



**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**UT ref: UA-2024-000127-GIA  
[2024] UKUT 309 (AAC)**

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

**Between:**

**Mr Stephen John Gullick**

Appellant

- v -

**The Information Commissioner**

Respondent

**Before: Upper Tribunal Judge Wright**

Decided on the papers and without a hearing.

Decision date: 30 September 2024

**DECISION**

**The decision of the Upper Tribunal is to allow the appeal.** The decision of the First-tier Tribunal made on 20 November 2023 under case reference EA/2023/0118 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 appeal to be decided by an entirely freshly constituted First-tier Tribunal, after or at an oral hearing.

**REASONS FOR DECISION**

**Introduction**

1. I consider I can decide this appeal properly and fairly, dealing with all material issues, without a hearing. I therefore refuse Mr Gullick's request to hold an oral hearing on his appeal to the Upper Tribunal.

2. This appeal concerns whether the First-tier Tribunal ("the FTT") erred in law when it dismissed Mr Gullick's appeal from the Information Commissioner's Decision Notice of 6 February 2023. The essence of the FTT's decision was that the public authority had been entitled to rely on section 40(2) of the Freedom of Information Act 2000 (FOIA) to refuse Mr Gullick's request for information.

### Relevant background

3. Mr Gullick had made a request for information to Cottesmore Parish Council ("the Council") on 28 March 2022. That request was for a copy of a letter from the solicitors "Oldham Marsh Page Flavell" sent on behalf of their client to the Council. The context for the request was that the minutes of a meeting held by the Council on 18 October 2021 had recorded under the heading "Update on Allotments – access to site through the Jubilee Gardens open space" that:

"In view of the letter from Oldham Marsh Page Flavell it was agreed to postpone the discussion of this item until a later meeting."

4. Mr Gullick is (or at least at the time of the request was) a joint tenant of an allotment plot at the Richard Westbrook Allotment site in Cottesmore and wanted to know what the letter had said to lead to the discussion being deferred by the Council.

5. The Council had relied on section 41 of FOIA to refuse the request. On Mr Gullick's complaint to the Information Commissioner the Commissioner decided the Council was (instead) entitled to rely on section 40(2) of FOIA.

6. The essence of the Information Commissioner's reasoning was that (i) the letter contained the personal data of the solicitor's client, (ii) the contents of letter had not been put in the public domain at the Council meeting or the minutes of the meeting, (iii) Mr Gullick was pursuing a legitimate interest and disclosure of the letter was necessary to meet that interest, but (iv) the solicitors' client had a strong and reasonable expectation that the letter would remain confidential to them, their solicitor and the Council, and that expectation/right of the solicitors' client outweighed Mr Gullick's legitimate interest.

7. It was this Information Commissioner's decision which the FTT upheld.

### The FTT's decision

8. I set out the central parts of the FTT's decision. A difficulty with the decision is that parts of the reasoning or analysis appears under a heading "The Grounds of Appeal" and not under the next heading in the decision "Conclusion". Doing the best I can with this somewhat confusing structure, the essential parts of the FTT's reasons appear to be as follows:

#### **"The Grounds of Appeal**

[23] The Commissioner in Response (dated 14 April 2023) argues the Grounds of Appeal do not disturb the DN and makes the following succinct points....

*e) The Commissioner maintains that the withheld information would identify, and represents the views of, the data subject and that there would have been a reasonable expectation that the correspondence would remain private in the context of the contentious issues regarding access to the allotments. The Commissioner maintains that there is an insufficient legitimate interest to outweigh the rights of the data subject.*

*f) Accordingly, the Commissioner submits that the appeal should be dismissed for the reasons given in the Decision Notice. The Appellant has failed to set out why the Commissioner's Decision Notice is not in accordance with the law or that the Commissioner ought to have exercised his discretion differently. Should the Tribunal disagree with*

*the Commissioner's findings with regards to the application of s.40(2) FOIA it would be necessary for the Tribunal to consider the engagement of s.41(1) FOIA as the Tribunal is seized of this matter (Information Commissioner v Malnick & ACBA [2018] UKUT 72 (AAC)).*

[24] While the Tribunal acknowledge, accept and adopt the Commissioner's reasoning in paragraphs 7 to 19 DN, and as set out in the Response at §23 above we have conducted a full rehearing on the merits under sections 58(1)(b) and 58(2) FOIA.

