Neutral Citation Number: [2026] UKUT 199 (AAC)
Appeal No. UA-2022-001062-GIA

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

Mr Peter Wilson

Appellant

- v -

The Information Commissioner

Respondent

Before: Upper Tribunal Judge J. Butler

Decision date: 18 May 2026
Decided following a video hearing on 12 February 2026.

Representation:

Appellant: Represented himself
Respondent: Peter Lockley (counsel)

On appeal from:
Tribunal: First-tier Tribunal (General Regulatory Chamber)
Tribunal Case No: EA/2021/0149P
Tribunal Venue: Determined on the papers (in Chambers)
Hearing Date: 14 March 2022
Decision Date: 29 March 2022 (issued on 30 March 2022)

SUMMARY OF DECISION

INFORMATION RIGHTS – Environmental information (93.7) and information rights practice and procedure (93.10)

The First-tier Tribunal ("FTT") provided the appellant with a 'gist' of the withheld closed material but not before dismissing his appeal. The appellant had no meaningful opportunity to respond to the gist before his appeal was decided. The Upper Tribunal decided the FTT's approach was procedurally irregular and failed to do its utmost to minimise the disadvantage to the appellant of closed material being withheld from him (***Browning v (1) Information Commissioner and (2) Department for Business, Innovation and Skills*** [2014] EWCA Civ 1050 and ***Barrett v (1) Information Commissioner and (2) Financial Ombudsman Service*** [2024] UKUT 107 (AAC)).

The FTT also failed adequately to explain to the appellant how the closed material procedure would operate for an appeal determined on the papers. The appellant was therefore unable to make an informed choice between continuing to have his appeal determined on the papers and requesting an oral hearing of his appeal. This was also a procedural irregularity.

The FTT failed to demonstrate it had taken the structural approach towards regulation 12 of the Environmental Information Regulations 2004 set out in ***Highways England Company Ltd v Information Commissioner and Henry Manisty*** [2019] AACR 17.

The Upper Tribunal set aside the FTT's decision on the basis the above errors of law were material and remitted the appeal to a new FTT to decide.

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

DECISION

As the decision of the First-tier Tribunal involved the making of an error of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the First-tier Tribunal for rehearing by a fresh Tribunal.

DIRECTIONS

A. The case is remitted to the First-tier Tribunal for reconsideration at an oral hearing.

B. The new Tribunal should not involve any of the panel members previously involved in determining this appeal on 14 March 2022, which led to the decision dated 29 March 2022.

C. The Tribunal hearing the remitted appeal is not bound in any way by the decision of the previous First-tier Tribunal. Depending on the findings of fact it makes, the new Tribunal may reach the same or a different outcome from the previous tribunal.

D. If any party wishes to rely before the First-tier Tribunal on submissions made to the Upper Tribunal, or on evidence not previously before the First-tier Tribunal, that party is to send the First-tier Tribunal the relevant document(s) within one month of the date this Decision is issued to the parties.

E. A copy of this Decision and the Decision Notice granting permission to appeal, dated 24 March 2025, is to be added to the First-tier Tribunal's bundle.

These Directions may be supplemented by later directions by a Tribunal Judge or Registrar in the General Regulatory Chamber of the First-tier Tribunal.

REASONS FOR DECISION

Introduction

1. This is Mr Wilson's appeal. He was the appellant in the First-tier Tribunal ("**FTT**") proceedings. He appeals against the FTT's decision dated 29 March 2022, made after his appeal was determined by the FTT on the basis of the documents in the FTT appeal bundle.

Factual background

2. On 10 January 2020, Mr Wilson wrote to Shropshire Council and requested (1) information about communications between Shropshire Council officers and members of the Stanmore Consortium in connection with release of land from the Green Belt at Stanmore and Swancote in Shropshire. Mr Wilson also asked for (2) clarification of the Council's position about whether notes and minutes were taken at a meeting on 01 September 2017 and for the Council to provide copies of emails or other correspondence or notes of telephone conversations relating to the meeting being set up and also copies of any emails or other correspondence or notes of telephone conversation after it took place. Finally, Mr Wilson asked for (3) a copy of confirmation by a landowner about available sites, which he stated presumably would be in written form.
3. On 13 February 2020, Shropshire Council replied to Mr Wilson's request, confirming no formal meeting notes existed of the meeting on 01 September 2017. Shropshire Council refused to provide the information requested in parts (1) and (2) of the request, relying on exceptions under regulation 12(4)(d) and 12(5)(e) of the Environmental Information Regulations 2004 ("**the EIRs 2004**"). These relate, respectively, to exceptions for information in the course of completion and confidentiality of commercial information. Shropshire Council told Mr Wilson it had already provided him with information within the scope of part (3) of his request.
4. Shropshire Council maintained its position at internal review stage on 21 May 2020 and provided further arguments about why it considered regulation 12(4)(d) applied to the information requested.
5. On 26 May 2020, Mr Wilson complained to the Information Commissioner about the way in which Shropshire Council had dealt with parts (1) and (2) of his information request. The ICO carried out an investigation in relation to:
    (a) whether Shropshire Council was entitled to rely on exceptions as a basis for refusing to provide the withheld information; and
    (b) whether Shropshire Council was correct to state it did not hold further information within the scope of part (2) of the request.
6. During the ICO's investigation, Shropshire Council provided Mr Wilson with further information that, having carried out a review, it considered could be provided. Shropshire Council also confirmed it was only relying on the exception under regulation 12(4)(d) (information in the course of completion). Shropshire Council indicated this exception applied to all the information it had withheld.

