Martin-Clark v (1) ICO; (2) HfH
[2023] UKUT 245 (AAC)

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal No. UA-2021-000415-GIA

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

Between:

Mr Nick Martin-Clark

Appellant

- v –

The Information Commissioner

First Respondent

Homes for Haringey

Second Respondent

Before: Upper Tribunal Judge Church
At Field House, London on 14 March 2023

Representation:

Appellant:	Mr Sam Fowles of counsel, instructed by Bark & Co. Solicitors Limited
First Respondent:	Mr Peter Lockley of counsel (written submissions only)
Second Respondent:	Mr Julian Blake of counsel, instructed by Trowers & Hamlins LLP

DECISION

The decision of the Upper Tribunal is to allow the appeal.
The decision of the First-tier Tribunal made on 30 June 2021 (and promulgated on 2 July 2021) under number EA/2019/0066 was made in error of law.
Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set that decision aside and remit the case to be reconsidered by the First-tier Tribunal in accordance with the following directions.

Directions

1. This case is remitted to the First-tier Tribunal for reconsideration.
2. If any party has any further evidence to put before the First-tier Tribunal this should be sent to Her Majesty's Courts and Tribunals Service within one month of the date on which this decision is issued.
3. The First-tier Tribunal hearing the remitted appeal is not bound in any way by the decision of the previous First-tier Tribunal. Depending on the findings of

fact it makes it may reach the same or a different outcome from that made on 30 June 2021.

4. A copy of this decision shall be added to the bundle to be placed before the First-tier Tribunal hearing the remitted appeal.
5. These Directions may be supplemented by later directions by a tribunal judge, registrar or caseworker in the General Regulatory Chamber of the First-tier Tribunal.

REASONS FOR DECISION

What this case is about

1. This case is about the Freedom of Information Act 2000 (**"FOIA"**), which provides for a general right to disclosure of information held by public authorities, subject to certain exemptions.
2. It raises the legal issue of whether, when faced with a document held by a public authority that contains substantial quantities of information which satisfy the criteria for one or more exemptions under FOIA and which *may* contain information which does not qualify for any exemption, but which is considered likely to be 'peripheral' only, the Information Commissioner (or the First-tier Tribunal standing in his shoes) is entitled to:
   (a) decline to carry out a granular analysis of the document to assess what information is exempt and what is not exempt, if such an exercise would not be 'proportionate'; and
   (b) treat the entire document as exempt.
3. In this decision I also discuss the discretion under section 50(4) FOIA not to specify any steps to be taken by a public authority even where that public authority has failed to comply with its duties under section 1(1) FOIA, and what amounts to 'adequacy' when it comes to a tribunal's reasons in an information rights context.

Factual background

4. Homes for Haringey (**"HfH"**) was set up by Haringey Council (the **"Council"**) in 2006 to manage its housing stock comprising approximately 21,000 leasehold properties, some of which were rented, and others were held on long leases. HfH set up a 'resident scrutiny panel' (the **"RSP"**) of volunteers who were residents in Haringey Council owned properties. The RSP was a borough-wide resident-led body whose function was to hold the Council and HfH to account through scrutiny and challenge.
5. HLA was established in 2000 to provide representation to 4,500 leaseholders of Haringey Council. HLA has from time to time been 'recognised' by HfH as a consultative body for leaseholders, a status that entitles it to a small annual grant, limited secretarial / photocopying support and free accommodation for meetings. The Appellant is a committee member of the Haringey Leaseholders' Association (**"HLA"**).
6. HLA was 'derecognised' by HfH in December 2010 for alleged breaches of its code of conduct and its perceived inability to deliver objectives.
7. A decision was made by HfH in September 2012 to recognise HLA once again.

8. In May 2014 HfH asked the RSP to conduct an audit of HLA in respect of certain allegations that had been made about HLA's practices, and to produce a report of its findings (the **"Report"**). The audit was intended, among other things, to inform consideration of HLA's application for funding and recognition.
9. The RSP carried out a series of fact-finding interviews. The information obtained during these interviews formed the building blocks of the Report. The audit was concluded in September 2014 but the Report was not published. The RSP did publish a summary report (the **"Summary Report"**), which was said to summarise the "key findings" in the Report. The Summary Report included no recommendations other than that "the Board should consider their findings and take appropriate action".
10. On 20 October 2014 HLA was again derecognised by HfH, this time on the basis of findings that HLA had not properly account for the grant paid to it, and had not demonstrated that it represented a sufficient number of leaseholders to be regarded as representative of all leaseholders.
11. On 5 August 2016 HfH published a statement on its website to the effect that it was now satisfied that HLA had properly accounted for its grant. HLA achieved recognition by HfH again on 30 January 2018.