[25] Personal data cannot be disclosed if it would contravene the data protection principles. Those principles are set out in Article 5 of the GDPR, of which Principle (a) is relevant and sets out that personal data shall be "processed lawfully, fairly and in a transparent manner in relation to the data subject".

[26] For disclosure of personal data to be lawful under FOIA and EIR, the consent of the data subject must have been provided (under Article 6(a)) or it must be within the legitimate interests of any party (under Article 6(f)).

[27] No positive evidence has been submitted from the data subject to state that it does not want the letter to be published more widely. An indication of the data subject's wishes can be considered through the context of the request though. Here a private letter drafted by a solicitor regarding matters of a private nature regarding which the Council not only did not discuss the letter in a public forum, but cancelled discussions of the broader issues in a public forum. The inference is that this issue is considered a private matter, or at least not a public matter.

[28] Article 6(1)(f) points to a three-step test for consideration when assessing a legitimate interest basis for processing: a) what is the legitimate interest in the disclosure; b) is the disclosure necessary for that purpose; and c) does the legitimate interest outweigh the interests and rights of the individual? If the answer is "no" to any of those questions, then there cannot be a legitimate interest in its disclosure.

[29] The legitimate interest in disclosing this material is the general requirement for transparency in public life. At a meeting of the Council in April 2021, it was agreed that plot holders should be allowed to access the allotment site via a specific gate. In July 2021, the Council were concerned that the procedure agreed was not being adhered to and was to be placed on the agenda for discussion at the August meeting. There were meetings on 4 August and 16 August 2021, when it was agreed that the arrangement could continue. The question of access via the Green Space Gate was then specifically listed for the agenda of the meeting to be held on 18 October 2021. By virtue of its repeated reference in several Council meetings and being listed as a specific agenda item in October 2021, the issue of the Green Space Gate was evidently a matter of public concern that is or was to be discharged by examination and discussion in a public forum.

[30] Discussion of the gate on 18 October 2021 was adjourned following receipt of the letter specifically stated to have been received from a firm of solicitors called Oldham Marsh Page Flavell and that it had been sent on

behalf of a resident relating to "*various issues in connection with allotment holders accessing the allotment site via the Jubilee Gardens Open Space*". The examination and discussion in a public forum were therefore delayed and/or prevented as a result of the contents of the letter. It is certainly arguable that disclosure of the letter is therefore necessary for the purpose of public scrutiny and transparency. However, the argument as to public interest is starker in relation to the broader issues in play regarding the proper route of access to the allotments, rather than this narrower issue of the public interest of disclosing the contents of this specific letter. There is clearly a lesser public interest in disclosing the disputed information – the letter.

[31] The final issue is one of balancing the legitimate interests identified with the interests and rights of the data subject.

[32] Insofar as the disputed information could be said to have contained confidential information, the reference by the Clerk to the Council in the published agenda potentially waives any such confidentiality, given that: (a) it refers to the letter having been sent by a firm of solicitors; (b) it is stated to relate to access to the site through the Jubilee Gardens open space; (c) the reference is made in the context of an ongoing discussion about the open space, the conduct of plot holders, and the relative views of the owners of properties facing the open space itself; and (d) it is of sufficient relevance to the issue under public examination that the discussion at the Council meeting needs to take into account its contents before it can usefully be undertaken. It is difficult to foresee how the Council could refer to the letter with such specificity as to its relevance and contents in these terms, refer to it as justification for not publicly examining an item previously considered important for public examination, and continue to discharge its obligations of transparency. This is the only route to seek disclosure of this information.

[33] Nevertheless, and in the context here of the wider issue of the proper route of access to the allotment being of public interest and under appropriate public scrutiny, we find that, on the balance of probabilities, the balancing test falls in favour of non-disclosure of the letter on the basis that it contravenes the data protection principles.

[34] There are clear arguments in each direction. Public authorities must be held to public scrutiny and a level of transparency must prevail. Neither the Council nor the data subject, or its solicitors, have sought to flag the letter more clearly in question as explicitly being of a private nature. For example, there is no suggestion in the evidence before us that the data subject itself considered this material to be confidential. In these circumstances, one might conclude that the natural inclination of a public authority would or should err on the side of transparency. Nevertheless, we find the correct burden to consider here is on the balance of probabilities and we find that it is more likely than not that this letter is private, should be considered private, and that its disclosure would be a breach of the individual's privacy rights and a contravention of the data protection principles. In our view, this is what the Council have properly done.