7. On 19 May 2021, the ICO issued a Decision Notice. This confirmed the ICO did not require Shropshire Council to take any steps. The Notice explained the ICO was satisfied, on the balance of probabilities, that Shropshire Council was entitled to apply regulation 12(4)(d) to the withheld information and that the public interest in maintaining the exception outweighed the public interest in disclosure.

8. The ICO also decided that Shropshire Council did not hold further information within the scope of part (2) of Mr Wilson's request. The ICO was therefore satisfied that Shropshire Council complied with its duty under regulation 5(1) of the EIRs 2004 by reason of regulation 12(4)(a) (information not held).

The First-tier Tribunal's decision

9. On 16 June 2021, Mr Wilson appealed to the First-tier Tribunal. The ICO was listed as the only Respondent to the appeal.

10. On 10 November 2021, a Registrar of the First-tier Tribunal (General Regulatory Chamber ("**GRC**") made case management directions ("**CMDs**"). These provided the following:

> *"Prevention of disclosure[1] - disputed information*
>
> 1. The Tribunal has received a copy of the disputed information. The disputed information will be held, pursuant to rule 14(6), on the basis that it will not be disclosed to anyone except the Information Commissioner and the Shropshire Council (should they be joined or make submissions as a party or non-party). To do otherwise would defeat the purpose of the proceedings.
>
> 2. The above direction permits a party to edit a document to prevent disclosure of disputed information; it is however the Tribunal's decision whether a party may place documents before the Judge/Panel but withhold them from one of the parties.
>
> *Paper consideration – final written representations*
>
> 3. Parties have consented to this matter being dealt with on the papers. Parties will not be told of the date on which the case will be considered. This is to enable the Tribunal to list cases more flexibly.
>
> 4. Each party will have an opportunity to make final written representations; any such representations must be with the other parties (unless rule 14 application is made) and the Tribunal no later than on **01 December 2021**."

11. The Upper Tribunal hearing bundle provides, at pages 18 to 20, a copy of the FTT's Practice Note about Closed Material in Information Rights cases, dated May 2012 ("**the Practice Note**"). The ICO's position is that it is the Practice Note hyperlinked via a footnote to the CMDs. Mr Wilson's position is that the hyperlink embedded within the CMDs is broken and one cannot now reach any particular document or webpage by clicking on it.

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[1] You may find it helpful to refer to the Practice Note on Closed Material available here: https://www.judiciary.gov.uk/publications/practice-note-closed material-in information-rights-cases/

12. Neither party made further written representations. On 14 March 2022, an FTT determined Mr Wilson's appeal on the basis of the papers. The FTT recorded making its decision on 29 March 2022 and issuing it to the parties on 30 March 2022.

13. At paragraph 1 of its Decision, the FTT noted that the mode of hearing was one the parties and Tribunal agreed was suitable for determination on the papers in accordance with rule 32 of the Chamber's Procedure Rules. At paragraph 32 of the Decision Notice, the FTT stated it had considered an agreed open bundle of evidence comprising pages 1 to 300. The FTT stated: "*It [the FTT] also considered a closed bundle comprising pages 1 to 73. We received no closed submissions and there is no closed annexe to the Decision. A "gist" of the closed material is provided at paragraph 29 below*".

14. Paragraph 29 of the FTT's Decision stated:

> "*Our closed bundle contains the withheld information, consisting of 19 emails comprising exchanges between the Council's officers and third parties. We provide here a "gist" of that information by describing it as preliminary and exploratory exchanges about some "in principle" development opportunities, taking into account decisions by planning Inspectors in other areas, and caveated by the officers as expressing informal views only in view of the requirement for public consultation before any formal decisions could be taken.*"

15. The FTT dismissed Mr Wilson's appeal. At paragraph 31 of its Decision, the FTT decided the withheld material engaged the exception under regulation 12(4)(d) of the EIRS 2004 that Shropshire Council had applied.

16. At paragraphs 32 to 33 of its Decision, the FTT addressed the public interest balancing exercise, which it decided favoured maintaining the exception in favour of the particular withheld material and that the presumption in favour of disclosure in the EIRs 2004 did not displace that conclusion.

17. At paragraph 34 of its Decision, the FTT explained it accepted the ICO's submission that the information requested had either been disclosed or withheld under regulation 12(4)(d). The FTT was not persuaded there were categories of information within the scope of the request that had been overlooked by the Information Commissioner. The FTT stated it did not regard it as erroneous for the ICO to attach weight to the assurances Shropshire Council's officer had given during the course of a formal investigation process. The FTT noted there was no evidence before it to contradict the Council's statement that minutes of the meeting were not held. The FTT stated it acknowledged Mr Wilson's personal scepticism but on its own, that was insufficient reason for the Tribunal to overturn the ICO's Decision Notice on that point.