The requests

12. By an email sent on 26 July 2017 the Appellant made two requests:

    > "[1] We note that you have said you believe the rest of the report (and the evidence on which it was based) is exempt under section 30 and /or 40 of the FOI Act. Can we ask for this to be reviewed? Without going into details at this stage could we ask that some compromise, for instance the redaction of names, be considered? The HLA has emphatically never sought to intimidate anyone. Of course there have been some difficult situations all round.
    >
    > …
    >
    > [2] I would also like to ask you to give special consideration to releasing the documents and notes relating to the interviews I took part in myself (as well as those of other committee members such as [name redacted] and [name redacted] as I think these are not subject to the same confidentiality concerns."

13. The Appellant later (on 16 February 2018) provided clarifications of the scope of his requests in response to a request from the First Respondent (see Appeal Bundle 2, Tab F page 1699):

    > "Thank you for your emails of 31st January and 13th February. As you know I have taken some time to consider what you wrote and to discuss it with colleagues on the committee of our Association. In terms of what you require in the short term I believe there is little to add to the scope of the case. Request 2 is in fact a part of Request 1, just one that might be slightly easier/less contentious to deal with. This is because when we refer to 'the evidence on which [the report] was based' we mean the documents and notes of interviews."

14. HfH initially responded that it didn't hold the information requested. On 20 November 2017 the Appellant complained to the Information Commissioner, who commenced an investigation.

15. HfH wrote to the Appellant on 25 October 2018 indicating that it did, after all, hold information within the scope of his request, but maintained that most of the information requested was exempt under section 41 FOIA and was otherwise personal information, exempt under section 40 FOIA.
16. On 5 February 2019 the Information Commissioner issued a Decision Notice which upheld HfH's decision that the information identified in both requests was exempt information under sections 40 and/or 41 FOIA.

Procedural background

17. The Appellant was unhappy with the Information Commissioner's Decision Notice and appealed to the First-tier Tribunal. A panel of the First-tier Tribunal (the **"Tribunal"**) convened on 12 September 2019 for an oral hearing, but the hearing was adjourned because the Tribunal required submissions from HfH. A two-day oral hearing of the appeal took place on 7-8 June 2021, and the Tribunal issued its decision on 2 July 2021. Its decision was to confirm the Information Commissioner's Decision Notice (the **"FtT Decision"**).
18. The Appellant applied to the First-tier Tribunal for permission to appeal the FtT Decision, but his application was refused by a judge of the First-tier Tribunal. The Appellant then applied to the Upper Tribunal for permission. The matter came before me and I granted permission limited to Grounds 2, 3, 4 and 7 of his grounds of appeal on the papers.
19. The Appellant was unhappy with my limited grant of permission, so he exercised his right of oral renewal. His application was listed before Judge Jacobs, who granted limited permission in respect of Ground 1, as well as the grounds on which I had already granted permission.
20. The appeal was listed for a one-day oral hearing at Field House, London on 14 March 2023. The Appellant was represented by Mr Sam Fowles, of counsel. Homes for Haringey was represented by Mr Julian Blake, of counsel. I am grateful to Mr Blake and Mr Fowles for their very helpful oral submissions and for their co-operative approach to the hearing, as well as to Mr Peter Lockley of counsel, who provided a clear and succinct skeleton argument on behalf of the First Respondent but did not appear before me.

Grounds of appeal

21. The grounds of appeal for which permission was granted were:

    Ground 1:

22. The Appellant was denied a fair hearing because the Homes for Haringey by the late disclosure of a relatively large quantity of documents on the day before the two-day hearing before the First-tier Tribunal, denying him and his counsel an adequate opportunity to consider and respond to that material, resulting in material unfairness.

    Ground 2:

23. The First-tier Tribunal erred in its approach to the application of section 41 FOIA by:

    (i) applying a blanket approach to the Report rather than considering the nature of each different class of information and the circumstances of the communication of each different class of information comprising the withheld information; and

(ii) failing to consider the nature and extent of the guarantee of confidence given to those who participated in the audit, contrary to the approach set out in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at §48-49; and

(iii) failing to consider the extent to which the withheld information was already in the public domain.

Ground 3:

24. The First-tier Tribunal took an unlawful approach to the withheld information, deciding that certain information in the withheld information which did not fall within any exemption should not be disclosed, contrary to section 1(1) FOIA.

Ground 4:

25. The First-tier Tribunal erred in its approach to the issue of whether the public interest in exposing iniquity justified disclosure, failing to apply the proper test set out in *AG v Guardian Newspapers* [1990] 1 AC 109 at §283.

Ground 7:

26. The First-tier Tribunal's conclusion on the scope of the Appellant's request was outside the range of reasonable conclusions open to it.

The positions of the parties

The Appellant

27. The Appellant continued to pursue each of the grounds of appeal for which he had been granted permission. Mr Fowles maintained that the Tribunal erred in law because, while it identified the test it had to apply in determining whether the exemption under section 41 FOIA was available, it failed properly to apply it in its decision making. He also argued that the Tribunal managed its procedure in a way which was unfair. He invited me to allow the appeal and to set aside the FtT Decision as being materially in error of law.

