

Neutral Citation Number: [2026] UKUT 405 (AAC)
Appeal No. UA-2026-000145-GIA

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

Department for Energy Security and Net Zero

Appellant

- v -

Information Commissioner

1st Respondent

and

Ben Webster

2nd Respondent

Before: Upper Tribunal Judge Wikeley

Hearing date: 21 September 2026
Mode of hearing: Face-to-face hearing

Representation:
Appellant: Mr Jorren Knibbe of Counsel, instructed by the Government Legal Department
1st Respondent: Mr Oliver Jackson of Counsel, instructed by the Information Commissioner
2nd Respondent: In person

On appeal from:
Tribunal: First-tier Tribunal (General Regulatory Chamber)
Judge/Panel: Judge B Sanger, Member S Cosgrave and Member P Taylor
Tribunal Case No: FT/EA/2024/0262
Decision Date: 27 August 2025

SUMMARY OF DECISION

KEYWORD NAME (Keyword Number): Information rights (93) – environmental information – exceptions (93.8)

The First-tier Tribunal (FTT) ordered the disclosure, under the Environmental Information Regulations 2004 (EIR), of a document held by a government department

dealing with the future availability and cost of hydrogen for heating. The department appealed to the Upper Tribunal, submitting that the FTT had erred in law in not applying the exceptions in regulation 12(4)(d) EIR ("material which is still in the course of completion") and regulation 12(4)(e) EIR ("internal communications"). The Upper Tribunal dismissed the department's appeal.

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

The decision of the Upper Tribunal is to dismiss the appeal.

The decision of the First-tier Tribunal did not involve any error of law (section 11 of the Tribunals, Courts and Enforcement Act 2007).

REASONS FOR DECISION

Introduction

1. This appeal is about whether the Environmental Information Regulations 2004 (SI 2004/3391; 'EIR') require the disclosure by a Government department of a document dealing with the future availability and cost of hydrogen for heating. In particular, this appeal concerns the proper interpretation and application of the exceptions in regulation 12(4)(d) EIR ("material which is still in the course of completion") and regulation 12(4)(e) EIR ("internal communications").

2. The department in question, and the Appellant in this appeal, is the Department for Energy Security and Net Zero ('DESNZ' or 'the Department'), formerly part of the Department for Business, Energy and Industrial Strategy or 'BEIS'), represented by Mr J. Knibbe of Counsel. The Information Commissioner (as he then was) is the First Respondent in these proceedings (represented by Mr O. Jackson of Counsel) and the requester, Mr Ben Webster, a journalist, is the Second Respondent, acting in person. Both Respondents oppose the Department's appeal to the Upper Tribunal. Mr Webster's submissions, both written and oral, were directed more to the public interest in disclosure. However, those considerations were not raised directly by the Department's grounds of appeal so are not explored further in this decision. In all other respects, I understood Mr Webster to be adopting Mr Jackson's submissions on behalf of the Information Commissioner and in support of the First-tier Tribunal's decision, which had directed disclosure of the information in question.
3. By way of context it is right to record that DESNZ had anticipated that a strategic decision about the use of hydrogen in heating would be announced in 2026. Mr Knibbe explained in opening the Upper Tribunal appeal hearing that as a result of various factors, not least the change in government, it was no longer expected that any announcement or consultation process about the strategic decision would take place "in the immediate future". Mr Webster's frustration at the ongoing delay was both obvious and understandable.

The Upper Tribunal's decision in summary

4. I dismiss DESNZ's appeal to the Upper Tribunal. The decision of the First-tier Tribunal (FTT) did not involve any material legal error. My reasons follow.

An outline of the legal framework of the EIR

5. Regulation 5(1) EIR provides that "a public authority that holds environmental information shall make it available on request". However, regulation 12(1) qualifies that duty to the extent that "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."

6. Thus, assuming that a relevant exception is engaged (regulation 12(1)(a)), the public interest balancing test then applies (regulation 12(1)(b)). Notably, however, regulation 12(2) provides that "A public authority shall apply a presumption in favour of disclosure."

7. For present purposes the potentially relevant exceptions to the duty under regulation 5(1) are to be found in regulation 12(4)(d) and (e), as highlighted below:

> (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.**

8. The exception in regulation 12(4)(e) is explained further in regulation 12(8):

> (8) For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

The request under the Environmental Information Regulations 2004

9. On 7 August 2023 Mr Webster made an information request to DESNZ in the following admirably concise terms:

> *I write to request, under EIR/FOI, copies of assessments or reports held by BEIS or DESNZ concerning the potential future availability and cost of hydrogen for home heating.*

I would like any reports or assessments produced since January 2021.

10. At the outset DESNZ stated that there were four documents within the scope of the request. DESNZ asserted that all four documents had been withheld pursuant to regulation 12(4)(d), i.e. being material still in the course of completion:

> **Document 1**: a report prepared by Mott MacDonald on behalf of the Department for Business, Energy and Industrial Strategy ("BEIS"), entitled *Hydrogen Storage - Assessment of Potential Storage in UK* and dated 29 November 2021;
>
> **Document 2**: a presentation prepared in August 2021 by analysts within BEIS, entitled *Exploring Net Zero Heat Decarbonisation Scenarios with the IWES Whole System Model*;
>
> **Document 3**: a report prepared by Frontier Economics on behalf of gas network operators, entitled *Assessment Methodologies: Final Report* and dated 12 May 2022, which had been published in a redacted form, but was held by the Secretary of State in unredacted form; and
>
> **Document 4**: a report prepared in January 2023 by analysts within BEIS entitled *Can hydrogen heating be delivered at a broadly comparable cost to electrification?*

11. Subsequently DESNZ's own evidence to the FTT was that Documents 1 to 3 constituted "input for the analysis in Document 4", which latter document was described as one that "draws the strings together" from the earlier documents (Witness Statement by Sandra Dewhurst, co-Deputy Director of the Future Heat Decisions team in DESNZ, 6 December 2024). DESNZ's grounds of appeal to the FTT also acknowledged (at §10) that "each of those documents is itself a completed piece of work", but submitted that "they are each a part or subset of 'material which is still in the course of completion' – namely the material, or evidence base, on which SS [the Secretary of State] (and the broader Government) will reach the forthcoming strategic decision on the role of hydrogen in heating."

12. Mr Webster sought an internal review by DESNZ but to no avail, so he then filed a complaint with the Information Commissioner.

