



Appeal No. UA-2024-001615-GIA
Neutral Citation Number: [2026] UKUT 24 (AAC)

**IN THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)**

Between:

ECOTRICITY LIMITED

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) THE ANIMAL AND PLANT HEALTH AGENCY**

Respondents

Before: Upper Tribunal Judge West

Hearing Date: 9 September 2025

Decision Date: 19 January 2026

**Representation: Mr Eric Metcalfe, counsel, for the Appellant
(instructed by Advocates for Animals)**

**Mr Leo Davidson, counsel, for the First Respondent
(instructed by the Information Commissioner)**

**Mr Nicholas Ostrowski, counsel, for the Second
Respondent (instructed by the Government Legal
Department)**

On appeal from:

Tribunal	First-tier Tribunal (General Regulatory Chamber) (Information Rights)
Tribunal Case No:	EA/2023/0098-0101
Tribunal Hearing Date:	1/3/2024
Tribunal Decision Date:	23/7/2024

Summary of Decision Freedom of Information Act 2000 – information requests concerning pig culling - s.43(3) – whether Tribunal’s assessment of existence of risk of prejudice flawed because requested information already in public domain – whether applicable test is whether requested information already in public domain - applicable interests – nature of prejudice and causal link – likelihood of prejudice – balance of public interest – whether conclusion that prejudice was “real, actual or of substance” at odds with evidence - whether identity and ownership of farm should be disclosed

Keyword Name 93 Information rights

93.1 Freedom of information - right of access

93.2 Freedom of information - public authority response

93.3 Freedom of Information - exceptions

93.5 Freedom of information - qualified exemptions

Please note that the Summary of Decision is included for the convenience of readers. It does not form part of the decision. The Decision and the Reasons of the Judge follow.

DECISION

The decision of the First-tier Tribunal (General Regulatory Chamber) dated 23 July 2024 under file reference EA2023/00989-0101 does not contain an error on a point of law. Permission to appeal is granted in respect of the first two grounds of appeal (but not the third), but the appeal is dismissed.

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

REASONS

Introduction

1. This is an application for permission to appeal, with the appeal to follow if permission is granted, against the decision of the First-tier Tribunal (Judge Foss, Tribunal Members Yates and Shaw) which sat on 1 March 2024 and which issued its decision on 23 July 2024.

2. In its decision the Tribunal dismissed the appeal of the Appellant, Ecotricity Limited ("Ecotricity") from the Decision Notices of the Information Commissioner ("the IC") dated 23 January 2023 in which he decided that the Animal and Plant Health Agency ("APHA") was entitled neither to confirm nor to deny that it held the information requested.

Background

3. On 18 July 2022 and 5 September 2022, Ecotricity made two requests for information to APHA as follows:

18 July 2022 (the first request)

"This is a freedom of information request.

Ref: [name of a farm redacted ("the Farm")]

1) Please confirm whether the Secretary of State granted [the Farm] any derogation under Article 18(3) of Council Regulation (EC) No 1099/2009 (PATOK¹) to kill pigs on the farm in June/July 2022, as part of a depopulation operation.

2) In the event a derogation was granted please provide the following information:

a) The provisions of PATOK and the Welfare at The Time of Killings Regulations that were subject to the derogation

b) Any conditions on which the derogation was granted

c) How the welfare of the pigs was considered under the derogation

d) A copy of the derogation notice"

5 September 2022 (the second request)

"We understand a mass pig cull took place on [the Farm] in June 2022. In relation to that pig cull please could you confirm the following:

1) When was your department first alerted to the possible disease risk

2) When were tests taken to confirm whether the pigs carried a disease

3) What were the results of those tests

4) When were the results communicated to the farm

5) Who decided on the mass pig cull and when

6) What was the management plan for the cull

7) Were there APHA officials and an official veterinarian present at the cull".

4. On 4 August 2022, APHA said that it could neither confirm nor deny that it held the information within scope of the first request. In so doing, it relied on s.40(5B)(a)(i) (personal data) and s.43(3) (commercial interests) of the Freedom of Information Act 2000 ("FOIA"). Ecotricity sought an internal review of that decision. On 16 September 2022 APHA maintained its position by reference to s.43(3), but accepted that s.40(5B)(a)(i) was not engaged as the first request did not include a request for personal data.

5. On 21 September 2022 APHA said that it could neither confirm nor deny that it held the information within scope of the second request. In so doing, it relied on s.43(3). Ecotricity also sought an internal review of that decision. On 24 October 2022 APHA maintained its position in reliance on s.43(3). It confirmed that the commercial interests in question were those of the Farm.

6. On 15 November 2022 Ecotricity complained to the IC about APHA's response to both requests. APHA maintained its position during the IC's investigation. Additionally, it said it was entitled neither to confirm nor deny it held the requested information in reliance on s.38(2) (health and safety).

7. On 26 January 2023, the IC issued two Decision Notices: Decision Notice IC-202669-D7B6 in relation to the first request, and Decision Notice IC-203536-F3J1 in relation to the second request.

8. In summary, he decided that APHA was entitled neither to confirm nor to deny that it held the information requested, for the following reasons:

(a) the exemption under s.38(2) was engaged because the Farm was identified in the requests; information about the Farm was already in the public domain; pig farming was a sensitive subject matter, and confirming or denying that APHA held the information requested would be likely to cause upset to the owners of the farm to the point that this would endanger their mental health. It would also be a likely risk to employees' safety at the premises due to concerns about the activities of animal rights protesters; protecting individuals' health and safety outweighed the public interest in confirming or denying whether APHA held information about a process that may or may not have taken place; and that confirming or denying whether APHA held the requested information would be likely to endanger individuals' health and safety.

(b) the exemption under s.43(3) was engaged because the harm anticipated by APHA (negative public coverage) related to the commercial interests of the corporate owner of the Farm; there was a causal link between confirmation or denial of whether the requested information was held and the commercial prejudice anticipated by APHA feared would arise i.e. because it would indicate to the wider world whether or not the Farm culled pigs as part of a depopulation operation and because it would be likely to result in negative publicity about the Farm which may also be incorrect or not based on the facts of the situation. The Farm's and the company's competitors could use this to their advantage and the Farm's and/or the company's commercial interests could be undermined.

(c) in relation to the balance of the public interest under s.43(3): (i) although there was a public interest in the welfare of farmed animals, there was a greater public interest in farms being prepared to cooperate and engage willingly with APHA, without the need for APHA to use more formal processes to ensure that farms engaged with them; (ii) there was a public interest in not undermining the competitiveness of the Farm in this case, or its corporate owner, through generating potentially negative, and perhaps incorrect, publicity; and (iii) there

was a "strong" public interest in ensuring that the UK has a strong rural economy.

9. On 23 February 2023 Ecotricity appealed against the Decision Notices to the Tribunal. On 27 March 2023 the Tribunal directed that the appeals be joined. On 30 June 2023, the Tribunal joined APHA to the appeal. On 8 September 2023, APHA filed and served its Response to both appeals. On 20 September 2023, the Appellant filed and served its Reply to APHA's Response.

10. The Tribunal heard the appeal on 1 March 2024 and produced its decision on 23 July 2024. The Tribunal gave reasons for its determination of the appeals in a single OPEN decision and in a separate CLOSED decision insofar as those reasons needed to be articulated by reference to material which was held on a CLOSED basis, pursuant to rule 14(6) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

The Hearing

11. Ecotricity and APHA were each represented by counsel at the hearing. The IC did not appear and was not represented.

12. The Tribunal had before it three bundles: an OPEN bundle, a CLOSED bundle, a bundle of authorities agreed by the parties and detailed skeleton arguments.

13. Ecotricity called evidence from its General Counsel, Mr Rolf Stein, who made a witness statement on 21 December 2023. Counsel for APHA cross-examined Mr Stein.

14. APHA called evidence from Dr Williamson. Counsel for Ecotricity cross-examined Dr Williamson in OPEN session. The Tribunal then questioned Dr Williamson about her evidence in CLOSED session.

15. After the CLOSED session of the hearing, APHA disclosed to Ecotricity in OPEN session a description of the contents of the CLOSED bundle by reading out the index to that bundle and a gist of the CLOSED hearing as follows:

"Counsel directed the Tribunal to the rule 14 order, taking the tribunal through the relevant information and evidence contained within the CLOSED bundle. Mr Ostrowski directed the Tribunal to the unredacted version of the documents sent to the First Respondent which were provided in redacted form in the OPEN bundle.

Dr Williamson's evidence covered:

a) Information about the farm in question and the disease investigation which took place and why the cull occurred.

b) That the Temporary Control Zone relating to Foot and Mouth Disease at the farm in question was revoked on 24 June 2022.

c) That a small number of diseased pigs (approximately 10) were euthanised on 28 June 2022 as part of the official APHA investigation in order to obtain material required for the notifiable disease testing which could not be collected from live pigs.

d) That on 29 June 2022 the notifiable disease investigation found that notifiable disease was no longer suspected on the premises.

e) Examples were given where potential non-statutory disease threats have been detected and private vets voluntarily liaised with APHA who provided advice and additional testing at no charge enabling mitigation of risks and/or concerns to be allayed.

The panel further questioned Dr Williamson on non-statutory diseases. Dr Williamson explained the definition and meaning of non-statutory diseases and the events at the farm in June 2022."

16. Counsel for Ecotricity expressed disquiet at the start of the hearing as to how much information had been redacted by APHA from the papers in the appeal. Having carefully reviewed all the redacted material, and taking into account APHA's description of the contents of the CLOSED bundle and the gist

of the CLOSED session of the hearing, the Tribunal was satisfied that APHA's redactions were appropriate.

The Statutory Framework

17. So far as material, FOIA provides that:

“Section 1

General right of access to information held by public authorities.