The Information Commissioner (First Respondent)

28. While the Information Commissioner did not take an active role in the appeal before the Upper Tribunal, Mr Peter Lockley of counsel served a skeleton argument on his behalf to assist the Upper Tribunal.
29. Mr Lockley explained that the Information Commissioner continued to maintain the position he took before the First-tier Tribunal on the issues raised by Grounds 2(i) and 3, arguing that the First-tier Tribunal did not err in law in the ways argued by the Appellant.
30. In summary, he argued that the interviews were conducted under condition of confidentiality. He submitted that not only the record of the interviews themselves, but also all the information contained in the Report that represents or records the process of conducting interviews, recording interviews, summarising the evidence gathered and analysing that evidence, is subject to the same obligation of confidentiality as the "raw" interview information. This is because it is both derived from, and reveals the substance of, the raw information. Mr Lockley argued that the approach to section 41 FOIA suggested by the Appellant would deprive the doctrine of confidentiality of much of its utility in practice, as the confidentiality of information could be side-stepped by requesting "derived" information that conveyed the same or similar substance.
31. Mr Lockley said that the Information Commissioner accepted that some of the information contained in the Report (such as Appendices 12 to 14) was in the public domain or was otherwise not confidential (such as information about the

circumstances in which the report was commissioned). However, he maintained that the First-tier Tribunal was not in error of law when it found that the Report as a whole was exempt under section 41 FOIA because the non-confidential elements of the Report were peripheral or trivial, and a line-by-line exercise of filleting the Report of all its confidential content was not justified or proportionate.

32. No submissions were made on behalf of the Information Commissioner in relation to the other grounds of appeal on the basis that those other grounds concerned either:

    the procedure adopted by the First-tier Tribunal at the hearing (Ground 1);

    the First-tier Tribunal's approach to the evidence heard at the hearing (Ground 2(ii)-(iii) and Ground 4); or

    material identified by the First Respondent that was not before the Information Commissioner during his investigation (Ground 7).

33. Mr Lockley argued that if the Upper Tribunal were to allow the appeal, the appropriate disposal would be remittal to the First-tier Tribunal for redetermination.

Homes for Haringey (Second Respondent)

34. Mr Blake of counsel, for the Second Respondent, resisted all grounds of appeal and argued that the First-tier Tribunal's decision involved no error of law. He invited me to dismiss the appeal and to confirm the decision of the First-tier Tribunal.

The law

35. Section 1(1) provides for a general right to disclosure of information held by public authorities:

    > "**1. General right of access to information held by public authorities**
    >
    > (1) Any person making a request for information to a public authority is entitled –
    >
    > (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
    >
    > (b) if that is the case, to have that information communicated to him."

36. That general right is subject to various exemptions, set out in sections 2, 9, 12, 14 and Part II of FOIA. Some of those exemptions are absolute. Others are qualified, requiring a balancing of the public interest in disclosure against the public interest in maintaining the exemption.

37. Section 41 provides an exemption in relation to confidential information.

    > "**41. Information provided in confidence**
    >
    > (1) Information is exempt information if –
    >
    > (a) it was obtained by the public authority from any other person (including another public authority), and
    >
    > (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
    >
    > (2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to

comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence."

38. Although the exemption under section 41 FOIA is categorised as an absolute exemption (see section 2(3)(g) FOIA), because its scope is defined by reference to the availability of an action for breach of confidence, and it is a 'defence' to such an action that the enforcement of the obligation of confidence would not be in the public interest (such as where it reveals some form of iniquity on the part of the party bringing the action) it is in practice subject to limitations.
39. Information falling within section 41 may also be exempt from disclosure under other provisions of FOIA, such as section 40 (Personal information), which was relied upon by the Second Respondent in this case. However, this appeal relates only to the Tribunal's decision-making in relation to the section 41 exemption, and not the section 40 exemption.
40. Section 12 FOIA also provides a public authority with an exemption from complying with an information request if it estimates that the cost of complying with the request would exceed a specified limit. However, that exemption was not relied upon in this case.
41. Generally speaking, the right to disclosure is to be interpreted broadly and the right to rely on an exemption narrowly. In *Montague v Information Commissioner* [2022] UKUT 104 (AAC) (***"Montague"***) a three-judge panel of the Upper Tribunal said:

> "The starting point is that section 1(1)(b) of FOIA confers a right ("is entitled") for a person to have information sought by them provided to them if it is held by the public authority *unless*, inter alia, it is exempt information under Part II of FOIA. Given the general and important constitutional right conferred by section 1 of FOIA, we consider that statutory cutting down of that right as set out elsewhere in FOIA needs to be carefully construed. The language of the Act should, where possible, be construed broadly and liberally in the context of FOIA's statutory purpose to make provision for the disclosure of information held by public authorities in the interests of greater openness and transparency: see *University and Colleges Admissions Services v ICO and Lucas* [2014] UKUT 557 (AAC); [2015] AACR 25 at paragraphs [35] and [39] and, albeit in a different context but to similar effect, paragraphs [2] and [68] of *Dransfield v ICO and Devon CC* [2015] EWCA Civ 454; [2015] 1 WLR 5316.

