**IN THE UPPER TRIBUNAL** **UT ref: UA-2024-000390-GIA**
**ADMINISTRATIVE APPEALS CHAMBER** **[2025] UKUT 76 (AAC)**

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

**Between:**

**George Greenwood**

Appellant

- v –

**The Information Commissioner**

First respondent

-and-

**The Commissioner of the Police for the Metropolis**

Second respondent

**Before: Upper Tribunal Judge Wright**

Decision date: 28 February 2025
Decided after an oral hearing on 27 November 2024

**Representation:**

| | |
|---|---|
| **Appellant**: | Philip Coppel KC of counsel, instructed by Bates Wells & Braithwaite. |
| **First respondent**: | Will Perry of counsel, instructed by the Information Commissioner. |
| **Second respondent:** | Ben Amunwa of counsel, instructed by the Directorate of Legal Services, Metropolitan Police Service. |

**DECISION**

**The decision of the Upper Tribunal is to allow the appeal.** The decision of the First-tier Tribunal made on 16 January 2024 under case number EA/2023/0340 was made in error of law and is set aside.

The Upper Tribunal gives the decision the First-tier Tribunal ought to have given. That remade decision is to refuse to consent to the Commissioner of the Police for the Metropolis withdrawing his appeal from the First-tier Tribunal. It will now be for the First-tier Tribunal to give directions for the onward progress of that appeal.

This decision is made under section 12(1), 12(2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

## REASONS FOR DECISION

What this appeal is about

1. This appeal in a nutshell is about the correct legal basis on which a First-tier Tribunal may consent to an appeal before it being withdrawn and whether it needs to hold a hearing before consenting to the appeal being withdrawn.

Introduction

2. It is an appeal by Mr Greenwood, who was the second respondent in the First-tier Tribunal (FTT) proceedings, from the decision made by the FTT on 16 January 2024. By that decision, the FTT consented to the appellant, who in the FTT proceedings was the Commissioner of Police of the Metropolis ("the Met Commissioner" or "the Met Police"), to withdraw his appeal from the FTT. That withdrawal decision was made under rule 17 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (("the GRC Rules").

3. Permission to appeal to the Upper Tribunal against the FTT's consent to withdraw the appeal decision was granted to Mr Greenwood by the FTT. The FTT considered that:

> "the effect of rule 17 [of the GRC] Rules on a requester, where they are a party to the appeal but are not the appellant and object to withdrawal, is a matter for consideration on an appeal to the Upper Tribunal."

Relevant factual background

4. I sketch in only sufficient of the background to frame a proper understanding of the FTT's consent to withdraw the appeal decision and the arguments made on this appeal about that decision.

5. Mr Greenwood is a journalist for *The Times* newspaper. In that capacity, he has written a number of articles about the Met Police's handling of sexual offences. Following a reply by the Met Police to a prior request for information made to it by Mr Greenwood, on 15 August 2022 he made the following request for information to the Met Police:

> "Please provide a copy of the [Metropolitan Police Service's] Pan London Serious Sexual Offence Problem Profile, as set out in your [previous reply]."

6. On 19 December 2022 the Met Police refused the request. It relied on sections 30(1)(a), 31(1)(a) and (b), 38(1) and 40(2) of the Freedom of Information Act 2000 ("FOIA") in so doing. That decision was upheld on internal review.

7. Mr Greenwood then made a complaint to the Information Commissioner ("the ICO") under section 50(1) of FOIA about the Metropolitan Police's refusal of the above request. By a Decision Notice of 20 June 2023, the ICO rejected the Met Police's reliance on sections 30, 31 and 38 of FOIA and required disclosure of the Serious Sexual Offences Problem Profile, save for personal data caught by section 40(2) of FOIA. In the course of his investigation of the complaint, the ICO had been told by the Met Police that it held one report falling within the scope of Mr Greenwood's request. That report was 29 pages in length and contained:

> "tables, charts, maps, references, problem profiles, strategic assessments created as an intelligence product for the MPS. The report has a clear

> framework of analysis of information and intelligence for allowing a problem solving approach to law enforcement and crime prevention. The aim is to identify the issues and find ways to deal with the problem. The report covers key areas of concern for example identified and named venues, provides a detailed analysis regarding description of victim profiles and suspects. Names schools, areas for offences, venues for repeat locations, street names, hotel names, names of entertainment venues, names of mini cab companies, locations of sex workers, gaps and recommendations. The sensitive information contained within the report was not created or intended for public release as the information includes tactical elements as well as data and information relating to very specific areas, locations, and demographics which could also identify victims

8. The reasons why the ICO upheld Mr Greenwood's complaint and found the Met Police had not dealt with his request in accordance with the requirements of Part I of FOIA were, in summary, because (a) the exemptions in sections 30(1)(a) and 31(1)(b) of FOIA are mutually exclusive and could not both cover the same information, and (b) the Met Commissioner, had relied on those exemptions and the exemption in section 38(1)(b) of FOIA in a blanket fashion and had not therefore demonstrated that any of the relevant exemptions were properly engaged.

9. Dissatisfied with this result, the Met Police appealed to the FTT under section 57 of FOIA. Under section 50(6) of FOIA, the making of this appeal had the effect of staying the steps the ICO had ordered to be taken under the Decision Notice. Mr Greenwood was subsequently made the second respondent to the FTT appeal.

10. In the course of the FTT proceedings, on 3 November 2023, the Met Police emailed Mr Greenwood and informed him that it had decided to "release the Problem Profile with only minor redactions to safeguard personal details, specific offence investigations and material that would cause prejudice to policing". A copy of the redacted Problem Profile was attached to the email. The email went on to express the hope that the appeal could be dealt with by way of consent, and continued:

> "I am therefore refraining from serving today a statement explaining the application of the exemptions relating to the [redactions"], and the investigation correspondence referred to below."

11. A few days later the ICO asked the Met Police to set out the exemptions it was relying on in relation to the redacted Problem Profile, which the Met Police did. On the face of it, the redactions to the Problem Profile went wider than those for personal data that the ICO had allowed for under section 40(2) of FOIA.

12. As result of the changed stance of the Met Police (to release the redacted Problem Profile as described in paragraph 10 above), on 18 December 2023 the ICO wrote to the Met Police and Mr Greenwood and said he had decided not to continue to defend his Decision Notice. He further said that he would be agreeable to the appeal being concluded by way of a consent order.

13. By way of a response, Mr Greenwood said he was not agreeable to the appeal being concluded by a consent order and he served a second witness in which he described what he considered to be the significance of the redactions made to the Problem Profile by the Met Police.

14. The Met Police then, on 2 January 2024, emailed the FTT as follows:

> "Dear Tribunal
>
> The Appellant no longer wishes to proceed with the Appeal of the Decision Notice, and the ICO no longer wishes to defend its Decision Notice.
>
> We are therefore giving notice under Rule 17(1) that the Appeal is withdrawn. We are aware that the permission of the Tribunal is required under Rule 17(2), and to that end the parties are currently working on a consent order to present to the Tribunal.
>
> In order to avoid the publicly funded bodies incurring unnecessary costs we do not intend taking any further steps in the proceedings, except in relation to the consent order."