The Information Commissioner's Decision Notice

13. On 6 June 2024 the Information Commissioner issued a Decision Notice (IC-273287-P3B4), concluding that the regulation 12(4)(d) exception was not engaged. As such, the public interest balancing test did not come into play and so DESNZ was required to disclose the four documents that it had withheld. The Information Commissioner's reasoning was as follows (omitting a footnote):

> **Regulation 12(4)(d) – material in the course of completion**
>
> 13. Regulation 12(4)(d) of the EIR states that a public authority may refuse to disclose information to the extent that the request relates to material

which is still in the course of completion, to unfinished documents or to incomplete data.

14. The exception is class-based, which means that it is engaged if the information in question falls within its scope. If the information falls into one of the three categories, then the exception is engaged. It is not necessary to show that disclosure would have any particular adverse effect in order to engage the exception.

15. If engaged, regulation 12(4)(d) is a qualified exception, so the public authority must consider whether, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

16. Regulation 12(2) of the EIR requires a public authority to apply a presumption in favour of disclosure when relying on any of the regulation 12 exceptions.

17. DESNZ determined that the part of the exception which was engaged in this case is that which relates to material still in the course of completion.

18. DESNZ explained:

> "The department is working towards an ambitious and complex assessment to inform the strategic decisions in 2026. This is currently at a very early stage. In 2026, the department is aiming to undertake a whole energy system assessment of pathways with different mixes of low-carbon heating technologies to help understand how the scale and distribution of different costs vary with different heat decarbonisation approaches using a range of technologies. While the department does hold an early cost assessment of hydrogen for heating in comparison to electrification, it is based on incomplete data and evidence and therefore it would be misleading to release it in its partial nature.
>
> … The data does not undermine the government's position to continue to explore hydrogen heating as an option for heat decarbonisation. No decisions have been made based on this analysis (although the preliminary data has been referred to in submissions where we have sought Ministerial decisions on e.g. funding), and based on current evidence and analysis it is not possible to come to any firm conclusions regarding the potential role of hydrogen heating. However, we have taken the judgement that it would not be suitable for publication given we know that this assessment is incomplete – it is based on significant weaknesses/shortcomings that we are seeking to address ahead of 2026."

19. DESNZ went on to highlight particular areas where it considers the analysis to be incomplete and its plans to address the "gaps".

20. The Commissioner has considered whether the withheld information comprises material in the course of completion. The Commissioner's published guidance on this exception1 explains that, for this limb to be engaged, either the requested information itself must be still in the course of completion, or the requested information must relate to material which is still in the course of completion. The term "still in the course of completion" refers to the process of preparing "material". It must be the material itself which is in the course of completion, rather than any wider 'project' or 'process'. In the case of *Highways England v Information Commissioner and Manisty* [2018] UKUT 423 AAC the Upper Tribunal said that "material" must have a physical existence. It cannot be something that does not physically exist, like a project, an exercise, or a process.

21. Again cited in the Commissioner's guidance, is the following example which the Commissioner highlighted to DESNZ in the course of his investigation:

> "In *Chris Ames v the Information Commissioner and the Department of Transport* EA/2015/0283 (2015), the First-tier Tribunal considered that regulation 12(4)(d) did not apply to completed information that was withheld because the Department considered it related to the larger process of setting government policy on the provision of airport capacity – an ongoing task at the time of the request. The Tribunal said, however, that the exception could not apply because, "An ongoing policy process is not in and of itself 'material' within the meaning of reg 12(4)(d)." (paragraph 38)"

22. The Commissioner is persuaded that the withheld information relates to a process which is currently underway at DESNZ in that he accepts that the analysis reported so far will be built on further and that the process to inform strategic decisions in 2026 will continue. He would also expect the public to understand that information held at the time of the request in 2023 will be added to during the journey to the position reached at 2026. However, the material currently held within the scope of the request is in itself complete. It comprises a presentation and reports concerning heat decarbonisation assessments which are separate, complete and independent pieces of work. The Commissioner notes that there are uncertainties raised in the material and additional work will be required to inform policy decisions. Notwithstanding this, the material held represents the position at the time or stage at which it was created; it is not in the course of completion and falls within the scope of the request made. The Commissioner is also satisfied that the information does not fall within the other two limbs of the exception (unfinished documents or incomplete data).

23. On this basis, the Commissioner does not consider the exception at regulation 12(4)(d) to be engaged and therefore the withheld information is not exempt from disclosure on that basis.

14. DESNZ lodged an appeal with the FTT. Meanwhile, in June 2025, a year after the Information Commissioner had issued his Decision Notice, DESNZ disclosed to Mr Webster the first three of the four withheld documents. It followed that by

the time the appeal reached the FTT it was only Document 4 that remained in contention – namely, the January 2023 report entitled *Can hydrogen heating be delivered at a broadly comparable cost to electrification?*

The First-tier Tribunal's decision

15. On 27 August 2025 the FTT issued its decision dismissing the appeal by DESNZ and requiring it to disclose Document 4 within 30 calendar days. The FTT's reasoning was as follows:

> **Discussions and conclusions**
>
> ***Is the test set out in Regulation 12(4)(d) met? Does the request relate to material which is still in the course of completion, to unfinished documents or to incomplete data?***
>
> ***If it is, does the public interest in withholding the information outweigh the public interest in disclosing it?***
>
> 19. It is important to note that we are dealing here with exceptions. The starting point is that there is a duty to disclose the information unless an exception applies. This is an important concept in matters of public discourse.
>
> 20. The Tribunal was not persuaded by the points raised by the Appellant at paragraph 31 of its Grounds. They may have been intended to address the public interest test set out in Reg 12(1)(b). However they were not identified as such and therefore the Tribunal felt it important to address them.
>
> 21. In short the argument appeared to the Tribunal to be that the release of the information might be misleading as to the state of the Secretary of State's investigation into the issues, misleading the public and undermining trust in the Government; that in turn might have a "chilling effect" on future policy formation: that in turn might dissuade officials from producing analysis until fully confident; thus inhibiting policy and inhibiting free and frank internal debate at an early stage. These appeared either to be general arguments against the substance of the regulations themselves or to be arguments relating to the timing of the release of information. Either way, they did not, we felt, apply to the specifics of the case before us.
>
> 22. The view can perhaps be summarised, as it was by the Appellant elsewhere in its grounds: there is a risk that the Decision *"would permit third parties to use EIR to in order inappropriately to shortcut and/or seek to influence important policy decisions at a time when decision-making remains in progress because the evidence base is not yet complete".*
>
> 23. It struck the panel that there is nothing inappropriate about the public using its political voice. Indeed, in a democratic society, there is no reason why the public should not see information of this nature, even if the process is incomplete, and every reason why it should. It is the release of that

information which informs public and political debate and that is a cornerstone both of democracy and of the Information Rights and Environmental Information regime.

