea in December 2014. In response to Mr Cox's request, the Home Office referred to a parliamentary answer but otherwise (at that stage at least) refused to disclose any further information. The House of Lords written answer in issue (Vol. 758, WA 260-261, 15 January 2015) recorded that:

> "As part of an ongoing dialogue on migration related issues between the UK and Eritrean governments, a joint delegation of senior Home Office and Foreign Office officials visited Eritrea on 9-11 December. The delegation held a number of discussions with government ministers, officials and non-government actors on topics including the current drivers of irregular migration, ways to mitigate it, and voluntary and enforced returns. The meetings were constructive and identified a number of potential areas for joint co-operation, including on returns. We are now considering how best to use the information gathered during the visit to develop our approach to managing migration from Eritrea."

6. The Home Office then seems to have ignored Mr Cox's request for an internal review. Mr Cox subsequently complained to the Information Commissioner.

The Information Commissioner's decision notice

7. The Information Commissioner's conclusion, as set out in decision notice FS50604484, was as follows:

> "1. The complainant requested information relating to meetings held with the Governments of Eritrea, Somalia, Ethiopia or Egypt to discuss migration.
>
> 2. The Home Office provided some information within the scope of the request but withheld the remainder citing sections 21 (information accessible to applicant by other means), 27(1) (international relations), 36(2)(b)(i) (prejudice to effective conduct of public affairs) and 40(2) (personal information) of the FOIA.
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> 3. The Commissioner has investigated the Home Office's application of sections 27(1) and 40(2) and has concluded that the Home Office was entitled to apply those exemptions to the requested information.
>
> 4. The Commissioner requires no steps to be taken as a result of this decision."

8. Mr Cox then lodged an appeal with the First-tier Tribunal. The precise grounds of his appeal are not material, given the various twists and turns that this appeal has taken as it has wended its way through the appellate system.

The proceedings before the First-tier Tribunal and the Tribunal's decision

9. The three parties to the appeal before the First-tier Tribunal ("the Tribunal") were Mr Cox, the Information Commissioner and the Home Office. Mr Cox was represented at the Tribunal hearing by Ms Alison Pickup of Counsel (and of the Public Law Project). The Information Commissioner was not represented at the Tribunal hearing but had made written submissions in advance, drafted by Mr Rupert Paines of Counsel, which resisted the appeal and in broad terms supported the Home Office's position on each of the main issues for decision by the Tribunal. The Home Office itself was represented at the hearing by Mr David Pievsky of Counsel, instructed by the Government Legal Department.

10. By the time of the Tribunal hearing the main issues for determination were threefold and as follows. First, was information in certain documents within the scope of the original FOIA request (the *scope issue*)? Second, had the Home Office made a sufficient search for information relevant to the Appellant's FOIA request (the *search issue*)? Third, should the names of three civil servants (known as J, L and N in the Tribunal proceedings), who were members of the Home Office delegation to Eritrea in December 2014, be disclosed (the *personal data issue*)?

11. At the Tribunal hearing itself a further issue arose – what became known as the *job description issue*. In short there was a dispute as to how much of the three job descriptions (for J, L and N respectively) that had been put in evidence should be disclosed and to whom and on what basis. Those three job descriptions had been exhibited to an open witness statement by Mr Simon Marsh, a senior civil servant in the Home Office.

12. The Tribunal summarised its decision in the following terms at the head of its reasons:

> *The Tribunal finds*
>
> *(i) that the Home Office did not and does not hold information within the scope of the request other than that which has been disclosed;*
>
> *(ii) that disclosure of the names of the persons identified in the papers as "J", "L" and "N" would breach the First Data Protection Principle ("the FDPP"), hence that the exemption provided by FOIA s.40(2) applies to such information.*
>
> *The Decision Notice was in accordance with the law. The appeal is dismissed. The Tribunal does not require the Home Office to take any action in response to the Request.*

13. On the face of it that summary of the decision only addresses the *search issue* and the *personal data issue*. However, the Tribunal dealt with the *scope issue* and the *job description issue* in the body of its reasons for its decision. There is no ground of appeal in relation to the adequacy of the Tribunal's reasons. Nor has there been any challenge to the Tribunal's findings on the *scope issue* and the *search issue*. It follows that the appeal to the Upper Tribunal has been concerned solely with the substance of the Tribunal's decision as regards the *personal data issue* (Ground 1) and the *job description issue* (Ground 2).

The proceedings before the Upper Tribunal

14. I held an oral hearing of this appeal at Field House in London on 22 March 2018. Ms Pickup and Mr Pievsky appeared for Mr Cox and the Home Office respectively, as they had before the Tribunal. Mr Paines also attended the Upper Tribunal hearing (I make no criticism of the Information Commissioner's non-appearance before the First-tier Tribunal, as she must necessarily pick and choose those cases which merit her attendance at hearings by a legal representative, given the other calls on her limited resources). I am grateful to all counsel for their helpful written and oral submissions.

Ground 1: the personal data issue

The legal framework

15. The "general right of access to information held by public authorities", as section 1 of FOIA is entitled, stipulates that "any person making a request for information to a public authority is entitled … to have that information communicated to him", assuming it is held by that public authority (FOIA, section 1(1)(b)). The general right is subject to the effect of the various exemptions specified in FOIA, which may be absolute or qualified in nature (see section 2). One of the absolute exemptions is section 40 (personal information). Section 40(1) covers personal data of which the FOIA applicant is the data subject, and is immaterial for present purposes. Section 40(2) provides that information to which a request for information relates is also exempt information if "(a) it constitutes personal data which do not fall within subsection (1), and (b) either the first or the second condition" (as spelt out in section 40(3) and (4)) is satisfied.

16. Section 2(3)(f)(ii) of FOIA provides that section 40(2) is an absolute exemption "so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section." Section 40(3)(a)(i) in turn provides that:

> "The first condition is—

> (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—
>
> (i) any of the data protection principles".