The hearing of the appeal to the FTT was due to take place on 16 January 2024.

15. A further version of the redacted Problem Profile was disclosed by the Met Police to Mr Greenwood on 3 January 2024.

16. The Met Police's email of 2 January 2024 caused the solicitors for Mr Greenwood to write to the FTT, on 4 January 2024, setting out that Mr Greenwood did not agree "to the Appellant's withdrawal". Mr Greenwood said that submissions on the withdrawal issue would be provided by him to the FTT the next day, and he asked that those submissions be taken into account by the FTT before reaching its decision "on whether to consent to the Appellant's notice of withdrawal".

17. On 5 January 2024 a registrar of the FTT gave case management directions on the appeal. These stressed the difference between withdrawing an appeal under rule 17, which would bring the appeal proceeding to an end and the ICO's Decision Notice in place, and a consent order which would dispose of the appeal on terms agreed by the parties. The FTT registrar suggested that the stance of the parties suggested a consent order was unlikely to be agreed, and she asked the Met Police to confirm by 1pm on 9 January 2024 whether it (still) sought to withdraw the appeal.

18. In response to these directions, the ICO said he did not intend to be represented at the oral hearing on 16 January 2024. The full response reads as follows:

> "Dear Tribunal
>
> On the 3 November 2023 the Appellant (the public authority in this appeal) released the Problem Profile with redactions.
>
> The Commissioner has subsequently, and as explained to the parties, very carefully considered this appeal, the submissions and evidence, and raised queries with the Appellant on a closed basis which have been answered. The Commissioner has decided not to continue to defend his Decision Notice and explained this to the parties by email on 18 December 2023.
>
> The Appellant's solicitor suggested the appeal be concluded by way of a Consent Order and the Commissioner has confirmed to the parties that he would be agreeable to a Consent Order with the exact terms to be agreed. The Commissioner notes the Second Respondent has indicated he does

> not agree to the appeal being concluded by way of a Consent Order and proposes the matter proceed to a substantive hearing.
>
> In a bid to reduce legal costs and to reduce the amount of judicial time incurred in considering this appeal, the Commissioner does not propose to file a skeleton argument or to be represented at the oral hearing on 16 January 2024. No discourtesy is intended, the Commissioner is merely attempting to preserve his and the Tribunal's limited resources."

19. The next day, 9 January 2024, the Met Police set out its response to the above directions, which reads:

> "Dear Sirs
>
> By email of 2 January the Appellant gave notice that the Appeal against the [Information Commissioner's Decision Notice] was withdrawn. The Decision Notice stands.
>
> As stated below, in line with the overriding objective the Appellant and the First Respondent negotiated and reached an agreement regarding the subject matter of the appeal; there are no extant issues to resolve between them.
>
> Ideally the matter should be dealt with by way of a consent order, however this did not prove possible to achieve.
>
> The Second Respondent wishes to maintain the hearing listed for 16 January. This is a matter for him and the Tribunal. For the Appellant and First Respondent this hearing has no function. As public authorities, both are anxious to avoid expending further resources and therefore will take no further steps in the proceedings."

20. The hearing of the appeal on 16 January 2024 was vacated and adjourned by the FTT of its own motion on 11 January 2024. The FTT in those adjournment directions stated that:

> "The Appellant's request to withdraw the Appeal and the 2nd Respondent's opposition to this shall be considered and decided by the Tribunal on the 16 January 2024 on the papers."

The FTT reasoned that it was appropriate for the issue of withdrawal to be considered and concluded prior to the FTT and the parties being put to extra cost and expense in preparing for a full day hearing.

21. In a further email of 12 January 2024 to the FTT, in response to the FTT's adjournment directions of 11 January 2024, the ICO set out the following:

> "I write with reference to paragraph 3 of the reasons in the Case Management Directions of Judge Heald dated 11 January 2024, the Commissioner had not agreed to withdrawal (and it does not appear this is a requirement of the Tribunal Rules in any event), but to a Consent Order with the terms to be agreed. The terms had not been agreed between the parties.
>
> It does not appear to the Commissioner that this appeal is amenable to a withdrawal. However it is noted the Tribunal will consider the Appellant's

> application to withdraw its appeal and is considering this matter reflecting on the overriding objective, Rule 2.
>
> Following careful consideration of the submissions and evidence provided during the appeal, the Commissioner decided to change his position and agrees with the [Met Police] in relation to the application of the exemptions to the withheld information and no longer proposes to defend his Decision Notice. The Commissioner has suggested the appeal could be concluded by way of a Consent Order, with the exact terms of the Consent Order to be agreed, but acknowledged that the Second Respondent is not agreeable to this and wishes the matter to proceed to a substantive hearing.
>
> A Decision Notice can be substituted by two mechanisms, either a Consent Order or by a Tribunal Decision. The Commissioner would be agreeable to the Decision Notice being substituted with either a Consent Order or a Decision of the Tribunal which indicates that the appeal is allowed, and this Decision Notice be substituted with a new Decision that the Appellant was entitled to rely on the exemptions (setting out those exemptions) to refuse to provide the information requested and that the Commissioner does not require the Appellant to take any further steps in response to the request, with no order as to costs. If the Tribunal would be assisted by precise suggested wording from the Commissioner for the terms of a draft Consent Order then please let me know.
>
> It may be that following the Appellant's email which was sent today at 17:11 the Second Respondent may decide to change his position, but that of course is a matter for him." (the underlining is mine and has been added for emphasis)

22. I will return to this later, but it would seem that the view of the ICO which I have underlined in the above email was based on what the email later addresses about substituting the ICO's Decision Notice of 20 June 2023; a Decision Notice which otherwise would, on the face of it, remain intact if the appeal was withdrawn.

The FTT's Consent to Withdraw Decision

23. The FTT's decision consenting to the Met Police withdrawing its appeal was made on 16 January 2024. I set out the key parts of it. However, I note here that although the FTT set out most of the relevant parts of the background in the decision (which I have not included below), it did not refer to, or otherwise obviously take into account, the ICO's email of 12 January 2024.

> "DECISION
>
> 1. the Appeal having been withdrawn by the Appellant, the Tribunal consents to the withdrawal pursuant to rule 17(2) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("2009 Rules").
>
> 2. this document is formal notification of the taking effect of the withdrawal further to rule 17(5) 2009 Rules….

**Decision on withdrawal**

20. I have reviewed what is said by Mr Greenwood in his written submissions [objecting to the withdrawal], by [the Met Police] and by the [ICO]. I have considered rule 17 2009 Rules and the Overriding Objective in rule 2 2009 Rules.

21. As regards the lateness of the withdrawal and the absence of an explanation for that lateness:-

- the 2009 Rules themselves anticipate late withdrawals with rule 17 (1)(b) providing that it is open to the appellant to withdraw "orally at a hearing."
- by this Chamber's Rules there is no obligation on [the Met Police] to explain why it wishes to withdraw
- parties to appeals should continue to seek to work to narrow issues and reach agreement where that is possible

22. Neither the timing of the decision to withdraw nor the concern raised about the explanation for the timing would be reasons to refuse consent to the withdrawal of this appeal.