24. The Government bears the responsibility of ensuring that information which is in the public domain (subject to the exceptions set out in that regime) is as transparent, accurate and complete as possible and that, where appropriate, it bears caveats so that the public may engage in public discourse around matters of national importance.

25. It is not argued that the document itself is incomplete.

26. The Appellant concedes, at paragraph 10 of its Grounds, that the document *"is a completed piece of work"*. The Panel accepted that.

27. Further, it is clear from the evidence that Document 4 has been released to other government departments. That suggests that it is a finished piece of work and is therefore no longer in the course of completion. There was no evidence to suggest that the document was sent with any caveat or marked incomplete.

28. The position taken by the Appellant is this: rather than seeking to contend that the document itself is incomplete, as it goes on to say, Document 4 is *"a part or subset of material which is still in the course of completion" – namely the material, or evidence base, on which SS [Secretary of State] (and the broader Government) will reach the forthcoming strategic decision on the role of hydrogen in heating"*.

29. The Tribunal found it impossible to reconcile that position with the fact that the other three documents which formed the original request have now been released in compliance with the Decision Notice.

30. Nonetheless, the Tribunal did consider the case law which deals with whether the material could fall to be considered as that which is in the course of completion. We considered the cases of *Highways England v Information Commissioner and Manisty [2018] UKUT 423 ACC* and *Chris Ames v the Information Commissioner and the Department of Transport* [2015] EA/2015/0283.

31. While the *Chris Ames* case is not binding, it was endorsed in the subsequent case of *Manisty*, which is. The Upper Tribunal's analysis in *Manisty*, upholding the reasoning of the First-tier Tribunal, was that, while there are no clear definitions of *"material in the course of completion"* within the EIR itself, the Commissioner's Guidance Note of May 2016 is to be relied upon. That says:

> *The fact that the exception refers to both material in the course of completion and unfinished documents implies that these terms are not necessarily synonymous. While a particular document may itself be finished, it may be part of material which is still in the course of*

> *completion. An example of this could be where a public authority is formulating and developing policy….*
>
> *However, the fact that a public authority has not completed a particular project or other piece of work does not necessarily mean that all the information the authority holds relating to it is automatically covered by the exception.*

32. In that case, it was held that the terms of the request are important. The Tribunal did not wish to make a "forced distinction" between *documents* and *material* but noted that a particular document, if complete, may still form part of *"material which is still in the course of completion"*.

33. We distinguish the material in this particular case from this analysis for one simple reason: the disclosure of those other documents which were previously part of the same request. The Public Authority makes no arguments which support a distinction between Document 4 and the other documents such that it would be brought into a separate scope. The facts, as they appeared to the Tribunal, were that if three of the four documents had been disclosed it would seem to follow that the fourth should fall to be so in the absence of any compelling argument to distinguish it from them.

34. *Manisty* also notes that the exception must be applied restrictively. This follows a long line of European and UK authorities and supports the general position, which is that the Regulations are in favour of disclosure.

35. Paragraph 22 of the Decision Notice is endorsed by the Tribunal. It said:

> *The Commissioner is persuaded that the withheld information relates to a process which is currently underway at DESNZ in that he accepts that the analysis reported so far will be built on further and that the process to inform strategic decisions in 2026 will continue. He would also expect the public to understand that information held at the time of the request in 2023 will be added to during the journey to the position reached at 2026. However, the material currently held within the scope of the request is in itself complete. It comprises a presentation and reports concerning heat decarbonisation assessments which are separate, complete and independent pieces of work. The Commissioner notes that there are uncertainties raised in the material and additional work will be required to inform policy decisions. Notwithstanding this, the material held represents the position at the time or stage at which it was created; it is not in the course of completion and falls within the scope of the request made. The Commissioner is also satisfied that the information does not fall within the other two limbs of the exception (unfinished documents or incomplete data).*

36. Having found that Reg 12(4)(d) was not engaged, there was no need to go on to consider the public interest balance set out in Reg 12(1)(b).

> ***Is the test set out in Regulation 12(4)(e) met? Does the request involve the disclosure of internal communication, including communication between Government Departments (Reg 12(8))?***
>
> 37. As to the argument that the document represents internal communications (as defined in EIR Regulation 12(4)(e) and defined in Regulation 12(8)), put forward in the alternative in the Appellant's Grounds, that argument is rejected. Other than a brief assertion, the argument was not developed as to why the document meets the test.
>
> 38. Our brief findings on that point were that the fact that a report is shared between departments does not, the Tribunal consider, make it "communication". Communication has its own definition and, given its every day meaning, we decline to consider, in the absence of any arguments to the contrary, that the material constitutes communication.

16. Permission to appeal was refused by the FTT but granted by the Upper Tribunal.

The DESNZ's grounds of appeal to the Upper Tribunal

17. DESNZ was given permission to appeal to the Upper Tribunal on four grounds. However, the first two grounds of appeal were abandoned by the Department at a relatively late stage in the proceedings and so need not be considered further. The appeal proceeded to an oral hearing before the Upper Tribunal on the remaining two grounds of appeal, which for convenience have retained their original numbering. They can be summarised very shortly.

18. Ground 3 was that the FTT erred in law when it concluded that Document 4 was not "material which is still in the course of completion" for the purposes of regulation 12(4)(d) EIR.

19. Ground 4 was that the FTT erred in law when it concluded that Document 4 fell outside the exception for "internal communications" contained in regulation 12(4)(e) EIR.

Discussion

<u>Ground 3</u>

Introduction

20. Ground 3 was thus that the FTT had erred in law when it concluded that Document 4 was not "material in the course of completion" for the purposes of regulation 12(4)(d) EIR, which provides as follows:

> (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—
>
> …
>
> (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data;

21. Regulation 12(4)(d) was considered by the Upper Tribunal in *Highways England Company Ltd v Information Commissioner and Manisty* [2018] UKUT 423 (AAC); [2019] AACR 17. There, Upper Tribunal Judge Jacobs held as follows:

