



Neutral Citation Number: [2026] UKUT 313 (AAC)  
**Appeal No. UA-2025-001691-GIA**

**IN THE UPPER TRIBUNAL  
ADMINISTRATIVE APPEALS CHAMBER**

**Between:**

**MR GERRY WOODHOUSE**

**Appellant**

**- v -**

**INFORMATION COMMISSIONER**

**Respondent**

**Before: Upper Tribunal Judge Stout  
Decided on consideration of the papers**

**Representation:**

**Appellant:** In person

**Respondent:** Sapna Arora (Information Commissioner's Office)

*On appeal from:*

Tribunal: First-Tier Tribunal (General Regulatory Chamber)  
(Information Rights)

Judge/Panel: Judge Hughes, Members Cosgrave and Sivers

Tribunal Case No: FT/EA/2024/0287

Digital Case No.: [2025] UKFTT 00638 (GRC)

Tribunal Venue: On the papers

Decision Date: 4 June 2025

**SUMMARY OF DECISION**

**FREEDOM OF INFORMATION - absolute exemptions (93.4)**

This appeal concerns the absolute exemption under section 44 of the Freedom of Information Act 2000 (FOIA) for information whose disclosure is prohibited under any enactment, in this case section 132 of the Data Protection Act 2018 (DPA) in relation to information obtained by, or provided to, the Information Commissioner in his regulatory capacity. The request concerned advice and communications between the Commissioner and a parish council.

The Upper Tribunal held that the First-tier Tribunal had erred in law by failing adequately to consider whether parts of the withheld information consisting of material sent by the Commissioner to the council could be disclosed without revealing information protected by section 132(1)(a), and by failing properly to address the appellant's argument that some of the information had previously been made available to the public during council meetings so that section 132(1)(c) did not apply. The First-tier Tribunal's reasoning was inadequate because it failed to explain why it concluded that all of the withheld information had not previously been made available to the public, having failed to make sufficient findings as to what had been disclosed at public council meetings beyond what was recorded in the minutes. The Upper Tribunal emphasised that, in closed-material proceedings, the First-tier Tribunal is required, of its own motion if necessary, to give anxious consideration to arguments that might arise from material unavailable to the appellant.

The Upper Tribunal allowed the appeal, set aside the First-tier Tribunal's decision and remitted the case to a differently constituted First-tier Tribunal for re-determination.

*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.*

## **OPEN DECISION**

**The decision of the Upper Tribunal is to allow the appeal.** The decision of the First-tier Tribunal involved an error of law. Under section 12(2)(a), (b)(i) and (3) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with this decision.

## **REASONS FOR DECISION**

### **Introduction**

1. This appeal concerns the exemption in section 44 of the Freedom of Information Act 2000 (**FOIA**) for information prohibited from disclosure by or under any enactment. The enactment in question in this appeal is section 132 of the Data Protection Act 2018 (**DPA**) which (in broad terms) exempts from disclosure under FOIA information held by the Information Commissioner (**the Commissioner**) in his regulatory role, where certain conditions are met.
2. This is one of those appeals in which the respondent Information Commissioner "wears two hats" as Judge Wikeley described it in *Information Commissioner v Colenso Dunne* [2015] UKUT 471 (AAC), [2016] AACR 9. In this decision, I refer to the Information Commissioner as "the Commissioner" when he is acting in his regulatory capacity under section 50 of FOIA and as "the Information Commissioner's Office" (**ICO**) when he is acting in his capacity as public authority responding to an information request under section 1 of FOIA.
3. This appeal to the Upper Tribunal lies against the decision of the First-tier Tribunal of 4 June 2025 by which the First-tier Tribunal refused the appellant's

appeal against the Commissioner's Decision Notice (**DN**) of 22 July 2024. The First-tier Tribunal decided that the information requested by the appellant from the ICO under section 1 of FOIA had been correctly withheld by the ICO, applying section 44 of FOIA.