23. Mr Greenwood also takes the view that [the Met Police] have not performed its obligations pursuant to the Decision Notice adequately.

24. However, when dealing with an appeal pursuant to sections 58 FOIA, the Tribunal's focus is on the Notice itself. It's role is to decide whether the Notice "is not in accordance with the law" or if "the notice involved an exercise of discretion.." that ought to [have] been exercised differently.

25. Withdrawal will mean that the original Decision Notice stands. The concern raised by Mr Greenwood about whether the Commissioner was right to be satisfied with MPS' position is not an issue for the Tribunal in this Appeal.

26. I see no other reason to refuse to consent [and] accordingly have concluded that it is appropriate for the Tribunal to consent to the withdrawal."

Relevant law

24. 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."

25. 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."

26. 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."

27. 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).

28. The relevant tribunal procedure rules are the GRC Rules, made under and pursuant to section 22 and Schedule 5 of the Tribunals, Courts, and Enforcement Act 2007.

29. Rule 17 of the GRC rules provides as follows:

> "**Withdrawal**
>
> 17.—(1) Subject to paragraph (2), a party may give notice of the withdrawal of its case, or any part of it—
>
> (a) by sending or delivering to the Tribunal a written notice of withdrawal; or
>
> (b) orally at a hearing.
>
> (2) Notice of withdrawal will not take effect unless the Tribunal consents to the withdrawal.
>
> (3) A party who has withdrawn their case may apply to the Tribunal for the case to be reinstated.
>
> (4) An application under paragraph (3) must be made in writing and be received by the Tribunal within 28 days after—
>
> (a) the date on which the Tribunal received the notice under paragraph (1)(a); or
>
> (b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b).
>
> (5) The Tribunal must notify each party in writing that a withdrawal has taken effect under paragraph (2).
>
> (6) The Tribunal must (save for good reason) treat the proceedings as withdrawn if the respondent provides notification in writing to the Tribunal and each other party that the decision or act to which the proceedings

relate has been withdrawn or revoked, or that the respondent otherwise does not rely upon the decision or act.

(7) For the purposes of paragraph (6) "decision or act" includes a direction or order, and means, where the proceedings relate to more than one decision or act, all of the decisions or acts.

(8) The Tribunal must notify each party in writing that the proceedings have been treated as withdrawn under paragraph (6).

(9) A party may apply to the Tribunal for proceedings which have been treated as withdrawn under paragraph (6) to be reinstated.

(10) An application under paragraph (9) must be made in writing and be received by the Tribunal within 28 days after the date on which the Tribunal sent the notice under paragraph (8)."

30. Rule 32 of the GRC sets out when the FTT must hold a hearing of an appeal. It provides as follows:

"**Decision with or without a hearing**

32.—(1) Subject to paragraphs (1A), (2) and (3), the Tribunal must hold a hearing before making a decision which disposes of proceedings unless— (a) each party has consented to the matter being determined without a hearing; and (b) the Tribunal is satisfied that it can properly determine the issues without a hearing.

(1A) The Tribunal may dispose of an application under rule 25A (application for an authorised costs order) without a hearing if the Tribunal is satisfied that it can properly determine the issues without a hearing

(2) This rule does not apply to a decision under Part 4 (correcting, setting aside, reviewing and appealing Tribunal decisions).

(3) The Tribunal may in any event dispose of proceedings without a hearing under rule 8 (striking out a party's case).

(4) Notwithstanding any other provision in these Rules, if the Tribunal holds a hearing to consider a preliminary issue, and following the disposal of that preliminary issue no further issue remains to be determined, the Tribunal may dispose of the proceedings without holding any further hearing."

31. Rule 37 of the GRC Rules deals with consent orders, as follows:

**Consent orders**

37.—(1) The Tribunal may, at the request of the parties but only if it considers it appropriate, make a consent order disposing of the proceedings and making such other appropriate provision as the parties have agreed.

(2) Notwithstanding any other provision of these Rules, the Tribunal need not hold a hearing before making an order under paragraph (1), or provide reasons for the order."

32. Finally, rule 38 of the GRC Rules is concerned with:

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

The parties' arguments

33. It is fair to observe that the shape of the arguments made on behalf of Mr Greenwood on this appeal has shifted quite dramatically over time. As clarified in his skeleton argument (provided a week before the hearing before me) and as then developed at the hearing, Mr Greenwood relied on three main arguments, which I describe below.

34. First, he argued that as a matter of construction all rule 17(1) of the GRC Rules allowed the Met Police to do was to withdraw its 'case' before the FTT. It could not withdraw the appeal and the FTT therefore remained seized of that appeal and had to decide it under section 58 of FOIA. The FTT therefore erred in law in treating the appeal as having been withdrawn and the proceedings before it to have come to an end.

35. Second, and I think this had to be in the alternative to the first argument, Mr Greenwood argued that rule 32 of the GRC Rues required the FTT to hold a hearing to decide whether to consent under rule 17(2) to the Met Police withdrawing its case/appeal because the effect of such a decision was to dispose of the proceedings. I have said that this argument must on its face be in the alternative to the first argument because if the appeal has not been withdrawn then the appeal proceedings have not been disposed of.

36. Third, and again in the alternative to the first argument, the FTT failed to take account of relevant matters in deciding whether to consent to the appeal being withdrawn. Mr Greenwood argued that these relevant matters were (i) the lack of ability for Mr Greenwood to enforce compliance with an FTT decision through the FTT (and Upper Tribunal); (ii) rule 32 of the GRC Rules; and (iii) the ICO did not support withdrawal. In addition, Mr Greenwood argued the reasons the FTT gave for consenting to the appeal being withdrawn were inadequate.

37. In terms of remedy, Mr Greenwood argued that, having allowed the appeal and set aside the FTT's consent to withdraw decision, I should remake the FTT's decision by dismissing the Met Commissioner's appeal to that tribunal and requiring him to disclose all the information the ICO's Decision Notice of 20 June 2023 had required the Met Commissioner to provide. Implicit within this submission was the logically

anterior step that I should remake the FTT's decision by refusing to consent to the Met Police withdrawing their case/appeal from the FTT.

38. Virtually none of these arguments had featured in Mr Greenwood's grounds of appeal. Those grounds had argued, inter alia, that the FTT had wrongly consented to the Met Police withdrawing its appeal because by so doing the FTT had terminated Mr Greenwood's right embodied in Article 6 of the European Convention on Human Rights ("ECHR") to be heard in support of the ICO's Decision Notice and had diminished his rights under Article 10 of the ECHR. Neither of these ECHR arguments was relied on by Mr Coppel KC when opening the appeal before me for Mr Greenwood. Insofar as they were not thereby expressly withdrawn, they have no merit. Neither Article 10 or Article 6 of the ECHR add anything in terms of Mr Greenwood's right to information under FOIA or his ability to challenge (or support) the ICO's Decision Notice before the FTT: see *Moss v IC and Cabinet Office* [2020] UKUT 242 (AAC); [2021] AACR 1.