> **J. The exception for 'material which is still in the course of completion'**
>
> *The EU principles*
>
> 16. The 2004 Regulations implement the Directive. They must be interpreted consistently with the Directive and in accordance with the normal principles that apply to EU law. One of those principles is that exceptions must be interpreted restrictively. This is a separate point from the presumption in favour of disclosure in regulation 12(2). The presumption allocates the burden of proof; the restrictive approach controls the scope of the exception.
>
> 17. The exception can only be interpreted by reference to its language or its purpose. As to the language, 'material' is a vague word, probably deliberately chosen for that reason; and the only indication of the purpose I have been shown is the mention in the European Commission's memorandum of 'the necessary space to think in private.'
>
> 18. Given the vagueness of the language, I have looked at other language versions of the Directive (French, German and Spanish), but have not learned anything useful. The German and Spanish versions use equally broad terms. The French version uses document for both 'material' and 'document' in the English version.
>
> *The Convention and the Implementation Guide*
>
> 19. The Directive implements the Convention. It is permissible to interpret the Directive as implementing the Convention and therefore as consistent with it. The European Court of Justice has commented on the relevance of the Implementation Guide. In *Fish Legal and Shirley v the Information Commissioner, United Utilities Water plc, Yorkshire Water Services Ltd and Southern Water Services Ltd* (Case C-279/12) ECJI:EU:C:2013:853 [2014] AACR 11, the Court said:
>
> > 38. In addition, the Court has already held that, while the Aarhus Convention Implementation Guide may be regarded as an explanatory document, capable of being taken into consideration, if appropriate, among other relevant material for the purpose of interpreting the convention, the observations in the guide have no binding force and do not have the normative effect of the provisions of the Aarhus Convention (Case C-182/10 *Solvay and Others* [2012] ECR, paragraph 27).
>
> I was also referred to what the Advocate General said of the Guide in *Flachglas Torgau GmbH v Federal Republic of Germany* (Case C-204/09) ECJI:EU:C:2011:413:

> 58. … that document has no authoritative status as regards the interpretation of the Convention. Its authors specify that the views expressed do not necessarily reflect those of the UN/ECE or of any of the organisations which sponsored the guide; nor does it appear to have been specifically approved by the Parties to the Convention. …

In its Judgment (ECJI:EU:C:2012:71), the Court said:

> 35. In addition, Flachglas Torgau's argument based on the document published in 2000 by the United Nations Economic Commission for Europe, 'The Aarhus Convention: An Implementation Guide', must be rejected. Flachglas Torgau refers in that regard to the clarifications contained in that document, according to which '[a]s the activities of public authorities in drafting regulations, laws and normative acts is expressly covered by [Article 8 of the Aarhus Convention], it is logical to conclude that the [Convention] does not consider these activities to be acting in a "legislative capacity". Thus, executive branch authorities engaging in such activities are public authorities under the [Convention].'
>
> 36. Apart from the fact that that document's interpretation of the Aarhus Convention is not binding, Article 8 of the Convention, to which it refers, in any event does not expressly mention the participation of public authorities in drafting 'laws', so that an interpretation such as that adopted by that document cannot be derived from the wording of that article. From those references I draw this conclusion: the Guide can be used an aid to interpretation, but it is not binding and cannot override what the Convention provides.

What the exception does not mean

20. It is possible that whatever is being held by the public authority cannot properly be described as information. As Eady J said of earlier Regulations in *Maile v Wigan Metropolitan Borough Council* [2001] Env LR 11 at [8]: 'The regulations are concerned with the availability of information (and I emphasise that word) and not speculation or preliminary thoughts based on limited research.' The exception cannot cover that sort of case. Interpreting it to do so would produce an overlap with regulation 12(4)(a), which already provides for an exception if the public authority does not hold the information requested.

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).

The request

22. The exception is only engaged if there has been a request. That must mean a request for environmental information as defined in regulation 2(1). That is all that a public authority is required to make available under regulation 5(1). The request may ask for specific documents and the authority may comply with its duty by providing those documents, but it is strictly the information in the documents that is the subject of the request and the duty.

Material and relates to

23. 'Material' must have a physical existence. It is not apt to describe something incorporeal, like a project, an exercise or a process. That is what the Implementation Guide says and it is surely right as a matter of language. Highways England's letter of 16 December 2016 was wrong to equate its decision-making process with the material in the course of completion. The Information Commissioner seems to have made the same mistake in paragraph 25 of her decision notice. The material may be part of a project or whatever, but it is the material that must be in the course of completion, not the project.

24. Material includes information that is not held in documents and is not data: things like photographs, film, or audio recordings. Can it also include documents that are finished and data that is complete? The Commissioner's guidance says that it can and I accept that that is correct. Take a simple example. A public authority is developing an online training package with printed notes to explain the effect of climate change on Norfolk. The notes will be a document when they are complete, but they may make no sense on their own in view of the way that the written and online elements interrelate. Until both elements are complete, each relates to material that is still in the course of completion.

25. That was a simple example. But suppose that the project for Norfolk is but part of wider project for England, which in turn is part of a cross-border project for the whole of Great Britain. When the whole package for Norfolk is complete, are the notes part of the material that is still in the course of completion until every county in Great Britain has been covered? As Mr Honey accepted, there has to be a line. The question I have to answer is: where and how is it to be drawn?

26. My analysis of 'material' helps to explain the wording of regulation 12(4)(d). It is not limited to requests for information in material that is in the course of completion, unfinished documents or incomplete data. It is engaged if the request relates to that material or those documents or that data. That suggests that the information may be held elsewhere, perhaps in preparation for being included later.

27. I was referred to cases on the meaning of 'relates to', but I have not found them helpful. Context is always important, even when the words are used in the same legislation. None of the authorities helped me interpret those words in the restrictive context of an exception.

What the exception means

28. My conclusion is this. 'Relates to' is an expression in everyday use. It is not possible to rephrase the language of the exception to make clear(er) what it means and it would be wrong to do so. The language is deliberately imprecise. Providing a more precise formulation would either override or gloss the language and, potentially, undermine or defeat the purpose of the exception. All that I can do, and all that it is right to do, is describe how the language of the exception has to be applied.

29. The exception must be applied, like all language in everyday use, consistently with its context. So far I have referred to 'the exception'. When a public authority relies on the exception, they are in effect saying two things: (a) it is engaged and (b) the balance of public interests is in favour of maintaining the exception. This decision is concerned with (a), but it is important to remember that the operation of the exception is not binary. There are three possibilities: it may not be engaged, or it may be engaged with the balance in favour of maintaining the exception, or it may be engaged with the balance in favour of disclosure. A decision that the exception is not engaged means that disclosure is appropriate regardless of where the balance of the public interests may lie. That is the context in which my approach has to be applied. It applies to all the exceptions in regulation 12 and does not undermine the point I made in paragraph 21.

30. The exception must, nevertheless, be applied restrictively. It must not be engaged so widely as to be incompatible with the restrictive approach required by EU law. But it must not be engaged so narrowly that it defeats its purpose of allowing public authorities to think in private.