17. For completeness section 40(7) of FOIA imports a series of definitions from the Data Protection Act 1998 (DPA).

> "(7) In this section—
> 'the data protection principles' means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
> 'data subject' has the same meaning as in section 1(1) of that Act;
> 'personal data' has the same meaning as in section 1(1) of that Act."

18. The central core of the section 1 DPA definition of "personal data" is that it "means data which relate to a living individual who can be identified— (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller".

19. Paragraph 1(1)(a) of Part I of Schedule 1 to the DPA provides that the first data protection principle is that "personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—(a) at least one of the conditions in Schedule 2 is met". It was common ground that the only Schedule 2 condition in issue in the present appeal was paragraph 6(1) of Schedule 2:

> "The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

20. In *South Lanarkshire Council v Scottish Information Commissioner* [2013] UKSC 55; [2013] 1 WLR 2421 Lady Hale DP observed (at paragraph 18) that the proper interpretation and application of condition 6 required three discrete questions to be answered:

> "(i) Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
> (ii) Is the processing involved necessary for the purposes of those interests?
> (iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?"

21. The case law on these three questions was summarised in terms of a 'roadmap', setting out a series of propositions of law, in *Goldsmith International Business School v Information Commissioner and the Home Office* [2014] UKUT 563 (AAC) (at paragraphs 35-42). Counsel referred to these three questions as "the *Goldsmith* questions" and for convenience I adopt the same usage in this decision.

The factual context for the personal data issue

22. The official delegation to Eritrea comprised five individuals (although the meeting with Eritrean officials also included the British Ambassador, Mr David Ward). The group was led by Mr Rob Jones, Head of the Asylum and Family Policy Unit at the

Home Office together with a senior FCO colleague. The other three Home Office civil servants (J, L and N) were an HEO (J) and two Grade 7s (L and N) respectively.

23. At this juncture a short and doubtless crude explanation of the civil service grading structure is in order. The top five grades (Grades 1-5, Grade 1 being the highest ranking) are known collectively as being at Senior Civil Servant (SCS) level. The other staff grades (Grades 6 and 7, Senior Executive Officer (SEO), Higher Executive Officer (HEO), Executive Officer (EO), along with Administrative Officers and Administrative Assistants) are sometimes referred to generically (and in contradistinction to the SCS) as 'junior' civil servants. The Tribunal reviewed Mr Marsh's evidence as follows:

> "26. Mr. Marsh dealt also with the naming of junior officials. He referred to the familiar precept in *Home Office v Information Commissioner EA/2011/0203* to the effect that the personal data, including names, of junior civil servants (in some cases a misleading term) are generally protected from disclosure unless they occupy a public-facing role. He acknowledged that there was no blanket rule and every case had to be treated on its particular facts. Grade 7 civil servants and HEOs have important managerial and advisory functions. They often have significant responsibilities. Their reports and recommendations may go to ministers. However, where serious policy or resource issues are involved, a Grade 7 official or an HEO, must refer the matter to a Senior Civil Servant (an 'SC') who is accountable to the minister for the action taken. If a report by a Grade 7 civil servant goes to a minister, it does so because it has been vetted and approved by an SC. The SC, not the Grade 7, carries the can. This principle is enshrined in the HO Guidance which states that *'G7s may contribute significantly to decisions taken by senior grades and ministers'".*

The Information Commissioner's decision notice

24. The Information Commissioner's decision notice recognised that consideration of the section 40 exemption was a two-stage process, namely "covering first whether the information in question is personal data and, secondly, whether the disclosure of that personal data would be in breach of any of the data protection principles" (FS50604484 at §45). There has been no dispute in this case but that the three civil servants' names constituted their personal data. Accordingly the main focus of the decision notice was on the second part of that assessment. The Information Commissioner concluded that there were "no convincing arguments as to why the data subjects would hold a reasonable expectation that this information would not be disclosed, or how disclosure would be damaging or distressing to them. This information relates to the data subjects in their professional capacities." That finding pointed towards disclosure. However, notwithstanding this, the Commissioner concluded that disclosure of the names of the three officials concerned would be in breach of the first data protection principle (and so attracted the section 40(2) exemption). In short, this was because the Commissioner did "not believe that disclosure of junior officials' names is necessary in order to satisfy any legitimate public interest" (FS50604484 at §51).

The First-tier Tribunal's decision on the personal data issue

25. The Tribunal set out its reasoning on the *personal data issue* as follows:

> "51. As to the general issue of disclosure of names, a substantial body of evidence on both sides was concerned with the grades and functions of J, L and N. It is unnecessary to repeat here the undisputed evidence as to their grades and the kind of work each performed. *The Home Office v The Information Commissioner* is a useful starting point as to the desirable limits on protection of

personal data in this context but, in each case, much depends on the nature of the legitimate interest (if any) which would be furthered by disclosure.

52. This appeal involves two Grade 7s and an HEO. The important and responsible nature of much of their work has been acknowledged already. The critical limitation, in our view, is that they are not decision makers, however valuable their input to decisions. Rob Jones provided the clearest and most persuasive evidence that every report, advice or recommendation goes to an SC, who is accountable for its subsequent adoption or rejection. He or she takes responsibility if it is submitted as a recommendation to a minister or adopted as departmental policy. Ministers and SCs are policy makers, not Grade 7s. We reject Ms. Pickup's bold contention, unsupported by authority, that there is a legitimate interest "in disclosure of the names of public officials exercising public functions and powers in the public interest". That wide-ranging and indiscriminate formula would strip a high proportion of public servants, including many of quite junior rank, of protection of their personal data.

53. There is a plain public interest in tracing the development of possibly controversial policies from their birth to their implementation, especially in such areas as asylum and immigration, which rouse strong public concerns from very different angles.

54. It may well be that the involvement of a particular junior minister or SC in the development and adoption of a policy is a matter of legitimate public interest because he/she took decisions critical to its implementation. It is far less clear that the public has a legitimate interest in the contributions, great or small of those who researched, advised, recommended particular strategies underlying the policy to those who took the decisions. If a particular HEO produced a particularly perceptive report which was influential in persuading the Home Secretary or a junior minister to change course in relation to migration from country X, should that HEO be exposed by name to the media because his ideas, not his decisions, led to a particular controversial, perhaps unpopular, policy?