(1) Any person making a request for information to a public authority is entitled-

(a) To be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) If that is the case, to have that information communicated to him.

...

Section 2

Effect of the exemptions in Part II.

...

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

...

Section 43

Commercial Interests

...

(1) Information is exempt information if it constitutes a trade secret.

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).

...

Section 58
Determination of appeals

(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. The import of s.58 is that the right of appeal to the Tribunal involves a full merits consideration of whether, on the facts and the law, the public authority's response to the Request is in accordance with Part 1 of FOIA (*IC v Malnick and ACOBA* [2018] UKUT 72 (AAC); [2018] AACR 29 at [45]-[46] and [90]). The Tribunal has jurisdiction to decide, de novo on the merits, whether the IC's decision is in accordance with the law.

The Tribunal's Decision

19. The Tribunal found that s.38(2) was not engaged at the time of refusing to confirm or deny whether APHA held the requested information. As the Tribunal did not find that s.38(2) was engaged, it was not necessary for it to consider the

public interest arising under that exemption. That aspect of the decision calls for no further comment.

20. As to S.43(3) the Tribunal held that

“Was the information requested in the public domain?”

33. The Appellant's first ground of appeal is that the Commissioner erred in concluding that s43(3) FOIA was even engaged on the facts of this case; specifically, he failed to address the fact that the location and identity of the Farm was already in the public domain at the time APHA refused to confirm or deny if it held the information requested, because of the following matters:

a. APHA had published sufficient information by the grid reference of the temporary control zone it put in place over the Farm, and by descriptive reference to the geographical area of the Farm, to enable its identification.

b. Drone footage taken of the cull and posted on YouTube on 14 July 2022, gives an overhead shot of the Farm which enables its identification. This footage had, as at the date of the Appellant's skeleton argument, 26 February 2024, received 1,280 views (we were not told how many views it had received by the dates of APHA's refusal to confirm or deny if it held the information requested, 4 August and 21 September 2022).

c. Four press articles (published on 25 June 2022, 18 July 2022, 9 August 2022 and 11 August 2022, one by the BBC, the others by local press) had given the approximate geographical location of the Farm and identified the name of its corporate owner.

d. The corporate owner of the Farm had effectively "outed" itself by having a spokesman (identified as a spokesman of the owner by name) make a statement about the cull.

34. We do not accept that the information requested was already in the public domain at the time of APHA's refusal to confirm or deny it held the information requested. Whether or not something is in the public domain is a question of degree. Our view is that the most that the matters described by the Appellant demonstrate, is that there was sufficient information publicly available to enable a motivated individual, with background knowledge, to identify the Farm, should they wish to. That

is a very different matter, in our view, from the Government agency responsible for surveillance of pig diseases confirming or denying to the world that it holds information of the type requested in relation to a particular incident or investigation at a particular site. Recognising that is not unfairly to aggrandize the standing or influence of APHA. It is simply a proper acknowledgment of APHA's role and authority.

35. S43 FOIA is a prejudice-based exemption. The approach to be taken in prejudice cases was set out in the First-tier Tribunal decision of *Hogan v Information Commissioner* [2011] 1 Info LR 588, as approved by the Court of Appeal in *Department for Work and Pensions v Information Commissioner* [2017] 1 WLR 1:

a. first: the applicable interests within the relevant exemption must be identified.

b. second: the nature of the prejudice being claimed must be considered. It is for the decision maker to show that there is some causal relationship between the potential disclosure and the prejudice, and that the prejudice is "real, actual or of substance".

c. third: the likelihood of occurrence of prejudice must be considered. The degree of risk must be such that there is a "real and significant" risk of prejudice, or there "may very well" be such prejudice, even if this falls short of being more probable than not.

Applicable Interests

36. The most obvious applicable interests in this case are the commercial interests of the Farm's corporate owner, and its corporate group ("the Farm's commercial interests"). We reject any suggestion that because the Farm does not sell directly to the public, its interests are less likely to be prejudiced. As the Appellant indicated, it would be no great work of research by a motivated individual to identify the Farm, its corporate owner, and, consequently, its market, and we consider that the Farm's commercial customers' confidence in its product may be diminished to an extent equal to, if not more than, that of any member of the public purchasing directly.

37. APHA submitted there was also a risk of prejudice more widely to the commercial interests of the pig industry, the veterinary profession, and the rural economy generally. We do not reject that submission, but we do consider the prospects of those interests to be

exponentially more distant than any likely, immediate or imminent prejudice caused to the Farm's commercial interests by a confirmation or denial of the requested information being held in this case.

38. For completeness, we address the Appellant's submission in its grounds of appeal that the Farm's commercial interests were not legitimate because "*there is a strong chance that illegal activity took place, which the disputed information will shine more light on.*" The Farm's commercial interests are, so we understand, the breeding and marketing of pigs or pig products. That is a legitimate commercial activity. The possibility that within that enterprise a killing method may have been unlawful (which is not an issue before the Tribunal and on which we are not competent to opine in any event) does not detract from the overall legitimacy of the operation giving rise to the relevant commercial interest, and thus the interest itself.

The nature of the prejudice and the causal link

39. APHA's arguments and evidence as to the nature of the prejudice which would or would be likely to be caused, ranged, in our view, somewhat indiscriminately over a number of interests, as follows:

a. a chilling effect on the willingness of farms and vets to engage voluntarily with APHA in terms of reporting a non-notifiable disease, which, in turn, would stifle APHA's disease surveillance function, including its ability to investigate, diagnose, and raise awareness of non-notifiable disease;

b. disincentivising farms and vets from co-operating with disease reporting and surveillance, causing the UK's international trading partners in live pigs, pork or pig semen (depending upon the type of unit involved) to doubt the integrity of the UK's disease reporting and surveillance systems, and consequently undermining market access;

c. disengagement from co-operation with APHA risking prompt notification of suspected cases of Foot and Mouth Disease (or other notifiable diseases), which could have devastating economic consequences not only for the pig sector but the wider, agricultural industry;

d. feeding a perception of some in the pig industry that, especially, at times of oversupply of pigs, an abattoir could decide to limit commercial risk to themselves by

refusing to accept healthy pigs from herds with certain diseases;

e. unfairly damaging the reputation of certain vets;

f. giving a competitive advantage to other pig companies who would have information about the affected pig company on a disease about which they would not share their own information;

g. deterring UK trading parties from trading with the Farm's corporate owner.

40. Of all these, it seems to us that only the last two instances of prejudice to the Farm's commercial interests might be said to arise from any confirmation or denial by APHA that the requested information was held. The balance are more remote prospects, resting in a national and international loss of confidence in the UK's disease surveillance system which may, in turn, weaken confidence in UK pigs or pig products for export. We accept, of course, that long-term such matters might prejudice the Farm's commercial interests, together with those of other pig producers, but we do not consider that there is a sufficiently direct, causal link between confirming or denying the requested information is held in this case and those wider prejudices identified. Those matters seem to us to be more relevant to assessment of the public interest in favour of disclosure or non-disclosure, if the exemption is engaged.

41. The Tribunal had no direct evidence from the Farm's corporate owner as to the issue of prejudice. We note, however, from the OPEN version of APHA's response of 21 December 2022 to the Commissioner's investigation that the Farm's corporate parent (named in APHA's correspondence with the Commissioner) had advised APHA that it regularly participates in product tenders to supply supermarket retailers, and it was concerned that APHA confirming or denying it held the requested information would be used selectively and out of context by its competitors to seek to influence its retail customers to unfairly switch their supply and/or to exclude the company from future tenders. It had apparently also expressed great concern that APHA confirming or denying it held the information requested would be used by animal rights protest groups selectively and unfairly to seek to damage its commercial reputation.

42. Taking together the OPEN and CLOSED material addressing the issue of prejudice, we are satisfied that prejudice to the Farm's commercial interests would be real, actual and of substance.

The likelihood of prejudice

43. The question of the meaning of likelihood in the current context was addressed by the Tribunal in *John Connor Press Associates v Information Commissioner* (EA/2005/0005, 25 January 2006): "*We interpret the expression "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk.*" In so doing, the Tribunal drew on the judgment of Munby J in *R (on the application of Lord) v Secretary of State for the Home Office* [2003] EWHC 2073 (Admin) (a Data Protection Act case) who said: "*Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not.*" [100].

44. We adopt the interpretation of "*likely to prejudice*" as meaning that the chance of the prejudice being suffered is more than a hypothetical or remote possibility; there is a real and significant risk.

45. Taking together the matters which Dr Williamson addressed in her OPEN and CLOSED evidence, we are satisfied that were APHA to confirm to the world whether it held such information, by its very authority and expertise, that would create a real and significant risk of prejudice.

46. We find that 43(3) FOIA is engaged in relation to the requested information.

The Public Interest

47. In considering factors in favour of disclosure, we accept that there is a public interest in disclosing information that promotes accountability and transparency to maintain confidence and trust in a public authority. We also accept that there is a significant public interest in animal welfare, and in the public being able to be confident that those persons and entities tasked with promoting it, and protecting animals, are accountable in that regard.

48. The evidence of Mr Stein, for the Appellant, was that there is little in the public domain in relation to mass animal culls and disease control measures; he considered the drone footage of the cull procured by the Appellant to be highly distressing, possibly involving illegal conduct; to understand whether a departure from the lawful methods of killing farmed animals is justified, whether by way of official derogation or otherwise, it is necessary to understand whether disease is present at the time of killing. He accepted that while the information requested by the Appellant may support a private prosecution against the Farm and may assist the Appellant in challenging APHA by way of judicial review if the cull was unlawful, those matters are not directly relevant to the consideration of the public interest, which is whether the cull was lawful per se.