31. It is not engaged when a piece of work may fairly be said to be complete in itself. 'Piece of work' is a deliberately vague expression that can accommodate the various circumstances in which the exception has to be considered. In this case, I would loosely apply that description to the Stage 3 Report and work on it. The piece of work may form part of further work that is still in the course of preparation, but it does not itself require further development. One factor that may help in applying this approach in some cases is whether there has been a natural break in the private thinking that the public authority is undertaking. Is it moving from one stage of a project to another? Another factor may be whether the authority is ready to go public about progress so far. The fact that the project, exercise or process is continuing may also be relevant, although this is probably always going to be a feature when a public authority is relying on this exception. Everything depends on the circumstances. That is why it would be inappropriate in a decision to provide a detailed critique of everything said in the Implementation Guide. Cases like those referred to in the Guide will have to be dealt with on their own terms when they arise.

> 32. The way that the public authority has treated the material is relevant but not decisive. A public authority cannot label its way out of its duty to disclose. A label like draft or preliminary thoughts may, or may not, reflect the reality. The scope of the exception depends on the substance, not the form in which the material is stored or presented.
>
> 33. The terms of the request are important. They form the request that must relate to material in the course of completion if the exception is to be engaged. And they set the limit to the public authority's duty under regulation 5(1) to provide the information. Mr Manisty referred me to page 78 of the Implementation Guide, which says of the exception: 'Requested material in the course of completion'. That suggests that the exception is only engaged if the subject matter of the request is 'material in the course of completion'. That cannot be right. It is contrary to the language of the Convention, the Directive and the Regulations. The request may be for the material that is in the course of completion, but the exception is wider than that. It includes information that merely relates to that material. The interpretation suggested by the Guide would allow the purpose of the exception to be undermined by narrowly framed questions.
>
> 34. This approach involves a judgment. There are no bright lines here. That is the nature of the exception and the circumstances in which it has to apply. If applied in a practical and common sense way, my approach gives proper scope for the policy of allowing public authorities space in which to think, whilst respecting the restrictive nature of exceptions in EU law.
>
> 35. Mr Honey emphasised the importance of legal certainty. I accept that this approach is not going to produce legal certainty in the way he envisaged and that it will not be easy to apply. But there are limits to what can be achieved, especially when issues of judgment are involved.

22. The Upper Tribunal's decision in *Manisty* is recognised as the leading authority on the interpretation and application of regulation 12(4)(d) EIR.

The Department's submissions on "material which is still in the course of completion"

23. The Department's case, in summary, was that Document 4 was (or was part of) "material in the course of completion" within the meaning of regulation 12(4)(d) (as construed in *Manisty*). Mr Knibbe advanced three reasons for this submission. In outline they were as follows. First, Document 4 was part of the 'evidence base' for the forthcoming strategic decision on the future role of hydrogen in domestic and commercial heating. Secondly, the Secretary of State's 'private thinking' in relation to that decision was ongoing, and the Department was not yet ready to go public with its thinking. Thirdly, the analytical approach contained in Document 4 had been updated in work geared towards the strategic decision. In reaching the opposite conclusion, Mr Knibbe submitted, the FTT had erred in two principal respects.

24. The first error was that the FTT had based its decision on the fact that Document 4 was "a finished piece of work". However, that factor was not determinative of whether Document 4 was no longer "material which is still in the course of

completion" (see *Manisty* at paragraphs 24 and 31). Furthermore, even if Document 4 was complete, the EIR request "related to" material in the course of completion because Document 4 was part of the evidence base and the analysis therein was due to be updated (see *Manisty* at paragraphs 26 and 33).

25. The second error, Mr Knibbe submitted, lay in the FTT's reliance on the comparison with the fact that Documents 1 to 3 had been released by DESNZ. It did not necessarily follow from their disclosure that Document 4 also fell to be released. In addition, there were factual differences between the documents (e.g. the fact that Document 4 was due to be updated). Finally, the FTT had arrived at its conclusion that regulation 12(4)(d) was not engaged in a procedurally unfair manner, namely by having regard to a consideration which had not been canvassed with the parties beforehand or otherwise giving them the opportunity to make representations.

The Commissioner's submissions on "*material which is still in the course of completion"*

26. The Commissioner submitted that many of the Department's arguments ultimately boiled down to a factual disagreement with the FTT's evaluation of the documents before it. As such, Mr Jackson contended, the DESNZ's critique of the FTT's decision did not disclose any error of law. In that context Mr Jackson reminded me of the line of authorities which hold that an appellate court or tribunal should not readily disturb a factual evaluation or assessment made by a first instance court or tribunal (e.g. *Volpi v Volpi* [2022] EWCA Civ 464 at [2(ii)] and *FAGE v Chobani* [2014] EWCA Civ 5 at [114]). In addition, that judicially-approved appellate deference to first instance evaluations or assessments applies equally where the evidence before the trial court or tribunal was entirely documentary in nature (*R (Smech Properties) v Runnymede BC* [2016] EWCA Civ 42 at [29] and *R (Dickinson) v HMRC* [2018] EWCA Civ 2798 at [63]). In addition to this principal submission, Mr Jackson advanced three further reasons why he said Ground 3 should not succeed.

27. The first further reason related to DESNZ's assertion that as Document 4 was part of the evidence base for the forthcoming strategic decision, and so the Department's private thinking was ongoing, it was therefore, according to DESNZ, an error of law to conclude that Document 4 was not "material in the course of completion". However, Mr Jackson submitted, the existence of ongoing work or thinking was insufficient to engage regulation 12(4)(d).

28. The second further reason concerned DESNZ's argument that the FTT had based its decision on the fact that Document 4 was a 'finished piece of work'. Mr Jackson submitted that this was not a fair characterisation of the FTT's reasoning. Indeed, if the FTT had regarded that factor as determinative, as DESNZ contended, then the panel's decision would have been much shorter.

29. The third further reason related to the FTT's decision to contrast the disclosure of Documents 1 to 3 on the one hand with the continued withholding of Document 4 on the other. Mr Jackson submitted that this was simply a factor which the FTT was entitled to take into account as part of the overall factual matrix. In addition, he argued that there had been no procedural unfairness in the approach adopted by the FTT.

Analysis: "material which is still in the course of completion"

30. To cut to the quick, I prefer Mr Jackson's analysis of Ground 3 to that advanced by Mr Knibbe for the following reasons.