55. Mr. Cox's concerns for relations with the countries of the Horn of Africa and related issues of migration and financial aid are undoubtedly a legitimate public interest for the purpose of Condition 6. The question is whether disclosure of the names of civil servants of middle rank who made important contributions to action programmes but were not accountable for policy or significant decisions are necessary to understanding what the Home Office is doing in this region.

56. We were wholly unpersuaded that identifying the involvement of a named Grade 7 in preparing a particular report, drafting advice and then attending an important related meeting at which particular views were expressed or policies discussed had serious value for one sharing Mr. Cox's concerns. Nowhere in his evidence did he demonstrate any such value.

57. We therefore find that Mr. Cox's case falls well short of demonstrating that the names of the Grade 7/HEOs are necessary to the furtherance of legitimate interests in UK policy in relation to the countries in the Horn of Africa and their resident and migrating populations.

58. The ready availability of the job descriptions further strengthens the HO case. Even if there were a legitimate interest in learning that particular actions were performed and significant advice tendered by civil servants of a given

> grade with specific functions and skills, the names of those concerned add nothing to the information supplied. That information is now in the public domain and could have been obtained by Mr. Cox by a FOIA request at any time.
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> 59. His researches designed to identify the three civil servants have no bearing on our decision. The same goes for the evidence that the HO publishes the names of Grade 7s in some circumstances. That is not surprising. All depends on the context and what, if anything, it reveals about the specific work of that individual. In any case, inconsistency in HO policy, if proved, would not affect the rights of individuals under the DPA.
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> 60. This is a case where the question of fair processing of personal data is best approached by first examining whether the specific requirements of condition 6 are met, regardless of whether, in a more general sense, disclosure of names would be fair. They are not. This ground of appeal also fails."

The parties' submissions on the personal data issue

26. Ground 1 of the Appellant's grounds of appeal was that the Tribunal had misdirected itself in law in holding that there was no general legitimate interest in the disclosure of names of public officials exercising public functions and powers in the public interest. In doing so, Ms Pickup submitted, the Tribunal had fallen into error at the first hurdle of the three *Goldsmith* questions. That error has then been carried over into and so also infected the second stage of that process. The Tribunal, she observed, had given two reasons (at §52) for rejecting the proposition that there was a general legitimate interest in the disclosure of names of public officials, as argued for by the Appellant. Neither reason, Ms Pickup submitted, withstood close scrutiny.

27. The first reason given by the Tribunal was the absence of any authority for the proposition maintained. However, no contrary authority had been identified by the Respondents. Moreover, Ms Pickup advanced a number of arguments in support of the proposition based on analogy with FOIA case law, existing Home Office policy and the Information Commissioner's guidance on *Requests for personal data about public authority employees*. More generally, she submitted, there was an "expectation in a democracy founded on the rule of law that public officials carrying out public functions doe no act behind a cloak of secrecy, absent some specific justification for keeping their identity secret" (skeleton argument at §8(f)) .

28. The Tribunal's second reason was that the Appellant's "wide-ranging and indiscriminate formula would strip a high proportion of public servants, including many of quite junior rank, of protection of their personal data" (reasons at §52). Not so, Ms Pickup argued, as the Appellant's proposition arose only where the requester's legitimate interest involved transparency and only where public functions were being exercised. The Tribunal's rationale thus overstated the Appellant's proposition, and disregarded the fact that the individual civil servant's privacy interests were protected at the third stage of the *Goldsmith* questions.

29. Thus, in summary, the Appellant's case was that where a FOIA request was based on the public interest in transparency and the information in question includes the personal data of identifiable public officials exercising public functions or powers in the public interest, then there is a readily identifiable and general legitimate interest in that information, including the names of those civil servants. Ms Pickup argued that the Tribunal's rejection of that proposition meant it fell into error at both the first and (by necessary extension) second stages of the *Goldsmith* questions. She submitted that in the circumstances of this case, where the legitimate interest pursued was that of transparency about the public activities of public officials, the names were

necessary as they were the identifiers which allowed members of the public to connect officials, whose actions and decisions were revealed by information disclosed in response to FOIA requests, with other information associated with those officials in the public domain. The evidence before the Tribunal showed that the Home Office did not adopt a consistent approach to the public identification of its officials. As Ms Pickup put it, it was only with the individuals' names that Mr Cox could "join up the dots".

30. Mr Paines for the Information Commissioner resisted Ground 1 of the appeal and in particular the notion that there was necessarily a general legitimate interest in the disclosure of the three individuals' identities under FOIA. He relied on four main reasons. First, there is no presumption in favour of disclosure under FOIA, not least in personal data cases. Second, the Appellant's position involved an illogical approach to the legislation, such that a general value of transparency under FOIA transmuted into a legitimate interest in disclosure under the DPA, even though the latter statute operates under different principles. Third, the Appellant's arguments were inconsistent with both the legislation and the relevant case law. Fourth, the Appellant's position "proves far too much", not least in effectively creating a legitimate interest in favour of disclosure of all personal data, irrespective of the actual legitimate interest of the requester. Accordingly, Mr Paines argued, the Tribunal was right to reject in the DPA context the Appellant's absolutist arguments based on transparency and accountability.

31. Mr Pievksy, for the Home Office, gratefully adopted the submissions advanced by Mr Paines. He further emphasised that the Tribunal did not in terms reject the proposition that there might be a public interest in the disclosure of the names of civil servants – even in the case of very junior officials. However, that depended on the particular circumstances of any given case. Ms Pickup, he submitted, was seeking to elevate what was ultimately a question of fact into a proposition of law. Furthermore, and in the alternative, if I was not with the Respondents on the substantive points, Mr Pievsky submitted that any error was immaterial, in that the Tribunal found on the evidence that the necessity threshold was not met (i.e. the case fell in any event at the second stage of the *Goldsmith* questions).