## **Conclusion**

[35] We have carefully read the Grounds of Appeal and on the material facts and evidence before us and determine as follows;

a) We find the Appellant has a legitimate interest in the requested information and has said that he believes he knows the data subject's identity and wants official confirmation of it. Disclosure of the data subject's identity would assist him to pursue his concerns about this, across multiple agencies.

b) However, disclosure under FOIA is to the world at large. The Tribunal is of the view that data subjects have a clear and strong expectation that their personal data will be held in accordance with data protection laws (and can be presumed to have unless otherwise declared). The Tribunal considers that the data subject in this case would have a reasonable expectation that their identity would not be released to the world at large by means of an FOI request. We find that the data subject has a strong expectation of privacy relating to the requested information and in any event as disclosure is not proven necessary, the data subject's consequent loss of privacy would be disproportionate and unwarranted.

c) Furthermore, while the Tribunal accepts that the Appellant is pursuing a legitimate interest, we do not consider that, in this case, disclosure of the withheld information is necessary to meet that legitimate interest. There are other formal channels through which the Appellant could pursue his concerns, which would not necessitate the disclosure of the data subject's identity to the world at large.

d) The Tribunal therefore considers that it would be an intrusion of privacy and could cause unnecessary and unjustified distress to the individual and that there is an insufficient legitimate interest to outweigh the rights of the data subject.

e) Further and in the alternative, the Tribunal are of the view that the disputed information is held by the requested public authority by virtue of it being contained in a document, placed in the custody of a person conducting an inquiry or arbitration, or in a document created by a person conducting an inquiry or arbitration for the purposes of the inquiry or arbitration (see [33] above). The fact that the disputed information is in a solicitor's letter, sent on behalf of the data subject, indicates this is applicable and indicates implied confidentiality.

f) In any event we do not accept that the absence of a formal "Private and Confidential" or such like warning statement is a condition to the standard required for such confidentiality in the circumstances pertaining in this case as set out above.

g) The Tribunal acknowledge each case is determined on its own merits and in this case, we find the Appellant's legitimate interest alone is insufficient to demonstrate that disclosure of the requested information would be lawful within the data protection principles.

h) The Tribunal has therefore determined that disclosure of the data subject's personal data would be unlawful and in contravention of data

protection principle (a), as set out under Article 5(1)(a) of the UK General Data Protection Regulation.

i) As disclosing the data subject's personal data would be unlawful, section 40(2) is engaged. The Tribunal's decision is therefore that the Commissioner was entitled to apply section 40(2) of FOIA in the DN and the Council are entitled to rely upon this exemption.

j) The Tribunal find the position in relation to the UK GDPR is that it does not go to disturb the conclusion that section 40(2) of the FOIA and the data protection principles under the UK GDPR are the correct sections/regimes under which to consider whether the requested information in this instance can be properly disclosed. Further, the Tribunal finds that Articles within the Declaration and Convention, insofar as they relate to receiving a fair trial are not relevant in this instance.

k) The Tribunal find that any disclosure of personal data under the FOIA must be in accordance with the relevant data protection principles as this is the context in which the disclosure is set rather than, for example, in criminal or civil cases where different laws, rules and considerations apply."

9. Notwithstanding what the FTT's language in paragraphs 35e) and f), it went on in paragraph 37 of its decision to comment, expressly *obiter* and not as a finding, on whether section 41 of FOIA could also apply to the requested information.

#### Permission to appeal

10. In giving Mr Gullick permission to appeal I said:

"1.....it is arguable with a realistic prospect of success that the FTT failed to give adequate reasons for its decision, and thereby erred in law.

2. The essence of Mr Gullick's arguments are set out in the written 'Heads of Argument' which he helpfully provided before the oral hearing on 18 April 2024. For convenience, I set out those 'Heads of argument', which are dated 14 April 2024.

1. "The issue: Does the Applicant have a realistic prospect of showing that the First-tier Tribunal erred in law in finding the exemption in section 40(2) of the Freedom of Information Act 2000 ("FOIA") applied to the requested information?

2. A realistic prospect.

3. For a Tribunal to invoke/rely upon an exemption such as that in Section 40(2) it must first determine the facts of the case and if it concludes that the exemption can properly be relied upon it must, in its published judgement, not only set out the facts that it has found which justify reliance on the exemption but also set out its reasons for concluding that those facts, as they have found them, are indeed established.

4. In the context of the present case for the exemption to apply (a) there must be personal data and (b) to disclose it would contravene an established data protection principle - unfair and unlawful.