31. The starting point for the DESNZ's case was the submission that as Document 4 was part of the evidence base for the forthcoming strategic decision, and as the Department's 'private thinking' in relation to that decision was (and indeed is still) ongoing, then it was an error of law for the FTT to conclude that Document 4 was not "material which is still in the course of completion" within regulation 12(4)(d)). There are two fundamental difficulties with this submission.

32. The first is that it is a thinly disguised attempt to re-argue the factual merits of the case. In that context I must bear in mind the generic principles of appellate review helpfully summarised by Green LJ in *Ullah v Secretary of State for the Home Department* [2024] EWCA Civ 201 at [26] (that was an immigration case but the same principles apply across the board in specialist tribunals):

> 26. Sections 11 and 12 TCEA 2007 Act restricts the UT's jurisdiction to errors of law. It is settled that:
>
> (i) the FTT is a specialist fact-finding tribunal. The UT should not rush to find an error of law simply because it might have reached a different conclusion on the facts or expressed themselves differently: see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49 [2008] 1 AC 678 at paragraph [30];
>
> (ii) where a relevant point was not expressly mentioned by the FTT, the UT should be slow to infer that it had not been taken into account: e.g. *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49 at paragraph [45];
>
> (iii) when it comes to the reasons given by the FTT, the UT should exercise judicial restraint and not assume that the FTT misdirected itself just because not every step in its reasoning was fully set out: see *R (Jones) v First Tier Tribunal and Criminal Injuries Compensation Authority* [2013] UKSC 19 at paragraph [25];
>
> (iv) the issues for decision and the basis upon which the FTT reaches its decision on those issues may be set out directly or by inference: see *UT (Sri Lanka) v The Secretary of State for the Home Department* [2019] EWCA Civ 1095 at paragraph [27];
>
> (v) judges sitting in the FTT are to be taken to be aware of the relevant authorities and to be seeking to apply them. There is no need for them to be referred to specifically, unless it was clear from their language that they had failed to do so: see *AA (Nigeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1296 at paragraph [34];

> (vi) it is of the nature of assessment that different tribunals, without illegality or irrationality, may reach different conclusions on the same case. The mere fact that one tribunal has reached what might appear to be an unusually generous view of the facts does not mean that it has made an error of law: see *MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10 at paragraph [107].

33. The second difficulty is that the Department's submission fails properly to reflect the true legal test for regulation 12(4)(d). The existence of ongoing project work or private thinking is insufficient in and of itself to engage regulation 12(4)(d). As Upper Tribunal Judge Jacobs opined in *Manisty* (at paragraph 23) "'Material' must have a physical existence. It is not apt to describe something incorporeal, like a project, an exercise or a process. … The material may be part of a project or whatever, but it is the material that must be in the course of completion, not the project." Furthermore, as Mr Jackson noted, the decision in *Manisty* 'cited without demur' (at paragraph 15) the passage in the Commissioner's guidance to the effect that "the fact that a public authority has not completed a particular project or other piece of work does not necessarily mean that all the information the authority holds relating to it is automatically covered by the exception."

34. As to the first principal error of law which Mr Knibbe submitted that the FTT had made, this referred to the argument that the FTT had based its decision on the factual finding that Document 4 was a finished piece of work. However, its characteristic as a finished piece of work was not in dispute and indeed its status as such was (correctly) not treated as determinative by the panel. Rather, the FTT recognised DESNZ's core submission (see FTT's reasons at paragraph 28). It then considered the principles to be derived from the *Manisty* decision (see the FTT's reasons at 30-33) in determining that Document 4 was not "material which is still in the course of completion". Paragraph 31 of the judgment in *Manisty* is especially in point:

> 31. It is not engaged when a piece of work may fairly be said to be complete in itself. 'Piece of work' is a deliberately vague expression that can accommodate the various circumstances in which the exception has to be considered. In this case, I would loosely apply that description to the Stage 3 Report and work on it. The piece of work may form part of further work that is still in the course of preparation, but it does not itself require further development. One factor that may help in applying this approach in some cases is whether there has been a natural break in the private thinking that the public authority is undertaking. Is it moving from one stage of a project to another? Another factor may be whether the authority is ready to go public about progress so far. The fact that the project, exercise or process is continuing may also be relevant, although this is probably always going to be a feature when a public authority is relying on this exception. Everything depends on the circumstances. That is why it would be inappropriate in a decision to provide a detailed critique of everything said in the Implementation Guide. Cases like those referred to in the Guide will have to be dealt with on their own terms when they arise.

35. Plainly, the FTT came to the conclusion that this was a case where "The piece of work may form part of further work that is still in the course of preparation, but it

does not itself require further development." Mr Knibbe criticised the FTT for failing to ask itself whether there had been a "natural break" in the public authority's private thinking and whether the Department was "ready to go public about progress so far". However, this is to fall into the trap of reading guidance in a judgment as if it were a legislative text. These were, after all, simply examples given by Upper Tribunal Judge Jacobs – rather "everything depends on the circumstances" (paragraph 31) and so "there are no bright lines here" (paragraph 34). This is a further indication that the Department's submissions are on closer scrutiny an attempt to re-argue the factual merits of the case.

36. As to the second principal error of law which Mr Knibbe charged the panel with making, the FTT was entitled to have regard to the fact that Documents 1 to 3 had been disclosed by DESNZ to Mr Webster while the FTT proceedings were under way. In this context it is axiomatic that the FTT exercises an inquisitorial jurisdiction, as recognised by the Court of Appeal in *DWP v Zola* [2016] EWCA Civ 758. Notably, Lloyd-Jones LJ referred there to "the respect which is naturally paid to the decisions of a specialist Tribunal in an area where it possesses a particular expertise. Given such expertise in a Tribunal, it is entirely understandable that a reviewing court or Tribunal will be slow to interfere with its findings and evaluation of facts in areas where that expertise has a bearing" (at [34]). At no stage did DESNZ claim that there was any material distinction between Document 4 and the other documents. The FTT was accordingly entitled to draw the inference from the whole of the evidence before it that Document 4 was not legally distinct. Ultimately the Department's case amounts to a disagreement with the FTT's evaluation of the factual evidence before it. As such, it comes up against the buffers identified by the Court of Appeal in authorities such as *Volpi v Volpi* [2022] EWCA Civ 464 and *Ullah v Secretary of State for the Home Department* [2024] EWCA Civ 201.