4. I granted permission to appeal in a decision sent to the parties on 9 March 2026. Since then, both parties have made (further) written submissions in relation to the appeal. Both parties have consented to me determining the appeal on the papers without a hearing. Given the nature of the appeal, I am satisfied that it is appropriate and in accordance with the overriding objective in rule 2 of The Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) (**the UT Rules**) for me to determine the appeal on the papers as permitted by rule 34(1).

### Open and closed material and decisions

5. For the purposes of determining the appeal, I have considered both the open and closed bundles that were before the First-tier Tribunal. In accordance with the First-tier Tribunal's usual practice, the closed bundle contains only the information that has been withheld from the appellant under FOIA. It was the subject of a rule 14 order before the First-tier Tribunal so that its contents have been withheld from the appellant to avoid defeating the purpose of the proceedings. The Upper Tribunal has proceeded on the same basis and, for the avoidance of doubt, I formally extend the First-tier Tribunal's rule 14 order to the Upper Tribunal proceedings by making an order under rule 14(8) of the UT Rules.
6. I have also found it necessary when determining the appeal to refer to the material in the closed bundle. This means that not all of my decision could be included in this open decision. There is accordingly a short closed decision that accompanies this open decision but, as required by rule 14(11) where an order under rule 14(8) has been made, this will be sent only to the Commissioner, the First-tier Tribunal and (in accordance with [Practice Direction: Closed Judgments](#) of 14 January 2019) to the RCJ Senior Information Officer. It will not otherwise be disclosed to the public.

### Background

7. The appellant's requests to the ICO relate to the Commissioner's interactions with Potto Parish Council in Yorkshire (**the Council**). On 20 November 2023 the appellant wrote to an officer of the ICO:

"...I would also be most grateful to receive a copy of whatever advice was sent to Potto council.... see excerpt below from its October 2023 minutes."

8. On 26 November 2023, the appellant made a further request about a meeting between officers acting on behalf of the Commissioner and the Council referred to in the same minutes:

"Please can you send me information confirming the nature and detail of this "meeting""

9. The ICO refused both requests on 8 December 2023, and confirmed the refusal by way of internal review decision dated 13 February 2024. In the initial refusal and internal review the ICO relied on section 31 of FOIA (for regulatory action) in response to the second request, in addition to section 44 in relation to both requests.
10. The appellant then applied to the Commissioner for a decision under section 50 of FOIA as to whether the ICO had complied with the requirements of that Act. The DN issued on 22 July 2024 dealt only with section 44 of FOIA, and before the First-tier Tribunal, the Commissioner also relied in relation to both requests only on section 44 of FOIA, read together with section 132 of the DPA. Accordingly, section 31 was not in issue before the First-tier Tribunal.
11. The appellant in his requests set out sections from the minutes of the October 2023 Council meeting, the complete text of which (so far as relevant) is as follows:

**MINUTES OF THE MONTHLY MEETING OF POTTO PARISH  
COUNCIL HELD ON TUESDAY 17 OCTOBER 2023 AT 7.00PM AT  
POTTO VILLAGE HALL**

**1. Reminder by the Chairman of the Councils expectations for the  
audio or visual recording of this meeting**

No requests received.

...

**4. Matters Arising from last month's meeting**

...

**4.8 ICO - Freedom of information requests and reviews**

- ☐ Discussed the meeting with the ICO.
- ☐ Discussed requests (*sic*) for internal reviews, it was noted that the requests have been received from persons outside the parish.
- ☐ A review of the responses to these requests was undertaken, it was agreed that the original responses were correct.

Email from ICO commissioner. Discussed policy from 'What do they know' and 'FOI' about pseudonyms.

12. Before the First-tier Tribunal the appellant in addition relied on the Minutes of the Council's subsequent three monthly meetings, which include the following:

**MINUTES OF THE MONTHLY MEETING OF POTTO PARISH  
COUNCIL HELD ON TUESDAY 21 NOVEMBER 2023 AT 7.00 PM AT  
POTTO VILLAGE HALL**

**Meeting open to the public**

2 members of the public present.

...

**1. Reminder by the Chairman of the Councils expectations for the audio or visual recording of this meeting**

No requests received.

...

