Neutral Citation Number: [2026] UKUT 177 (AAC)

Appeal Number: UA-2024-001777-GIA

IN THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

THE UPPER TRIBUNAL HAS ORDERED that, without the permission of the Tribunal, the closed material in this case must not be published or disclosed to anyone other than the Upper Tribunal, the Information Commissioner, the University of Essex or the Court of Appeal. Any breach of this order is liable to be treated and punished as a contempt of court.

Between:

Alan Sokal

Appellant

v

Information Commissioner

First Respondent

University of Essex

Second Respondent

Before: Upper Tribunal Judge Jacobs

Decided on 1 May 2026 following an oral hearing on 11 June 2025.

Representation:

Mr Sokal:	Spoke on his own behalf
Information Commissioner:	Remi Reichhold of counsel, instructed by the Commissioner's Legal Department
University of Essex:	Christopher Knight of counsel, instructed by Eversheds Sutherland (International LLP)

DECISION OF UPPER TRIBUNAL

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

Reference: EA/2022/0385
Decision date: 4 September 2024
Decision made: On the papers

The decision of the First-tier Tribunal did not involve the making of an error on a point of law under section 12 of the Tribunals, Courts and Enforcement Act 2007.

Summary: Information rights (93)

Freedom of Information Act 2000 – reasons by specialist tribunals – nature of test for qualifying person's opinion – overlap between sections 36, 40 and 41 – nature of public interests balance test – breach of confidence – consent to disclosure of personal data – gisting.

REASONS FOR DECISION

A. What this appeal is about

The request for information

1. On 26 May 2021, Mr Sokal asked the University of Essex for a copy of a report by Akua Reindorf KC. He asked that the report be unredacted except for names of individuals.

2. The subject of the report is apparent from its title:

> Review of the circumstances resulting in and arising from the cancellation of the Centre for Criminology seminar on Trans Rights, Imprisonment and the Criminal Justice System, scheduled to take place on 5 December 2019, and the arrangements for speaker invitations to the Holocaust Memorial Week event on the State of Antisemitism Today, scheduled for 30 January 2020.

3. Professor Joanna Phoenix had been invited to take at the seminar on 5 December. Her topic was:

> Trans rights and justice: complicated contours in contemporary sex, gender and sexualities politics when thinking about issues of justice and punishment.

The seminar was cancelled on the day of the event.

4. Professor Rosa Freedman was invited to take part in the event on 30 January. Her invitation was rescinded, but she did subsequently attend.

5. The University replied to the request relying on exemptions under sections 41(1), 40(2), 36(2)(b)(ii) and 36(2)(c) of the Freedom of Information Act 2000 [FOIA from now on]. It confirmed its position on review.

The complaint to the Information Commissioner

6. Mr Sokal complained to the Information Commissioner under FOIA section 50. The essence of the Commissioner's decision was that:

> The University correctly applied section 36(2)(c) and/or section 40(2) and/or section 41(1) of FOIA to the information it is withholding and, where relevant, the public interest favoured withholding his information.

The appeal to the First-tier Tribunal

7. The First-tier Tribunal dismissed Mr Sokal's appeal. Its decision is publicly available under the name *Alan David Sokal v Information Commissioner and University*

of Essex [2024] UKFTT 795 (GRC). It contains 170 paragraphs. As it is available to be read in full, I have limited the extent to which I have referred to it.

The appeal to the Upper Tribunal

8. I gave Mr Sokal permission to appeal to the Upper Tribunal. The issue on the appeal was whether the making of the First-tier Tribunal's decision involved the making of an error on a point of law (section 12(1) of the Tribunals, Courts and Enforcement Act 2007). I have decided that it did not.

B. Why the decision has taken so long to write

9. I am sorry it has taken me so long to produce this decision. It has not been easy to write. Mr Sokal's grounds of appeal and outcome sought covered 33 pages. There were 11 grounds of appeal. For some, but not all, there were a number of sub-grounds. They were characterised by extensive citations of authority and many detailed footnotes. The arguments were detailed, with regular references to Mr Sokal's grounds before the First-tier Tribunal. There was considerable overlap between the grounds with frequent, but different, complaints about inadequacies of reasons. Mr Sokal's reply to the responses by the Commissioner and the University covered 63 pages. It followed the pattern of the grounds of appeal. Finally, Mr Sokal was allowed to make submissions after the hearing. They consisted of 12 pages, which included two pages of abbreviations.

10. Rather than addressing every single point that Mr Sokal has made, I have tried to distil the essence of his criticisms of the tribunal's decision and deal with the underlying flaws.

C. The legislation

FOIA – relevant provisions

11. These are the relevant provisions. Sections 24(1) and 31(1) are relevant only for comparison.

> **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-
>
> …
>
> (b) … to have the information communicated to him.
>
> …
>
> **2. Effect of the exemptions in Part II**
>
> (1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—
>
> (a) the provision confers absolute exemption, or
>
> (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,
>
> section 1(1)(a) does not apply.

(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.

(3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—

…

(f) section 40(1),

(fa) section 40(2) so far as relating to cases where the first condition referred to in that subsection is satisfied,

(g) section 41, …

17. Refusal of request

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

…

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

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

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

…

24. National security

(1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.

…

31. Law enforcement

(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

…

36. Prejudice to effective conduct of public affairs

(1) This section applies to—

(a) information which is held by a government department or by the Welsh Assembly Government and is not exempt information by virtue of section 35, and

(b) information which is held by any other public authority.

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

…

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

(3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).

(4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words 'in the reasonable opinion of a qualified person'.

…

40. Personal information

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

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

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

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

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

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

(b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.

(3B) The second condition is that the disclosure of the information to a member of the public otherwise than under this Act would contravene Article 21 of the UK GDPR (general processing: right to object to processing).

(4A) The third condition is that—

(a) on a request under Article 15(1) of the UK GDPR (general processing: right of access by the data subject) for access to personal data, the information would be withheld in reliance on provision made by or under section 15, 16 or 26 of, or Schedule 2, 3 or 4 to, the Data Protection Act 2018, or

(b) on a request under section 45(1)(b) of that Act (law enforcement processing: right of access by the data subject), the information would be withheld in reliance on subsection (4) of that section.