Discussion

Ground 1

42. Ground 1 alleges that the Appellant was denied a fair hearing because the late disclosure on the day before the two-day hearing before the First-tier Tribunal of 99 documents, running to some 320 pages, denied him and his counsel an adequate opportunity to consider and respond to that material, resulting in material unfairness.
43. I initially refused permission to pursue this ground of appeal on the papers, but the Appellant renewed his application in respect of this ground before Judge Jacobs who, after hearing oral argument, was persuaded to grant permission.
44. At the oral hearing before me Mr Fowles was able to cast further light on the difficulties that the Appellant, and he himself, had faced as a result of the

provision of documents that Ground 1 complains of on the eve of the hearing before the Tribunal.

45. Mr Blake, for the Second Respondent, maintained that the supposedly late disclosure was not late at all, because the documents provided were documents that were already available to the Appellant through other sources, or were otherwise not required to be disclosed by the Second Respondent, and that they were provided purely in the spirit of helpfulness. He said that events in the lead-up to the hearing were 'fast-moving', and the Appellant too had provided documents late in the day.
46. I have decided in relation to Ground 2 that it is appropriate and in the interests of justice to set the FtT Decision aside and remit the matter to be re-heard by the First-tier Tribunal. Any unfairness that may have arisen as a result of documents being provided the day prior to the hearing before the First-tier Tribunal will therefore be subsumed in the rehearing. I do not, therefore, need to reach any conclusions on Ground 1.

Ground 2

47. Ground 2 concerns the approach that the Tribunal took to the application of the exemption in section 41 of FOIA.
48. It was common ground between the parties that the correct test for establishing an actionable breach of confidence was that set out by Megarry J in *Coco v A.N. Clark (Engineers) Limited* [1968] FSR 415 (***"Coco"***) at 419:

    > "In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene, MR in the *Saltman* case on page 215, must "have the necessary quality of confidence about it". Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it."

49. Ground 2 argues that the Tribunal erred in its approach to the application of section 41 FOIA by applying a blanket approach to the Report, rather than considering the particular character of each different item of information within the withheld information, the particular guarantee of confidence given prior to it being disclosed, and whether the information in question was already in the public domain.
50. The Second Respondent counters that this is, in substance, simply a 'reasons' challenge by another name, and that it seeks to hold the Tribunal to an unworkably high standard which runs contrary to a long line of authority from the higher courts about the standard to which a judge's reasons are to be held. Mr Blake referred me to *Oxford Phoenix Innovation v Information Commissioner* [2018] UKUT 192 (AAC) which, at §50, cautions against reasons challenges of this nature, and *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48, in which Lord Hope observed at §25:

    > "It is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it."

51. Mr Blake also referred me to Sir James Munby's observations in *Re F (Children)* [2016] EWCA Civ 546 at §23:

    > "It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffmann's phrase, the court must be wary of becoming embroiled in "narrow textual analysis".

52. The Upper Tribunal observed in *UCAS v Information Commissioner and Lord Lucas* [2014] UKUT 557 (AAC) that:

    > "it is unrealistic to expect a Tribunal to set out every twist and turn in its assessment of the evidence and its consequential reasoning"

53. The question is, rather:

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

54. Mr Blake cited the words of Judge Wikeley in *Department for Work and Pensions v Information Commissioner and Zola* [2014] UKUT 334 (AAC) at §27 in the context of an appeal which concerned the exemption in respect of commercial interests in section 43 FOIA:

    > "the relevant standard is well known to the Tribunal and to the parties, being part of the normal currency of information rights litigation, and so the Tribunal did not need to articulate all its dimensions fully."

55. Mr Fowles, for the Appellant, acknowledged the authorities cited by the Second Respondent which deprecated an over-forensic approach to assessing adequacy of reasons, but said that there had to be a line beyond which reasons became inadequate. He relied upon the comments made by Henry LJ in *Flannery v Halifax Estate Agents* [2000] 1 All ER 373; [2000] 1 WLR 377 on the nature of the duty to give reasons as setting out where that line should be drawn:

    > "The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in *ex parte Dave*) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind: if it is fulfilled, the resulting decision is much more likely to be based on soundly based on the evidence than if it is not."

56. Whether Ground 2 is properly viewed as a challenge to the Tribunal's decision making or to its reasons doesn't really matter. In order for it properly to conclude that withheld information was exempt under section 41 FOIA, the Tribunal had to satisfy itself both that the information in question was "obtained" from "any other person" (i.e. that it was not self-generated, see section 41 FOIA), and that disclosure of the information (otherwise than under FOIA) would constitute an actionable breach of confidence (see section 41 FOIA and the requirements set out in *Coco*).

57. The Tribunal was not under a duty to set out all the twists and turns of its reasoning, and there was no need for a painstaking line by line analysis of the withheld information, but if it is not adequately clear from its reasons that it

assessed the material and that it determined that those two key criteria were satisfied, that failing would itself amount to an error of law.