39. Although Mr Greenwood's grant of permission to appeal to the Upper Tribunal is not limited, the appeal proceedings before me had to be fair and I was concerned that the late change to the arguments relied on by Mr Greenwood should not prejudice the ability of either respondent to address them fully. Both Mr Perry and Mr Amunwa were able to address me on the three arguments of Mr Greenwood (as summarised in paragraphs 33-35 above) at the hearing on 27 November 2024. However, I also gave the respondents time after the hearing in which to consider Mr Greenwood's arguments further and add anything they wished to say in response to those arguments. Both respondents indicated by 6 December 2024 that they had nothing further they wished to add.

40. The ICO supported Mr Greenwood's appeal on the second argument I have summarised above (the FTT had to hold a hearing before consenting to the appeal being withdrawn). He also argued the FTT had erred in law in wrongly holding that its jurisdiction was limited only to a consideration of the lawfulness of the conclusions in the Decision Notice, rather than the full merits review required by section 58 of FOIA. The ICO argued in addition that, in the light of the volume and nature of the information in the Problem Profile that the Met Police intended to still withhold from disclosure and Mr Greenwood's opposition to withdrawal, the FTT exceeded its margin of discretion under rule 17(2) of the GRC Rules. He submitted that Upper Tribunal should set aside the FTT's decision and remake it by refusing to consent to the Met Police withdrawing its appeal, and remit the proceedings for the FTT to decide the substantive issues on the appeal.

41. The Met Commissioner opposed all of these arguments and argued the FTT's decision had been made lawfully and should be upheld.

Discussion and Conclusion

42. I will take each of the arguments in turn, though in my judgement the third part of Mr Greenwood's third argument and the ICO's arguments fall to be taken together.

*Rule 17(1) – the appeal was not withdrawn*

43. In my judgement , the FTT did not err in law in treating the Met Police's request under rule 17(1) of the GRC Rules as a request to withdraw its appeal from the FTT. It was the Met Police, and the Met Police alone, that withdrew its case from the FTT, and in context that 'case' was the Met Police's appeal.

44. Mr Greenwood sought to contrast the use of the word "case" in rule 17(1) with the word "appeal" as addressed by the Upper Tribunal in *Anwar (rule 17(1): withdrawal of appeal)* [2019] UKUT 125 (IAC). He argued that the use of the word 'case' must mean something different from 'appeal', because the draughtsperson of the GRC Rules could have used the word 'appeal' but had not done so and that election had to be seen as being a deliberate choice which meant that rule 17(1) of the GRC Rules was not about allowing the appeal to be withdrawn. An appeal was a necessary step to found the FTT's jurisdiction under section 58 of FOIA, but once made the appeal could not be withdrawn from the FTT. Absent a consent order under rule 37 of the GRC Rules, all the Met Commissioner could do was withdraw his case on the appeal, but it remained for the FTT to decide the appeal. It followed, so Mr Greenwood argued, that the Met Police's withdrawal of its case did not mean that the ICO's Decision Notice of 20 June 2023 remained in place. This was because the appeal had not been withdrawn (it was just the Met Police's case on the appeal that had been withdrawn), and section 50(6) of FOIA, accordingly, had nothing to bite on.

45. Mr Greenwood also sought to draw support for this argument from the terms of rule 17(6) of GRC Rules. He argued that the distinction between rule 17(1) and 17(6) had to be respected and it was only under the latter that the proceedings are withdrawn. Nothing in rule 17 provided that where a party's case had been withdrawn, the proceedings were at an end.

46. The rule in issue in *Anwar* was rule 17 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ("the IAC Rules"), which provided as follows:

> "**Withdrawal**
>
> 17.—(1) A party may give notice of the withdrawal of their appeal—
>
> (a) by providing to the Tribunal a written notice of withdrawal of the appeal; or
>
> (b) orally at a hearing,
>
> and in either case must specify the reasons for that withdrawal.
>
> (2) The Tribunal must (save for good reason) treat an appeal as withdrawn if the respondent notifies the Tribunal and each other party that the decision (or, where the appeal relates to more than one decision, all of the decisions) to which the appeal relates has been withdrawn and specifies the reasons for the withdrawal of the decision.
>
> (3) The Tribunal must notify each party in writing that a withdrawal has taken effect under this rule and that the proceedings are no longer regarded by the Tribunal as pending."

47. As the Immigration and Asylum Chamber of the Upper Tribunal recognised in *Anwar*, the wording of rule 17(1) in the IAC Rules is different from the wording used in the GRC Rules (and, for example, the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008). Firstly, the IAC Rules refer to the "appeal" instead of a party's "case" being withdrawn. Secondly, no consent is required from the First-tier Tribunal for the appeal to be withdrawn under the IAC Rules. However, I do not see anything in the wording of rule 17(1) of the IAC Rules, dealing as it is with appeals concerning different statutory provisions, which mandates that the word "case" cannot mean or include "appeal" when it is used in the GRC Rules. The use of

the word "case" may be a deliberate choice by the draughtsperson, but it is not obvious that that was done, and only done, to delineate it in contradistinction from "appeal". The more obvious reason, in my judgement, for the draughtsperson using the more protean word "case" is to enable it to cover the arguments (or cases) of all potential people or bodies other than the appellant who may be parties on an appeal to the General Regulatory Chamber of the FTT.

48. By way of example, the ICO as a party to such an appeal might wish to withdraw his support for the part of the Decision Notice which had found one exemption within Part 1 of FOIA had been breached by a public authority, but wish to continue to maintain another exemption on which the Decision Notice had relied. Another example would be a respondent public authority which wished to resile in whole or in part from its opposition to a requestor's appeal. If rule 17(1) of the GRC Rules used the word "appeal" instead of "case", neither respondent in these examples would have any mechanism from withdrawing their case on the appeal before the FTT.

49. In *Anwar* the appellant's 'case' **was** their 'appeal' against the respondent's decision. Moreover, as I understand it, there could only be one respondent to such an appeal (the Secretary of State for the Home Department). Therefore rule 17(2) provided for the other outcome on the appeal in the hands of the other party to the appeal, that being the withdrawal of the decision under challenge. The IAC Rules therefore had no need to use the word 'case'.

50. The equivalent of rule 17(2) of the IAC Rules is rule 17(6) of the GRC Rules. The purpose of rule 17(6) is similar to rule 17(2) of the IAC Rules. It allows for the respondent who made the decision (or act) to which the appeal proceedings relate to bring those proceedings to an end by revoking or withdrawing the decision (or act) under appeal. That action, however, is separate from and different to the respondent(s) withdrawing all or part of their case(s) on the appeal. Perhaps most obviously in a FOIA context, the respondent whose decision is under appeal is the ICO and so it is only the ICO who could invoke rule 17(6) in an appeal under sections 57-58 of FOIA. Rule 17(6) would have no application to a respondent public authority in such a FOIA appeal, but rule 17(1) would usefully enable such a respondent public authority to amend its defence on the appeal.