(5A) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

(5B) The duty to confirm or deny does not arise in relation to other information if or to the extent that any of the following applies—

(a) giving a member of the public the confirmation or denial that would have to be given to comply with section 1(1)(a)—

(i) would (apart from this Act) contravene any of the data protection principles, or

(ii) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded;

(b) giving a member of the public the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene Article 21 of the UK GDPR (general processing: right to object to processing);

(c) on a request under Article 15(1) of the UK GDPR (general processing: right of access by the data subject) for confirmation of whether personal data is being processed, the information would be withheld in reliance on a provision listed in subsection (4A)(a);

(d) on a request under section 45(1)(a) of the Data Protection Act 2018 (law enforcement processing: right of access by the data subject), the information would be withheld in reliance on subsection (4) of that section.

(6) …

(7) In this section—

‘the data protection principles’ means the principles set out in—

(a) Article 5(1) of the UK GDPR, and

(b) section 34(1) of the Data Protection Act 2018;

'data subject' has the same meaning as in the Data Protection Act 2018 (see section 3 of that Act);

...

'personal data' and 'processing' have the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2), (4) and (14) of that Act);

'the UK GDPR' has the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(10) and (14) of that Act).

(8) In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (disapplying the legitimate interests gateway in relation to public authorities) were omitted.

41. Information provided in confidence

(1) Information is exempt information if—

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

UK GDPR

12. This is Regulation (EU) 2016/679. These are the relevant provisions:

Article 5

Principles relating to processing of personal data

1. Personal data shall be:

(a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency');

(b) collected (whether from the data subject or otherwise) for specified, explicit and legitimate purposes and not further processed by or on behalf of a controller in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes the purposes for which the controller collected the data ('purpose limitation');

(c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation');

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay ('accuracy');

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject ('storage limitation');

(f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures ('integrity and confidentiality').

Article 6

Lawfulness of processing

1. Processing shall be lawful only if and to the extent that at least one of the following applies:

(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;

(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;

(c) processing is necessary for compliance with a legal obligation to which the controller is subject;

(d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;

(e) processing is necessary for the performance of a task of the controller carried out in the public interest or a task carried out in the exercise of official authority vested in the controller;

(ea) processing is necessary for the purposes of a recognised legitimate interest;

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

Tribunal procedure – relevant provisions

13. These are the relevant enabling provisions from the Tribunals, Courts and Enforcement Act 2007:

22. Tribunal Procedure Rules

(1) There are to be rules, to be called "Tribunal Procedure Rules", governing—

(a) the practice and procedure to be followed in the First-tier Tribunal …

…

(3) In Schedule 5—

Part 1 makes further provision about the content of Tribunal Procedure Rules,

…

(4) Power to make Tribunal Procedure Rules is to be exercised with a view to securing—

(a) that, in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done,

(b) that the tribunal system is accessible and fair,

(c) that proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently,

(d) that the rules are both simple and simply expressed, and

(e) that the rules where appropriate confer on members of the First-tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.

(5) In subsection (4)(b) 'the tribunal system' means the system for deciding matters within the jurisdiction of the First-tier Tribunal or the Upper Tribunal.

Schedule 5

7 Rules may—

…

(b) make provision as respects allowing or requiring a hearing to be in private or as respects allowing or requiring a hearing to be in public.

11-

(1) Rules may make provision for the disclosure or non-disclosure of information received during the course of proceedings before the First-tier Tribunal or Upper Tribunal.

…

16 Rules may confer on the First-tier Tribunal, or the Upper Tribunal, such ancillary powers as are necessary for the proper discharge of its functions.

14. These are the relevant provisions in the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI No 1976):

2. Overriding objective and parties' obligation to co-operate with the tribunal

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

…

5. Case management powers

(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may—

…

(g) decide the form of any hearing; …

…

14. Prevention of disclosure or publication of documents and information

(1) The Tribunal may make an order prohibiting the disclosure or publication of—

(a) specified documents or information relating to the proceedings; or

(b) any matter likely to lead members of the public to identify any person whom the Tribunal considers should not be identified.

…

(6) The Tribunal may give a direction that certain documents or information must or may be disclosed to the Tribunal on the basis that the Tribunal will not disclose such documents or information to other persons, or specified other persons.

…

(10) The Tribunal must conduct proceedings and record its decision and reasons appropriately so as not to undermine the effect of an order made under paragraph (1), a direction given under paragraph (2) or (6) or the duty imposed by paragraph (9).

…

35. Public and private hearings

(1) Subject to the following paragraphs, all hearings must be held in public.

(2) The Tribunal may give a direction that a hearing, or part of it, is to be held in private.

(2A) Without prejudice to paragraph (2), the Tribunal may direct that a hearing, or part of it, is to be held in private if—

(a) the Tribunal directs that the proceedings are to be conducted wholly or partly as video proceedings or audio proceedings;

(b) it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing;

(c) a media representative is not able to access the proceedings remotely while they are taking place; and

(d) such a direction is necessary to secure the proper administration of justice.

(3) Where a hearing, or part of it, is to be held in private, the Tribunal may determine who is permitted to attend the hearing or part of it.

(4) The Tribunal may give a direction excluding from any hearing, or part of it—

(a) any person whose conduct the Tribunal considers is disrupting or is likely to disrupt the hearing;

(b) any person whose presence the Tribunal considers is likely to prevent another person from giving evidence or making submissions freely;

(c) any person who the Tribunal considers should be excluded in order to give effect to the requirement at rule 14(10) (prevention of disclosure or publication of documents and information); or

(d) any person where the purpose of the hearing would be defeated by the attendance of that person.

(5) The Tribunal may give a direction excluding a witness from a hearing until that witness gives evidence.

