

Neutral Citation Number: [2026] UKUT 419 (AAC)
Appeal No. UA-2025-002068-GIA

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

The Cabinet Office

Appellant

- v -

Information Commissioner

1st Respondent

- and -

Martin Rosenbaum

2nd Respondent

OPEN DECISION

Before: Upper Tribunal Judge Wikeley

Hearing date: 14 September 2026
Mode of hearing: Face to face
Decision date: 27 October 2026

Representation:
Appellant: Ms Jennifer Thelen of Counsel, instructed by the GLD
1st Respondent: Mr Oliver Jackson of Counsel, instructed by the Information Commissioner (representing but not attending)
2nd Respondent: Mr Sam Fowles of Counsel

On appeal from:
Tribunal: First-tier Tribunal (General Regulatory Chamber)
Tribunal Case No: FT/EA/2024/0065
Panel: Judge Mornington, Members Palmer-Dunk and Matthews
Decision Date: 5 June 2025

SUMMARY OF OPEN DECISION

The First-tier Tribunal (FTT) had allowed the requester's appeal, ordering the disclosure of a file from the Prime Minister's Office with certain redactions. The redactions included some, but not all, of the redactions made by the Cabinet Office on grounds of national security, when applying sections 23/24 FOIA. The Cabinet Office appealed to the Upper Tribunal, submitting that (i) the FTT had misapplied the test under sections 23/24 FOIA; and (ii) the FTT had failed to give adequate reasons for its decision. The Upper Tribunal allowed the Cabinet Office's appeal on both grounds, set aside the FTT's decision and re-made that decision.

KEYWORD NAME (Keyword Number]:
34.9 Tribunal procedure and practice – statements of reasons
93.4 Information rights – Freedom of Information – absolute exemptions
93.5 Information rights – Freedom of Information – qualified exemptions

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 Cabinet Office's appeal.

The decision of the First-tier Tribunal involved an error of law. Under section 12(2)(a), (b)(ii) and (4) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remake the decision as follows:

> **Re-made First-tier Tribunal Decision**
>
> Mr Rosenbaum's appeal under reference FT/EA/2024/0065 is allowed in part. The requested information is to be disclosed subject to the redactions detailed in the CLOSED decision.

[redacted]

REASONS FOR OPEN DECISION

Introduction

1. This appeal concerns an appeal from the First-tier Tribunal (General Regulatory Chamber) ('the FTT') which involved the national security exemptions (FOIA sections 23 and 24). To save the time of those who may be contemplating reading the judgment, I can say this decision does not (I think) break any new ground.

The parties to the Upper Tribunal appeal

2. The Cabinet Office is now the Appellant in the Upper Tribunal proceedings (but was the Second Respondent before the FTT). The Information Commissioner (now the Information Commission) remains the First Respondent and Mr Martin Rosenbaum, a distinguished journalist, is the requester and Second Respondent (and was the Appellant before the FTT).

The Upper Tribunal oral hearing

3. I held an oral hearing of the Cabinet Office's appeal. Ms Jennifer Thelen of Counsel appeared on behalf of the Cabinet Office and Mr Sam Fowles of Counsel represented Mr Rosenbaum. Mr Oliver Jackson of Counsel made submissions in writing on behalf of the Information Commissioner but did not attend the hearing. This was entirely understandable as the Information Commissioner fully supported the Cabinet Office's appeal. The Upper Tribunal hearing (including a closed session, a gist of which was provided) took place in the morning session on 14 September 2026.

The Upper Tribunal's decision in summary

4. I allow the Cabinet Office's appeal to the Upper Tribunal. The decision of the FTT involves a material legal error and so is set aside. There is both an OPEN and a CLOSED Upper Tribunal decision on this appeal.

5. There is no point in remitting the underlying appeal to the FTT for a different panel to re-decide the matter afresh. It would be wholly disproportionate to do so. Accordingly, I substitute the following decision, being the one that the FTT should have made:

> **Re-made First-tier Tribunal Decision**
>
> Mr Rosenbaum's appeal is allowed in part. The requested information is to be disclosed subject to the redactions detailed in the CLOSED decision.