51. Insofar as emphasis was placed on rule 17(6) of the GRC Rules expressly providing that the consequence of the decision under appeal being withdrawn or revoked is that the proceedings are (save for good reason) treated as withdrawn, whereas rule 17(1) is silent on such a consequence, such silence does not in my judgement show that the appeal proceedings cannot be withdrawn under rule 17(1). For the reasons I have given already, rule 17(1) has a wider application than just the withdrawal of the appeal by the appellant, whereas by contrast rule 17(6) has a narrower focus on the decision under appeal no longer existing. But withdrawal of a party's 'case' under rule 17(1) includes an appellant withdrawing their appeal, and in such a situation the consequence is (if the FTT provides its consent) that the appeal proceedings are withdrawn. That consequence will not arise under rule 17(1), however, if a public authority withdraws all of part of its response (i.e. defence) to the appeal, and that is why rule 17(1) is not couched in terms of all withdrawal acts made by a party under it sounding in the appeal proceedings being withdrawn.

52. I am mindful, too, that in construing the GRC Rules it needs to be borne in mind that they are not just concerned with appeals under FOIA. Moreover, and

perhaps most pertinently, they also extend to applications which are not founded on any "appeal" being made. Under rule 25A of the GRC Rules, it is an "application", not an appeal, which is made by a charity or charity trustees for an order under section 324A of the Charities Act 2011. The requirement of the GRC Rules is that these Charities Act 2011 'authorised costs' proceedings are begun not by an appeal but by an application: see rule 25A(2) of the GRC Rules. It is obvious, why the use of the *Anwar* word "appeal" in rule 17(1) of the GRC Rules would be inapt in such authorised costs proceedings, as no appeal is involved. However, a charity may wish to withdraw its application for an authorised costs order from the FTT and the use of the generic word "case" in rule 17(1) allows it to do so. This has nothing to do with the FTT retaining any jurisdiction on the application (and even less so on any appeal).

53. Coming back to appeals under FOIA, however, perhaps the strongest pointer against Mr Greenwood's first argument, is the terms of section 50(6) of FOIA. I say this because under section 50(6) of FOIA Parliament has expressly contemplated that an appeal can be withdrawn. However, on Mr Greenwood's thesis an appeal once made cannot be withdrawn by the appellant (under rule 17(1) or otherwise) and it may only be disposed of by the FTT either deciding the appeal or by a consent order under rule 37 of the GRC Rules. So to construe rule 17(1) would put it sharply and obviously in conflict with section 50(6) of FOIA, and the language of rule 17(1) gets nowhere close to compelling such a result.

54. An additional difficulty with Mr Greenwood's argument is that it would undermine much of the practical effect of rule 17(2). If an appeal once made cannot be withdrawn, and has to be decided by the FTT (absent a consent order), it is less easy to see what would engage the need for the adjudicatory consent of the FTT to the appellant's 'case' being withdrawn.

55. In summary, the word "case" in rule 17(1) of the GRC Rules covers all or part of an appellant's appeal, a respondent's "response" to the appeal (per rule 23 of the GRC Rules), and an application by a charity for an authorised costs order under section 324A of the Charities Act 2011. The 'case' the Met Police was seeking the consent of the FTT to withdraw was its appeal and the FTT did not err in law in treating it as such.

56. I should add finally on this ground of appeal that the ICO referred me to paragraph 10.1 of the Explanatory Memorandum to the Tribunal Procedure (Amendment) Rules 2021. These amendment rules, amongst other things, added in paragraphs (6)-(10) to rule 17 of the GRC Rules. Paragraph 10.1 of explanatory memorandum refers to these amendments as having been "made in relation to the withdrawals of appeals", and that the proposed amendments had been the subject of consultation by the Tribunal Procedure Committee ("the TPC"). The TPC's consultation was also relied on before me by the ICO. He founded in particular on the TPC's view as set out in paragraph 12(i) of the consultation document.

> "12. There are presently 4 ways in which an appeal may be disposed of in the GRC upon the decision under appeal being revoked/withdrawn.
>
> (i) Withdrawal of the appeal under GRC rule 17
>
> (ii) Non-opposition to the appeal
>
> (iii) Consent Order encompassing either (i) or (ii)

(iv) Strike out of the appeal under GRC rule 8"

57. The ICO argued that the TPC's view about the scope of rule 17(1) of the GRC Rules prior to the amendments to rule 17 was persuasive. There may be some force in this submission given it is for the TPC to make the Tribunal Procedure Rules: see section 22(2) of the Tribunals, Courts and Enforcement Act 2007. However, the explanatory memorandum to any legal instrument has no more than a secondary role in deciding the intended scope of the legal provision itself (see paragraph [30] of *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255); and here the explanatory notes and the TPC's consultation are at further remove as they are not about the meaning of "case" in rule 17(1). The Upper Tribunal's primary function is to construe the words of the legal instrument or rule in their statutory context: *R (O)* at paras; [29]-31]. Given this, I do no more than note that the TPC's view about rule 17(1) of the GRC Rules accords with the one to which I have (already) come about rule 17(1).

58. The appeal therefore fails on this ground.

*Whether FTT had to hold an oral hearing of consent issue under rule 17(1)*

59. I am satisfied, however, that the appeal should succeed on this second ground. In my judgement, rule 32(1) of the GRC Rules required the FTT to hold an oral hearing before it made its rule 17(2) decision consenting to the Met Police withdrawing its appeal to the FTT. My reasons for coming to this conclusion are as follows.

60. First, none of the exceptions to rule 32(1) found in rule 32(1A)-(4) applied. This is more than a forensic observation. It is an important consideration in interpreting rule 32(1) because the exemptions from the requirement to hold an oral hearing before making a decision which disposes of the proceedings found in paragraphs (1A)-(4) of rule 32 show that the draughtsperson has had specific regard to the class of cases that should not be subject to the oral hearing requirement in rule 32(1) and has set those exempt classes of case out in the GRC Rules. The FTT 'giving' (to use a neutral word at this stage) its consent to the withdrawal of an appeal under rule 17(2) does not fall within any of the specified exemptions found in rule 32 of the GRC Rules.

61. Second, three matters arise under rule 32(1): (i) was the FTT on 16 January 2024 making a decision, (ii) if it was a decision, did that decision dispose of (the appeal) proceedings, and (iii) had each party consented to the matter being determined without a hearing?

62. As to the first issue under rule 32(1), in my judgement the FTT was making a decision on whether to consent to the Met Police withdrawing its appeal. That involved the FTT in adjudicating on that matter. That such adjudication was needed results from the word "consent" itself. The result was not automatic, or as is sometimes said 'self-executing', on the Met Police's application to withdraw its appeal. Moreover, the context makes the need for a decision more obvious as Mr Greenwood had put forward detailed arguments opposing that decision being taken and the ICO had indicated that withdrawal was not an appropriate means of dealing with the appeal. I may add that none of the parties before me argued that the FTT was not *deciding* whether to consent to the Met Police's appeal being withdrawn under rule 17(2).