**4. Matters Arising from last month's meeting**

...

**4.8 ICO - Freedom of information requests and reviews**

- ☐ Discussed the meeting with the ICO. Discussed policies from 'What do they know' and 'FOI' about pseudonyms.
- ☐ Discussed requests for internal reviews, it was noted that the requests have been received from persons outside the parish.
- ☐ A review of the responses to these requests was undertaken, it was agreed that the original responses were correct.

**MINUTES OF THE MONTHLY MEETING OF POTTO PARISH COUNCIL HELD ON TUESDAY 19 DECEMBER 2023 AT 7.00 PM AT POTTO VILLAGE HALL**

**Meeting open to the public**

1 members of the public present.

**1. Reminder by the Chairman of the Councils expectations for the audio or visual recording of this meeting**

No requests received.

...

**4. Matters Arising from last month's meeting**

...

**4.8 ICO - Freedom of information requests and reviews**

- Discussed the meeting with the ICO. Discussed policies from 'What do they know' and 'FOI' about pseudonyms.
- Discussed requests for internal reviews, it was noted that the requests have been received from persons outside the parish.
- A review of the responses to these requests was undertaken, it was agreed that the original responses were correct.

**MINUTES OF THE MONTHLY MEETING OF POTTO PARISH COUNCIL HELD ON TUESDAY 16 JANUARY 2024 AT 7.00 PM AT POTTO VILLAGE HALL**

**1. Reminder by the Chairman of the Councils expectations for the audio or visual recording of this meeting**

No requests received.

...

**4. Matters Arising from last month's meeting**

...

## 4.8 ICO - Freedom of information requests and reviews

- ☐ Discussed the meeting with the ICO. Discussed policies from 'What do they know' and 'FOI' about pseudonyms.
- ☐ Discussed requests for internal reviews, it was noted that the requests have been received from persons outside the parish.
- ☐ A review of the responses to these requests was undertaken, it was agreed that the original responses were correct.
- ☐ Discussed complaints from a single member of the public, it was agreed that this was a continuation of the individuals vexatious behaviour.
- ☐ It was agreed to appeal the decision of the ICO not to support their decision against the vexatious behaviour of a single individual in the parish.

**Legal framework**

13. Section 1 of FOIA provides a general right of access to information held by public authorities. By sub-section (1) a person making a request for information to a public authority is entitled: (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him. By virtue of sub-section (2), the duties in sub-section (1) are subject to (among other things) section 2. By section 2(2), where information requested is exempt information by virtue of any provision of Part II, the duty to communicate the information to the requester 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.
14. By section 2(3)(h), section 44 is an absolute exemption. So far as relevant, it provides:

**44 Prohibitions on disclosure.**

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—

(a) is prohibited by or under any enactment ...

15. The prohibition on disclosure relied on by the Commissioner in this case is in section 132 of the DPA, which provides, so far as relevant:

**132 Confidentiality of information**

(1) A person who is or has been the Commissioner, or a member of the Commissioner's staff or an agent of the Commissioner, must not disclose information which—

(a) has been obtained by, or provided to, the Commissioner in the course of, or for the purposes of, the discharging of the Commissioner's functions,

(b) relates to an identified or identifiable individual or business, and  
 (c) is not available to the public from other sources at the time of the disclosure and has not previously been available to the public from other sources, unless the disclosure is made with lawful authority.

(2) For the purposes of subsection (1), a disclosure is made with lawful authority only if and to the extent that—

(a) the disclosure was made with the consent of the individual or of the person for the time being carrying on the business,

(b) the information was obtained or provided as described in subsection (1)(a) for the purpose of its being made available to the public (in whatever manner),

(c) the disclosure was made for the purposes of, and is necessary for, the discharge of one or more of the Commissioner's functions,

(d) . . . . .

(e) the disclosure was made for the purposes of criminal or civil proceedings, however arising, or

(f) having regard to the rights, freedoms and legitimate interests of any person, the disclosure was necessary in the public interest.

(3) It is an offence for a person knowingly or recklessly to disclose information in contravention of subsection (1).