49. We accept that there is a public interest in the lawfulness of the cull and in relation to APHA's oversight of it: see *Beloff v Pressdram Ltd* [1973] 1 All ER 241, where Ungood-Thomas J observed [260] that public interest covers "*matters, carried out or contemplated, in breach of the country's security, or in breach of law, including statutory duty, fraud or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity.*"

50. We also accept the Appellant's submission that the fact that the local authority had not prosecuted anyone involved in the cull is not determinative of whether the cull was lawful and cannot of itself be taken to satisfy the Appellant's concerns, which it is entitled to pursue by requests made of APHA under FOIA.

51. In our assessment of the public interest considerations which might justify maintaining the s43(3) exemption, we drew great assistance from Dr Williamson's oral evidence. Counsel for the Appellant subjected her to rigorous cross-examination. We considered her to be an impressive witness. Her oral evidence, particularly in CLOSED session, where she was able to expound freely, was evidently based on her substantial experience of the real-life consequences of pig disease identification for all those working in the pig industry.

52. In her OPEN evidence, she explained that she, in conjunction with the Department for Environment, Food and Rural Affairs ("DEFRA"), the Government's

Veterinary Risk Group, and the Chief Veterinary Officer, work to assess disease threats for the need for Government intervention according to their impact on public health, animal health and welfare, international trade and wider society.

53. She explained that there are two types of relevant pig disease: statutory, notifiable disease, whose reporting to APHA by anyone suspecting or detecting it is a legal requirement, and non-statutory, non-notifiable disease, whose reporting is voluntary. Threats of particular concern which fall into the remit of scanning surveillance include non-notifiable and non-reportable exotic diseases which have not previously been detected in the UK livestock populations and new and emerging diseases. Vets attending livestock and wildlife engage voluntarily with APHA to access veterinary or scientific advice and the Government-funded diagnostic service. Information contained within the reports generated from such engagement is anonymised to prevent identification of the veterinary practices, livestock keepers and premises involved. The geographical location of livestock premises included in reports is never more specific than naming the county for the same reason. This voluntary engagement, predicated on the pig industry's trust and confidence in APHA, including the understanding that APHA will not publish information which identifies precisely those who have engaged with APHA, is the cornerstone of the UK's disease surveillance operation, which Dr Williamson testified is world-leading. Without that voluntary engagement, APHA could not be effectively alert to new threats, and, as Dr Williamson put it, "*we incapacitate ourselves as a country.*" In her CLOSED evidence, she was able to give examples of her own experiences in specific cases where mutual trust and confidence between those in the pig industry and APHA had reaped substantial benefits for all concerned.

54. Counsel for the Appellant pressed Dr Williamson repeatedly to explain where farms' and vets' expectations of confidentiality to which she had alluded were recorded. She was unable to identify during her evidence any written policy or agreement with relevant stakeholders enshrining a promise of confidentiality by APHA, and accepted that in some cases APHA might make a limited referral of relevant information to another Government agency, for example the discovery of a potential toxic element to the Food Standards Agency, but she was clear that APHA do not place information about non-notifiable diseases associated with a specific farm in the public

domain, and that the expectation of confidentiality is well-established.

55. We were persuaded by her OPEN and CLOSED evidence that this co-operative engagement rests on farms, vets and livestock industries having trust and confidence in APHA that the content of their engagement with APHA in relation to non-notifiable diseases will be kept confidential, and that absent that relationship of trust and confidence, there is a risk that that engagement will diminish, disease threats will consequently go undetected or take significantly longer to be detected, and APHA's function be frustrated. By her CLOSED evidence, Dr Williamson was able to provide a detailed account of APHA's concerns as to this risk in relation to the Appellant's specific requests.

56. Having considered Dr Williamson's evidence (with a particular regard for the thrust and detail of her CLOSED evidence) and balancing all the considerations in the round, we are satisfied that the public interest in disclosure at the time of APHA refusing to confirm or deny whether it held the information requested, was significantly outweighed by maintaining the exemption from disclosure pursuant to s43 FOIA.

57. Accordingly, we find that APHA was entitled neither to confirm nor deny it held the information requested pursuant to s43(3) FOIA, and the Commissioner's Decision Notices were in accordance with the law.

58. We dismiss the appeal.”

The Rolled Up Hearing

21. Ecotricity was refused permission to appeal by the Tribunal on 1 October 2024. That decision was issued on 8 October 2024. It applied to the Upper Tribunal for permission to appeal on 5 November 2024.

22. On 20 November 2024 I directed that there was to be a rolled-up oral hearing of the application for permission to appeal, with the appeal to follow if permission is granted, so as to obviate the need for a second hearing, although given the respective commitments of counsel it was not possible to find a date for the hearing before 9 September 2025 when all three parties appeared before me, ably represented by Mr Metcalfe, Mr Davidson and Mr Ostrowski, to

whom I am indebted for their written and oral submissions. Mr Metcalfe and Mr Ostrowski had appeared in the Tribunal below.

The Grounds of Appeal

23. There were 3 grounds of appeal:

(1) the Tribunal's assessment of the existence of a risk of prejudice under s.43(3) was flawed. In particular, it manifestly failed to address the wealth of information which was already in the public domain at the time of Ecotricity's requests on 18 July and 5 September 2022, namely that:

(i) APHA had already published a declaration with a grid reference which identified the Farm at the centre of the 20km-wide Temporary Control Zone on 23 June 2022;

(ii) a spokesman for the Wayland Farms Group, a major UK pig producer, had already given a statement to the Eastern Daily News, which was published on 19 July 2022, admitting that they owned the Farm that was the site of the cull; and

(iii) persons unknown had already published a YouTube video on 14 July 2022 showing live footage of the Farm, from which its location on Brandon Road in Norfolk was plainly visible.

(2) the Tribunal's conclusion that the prejudice under s.43(3) was "real, actual or of substance" was plainly at odds with the evidence before it. The Tribunal heard no evidence from Wayland Farms, the Farm's owner, and there was nothing to show any prejudice having accrued to Wayland Farms over the past several years despite its farm having been publicly identified as the site of the cull in July 2022; and

(3) having found against the IC's decision that s.38(2) was engaged, the Tribunal was bound to allow Ecotricity's appeal in that respect, at least in part.

Ecotricity's Submissions

Ground 1 – the Tribunal's assessment of the risk of prejudice under s.43(3) involved material errors of law

24. In determining whether s.43(3) was engaged on the facts of the case, Mr Metcalfe submitted that it was plainly incumbent on the Tribunal to make findings of fact as to which information was already in the public domain at the time APHA refused Ecotricity's requests on 4 August and 17 September 2022.

25. In the present case, the Tribunal:

(i) made findings which were irrational;

(ii) failed to make findings which were necessary to the assessment of any prejudice under s.43(3); and

(iii) misdirected itself as to what constituted information being in the public domain.

26. First, it was irrational for the Tribunal to conclude, as it did, that APHA's publication of the grid reference designating the Farm as the centre of the Temporary Control Zone did not amount to putting its location into the public domain. The Tribunal accepted that there was "there was sufficient information publicly available to enable a motivated individual, with background knowledge, to identify the Farm, should they wish to" (para 34), but distinguished this from:

"the Government agency responsible for surveillance of pig diseases confirming or denying to the world that it holds information of the type requested in relation to a particular incident or investigation at a particular site (ibid)."

27. This overlooks the very obvious point, however, that the purpose of a grid reference is to specify a particular location. APHA's statement accompanying the declaration stated that a Temporary Control Zone "had been declared around a premises near Feltwell, Kings Lynn and West Norfolk, Norfolk". The

declaration itself, however, made the location explicit. Indeed, APHA's declaration of the Control Zone would be useless unless it accurately identified the area in question and it would be irrational for the Control Zone to be centred upon anything else besides the site of the suspected outbreak. It is, moreover, no more difficult to look up a grid reference online than it is to look up a street address. Consequently, for the FTT to describe APHA's publication of the grid reference as "enabli[ing] a motivated individual, with background knowledge, to identify the Farm" was to mischaracterise it. On the contrary, APHA's declaration was an official statement to the entire world that the "premises" at grid reference TL7491487850 was the site of the suspected outbreak.

28. Secondly, the Tribunal entirely failed to address the fact that, by the time APHA refused Ecotricity's requests, an official spokesman for Wayland Farms had already given a statement to the media, acknowledging that it was the owner of the Farm where the cull took place. On 19 July 2022, Eastern Daily News identified the Farm as "part of the Wayland Farms group" and quoted a "spokesman for the company" as follows:

"Unfortunately a cull did take place at the farm, but it was conducted with the advice of official vets and under the full supervision of vets at the time of the cull."

29. The fact that Wayland Farms had *already* identified itself as the owner of the Farm that was the site of the suspected outbreak was, plainly, a matter that was central to any rational assessment of whether APHA's subsequent confirmation or denial of holding information would, or would be likely to, prejudice Wayland Farms's commercial interests under s.43(3).

30. The Tribunal's decision, by contrast, made no finding that Wayland Farms had identified itself as the owner of the Farm in question. Instead, it referred only to Ecotricity's submission that "[t]he corporate owner of the Farm had effectively "outed" itself by having a spokesman (identified as a spokesman of the owner by name) make a statement about the cull" (para 33(d)). In other words, not only could the Tribunal not bring itself to name Wayland Farms as the owner, despite the information having manifestly been made public by

Wayland Farms itself, but the Tribunal was not even able to accurately set out what Wayland Farms had acknowledged. Wayland Farms did not just “make a statement about the cull”. Wayland Farms publicly acknowledged that it was the owner of the Farm in question.

31. Having shied away from making any findings of fact about which information was already in the public domain, it follows that the Tribunal’s analysis of the existence of a risk of prejudice under s.43(3) was necessarily flawed. Whether or not the address of the Farm was known to the public, the fact that Wayland Farms had already publicly identified itself as the owner meant that it was not reasonably open to the Tribunal to conclude that Wayland Farms’s commercial interests would be prejudiced by APHA’s confirmation that it held information within the scope of Ecotricity’s request.