58. Taking the “obtained” from “any other person” point first, this element of the test was acknowledged by the Tribunal in §48 of the FtT Decision. The Tribunal decided that this meant any information provided by employees of HfH could not be exempt under section 41 FOIA:

> “48. Section 41 only applies to information obtained from a third party. It was submitted by Mr Fowles that information given to the RSP under condition of confidentiality by employees of HfH was not information from a third party and so could not be exempt under Section 41. This is an unusual situation. The RSP is independent of HfH. Its role is to independently examine and report on the performance of HfH. HfH staff who co-operated with the RSP did not do so under the assurance of confidentiality save for that provided by HfH’s ‘whistle blowing (sic) policy’, the fact remains however that HfH staff are not third parties. The tribunal find that such information is not covered by S.41(1) for this reason.”

59. However, the Tribunal decided that, while the information provided by employees of HfH was not exempt under section 41 FOIA, it was exempt under section 40 (Personal information). That element of its decision making is not challenged in this appeal.

60. The Appellant had argued, though, that it was not only the information provided by employees of HfH that was not “obtained” from “any other person”, but also other information, such as the scope of the audit and the methodology for the report, and this submission was not addressed by the Tribunal. This leaves open the possibility that there was information that fell under neither exemption.

61. The Appellant says that the Tribunal divided the withheld information arbitrarily into “information in the Report” and “information not in the Report”, and it applied the section 41 test to the Report “en bloc”. I find this criticism to be unfounded: it is apparent from what the Tribunal says in its reasoned decision at §24 (where it provides the ‘gist’ of the closed session) that it “went through the bundle of withheld information” and the panel was:

> “provided with further examples of documents that fall within the following categories: (i) letters and emails from individual leaseholders and former members of the HLA which contain personal and sensitive information and which were provided to the scrutiny panel in confidence, (ii) bank details and financial transactions; (iii) interview summaries (described as interview notes); (iv) extracts from the draft scrutiny panel report.”

62. So, while the Tribunal has not gone through each individual document one by one, it has identified meaningful categories of documents.

63. The Tribunal then set out its findings in relation to those documents. It made a clear finding (in §40) that they were “given to the RSP by individuals on condition of confidentiality”. The Tribunal made this finding based on evidence, relying primarily on witness evidence, as well as the terms of reference for the report. It acknowledged (at §42 of the FtT Decision) that Mr Fowles, for the Appellant, had argued that the absence of “a specific written script” for those conducting the interviews and the fact that some of the witness evidence did not support there having been any mention of, or at least

no particular emphasis on, confidentiality. However, it rejected Mr Fowles's argument about the absence of a script and it preferred the evidence of those who said that they were given some manner of assurance that their evidence would be treated as confidential. That position was open to it on the evidence. The Tribunal was entitled to find that the interviews were carried out under an assurance of confidentiality.

64. The Tribunal said at §44 of the FtT Decision that it was accepted that the test for breach of confidence was that set out by Megarry J in *Coco*, which it quoted. It cannot, therefore, be argued that the Tribunal was in ignorance of the proper test to be applied.
65. However, the *Coco* test has three limbs, so the Tribunal's finding that the withheld information was provided on the understanding that it would be kept confidential is not enough, on its own, to demonstrate that it is information the disclosure of which would give rise to an action for breach of confidence, therefore attracting the section 41 FOIA exemption.
66. After quoting what Megarry J said in *Coco* the Tribunal continued:

> "45. The Tribunal find that this test is satisfied in respect of the documents referred to as 'S40/S41' documents and in respect of the full report. Those who took part in the audit did so on a promise of confidentiality and they expected the information they provided to remain private. The tribunal also accepts that the participants would not have provided the information if they thought it would be disclosed …"

67. That is fine as far as it goes, but again it only really addresses the second of the three limbs of the *Coco* test. There is no assessment of whether the information had the 'necessary quality of confidence about it'. Given the way that Mr Fowles put the Appellant's case (see the Tribunal's own summary of it at §9 of the FtT Decision), the issue whether the withheld information had the "necessary quality of confidence" was clearly in issue and it needed to be addressed.
68. The confidential quality of the information relevant to the Coco test is referenced somewhat obliquely in §39 of the FtT Decision:

> "The Section 40/41 documents have been withheld by HfH because disclosure could lead to the identification of individuals and these documents were provided to the RSP on condition of confidentiality."

69. However, while this reasoning may apply to some of the information in question, the Appellant had argued that some of the information would not lead to the identification of individuals (for example, the contextual information such as the 'introduction', 'methodology' and 'background' sections).
70. He argued that, in many instances, redactions could be used to deal with the concern that disclosed information could, due to the small number of individuals involved, lead to individuals being identified. While it is established law that information that has been the subject of restricted disclosure may remain subject to an obligation of confidence (see *Attorney-General v Guardian Newspapers Limited (No. 2)* [1990] 1 AC 109), the Appellant's case was that some of the withheld information (such as the chair's email) was distributed very widely, so its disclosure would not be liable to identify its provider.
71. In §40 of the FtT Decision the Tribunal acknowledged the Appellant's proposal for redactions, and it acknowledged that such an exercise "may elicit some documents or parts of documents that should not be excluded under section

40 or section 41", but it decided that it was "not proportionate" to undertake such an exercise, adopting the First Respondent's reasons for concluding that the documents could properly be withheld in their entirety.