The Upper Tribunal's analysis of the personal data issue

32. To the best of my knowledge this appeal is the first occasion on which the Upper Tribunal has had to consider in any depth the issue of the principles governing the disclosure of the names of individual civil servants in response to a request under FOIA. This question involves resolving what may necessarily be a tension between FOIA, with its emphasis on transparency, and the DPA, with its emphasis on individuals' privacy.

33. This is not to suggest that we are faced with a blank sheet of paper. The Information Commissioner, in the exercise of her powers under section 47 of FOIA, has issued detailed and helpful guidance to public authorities in the 33-page publication *Requests for personal data about public authority employees*. Ms Pickup referred to a number of passages in this guidance in support of her submissions. For example, she relied on the statement in paragraph [31] that "There is a general social need for transparency about the policies, decisions and actions of public bodies and this is the purpose of FOIA". Likewise, Ms Pickup prayed in aid the statement in paragraph [65] that it is "also necessary for a public authority to consider what constitutes the legitimate interest in disclosure. If a request concerned the reasons for a particular decision or the development of a policy, there may be a legitimate interest in full transparency, including the names of those officials who contributed to the decision or the policy."

34. Neither Mr Paines nor Mr Pievsky made any particular submissions on the Information Commissioner's guidance. But in any event, on closer scrutiny, the guidance is more nuanced than the above extracts taken in isolation might suggest. Thus paragraph [31] concludes by stating that "It is likely to be easier to demonstrate a need to release personal information about more senior decision makers than about more junior staff." Likewise paragraph [66] goes on to reiterate that "The decision as to whether it would be fair for a public authority to release the name therefore depends on a number of factors and must be decided in the circumstances of the request."

35. So, in a phrase, the answer (at least according to the Information Commissioner's guidance) is that it all depends.

36. The First-tier Tribunal has also had cause to consider the issue, notably in *Home Office v Information Commissioner* (EA/2011/0203) (as recognised by this Tribunal in both its review of Mr Marsh's evidence and in its reasons, where the earlier decision was described as "a useful starting point" (at §51)). In that case the Information Commissioner had directed the Home Office to disclose the names of certain officials, taking the view that the section 40(2) exemption under FOIA did not apply to staff at the HEO grade or higher. The First-tier Tribunal rejected such a blanket rule in that case (at paragraph [26]):

> "There may well be a pressing social need for the public to know the policy and its application (encapsulated, on the facts of this case, in the content of the communications to which B and C put their names). There may also be such a need for the public to know how policy is developed and who, in the higher levels of the civil service, takes responsibility for its development. However, we can see no such need for the public to know the identity of an individual who does no more than communicate basic policy detail or explain its effect at the level of detail appearing in the communications with which we are concerned in this Appeal."

37. So again, in a phrase, the answer (at least according to the First-tier Tribunal in that earlier case) is that it all depends.

38. Ms Pickup expressly sought to disavow any suggestion that her submissions involved the recognition of what amounted to a general presumption in favour of disclosure of officials' names in response to a FOIA request. That recognition on her part was inevitable given the weight of authority. As the Court of Appeal recently confirmed in *Department of Health v Information Commissioner and Lewis* [2017] EWCA Civ 374; [2017] 1 WLR 3330; [2017] AACR 30, "when a qualified exemption is engaged, there is no presumption in favour of disclosure" (at paragraph 46 *per* Sir Terence Etherton MR). By definition, therefore, an absolute exemption either applies on its terms or it does not; presumptions do not come into the equation. Referring to the parallel Scots statute, the Freedom of Information (Scotland) Act 2002, Lord Hope of Craighead averred that "there is no presumption in favour of the release of personal data under the general obligation" in freedom of information legislation (*Common Services Agency v Scottish information Commissioner* [2008] UKHL 47; [2008] 1 WLR 1550 at paragraph 7). As Lord Rodger of Earlsferry further explained in the same decision (at paragraph 68):

> "Where the legislature has thus worked out the way that the requirements of data protection and freedom of information are to be reconciled, the role of the

> courts is just to apply the compromise to be found in the legislation. The 2002 Act gives people, other than the data subject, a right to information in certain circumstances and subject to certain exemptions. Discretion does not enter into it. There is, however, no reason why courts should favour the right to freedom of information over the rights of data subjects."

39. The generality of that statement was not in any way qualified by the fact that the *Common Services Agency* case itself involved the issue of disclosure of personal data held by public authorities about private individuals rather than about civil servants exercising public functions. Faced with those authorities, Ms Pickup framed the Appellant's case in a more sophisticated way, eschewing any reference to a presumption in favour of disclosure of officials' names. Rather, she acknowledged that the starting point must be the first of the *Goldsmith* questions and hence the need to identify a legitimate interest in the disclosure of the information in question. As already noted, her submission was that where the information in issue concerns the identification of public officials exercising public functions or powers in the public interest then there is a readily identifiable and general legitimate interest in that information being disclosed.

40. I agree with both Mr Paines and Mr Pievsky that there are a number of difficulties with the Appellant's submission in the particular context of this appeal.

41. First, whilst Ms Pickup insisted that her submission did not involve any presumption as such, it certainly looks and sounds very much like a presumption. In practice it seems at the very least to short-circuit the process of answering the *Goldsmith* questions by providing a ready-made (if rather circular) answer to the first question. In other words, the information requested (the officials' names) should be in the public domain because there is a legitimate interest in information such as official names being in the public domain. Moreover, starting with the 'proposition' or 'assumption' (if not in express terms a presumption) that there is a legitimate interest in the identification of public officials exercising public functions or powers in the public interest necessarily involves the imposition of an unwarranted gloss on the carefully calibrated statutory balance between DPA and FOIA interests. Indeed, as Mr Paines submitted, the Appellant's case in effect reverses the position as enshrined in the DPA – rather than the personal data of public servants being protected unless there are strong reasons to disclose them, instead such personal data would have to be disclosed unless there are specific reasons why it would be wrong to do so.