32. The Tribunal’s failure squarely to address the nature and significance of Wayland Farms’s public statement, moreover, means that the distinction which it drew between the ability of motivated individuals to identify the Farm, on the one hand, and the formal acknowledgment from APHA - “the Government agency responsible for surveillance of pig diseases confirming or denying to the world that it holds information of the type requested in relation to a particular incident or investigation at a particular site” – on the other hand, is unfounded. If this were simply a matter of members of the public being able to identify the Farm from drone footage, the emphasis given to “official confirmation” by the Tribunal might have some force. The Tribunal, however, simply failed to address the fact that Wayland Farms had acknowledged it owned the Farm. In light of that fact, the significance of any confirmation or denial by APHA drains entirely away.

33. These errors in the Tribunal’s assessment were compounded by its failure properly to address whether or not particular items of information were already in the public domain. The Tribunal held that “[w]hether or not something is in the public domain is a question of degree” (para 34), but sought to distinguish between “information publicly available to enable a motivated individual, with background knowledge, to identify the Farm” on the one hand, from “the

Government agency responsible for surveillance of pig diseases confirming or denying to the world that it holds information of the type requested” (ibid).

34. This distinction, however, is at odds with the case law. In ***K v News Group Newspapers Ltd*** [2011] EWCA Civ 439, the Court of Appeal stated at [10(3)] that:

“The protection may be lost if the information is in the public domain. In this regard there is, per *Browne v Associated Newspapers Ltd* [2008] QB 103 at [61],

“...potentially an important distinction between information which is made available to a person’s circle of friends or work colleagues and information which is widely published in a newspaper.””

Whether what may start as information which is private has become information known to the public at large is a matter of fact and degree for determination in each case depending on its specific circumstances.”

35. In ***ZXC v Bloomberg LP*** [2022] AC 1158, the Supreme Court cited the Court of Appeal’s decision in ***K*** with approval at [54]:

“A relevant circumstance will be the extent to which the information is in the public domain. Information that was private may become so well known that it is no longer private. Whether this is so is a matter of fact and degree - see *K v News Group Newspapers Ltd* [2011] EWCA Civ 439; [2011] 1 WLR 1827, para 10(3). In relation to journalistic, literary or artistic material, section 12(4) of the HRA requires the court to have particular regard to “the extent to which the material has, or is about to, become available to the public””.

(See also e.g. the speech of Lord Goff in ***AG v Guardian Newspapers Ltd (No 2)*** [1990] 1 AC 109 at pp.281-283: “once it has entered what is usually called the public domain (*which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential*) then, as a general rule, the principle of confidentiality can have no application to it” (emphasis added).

36. While it is clear from **Browne** and **K** that information may be known to others – e.g. “a person’s circle of friends or work colleagues” – without having reached the threshold of being “in the public domain”, this is very far indeed from the Tribunal’s proposed threshold of “information publicly available” (para 34). The information in the present case – the grid reference identifying the Farm’s location, the public statement by the Farm’s owners, and the YouTube footage showing the location of the farm – was not information known only to “a person’s circle of friends or work colleagues” or otherwise in limited circulation. This was information which had been published to the world at large by, respectively, (i) APHA, (ii) a prominent Norfolk newspaper with an unpaywalled website and an audited circulation of 13,059 and (iii) the world’s largely video platform. Whether the test is one of fact and degree or binary, this was manifestly information already in the public domain. The Tribunal’s assessment of the risk of any prejudice from APHA confirming or denying that it held information within the scope of Ecotricity’s request was, therefore, also flawed by its approach to the question of what information was in the public domain and what that signified.

37. Lastly, it remains unclear on what basis the Tribunal refused to identify Wayland Farms as the Farm’s owner, despite no application having been made by either the IC or APHA for such information to be withheld from the Open Bundle. The Farm’s address, moreover, was included in the pleadings and no application was made by either of the Respondents for that information to be withheld from members of the public who might otherwise request it. The Tribunal’s approach in this matter runs contrary to the rule in **HMRC v Banerjee** [2000] EWHC 1229 (Ch) that “*once material has been read or referred to in open court, it enters the public domain*” (at [38] per Henderson J, emphasis added).

Ground 2 – any prejudice under s.43(3) was not “real, actual or of substance”

38. The Tribunal also erred in concluding that the prejudice feared by APHA under s.43(3) was “real, actual or of substance”. This is because:

(i) a spokesman for Wayland Farm Group, the owner of the farm, had told the media on 19 July 2022 that its farm had been the site of the cull and the APHA measures;

(ii) the Tribunal accepted that it had “no direct evidence from the Farm’s corporate owner as to the issue of prejudice” (para 41);

(iii) despite Wayland Farm Group having identified itself as the owner of the Farm on 19 July 2022, there was no evidence whatsoever of any prejudice accruing to Wayland Farm Group in the subsequent two or more years as a result;

(iv) indeed, if any witness had appeared on behalf of Wayland Farms, that assertion would have been tested under cross-examination, including as to (i) whether Wayland Farms had suffered any prejudice to its commercial interests following its public admission in July 2022 that it owned the Farm at the site of the cull; and (ii) if not, why it believed it would suffer any further prejudice if APHA were to confirm or deny that it held information within the scope of Ecotricity’s request. More importantly, how could the Tribunal sensibly address any risk of prejudice arising from APHA’s confirmation or denial when it had never addressed itself to the fact that Wayland Farms had already admitted it owned the Farm in the first place?

(v) to the extent, therefore, that confirming or denying that information was held might give “a competitive advantage to other pig companies” (para 39(h)) or deter “UK trading parties from trading with the Farm’s corporate owner” (para 39(i)), these were harms that would have undoubtedly already accrued to the Farm’s owner after it went public on 19 July 2022. Notably, the Tribunal did not deal with Ecotricity’s evidence and submissions on this point (i.e. the lack of any harm to Wayland Farm Group over the past two years), despite it being central to its case that no prejudice arose on the facts of this case. Nor was APHA’s witness, Dr Williamson, able to point in open evidence to any such harms occurring in the past two years despite the admission by Wayland Farm

Group on 19 July 2022;

(vi) the matters on which Dr Williamson did give evidence, as reflected in paragraphs 45-56 and the gist of her closed evidence at paragraph 24 did not address a risk of prejudice to any person's commercial interests arising from confirmation or denial that information was held by APHA in this case. Indeed, her evidence was overwhelmingly directed at the risks to health and safety under s.38(2), which the Tribunal found was not engaged on the facts of this case.

39. Ecotricity submitted that the Tribunal did not have a sufficient evidential basis upon which to conclude that the prejudice arising under s.43(3) was "real, actual or of substance".

Ground 3 – the Tribunal was bound to allow the appeal in relation to s.38(2)

40. S.58(1)(a) provides that, if on an appeal under s.57, the Tribunal "considers that the notice against which the appeal is brought is not in accordance with the law ... 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".

41. It is plain from the above that the Tribunal, having found that APHA's reliance on s.38(2) was in error, had no power to dismiss the appeal in its entirety. The IC and APHA suggest that this is "entirely cosmetic" and "academic" since it made no difference to the substantive outcome. The IC, however, does not go so far as to claim that the Tribunal did not err in law.

The IC's Submissions

Ground 1

42. The IC submitted that this ground is misconceived. The "public domain" is not a term of art nor does it have a legal test or definition. The Tribunal rightly did not lose sight of the actual issue which it was required to determine, namely whether confirmation or denial would be likely to prejudice any person's

commercial interests. Indeed, it would have erred had it replaced or glossed that straightforward factual, prognostic question with a supposedly binary, abstract legal one of whether information is or is not in the public domain. That latter question was, at best, a relevant factual matter to be weighed in the balance in determining the substantive issue of the application of the s.43 exemption (see *MoJ v IC and Palmer* (GIA/2548/2015) at [29]); at worst, it was a red herring.

43. Even if this were a binary question of law, as Ecotricity asserted, it would not be determinative of the actual issue, i.e. the application of s.43(3). That was both because (a) the requested information went beyond the information which it was said to be in the public domain and (b) because the extent to which the publicity of the information affected the likelihood of prejudice depended on the extent to which it is known or accessible to the public.

44. It was striking that, in seeking to characterise an unassailable finding of fact as a challengeable issue of law, several of Ecotricity's propositions of law were themselves erroneous.

45. First, the Tribunal was correct to observe that whether something is in the public domain (in the context of the overarching issue of prejudice) was a question of degree. It is not, as Ecotricity argues by reference to irrelevant authorities, a binary question. The law overflows with examples, in statute and case-law, of this being a quantitative question of fact and degree to be assessed in light of the circumstances. So, for example:

(1) s.12(4) of the Human Rights Act 1998 requires the Court to have regard not to a binary question of whether information is or is not in the public domain, but "the extent to which the material has, or is about to, become available to the public".

(2) when assessing whether information is private or not, one relevant factor is "the extent to which the information is in the public domain. Information that was private may become so well known that it is no longer private. Whether this is

so is a matter of fact and degree”: in **ZXC v Bloomberg LP** [2022] UKSC 5; [2022] AC 1158 at [54].

(3) confidential information may be known or available to a number of people but remain “relatively secret”: **Franchi v Franchi** [1967] RPC 149 at pp.152-3. Whether information is sufficiently publicly accessible so as to have lost its secrecy is “a question of fact and degree”: **Mohammed v Ministry of Defence** [2013] EWHC 4478 (QB) at [19]. (See *also* **PJS v News Group Newspapers Ltd** [2016] UKSC 26; [2016] AC 1081, in which the Supreme Court endorsed a “quantitative” approach which has regard to “how widely known the relevant facts are” at [25].)