…

38. Decisions

…

(2) Subject to rule 14(10) (prevention of disclosure or publication of documents and information), the Tribunal must provide to each party as soon as reasonably practicable after making a decision which finally disposes of all issues in the proceedings (except a decision under Part 4)—

…

(b) written reasons for the decision; …

D. Reasons and the Senior President's Practice Direction

15. It is convenient to deal with reasons first, because a number of Mr Sokal's grounds refer to inadequacy of reasons.

Reasons and specialist tribunals

16. Mr Knight emphasised the importance of the approach that is taken on an appeal from a specialist tribunal, especially when its decision involves evaluation. It is not necessary to set out the well-known authorities that establish the following principles, which I have applied.

17. First, as a general principle a tribunal is taken to know the basics, such as the burden and standard of proof, in the absence of anything to show that they were misunderstood or misapplied.

18. Second, for a specialist tribunal, its decision and reasons are read with appropriate allowance for the use of its specialist knowledge and experience.

19. Third, in the case of evaluative judgments, the appellate tribunal must not substitute its view of the outcome for that of the tribunal. It must limit itself to deciding whether the decision was one that the tribunal was entitled to make, making allowance for its particular specialist experience.

20. Fourth, the nature of errors of law that arise in evaluative judgments are found in administrative or public law. I break my self-imposed prohibition on citing authorities to refer to the decision of the Supreme Court in *U3 v Secretary of State for the Home Department* [2025] AC 1510 at [58]-[64]. The Court was there concerned with assessing risk.

The Senior President's Practice Direction

21. This refers to the **Practice Direction from the Senior President of Tribunals: Reasons for decisions** of 4 June 2024. It relates, as the opening paragraph says, to the First-tier Tribunal. Both Mr Knight and Mr Reichhold referred to this Direction.

22. The final paragraph of the Direction says (with my italics):

> 10. This Practice Direction is made by the Senior President of Tribunals without the approval of the Lord Chancellor under section 23(6) of the Tribunals, Courts and Enforcement Act 2007, on the basis that it consists solely of *guidance about the application or interpretation of the law, and the making of decisions by judges and members in the First-tier Tribunal*.

That paragraph is important as it shows the statutory authority under which the Direction was given. Section 23 of the Tribunals, Courts and Enforcement Act 2007 provides:

> **23 Practice directions**
>
> (1) The Senior President of Tribunals may give directions—
>
> (a) as to the practice and procedure of the First-tier Tribunal;
>
> …
>
> (4) Directions under subsection (1) may not be given without the approval of the Lord Chancellor.
>
> …
>
> (6) Subsections (4) and (5)(b) do not apply to directions to the extent that they consist of guidance about any of the following—
>
> (a) the application or interpretation of the law;

(b) the making of decisions by members of the First-tier Tribunal or Upper Tribunal.

23. I explained the significance of the statutory authority in *MK v Secretary of State for Work and Pensions* [2025] UKUT 272 (AAC):

> 30. … The words I have italicised repeat the language of subsection (6). The important word is guidance. Despite being a direction, it is only guidance. It cannot be more than that, because if it were, it would have needed the approval of the Lord Chancellor. That does not make it any the less valuable, not least because it summarises some of the key points that have been made by the Upper Tribunal and the senior courts.

The Court of Appeal has recently decided that failure to follow guidance does not of itself amount to an error of law: *Khan v Secretary of State for the Home Department* [2026] EWCA Civ 148 at [48].

24. In short, the position is this. The Direction does not change the law on adequacy of reasons. What it does is to provide guidance to tribunals on how to comply with the standard that the law requires.

This case

25. Many of Mr Sokal's grounds refer to adequacy of reasons. Most, if not all, are variations on the theme of the particular ground to which they are attached.

26. Regulation 38(2)(b) of the tribunal's rules of procedure provides that the tribunal must provide written reasons for the decision. It says nothing about the standard that the reasons must attain. The appellate courts and tribunals have set the standard in numerous cases in different contexts. They require reasons to be adequate. Perfection is not required. Adequacy has to be judged in the context. The reasons have to be sufficient for the losing party to understand why they have lost and to allow the Upper Tribunal to decide whether the tribunal made an error of law. I consider that the tribunal's written reasons satisfy that standard.

27. The reasons contain an explanation of why the tribunal made the decision it did. It does not need to explain why it did not make a different decision. Nor is it required to deal with every argument made by the losing party. The reasons are the *tribunal's* reasons for making *its* decision.

28. Mr Sokal's criticisms of the tribunal's reasons set a high standard for the tribunal to attain. By his standard, the tribunal should have set out every single step in its reasoning, as if it were instructions for a chemical experiment or production process. That is much higher than the law requires. Tribunals are assumed to know what is required in their jurisdiction unless there is evidence to the contrary. That is especially so for a tribunal sitting with specialist members.

29. This is subject to the tribunal's power to provide closed reasons that are not disclosed to a requester. The duty to provide reasons under rule 38(2) is subject to rule 14(10), which imposes a duty on the tribunal to record its decision and reasons appropriately so as not to undermine any order or direction prohibiting disclosure. A direction may be made under rule 14(6) in advance of disclosure to the Upper Tribunal and an order may be made under rule 14(1) after the event. These provisions provide the legal framework for the closed procedure in FOIA cases.

30. Sometimes Mr Sokal's insistence on perfection comes up against the closed material. He argued that the tribunal should have considered every single piece of information that was withheld and identified which exemption applied to each. And, he added, the tribunal's reasons should explain its decision. There is no error of law in the way the tribunal dealt with this process. First, the tribunal said that it had undertaken the process. There is nothing to cast doubt on that. Quite the reverse. It had the materials on which to do so and the time in which to do so. Those materials are before the Upper Tribunal in full.

E. The qualified person's opinion under section 36(2)

31. This is covered by grounds 1 to 3 and 5.

32. The issue raised is whether the decision in *Hogan and Oxford City Council v Information Commissioner* [2006] UKIT EA-2005-0030 is relevant to the reasonableness of the qualified person's opinion. The tribunal decided that it was not and that was correct in law.