42. Second, Ms Pickup laid great store by those authorities which emphasise that there is an assumption underpinning FOIA that there is both an inherent value and a legitimate interest in the disclosure of information by public authorities – see e.g. *BBC v Sugar* [20132] UKSC 4; [2012] 1 WLR 439 at paragraph [76] and *Evans v Information Commissioner* [2015] UKUT 313 (AAC); [2015] AACR 38 at paragraphs [127]-[133]. Mr Paines's response, which seems to me to be sound, is that those values can be taken into account under FOIA, such as when applying the public interest balancing test under section 2 of that Act. However, the balancing process in the application of the *Goldsmith* questions "is different from the balance that has to be applied under, for example, section 2(1)(b) of FOIA" (see *GR-N v Information Commissioner and Nursing and Midwifery Council* [2015] UKUT 449 (AAC) at paragraph 19). Furthermore FOIA stipulates that the section 40(2) exemption applies if disclosure would contravene the data protection principles enshrined in the DPA, so it is the DPA regime which must be applied. There is no obvious reason why the general transparency values underpinning FOIA should automatically create a legitimate interest in disclosure under the DPA.

43. Third, the Appellant's submission is contrary to authority as regards the DPA. The focus of the first stage of the three *Goldsmith* questions is very much on the legitimate interests of the individual requester, and not the more abstract legitimate interests of the public at large. Thus the European Court of Justice in the *Rīgas satiksme* case (Case C-13/16) [2017] 3 C.M.L.R. 39 referred to "the pursuit of a legitimate interest *by the data controller or by the third party or parties to whom the data are disclosed*" (at paragraph [28], emphasis added).

44. The same point is articulated more clearly in *GR-N v Information Commissioner and Nursing and Midwifery Council* [2015] UKUT 449 (AAC). There Upper Tribunal Judge Jacobs held that the first stage of the *Goldsmith* questions "is to consider whether the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data would be disclosed. If not, it is not necessary to proceed to the other stages" (at paragraph 19). That conclusion, of course, was consistent with recital 30 of the EU Data Protection Directive 95/46/EC, which stipulates that "in order to be lawful, the processing of personal data must in addition … be necessary … in the legitimate interests of a natural or legal person, provided that the interests or the rights and freedoms of the data subject are not overriding". More pertinently, Judge Jacobs proceeded to dismiss a submission to that effect that "paragraph 6(1) had to be applied as if 'the party … to whom the data are disclosed' was any member of the public" (at paragraph 20). Rather, Judge Jacobs concluded his analysis on this point with the observation (at paragraph 24) that:

> "The focus must be on the data subject and the protection of that person's privacy, as that is the policy of the DPA. In those circumstances, it seems preferable to take account of the FOIA language at the second and third stages of applying paragraph 6(1) rather than distorting the analysis of the interests of the person making the request."

45. Also relevant in the present context is Judge Jacobs's warning in *GR-N v Information Commissioner and Nursing and Midwifery Council* (at paragraph 30) against over-generalised propositions: "is impossible to apply paragraph 6(1) without having regard to the identity of the applicant, the interest pursued by the request, and the extent to which information is already potentially available to the public."

46. Fourth, it follows from the above that the legitimate interests of an individual requester may, or may not, involve the disclosure of officials' names – but that is a context-specific and fact-sensitive question. Such a legitimate interest cannot be automatically assumed. To revert to a well-worn phrase, it all depends. The working out of the balance between the requester's legitimate interests and the officials' privacy rights is struck by the *Goldsmith* questions. As Mr Paines submitted, there cannot be, simply by virtue of the nature of an individual's employer, an additional legitimate interest that trumps that individual's fundamental DPA rights. In the present case the Tribunal's reasoning was not confined to the discussion at §52, as is evident from the passage cited at paragraph 25 above. Indeed, I do not accept Ms Pickup's submission that the Tribunal elided the three *Goldsmith* questions (although arguably the Information Commissioner's original decision notice did do just that – see paragraph 24 above). On the contrary, the Tribunal rejected the Appellant's absolute proposition but accepted that there were cases where there was a legitimate interest in the disclosure of the identities of particular officials (at §34). In a detailed inquiry it considered the particular legitimate interests being pursued in the present case (e.g. at §53 ["a plain public interest in tracing the development of possibly controversial polices from their birth to their implementation"] and at §55 ["Mr Cox's concerns for

relations with the countries of the Horn of Africa and related issues of migration and financial aid are undoubtedly a legitimate public interest"]). It then concluded that disclosure was not necessary for those purposes (at §55-§60). In doing so the Tribunal examined the particular roles and functions of the three individuals concerned (at §52) against the background of its earlier finding of fact, on Mr Marsh's evidence (at §26), that the SCS and not the Grade 7 (let alone the HEO) "carries the can" in terms of responsibility and accountability.

47. Finally, and for the avoidance of any doubt, I should also mention that I do not consider that the Appellant's case is buttressed to any degree by any other provisions of the EU Directive. True, recital 72 of the European Directive explicitly allows for "the principle of public access to official documents to be taken into account when implementing the principles set out in this Directive". However, I do not read that recital as suggesting in any way that the principles of transparency underpinning FOIA may *necessarily* triumph over privacy rights. Rather, it is a matter for Parliament to reconcile the requirements of data protection and freedom of information, and then for the courts and tribunals to apply that statutory solution, as Lord Rodger emphasised in the *Common Services Agency* case.

Ground 2: the job descriptions issue

The legal framework

48. The statutory provisions governing the protection of personal data under the DPA and the related absolute exemption under FOIA have been set out above in relation to the first ground of appeal. They need not be rehearsed here. However, it is also important to have regard to the Tribunal's procedural rules. Rule 14 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976) stipulates as follows (omitting rules 14(2)-(5), provisions which are concerned with disclosure that would be likely to cause "serious harm" to a person, and which are not material in the present context):

> **"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.
> …
>
> (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)."

The Information Commissioner's decision notice

49. There was nothing in the Information Commissioner's decision notice about the *job descriptions issue*. That was for the very simple reason that the *job descriptions issue* was not a live matter for determination at that stage.