(4) indeed, the authority on which Ecotricity relied, **DSG Retail Ltd v Mastercard Incorporated** [2020] EWCA Civ 671, drew a distinction between information which could be characterised as being in the public domain and the supposition that anyone was therefore, as a matter of fact, on notice of those facts. That undermined, rather than supported, Ecotricity’s position.

(5) similarly, in the context of the law on contempt, predicated on the question of “prejudice” to proceedings, it was well-established that earlier publication would not prevent later reports from creating further risk: **A-G v Independent Television News Ltd** [1995] 2 All ER 370 at p.381: “it does not follow that because a risk had been created by the broadcast, further publication in newspapers would not create fresh and added risk of prejudice” per Leggatt LJ. In **A-G v MGN Ltd** [1997] EMLR 284, the Divisional Court noted that it was not in serious dispute that “the mere fact that, by reason of earlier publications, there is already some risk of prejudice does not prevent a finding that the latest publication has created a further risk”. This is particularly so where memories of earlier reports “would have faded”: **A-G v Condé Nast Publications Limited** [2015] EWHC 3322 (Admin); [2016] ACD 11 at [30].

46. Secondly, the Tribunal was correct to draw a distinction between information being potentially accessible to a motivated individual and confirmation or denial by an official response from a public authority pursuant

to FOIA; indeed, it would have been an error of law had it not done so. If authority were needed for this proposition, it might be found in the Upper Tribunal's decision in ***Commissioner of the Police of the Metropolis v IC and Rosenbaum*** [2021] UKUT 5 (AAC) at [55]: "Official confirmation adds something to other information in the public domain, even if that is credible information provided by third parties who are well-placed to provide that information", citing ***Corderoy v IC*** [2017] UKUT 495 (AAC), [2018] AACR 19 at [60] and ***DIL and others v Commissioner of Police of the Metropolis*** [2014] EWHC 2184 (QB) at [44-47].

Ground 2

47. This was a full-frontal assault on a finding of fact. An appeal to the Upper Tribunal must be on a "point of law": s.11(1) Tribunals, Courts and Enforcement Act 2007. It was a matter for the Tribunal what evidence it considered was probative and what weight to give that evidence in making its factual findings. The fact that Ecotricity was disappointed with the Tribunal's findings was not an error of law.

48. Insufficiency of evidence was a poor cover for such an assault on a finding of fact and was particularly questionable in circumstances where there was CLOSED evidence to which Ecotricity was not privy (which was expressly relied on in the judgment at [42] and [45]). It was noted that, despite having "expressed disquiet" at the hearing as to the level of redaction (at [25]), no point of that nature had been taken on appeal.

49. The presence or otherwise of evidence of historic harm was not determinative of the issue for the Tribunal, namely the risk of future harm arising from confirmation or denial. The Tribunal found such a confirmation or denial would amount to a material change of circumstances, which it was entitled to find (contrary to Ecotricity's Ground 1). The Tribunal was entitled to use its knowledge when assessing evidence and should not be subjected to unrealistic expectations in terms of direct evidence: ***DWP v IC, Slater and Collins*** [2015] UKUT 535 (AAC) at [12-13].

Ground 3

50. The Tribunal found that s.43 applied to the entirety of the requested information and that the public interest balance favoured no confirmation no denial across the board. Ground 3 made the surprising contention that the Tribunal erred in law by failing to take the entirely cosmetic step of allowing the appeal in part, even though that would have made no difference to the substantive outcome.

51. It was well-established that an appeal was against a decision, not against the reasons for that decision. Equally trite was the proposition that courts and tribunals will not entertain issues which are stale or academic, in the sense that they do not in reality affect the position of the parties. Even if there were an error of law by the Tribunal, it was hard to see how it could possibly be material, even arguably.

52. For these reasons, the IC invited the Upper Tribunal to refuse permission to appeal, or alternatively to dismiss the appeal.

APHA's Submissions

53. Mr Ostrowski submitted that, after hearing evidence from Dr Williamson, tested extensively in cross-examination, the Tribunal concluded that the co-operative engagement required between farms, vets, livestock businesses and APHA relied on all parties understanding that the content of their engagement with APHA in relation to non-notifiable diseases will be kept confidential. The particular circumstances which were in place in this case, subject to questioning from the panel in the CLOSED session and covered in detail in the First tier Tribunal's CLOSED judgment compellingly set out why the public interest in disclosure at the time of APHA refusing to confirm or deny whether it held the information requested, was significantly outweighed by maintaining the exemption from disclosure pursuant to s.43.

54. In this application for permission to appeal Ecotricity alight on one single issue, namely that the *location* of the farm where the alleged cull took place was already allegedly in the public domain. However, the Tribunal was plainly

aware of Ecotricity's contention about that (see e.g. [6] and [33]-[34] of the OPEN judgment) and dismissed the case on that issue because it concluded, for justifiable and appropriate reasons, that on balance the information which Ecotricity actually requested, namely information about *why* the alleged cull took place, was not in the public domain. The Upper Tribunal, without having the benefit of hearing the evidence (particularly the CLOSED evidence), should be very slow indeed to re-open that matter and conclude, just because the location of the farm where the incident allegedly occurred was, allegedly, in the public domain, that APHA should confirm or deny that it held this particularly sensitive information about why the alleged cull occurred and APHA's involvement in the alleged cull.

Ground 1

55. The requests made were for detailed information about APHA's investigation into the pigs which were said to have been culled, tests which were conducted, and APHA's involvement with the alleged cull (see [1] of the OPEN judgment).

56. The Tribunal considered whether the information requested was already in the public domain at [33]-[34] of the OPEN judgment and thereafter concluded at [56] of the OPEN judgment that "the public interest in disclosure at the time of APHA refusing to confirm or deny whether it held the information requested, was significantly outweighed by maintaining the exemption from disclosure pursuant to s43 FOIA."

57. The details of APHA's investigation into the pigs which were said to have been culled, the tests which were conducted and APHA's involvement with the particular incident at a particular site were not in the public domain. The detailed OPEN and CLOSED evidence of Dr Williamson, tested extensively in OPEN cross examination and questioned by the Tribunal in the CLOSED session, persuaded it (see [55]-[56] of the OPEN judgment and [59]-[61] of the CLOSED judgment) that, in the particular circumstances of this case, farms' engagement with APHA in relation to non-notifiable diseases (not just farms' locations) is vital in ensuring that co-operation between industry and APHA continues and

this led the Tribunal to conclude at [56] of the OPEN judgment that the exemption set out at s.43 was made out.

58. APHA submitted that these findings were unassailable and unimpeachable. In particular, they could not be impeached by Ecotricity who had not had sight of the CLOSED evidence and the FTT's CLOSED findings.

59. Ecotricity suggested that the Tribunal's findings could be impeached because they incorrectly proceed on the basis that the information requested was not already in the public domain. It attempted to make good this point by repeating the fact that a spokesman for the owner of the farm where the alleged cull took place had stated that a cull had taken place.

60. That might be a strong argument in its favour if its request to APHA was solely for information about the location of the alleged cull. In such circumstances, a finding by the Tribunal that if APHA confirmed or denied that it held information about the location of the alleged cull that would prejudice the commercial interests of the farm in question, might be challengeable.

61. But the actual finding of the Tribunal was that "information of the type requested" was not in the public domain because APHA, as the Government Agency responsible for surveillance of pig diseases, had not confirmed or denied that it held information about its investigation into a particular incident involving pigs at a particular site (see [34] of the OPEN judgment). The application for information was not for the location of the farm, indeed, Ecotricity's application proceeded on the assumption that it already knew the location of the farm where the alleged cull took place. The application for information was in fact for detailed information about the circumstances of the alleged cull and APHA's involvement in the alleged cull.

62. Ecotricity's submission in this appeal must be that as soon as the spokesperson for the farm where the alleged cull took place confirmed to the media that a cull had occurred, that decided the question of whether the requested information was in the public domain. But that wrongly ignored the

very important distinction between APHA confirming that it held information about, on the one hand, the location of the farm and, on the other hand, APHA confirming that it held information about “(1) When was your department first alerted to the possible disease risk, (2) When were tests taken to confirm whether the pigs carried a disease (3) What were the results of those tests, (4) When were the results communicated to the farm, (5) Who decided on the mass pig cull and when, (6) What was the management plan for the cull and (7) Were there APHA officials and an official veterinarian present at the cull”.

63. The Tribunal, in considering whether that information was already in the public domain at [34] of the OPEN judgment, principally considered the question of the location of the farm where the alleged cull had taken place because that is what Ecotricity had focussed on in its submissions (i.e. it had referred to evidence about the grid reference of a temporary control zone, identifying features in drone footage, press articles about the alleged cull and the spokesperson for a farm identifying that a cull had taken place). But the Tribunal’s consideration of the extent to which information was in the public domain was not limited solely to the location of the farm as [33] and [34] of the OPEN judgment were a conclusion that “information of the type requested” was not already in the public domain. That finding was indisputably correct both at the time of APHA’s refusal to confirm or deny, at the time of the Tribunal’s decision, and now. If the information which Ecotricity had actually requested was already in the public domain, then it would be able to answer the questions it asked such as - when were tests taken to confirm whether the pigs carried a disease and what were the results of those tests? It patently could not answer those questions and so the premise of the ground of appeal was not made out.

64. Ecotricity asserts that APHA’s focus on the information actually requested (namely the reasons why the alleged cull occurred and APHA’s involvement in the alleged cull) rather than simply the location of the alleged cull is not relevant because “the fact that Wayland Farms had already publicly identified itself as the owner meant that it was not reasonably open to the Tribunal to conclude that Wayland Farms’s commercial interests would be prejudiced by APHA’s confirmation that it held information within the scope of the Appellant’s request”.