5. So far as (a) is concerned the letter, I assume, includes the personal data of the resident concerned.

6. So far as (b) is concerned the Tribunal concluded as a matter of fact (exactly as the Information Commissioner had done before it) that to release the document would contravene the “fair and lawful” data principle because the resident had a strong expectation of privacy and therefore the exemption in Section 40(2) applied.

7. It is well established law: a First Tier Tribunal must provide a statement of reasons which have led it to reach a particular factual conclusion (particularly one which is central to the case).

See:

(1) *Meek v Birmingham City Council* 1987 EWCA Civ 9 .

(2) *English v Emery* [2002] EWCA Civ 605 (Paras 18 and 19)

(3) *Bennis v ICO and Stratford-on-Avon D C* [2019] UKUT 317 (AAC)

8. At the heart of the decision in the present case was the proposition that the resident who caused the requested letter to be sent by her solicitor (to a public body about a matter of public interest) had “a strong expectation” of privacy both in relation to its contents and in relation to the identity of that resident.

9. Nowhere in its judgement did the First Tier Tribunal identify and explain the evidential basis for the resident’s “strong expectation” or set out the reasoning for arriving at its conclusion. It simply made (and repeated) a bald, bare statement that the resident had such a “strong expectation of privacy”. [ i.e., see para 35(b) of the judgement]

10. Equally, nowhere, did the First Tier Tribunal indicate the factual basis of its finding, that such an “expectation of privacy”, was “strong” as opposed to any other epithet, (or none at all).

11. The present case has many similarities with (if not on all fours with, given the similarities of language) *Bennis v Stratford*.

12. The criticisms directed by the Upper Tribunal at the First Tier Tribunal in the *Bennis* case can equally be directed at the First Tier Tribunal in the present case. The deficiencies are manifest on the face of its judgment. (see paras 13-15 and 17 of the Judgment in *Bennis*)

13. Given the clear and unambiguous words and guidance in *Meek*, *English* and *Bennis* I would argue that I have considerably more than realistic prospect of showing that the First-tier Tribunal erred in law in finding the exemption in section 40(2) of the Freedom of Information Act 2000 (“FOIA”) applied to the requested information and having its decision set aside”

3. In addition, or by way of supplement to the ground(s) on which Mr Gullick relies, it is arguable that the FTT’s reasoning in paragraphs [23]e), [24], [27], [30], [34] and [35]b) of its decision presents a confused picture as to why the FTT found the data subject’s right not to have [their] personal information

disclosed outweighed the public interest in the letter being disclosed. A number of points may be relevant here.

4. First, the FTT's decision was founded solely on section 40(2) of the Freedom of Information Act (FOIA), not section 41 of FOIA. It was therefore not deciding whether the letter was provided in confidence to Cottesmore Parish Council. However the FTT's language of the letter not being of "a private nature" and not being considered to be "confidential" (per para. [34] of the FTT's decision) might arguably blur the distinction between sections 40(2) and 41 of FOIA.

5. Second, it is arguably unclear what the FTT meant in paragraph [27] by the letter at least not being a public matter. Is there any space between information being 'not public' and it being 'private'?

6. Third, the FTT's finding (if it is such, paragraphs [27] and [34] of the decision sit under a sub-heading titled "The Grounds of Appeal") in paragraph [27] about the requested information being "a private letter" regarding matters of a "private nature", may arguably be contradicted by its other 'findings':

- (i) in paragraph [30] about the letter relating to a public council meeting; and
- (ii) in paragraph [34], that the letter was not flagged as "being of a private nature" and that the data subject did not him or herself consider "this material to be confidential".

7. Fourth, it is arguably unclear why, per paragraph [34] of the decision, the both obvious and correct evidential burden of proof of itself seemingly played a decisive (given the FTT's use of "Nevertheless") substantive role in the FTT's weighing of the interests involved.

8. Fifth, and finally, it is arguable the conclusive reasoning about the particular data subject's expectation (as opposed to data subjects as a general class), in paragraph [35]b) of the decision, failed to explain why the data subject's reasonable expectation that their identity would not be released was consistent with that person having a strong expectation of privacy relating to the requested information, given that that information included the data subject's identity. Moreover, as at least part of the information to which these differing strengths of expectations related was the same, it is arguably unclear which strength of expectation the FTT relied on in coming its decision."

### The parties' arguments

11. In opposing the appeal, the Information Commissioner argues:

"2. The Commissioner maintains the position set out in his Decision Notice and his response before the First-Tier Tribunal. In short the withheld information constitutes personal data for which there would be no condition for processing such that it's disclosure would be unlawful and in breach of the data protection principles.