So how did the job descriptions issue arise?

50. In fact the *job descriptions issue* arose very late in the day and only really emerged fully in the course of the Tribunal hearing itself. This may possibly account for the curious procedural course that this matter has taken.

51. On 11 May 2017 the Home Office disclosed to Mr Cox for the first time the grades of the three officials concerned (J, L and N) and the fact that they were all policy officials in the Home Office's International and Immigration Policy Group.

52. On 24 May 2017 Mr Marsh swore his witness statement. In the section in that witness statement dealing with the *personal data issue* (i.e. the names of the three junior officials), he explained that two of the three officials concerned were Grade 7s (two grades lower than senior civil servant status) while the third was a Higher Executive Officer (or HEO), which is a further two grades lower than a Grade 7. He added that "the three officials' job descriptions and an indication of their role on the visit to Eritrea are exhibited at SM6" (witness statement at §21).

53. The first job description was for the HEO, whose job title was given as "Country Policy & Research Manager", followed by a job description comprising 10 bullet points summarising the various duties involved in that role.

54. The two Grade 7 job descriptions were more rudimentary; neither included a job title and in each case the 'job description' itself consisted of only a handful of bullet points which, at least in the case of the second Grade 7 post, were clearly not meant to be exhaustive. No H.R. professional would regard these latter two documents as much more than sketchy first drafts of a job description properly so called.

55. All three job descriptions included a final sentence, sourced from each of the three Home Office staff members concerned, which described the purpose of their participation in the visit to Eritrea – in two cases by way of a direct quotation from the individual civil servant in question.

56. On 30 May 2017 the bundles were served. It was only at this stage that Mr Cox saw for the first time the exhibits to Mr Marsh's witness statement, including the job descriptions at SM6. Mr Cox's understanding of the role of the three officials concerned became significantly clearer at that late stage. In particular, it was now apparent that J and L were the authors of certain of the documents which had eventually been released by the Home Office to Mr Cox in response to his FOIA request.

57. The Tribunal hearing then took place a month or so later on 4 July 2017. The hearing included some discussion of the three job descriptions in the context of the *personal data issue*. When I questioned them about the issue, both Ms Pickup and Mr Pievsky were understandably a little hazy in their recall as to the precise details of the relevant exchanges in the course of the First-tier Tribunal hearing. However, what seems reasonably clear is that the Tribunal invited the parties to file short written submissions after the hearing on the question as to whether the job descriptions were disclosable under FOIA in any event. Unfortunately there is no formal record on

the appeal file of the Tribunal's direction inviting the parties to make submissions on the *job description issue*.

58. I would surmise that the Tribunal's oral direction for further submissions set a time limit of 7 days, as on 11 July 2017 Ms Pickup and Mr Pievsky each submitted by e-mail their post-hearing supplementary submissions to the Tribunal. In hers, and having set out the background, Ms Pickup emphasised the open justice principle, notably the starting point being that the job descriptions (at pp.68-70 of the bundle), having been referred to in open court during a public hearing, were now public documents and were subject to no restrictions on their use (subject to any directions under rule 14). In the alternative, and without prejudice to the Appellant's primary case on the *personal data issue*, Ms Pickup argued that the job descriptions should be disclosed to Mr Cox under FOIA. She concluded by asking the Tribunal (a) to clarify whether there was any restriction on the use to which Mr Cox could make of the documents or information referred to by any of the witnesses; and (b) whether at a minimum the Home Office should be required to disclose the job descriptions under FOIA.

59. Mr Pievsky's supplementary note, while emphasising that the job descriptions were not within the scope of the original FOIA request, acknowledged that the generic information about the Grade 7 and HEO job descriptions would not in fact have attracted any relevant exemption, had indeed an appropriate FOIA request been made. On that basis he explained that the Home Office was content to treat Ms Pickup as having made a FOIA request for that generic information. However, the Home Office contended that the final sentence in each document was not disclosable under FOIA. This was because it was said to be information acquired from each of the particular individuals involved and could be used to identify their names (and so would be exempt under section 40(2)). Mr Pievsky astutely observed that, in any event, "there is no jurisdiction on a FOIA appeal to order the Home Office to disclose any disputed parts of pp.68-70, because there is no decision notice from the IC dealing with a request for such information (c.f. sections 50(4)(a) and 58 of FOIA)."

The First-tier Tribunal's decision on the job descriptions issue

60. In its reasons for its decision the Tribunal dealt with the job description issue as follows:

> "50. As already indicated, the HO provided Mr. Cox with what were broadly job descriptions relating to the three shortly before the hearing, though for the purposes of conducting this appeal, not under FOIA. Ms. Pickup raised the issue whether they should not be disclosed under FOIA, that is, to the general public. The Tribunal invited written submissions on the question. Ms. Pickup submitted that they should. They had been referred to at an open hearing and the starting point was that they were now public documents and anybody was now entitled to make use of them as they chose. *R. (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [2013] Q.B. 618. This was subject to the Tribunal's power to prohibit disclosure pursuant to Rule 14(1) of the 2009 Rules, though such power must be exercised with due regard to the principles of open justice and fairness. Mr. Pievsky, for the HO, argued that these documents were not within the scope of the request but stated that the HO did not object to disclosing them (subject to redaction of personal data) and was willing to treat an application for disclosure from Mr. Cox (which has been made) as a FOIA request with which the HO would comply. He argued, however, that the last sentence in each document contained the personal data of the individual concerned and that they should be redacted accordingly, although referred to in the evidence. The Tribunal, following

> subsequent discussion by telephone conference, decided to direct that the redacted passages should not be disclosed because disclosure was unnecessary to any legitimate purpose. Subject to that direction, the job descriptions should be disclosed under FOIA."