63. If authority is needed in support of the conclusion that the FTT was making a decision under rule 17(2) of the GRC Rules, it can be found in paragraphs [36]-[37] of *AMA v Greater Manchester West Mental Health NHS Foundation Trust and others* [2015] UKUT 36 (AAC) and paragraph [29] of VS v St Andrew's Healthcare [2018] UKUT 250 (AAC). Both those decisions concerned rule 17(1) and (2) of the Tribunal Procedure (First-tier Tribunal) (Health, Education and Social Care Chamber) Rules 2008, which concerned (as here) the FTT "consenting" to a party in mental health proceedings withdrawing their "case". In *AMA* and in *VS* the FTT's task was described, respectively, in this way:

> *AMA*
>
> "[36].....The F-tT's consent to a withdrawal is a decision (see for example *MB v BEH MH NST* [2011] UKUT 328 (AAC) at [16]).
>
> [37] It follows in my view that:
>
> i) the F-tT must always ask for and consider who made the application to withdraw, how it was made, and perhaps most importantly the reasons for it and thus the continuation of a detention,
>
> ii) the F-tT must always make its own mind up on whether it should agree to it or conduct a review of the detention and give reasons for its decision, and
>
> iii) if it is in doubt it should refuse consent and as a consequence carry out the review itself.
>
> In effect the decision to give consent has to be based on a conclusion of the tribunal that continued detention under the MHA is justified for the reasons founding the application to withdraw (or other reasons)."
>
> *VS*
>
> "[29] The tribunal was asked to exercise a power conferred by rule 17. In deciding whether to consent, the tribunal had to act judicially. That means that it had to make a judgment in the individual circumstances of the case. A tribunal's consent to withdrawal is not a rubber stamp to be applied for the asking."

Although both of these extracts were made in the context of mental health law, I consider the views expressed in the extracts about a decision being made are of general application.

64. The FTT was, therefore, making a decision as to whether to consent to the Met Police's application to withdraw its appeal, and thus the appeal proceedings, from the FTT.

65. As to the second question under rule 32(1), I cannot see any escape from the conclusion that the decision which the FTT made "disposed of" the (appeal) proceedings. Had the FTT not consented to the Met Police's notice of withdrawal, the proceedings would have continued. By making the decision to consent to withdrawal, the appeal proceedings came to an end. That, in my judgement, is just another way of saying the FTT's consent decision disposed of the appeal proceedings. Again, no party before me really argued to the contrary.

66. The third question arises under rule 32(1)(a) and is whether each of the three parties before the FTT had consented to the matter (that 'matter' being whether to consent to withdrawal of the appeal) being decided without a hearing. This question under rule 32(1)(a) is in addition to the question that arises under rule 32(1)(b), namely that the FTT is satisfied it can decide the matter without a hearing. It follows that rule 32(1)(a) must also be satisfied before no hearing need be held.

67. I reject the Met Commissioner's argument that such consent was given by all three parties when none of them objected to the FTT's adjournment direction of 11 January 2024. In my judgement, the "consent" of the parties referred to in rule 32(1)(a) of the GRC Rules involves the positive and active giving of consent by each party, not a mere absence of objection: see to the same effect *IB v ICO and Dorset Police* [2013] UKUT 582 (AAC) (at paragraph [28] in particular) and *GA and JA v Wirral MBC* (SEN) [2020] UKUT 24 (AAC) (at paragraph [25] in particular) .

68. Accordingly, in my judgement, as a matter of statutory construction, the words of rules 17(2) and 32(1) of the GRC Rules are clear and require the FTT, unless the terms of rule 32(1)(a) and (b) are both met, to hold a hearing before consenting to an appeal being withdrawn.

69. This result will not necessarily obtain where what is being withdrawn falls short of the appeal (e.g. only part of the appellant's case on their appeal is withdrawn or a respondent withdraws all or part of their response to an appeal), because in such a situation the withdrawal of the "case" will not dispose of the appeal proceedings.

70. As I understood the Met Police's argument opposing this ground of appeal, it did not really dispute this analysis of the wording of rules 17(2) and 32(1). Its case was that the contrary statutory intent could be identified elsewhere.

71. Is there, therefore, anything elsewhere in the GRC Rules, or elsewhere, which ousts the clear meaning I have found rules 17(2) and 32(1) have or otherwise removes rule 32(1) from applying to decisions under rule 17(2)?

72. The Met Police's main contention in this regard was, in effect, that rule 32(1) had no application to decisions made under rule 17(1). It argued that rule 7A(6) and, more particularly, rule 10(4) of the GRC Rules showed this to be so, and that rule 32(1) did not set out a complete code for when a hearing needed to be (or need not be) held by the FTT.

73. As I have not set out rules 7A and 10 of the GRC Rules before, I do so now. They provide, insofar as is material, as follows:

> "**Certification**
>
> 7A.—(1) This rule applies to certification cases.
>
> (2) An application for the Tribunal to certify an offence to the Upper Tribunal must be made in writing and must be sent or delivered to the Tribunal so that it is received no later than 28 days after the relevant act or omission (as the case may be) first occurs…..
>
> (6) A decision disposing of the application will be treated by the Tribunal as a decision which finally disposes of all issues in the proceedings comprising the certification case and rule 38 (decisions) will apply.

> **Orders for costs**
>
> 10.—(1)…..the Tribunal may make an order in respect of costs (or, in Scotland, expenses) only—
>
> (a) under section 29(4) of the 2007 Act (wasted costs) and costs incurred in applying for such costs;
>
> (b) if the Tribunal considers that a party has acted unreasonably in bringing, defending or conducting the proceedings; or
>
> (c) where the Charity Commission the Gambling Commission or the Information Commissioner is the respondent and a decision, direction or order of the Commission or the Commissioner is the subject of the proceedings, if the Tribunal considers that the decision, direction or order was unreasonable…..
>
> (2) The Tribunal may make an order under paragraph (1) on an application or on its own initiative…..
>
> (4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 14 days after the date on which the Tribunal sends—
>
> (a) a decision notice recording the decision which finally disposes of all issues in the proceedings;
>
> (b) notice under rule 17(5) that a withdrawal which ends the proceedings has taken effect; or
>
> (c) notice under rule 17(8) that the proceedings have been treated as withdrawn…..

74. I am not persuaded that, even if rule 32(1) does not provide a complete code for when the FTT must hold a hearing before making a decision which disposes of the proceedings, such a result necessarily shows that rule 32(1) does not apply to a decision under rule 17(2).

75. The Met Police's reliance on rule 7A(6) does not provide the plain contrary statutory intent for which it argues. The decision in *Information Commissioner v Dr Gary Spiers and Garstang Medical Practice* [2022] UKUT 93 (AAC); [2023] AACR 3 establishes that the certification proceedings are a separate set of proceedings from the appeal proceedings. It is therefore unsurprising that when rule 7A was added in to the GRC Rules the draughtsperson, perhaps out of an abundance of caution, wished to make plain in rule 7A(6) that disposal of the certification application was to be treated as a decision finally disposing of that certification application such that rule 38 of the GRC Rules applied to that decision. Moreover, I doubt whether a later amendment to the GRC Rule can properly throw light as to the statutory intent when those rules were first made.