33. *Hogan* is relevant to the public interest balance test under FOIA section 2(1)(b) and (2)(b). That is not in dispute. There is no authority that says in terms that *Hogan* either does or does not apply to section 36. I must, therefore, approach it as a question of statutory interpretation.

34. I begin with the language of section 36. The section applies to the information requested in this case, because it is within section 36(1)(b). It is exempt information if: (a) the qualified person has given an opinion on the matters listed in section 36(2); and (b) that opinion is reasonable. If the information is exempt, the public interests balance test under section 2(2)(b) has to be applied. *Hogan* is relevant at that stage. The outcome of applying that test determines whether the information must be disclosed under section 1(1)(b).

35. On its wording, section 36(2) sets the standard that the opinion must meet for the section to be engaged: it must be reasonable. The issue for the Information Commissioner and, on appeal, the First-tier Tribunal is whether the opinion meets that standard. Reasonableness is not unique to section 36. It arises in numerous branches of law, each within its own context. What is required depends on that context. Without attempting a comprehensive statement of what is required under FOIA, it is likely that a reasonable opinion under section 36 will involve identifying the relevant factors that the person has taken into account and providing an explanation that shows a rational process of reasoning leading to the opinion. This basic statement provides a simple structure without introducing technicality.

36. *Hogan* was concerned with the public interests balance test under section 2(2)(b). That is a different test, which requires a decision whether one set of interests outweighs the other. The issue for the Commissioner and the tribunal is whether the public authority struck the balance correctly. It is not applying a standard; it is making a comparative judgment.

37. If *Hogan* were to apply under both section 36(2) and 2(2), it would operate before the public authority in different legal contexts, which could make the application of FOIA unnecessarily technical. And on a challenge before the Commissioner or the tribunal, it would require a different analysis under each section, which could result in an unduly refined analysis by the Commissioner and the tribunal.

38. My conclusion is that *Hogan* does not apply to the qualified person's opinion. The language does not require that and requiring it in the context could lead to unnecessary difficulty and technicality.

F. General and specific provisions – sections 36, 40 and 41

39. This is grounds 4 and 5.

40. Mr Sokal criticised the University for relying on section 36 to fill what it perceived as gaps in sections 40 and 41. There is a short answer to that. This appeal is concerned with what the First-tier Tribunal did, not with what the public authority did. That is sufficient to dispose of the point as presented, but it does not do justice to Mr Sokal's argument. He was making a point about statutory interpretation and the proper scope of section 36. In support, he relied on the principle, which he elegantly expressed in Latin, that specific provisions override general provisions. I do not accept that argument, for the following reasons.

41. The principle is just that – a principle. It is not a rule. It is a guide to the appropriate interpretation of the language of a provision in its context. It does not override the general requirement to interpret legislation as a whole. Taking that approach, the following factors, individually and collectively, indicate that the appropriate interpretation is that each must be applied in this case.

42. First, FOIA contains express provisions giving priority between some exemptions. They are in sections 24(1), 31(1) and 36(1). There is no express priority provision between sections 36, 40 and 41.

43. Second, there is no limit to the nature of the information that may be subject to a request to a public authority. Inevitably, there is a wide range of exemptions, each designed to cover different possibilities. It is no surprise that more than one exemption may apply to the same information or different aspects of the same information.

44. Third, as Mr Knight argued, section 36 is not a general provision in contrast to the specific provision in sections 40 and 41. Each makes provision tailored to the particular exemption. Some may be expressed in wider terms than others, but that does not make one specific and the other general.

G. The date of the qualified person's opinion

45. This is ground 6.

46. The issue is whether the reasonableness of a qualified person's opinion must be evaluated as at the time of the public authority's refusal to provided requested information. Mr Sokal accepted in his grounds of appeal that the University had not made this error in its open submissions and material. I accept Mr Knight's argument that the University did not make the error in its closed submissions and material. In short, this does not arise. Mr Sokal acknowledged this in his reply and withdrew this ground of appeal.

47. Mr Reichhold dealt with the timing point in detailed submissions. I am grateful for them and accept them, but do not need to repeat them.

H. Public interests balance test

48. This is ground 7.

49. The tribunal dealt with this balance in the following paragraphs.

162. Reasons the public interest would favour disclosure in our view include:-

- the desirability of transparency and openness.
- to allow for the open free and frank exchange of ideas and views.
- that elements of the redacted material if published might add to the readers understanding.
- because there was considerable interest in the issues that form the background to this Appeal.
- the importance of the subject matter for UoE, the Education sector and others who wish to benefit from the Report's insights.
- to add to the public debate on these subjects.
- to support freedom of speech and expression.
- to protect academic freedom.

163. Reasons the public interest would favour the maintenance of the exemption include:-

- the public interest in ensuring people taking part investigations in the future have the necessary trust in the confidential nature of the process (as explained to them or expected by them) that they decide to be involved. This is especially so when the issues under review have such a high profile and raise passionate responses.
- that it would invariably be the case that the more people that take part in such investigations providing their view and sharing at times personal thoughts with confidence the more instructive the outcome and recommendations- which is clearly in the public interest.
- the need for UoE to be able to focus on its core activity and deploy its resources accordingly.

164. UoE also put forward (see the DN page A8) the argument that the exemption should be maintained because:-

> *'Reputational damage arising from events would be likely to affect the ability of the University to attract and retain both the best staff and the right numbers of students to allow it to maintain its growth and its contribution to the local community and wider society.'*

165. We noted but gave no weight to this argument because:-

(a) it appears to suggest that a public authority may wish to withhold information if disclosure might cause reputational damage and thus be likely to prejudice the conduct of public affairs. However if there has been reputational damage it might equally be said that in the right circumstances additional disclosure (while embarrassing in the short term) would, be likely to enhance reputations and assist in the conduct of public affairs.

(b) there was so much already in the public domain by the time of the Response that it is unlikely in our view that this potential outcome would have been as damaging as described.