72. In §50of the FtT Decision the Tribunal summarised the thrust of Mr Blake's case on the applicability of section 41 FOIA:

> "… Mr Blake's submission, supporting the view of the ICO, is that the full report was derived from information imparted under conditions of confidence and that this provides an exemption from disclosure under S.41 which applies to all the report…"

73. It then set out its own position:

> "51. The tribunal accept this submission. Having considered the full report, and the redacted full report, the tribunal agrees with the submissions of HfH and the ICO. The report was compiled from interviews and information provided by people in confidence. The duty of confidence attaches to the report. The tribunal agree with the submission by the ICO that the non-confidential elements are peripheral and that a line-by-line exercise of filleting the report would result in unconnected bits of the report or parts of the necessary architecture of a report. A summary report is already available which has, in essence, conducted this exercise."

74. There is no further discussion of the issue of whether the information has 'the necessary quality of confidence'.

75. I approached the Tribunal's decision-making on the working assumption that, having identified the proper tests for deciding whether the relevant information was exempt under section 41 (and indeed having set them out in its reasons), that it had applied those tests faithfully. However, the reasons the Tribunal has given show that such an assumption is not warranted in this case. While the Tribunal says, in relation to the *Coco* test, "this test is satisfied in respect of the documents referred to as 'S40/S41' documents and in respect of the full report", it appears from its subsequent explanation that it based that finding on only one of the relevant criteria, i.e. the finding that the information was provided under conditions of confidence. What is clear to me from the Tribunal's reasons is that it didn't conduct the analysis that would have been required for it to make findings on the other limbs of the *Coco* test, because it didn't consider it to be "proportionate" to do so.

76. Mr Blake, for the Second Respondent, maintained that the Tribunal was entitled to decline to carry out the kind of granular analysis of the withheld information that would be required if it were to make such findings, and indeed he says it was *required* to take a proportionate approach by the overriding objective in rule 2 of the Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009 (the **"GRC Rules"**). That provision requires the Tribunal to deal with appeals "in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties".

77. I am not persuaded by that submission. Rule 2(3) of the GRC Rules provides that the First-tier Tribunal must seek to give effect to the overriding objective when it exercises any power under the GRC Rules or interprets any rule or practice direction. It does not import either a power or an obligation for the Tribunal to apply a filter of "proportionality" when interpreting legislation. The Tribunal's job was to consider whether the Information Commissioner's

decision notice was in accordance with the law. In doing so it had to consider whether the public authority had complied with its obligations under Part I of FOIA. That task, in turn, required it to assess whether the information the Appellant had requested was exempt from disclosure under any of the absolute or qualified exemptions.

78. Mr Blake submitted that a public authority could only be required to do what was ‘practical’ and ‘realistic’. He posited a hypothetical situation in which a 10,000 page document in the possession of a public authority was requested, but all but one word in the document (the word “the”) fell under one or other exemption. The costs exemption under section 12 FOIA would not apply because the document was easily found (see §86 below). In such a situation, Mr Blake argued, the public authority surely couldn’t be required to pore over the entire document and laboriously apply redactions to it. Mr Fowles gave an equally extreme hypothetical situation in response to Mr Blake’s: a request is made for a 10,000 page document in the public authority’s possession, which the public authority says it would be disproportionate to analyse and redact, but within its 10,000 pages there is evidence of some iniquity: state fraud, or murder, which would not be brought to light if the public authority’s word was simply accepted and the Information Commissioner and Tribunal didn’t do the work of assessing the information.
79. The problem with Mr Blake’s example is that, until the document has been reviewed, it will not be known what is disclosable and what is exempt.
80. The Tribunal’s decision not to carry out its own analysis of the applicability of the statutory exemptions to the withheld information, on the basis that to do so would be “disproportionate”, was in error of law.
81. The Tribunal gave another, rather contradictory, reason for its decision not to carry out an analysis of all the withheld information to assess the applicability or otherwise of the claimed exemptions: it said that the production by HfH of the Summary Report had, “in essence, conducted this exercise”. If the decision not to assess the information in the report was made on the basis that the work had already been done by HfH then that too was in error of law, as it involved the Tribunal in effect abdicating its role to the party resisting disclosure.
82. If I am wrong that the Tribunal failed to apply two of the limbs of the *Coco* test that it had identified as being applicable, nothing in the Tribunal’s reasons explains how or why it satisfied itself that each of the first and third limbs of the test in *Coco* was satisfied. Although clearly there are limits to what a tribunal can say in an information rights case about information which is being withheld, and it is not necessary for it to explain matters in granular detail word by word or sentence by sentence, it was nonetheless incumbent on the Tribunal to explain in broad terms how the various categories of information withheld in reliance on the exemption in section 41 FOIA satisfied the three limbs of *Coco*. The Tribunal’s failure to do so renders its reasons inadequate and the FtT Decision itself in error of law.