3. The Commissioner considers that sufficient reasoning has been provided by the First-Tier Tribunal to understand the basis for it's decision. Ultimately it is sufficiently clear that having considered the withheld information the First-Tier Tribunal was satisfied when weighing the competing legitimate interests that the balance did not favour disclosure.



4. The Commissioner also reminds himself of the comments of Lord Hope in *R(Jones) v First-tier Tribunal (Social Entitlement Chamber) and Criminal Injuries Compensation Authority* [2013] 2 AC 48 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.”

12. Mr Gullick argues that the Information Commissioner’s submission on the appeal to the Upper Tribunal: (i) has no basis for arguing the FTT had considered the withheld information; and (ii) had not addressed the ‘confused and confusing’ points highlighted in the grant of permission to appeal.

13. Mr Gullick ask that if the FTT’s decision is set aside, the Upper Tribunal should redecide it given the age of the request and the unlikelihood of there being any further evidence that would need to be considered.

#### Relevant statutory framework

14. Section 1 of FOIA provides, subject to immaterial exceptions on this appeal, the core duty under FOIA. It states:

##### **“General right of access to information held by public authorities.**

1(1) A 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.”

15. Sections 40 and 41 of FOIA provide, so far as is relevant, as follows:

##### **“Personal information.**

40:- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which does not fall within subsection (1), and

(b) the first, second or third condition below is satisfied.

(3A)The first condition is that the disclosure of the information to a member of the public otherwise than under this Act—

(a) would contravene any of the data protection principles,...

##### **Information provided in confidence.**

41:- (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.

16. Section 50 of FOIA is about complaints to the Information Commissioner and sets out (insofar as is relevant):

**“Application for decision by Commissioner.**

50.-(1) Any person (in this section referred to as “the complainant”) may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.

(2) On receiving an application under this section, the Commissioner shall make a decision unless it appears to him—

(a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,

(b) that there has been undue delay in making the application,

(c) that the application is frivolous or vexatious, or

(d) that the application has been withdrawn or abandoned.

(3) Where the Commissioner has received an application under this section, he shall either—

(a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or

(b) serve notice of his decision (in this Act referred to as a “decision notice”) on the complainant and the public authority.

(4) Where the Commissioner decides that a public authority—

(a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or

(b) has failed to comply with any of the requirements of sections 11 and 17,

the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.

(5) A decision notice must contain particulars of the right of appeal conferred by section 57.

(6) Where a decision notice requires steps to be taken by the public authority within a specified period, the time specified in the notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, no step which is affected by the appeal need be taken pending the determination or withdrawal of the appeal.”

17. Sections 57 and 58 of FOIA are concerned, respectively, with the right of appeal to the FTT and the FTT's duties and powers on an appeal to it. They provide relevantly as follows:

**“Appeal against notices served under Part IV.**

57.-(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.

**Determination of appeals.**

58.-(1) If on an appeal under section 57 the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

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

18. It is settled by case law that the language of “not in accordance with the law” in section 58(1)(a) does not import a secondary judicial review test of legality. Instead, the FTT has a full merits jurisdiction on an appeal: see paragraphs [45]-[46] of *Information Commissioner v Malnick and the Advisory Committee on Business Appointments* [2018] UKUT 72 (AAC); [2018] AACR 29 and paragraph [21] of *Lin v ICO* [2023] UKUT 143 (AAC).

Discussion and Conclusion

19. I do not accept the Information Commissioner's defence of the FTT's decision. With respect to the decision in *Jones*, this is not in my judgement a case where the FTT failed to set out all the steps in its reasoning but one where it set out too many steps and more particularly, where those appeared to be contradictory.

20. I accept that evidence relevant to section 40(2) of FOIA may also be relevant under section 41 of FOIA. For example, evidence which was in fact provided in private and in confidence might also (i.e., in addition to being relevant to section 41) provide evidence of the expectation of the data subject under section 40(2) of FOIA. I therefore can set to one side whether the FTT elided the two statutory tests. I likewise do not rest this decision on the FTT's confusing reference in paragraph 35e) to the letter having been created for the purposes of an inquiry or arbitration, which does not seem to have been based on any argued case put forward by either party on the appeal. However, this was seemingly seen as an alternative basis for the FTT upholding the Information Commissioner under section 40(2) of FOIA, and if the primary basis for upholding the decision was legally sound it will not matter, it seems to me (at least in terms of a material error of law), if the alternative basis of the decision was flawed.