However, that proceeded on the false premise that simply confirming that the alleged cull had taken place at the farm in question meant that the information it actually requested (about the reasons for the alleged cull and APHA's involvement etc.) was already in the public domain and that the further information requested (about the reasons for the cull etc.) would not prejudice the Farm's commercial interests. That is not the case, as the CLOSED judgment in particular makes clear.

65. In those circumstances, the fine legal distinctions which Ecotricity seeks to draw about the meaning of the public domain and when information enters the public domain fell away. As the Tribunal plainly understood at [34] of the OPEN judgment, the information which was actually requested was not in the public domain.

66. Having correctly identified that the information actually requested was not in the public domain the Tribunal then assessed the question of whether confirming or denying existence of the requested information would create a real and significant risk of prejudice to the Farm's corporate owner. At best, the Farm's location allegedly being in the public domain was a matter of fact which formed part of the Tribunal's polycentric assessment of whether confirmation or denial would prejudice the Farm's commercial interests. It was plainly aware of the contentions that the location of the Farm was in the public domain when it made its assessment of the prejudice to the Farm's commercial interests and it placed particular weight on the distinction between information which might be available to a motivated individual and confirmation or denial by the government agency involved. The Tribunal's factual finding that the Farm's commercial interests would be prejudiced was not a legal error and should not be disturbed.

Ground 2

67. This ground of appeal also proceeded on the same false premise that underlined Ground 1 which was that simply because Ecotricity alleged that the Farm owner had identified a specific farm as the site of a cull in June 2022, that automatically meant that there could be no prejudice arising from confirming or denying the requested information about the reasons for the cull and APHA's

involvement in it. For the reasons set out above, the requested information was for APHA's investigation into the allegedly culled pigs, the tests which were conducted and APHA's involvement with the incident. Even if the location of the alleged cull was in the public domain, the Tribunal was entitled to conclude that confirming or denying the existence of the requested information would cause real prejudice to the Farm.

68. The Tribunal's finding on the facts that the prejudice to the Farm under s.43(3) was real, actual or of substance was made following sustained cross-examination of Dr Williamson on APHA's behalf and was made after the Tribunal self-directed itself that it lacked direct evidence before it from the Farm (see the OPEN judgment at [41]) and at [33(d)].

69. Read as a whole, the judgment demonstrates that the Tribunal took into account Ecotricity's case on the lack of evidence of prejudice, but nevertheless concluded that there was such prejudice to the Farm in all the circumstances (including the circumstances set out in detail in the CLOSED judgment). That assessment and weighing up of evidence is pre-eminently a matter for the Tribunal as arbiter of the facts and should not be disturbed on appeal.

Ground 3

70. If the Tribunal considered that the IC's Notice was unlawful or that his discretion should have been exercised differently, s.58 permits the Tribunal either to allow the appeal or to substitute the IC's Notice with its own. Thus, to the extent an appeal succeeded, the Tribunal was not obliged to substitute the IC's order with its own. Read fairly and without an artificially hyper-critical lens, the OPEN judgment at [28]-[32] was a finding that the appeal in respect of s.38 succeeded. Nothing more was required and there was no error of law in the Tribunal's approach.

71. In any event and even if that were wrong, this was a wholly academic criticism of the Tribunal. Nowhere did Ecotricity explain why, if the Tribunal had explicitly said at the end of [32] of the OPEN judgment that it "allowed the appeal" in part in respect of s.38, that would have made any difference to

anybody. After finding that s.38(2) was not engaged, the Tribunal found that s.43 did apply to all the requested information and that the public interest balance favoured neither confirming nor denying the existence of the requested information. The end result for Ecotricity, the IC, APHA and anyone reading the judgment was the same.

Analysis

Ground 1

72. I accept the Respondents' submission that the naming of the Farm was not akin to the information actually requested under the two requests and that the information sought under the two requests in fact went much wider than the identification and location of the Farm.

73. What was submitted in the original grounds of appeal was that

“28. The FTT held that, for APHA to confirm or deny whether it held information within the scope of the Appellant's request would give rise to a real and significant risk of prejudice to the commercial interests of the Farm, essentially because it would identify the Farm as being the site of the cull in June 2022.”

74. However, the two requests went far beyond merely the identification of the location of the Farm. The first request sought the following information

“1) Please confirm whether the Secretary of State granted [the Farm] any derogation under Article 18(3) of Council Regulation (EC) No 1099/2009 (PATOK¹) to kill pigs on the farm in June/July 2022, as part of a depopulation operation.

2) In the event a derogation was granted please provide the following information:

a) The provisions of PATOK and the Welfare at The Time of Killings Regulations that were subject to the derogation

b) Any conditions on which the derogation was granted

c) How the welfare of the pigs was considered under the derogation

d) A copy of the derogation notice".

75. The second request sought the following additional information

"1) When was your department first alerted to the possible disease risk

2) When were tests taken to confirm whether the pigs carried a disease

3) What were the results of those tests

4) When were the results communicated to the farm

5) Who decided on the mass pig cull and when

6) What was the management plan for the cull

7) Were there APHA officials and an official veterinarian present at the cull".

76. The requests did not seek the name of the Farm since Ecotricity knew that already; it was not therefore part of the requests, as Mr Metcalfe agreed in his reply. The requests went far wider than that and sought information dealing with the conditions of the cull and the manner in which the cull was carried out. The difference between the identification of the Farm and the scope of the requested information was therefore correctly set out by the Tribunal in its judgment at [34] where it said that

"We do not accept that the information requested was already in the public domain at the time of APHA's refusal to confirm or deny it held the information requested. Whether or not something is in the public domain is a question of degree. Our view is that the most that the matters described by the Appellant demonstrate, is that there was sufficient information publicly available to enable a motivated individual, with background knowledge, to identify the Farm, should they wish to. That is a very different matter, in our view, from the Government agency responsible for surveillance of pig diseases confirming or denying to the world that it holds information of the type requested in relation to a particular incident or investigation at a particular site. Recognising

that is not unfairly to aggrandize the standing or influence of APHA. It is simply a proper acknowledgment of APHA's role and authority.”

77. The Tribunal was therefore making a conscious (and correct) distinction between the two matters. I accept the Respondents' submissions in that regard, particularly those of Mr Ostrowski which I have set out in paragraph 59 to 64 above.

78. Once the spokesman for Wayland Farms had confirmed to the Eastern Daily Press that a cull had occurred, the location and identity of the Farm may have been in the public domain, but there was a crucial distinction between APHA confirming that it held information about the location of the farm and confirming that it held information about “(1) *When* was your department first *alerted* to the possible disease risk, (2) *When* were tests *taken* to confirm whether the pigs carried a disease (3) *What* were the *results* of those tests, (4) *When* were the results *communicated* to the farm, (5) *Who* *decided* on the mass pig cull and *when*, (6) *What* was the *management plan* for the cull and (7) *Were* there *APHA officials and an official veterinarian present* at the cull”. As Mr Ostrowski put it

“If the information which Ecotricity had actually requested was already in the public domain, then it would be able to answer the questions it asked such as - when were tests taken to confirm whether the pigs carried a disease and what were the results of those tests? It patently could not answer those questions and so the premise of the ground of appeal was not made out.”

79. Ecotricity's argument might be made out if its request to APHA was solely for information about the location of the alleged cull. In that case a finding by the Tribunal that, if APHA confirmed or denied that it held information about the location of the alleged cull which would prejudice the commercial interests of the farm in question, might well be challengeable. However, the actual finding of the Tribunal was that “information of the type requested” was not in the public domain because APHA, as the government agency responsible for surveillance

of pig diseases, had not confirmed or denied that it held information about its precise investigation into a particular incident involving pigs at a particular site.

80. I also accept the Respondents' submission (and particularly that of Mr Davidson for the IC) that the Tribunal was correct to draw a distinction between information being potentially accessible to a motivated individual (such as the identity and location of the Farm) and confirmation or denial by an official response from a public authority pursuant to FOIA; indeed, it would have been an error of law had it not done so. That appears a series of decisions, but in particular in the FOIA context from the decision of Upper Tribunal Judge Markus QC (as she then was) in ***Commissioner of the Police of the Metropolis v IC and Rosenbaum*** [2021] UKUT 5 (AAC) at [53]-[57]:

“53. Mr Rosenbaum submitted that there would be no “disclosure” of information already in the public domain because NCND is a protective concept which is intended to be used where complying with the duty to confirm or deny would disclose sensitive or potentially damaging information that falls under an exemption. He said that it could not have been the intention of Parliament that NCND could be relied on where there was no potential for harm because the information was effectively already a matter of public record. In any event, he submitted that there had in fact been official confirmation of the information in “True Spies”.

54. I reject Mr Rosenbaum's submission that section 23(5) cannot apply where there is no potential for harm because the information is already in the public domain. To invite consideration of the extent to which information is already known, or whether revelation of such information would be harmful, flies in the face of the purpose of section 23 as identified in *APPGER* and as summarised by Mr Knight's principle 5. The position is different if there is official confirmation of the revealed information, because there is then no need for the decisionmaker to get involved in such considerations.

55. Official confirmation adds something to other information in the public domain, even if that is credible information provided by third parties who are well-placed to provide that information. In the context of section 23(5), this follows from the fundamentally important exclusionary principle referred to in *Cobain* and *Lownie*

(see Mr Knight's principle 4). Mr Talalay referred to the FTT decision in *Commissioner of the Police of the Metropolis v Information Commissioner* (EA/2010/0008) which upheld the MPS's reliance on section 23(5) on the basis that confirmation or denial would reveal the involvement or non-involvement of the security services in the operation in issue, even though the then President of the USA had made a public announcement revealing that information. As a decision of the FTT, it is not binding but I mention it because it provides a clear example of the importance and effect of the principle, which is not eroded by information provided by a credible source (the US President) but which has not been officially confirmed. This is reinforced by the Upper Tribunal's suggestion in *Corderoy* at paragraph 60 that a NCND approach would be inappropriate where there was "expected *and confirmed* involvement of the security bodies" (my emphasis).