18. The FTT refused Mr Wilson permission to appeal to the Upper Tribunal in a decision dated 19 May 2022.

The grant of permission by the Upper Tribunal

19. Mr Wilson's application for permission to appeal to the Upper Tribunal was stayed from 07 November 2022 until 26 April 2024, while the Upper Tribunal was considering the appeal of ***Barrett v (1) ICO and (2) Financial Ombudsman***

Service [2024] UKUT 107 (AAC) ("***Barrett***"). The stay related to the fact Barrett would be considering the process of gisting used by the First-tier Tribunal in information rights appeals. Mr Wilson provided amended appeal grounds after the stay was lifted.

20. There was a second stay, related to a separate Upper Tribunal appeal about the relevance of UNECE implementation guidance for the meaning of "*in the course of completion*". The other appeal was ultimately withdrawn, and the second stay of Mr Wilson's application was lifted.

21. On 24 March 2025, and following an oral hearing, I granted Mr Wilson permission to appeal against the FTT's Decision dated 29 March 2022. A summary of the grounds on which I granted permission is:

    (a) It was arguable the FTT's determination of his appeal may have been procedurally unfair (procedural irregularity). In particular, the FTT may have failed to take appropriate steps to minimise the disadvantage described in ***Browning v (1) Information Commissioner and (2) Department for Business, Innovation and Skills*** [2014] EWCA Civ 1050 ("***Browning***") and ***Barrett*** for a party who does not see the closed material and therefore cannot consider and make submissions on all the evidence and submissions before the FTT;

    (b) It was arguable there was a procedural irregularity (procedural unfairness) in the FTT failing to explain the procedure for dealing with the closed material in Mr Wilson's appeal beyond the Registrar's CMDs dated 10 November 2021. Possible examples of this included providing only a footnote to the closed material process and that the CMDs may not have enabled Mr Wilson to take an informed position about his options for how the appeal was dealt with given there was closed material in it;

    (c) It was arguable the FTT had failed to consider and apply relevant principles set out by Upper Tribunal Judge Jacobs in ***Highways England Company Ltd v Information Commissioner and Henry Manisty*** [2019] AACR 17 ("***Manisty***");

    (d) Alternatively, the FTT may have failed to consider the specific principles set out in the ICO's guidance in addition to ***Manisty***; and

    (e) In the event that the Upper Tribunal decided the FTT had failed to deal with Mr Wilson's appeal in a procedurally fair way, on the basis of ***Barrett***, the FTT's assessment of regulation 12(4)(d) of the EIRs 2004, which relied partly on the "gist" it had formulated from the procedure it had applied, might also be affected by error of law.

Oral hearing of appeal on 12 February 2026.

22. My decision granting permission to appeal asked the parties whether they wanted an oral hearing. The ICO's Response explained he considered an oral hearing of the appeal would be appropriate, particularly given the potential pervasive and practical implications of the procedural fairness issues for the appeals regime. Mr Wilson asked for the appeal to be determined on the papers instead, on the basis

that it had already been delayed and the ICO had not played any part in the oral hearing about permission to appeal.

23. I directed an oral hearing on the basis one of the appeal grounds was directly linked to ***Barrett*** and elements of my decision about the appeal might read across to future cases involving procedural fairness considerations where closed material is involved.

24. The oral hearing took place by CVP video on 12 February 2026. Mr Wilson represented himself and Mr Lockley of counsel represented the ICO. I am grateful to them both for their thoughtful submissions.

Legal framework

25. Regulation 12(1) to (5) of the EIRs 2004 provides:

> "**Exceptions to the duty to disclose environmental information**
>
> **12.**—(1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—
>
> (a) an exception to disclosure applies under paragraphs (4) or (5); and
>
> (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
>
> (2) A public authority shall apply a presumption in favour of disclosure.
>
> (3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.
>
> (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—
>
> (a) it does not hold that information when an applicant's request is received;
>
> (b) the request for information is manifestly unreasonable;
>
> (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
>
> (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
>
> (e) the request involves the disclosure of internal communications.
>
> (5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—
>
> (a) international relations, defence, national security or public safety;

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;

(c) intellectual property rights;

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

(f) the interests of the person who provided the information where that person—

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure; or

(g) the protection of the environment to which the information relates.

Why I have allowed this appeal - analysis

26. At the permission stage, I only needed to be persuaded that it was arguable with a realistic (as opposed to fanciful) prospect of success that the FTT had made an error of law in a way that was material.

27. At this substantive stage, I need to be satisfied on the balance of probabilities that the FTT did make an error or errors of law that were material.

28. I am satisfied the FTT made the following errors of law in its decision dated 29 March 2022 and that they were material.