76. Rule 38 is concerned with how decisions are to be given. On the face of it, rule 38 is consonant with and links back to rule 32, because rule 38(2) is (also) about decisions which dispose of the proceedings. In any event, rule 7A(6) is silent as to whether the rule 32(1) requirements apply to such a decision or not, which may be contrasted with the terms of rule 37(2) of the GRC Rules, and it has nothing to say about rule 17(2). On one basis, rule 7A's wording about treating the certification decision as finally disposing of the certification proceedings might be argued to so

obviously show that rule 32(1) applies to it that it did not need to say so; and as I have just stated rules 32 and 38 would seem to dovetail with one another. Rule 7A(6) does not therefore show that rule 32(1) does not apply to a decision made under rule 17(2), and nothing in rule 17(2) removes rule 32(1) from applying to it either. A contrast may again be drawn here with rule 37(2) of the GRC Rules, which shows that when rule 32(1) is not to apply that is set out expressly.

77. Nor in my judgement does anything in rule 10(4) of the GRC Rules make good the Met Police's case on this point. Its argument, as I understood it, was that rule 10(4)(a) was about a decision which finally disposed of all the issues in the proceedings whereas, by contrast, rule 10(4)(b) was about the ending of the proceedings under rule 17 and that did not engage rule 32(1)'s rubric of "disposing of proceedings". There are a number of answers which show on balance why this argument is not persuasive.

78. First, rule 10(4)'s only function is to fix the end date when an application for costs may be made. That is why it focuses on the date when the relevant decision notice or notice of decision has been "sent" by the FTT.

79. Second, the rule 17(2) decision of the FTT's consenting to the withdrawal of the Met Police's appeal on the face of it (also) fell under rule 10(4)(a) as a decision notice under rule 38(2) which finally disposed of all the issues in the Met Police's appeal proceedings. Indeed, that is how the FTT seemingly dealt with its rule 17(2) consent decision, though that obviously cannot be determinative. That it may also constitute a notice under rule 17(5) (per rule 10(4)(b)) of the GRC Rule does not necessarily alter this conclusion.

80. Third, and following on from this very last point, what the language of rule 17(5) is strictly concerned with is notice of when the withdrawal under rule 17(2) "has taken effect", though I would accept that that effect and the rule 17(2) consent to withdrawal decision on language of rule 17(2) and 17(5) should be coterminous.

81. Fourth, and perhaps decisively, even if the consent to withdraw the appeal decision is notified under rule 17(5) of the GRC Rules (whether or not it is also a notice under rule 38(2) of those rules), that notice that the withdrawal has taken effect is predicated on the adjudicatory exercise which the FTT had to engage in under rule 17(2) in order to consent to the withdrawal, and that exercise was to make a decision which disposed of the appeal proceedings. Putting this last point another way, even if rule 17(5) shows that the rule 17(2) consent to withdrawal decision is not a decision for the purposes of rule 38(2) of the GRC Rules, that does not show that it is not a decision disposing of the proceedings under rule 32(1) of those rules.

82. The Met Police sought to bolster its argument here by referring to the Senior President of Tribunals Practice Direction of 19 May 2023 on the *Composition of the First-tier Tribunal in relation to matters that fall to be decided by the General Regulatory Chamber*. It was pointed out that the focus under that FTT composition direction was on 'decisions disposing of proceedings', and that as a rule 17(2) consent to withdrawal decision was not identified in paragraph 3(a) of the composition direction as a species of decision that could be decided by a judge sitting alone, it would have to be decided (per paragraph 3(b)) by a judge and at least one specialist member. This was to be contrasted, so the Met Police, argued with the Senior President of Tribunals *Practice Statement authorising Registrars and Legal Officers to carry out functions of a judicial nature in the First-tier Tribunal (General*

*Regulatory Chamber)*, dated 3 July 2023, which under paragraph 2(g) purports to authorise that a Legal Officer of the GRC may decide whether to consent to the withdrawal of a case under rule 17(2). The Met Police's argument was that the Practice Statement supported its case that rule 17(2) was not to be read as making a decision that disposed of the proceedings because, given the terms of the Practice Direction, such a decision could not be made by a GRC Legal Officer.

83. I accept that the view of the Senior President of Tribunals expressed in the Practice Statement would seem to be based on rule 17(2) *not* being a decision disposing of the proceedings. However, the Senior President's implied authorisation to make a Practice Statement extends only to it providing what is intended as helpful guidance. The Practice Statement does create law nor can it lay down legal requirements: see *AEB v SSHD* [2022] EWCA Civ 1512; [2023] 4 WLR 12 at paragraphs [12]-[15]. The only express statutory authority which the Senior President of Tribunals has about the "practice and procedure" in the FTT is by way of a Practice Direction: see section 23 of the Tribunals, Courts and Enforcement Act 2007. What the Practice Statement might therefore be said to infer cannot, in my judgement, be given any great (let alone determinative) weight legally. Furthermore, and in the end, the identification of who is to decide a legal matter in the GRC cannot in my view mandate the answer to the separate question of when an oral hearing must be held before making a decision on that matter.

84. The FTT therefore erred in law in not holding a hearing before deciding the consent to withdraw matter under rule 17(2) of the GRC Rules.

85. I should add that this result is not anomalous. Where the relevant procedure rules allow a party to withdraw its appeal as of right, per *Anwar*, the need for a hearing would not arise because no decision would be called for by the FTT. A hearing would probably also not be needed where all the parties in the GRC proceedings agreed (per rule 32 (1)(a) of the GRC Rules) to the FTT making the consent decision without a hearing and that is because they agree that the appeal should be withdrawn. This is likely to be the case in many, if not most, GRC appeal proceedings where the appellant seeks to withdraw their appeal. However, where, as here, the withdrawal of the appeal is disputed, absent the parties agreeing to the consent to withdrawal decision being made without a hearing, the FTT will need to hold a hearing.

*The FTT's consideration of the request to withdraw*

86. Setting the issue of the oral hearing to one side, I accept Mr Greenwood's argument that the FTT erred in law in failing to take account of the ICO's lack of support for withdrawal of the appeal when it consented to the appeal being withdrawn. I also accept the ICO's arguments that the FTT erred in law in its consideration of the Met Police's request to withdraw its appeal. All these arguments are in my judgement just different ways of making the same point about the FTT's failure to grapple properly with the consequence of the appeal being withdrawn.

87. I do not accept, however, Mr Greenwood's argument that a relevant consideration for the FTT was Mr Greenwood's inability to use the FTT to enforce compliance with an FTT decision if the appeal was withdrawn. The use of the FTT's 'enforcement' mechanism under rule 7A of the GRC Rules is, as I have already noted, a separate set of proceedings (see *Spiers*). In this case those separate proceedings would only arise once the appeal proceedings had been decided and if

the FTT had ordered the Met Police to do something and it was then argued the Met Police had not complied with that order. Until that stage had been reached, however, the issue of enforcement by the FTT of a potential future breach was legally irrelevant to the issues that arose on an appeal under section 58 of FOIA. This is underscored by the fact that unless and until the FTT has made a decision on a section 57 appeal and substituted a Decision Notice under section 58(1)(b) of FOIA, the only Decision Notice is the Information Commissioner's and enforcement of the Information Commissioner's Decision Notice is a matter for the Information Commissioner: per *Information Commissioner v Moss and the Royal Borough of Kingston upon Thames* [2020] UKUT 174 (AAC).