### **The First-tier Tribunal's decision**

16. The First-tier Tribunal upheld the Commissioner's DN and dismissed the appeal. The core part of its reasons, so far as concerns the matters that arise for determination on this appeal to the Upper Tribunal was as follows:

12. Mr Woodhouse has argued that he is seeking the advice provided, not the information sent to the IC and as such the request is not caught by s132(1)(a) as it was not provided to the Commissioner. The difficulty with this approach is the intimate relation between a question and an answer. Outwith certain political processes (where answers have little relation to questions) an answer provides substantial information about the question. An examination of the withheld material confirms this. If the answers were to be disclosed then information about the questions would be disclosed and the confidentiality protected by s 132 would be set aside.

...

15. S132(1)(c) provides for protection for material which "is not available to the public from other sources at the time of the disclosure and has not previously been available to the public from other sources". The "time of disclosure" is the date the request was made; as two distinct requests were made on dates in late November. While the existence of the information was disclosed, the assertion, "The fact that Potto council DID MAKE the withheld information available to the public during four council meetings that each were open to and some attended by, the public. The fact is that Potto council failed to record a summary of the withheld information in the meeting minutes for each of those meetings." is an

overstatement. While the existence of the information was disclosed, the detail of the “recorded information” appears not to have been made available to the public at the meetings or subsequently; accordingly the tribunal is satisfied that the material has not been available to the public.

16. The decision of whether, and if so how, to publish a version of advice he has given in a way which does not breach confidentiality obligations is a matter for the Commissioner. This would involve reviewing and developing his current guidance publications including considering the value of such publication and the existence of any gaps in published advice. In essence these are editorial matters for the Commissioner, not subject to the jurisdiction of the tribunal. The decision in Ofcom clearly identifies a limit to the power of the tribunal in this regard. The disclosure of the material is not necessary for the Commissioner’s functions [under 132(2)(c)], nor is there meaningful public interest in disclosure.

17. The tribunal is satisfied that there is no merit in this appeal and the decision of the Commissioner is clearly correct.

### **The grant of permission to appeal to the Upper Tribunal**

17. I granted permission to appeal on an unlimited basis, but identified two particular arguable errors in the decision of the First-tier Tribunal. The parties have both focused their arguments on those two particular errors, which are as follows:

(1) *Partial disclosure / section 132(1)(a)* - Whether the FTT erred in law by failing to consider partial disclosure, given the argument that some information was not “obtained by or provided to” the Commissioner but was sent by the Commissioner to the Council.

(2) *Public domain / section 132(1)(c)* – Whether the FTT erred in law by failing to consider whether the information requested had “previously been available to the public from other sources” so that section 132(1) did not apply and/or reached at [15] a perverse conclusion that the information requested had not been made available to the public at the Council’s meetings.

18. I deal with each in turn although, as will be seen, there is some overlap between the two grounds.

### **Ground (1) – partial disclosure / section 132(1)(a)**

19. The Commissioner argues that the First-tier Tribunal did not err in concluding that all the information falling within scope of the request was exempt from disclosure by virtue of section 44 and 132(1)(a) because all the information derived, directly or indirectly, from the Council and was obtained by or provided to the Commissioner in the course of him exercising his regulatory functions under FOIA in relation to the Council. The Commissioner relies on the decision of the First-tier Tribunal in *Lamb v IC* EA/2009/0108 in which the First-tier Tribunal accepted that the information in the documents held by the ICO had been obtained, directly



or indirectly from Cabinet Office minutes that had been viewed by the Commissioner in the course of an investigation.