37. Finally, and relatedly, I am not persuaded that there was any procedural unfairness in the approach adopted by the FTT. In this regard Mr Knibbe relied on the Court of Appeal's judgment in *Phones 4U v EE* [2025] EWCA Civ 869, and in particular Falk LJ's observation (at [194(a)]) that "The starting point is that a judge is not entitled to decide a case on a basis that has neither been pleaded nor canvassed before him. His function is limited to deciding the issues put before him". Falk LJ continued:

> 197. As a general rule, judges should be very cautious about advancing a theory which has not been put forward by the parties. If it is outside the scope of the pleaded cases it should generally not be done at all: see above. If, short of that, a judge concludes that it is necessary to his decision to address such a theory in relation to any material evidence, the proper course is to raise it with the parties and to provide them with an adequate opportunity to make submissions about it, including as to whether further evidence is required to ensure a just outcome.

38. Mr Jackson sought to rely, by analogy from a special educational needs case, on the dicta of Holman J in *S v SEND Tribunal* [2007] EWHC 1139 (Admin) at [12]:

> … it seems to me that a specialist tribunal such as this must, at any rate to some degree, be entitled to come to a conclusion, or outcome of their own,

> even if it is not one that was advocated by either side, nor even necessarily supported by "evidence" by either side. A specialist tribunal must surely be able to bring its own expertise and judgment to bear in formulating their view as to the needs and required provision for the child.

39. Mr Knibbe pointed out that Holman J had emphasised the fact-specific nature of that case and warned (at [1]) that "What I say in this judgment must not be relied upon as any form of precedent in any other case." That said, my view is that Holman J's observation in the passage cited from paragraph [12] is simply an uncontroversial statement of principle. It does not, and does not purport to, break any new ground. However, the Court of Appeal's strictures in *Phones 4U v EE* [2025] EWCA Civ 869, based on an adversarial regime with the issues defined by pleadings settled by experienced legal professionals, do not sound in the less rarified atmosphere of tribunals. The short point is that DESNZ elected for a paper hearing and were given multiple opportunities to make written submissions. Ultimately, and in any case, the FTT's reliance in part on a comparison of the treatment of Documents 1 to 3 and 4 respectively was part and parcel of the panel's evaluation of the evidence in the case.

40. It follows that Ground 3 does not succeed.

Ground 4

Introduction

41. To recap, Ground 4 is that the FTT erred in law in concluding that Document 4 fell outside the exception for "internal communications" contained in regulation 12(4)(e) EIR.

42. Again, by way of recap, regulation 12(4)(e) stipulates as follows:

> (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—
>
> …
>
> (e) the request involves the disclosure of internal communications.

43. In addition, regulation 12(8) EIR provides that "For the purposes of paragraph (4)(e), internal communications includes communications between government departments."

44. Lastly, by way of reminder, the FTT dealt with regulation 12(4)(e) in short order – just two brief paragraphs – as follows:

> ***Is the test set out in Regulation 12(4)(e) met? Does the request involve the disclosure of internal communication, including communication between Government Departments (Reg 12(8))?***
>
> 37. As to the argument that the document represents internal communications (as defined in EIR Regulation 12(4)(e) and defined in Regulation 12(8)), put forward in the alternative in the Appellant's Grounds,

> that argument is rejected. Other than a brief assertion, the argument was not developed as to why the document meets the test.
>
> 38. Our brief findings on that point were that the fact that a report is shared between departments does not, the Tribunal consider, make it "communication". Communication has its own definition and, given its every day meaning, we decline to consider, in the absence of any arguments to the contrary, that the material constitutes communication.

45. The FTT was therefore faced with two questions. First, was Document 4 a "communication"? Second, if it was, was it an "*internal* communication"? The FTT's conclusion was that Document 4 was not a "communication". Accordingly, given that finding, the FTT did not need to go on and address the second question.

The Department's submissions on the meaning of "communication"

46. The DESNZ's case was that Document 4 was a "communication" within the meaning of regulation 12(4)(e) and the FTT erred in law by concluding otherwise. Mr Knibbe's core submissions developed by way of three steps.

47. First, Mr Knibbe relied on the expansive definition in the Information Commissioner's own guidance (ICO, *What are internal communications?*), which had been adopted by a First-tier Tribunal in *Committee on Climate Change v Information Commissioner* (EA/2020/0231, at [118] and [272]-[273]):

> The concept is broad and includes any information someone intends to communicate to others. This includes information communicated by letter, memo and email… Communications also include information which has been filed either on paper or electronically where others may consult it.

48. Secondly, Mr Knibbe prayed in aid the judgment of the CJEU in Case C-619/19 *Land Baden-Württemberg* (EU:C:2021:35) [2021] Env LR 23:

> 37. As regards, first, the word 'communication' used in Article 4(1)(e) of Directive 2003/4, as the Advocate General has observed in points 20 and 21 of his Opinion, this word relates to information addressed by an author to someone, an addressee who or which may be an abstract entity – such as 'members' of an administration or the 'executive board' of a legal person – or a specific person belonging to that entity, such as a member of staff or an official.

49. Third, and in turning to the circumstances of the present case, Mr Knibbe observed that Document 4 had both authors (analysts within BEIS) and an audience (officials within BEIS working on the overarching strategic decision to be taken in relation to the usage of hydrogen). Accordingly, he submitted, Document 4 was a "communication".

The Commissioner's submissions on the meaning of "communication"

50. Mr Jackson's submissions likewise developed by way of three stages.

51. First, he contended that as a matter of principle DESNZ should not be permitted to run an argument on appeal that it did not run at first instance. As Lewison LJ memorably pointed out (see above, in *FAGE v Chobani* [2014] EWCA Civ 5 at paragraph 26), a first instance hearing "is not a dress rehearsal. It is the first and last night of the show." Notably, Mr Jackson observed that the FTT had reached its conclusion "in the absence of any arguments to the contrary" on the part of the Department.

52. Secondly, Mr Jackson submitted that the FTT's finding that Document 4 was not a "communication" was simply one that was open to it on the evidence. DESNZ's submission to the contrary, he argued, was squarely a disagreement with the FTT's factual evaluation of the evidence.

53. Third, and in any event, Mr Jackson submitted that the FTT's approach was correct as a matter of law. The word "communication", according to the CJEU in Case C-619/19 *Land Baden-Württemberg* (EU:C:2021:35) [2021] Env LR 23 "relates to information addressed by an author to someone, an addressee who or which may be an abstract entity" (at paragraph 37). Document 4, Mr Jackson argued, was not addressed to anyone. On instructions, Mr Jackson also confirmed that the Information Commissioner stood by his published guidance on the meaning of "communication". There were, however, limits to the breadth of that definition. As the CJEU explained at paragraph 40:

> 40 … On the one hand, Article 4(1)(d) of Directive 2003/4 contains an exception concerning material in the course of completion or unfinished documents or data and, on the other, Article 4(1)(e) provides for the exception relating to internal communications. It follows that the term 'communication' and the terms 'material' or 'document' should be given separate meanings. In particular, unlike the former term, the latter do not necessarily concern information that is addressed to someone.