166. The positive reasons for disclosure are in our view reduced in weight because:-

- of the publication of the Report as it is.

- of the ability to read with clarity the recommendations in particular.
- of the Report's status as a report on an investigation and not the result of an academic study.
- fewer redactions would not have added much to the usefulness of the work carried out by Akua Reindorf KC and the Report itself.

> 167. In our view, having considered the reasons for disclosure and for maintaining the exemption and having considered the weight of the arguments, the balance is in favour of maintenance.

50. Mr Sokal referred to the circumstances in which there may be an error of law in an exercise of judgment. The principles are not in doubt. What Mr Sokal has not taken into account is the nature of the judgment to which the test has to be applied. To take three examples from the cases, a judgment may be required when deciding whether: (a) to adjourn a hearing on medical grounds; (b) to bar a party from participating in proceedings; and (c) a product is classified as confectionary for VAT purposes. The nature of the judgment in each case is different.

51. The judgment in this case applies under FOIA section 2(2)(b). It only arises if the conditions in the relevant exemption are satisfied. The relevant exemption is in section 36. It is engaged if disclosure would (a) inhibit the provision of advice or exchange of views or (b) prejudice the conduct of public affairs. If either or both of those effects is satisfied, the public interests balance test has to be applied. Its purpose is to decide whether the information should be disclosed notwithstanding its potential effect. It involves an evaluation of the competing and cumulative public interests for and against disclosure.

52. The test is expressed in terms of weight: whether the interests in maintaining the exemption *outweigh* those that favour disclosure. Weight is, of course, a metaphor. It is wise to remember what Judge Cardozo said about metaphors in *Berkey v Third Avenue Railway Co* 155 NE 58 at 61 (NY 1926):

> Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.

The way, or a way, to avoid enslavement is to identify the relevant interests and to analyse their significance for the disclosure of the information that has been withheld. Despite Mr Sokal's argument, this is not susceptible to an evidence-based analysis or a detailed analysis of causation. It is about the values that underlie good public administration in a democracy. It connects the particular factors in the exemption with those wider values. It is undertaken with the assistance of the specialist members who have been appointed for their experience of public administration. And their contribution will feed through the investigatory approach required of the tribunal – more on this in the section on gisting (ground 11).

53. The tribunal's reasons show a methodical approach. It identified the interests in favour of disclosure. They are fairly general in their nature, as they often are. But the tribunal explained why the particular material and context reduced to some extent their significance. The public interests are not necessarily binary; the analysis may need (as here) to be more nuanced in the particular context. One feature of this case is the amount of material that was disclosed. It was not a case in which all the requested material was withheld. The tribunal properly took that into account. On the other side, the tribunal set out the interests in withholding the information. These were more specific and largely concerned with making the investigation as effective as possible.

Finally, the tribunal considered and rejected the University's argument about reputational damage.

54. I am only doubtful about one of the interests identified. This is the final bullet point in paragraph 163: allowing the University to focus on its core activity. That would only be effective if requesters were deterred from asking for information. Once a request has been made, a public authority must make a decision about disclosure, and perhaps another one on review, which may be followed by a complaint to the Information Commissioner and then an appeal to the First-tier Tribunal. Withholding information cannot avoid those steps. Having said that, I do not consider that it renders the tribunal's analysis in error of law. It was but one of many factors considered and the other factors alone would amply support the tribunal's analysis.

55. In summary, the tribunal carried out a methodical analysis. It identified the factors relevant to the balance of interests. It noted the extent to which the interests in disclosure were reduced in the context of extensive disclosure that had been made. I have not identified any significant factor on either side of the balance that was overlooked. It is the nature of the balancing exercise that it is susceptible to only limited explanation. I am, though, satisfied that the tribunal's conclusion is permissible and not perverse.

I. Breach of confidence

56. This is ground 8.

57. Section 41 contains an exemption for information obtained in confidence. It is an absolute exemption by virtue of FOIA section 2(3)(g). Accordingly, the balance of public interests test does not apply. However, the public interest is relevant in that it provides a defence to a breach of confidence. That is not in dispute.

58. The tribunal also decided that there would be no breach if the information is about individuals, provided they were not identifiable or could be made so by redaction.

59. Mr Sokal argued that the test to be applied was set out in my decision in *NHS Business Services Authority v Information Commissioner and Spivack* [2021] UKUT 192 (AAC). This case concerned FOIA section 40(2). That was how counsel for the Information Commissioner argued the case and I dealt with his arguments. I note that he accepted that if section 40(2) applied, section 41 would also apply. I cannot now remember whether that concession was limited to the circumstances of that case or more generally. The important point is that my reasoning concerned section 40(2), which relates to data protection. Inevitably, any application of section 40(2) must be based on data protection legislation. There may be some overlap between the two exemptions, but my decision relates only to section 40(2).

60. Mr Reichhold relied on *R v Department of Health, ex parte Source Informatics Ltd* [2001] QB 424. This case concerned the use of information from patients' NHS prescriptions. GPs and pharmacists had agreed to pass on the details of the prescriptions to Source Informatics Ltd, but with the patients' identities removed. Mr Reichhold argued that the Court of Appeal had identified the principle underlying the protection of confidentiality as an equitable one, with the test being whether the conscience of the person to whom the information was passed would be troubled by its disclosure. This is how Simon Brown LJ put it in the Court's only judgment:

> 31. To my mind the one clear and consistent theme emerging from all these authorities is this: the confidant is placed under a duty of good faith to the confider

> and the touchstone by which to judge the scope of his duty and whether or not it has been fulfilled or breached is his own conscience, no more and no less. One asks, therefore, on the facts of this case: would a reasonable pharmacist's conscience be troubled by the proposed use to be made of patients' prescriptions? Would he think that by entering Source's scheme he was breaking his customers' confidence, making unconscientious use of the information they provide?

61. I accept that conscience is the ultimate source of the protection of confidential information. It is, though, at a conceptual level. Asking whether the conscience of a reasonable pharmacist would be troubled is hardly a practical test. Still less, the conscience of a corporate body like a University. Putting the issue in that way raises the further issue of the criteria that apply to answer it.