61. This reasoning was repeated and elaborated upon in the Tribunal's ruling refusing permission to appeal. In particular, the ruling stated:

> "14. As to ground (ii), the redacted information is not 'publicly available'. It is presently available only to Mr. Cox, who seeks to make it 'publicly available'.
>
> 15. The Tribunal concluded, on a balance of probabilities, that the redacted material constituted the personal data of the officials whose job descriptions were provided, by relating those job descriptions to the visit to Eritrea. That would be sufficient for colleagues and others to identify them.
>
> 16. Giving judgment in *R. (on the application of Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, [2013] Q.B. 618. Toulson L.J. stated (§85) that the 'default position' within the 'open justice' principle was that documents will enter the public domain, if, they are referred to at the hearing. However, he added that every court or tribunal must evaluate the strength of the interest in disclosure on the one hand and of the objections to disclosure on the other. So, whether or not the redacted passages contained personal data, the Tribunal was entitled to consider the circumstances in which this information was first disclosed to Mr. Cox and the intrinsic value of the redacted information to the general public.
>
> 17. It was, in our opinion, information of little, if any public interest. It was not information within the scope of Mr. Cox's request, hence not information which he could require to be disclosed under FOIA. It was expressly disclosed to him on a personal basis to enable him to pursue his case more effectively. In post – hearing submissions, the Home Office decided to release the job descriptions, but not the redacted material, to the public. It was under no obligation to disclose either. If Mr. Cox, by reference to this voluntarily but conditionally disclosed material, can, without more, expose it to the general public, it is hard to see what a public authority can gain by purporting to limit the use of such information, whilst assisting the requester to mount his case. It will simply discontinue such a practice.
>
> 18. The Tribunal is not bound to order the removal of these redactions, hence disclosure to the world at large, simply because the documents were referred to at the hearing. Contrary to §15 of the application, the matters cited above are ample justification for maintaining the redactions made by the Home Office, whether or not the redacted information was personal data. Disclosure would fulfil no legitimate purpose."

The parties' submissions on the job descriptions issue

62. The parties' respective submissions on Ground 2 of the appeal (the *job descriptions issue*) can be readily summarised. Ms Pickup's primary submission was that the principle of open justice applied just as much to tribunal proceedings as to court proceedings. Fundamental to that principle was the understanding that the Appellant was entitled to make use of evidence and exhibits referred to during an open public hearing, whether or not such material had been disclosed under FOIA. In short, the Tribunal had approached the *job descriptions issue* from entirely the wrong

standpoint – it had looked for a justification for disclosure rather than searched for a justification for a restriction on the further use of material referred to in open court.

63. Mr Paines, for the Commissioner, contended that the Appellant had not been able to identify any relevant factor which the Tribunal had neglected to take into account when reaching its decision on the *job descriptions issue* – this ground of appeal, he therefore argued, was essentially no more than an attack on the Tribunal's exercise of judgment on the merits.

64. Mr Pievsky contended it had been an entirely reasonable and pragmatic approach to deal with the *job descriptions issue* within a FOIA framework. Agreeing with Mr Paines, he further submitted that the Tribunal was not only entitled to reach the conclusion it came to on the job description redactions but was right to do so, giving its previous findings on the *personal data issue*.

The Upper Tribunal's analysis of the job descriptions issue

65. I agree with Ms Pickup's primary submission that the starting point for this analysis has to be the principle of open justice. The importance of the principle of open justice has been emphasised many times in the courts (see e.g. *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2) (Guardian News and Media Ltd intervening)* [2010] EWCA Civ 65; [2011] QB 218, at paragraphs 38-39, *per* Lord Judge CJ and *Al Rawi v Security Service* [2011] UKSC 34; [2012] 1 AC 531, at paragraphs 10-14, *per* Lord Dyson). As Maurice Kay LJ stated, giving the judgment of the Court of Appeal in *Browning v Information Commissioner and DBIS* [2014] EWCA 1050 "the basic principles are incontrovertible" (at paragraph 29) and apply to tribunals as much as to courts (see *R (Guardian News & Media Ltd) v Westminster Magistrates' Court* [2012] EWCA Civ 420; [2013] QB 618, at paragraph 70, *per* Toulson LJ). Moreover, "the principle of open justice encompasses the entitlement of the media to impart and the public to receive information in accordance with article 10 of the European Convention of Human Rights. Each element of the media must be free to decide for itself what to report" (*R (Mohamed)*, at paragraph 40, *per* Lord Judge CJ).

66. Inevitably much of the recent case law of the superior courts on open justice, whether in the narrow arena of information rights or in other contexts, has turned on issues relating to closed hearings and closed material (as in cases such as e.g. *R (Mohamed)*, *Al Rawi* and *Browning*). However, the specific materials in issue in the present case – namely the three job descriptions – were part of the open evidence adduced by the Home Office in support of its case. The question of the use to which such open evidence could properly be put by newspaper media was the central issue in *R (Guardian News & Media Ltd)*. Giving the leading judgment in the Court of Appeal, Toulson LJ considered the inter-relationship between the common law principle of open justice and the absolute exemption for court records under FOIA (see sections 2(3)(c) and 32), an exemption which covers "any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter" (section 32(1)(b)). Toulson LJ held as follows:

> "74. It would be quite wrong in my judgment to infer from the exclusion of court documents from the Freedom of Information Act that Parliament thereby intended to preclude the court from permitting a non-party to have access to such documents if the court considered such access to be proper under the open justice principle. The Administrative Court's observation that no good reason had been shown why the checks and balances contained in the Act should be overridden by the common law was in my respectful view to approach the matter from the wrong direction. The question, rather, was whether the Act

> demonstrated unequivocally an intention to preclude the courts from determining in a particular case how the open justice principle should be applied."

67. In *R (Guardian News & Media Ltd)* Toulson J concluded as follows:

> "85. In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong. However, there may be countervailing reasons. In company with the US Court of Appeals, 2nd Circuit, and the Constitutional Court of South Africa, I do not think that it is sensible or practical to look for a standard formula for determining how strong the grounds of opposition need to be in order to outweigh the merits of the application. The court has to carry out a proportionality exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others.