(a) Procedural irregularity: failing to take appropriate steps to minimise the disadvantage to Mr Wilson of there being closed material in the appeal

29. This reflects the ground summarised at paragraph 21(a) above.

30. In ***Bank Mellat v HM Treasury (No. 2)*** SC(E) [2013] 3 WLR, Lord Neuberger stated:

> *"3. Even more fundamental to any justice system in a modern, democratic society is the principle of natural justice, whose most important aspect is that every party has a right to know the full case against him, and the right to test and challenge the case fully."*

31. Lord Neuberger went on to state, at paragraph 5, that decisions of the Strasbourg Court had confirmed article 6 of the European Convention on Human Rights (ECHR) is not infringed by a closed material procedure, provided that appropriate conditions are met. The third condition of the five that Lord Neuberger identified was that: "*a summary, which is both sufficiently informative and as full as the circumstances permit, of all the closed material has been made available to the excluded party*.".

32. In ***Browning***, the Court of Appeal considered whether an FTT hearing an appeal against a decision of the ICO can lawfully adopt a closed material procedure in which a party and his legal representative are excluded from the hearing or part of it. Maurice Kay LJ explained that for the FTT: "*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*" (paragraph 33).

33. At paragraph 35, Maurice Kay LJ stated:

> *"What is also important is that when the FTT excludes both a party and its 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."*

34. In ***Barrett***, one of the grounds on which the Upper Tribunal granted permission to appeal (ground 2) was that it was arguable the FTT erred in law in failing to consider whether, despite determining the appeal on the papers, the closed material procedure (contained in the Practice Note dated May 2012) should have been adapted to ensure the appellant was treated fairly in accordance with the principles under that procedure.

35. Upper Tribunal Judge Mitchell stated:

> *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 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.".*

36. I have applied the principles established by the above case law to Mr Wilson's circumstances. His appeal was determined on the papers. He was provided with a gist of the closed material *after* the FTT determined his appeal. The timing of this is important.

37. Firstly, by providing the gist in its Decision, the FTT decided it was possible to give a summary relating to the withheld material without disclosing the actual information in question. Secondly, as Upper Tribunal Judge Mitchell observed in paragraph 101 of ***Barrett***, by the time the FTT provided the summary of the closed material in its reasons, Mr Wilson's appeal had failed, and nothing said in the FTT's Decision was capable of minimising the disadvantages he faced in seeking to make out his case. Had he been provided with the gist before the decision was made, Mr Wilson could have made written representations about it or asked for an oral hearing to make representations about it. Once the FTT had decided his appeal, however, there was no way in which Mr Wilson could make arguments and submissions in response to the summary of the withheld material.

38. The relevant procedural rules the GRC needed to apply to Mr Wilson's appeal are the Tribunal Procedure (First-tier Tribunal) (GRC) Rules 2009 ("**the GRC**

Rules 2009"). The GRC's 2012 Practice Note on Closed Material Procedure provides that directions under rule 14(6) are to be made by a judge. This can be read as including the delegation authorised generally by the Senior President of Tribunals for a Registrar to be able to carry out these functions.

39. Paragraph 9 of the Practice Note confirms the GRC's approach is that: "*the judge will limit non-disclosure to what is necessary*". This requirement will apply at the point the rule 14(6) direction is made. Once the rule 14(6) direction has been made, the FTT is required to conduct proceedings and record its decision and reasons appropriately so as not to undermine the effect of that direction (rule 14(10) GRC Rules 2009).

40. Having explained what happens leading up to a direction being made under rule 14(6), the Practice Note deals exclusively with how closed material will be dealt with in an oral hearing (paragraphs 11 to 13). Paragraph 13(a) explains the FTT should discuss with the parties not excluded from the hearing: "*What summary of the closed hearing can be given to the excluded party without undermining the rule 14(6) direction*". This summary is what is commonly referred to as the "gist". The word "gist" does not appear in the Practice Note or in rule 14 of the GRC Rules 2009. It was not mentioned in the CMDs dated 10 November 2021.

41. Reading its Decision dated 29 March 2022, the FTT does not appear to have given any consideration to whether it could, or should, have adapted its closed material procedure described in the Practice Note to apply it when determining Mr Wilson's appeal on the papers. Nor has the FTT explained why providing the gist with the Decision but not beforehand, meant it still met its duty to do its utmost to minimise the disadvantage to Mr Wilson of not having the closed material, as set out in ***Browning***.

42. It is possible the first time the FTT considered whether it could provide a gist was when the FTT panel was convened on 14 March 2022 to determine the appeal. If so, this was relevant to whether the FTT could satisfy itself of the matter set out in rule 32(1)(b) of the GRC Rules 2009 (that it can properly determine the issues without a hearing). That requirement must be read in conjunction with rule 2 that the overriding objective of the GRC Rules 2009 is to enable the Tribunal to deal with cases fairly and justly. Furthermore, the principle reflected in paragraph 9 of the Practice Note (that the FTT Judge will limit non-disclosure to what is necessary) arguably continued to be a relevant consideration throughout the FTT's case management and determination of Mr Wilson's appeal.