62. The case does, though, help to answer that. This is how the judge proceeded:

> 35. … What interest, one must ask, is the law here concerned to protect?
>
> 34. In my judgment the answer is plain. The concern of the law here is to protect the confider's personal privacy. That and that alone is the right at issue in this case. The patient has no proprietorial claim to the prescription form or to the information it contains. … If, as I conclude, his only legitimate interest is in the protection of his privacy and if that is safeguarded, I fail to see how his will could be thought thwarted or his personal integrity undermined. …

This indicates an approach to section 41. What interest is being protected in this case? The interest is that an individual should not be identified as the source of particular information in the report. That is not how the tribunal applied section 41. But it achieved the same effect by asking whether any clues were left from which a motivated intruder might identify a contributor.

J. Section 40(2)

63. This is ground 9.

NHS Business Service Authority v Information Commissioner and Spivack [2021] UKUT 192 (AAC)

64. Mr Sokal criticised the tribunal for not citing this decision and for not applying it.

65. It would have been better if the tribunal had cited the case. That is good practice, but it is not essential. What matters is whether the tribunal applied the correct law.

First-tier Tribunal decisions

66. Mr Sokal quoted from the decision of the First-tier Tribunal decision in *Spivack* and criticised the tribunal for not relying on the First-tier Tribunal decision in *Peter Dun v Information Commissioner and the National Audit Office* EA/2010/0060.

67. This raises two issues, one general and the other specific to *Spivack*.

68. Beginning with the general issue, the First-tier Tribunal is not bound by its own previous decisions. The Upper Tribunal has been making this point since it acquired this jurisdiction. Those decisions are written to explain how an appeal was decided in the particular case, not to establish legal principles. I would not expect the tribunal to analyse or even cite its previous decisions. Rather, the tribunal should make findings of fact on the evidence and apply the law as interpreted by the Upper Tribunal and the Senior Courts.

69. Coming to the specific issue of *Spivack*, the Upper Tribunal or the Senior Courts sometimes quote a First-tier Tribunal decision with approval. That was not the case in *Spivack*. It is right that I dismissed the appeal in that case. But the Upper Tribunal's jurisdiction was limited to errors of law. My decision was that the tribunal did not make an error of law. I did not approve the decision in all respects. Indeed, I said at [38] that 'I do not agree with every word of its analysis of the law …' Those words make it all the more important not to rely on the precise wording of the First-tier Tribunal's decision in that case.

K. Disclosure of the personal data of Professor Phoenix and Professor Freeman

70. This is ground 10.

71. Mr Sokal argued before the First-tier Tribunal that the Professors had consented to the disclosure of their personal data in the report. If they did, I can only take it into account if consent was given by the time when the university refused the request: *R (Evans) v Attorney-General* [2015] AC 1787 at [72]. Mr Sokal accepts that the evidence he produced in support of that argument did not show that they had consented at the time when the University refused his request. Having read that evidence, I accept that he was right to accept that point.

72. The First-tier Tribunal and, within its jurisdiction, the Upper Tribunal are entitled to take account of evidence and arguments that were not available to the public authority at the date when it refused a request. But that does not allow either tribunal to rewrite history by retrospectively providing consent that was missing at the relevant time.

73. That is sufficient to deal with this ground of appeal. But even if the consent had been given at the right time, it would not necessarily be decisive, as it is but one of the factors to be taken into account.

L. Gisting

74. This is ground 11.

75. Mr Sokal criticised the University for its redactions in the open bundle and its gist of the closed material. He also criticised the tribunal for refusing his application for a more informative gist and for giving inadequate reasons when doing so. These criticisms raise issues of fairness and access to justice.

76. FOIA proceedings are a necessary exception to the open justice principle. Otherwise, the principle would thwart the purpose of the proceedings, which is to decide whether information should be disclosed: *PMC v A Local Health Board* [2024] EWCA Civ 2969 (KB) at [36]. The tribunal must, though, minimise the disadvantage to the requester: *Browning v Information Commissioner* [2014] 1 WLR 3848 at [35]. In order to achieve this, it must reconcile the divergent interests of the parties: *Browning* at [33]. It has two resources at its disposal. One is its duty to exercise an investigatory approach in respect of the closed material: *Browning* at [33]. The other is the General Regulatory Chamber's rules of procedure, which contain its procedural powers and duties. As to its powers, the tribunal has power: (a) to decide the form of any hearing; (b) to hold all or part of a hearing in private; and (c) to exclude anyone from the hearing whose presence would defeat the purpose of the hearing. See rules 5(3)(g) and 35(2) and (4)(d). As to its duties, the tribunal must seek to give effect to its overriding objective of

dealing with cases fairly and justly by: (a) allowing parties to participate as fully as practicable in the proceedings; and (b) using its special expertise to that end. See rule 2(1) and (2)(c) and (d). This is supported by the parties' duty to co-operate with the tribunal: rule 2(4).

77. Gisting operates within that legal framework. It is the process by which a requester is provided with a summary of the information, evidence and submissions that were before the tribunal but not disclosed to the requester. Its purpose is to enable a requester to engage as best they can in the proceedings without knowing precisely what has been withheld by the public authority.