56. The point applies more generally, however, and is illustrated by the decision in *DIL and others v Commissioner of Police of the Metropolis* [2014] EWHC 2184 (QB), albeit in a non-FOIA context. There the High Court considered a NCND policy, relied on by the police in order to avoid pleading a defence to a civil claim, in order to protect the identities of undercover officers. The officers had all been named in the media and some had also self-disclosed. At paragraph 44 the Court said that self-disclosure, while relevant, did not have the same significance as official confirmation. Nor did naming in the media. Two of the officers who had not self-disclosed had been named publicly in a variety of media (and with a photograph of each in one national newspaper). However, there had been no official confirmation that they were undercover officers. The Court held (paragraph 47) that the police were entitled to rely on NCND in relation to those officers.

57. As these cases show, there is a qualitative difference between credible third party information and official confirmation of that information. The FTT attempted to address this by stating "Although the involvement of MI5 has not been officially confirmed neither will it be officially confirmed by a 'yes' or 'no' answer: it is purely an inference that the public is expected to draw from the information expressly communicated. This misses the point. The provision of official confirmation by means of a 'yes' or 'no' answer that that information was held would provide a qualitatively different foundation for the drawing

of inferences from that provided by the unconfirmed information contained in the TV programme.”

81. In accordance with *DIL* at [44] I also accept that self-disclosure, while relevant, does not have the same significance as official confirmation and nor does naming in the media.

82. Mr Metcalfe sought to distinguish the cases on which Mr Davidson relied on the basis that they arose in far different circumstances, for example in the context of criminal contempt or in the context of a pending criminal trial where there was an obvious risk of prejudicing a fair trial by a subsequent publication or repetition of the subject matter. I do not need to set out the different contexts in which the decision such as *AG v ITN*, *AG v MGN*, *AG v Conde Nast*, *DIL* and *Rosenbaum* arose. I accept that those cases arose in different contexts, but I agree with Mr Davidson that the point of principle exemplified by those cases remains and is applicable in this case, namely that there is a distinction between confirmation by oneself (and naming in the media) and official confirmation. That is the point which the Tribunal was correctly making in its judgment at [34].

83. The Tribunal did not therefore need to make a positive finding that the owners of the Farm had identified themselves in the media. That they had in fact done so was obvious from what was said in [33(d)], albeit that that was a recitation of Ecotricity’s submissions rather than a positive finding to that effect by the Tribunal, but although that was a relevant matter it was not the decisive question which the Tribunal had to determine and it correctly identified and determined the point of principle that there was a distinction between confirmation by oneself (and naming in the media) and official confirmation.

84. I did not consider that, ultimately, there was anything between the parties that the question of whether something was or was not in the public domain was matter of fact and degree. That appeared to be common ground in oral argument. The Tribunal had correctly directed itself in its judgment at [34] that

“Whether or not something is in the public domain is a question of degree.”

85. Mr Metcalfe argued that the Tribunal’s position, that the information was publicly available, but not in the public domain, was incoherent, but I agree with Mr Davidson that that argument is misconceived. The actual issue which the Tribunal had to determine was whether confirmation or denial would be likely to prejudice any person’s commercial interests. It would have fallen into error if it replaced or glossed that statutory test with the question of whether the information was in the public domain. That latter question was a relevant factual matter to be weighed in the balance in determining the substantive issue of the application of the s.43 exemption. What the Tribunal was tasked with determining, however, was whether disclosure would, or would be likely to, prejudice the commercial interests of any person and where the balance of the public interest lay, either in maintaining the exemption or in disclosing the information.

86. Even if the information about the identity of the Farm were in the public domain, it follows from what I have said above that that would not have been determinative of the question of the s.43 exemption because the requested information went beyond the information which was in the public domain.

87. The Tribunal was therefore correct to draw a distinction in [34] between the *information requested* and the *identity of the Farm* as it made clear when it said that

“We do not accept that the *information requested* was already in the public domain at the time of APHA's refusal to confirm or deny it held the information requested. Whether or not something is in the public domain is a question of degree. Our view is that the most that the matters described by the Appellant demonstrate, is that there was sufficient information publicly available to enable a motivated individual, with background knowledge, *to identify the Farm*, should they wish to.”

88. The Tribunal was also therefore correct to go on to say in the second half of that paragraph that

“That [sc. Identification of the Farm] is a very different matter, in our view, from the Government agency responsible for surveillance of pig diseases confirming or denying to the world that it holds information of the *type requested* in relation to a particular incident or investigation at a particular site.”

89. For the sake of completeness IK should say that I did not derive much assistance from the citation of the decision in **DSG** which arose in the altogether different context of discovery of concealment with reasonable diligence in s.32 of the Limitation Act 1980.

90. For these reasons, although I grant permission on Ground 1 since the point was an eminently arguable one (and was well argued on all sides), I dismiss the appeal on that ground.

Ground 2

91. The second ground of appeal was that the Tribunal’s conclusion that the prejudice under s.43(3) was “real, actual or of substance” was plainly at odds with the evidence before it.

92. However, as I pointed out in argument, the Tribunal reached its decision on that question having regard to both the OPEN evidence and the CLOSED evidence, to which Ecotricity was not party. It seemed to me that Mr Metcalfe was in inevitable difficulty in maintaining a submission that the Tribunal’s conclusion that the prejudice was “real, actual or of substance” was plainly at odds with the evidence before it since Ecotricity was not party to a considerable portion of it.

93. I agree with Mr Ostrowski (and Mr Davidson) that the Tribunal’s finding on the facts that the prejudice to the Farm under s.43(3) was real, actual or of substance was made following sustained cross-examination of Dr Williamson on APHA’s behalf. It was also made after the Tribunal correctly noted that it

lacked direct evidence before it from the Farm (see the judgment at [33(d)] and [41]).

94. In the light of all of the evidence before it, including the CLOSED evidence, I am satisfied that the Tribunal took into account Ecotricity's case as to lack of evidence of prejudice, but nevertheless concluded that there was such prejudice to the Farm (including the circumstances set out in detail in the CLOSED judgment).

95. That assessment and weighing up of evidence is pre-eminently a matter for the Tribunal as arbiter of the facts and should not be disturbed on appeal. As Carr LJ (as she then was) said in *Walter Lilly & Co Ltd v Clin* [2021] 1 WLR 2753 (citations omitted)

“83. Appellate courts have been warned repeatedly, including by recent statements at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The reasons for this approach are many. They include:

i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed;

ii) The trial is not a dress rehearsal. It is the first and last night of the show;

iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case;

iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping;

v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence);

vi) Thus, even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

...

85. In essence the finding of fact must be plainly wrong if it is to be overturned. A simple distillation of the circumstances in which appellate interference may be justified, so far as material for present purposes, can be set out uncontroversially as follows:

i) Where the trial judge fundamentally misunderstood the issue or the evidence, plainly failed to take evidence in account, or arrived at a conclusion which the evidence could not on any view support;

ii) Where the finding is infected by some identifiable error, such as a material error of law;

iii) Where the finding lies outside the bounds within which reasonable disagreement is possible.

86. An evaluation of the facts is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and appellate courts should approach them in a similar way. The appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the trial judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion.

87. The degree to which appellate restraint should be exercised in an individual case may be influenced by the nature of the conclusion and the extent to which it depended upon an advantage possessed by the trial judge, whether from a thorough immersion in all angles of the case, or from first-hand experience of the testing of the evidence, or because of particular relevant specialist expertise."

96. In short, and as Mr Davidson submitted, insufficiency of evidence is a poor cover for an assault on a finding of fact and is particularly weak in circumstances where there was CLOSED evidence to which Ecotricity was not privy (yet which was expressly relied on in the judgment at [42] and [45]).

97. Moreover, as explained above, the fact that Dr Williamson did not know, when cross-examined in OPEN, that the owners of the Farm had disclosed their ownership of the Farm to the Eastern Daily Press was not decisive as to the issue which the Tribunal had to decide. As Mr Davidson put it, if the Tribunal had decided the case on the basis that the name of the Farm was in the public domain, it would have been deciding the case by reference to the wrong question.

98. I will grant permission to appeal on Ground 2, but only because it is closely bound up with Ground 1 (for which I have given permission to appeal). Although I grant permission on Ground 2, I nevertheless dismiss the appeal on that ground.

Ground 3

99. This ground is hopeless. Mr Metcalfe did not formally abandon it, but he did not press it or make oral submissions on it and, even if he had, I would not have required either Mr Davidson or Mr Ostrowski to address me in respect of it.

100. In the first place, the OPEN judgment at [28]-[32] was a finding that the appeal in respect of s.38 succeeded. Nothing more was required and there was no error of law in the Tribunal's approach.

101. In any event, the criticism of the Tribunal was wholly academic. Mr Metcalfe was unable to explain why, if the Tribunal had explicitly said at the end of [32] of the OPEN judgment that it "allowed the appeal" in part in respect of s.38, that would have made the slightest difference to the actual outcome. After finding that s.38(2) was not engaged, the Tribunal found that s.43 did apply to all the requested information and that the public interest balance favoured neither confirming nor denying the existence of the requested information. The end result for Ecotricity, the IC, APHA and anyone reading the judgment was the same. Any error of law was therefore wholly immaterial to the outcome. To quote Lord Brown in *R(Cart) v Upper Tribunal* [2011] UKSC 28 at [110]:

“The rule of law is weakened, not strengthened, if a disproportionate part of the courts’ resources is devoted to finding a very occasional grain of wheat on a threshing floor full of chaff.”