43. Mr Lockley set out several arguments about why the FTT was not required to give the gist to Mr Wilson before it issued its Decision. These were essentially:

    (a) It is not general practice for the FTT GRC to provide gists of closed material when determining appeals on the papers;

    (b) it is not proportionate to build in a process of inviting an appellant to comment on a gist where the rule 14 application relates solely to the closed material and the appeal is determined on the papers;

(c) deciding there was a material error of law in an FTT providing a gist for an appeal determined on the papers but not giving time to comment on it, might have a chilling effect, making FTTs more reluctant to provide a gist at all when determining closed material appeals on the papers; and

(d) the FTT was entitled to conclude there was not anything of sufficient benefit it could gain from building a further stage into the procedure given the limited nature of the gist it was providing.

44. I did not find these arguments persuasive.

45. Dealing with the first argument, it may be that some, or even many, FTTs do not often provide gists when determining appeals on the papers. This does not, however, change whether the FTT made an error of law in providing Mr Wilson with a gist of the withheld material but only after his appeal was determined.

46. Dealing with the second argument, Upper Tribunal Judge Jacobs provided some observations about gisting and proportionality in his recent decision in ***Sokal v (1) Information Commissioner and (2) University of Essex*** [2026] UKUT 177 (AAC). At paragraph 80 of his decision, Judge Jacobs listed, and agreed with, principles the ICO's counsel had argued were relevant to how to apply gisting:

> *"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."*

47. Judge Jacobs explained at paragraph 83 of ***Sokal*** that he could think of nothing useful to say on proportionality as what is required will depend on the circumstances of the individual case and the solution lies with the judge dealing with case management.

48. Where the FTT has decided it can properly provide a gist of the withheld material, it will therefore generally need to consider how best to provide it in a proportionate manner as part of its case management of an appeal. But proportionality considerations do not change the nature of the duty formulated in ***Browning*** as applied to paper determinations in ***Barrett***. Nor do they change the reason why the duty is important; to make determining an appeal procedurally fair in circumstances where it would not otherwise be fair. In this context, one cannot conclude that it is inevitably disproportionate for an FTT determining an appeal on the papers to provide a gist in a way that allows the party to make submissions about it. It may be shown to be disproportionate in the circumstances of a specific case, but it is not axiomatic that it will be disproportionate in all cases.

49. For similar reasons, I reject Mr Lockley's third argument. The cohort of affected appeals is those where an FTT has identified that it can properly provide a gist of the withheld material. The case law indicates that in such circumstances, the FTT should ordinarily provide a gist to reduce the disadvantage caused by the

asymmetry of material available to the parties to the appeal. This is based on the case law described at paragraphs 30 to 35 above. It is difficult to identify the scope for there being a chilling effect on disclosing a gist at all in such cases.

50. Dealing with the fourth argument, I recognise it is for the FTT to make case management decisions about how best to deal with its closed material appeals. The FTT's Decision does not, however, explain why it decided providing a gist but only in the outcome decision, was procedurally fair to Mr Wilson. The Decision does not address whether the FTT considered taking steps beyond providing the gist in the Decision itself, including providing it and adjourning the determination of the appeal on the papers to allow Mr Wilson make submissions about it.

51. It may be that the FTT decided that it was disproportionate to take such an approach. The ICO suggested this at paragraph 25 of his Response, which argued the FTT could conclude the delay and additional judicial resources consumed by further submissions were not warranted. If, however, the FTT decided it was disproportionate to allow Mr Wilson to respond to the gist before it made its decision, the FTT has not stated this or explained why it reached that conclusion. It has therefore not provided any reasoning to support the approach it took.

52. Nor has the FTT explained why, given the circumstances, it remained satisfied the appeal was one it could properly determine on the papers and do so fairly and justly (rules 2 and 32(1)(b) of the GRC Rules 2009).

53. I do not seek to prescribe the steps the FTT GRC should take when determining appeals involving closed material on the papers. However, applying the case law and the principles developed from it to Mr Wilson's circumstances, I have decided that giving him the gist, but only after the FTT had made its decision, was procedurally irregular.

54. The FTT's approach also reduced the effectiveness of the direction in paragraph 4 of the CMDs dated 10 November 2021 that each party could make written submissions before the appeal was determined. Mr Wilson had not received the gist at that time and could not respond meaningfully to it before his appeal was determined.

55. The ICO argued that any error of law by the FTT on this ground was not material because the FTT's gist did not provide significant new detail about the nature of the withheld material and it was clear Mr Wilson had in mind the terms of the information when he made part (1) of his request to Shropshire Council. Mr Lockley also argued the ICO had provided a further high-level description of the information at paragraphs 21 and 22 of its Decision. Mr Lockley argued the submissions Mr Wilson told the Upper Tribunal he would have made are all ones based on the evidence he already had before him. Asked about Mr Wilson's submissions that he would have asked for an oral hearing had he known about the scope for providing a gist, Mr Lockley submitted that Mr Wilson had opted for a paper determination and all the matters he now raised were ones he could have made at an oral hearing, with or without a gist.