Ground 3

83. Ground 3 argues that the First-tier Tribunal took an unlawful approach to the withheld information by deciding that certain information comprised in the withheld information, which did not fall within any exemption, should not be disclosed, contrary to section 1(1) FOIA. This ground overlaps with Ground 2.

84. First of all, I should say that the question whether an exemption applies to a piece of information is binary: information is either exempt or it isn't. If it is not exempt, then the public authority has the obligations set out in section 1(1) in respect of it.
85. Section 12 FOIA provides an exemption which applies where the cost of compliance with a request (i.e. investigating whether the information is held and, if so, communicating it to the requester in accordance with section 1(1) FOIA) would exceed a specified limit.
86. That exemption was not relied upon by the Second Respondent.
87. Mr Blake explained that the time consuming and costly part of complying with the requests in this case was not the exercise of locating the information, but rather the task of going through the documents to identify which information in them was exempt and required redaction. He said that this element of compliance was not, according to the Administrative Court's decision in *Chief Constable of South Yorkshire Police v Information Commissioner* [2011] EWHC 44 (Admin), a cost that could be considered when estimating the cost of compliance for the purposes of the section 12 FOIA exemption.
88. It was suggested that public authorities cannot be required to carry out steps which are onerous and disproportionate to the value of the information that is likely to be disclosable. However, Parliament has provided a specific exemption designed to protect public authorities from incurring excessive costs. There can be no justification for reading into the legislation a further exemption (in circumstances where the effort involved is 'disproportionate', or where the cost of applying redactions in respect of an identified document is excessive) that Parliament, having clearly considered the need to protect public authorities from excessively costly compliance, didn't choose to include. That would be contrary to the approach approved by the Upper Tribunal in *Montague* of interpreting the right to disclosure broadly and the right to rely on an exemption narrowly.
89. However, while non-exempt information cannot become exempt simply because it forms part of the same document as other information which is exempt, section 50 FOIA does provide for a discretion whether to require steps to be taken in respect of information which has been found to be non-exempt, and this discretion may be exercised to avoid requiring public authorities to do what would be unreasonable.
90. In *The Information Commissioner v HM Revenue & Customs and Geraldine Gaskell* [2011] WL 12849924 (***"Gaskell"***), Judge Wikeley considered what section 50(4) of FOIA required of the Information Commissioner in the context of a change of circumstances between the public authority's response to the information request and the Information Commissioner's decision. In that case the change of circumstances was the transfer of the Rent Service from the Department for Work and Pensions to HM Revenue & Customs. That transfer resulted in the Rent Service officials becoming subject to legislation which prevented them from disclosing information held by HM Revenue & Customs in connection with a function of HM Revenue & Customs (which they had not been subject to when the Rent Service was part of the Department for Work and Pensions). Judge Wikeley held at §24, that:

> "Parliament can be presumed not to have intended that the Commissioner might have to impose an obligation on a public authority to take the "step" of communicating certain information where that step

would, in the circumstances, be e.g. unlawful, impossible or wholly impractical…"

91. He concluded that section 50(4) FOIA vested the Information Commissioner with a discretion, rather than imposed a duty upon him, as to the steps that should be specified. He acknowledged the concern that widespread exercise of this discretion by the Information Commissioner could result in public authorities being relieved too readily of the need to take appropriate steps in a manner which would be inimical to the principles underpinning FOIA but noted (at §29) that the then Information Commissioner did not anticipate exercising the discretion not to require communication of requested information frequently, and indeed that case was the first time in which he had exercised that discretion in that way.
92. While this indicates that the Information Commissioner has a discretion under section 50(4) FOIA not to order the taking of steps to disclose where requested information has been found not to be subject to an exemption and the public authority has failed to comply with its obligations under section 1(1), 11 or 17 FOIA, it is a considerable way away from establishing a discretion not to carry out the exercise of evaluating the information in the first place.
93. Judge Wikeley returned to the discretion under section 50(4) FOIA in *Home Office v The Information Commissioner and Cobain* [2014] UKUT 306 (AAC). In that case the requester sought various information. One item of information was found by the First-tier Tribunal to be exempt from disclosure, while another was found not to fall within any exemption, but disclosure of the non-exempt information, when combined with publicly available information, would allow the requester (and the public at large) to ascertain what the exempt information was. The First-tier Tribunal concluded that the non-exempt information must be disclosed to the requester notwithstanding that it would have the effect of revealing the exempt information. Judge Wikeley found that the First-tier Tribunal had erred in law by failing to consider whether to exercise its discretion under section 50(4) FOIA as to whether or not to stipulate any steps to be taken by the public authority as regards disclosure. Since this was an interim decision only, and since Judge Wikeley said nothing about how the discretion should have been exercised (just that consideration should have been given to exercising it) that case does not advance the Second Respondent's case.
94. The Information Commissioner conceded that some elements of the Report do not contain derived information that reflects the 'raw' confidential information and says that "it would also doubtless be possible to identify sentences, and possibly paragraphs of the Report that do not relate to or reveal any raw confidential information for instance because they deal with the circumstances in which the Report was commissioned" (see §14 of the First Respondent's skeleton argument).
95. While the Tribunal did not say in so many words that there was information within the withheld information which did not satisfy any exemption, it contemplated that that was likely to be the case. It made no finding on this for the simple reason that, as discussed above, it did not carry out the exercise of assessing the withheld information and categorising it. I have found that this approach was in error of law.
96. Had the Tribunal carried out that exercise, and had it found that there was information within the withheld information that didn't attract any exemption, it