88. Reverting to the FTT's consideration of the arguments for and against withdrawal, and putting Mr Greenwood's arguments to the FTT against withdrawal aside, in my judgement a clear error was the FTT's failure to show that it had had any regard to the ICO's view of 12 June 2024 that the appeal was not amenable to withdrawal. The FTT, as shown by its reasoning, at no stage grappled with this concern. Taking account of the ICO's view is not an empty procedural formalism. The ICO's inhabits what has been described as the role of "guardian" in respect of FOIA: see paragraph [33] of *Browning v ICO and Department for Business, Innovation and Skills* [2014] EWCA Civ 1050; [2014] 1 WLR 3848, as well as section 47(1) of FOIA. In paragraph [51] of *Lubicz v ICO and Kings College* [2015] UKUT 555 (AAC) the ICO was described as:

> "…unlike other parties. He is an independent regulator and has a role in assisting in or ensuring the proper administration of the FOIA regime. As such, his role in tribunal proceedings is not to defend his decisions come what may…."

Given the ICO's role in ensuring the proper administration of the FOIA regime, the concern he expressed about the appeal being withdrawn needed to be addressed by the FTT.

89. Moreover, the concern expressed by the ICO on 12 June 2024 was an obvious and, in my view, a correct one. This only added the need for it to be addressed by the FTT. To turn the language the FTT used in paragraph 26 of its consent to withdraw decision around, there **was** a good other reason to refuse to consent, and that reason was the ICO's concern that the Met Police's appeal was not amenable to withdrawal.

90. That concern was based, as I see it, on the following relevant considerations. Withdrawal of the appeal would leave the Information Commissioner's Decision Notice of 20 June 2023, and the steps the Met Police were required to take under that notice, intact (per section 50(6) of FOIA). Without the FTT substituting an alternative Decision Notice, which could only occur under section 58(1)(b of FOIA if the appeal was not withdrawn, the ICO could not substitute any alternative Decision Notice: see *Malnick*. However, the ICO's Decision Notice remaining in place was, on the face of it, not a result which either the Met Police or the ICO considered was the correct one. That much is and was obvious from the ICO's changed view about the merits of Met Police's appeal, which itself was based on the Met Police having advanced a more particularised (or changed) basis for its reliance on sections 30, 31 and 38 of FOIA during the course of the appeal proceedings. In other words, the ICO was of the view that a different Decision Notice, one which upheld the Met Commissioner's decision, was merited. However, that result could obtain only if the

appeal proceedings continued and led to a decision under section 58 of FOIA. It could not arise if the appeal was withdrawn.

91. In a sense, Mr Greenwood's arguments to the FTT for why the Met Police should not be allowed to withdraw its appeal engaged, albeit perhaps obliquely, with this same point. Mr Greenwood's concern about the fresh arguments the Met Police had seemingly persuaded the ICO about in the course of the appeal proceedings was with the merits of those 'new arguments'. However, what I have termed the Met Police's new arguments had no real relevance in the appeal proceedings unless and until the FTT had dealt with those new arguments on the appeal, accepted them and allowed the Met Police's appeal, and substituted a new Decision Notice under section 58(1)(b) of FOIA to the effect that the Met Police was entitled to rely on the relevant exemptions in section 30, 31 and 38 of FOIA (as well as section 40) and was not required to provide Mr Greenwood with any further information under FOIA.

92. It may be that this is what the FTT was driving at when it said that when dealing with an appeal under section 58 of FOIA its focus was "on the Decision Notice itself" and its role was to decide if that Decision Notice was not in accordance with the law, withdrawal would mean the ICO's Decision Notice would stand and Mr Greenwood's concern about the Met Police's 'new arguments' was [therefore] not an issue for the FTT on the appeal. However, what this fails to grapple with is why it was appropriate under FOIA (that is, in accordance with Part I of FOIA) to keep that original Decision Notice in place.

93. I also accept there is merit in the ICO's argument that the FTT's formulation of its jurisdiction under section 58 of FOIA appears to have been too narrow. On an appeal in respect of a section 50 FOIA Decision Notice, the FTT exercises a full merits reconsideration as to what the correct decision should be: *Malnick* at paragraphs [45]-[46]. This reconsideration should take account of new arguments (e.g., as to exemptions) made by the parties in the course of the appeal proceedings. The FTT's jurisdiction was not therefore limited to whether the Decision Notice itself had been correctly decided. Mr Greenwood's concern about what the correct position ought to have been was, therefore, an issue for the FTT on the appeal and was, as a result, relevant to whether to decide to consent to that appeal being withdrawn.

94. In the end, as I have said already, the point made in the last paragraph may be doing no more than making the point again that Mr Greenwood's concerns about the Met Police's 'new arguments' (and the ICO's view that withdrawal was not an appropriate remedy) were matters which were relevant to whether the FTT ought to consent to the appeal being withdrawn. The FTT exercises an inquisitorial jurisdiction to ensure that "FOIA is properly applied in the circumstances" (see *Lownie v ICO, National Archives and the FCO* [2020] UKUT 32 (AAC) (at paragraph [31]) and *Browning v IC and DBIS* [2013] UKUT 236 (AAC) (at paragraph [60]). That investigatory function was needed in this case in circumstances where neither the Met Police or the ICO were supporting the Decision Notice of the ICO and where Mr Greenwood had advanced detailed arguments for why the new stance of the Met Police and the ICO was not in accordance with Part I of FOIA.

*Remedy*

95. Given the errors of law made by the FTT, its consent to withdraw decision must be set aside. I am satisfied I can remake that decision. Largely for the reasons I have set out above, I remake that decision by refusing to consent to the Met Police

withdrawing its appeal from the FTT. In summary, I refuse to consent to the appeal being withdrawn because to do so would leave a Decision Notice in place which neither the Met Police nor the ICO considers is the correct Decision Notice.

96. Mr Greenwood's argument in opening that I should also redecide the substantive appeal of the Met Police under section 58 of FOIA, was not maintained in his closing arguments. I refuse to do so in any event. The first reason why I refuse to do so is because that appeal has not been decided by the FTT and section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007 only empowers me to re-make a decision. There is no substantive decision on the section 58 appeal for me to remake as it has yet to be made in the first place by the FTT. Secondly, and even if this first point is wrong, redeciding the first instance appeal needs to wait until another day, whichever tribunal is to redecide it. Once this point is reached, the FTT 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 all parties should be able to have the appeal decided by that tribunal.

97. I add finally that as the Met Police has not had its appeal struck out under rule 8 of the GRC Rules, and nor has the ICO been debarred from any taking further part in the FTT appeal proceedings under rule 8, there is no warrant for the claim made at one stage on behalf of Mr Greenwood that both the Met Police and the ICO should not be able to participate in the FTT appeal.

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

On 28th February 2025