56. I did not find these arguments persuasive. If the FTT considered that in giving a gist it was simply reflecting the information Mr Wilson already had available, it would not have provided one. The FTT decided it was necessary and appropriate to provide a gist in addition to the information Mr Wilson already had and the wording the (then) ICO had used in her decision. The FTT used different wording for its gist, including contextual information (for example, that the exchanges took into account decisions by Planning Inspectors in other areas). Given the differences in the wording used in the gist, Mr Wilson might have understood it or responded to it differently. In these circumstances, one cannot assume that it would not have made any material difference had the FTT given Mr Wilson the gist and the chance to make submissions about it, before determining his appeal.

57. In any event, the Court of Appeal explained the error of law for procedural irregularity in ***R(Iran) v SSHD*** [2005] EWCA Civ 982 is: "*committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings*". The procedural irregularity here was the FTT's failure to give Mr Wilson the gist of the withheld information in a way that allowed him the opportunity to make his arguments about it before the FTT determined his appeal. In my assessment, this was capable of making a material difference to *both* the outcome of the proceedings *and also* the fairness of them.

58. I am therefore satisfied that the FTT made a material error of law in terms of the ground summarised at paragraph 21(a) above.

(b) Procedural irregularity: inadequate explanation of the closed material procedure to allow Mr Wilson to make an informed choice about his appeal being determined on the papers

59. This reflects the ground summarised at paragraph 21(b) above.

60. In its Response to the Upper Tribunal appeal, the ICO argued that although he is a litigant in person, Mr Wilson is a sophisticated one, and capable of researching case law and guidance. The ICO submitted that Mr Wilson could be taken to have understood the implications of choosing a paper determination (paragraph 26(d) of ICO Response to appeal).

61. This reflected a statement in paragraph 6(ii) of the decision refusing Mr Wilson permission to appeal dated 19 May 2022. The same FTT Judge chaired the panel deciding Mr Wilson's appeal. Despite both decisions involving the same Judge, I cannot take the reasoning in the decision refusing permission to appeal as an additional source of reasoning for the FTT's decision dated 29 March 2022 (paragraph 67 of ***Albion Water v Water Services Regulation Authority*** [2008] EWCA Civ 536). However, the ICO effectively adopted that position at the hearing, and I have therefore considered the ICO's position in terms of the ground summarised at paragraph 21(b).

62. At the hearing, Mr Lockley argued that Mr Wilson could be taken to have understood he would not see a gist of the closed material because he had opted for a paper determination of his appeal. Mr Lockley relied on what was in the CMDs, the Practice Note and the GRC Rules 2009 themselves. He argued that the combination of these made clear to Mr Wilson that there would be no hearing

and he would simply receive a decision (paragraph 3 of the CMDs), there was material he would not see (the reference to rule 14(6) in the CMDs) and he could have consulted the GRC Rules 2009 to understand what the procedure would involve.

63. I do not agree. Of the three information sources Mr Lockley put forward, the only one providing any explanation of how the closed material procedure applied in practice is the GRC's Practice Note. It does not, however, explain how the closed material procedure will work where an appeal is decided on the papers. Mr Lockley suggested that with a paper determination, a party would not be permitted to make submissions about a gist before the appeal was decided. It is not clear *why* paper determinations must be made without allowing a party to make submissions on any gist provided. It appears this was the GRC's policy in 2022, but if so, that policy required stating as it was not self-evident and it was not stated in the Practice Note. Nor could it reasonably be inferred from the Practice Note, especially for a party like Mr Wilson who was unfamiliar with the closed material procedure. In the absence of the FTT explaining its procedure for paper determinations for closed material cases, Mr Wilson could not be expected to guess how it would work.

64. The CMDs contained a footnote, which suggested the parties: "*may find it helpful*" to refer to the Practice Note on Closed Material and contained a hyperlink to it. This was equivocal wording and did not make clear the significance of that document in giving some explanation of the GRC's closed material procedure. However, the Practice Note did not set out how the closed material procedure worked for appeals determined on the papers. Even if the CMDs had given it greater prominence, this would not have explained to Mr Wilson how the closed material procedure would work for his appeal.

65. I do not consider that reading the CMDs, the Practice Note, rule 14, or even a combination of them, provided an adequate (or indeed, any) explanation that in having his appeal determined on the papers, the FTT might produce a gist of the closed material, but it would not give Mr Wilson the opportunity to comment on it before deciding his appeal. Without this explanation, Mr Wilson could not realistically make an informed and meaningful procedural choice about whether his appeal should be determined after an oral hearing or on the papers.

66. I therefore do not agree with the ICO's arguments that having been provided with the CMDs and the hyperlink to the Practice Note, Mr Wilson was able to make an informed decision to continue having his appeal determined on the papers rather than requesting an oral hearing. The information provided was insufficient to put Mr Wilson in that position.