[redacted]

[redacted]

The background to the appeal

6. Mr Rosenbaum made a FOIA request for all information held in file PREM 49/1946 (Part 1 of the request) and for all information relating to whether that file should be passed to The National Archive (TNA) and/or made open (Part 2 of the request). The named file, originating in the Prime Minister's Office, was one of several files being reviewed by the Cabinet Office for transfer to TNA. The Cabinet Office withheld certain information relying on the exemptions in FOIA sections 36 (prejudice to the effective conduct of public affairs), 23 and/or 24 in the alternative (national security) and 40(2) (personal data). Unhappy with the limited disclosure, Mr Rosenbaum lodged a complaint with the Information Commissioner. In the course of the Commissioner's investigation, the Cabinet Office released a redacted version of the PREM 49/1946 file (Part 1 of the request). However, it continued to withhold the information about the internal discussions relating to the decision-making process around the file's transfer (Part 2). The Information Commissioner upheld that decision and Mr Rosenbaum appealed to the FTT.

7. The FTT allowed Mr Rosenbaum's appeal in part, ordering that the withheld material relating to the Cabinet Office's deliberations on PREM 49/1946 be disclosed subject to redactions under FOIA ss.23, 24 and 40(2) as detailed in its CLOSED decision. So far as sections 23/24 were concerned, those redactions covered some, but not all, of the information that the Cabinet Office had submitted was covered by the scope of the statutory exemptions for national security.

The Cabinet Office's grounds of appeal

8. The Cabinet Office advanced two grounds of appeal before the Upper Tribunal. Ground 1 was that the FTT had erred in law in failing to apply section 23 and/or 24 in the alternative to all of the section 23/24 information. Ground 2 was that the FTT had erred in law in failing to provide any, or any adequate, reasons as to why it did not accept the entirety of the Cabinet Office's case on the application of sections 23/24 to the requested information.

9. I should also record that Mr Fowles made detailed submissions (insofar as he was able) on behalf of Mr Rosenbaum on the construction and application of sections 23/24. Thus, he submitted that the words "relates to" in section 23 must be construed widely, but with limitations. Furthermore, a granular analysis of the relevant information was required. Mr Fowles also submitted that the FTT proceedings and decision were unsatisfactory in several respects. For example, he submitted that Mr Rosenbaum should have been provided with a gist of the closed material at the FTT. However, there has been no cross-appeal on the requester's part and so there is little to be gained by exploring those latter submissions further in circumstances where both of the Cabinet Office's grounds of appeal have succeeded for the reasons that follow.

Discussion

Ground 1

10. The Cabinet Office's first ground of appeal asserts that the FTT erred in law in failing properly to apply FOIA section 23 and/or 24 in the alternative to the entirety of the section 23/24 information as it appeared in the requested material. The principles governing FOIA sections 23 and 24, which both concern national security, are well-established and need only be summarised here.

11. In outline, section 23 provides an absolute exemption for information that was "directly or indirectly supplied to the public authority by, or relates to," certain specified national security bodies (as to which, see the list of national security bodies in section 23(3)).

12. Section 24, on the other hand, provides that information which does not fall within section 23 is still exempt information if exemption is required "for the purpose of safeguarding national security". Unlike section 23, section 24 is a qualified exemption and so, if engaged, the public interest balancing test applies. In addition, sections 23 and 24 are mutually exclusive.

13. Furthermore, public authorities are entitled to rely on sections 23/24 in the alternative, as such 'masking' thereby conceals whether or not the information requested concerns one of the national security bodies listed in section 23(3) and so furthers the aims of the relevant exemptions (see *Foreign, Commonwealth and Development Office (FCDO) v Information Commissioner, Williams and Others* [2021] UKUT 248 (AAC); [2022] AACR 3).

14. To engage section 23, the requested information simply has to have been supplied (directly or indirectly) by a section 23 body or relate to one of those bodies. The term "relates to" is interpreted broadly and a wide approach should be taken (*APPGER v Information Commissioner and FCDO* [2015] UKUT 377 (AAC); [2016] AACR 5 and *Corderoy and Ahmed v Information Commissioner and Attorney General* [2017] UKUT 495 (AAC); [2018] AACR 19). As it is a class-based absolute exemption, there is no requirement under section 23 for disclosure to prejudice the work of a national security body in any way.

15. To engage section 24, "required" is taken to mean that the use of the exemption is reasonably necessary. "National security" includes the security of the UK and its people, as well as actions taken to combat international terrorism (*Baker v Information Commissioner* EA/2006/0045, applying *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153).

16. In this case, and in very broad terms, the FTT in its application of sections 23/24 was effectively imposing a requirement for the engagement of either/both those provisions that went beyond the terms of FOIA. However, the reasons why the FTT's approach to the application of sections 23/24 involves an error of law can only be satisfactorily explained in the Upper Tribunal's CLOSED decision. I have struggled unsuccessfully to find a way in this OPEN decision to explain in a meaningful fashion why this first ground of appeal succeeds. Suffice to say that the Cabinet Office's position on Ground 1 was forensically tested by judicial

questioning in relation to the closed material in the closed session before the Upper Tribunal.