20. So far as concerns this ground of appeal, the appellant has made generic arguments about how information sent by the Commissioner to the Council does not fall within the scope of section 132, but he is necessarily reliant on the Upper Tribunal because he has not seen the information in the closed bundle and so cannot make submissions about the specific withheld information in this case.
21. Having considered the information in the closed bundle, it seems to me that both the Commissioner and the First-tier Tribunal have erred in this case by giving what could be characterised as a generic response to the appellant when in fact the specific facts of this case required a different response. Let me explain.
22. There are many cases of this sort in which the answer given by the First-tier Tribunal and the Commissioner in this case will be correct, i.e. where the advice given by the Commissioner in response to a question from a public authority (or requester) will inevitably reveal the question asked, and thus impermissibly disclose information that falls within section 132(1)(a), (b) and (c).
23. This case seems to me to be different because: (i) some of the withheld information consists of quotations from the Commissioner's published guidance (for the avoidance of doubt, I consider that this fact is properly disclosable to the appellant as part of this open decision – I have deliberately not identified *which* guidance); and (ii) there is information that has undoubtedly been made public in the express text of the Council's minutes that needed to be taken into account by the First-tier Tribunal in deciding whether any part of the withheld material could be disclosed. I cannot be more specific in this open decision without revealing the content of the withheld information, but I have provided more detail in the accompanying closed decision so as to enable the First-tier Tribunal properly to consider this issue at the remitted hearing. I add that it is in relation to point (ii) that there is an overlap with ground (2) – see below.
24. In cases where the First-tier Tribunal has access to the closed bundle and the appellant does not, it is especially important (in line with the principles in *Browning v IC and the Department for Business, Innovation and Skills* [2014] EWCA Civ 1050) that the First-tier Tribunal should anxiously consider, of its own initiative if necessary, arguments that might be made by the appellant (or on his behalf) if he, or a representative acting on his behalf, were able to view that closed material. Given the material that is apparent on the face of the open and closed documents, the First-tier Tribunal has erred in law in this case by not engaging in that exercise.

### **Ground (2) – public domain / section 132(1)(c)**

25. In response to this ground of appeal, the Commissioner submitted as follows:
  10. The Commissioner notes he responded to the FOIA requests for the information on 8 December 2023 and for s132 to apply, the information must “not [be] available to the public from other sources at the time of the

disclosure and has not previously been available to the public from other sources.”

11. The Commissioner maintains that the information was not made available at the time of disclosure, or previously. Indeed, if this was the case, why would the Appellant submit a FOIA request for the same?

12. At the time of disclosure, the ICO looked at the Council minutes the Appellant cited in the requests. However, the ICO concluded these did not replicate the withheld information and further proportionate internet searches conducted at the time of writing this Response, have not returned any relevant results other than the Council minutes, and the Council has confirmed there were no members of public present at one of the meetings.

13. As the ICO is sure the withheld information was not available to the public at the time of disclosure, disclosing the withheld information in these circumstances would put the ICO at risk of contravening section 132(3), which states that it is an offence for a person knowingly or recklessly to disclose information in contravention of subsection (1).

26. In my judgment both the Commissioner and the First-tier Tribunal have misunderstood how section 132(1)(c) applies to the facts of this particular case. The Commissioner, in particular, has wrongly focused on whether the information either was available to the public from other sources at the time that the ICO originally responded to the request, or whether it is now available to the public. The Commissioner goes so far as to ask why the appellant would be submitting a FOIA request if the information was available. However, that misses the second part of section 132(1)(c), which provides that the prohibition on disclosure will not apply if the information has **previously** been available to the public from other sources. In my judgment, if the information requested was available to the public at the Council meetings on 17 October 2023 or 21 November 2023, then it was previously available to the public at the time that the ICO considered disclosure on 8 December 2023, even if it was not recorded in the minutes and was not therefore still available to the public at that point.
27. There is, potentially, a factual issue as to whether the 17 October 2023 meeting was open to the public because the minutes do not state so expressly (unlike the minutes of 21 November 2023). This will be a matter for the First-tier Tribunal to consider at the remitted hearing, but I observe that it is likely to be reasonable to infer that this was a public meeting because, as the appellant submits, all the Council’s meetings were in principle open to the public, the council needs to take a specific decision if the public are to be excluded for a particular reason, and there is no record of any such decision being taken. It seems to me that it is not material to the application of section 132(1) whether there was anyone actually present at the meeting. Section 132(1)(c) does not say that the information has to have been received by a member of the public from another source, just that it has to have been “available” to them.