67. The failure to provide an adequate explanation of the closed material procedure for an appeal determined on the papers, was procedurally irregular. It meant Mr Wilson could not make a properly informed choice about how his appeal should be dealt with. To do so, he would have to understand what procedural opportunities were lost by having his appeal determined on the papers. It was not clear from any of the information the FTT provided that the procedural opportunity Mr Wilson would lose with a paper determination was not merely being able to make oral arguments at a hearing. What Mr Wilson would lose was having an

opportunity to see any gist of the withheld material and respond to it before his appeal was determined.

68. This irregularity was capable of making a material difference to the outcome, or the fairness, of proceedings. Mr Wilson submitted that had he known what would happen with a paper determination and that if he received a gist, it would only be in the Decision, he would have sought an oral hearing of his appeal. Had there been an oral hearing with a closed session, applying the principles established in ***Browning*** and the GRC's Practice Note, the FTT would have used its expertise, and drawn on the ICO as regulator to explore the extent to which a summary of the closed material could be provided to Mr Wilson in the form of a gist so that he could make oral submissions about it before his appeal was determined. The error of law was therefore material.

(c) Failure to apply the principles established in *Manisty* when determining Mr Wilson's appeal

69. The decision in ***Highways England Company Ltd v Information Commissioner and Henry Manisty*** [2019] AACR 17 ("***Manisty***") set out binding principles the FTT needed to apply when determining Mr Wilson's appeal.

70. In ***Manisty***, Upper Tribunal Judge Jacobs considered the exception provided in regulation 12(4)(d) of the EIRs 2004 (material in the course of completion). He analysed how the EIRs should be interpreted in the context of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998) ("the Aarhus Convention") and the status of guidance given about its implementation by the United Nations Economic Commission for Europe. Judge Jacobs also considered what "material" means and how the exception fell to be considered where there are stages within the overall process of completion. Judge Jacobs explained that considering an exception in regulation 12 contains two elements: (a) determining firstly whether it is engaged, and (b) if so, whether the balance of public interests is in favour of maintaining the exception.

71. At paragraph 19 of ***Manisty***, Upper Tribunal Judge Jacobs concluded that the Aarhus Convention Implementation Guidance could be used as an aid to interpretation of the EIRs 2004. It was not, however binding and could not override what the Aarhus Convention itself required or permitted. The FTT did not make any statement about how the Aarhus Convention Implementation Guidance should be treated, although it acknowledged Mr Wilson had made arguments relying on it, at paragraph 31 of its Decision.

72. Although the FTT Decision referred to several senior court decisions, it did not refer directly to ***Manisty***. As Mr Lockley submitted, the FTT did not have to cite ***Manisty*** directly, as long as it applied the essential reasoning in that case. Having, however, considered paragraphs 31 and 32 of the FTT's Decision in the context of paragraph 20 of ***Manisty***, I am not satisfied the FTT applied the structural approach established in ***Manisty*** when determining Mr Wilson's appeal.

73. Judge Jacobs stated the following in paragraph 21 of ***Manisty***:

> *"What the exception does not mean*
>
> *...*
>
> *21. It is possible that disclosure of the information would have adverse consequences. That is a relevant factor to the balance of public interests, but that only arises if the exception is engaged. It is not a factor that can be taken into account in interpreting the scope of the exception. Interpreting it to do so would produce an overlap with regulation 12(5), which already provides for exceptions that apply if disclosure would adversely affect the specified interests. It may, though, be relevant as a factor in deciding whether the exception is engaged. The seriousness of disclosing information at a particular stage may be evidence that the material is still in the course of completion, but it is essential that it should not be used to turn a paragraph (4) exception into a paragraph (5) exception. Adverse consequences must not be made a threshold test for regulation 12(4)(d)."*

74. Judge Jacobs' analysis confirms the structural approach required in considering regulation 12. The starting point is identifying whether an exception under regulation 12(4) or (5) is engaged. It is only once an exception is engaged that the assessment is made of whether in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing it (the public interest balancing test). While a certain matter (e.g., adverse consequences) might be a factor potentially relevant to considering whether an exception is engaged, as well as where the balance of public interests lies, the two stages still need to be addressed separately.

75. At paragraphs 31 and 32 of its Decision, the FTT wrote:

> *"31. As to ground 1, we conclude that regulation 12(4)(d) of the EIRs is engaged by the withheld material in the appeal. We observe that there is no authority supporting the Appellant's view that a Local Plan process may be broken down into segments for the purposes of ongoing disclosure so as to facilitate greater public participation.* ***It is an attractive argument in some ways and, taking into account the Appellant's submission about the Aarhus Convention guidance, there may be cases in which it would weigh heavily with a Tribunal considering the public interest in disclosure. However, the public interest in disclosure is always intensely fact-sensitive and in this case the withheld material itself has not clearly been identified as falling within a discrete stage of the Local Plan process which may be regarded as complete (albeit preliminary) rather than in the process of completion. Having read it for ourselves, we find that the withheld information is unlikely to contribute to public participation in decision-making because, as we have "gisted" it above, it is informal, explorative and preliminary****. As we find it impossible to attribute its relevance to a single procedural stage of the Local Plan process, we prefer the Decision Notice's approach of viewing it as information held 'in the course of completion' of the overall Local Plan process.*