68. The fact-specific nature of the required assessment was also stressed by Charles J in *Adams v Secretary of State for Work and Pensions and Green (CSM)* [2017] UKUT 9 (AAC); [2017] AACR 28 (at paragraph 66):

> "… when the court is determining an open justice issue by weighing competing Convention rights it must have regard to the fundamental common law principle of open justice and the weight given to it, and thus the public interest reasons for it, by the courts in England and Wales. The exercise is fact and circumstance sensitive and, on this approach, a departure from open justice must be justified."

69. It accordingly followed from the principle of open justice that the default position was that as Mr Marsh's witness statement and exhibits had been referred to in the course of an open hearing, then in principle Mr Cox was perfectly entitled to make such use as he saw fit of that material thereafter. However, as Ms Pickup rightly recognised, the principle of open justice was subject to whatever direction the Tribunal might make under rule 14, either of its own volition or on application by a party.

70. I was puzzled as to why there had been no rule 14 application in this case in relation to the final personalised sentences in each of the job descriptions. In the course of the Upper Tribunal hearing I therefore pressed both Respondents on the question of the procedural route adopted by the Tribunal in this instance. Mr Paines accepted the Tribunal had adopted what he rather coyly described as an "informal process" to resolve the matter. Mr Pievsky acknowledged that with hindsight the Tribunal could have acted under rule 14. I would go further than either counsel. The Tribunal apparently slipped directly into FOIA appellate mode without more ado. But treating the *job descriptions issue* as a 'deemed' FOIA request, as the Tribunal did, was, jurisdictionally at least, a non-starter. The Tribunal's approach to the *job descriptions issue* was thus fundamentally flawed in jurisdictional and/or procedural terms.

71. It is trite law that the Tribunal is a creature of statute. In other words, it can only do what it is empowered to do by legislation. The parties cannot agree between or amongst themselves to confer on the Tribunal a jurisdiction which it does not have (see *Watt (formerly Carter) v Ahsan* [2007] UKHL 51; [2008] AC 696 at [30] *per* Lord Hoffmann). In the arena of information rights, the basis of the First-tier Tribunal's

jurisdiction is the complainant's right of appeal against the Information Commissioner's decision notice (section 57 of FOIA). As already noted, the *job descriptions issue* was not before the Information Commissioner and so, understandably, did not form part of the Appellant's grounds of appeal to the Tribunal. Furthermore, the Tribunal's powers in determining an appeal are set out in section 58 of FOIA. Obviously, from a procedural perspective, the Tribunal is under an obligation to give effect to the overriding objective when exercising any power or interpreting any rule (rule 2(3)). True, those imperatives include both "avoiding unnecessary formality and seeking flexibility in the proceedings" and "avoiding delay, so far as compatible with proper consideration of the issues" (rule 2(2)((b) and (e)). But the Tribunal's powers under section 58 of FOIA do not extend to offering the parties some form of bespoke judicial arbitration with regard to 'deemed' FOIA requests that have been not been through the Information Commissioner's statutory investigation procedure.

72. I also recognise that the overriding objective and the principles of active case management may well require a tribunal during a hearing to make directions 'on the hoof' e.g. for the parties to file short post-hearing written submissions on a narrowly defined issue or issues. Also, it will not always be either appropriate or feasible for such directions to be committed to writing and then formally issued by the tribunal administration. However, the present case shows in two ways what may go awry in such a situation. First, the post-hearing supplementary submissions by Ms Pickup and Mr Pievsky demonstrated that they did not share quite the same understanding of what they were being asked to do (prompting a further e-mail to the Tribunal office in reply from Mr Pievsky's instructing solicitor). Second, and as already noted, the Information Commissioner was not represented at the hearing. She obviously remained very much a party to the proceedings, but there is no indication on file that she was alerted to the Tribunal's request (or invitation) for such a post-hearing note on the *job descriptions issue*. I simply observe that, had she been asked, she might well have had something to say about the jurisdictional and procedural issues involved.

73. What then was the consequence of the Tribunal's approach? The Tribunal certainly started from the wrong place, treating the job descriptions issue as a 'deemed' FOIA request. But did the Tribunal end up in the wrong place? In my view it did not. The Tribunal plainly had regard to the principle of open justice, referring in both the reasons for its decision and its refusal of permission ruling to Toulson LJ's dicta in *R (Guardian News & Media Ltd)*. As Mr Paines submitted, it had regard to a number of relevant considerations in its deliberations. Most importantly, it found that the three personalised sentences at the end of each of the job descriptions amounted to personal data (a finding which is not now in dispute) from which the three individuals concerned could be identified. Had the Tribunal approached the issue from the right starting point, I am entirely satisfied that it would have made a rule 14 ruling prohibiting the onward disclosure of each of those three personalised sentences. The Tribunal was not just entitled to, but was in effect bound to, make an order prohibiting the disclosure or publication of those three passages in the job descriptions. This was because they amounted to "any matter likely to lead members of the public to identify any person whom the Tribunal considers should not be identified" within rule 14(1)(b). Any failure to make such a rule 14 direction would have led to the disclosure of the precise information that the Tribunal had decided, in determining the *personal data issue*, should not be disclosed.

74. Where does this then leave the Tribunal's decision in terms of disposal? Having dismissed the appeal in respect of Ground 1, I could find that the Tribunal has erred in law, allow the appeal on Ground 2, set aside the Tribunal's decision and in terms

re-make the decision to the same effect under rule 14, rather than under section 40(2) of FOIA. Another option would be to find that the Tribunal has erred in law, allow the appeal on Ground 2, but decline as a matter of discretion to set aside its decision. However, in the present circumstances either of those avenues seems to me to be an empty exercise. I prefer to conclude that although the Tribunal erred in law with regard to Ground 2, it did not *materially* err in law as its error did not affect the outcome.

Conclusion

75. I conclude that the decision of the First-tier Tribunal does not involve any material error of law. I therefore dismiss the appeal. The decision of the First-tier Tribunal stands (Tribunals, Courts and Enforcement Act 2007, section 11).

Signed on the original
on 06 April 2018

Nicholas Wikeley
Judge of the Upper Tribunal