54. However, according to Mr Jackson, the effect of applying the DESNZ's understanding of the word "communication" would be that virtually every written document would be a "communication" for the purposes of regulation 12(4)(e), which he submitted could not be correct as a matter of law.

Analysis: "communication"

55. I prefer the Information Commissioner's submissions on this first aspect of Ground 4. I therefore agree with Mr Jackson that the FTT correctly directed itself as to the applicable law and in particular to the meaning of the term "communication" in the context of regulation 12(4)(e). I acknowledge that Mr Knibbe made several submissions which initially appeared to have some merit – for example, and in particular, it might on the face of it appear strange if the addition of the two words "Dear Stakeholders" at the start of Document 4 had the effect, by including such generic addressees, of converting a report that did not fall within regulation 12(4)(e) into a "communication" that was so covered. I also recognise that "communication" has a broad meaning. However, "communication" is a term which has both a central core meaning and a more peripheral meaning. The central core meaning has "message" as a synonym – it is instructive that the Information Commissioner's guidance on the meaning of

"communication" focuses on examples of messaging by the use of various platforms e.g. e-mail, WhatsApp or Facebook Messenger. Plainly an e-mail sent by Person A to Person B with some information in it is a "communication". But the further one moves away from that central core meaning of "communication" (as a message) to the shaded penumbra of meanings, the more it becomes a judgement call for the fact-finder to determine whether or not the item (to use a neutral term) in question can properly be described as a "communication". Furthermore, that judgement call must be made having regard to the principle that the exceptions in the EIR must be interpreted restrictively. With that in mind, Mr Knibbe's construction of the term meant that any document other than an *aide-mémoire* would qualify as a "communication", which was simply too broad.

56. Accordingly, the FTT did not err in law when it concluded that Document 4 was not a "communication".

The Department's submissions on the meaning of "internal communication"

57. It will be recalled that the FTT did not address the second question that arose in the context of regulation 12(4)(e) EIR, given its finding that Document 4 was not a "communication" within the meaning of that provision. However, DESNZ's position was that Document 4 was not just a "communication" but constituted an "internal communication". It was not in dispute that Document 4 had been shared with the National Infrastructure Commission (an executive agency of HM Treasury) and the Committee on Climate Change (an independent non-departmental public body sponsored by the Secretary of State). Both bodies provide advice to the Secretary of State on decarbonisation policy.

58. Mr Knibbe submitted that regulation 12(4)(e) should be interpreted such that, where communications are shared between public bodies working together on the same government functions, they remain internal. This interpretation, he contended, gave effect to the purpose of regulation 12(4)(e), being designed to facilitate a protected space to enable public authorities to pursue internal discussions. Mr Knibbe further submitted that this reading was in accord with regulation 12(8) EIR, which was not phrased in exhaustive terms. The same should be true, he contended, where communications are with agencies or sponsored bodies of government departments where they are working on the same functions. Mr Knibbe added that this construction was also consistent with the approach taken by the CJEU in Case C-619/19 *Land Baden-Württemberg* (EU:C:2021:35) [2021] Env LR 23. Mr Knibbe argued that the first instance decision of the tribunal in *DEFRA v Information Commissioner and Portmann* (EA/2012/0105) should not be followed.

The Commissioner's submissions on the meaning of "internal communication"

59. On the facts, Mr Jackson submitted simply that Document 4 was shared with two external bodies, the National Infrastructure Commission and the Committee on Climate Change. As such, he argued, regulation 12(4)(e) EIR could not be engaged.

60. As to the law, Mr Jackson challenged the proposition advanced by Mr Knibbe that communications remained internal where they were shared between public

bodies working together on the same government functions. Such a proposition, he submitted, went far beyond the clear legislative wording of regulation 12(4)(e). Mr Jackson characterised the DESNZ's case in this regard as hopelessly vague and uncertain – there was no explanation as to what those "same government functions" were. Moreover, one could readily envisage circumstances where on any basis the separate entities were not "working together". For example, the National Infrastructure Commission might support a major infrastructure project (say a new airport runway) which was opposed by the Committee on Climate Change on environmental grounds. Finally, regulation 12(8) would be largely redundant if DESNZ's construction of regulation 12(4)(e) was correct.

Analysis: "internal communication"

61. Given its conclusion that Document 4 was not a "communication", the FTT did not get as far as having to ask itself if it was an "*internal* communication". However, even if it had got that far, the only realistic finding was that Document 4 was not an "internal communication".

62. Both counsel prayed in aid the judgment of the CJEU in Case C-619/19 *Land Baden-Württemberg* (EU:C:2021:35) [2021] Env LR 23. There the CJEU held as follows:

> 47 … the exception to the right of access to environmental information that is laid down in Article 4(1)(e) of Directive 2003/4 for internal communications must be understood as concerning information that circulates within a public authority and which, on the date of the request for access, has not left the public authority's internal sphere – as the case may be, after being received by that authority – inter alia as a result of being disclosed to a third party or being made available to the public.

63. In short, and applying that test, Document 4 did not contain information which (in effect, exclusively) "circulates within a public authority" because it had "left the public authority's internal sphere … as a result of being disclosed to a third party" (emphasis added). Rather, the information circulated within three public authorities as it had left the "internal sphere" of DESNZ. Documents shared between these three separate entities, each of which performs different government functions, cannot properly be regarded as "internal" in nature.

64. Both counsel also sought to rely on regulation 12(8) EIR, which provides that for the purposes of regulation 12(4)(e) the phrase "internal communications includes communications between government departments". Mr Knibbe's submission was that regulation 12(8) was a non-exhaustive definition, specifying types of government communications which are included in the definition of "internal", but leaving open the possibility that other comparable communications may also fall within the terms of regulation 12(8). Mr Jackson's submission, on the other hand, was that if regulation 12(4)(e) truly meant that intra-governmental communications were already "internal communications" (on the basis that the departments in question were working together on the same government functions) then regulation 12(8) was redundant. I agree with Mr Jackson that regulation 12(8) would appear to be otiose on the DESNZ's construction, that

being a strong pointer in itself that the Department's interpretation cannot be correct.

65. It follows that Ground 4 does not succeed.

Conclusion

66. As neither Ground 3 nor Ground 4 is made out, I therefore conclude that the decision of the First-tier Tribunal does not involve any material error of law. My decision is also as set out above.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised by the Judge for issue on 20 October 2026