> *32. Turning to ground 4 and the public interest balancing test, we conclude that the Decision Notice articulated well the relevant competing arguments in favour of disclosure ('transparency') and non-disclosure ('the safe space') and we do not need to repeat them here. We acknowledge the weight of the public interest in transparency in connection with a Local Plan, which, as the Appellant states can affect thousands of lives. However, our focus must be on the particular withheld material in this appeal, which we consider of itself to be of little value in facilitating public participation compared with the public interest of permitting the Council a safe space in which to hold preliminary discussions with stakeholders. We note that there has been significant information placed into the public domain already and that there will be a further public process. We do not accept the Appellant's suggestion that this is a process impermissibly taking place behind closed doors."*
>
> [my emphasis added in bold]

76. Paragraph 31 of the FTT's Decision expressed its reasoning about why regulation 12(4)(d) was engaged. The FTT linked Mr Wilson's reliance on the Aarhus Implementation Guidance directly to the public interest balancing test ("*the public interest in disclosure*"). The two sentences that followed also focus on the public interest balancing test. But at this stage, the FTT was still considering whether the exception in regulation 12(4)(d) was engaged. When this wording within paragraph 31 is read together (see paragraph 75 above, in bold), it indicates the FTT was merging its consideration of whether the regulation 12(4)(d) exception was engaged with its consideration of the public interest balancing test that only applied if the exception was engaged.

77. In his FTT appeal, Mr Wilson relied on the Aarhus Convention Implementation Guidance to argue the withheld material did not relate to material in the course of completion, because the Local Plan to which it related could be broken down into discrete stages. By merging his argument into a consideration of the public interest balancing test (or factors within that test), the FTT failed to consider it adequately in respect of whether the regulation 12(4)(d) exception was engaged. The FTT failed to take the structured approach directed by the principles established in ***Manisty***.

78. I have considered whether paragraph 31 of the FTT's Decision could be seen as merging or compressing the FTT's *explanation* of its overall analysis rather than the FTT incorrectly mixing two separate stages it had to consider. I do not consider it can properly be interpreted in this way.

79. Paragraph 32 of the Decision clearly considered the public interest balancing test. There was no reason for the public interest balancing test to be considered within paragraph 31, which was addressing whether an exception in regulation 12(4) applied at all.

80. Mr Lockley indicated he accepted the wording about the public interest in paragraph 31 was in the wrong paragraph. He invited me to conclude this might represent confusing and slightly unhelpful drafting but did not infect the FTT's reasoning or undermine its conclusion that regulation 12(4)(d) was engaged.

81. I agree with Mr Lockley that there is wording in paragraph 31 relating to the public interest balancing test, which should not been in that paragraph. I do not consider it represents the FTT applying the correct structural approach and simply using unhelpful wording to describe it. The three sentences shown in bold at paragraph 75 above are sandwiched within the FTT's analysis about whether the regulation 12(4)(d) exception was engaged. Having set out that middle reasoning, which refers to, and considers, the public interest, I am satisfied the final sentence of paragraph 31 indicates the FTT relied on that reasoning in concluding regulation 12(4)(d) was engaged.

82. The FTT therefore did not demonstrate the structured approach required by ***Manisty*** about how to approach regulation 12(4) separately from considering the public interest balancing test in regulation 12(1)(b). This was a material error of law. It also meant the FTT failed to address Mr Wilson's arguments in the way they needed to be considered under regulation 12(4)(d).

The other grounds on which I gave Mr Wilson permission to appeal

83. Given I have decided the FTT made material errors of law in terms of the appeal grounds summarised at paragraph 21(a), (b) and (c) above, it has not been necessary to address the grounds summarised at paragraph 21(d) and (e).

Disposal and conclusion

84. Having decided the FTT's decision involved material errors of law, it is appropriate to exercise my discretion to set aside the Tribunal's Decision dated 29 March 2022 under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Having done so, section 12(2)(b) of that Act provides that I must either remit the case to the First-tier Tribunal with directions for their reconsideration or remake the decision.

85. I recognise the FTT determined Mr Wilson's appeal in 2022 and remitting it to a new FTT will add to the overall time taken to resolve it. It is, however, appropriate for Mr Wilson's appeal to be considered afresh by a new FTT, which brings expertise in this area, is the dedicated tribunal to finding facts, and can decide how best to case manage the appeal, including the closed material aspect of it.

86. I therefore remit Mr Wilson's appeal for rehearing before a new First-tier Tribunal. It will make a fresh decision about whether the ICO's Decision Notice dated 19 May 2021 was in accordance with the law.

87. Although I have set aside the Tribunal's Decision dated 29 March 2022, I am not making any findings, or expressing any view, about the issues that arise in Mr Wilson's appeal. The next tribunal will need to hear evidence and make its own findings of fact and provide its reasoning for the decision it reaches.

Judith Butler
Judge of the Upper Tribunal

Authorised by the Judge for issue: 18 May 2026