28. As I noted when granting permission, unlike the Commissioner, the First-tier Tribunal did not wholly overlook this aspect of section 132(1)(c). At [15] of its decision, the First-tier Tribunal does appear to have made a finding that “the detail of the ‘recorded information’ appears not to have been made available to the public at the meetings or subsequently”. However, reading that paragraph as a whole, it seems to me that the First-tier Tribunal was basing this conclusion on what is recorded in the minutes. As the appellant correctly submits, the minutes are only a summary of what is said in the meeting. What the Tribunal needed to do was to make a finding of fact as to how much of the withheld information was actually revealed to the public at the meeting.
29. I observe that it would have been open to either party to seek to obtain witness evidence from someone present at the relevant meeting(s) dealing with this issue (by applying for a witness order if necessary). Potentially, the First-tier Tribunal should have identified this evidential gap and raised the matter with the parties (although I do not say that its failure to do so was a separate error of law).
30. As it is, the First-tier Tribunal needed at least to make a rational (and adequately reasoned) finding of fact on the basis of the evidence available. In this respect, it seems to me that there was not an adequate evidential basis for the First-tier Tribunal’s conclusion in [15] that “the detail” of the information had not been made available at the meeting. Or, at least, the First-tier Tribunal’s reasons do not adequately explain why it reached that conclusion. That is because the First-tier Tribunal’s reasoning appears to be erroneously based on what is expressly recorded in the minutes without any adequate consideration of what else was (on the balance of probabilities) said at the meeting that was not expressly recorded in the minutes. In addition, and this is where there is an overlap with Ground (1), there was a failure to consider whether parts of the withheld information had been made available at the public meeting so that it might follow that at least part of the withheld information was not exempt from disclosure.
31. I have in mind in particular that the minutes of the 17 October 2023 meeting specifically refer to an “Email from ICO commissioner”, and a discussion of policy from “what do they know” and “FOI about pseudonyms”, from which it might be inferred that the email and its contents, or part of them, were discussed at the meeting. Likewise, the minutes say “discussed the meeting with the ICO”, from which, again, it may reasonably be inferred that some of the meeting’s content was revealed to the public. By so saying, I do not mean to suggest that the First-tier Tribunal at the remitted hearing is bound to draw such inferences, but that its failure to explain why it has not drawn those inferences in this case leads me to conclude that its reasons are inadequate to explain its conclusion at [15].
32. I acknowledge that there will be limits to what may properly be inferred just from the minutes, hence my observations above about the possible need for witness evidence on this issue. However, even on the basis of the material that was before the First-tier Tribunal, I am satisfied that the First-tier Tribunal has erred in law in its conclusions on this issue.

### Timing for considering the application of the exemption

33. I add a further observation: the First-tier Tribunal at [15] stated that the “time of the disclosure” for the purposes of section 132 was the “date the request was made”. I have not received argument from the parties on this point, so it is an issue that may need to be addressed by the First-tier Tribunal at the remitted hearing, but I observe that the ordinary meaning of “the time of the disclosure” would be that the relevant time at which to assess the exemption was not the date of the request but the date of the public authority’s response to the request. In this case, that was 8 December 2023, which was after both the October and November 2023 Council meetings. Considering the application of the exemption as at the date of the ICO’s response to the request would also be consistent with Judge Mitchell’s decision in *Maurizi v IC and CPS* [2019] UKUT 262 (AAC) at [168] and [184] (in the FOIA context) and the logic of the Court of Appeal’s approach in the recent case of *Information Commissioner and another v O’Hanlon* [2026] EWCA Civ 838 in relation to the exception to disclosure in regulation 12(4)(a) of the Environmental Information Regulations 2004.

### Conclusion

34. For the reasons set out in this open decision, and further in the accompanying closed decision, I conclude that the First-tier Tribunal’s decision involved the making of errors of law. I set that decision aside and remit the case for re-determination by a different panel of the First-tier Tribunal.

**Holly Stout**  
**Judge of the Upper Tribunal**

Authorised by the Judge for issue on 11 August 2026