21. The chief flaw in the FTT's reasoning, in my judgment and after having read the decision several times, is in its approach to whether the data subject (that is, the person on whose behalf the letter was written) expected or wanted the letter to

remain confidential. The FTT was plainly correct in my view to see that as a key issue when balancing out Mr Gullick's legitimate interests with the interests and rights of the data subject. However, the FTT's reasons on the face of it diverge, or at least are not sufficiently clear, on this issue.

22. In paragraph 34 of the reasons the FTT makes what seems to me to be a powerful finding that there was no suggestion in the evidence before it (including presumably the closed evidence which included the letter) "that the data subject itself considered the material to be confidential". Moreover, this was given by the FTT as an example of a more general point, in paragraph 34, that "[n]either the Council nor the data subject, or its solicitors, have sought to flag the letter more clearly in question as explicitly being of a private nature. If, however, the letter was not flagged as being private and the data subject themselves did not consider the letter to be confidential, I find it difficult to identify from the reasoning what else in the evidence provided a rational basis for finding the exemption in section 40(2) to nonetheless be met.

23. I also do not follow why, having made the findings which the FTT on the face of it made in the first part of paragraph 34 of its decision, it considered that, despite these findings, "[n]evertheless" the burden of proof on the balance of probabilities made it more likely than not that the letter was private and should be considered private. The (undeniably correct) statement about the burden of proof was no more than the means to the end, but what is lacking in paragraph 34 is an explanation and identification of what 'nevertheless' led the FTT to conclude that the letter was private. Nor can I find anything in the paragraphs preceding paragraph 34 or those which follow it which obviously and discernibly fill this gap in the reasoning.

24. In paragraph 27 of the decision the FTT set out its view that no positive evidence had been submitted from the data subject to state that they did not want the letter to be published more widely. The emphasis here is slightly different from what is said in the first part of paragraph 34, with the latter in my judgement being in clearer and positive terms of there being no suggestion in the evidence before it that the data subject themselves considered the letter to be confidential. That dissonance itself undermines the adequacy of the reasons.

25. It is true that in paragraph 27 the FTT went on to consider the data subject's wishes from the context of the requested information. But the FTT appears then to assume the point in issue by stating next in paragraph 27: "[h]ere a private letter...regarding matters of a private nature". Paragraph 27 also ends oddly, in my view, by inferring "that this issue is considered a private matter, or at least not a public matter". Two aspects of this statement seem to me to be less than clear. First, if the letter was private and about matters of a private nature, it is not clear to me why it needed to be inferred that the issue was considered a private one. (And these is no closed decision which may have addressed this (and other) deficits.) Second, I remain unclear about what constitutes a not public realm but which might still not constitute a realm which is private.

26. Nor does anything else in the FTT's decision make good the deficit I have identified in paragh 34 of its decision. Paragraph 35b) of the decision states the FTT's view that the data subject in this case "would have a reasonable expectation that their identify would not be released to the world at large by means of a FOIA request" and, moreover, had a "strong expectation of privacy relating to the requested information". Given what the FTT had said in paragraph 34 of its decision

that there was no suggestion in the evidence before it (which must include, as I have said already, the letter itself) that the data subject themselves considered the letter to be confidential, I agree with Mr Gullick that the FTT's reasons fail adequately to explain what otherwise in the evidence provided the data subject with a strong expectation of privacy relating to the letter.

27. For these reasons, I set aside the FTT's decision. I do not consider, contrary to Mr Gullick's view, that I should redecide the appeal. Firstly, that argument has not been made before and so fairness would require the Information Commissioner's view, as the respondent in these Upper Tribunal proceedings, to be sought on that issue. Secondly, further submissions might be needed on the application of section 40 and section 41 of FOIA, and if those arguments are to be made at an oral hearing (as Mr Gullick would appear to want) that hearing can just as easily take place before a new First-tier Tribunal as before the Upper Tribunal. Thirdly, the First-tier Tribunal is the expert evaluative body charged with deciding such appeals (see *Natural England v Warren* [2019] UKUT 300 (AAC); [2020] PTSR 565 at paragraph [189]) and both parties should be able to have the appeal decided properly by that tribunal.

**Approved for issue by Stewart Wright  
Judge of the Upper Tribunal**

On 30<sup>th</sup> September 2024  
Corrected on 7<sup>th</sup> October 2024