78. The Court of Appeal dealt with gisting at a hearing in *Browning*. The context of the case was a decision by the First-tier Tribunal to exclude Mr Browning's counsel from a closed session within the hearing. The Court decided that this was permitted by the tribunal's rules of procedure, which were authorised by the Tribunals, Courts and Enforcement Act 2007. The Court also explained the context in which it operated, referring to the analysis in the First-tier Tribunal decision in *British Union for the Abolition of Vivisection v Information Commissioner and Newcastle University* EA 2010/0064 (BUAV):

> 33. The crucial task is to devise an approach, in the context of a specific case, which best reconciles the divergent interests of the various parties. In my judgment, the approach adopted in this case and originating in the *BUAV* case does precisely that, having regard to the unique features of appeals under FOIA where issues of third party confidentiality and damage to third party interests loom large. The features to which reference was made in the *BUAV* case – the expertise of the Tribunal, the role of the IC as guardian of FOIA etc – make it permissible to exclude both an appellant and his legal representative except in circumstances where the FTT
>
> 'cannot carry out its investigatory function of considering and testing the closed material and give appropriate reasons for its decision on a sufficiently informed basis and so fairly and effectively in the given case having regard to the competing rights and interests involved.'
>
> In associating myself with this formulation I am accepting that there are features surrounding a case such as this which merit the description of the procedure as being at least in part investigatory as opposed to adversarial.
>
> 34. In the *BUAV* case, the FTT opined that this approach might be departed from but only 'in exceptional cases'. It seems to me that it was there using the word 'exceptional' in a predictive sense rather than as positing a substantive test of exceptionality. What is important is that each case should be considered in its particular factual context.
>
> 35. What is also important is that when the FTT excludes both a party and his legal representative it does its utmost to minimise the disadvantage to them by being as open as the circumstances permit in informing them of why the closed session is to take place and, when it has finished, by disclosing as much as possible of what transpired in order to enable submissions to be made in relation to it. The same commitment to maximum possible candour should also be adopted when writing the reasoned decision. Having been taken by counsel to the contemporaneous notes written during the proceedings, I am satisfied that this was achieved in the present case. Parenthetically, I should add that Mr Coppel's

complaints about having been bounced out of the Upper Tribunal hearing peremptorily and unfairly seem to me, on proper investigation, to be unfounded.

36. It follows from what I have said that, in my judgment, the Tribunal Procedure Rules, properly construed, do permit the course that was taken by the FTT and upheld by the UT in the present case. There are sound reasons why their natural meaning should be maintained so that justice can be achieved to the fullest extent possible, having regard to the conflicting interests which arise in a unique statutory context.

79. The Upper Tribunal dealt with gisting on a paper determination in *Barrett v Information Commissioner and the Financial Ombudsman Service* [2024] UKUT 107 (AAC). This is what Upper Tribunal Judge Mitchell said:

96. While ground 2 was framed by reference to the Tribunal's arguable failure to adapt the Closed Material Procedure to a FOIA appeal decided on paper, the issue is really whether the Tribunal minimised, to the fullest extent possible (or, in the language of Browning, to 'the utmost'), without revealing the withheld information, the disadvantages inherent in the Appellant's position as a party not privy to all the evidence and submissions before the Tribunal. And that is how ground 2 has been argued.

97. The Appellant clearly expected to be provided with a gist of the withheld information/material. Before the Tribunal decided his appeal, he requested from the Tribunal a gist on three occasions (20 April 2020, 21 and 29 September 2020). The Tribunal did not respond to any of those requests until it gave its reasons for refusing the appeal.

98. The Respondents argue that the Tribunal did not proceed on the basis that a gist are [sic] inapt where a FOIA appeal is determined on the papers. However, the Tribunal's reasons are not without ambiguity. While it found in paragraph 34 of its reasons that it was not necessary to provide the Appellant with further details about the closed material in order to decide the appeal fairly, in paragraph 31 of its reasons, the Tribunal said it was not normal practice to provide a gist of closed material in a paper case. The Tribunal also found that it was not necessary to provide a 'detailed gist' (although no one had provided the Appellant with any type of gist at all).

99. While the First-tier Tribunal gave both an open and closed judgment, neither Respondent sought a closed session or made closed submissions in these proceedings before the Upper Tribunal. And so I cannot have regard to the Tribunal's closed judgment in deciding this appeal. This makes it difficult for me to assess whether the Tribunal minimised, so far as possible, the disadvantages inherent in the Appellant's position as a party who could not consider and makes submissions on all of the evidence and submissions before the First-tier Tribunal. But I can assess the information about the withheld information identified by the Tribunal which was, presumably, why it considered a 'detailed gist' unnecessary.

100. The Tribunal noted that the Commissioner's decision notice, in particular at paragraphs 21 and 24, gave some additional information about the content of the withheld information. It then went on to say, in paragraph 32, that, "having viewed the withheld information, we can confirm the following". However, all the Tribunal did was confirm the description given in the Commissioner's decision notice. Given the Appellant's multiple requests for a gist during the Tribunal proceedings,

I think it may safely be assumed that he considered the description in the Commissioner's notice insufficient.

101. FOS' reliance on the Tribunal having provided a further description of the closed material in its reasons is irrelevant. By then, the appeal had failed so that nothing said in the Tribunal's reasons was capable of minimising the disadvantages faced by the Appellant in seeking to make out his case.

102. Where a FOIA appeal is determined at an appeal which involves a closed session, the subsequent gist delivered in open session is not necessarily restricted to a limited description of the withheld information. Closed submissions will also be made at the closed session and the subsequent gist is intended also to relate to these, in order to minimise the prejudice faced by an Appellant who is not privy to certain of the arguments presented to the tribunal by the other party or parties. In this case, FOS provided the Tribunal with reasonably extensive closed submissions. The Tribunal's reasons do not address whether it might have been necessary to 'gist' FOS' closed submissions. The description that seems to have served as a gist – the description in the Commissioner's decision notice – could not have sufficed because proceedings were not underway when that description was given.

103. I accept that there are practical distinctions between an appeal determined at a hearing and one determined on paper. However, the requirement to minimise the disadvantages faced by a FIOA appellant is uniform. The Respondents do not argue that something akin to the gisting process carried out at a hearing can never be required for a paper case. I do not propose to prescribe, or give guidance, about how the Tribunal should do this, in cases where it is necessary in order to minimise the disadvantages faced by an appellant. I do not have sufficient knowledge of the Tribunal's internal processes, and the resources at its disposal, to enable me to do so with any confidence. In any event, the First-tier Tribunal is master of its own procedure.