may have been entitled to exercise the discretion under section 50(4) FOIA not to require the Second Respondent to take any further steps in relation to that non-exempt information.

97. While the Tribunal and the Information Commissioner speculated that, once filleted of exempt information, the Report would likely amount to "unconnected bits of the report or parts of the necessary architecture of a report" (§51 of the FtT Decision) or "unconnected scraps of information" (§15 of the First Respondent's skeleton argument), the fact is that it didn't carry out this exercise, so it can't know what would have been disclosable. It was not, therefore, in a position to engage in a conscious exercise of discretion under section 50(4) FOIA . Given that the Tribunal did not make findings as to which parts of the withheld information were disclosable, this is not an appropriate case for me to explore the limits of the discretion under Section 50(4) FOIA, and whether it extends to declining to order steps to be taken when compliance is not 'unlawful', 'impossible' or 'wholly impractical' (as in *Gaskell*), but also where to do so would be 'disproportionate' because the information that is disclosable would be 'peripheral' only.
98. The Tribunal was not entitled to treat the Report as exempt in its entirety without having made a finding that all the information comprised in it satisfied one or other of the FOIA exemptions. This was in error of law.
99. An exercise of discretion under section 50(4) FOIA only arises in respect of information which has been found to be non-exempt. Because it had not identified any information as being non-exempt it could not properly exercise that discretion not to require any steps to be taken. As such, its error of law cannot be said to be immaterial.

Ground 4

100. Ground 4 argues that the First-tier Tribunal erred in its approach to the issue whether the public interest in exposing iniquity justified disclosure, failing to apply the proper test set out in *AG v Guardian Newspapers* [1990] 1 AC 109 at §283.
101. Because I have decided that the Tribunal erred in law in the ways identified in Grounds 2 and 3, and because I have decided to set aside the FtT Decision and to remit the matter to be reheard by a panel of the First-tier Tribunal, it is not necessary for me to deal with Ground 4. The panel of the First-tier Tribunal which hears the remitted appeal will need to decide whether the criteria set out in section 41 FOIA are satisfied in respect of the withheld material, and this includes whether disclosure would involve an actionable breach of confidence. That exercise will involve fresh consideration being given to the issue of the public interest in disclosure.

Ground 7

102. Ground 7 argues that the First-tier Tribunal's conclusion on the scope of the Appellant's request, i.e. that it was limited to documents used to prepare the questions for the interviews and notes of the interviews, was not a conclusion that was open to it, given the way that the Appellant expressed the requests.
103. The Appellant made two distinct requests: the first for a copy of the Report, and the second for documents and notes relating to the interviews (see §11 above). He later attempted to clarify the scope of his request (see §12 above).
104. The Tribunal said in the FtT Decision:

> "38. The tribunal find that the 47 documents identified by HfH, and now included in Mr Martin-Clark's submissions for disclosure are not within the scope of his request and not part of this appeal. They were all created after the report was completed. Mr Martin-Clark both in his request and then in clarification of that request stated, "the documents we were seeking were those used to prepare the questions for our interviews as well as the notes of what took place during them. HfH have identified this period as between June and September 2014. There are a further 27 documents, which it is submitted fall outside the scope of the request because they were not considered by RSP in the preparation of questions for interview. The tribunal accepts that these documents are outside the scope of the request and were not used to prepare the questions for interview…"

105. While I am satisfied that the Tribunal was entitled to find the 47 documents which post-dated the Report to be outside the scope of the request, its conclusion that the other 27 documents fell outside the scope of the request is more problematic. However, because I have decided to set the Tribunal's decision aside and to remit it to the First-tier Tribunal for re-hearing on other grounds, any error that might have been made in this regard will be subsumed into the re-hearing. The panel of the First-tier Tribunal hearing the remitted appeal will make its own findings on the scope of the requests. I therefore decline to rule on Ground 7 now as it is unnecessary for me to do so.

Disposal

106. For the reasons I have explained, I find that the Tribunal's decision involved a material error of law and should be set aside. I have decided that it is not appropriate for me to remake the decision. Further facts need to be found and the First-tier Tribunal, with its expert members, is best equipped to determine the appeal. I therefore remit the matter to the First-tier Tribunal in accordance with the Directions above.

Thomas Church
Judge of the Upper Tribunal
Authorised for issue on 3 October 2023