[redacted]

18. Accordingly, Ground 1 is made out.

Ground 2

19. The Cabinet Office's second ground of appeal asserts that the FTT's reasons were inadequate.

20. It is axiomatic that a court or tribunal is required to give sufficient reasons to inform a party as to why the matter was decided as it was (*South Bucks DC v Porter* [2004] UKHL 33 (at [36] *per* Lord Brown). In written submissions Mr Jackson, for the Information Commissioner, helpfully summarised the key principles to be applied to any reasons challenge on an appeal as follows:

    (1) "The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it": *R (Jones) v First-tier Tribunal* [2013] UKSC 19, [2013] 2 AC 48 at §25 per Lord Hope; *Oxford Phoenix Innovation Ltd v Information Commissioner* [2018] UKUT 192 (AAC) at §§50-52 *per* UTJ Markus QC.

    (2) Similarly, in reviewing a decision of the FtT the UT "should not limit itself to what is explicitly shown on the face of the decision; it should also have regard to that which is implicit in the decision": *Information Commissioner v Experian* [2024] UKUT 105 (AAC) ("*Experian*") at §65. In other words, the UT is permitted to infer FtT findings based on the decision of the FtT as a whole: *Spiropolous v Information Commissioner* [2025] UKUT 285 (AAC) at §§17-18 per UTJ Citron.

    (3) Nevertheless, if even despite this appellate restraint "the reason for the decision is not apparent" i.e. the first-instance judge has failed "to produce a judgment that gives a clear explanation of his or her order", then the decision will be unlawful: *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409 at §§26, 118 *per* Phillips MR; cited by the UT in *Experian* at §66.

21. Even cutting the FTT the necessary degree of slack, Mr Jackson agreed with Ms Thelen that the FTT's reasons in this case were inadequate.

22. Thus, as Lewison LJ observed in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 (at [115]):

> The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate.

23. In the present case the FTT's reasons failed this fundamental test. The FTT's OPEN decision understandably, and quite properly, did not explain in any detail the FTT's reasons on the application of FOIA sections 23/24 to the requested material. However, one may search the FTT's CLOSED decision in vain for the explanation that could not be tendered in its OPEN decision. The simple fact of the matter is the FTT's CLOSED decision sheds no further light on the issue. It merely stated which information was to be redacted in accordance with sections 23/24, but without any explanation as to why those redactions included only a sub-set of the information in respect of which the Cabinet Office had (with the approval of the Information Commissioner) applied sections 23/24. Thus, the FTT's CLOSED decision on the appeal at best contained a conclusion but lacked any reasoning in support whatsoever. [redacted]

24. However, it is right to record that the FTT did include a very brief explanation in its subsequent OPEN ruling refusing permission to appeal, albeit amplified slightly in the CLOSED ruling on permission. There are, however, two difficulties with this somewhat belated explanation.

25. The first is that the way in which the FTT's explanation is formulated demonstrates that the FTT had indeed misapplied the test for the application of FOIA sections 23/24, as found in relation to the first ground of appeal (see above).

26. The second difficulty is that as a matter of principle such an *ex post facto* explanation does not cure the failure to provide adequate reasons in the original decision. As the Court of Appeal observed in *Brewer v Mann* [2012] EWCA Civ 246:

> … where a judge has received no request from the parties to reconsider his judgment or add to his reasons, and has not demonstrated the need in conscience to revisit his judgment, but on the contrary has received grounds of appeal and an application for permission to appeal on the basis of the alleged inadequacies of his judgment, then it would be most unwise for him to rewrite his judgment (other than purely editorially) and it would take the most extraordinary reasons, if any, to justify such a course on his part. It is also plain to us that this was not the case of a short judgment on a straightforward issue where an appeal might be avoided if the judge supplied further reasoning which had been requested of him.

27. Accordingly, Ground 2 is also made out.

Conclusion

28. I therefore conclude that the decision of the First-tier Tribunal involves a material error of law. The Cabinet Office's appeal to the Upper Tribunal succeeds and the FTT's decision is set aside. In all the circumstances it would be wholly disproportionate to remit the case for re-hearing before a new FTT. I therefore re-make the decision under section 12(2)(b)(ii) and 12(4) of the Tribunals, Courts and Enforcement Act 2007:

> **Re-made First-tier Tribunal Decision**
>
> Mr Rosenbaum's appeal is allowed in part. The requested information is to be disclosed subject to the redactions detailed in the CLOSED decision.



29. My decision is also as set out above.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised by the Judge for issue on 27 October 2026