104. So far as gisting and the withheld information was concerned, one reason given by the Tribunal for refusing to disclose further details about the closed material was that this would "undermine the effect of the Rule 14(6) direction". In my judgment, that was not a proper basis for refusing to consider whether further details of the withheld information should be disclosed. If fairness required such further details to be disclosed to the Appellant, the rule 14(6) direction could (and should) have been amended. I do, however, agree with FOS that the Upper Tribunal's decision in DVLA is not relevant because it was not concerned with the management in proceedings of closed material.

105. When I take the above matters into consideration (no consideration of the need to gist closed submissions and the mistaken view that the rule 14(6) direction barred further disclosure) alongside the Tribunal's reluctance to concede the need for a gist in a paper case, I am forced to conclude that it failed to minimise, to the fullest extent possible, the disadvantages faced by the Appellant. FOS argue that, in a paper case, the gisting process is an aspect of the application of rule 14(6) during the initial stages of proceedings but, if that is so, it does not assist the Respondents because the Registrar's and the Tribunal's approaches were identical.

106. The Tribunal proceedings were conducted unfairly. Ground 2 succeeds. The Tribunal's decision involved an error on a point of law, and it is set aside.

80. Mr Reichhold invited me to give guidance to the First-tier Tribunal on how to apply gisting. He suggested some principles. First, the closed material must not be disclosed: see FOIA section 17(4). Second, gisting must be carried out in a manner consistent with the overriding objective and with the tribunal being master of its own procedure. Third, it should not be disproportionate. Fourth, it must minimise the inherent disadvantage of non-disclosure by allowing the requester to understand the argument against them and afford them a chance to challenge that argument. I accept those points, which are consistent with the legal framework I have set out.

81. I need to say more about Mr Reichhold's fifth point, which is that gisting is not always necessary and essentially relates to the submissions and evidence. That is fine so far as it goes. But it implies that gisting should not be applied to the closed material or be undertaken by the public authority. These are points for the tribunal to take into account. But it would be wrong to rule them out in principle. Doing so would not be consistent with the nature of gisting, which is 'fact-sensitive' and has to be undertaken 'in the context of a specific case'. In particular, it may be both possible and useful to a requester to give an indication of the nature of the some or all of the closed material.

82. Mr Reichhold said that the 'Commissioner would welcome any guidance the UT is able to provide regarding the importance of proportionality in matters relating to the CLOSED procedure.' The best guidance I can give is surely already known to the Commissioner and the tribunal. The tribunal should provide the requester with the maximum assistance it properly can that is within its duties and powers, but is consistent with preserving the confidentiality of the closed information. Beyond that, requesters must trust the tribunal to act judicially. This final point is important. Gisting is not just about providing information to a requester. It is about providing information to a requester in the context of proceedings in which the tribunal will be using its special expertise to ameliorate, as far as it can, the disadvantage to the requester of not having seen the closed material. Inevitably, there will be some residual disadvantage, but that is an unavoidable consequence of the nature of proceedings.

83. I can think of nothing useful to say on proportionality, as what is required will depend on the circumstances of the individual case. The Commissioner is concerned about:

> … disproportionate satellite litigation and case management hearings, akin to mini-FOIA trials, regarding the precise wording of gists, the application of individual redactions, or the content of bundles, imposing a disproportionate burden on the appeals process.

I doubt that anything I say will be able to prevent that happening. The solution lies with the judge dealing with the case management. The cases I have cited and the procedural framework I have explained provide the judge with the tools to prevent gisting becoming disproportionate.

84. It is worth remembering that gisting developed as a response to a practical problem in litigation: helping the requester to participate in the proceedings. The practice developed into a process and became a concept with a label, in the course of which it became the subject of argument in individual cases and analysis in legal texts. It is natural that requesters will press for as much as they can glean about the information that has been withheld. But that is not the purpose of the exercise. The purpose is to improve the requester's ability to take part in proceedings, in which the tribunal itself will take an investigatory role. In that context, the gist should be at a relatively high level of generality, disclosing the nature (as opposed to the content) of

the material and the essence of the submissions. If this is provided, requests for further and better particulars should not be necessary. The exercise involves a judgment.

85. Having set out what the law requires, I now come to whether the tribunal went wrong in law in the gisting process. As *Browning* decided, the approach required is 'fact-sensitive' and must be devised 'in the context of a specific case': see [29] and [33]. Mr Sokal's argument raised two specific features of the case. First, he sought a gist of the closed material. Second, he requested that it be provided by the University.

86. In his grounds of appeal, Mr Sokal said that he was only asking for more detail 'at a very high level of generality'. That is what he was given. He criticised some details as being 'so vague and generic as to be essentially useless'. By way of example, he identified:

> Personal data that was not in the public domain.

and

> Information provided in confidence by witnesses during the Review phase. Direct quotes and reporting of their feedback.

I do not accept that descriptions like those are useless. They allowed Mr Sokal to understand why the information was not being disclosed.

87. Mr Sokal has provided detailed reasons for being dissatisfied with other explanations. By way of example, he said that he needed to know whether personal data belonged to one of the Professors or to a member of staff of the University or to someone else, because 'different issues of law will arise in these three cases'. I accept that different legal issues may arise, but that is not sufficient for Mr Sokal to be given the further information he has identified. Providing the details that Mr Sokal says he wanted would have increased the chance of disclosing too much. Providing all the details he identified in his examples as a whole would have further increased the risk.

88. The flaw underlying Mr Sokal's argument on gisting is that he has taken literally the language in *Browning* at [35] that the tribunal must do 'its utmost to minimise the disadvantage' to the requester. The Court did say that, but Mr Sokal has taken it without the qualification that immediately follows – 'by being as open as the circumstances permit' – and without regard to the context - specifically the investigatory role of the tribunal and to the tribunal's rules of procedure.

89. The tribunal was entitled to refuse to engage further than it did with the request for gisting. It should, though, have given a decision or direction to that effect rather than just ignore Mr Sokal's request. That failure is not one that justifies setting the tribunal's decision aside, as it had no effect on the ultimate outcome.

Authorised for issue
on 01 May 2026

Edward Jacobs
Upper Tribunal Judge