102. Permission to appeal on that ground is therefore refused.

The Naming of the Farm and its Ownership

103. At the outset of the hearing before me, I raised with the parties the question of whether I should name the Farm regardless of the outcome of the rolled-up hearing. Were I to grant permission to appeal and allow the appeal, clearly the Farm should be named, but what if I were to refuse permission or dismiss the appeal? Mr Metcalfe contended that I should name the Farm in any event. Mr Davidson and Mr Ostrowski both submitted that I should not.

104. Having refused permission to appeal on one ground, but having dismissed the appeal on the two grounds for which I granted permission, I am nevertheless satisfied that I should name the Farm. That is why I have set out Mr Metcalfe’s submissions at an earlier stage in the form in which I have where he refers by name to the owner of the Farm and to other attendant detail (see, for example, paragraphs 23, 27 to 31 and 36).

105. I now set out the factual background to the two requests in more detail.

106. On 23 June 2022, APHA declared a Temporary Control Zone (“TCZ”) under article 16(1) of the Foot-and-Mouth Disease (England) Order 2006 in order to contain a suspected outbreak of Foot and Mouth disease near Feltwell in Norfolk. Annex 1 of the declaration defined the Zone as a “circle of radius 10 kilometres, centred on grid reference TL7491487850”.

107. At the same time as it declared the TCZ, APHA published a statement on its website, stating materially:

“Following suspicion of vesicular disease in pigs, and as a precaution to prevent the spread of disease, a 10 km Temporary Control Zone has been declared around a premises near Feltwell, Kings Lynn and West Norfolk, Norfolk”.

On 24 June 2022, APHA revoked the TCZ.

108. On 28 June 2022 APHA visited the Farm and undertook an inspection. During the visit, at least 10 pigs were killed and tested for foot and mouth and vesicular swine disease.

109. On 27 June 2022 an article entitled “Foot and mouth control zone removed in Norfolk and Suffolk” was published on the BBC news website. It included a picture of the TCZ laid over an ordnance survey map and stated that the “site thought to have been affected was near Feltwell”.

110. On 30 June 2022, the owners of the Farm culled the remaining pigs. Footage of the cull was captured by drone and sent to the Ecotricity.

111. On 14 July 2022 footage of the cull was posted on YouTube. At the time of the Tribunal hearing in July 2024, it had received more than 1,000 views. At the beginning of the video there is an overhead shot in which the layout of the buildings of the Farm and the road are clearly visible.

112. On 19 July 2022, the day after the first request, the Eastern Daily Press (a regional newspaper with an audited circulation of 13,059) published a report entitled “Probe launched into farm’s shooting of diseased pigs”. It included a still photograph of the Farm taken from the drone footage and identified it as being located “between Feltwell and Brandon”. The report said that the Farm was “part of the Wayland Farms group” and quoted a “spokesman for the company” as follows:

“Unfortunately a cull did take place at the farm, but it was conducted with the advice of official vets and under the full supervision of vets at the time of the cull.”

113. On 9 August 2022 the Eastern Daily Press published a further report entitled “RSPCA clears Norfolk farm after investigating pig shooting footage”. The report again referred to the Farm as being located “between Feltwell and Brandon” and stated that the Farm was “part of the Wayland Farms group”.

114. On 11 August 2022 Plant Based News published a report entitled “RSPCA-approved farm under investigation for ‘deeply distressing’ pig shootings”. The report referred to “[t]he owner of the farm, the Wayland Farms Group”.

115. All of these matters are publicly available. It would take only 5 minutes or thereabouts on the internet to identify the Farm and its ownership.

116. No application was made either by the IC or APHA for such information to be withheld from the OPEN bundle in the Tribunal hearing. The Farm’s address was included in the pleadings and no application was made by either the IC or APHA for that information to be withheld from members of the public who might otherwise request it. The identity of the Farm was referred to in the OPEN Tribunal hearing without an objection being made.

117. Similarly in the hearing before me, the detail which I have set out above was referred to in Mr Metcalfe’s skeleton argument and was referred to by him during the hearing without objection by either the IC or APHA.

118. In that event, the position is as described by Henderson J in *HMRC v Banerjee* [2000] EWHC 1229 (Ch) at [38] that “once material has been read or referred to in open court, it enters the public domain”.

119. It is appropriate to set out Henderson J’s remarks in the last two paragraphs in *Banerjee* in full

“38. If, as I think, an application for the appeal to be heard in private would have been rejected, I agree with the

Revenue that the application which Dr Banerjee now makes, following a public hearing, has even less chance of success. The preponderance of English authority supports the view that once material has been read or referred to in open court, it enters the public domain. It seems to me that there is a need for a clear and simple rule on this point, which reflects the principle of open justice, and which can be overridden, if at all, only in exceptional circumstances where the interests of justice so require. The general rule is also reflected in the right of any interested member of the public to obtain a transcript of any judgment given or order made at a public hearing, subject to payment of the appropriate fee: see paragraph 1.11 of the Practice Direction to CPR Part 39. It is true that the paragraph refers only to judgments or orders, but I see no reason why an interested person should not also be able to obtain a transcript of the entire proceedings which took place in open court. After all, such a person would have had the right to sit in court and take notes, and if he was a shorthand writer, he could have taken a verbatim note. The right to obtain a full transcript would therefore add nothing to what he could, in principle, have done for himself by attending the hearing. The touchstone, in my view, is whether the hearing in question is held in public, not whether it is in fact attended by any member of the public.

39. The court should never make orders which it cannot police, or which are liable to cause confusion, or which may bring the administration of justice into disrepute. In my judgment there is a very real danger of one or more of these undesirable consequences ensuing if I were to make the orders now sought by Dr Banerjee. The judgment would be handed down in anonymised form, and the Revenue (but nobody else) would be forbidden by court order from revealing any information likely to lead to identification of Dr Banerjee as the respondent to the appeal. What is then to happen when the case comes to be reported? I have not been asked to make any reporting restrictions, or indeed any orders binding on third parties. The normal practice, in the taxation field, is for the case stated to be reported together with the judgment of the appeal court. I have not been asked to make an order redacting the case stated, and as I said in my original letter to Dr Banerjee's solicitors, I am not clear what jurisdiction, if any, I would have to do so. Is the case then to be reported with an unredacted case stated standing next to a redacted judgment? That would clearly be absurd. Furthermore, would the reporters of Tax Cases, which are reported under the direction of HMRC, be at

risk of proceedings for contempt of court if they were to follow the usual practice and include the case stated in the report? Even the reporters from an independent series of reports, such as Simon's Tax Cases, might be worried and feel it necessary to apply to the court for guidance. That apart, any interested member of the public would still be at liberty to apply for a transcript of the hearing on 5 December, and to ask for a copy of the case stated as a document which was referred to and discussed in open court on that occasion. It is unnecessary to pursue these speculations any further. They are sufficient to show, in my judgment, that there are sound practical reasons, as well as good legal reasons, for dismissing Dr Banerjee's application."

120. Once material has been read or referred to in open court, it enters the public domain. There is a need for a clear and simple rule on this point. Such a rule reflects the principle of open justice. It can be overridden, but only in exceptional circumstances where the interests of justice so require. The touchstone for the application of the rule, consistently with the principle of open justice, is whether the hearing in question is *held* in public, not whether it is in fact *attended* by any member of the public. This hearing was held in public, though no one other than the parties was in attendance.

121. Once the name and ownership of the Farm had been ventilated not once, but twice, in hearings open to the public without any objection being taken, and in circumstances where the briefest internet searches would reveal the information in question, it would in my judgment be wholly surreal, and wholly at variance with the principle of open justice, for the Farm not to be named and identified.

122. The principle of open justice can be overridden, but only in exceptional circumstances where the interests of justice so require and neither of the Respondents was able to proffer or identify any such circumstances.

123. The furthest they could go was to submit that the name and location of the Farm had not been mentioned in the IC's decision notices nor in the Tribunal's decision and that, if I were to dismiss the appeal (and uphold the Tribunal's

decision), I should do no more than the Tribunal did, but that does not answer the open justice point nor does such a submission demonstrate any exceptional circumstances which would allow the principle to be overridden.

124. For the reasons I have set out earlier in this judgment, the fact that the Tribunal did not name the Farm or identify its ownership was not an error of law. Nevertheless, I am satisfied that it is appropriate in the interests of the principle of open justice to identify the name of the Farm and its ownership.

125. The Farm which is the subject of Ecotricity's requests is Leylands Farm, Brandon Road, Hockwold, Thetford, Norfolk IP26 4NQ. The Farm is owned by Wayland Farms Ltd, a subsidiary of Cranswick County Foods Plc.

126. However, since I have named the Farm, I direct that after promulgation of this decision by the Upper Tribunal to the parties alone, the decision is not be published more widely, whether by being published on the Upper Tribunal website or the National Archives website, until 14 days after it is been promulgated to the parties, in case any party makes any application in respect of the decision to name the Farm.

Conclusion

127. For these reasons I am satisfied that the decision of the First-tier Tribunal (General Regulatory Chamber) dated 23 July 2024 under file reference EA2023/0098-101 does not contain an error on a point of law.

128. Although the points raised by grounds 1 and 2 of Ecotricity's application are arguable, and I grant permission in respect of them (but not in respect of ground 3), the appeal is dismissed.

129. I direct that that, after promulgation of this decision by the Upper Tribunal to the parties alone, the decision is not be to published more widely, whether by being published on the Upper Tribunal website or the National Archives website, until 14 days after it is been promulgated to the parties, in case any party makes any application in respect of the decision to name the Farm.

Mark West
Judge of the Upper Tribunal

Authorised for issue on 19 January 2026