



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

Appeal Reference: EA/2019/0227

Heard via CVP on 18 October 2021

Before

**UPPER TRIBUNAL JUDGE RINTOUL
(SITTING AS A JUDGE OF THE FIRST-TIER TRIBUNAL)
TRIBUNAL MEMBER P TAYLOR
TRIBUNAL MEMBER E YATES**

Between

REUBEN KIRKHAM

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

ALAN DRANSFIELD

Second Respondent

Representation:

For the Appellant: in person
For the First Respondent: Mr Kosmin
For the Second Respondent: in person

DECISION & REASONS

1. The appellant challenges a decision of the First Respondent made in June 2019 to refuse (Decision FS50802258) a request for information in respect of the Second Respondent. That request was in three parts, the Appellant seeking:

- (i) the email correspondence between Mr Dransfield and the Commissioner concerning the effective ban imposed on Mr Dransfield (including any warnings that were made);
 - (ii) any minutes or internal correspondence discussing the basis for implementing this decision and
 - (iii) the contents of s.50 complaints that were rejected under section 50(2)(c)
2. The ICO's case is, in summary that it does not hold the information sought at (ii) and that the exemption set out in s 40 (2) of FOIA applies to (i) and (iii).
3. Mr Dransfield was joined to the proceedings on 7 July 2020, substantially after the appeal was lodged.
4. In a ruling issued on 16 July 2021, the Tribunal identified a preliminary issue which ought to be determined:
 - (1) When considering an exemption under section 40 (2) of FOIA, is the Tribunal bound to make the assessment of the public interest at the point the decision was made? That is, is the reasoning in APPGER v ICO & FCO [2015] UKUT 377 (AAC) and Maurizi v The Information Commissioner and The Crown Prosecution Service [2019] UKUT 262 (AAC) applicable?
 - (2) If so, are there any exceptions to the general rule which may apply on the facts of this appeal?
 - (3) If not, what is the appropriate point for the consideration of the public interest?
5. By way of clarification, the ICO submits that, properly understood, the reference to the public interest balance are a reference to the balancing exercise required under section 40 (2) of FOIA since the exemption under section 40 (2) is absolute, and section 2 (1) of FOIA is not applicable. That is not a point of clarification which the appellant opposes, recognising in his skeleton at A 2 (1) that the s 40 (2) exemption is absolute. The second respondent, in adopting the appellant's submissions, does not take issue with this point.
6. The appellant's answers to the preliminary issue are, in summary that:
 - (1) APPGER and Maurizi are not applicable as they do not relate to the rights of the information subject and section 40 (2) is an absolute exemption.
 - (2) Even if APPGER and Maurizi did apply, there is no public or legitimate interest under article 6 (1)(a) of GDPR to consider, and neither authority applies to absolute exemptions
 - (3) The appropriate time point for consideration of the public interest, is the date the Tribunal reaches its decision, or, in respect of a decision by the ICO, when the ICO's decision notice is issued.

7. The respondent's response is, in summary, that:
- (1) Both APPGER and Maurizi can be distinguished because this appeal (unlike this appeal) did not relate to absolute exemptions, and the UT in those cases considered the timing point in the context of section 2 (1)(b) of FOIA.
 - (2) The principle that the correctness of the public authority's refusal to discuss the public interest balance is to be assessed according to the circumstances as at the date the public authority made its response is well-established (see R(Evans) V Attorney-General [2015] UKSC 21 and thus there can be no assessment at a different point such as the Tribunal's decision.
 - (3) When considering an exemption under section 40(2) FOIA, the Tribunal is bound to make the assessment of the balance of legitimate interests of the public in disclosure of the requested information under FOIA and the interests or fundamental rights and freedoms of the data subject at the point the public authority completed its handling of the information request. Further to section 17(7) FOIA that date will be: (i) where an internal review was offered and was carried out in accordance with relevant timescales, the date of the completion of that internal review; (ii) where an internal review was offered but was not carried out in accordance with relevant timescales, the date by which the internal review should have been conducted; and (iii) if no internal review was offered, the date of the initial refusal notice.
8. In his reply, Dr Kirkham submits that the ICO has misunderstood Evans and that Mr Dransfield's post-decision consent to disclosure can be taken into account. In doing so he drew attention in particular to paragraphs [72] to [74] of Evans. He submits also that Maurizi is not authority for the ICO's position. He submitted also that the ICO's position did not take account of Mr Dransfield's interest, relying on DEFRA v ICO and SB [2011] UKUT 39 (AAC).
9. Dr Kirkham also submits that the ICO's approach overlooks the GDPR and that the regime under the DPA 2018 is very different from that under the DPA 1998
10. The Second Respondent has effectively adopted the appellant's arguments and submission on these points.

The hearing

11. The hearing took place via CVP and there were no material difficulties which arose. Although at times, Mr Dransfield had difficulties in hearing Mr Kosmin, we do not consider that materially affected his ability to participate in proceedings or reply to Mr Kosmin, not least as he sought primarily to rely on Dr Kirkham's submissions.

12. We were assisted by a PowerPoint presentation from Dr Kirkham, and heard submissions from him, Mr Kosmin and Mr Dransfield.
13. In addition to the skeleton arguments, presentation and replies, we also took into account the bundle of authorities provided. Mr Dransfield served a number of documents which were admitted but were not relevant to the preliminary issue under consideration.

The Law

14. As at the date of the ICO's decision, section 40 of FOIA provided, so far as is relevant:

40. – *Personal information.*

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if –
 - (a) it constitutes personal data which does not fall within subsection (1), and
 - (b) the first, second or third condition below is satisfied.
- (3A) The first condition is that the disclosure of the information to a member of the public otherwise than under this Act –
 - (a) would contravene any of the data protection principles, or
 - (b) would do so if the exemptions in section 24(1) of the Data Protection Act 2018 (manual unstructured data held by public authorities) were disregarded.
- (3B) The second condition is that the disclosure of the information to a member of the public otherwise than under this Act would contravene Article 21 of the GDPR (general processing: right to object to processing).
- (4A) The third condition is that –
 - (a) on a request under Article 15(1) of the GDPR (general processing: right of access by the data subject) for access to personal data, the information would be withheld in reliance on provision made by or under section 15, 16 or 26 of, or Schedule 2, 3 or 4 to, the Data Protection Act 2018, or
 - (b) on a request under section 45(1)(b) of that Act (law enforcement processing: right of access by the data subject), the information would be withheld in reliance on subsection (4) of that section.

...

- (7) In this section –

"*the data protection principles*" means the principles set out in –

- (a) Article 5(1) of the GDPR, and
- (b) section 34(1) of the Data Protection Act 2018;

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

"*the GDPR*" "*personal data*" and "*processing*" and references to a provision of Chapter 2 of Part 2 of the Data Protection Act 2018 have the same meaning as in Parts 5 to 7 of the Data Protection Act 2018 (see section 3(2), (4) (10) and (14) of that Act);

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

15. Although section 40 has been amended with effect from 31 December 2020 by the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019/419, we do not consider that this was material. The effect of the amendments was primarily to reflect that the GDPR is now the "UK GDPR" but without changing the underlying substance.

16. Sections 50, 57 and 58 of FOIA provide, so far as is relevant to the consideration of this preliminary issue:

50. – Application for decision by Commissioner.

(1) Any person (in this section referred to as "*the complainant*") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of [Part I](#).

(2) On receiving an application under this section, the Commissioner shall make a decision unless it appears to him –

- (a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,
- (b) that there has been undue delay in making the application,
- (c) that the application is frivolous or vexatious, or
- (d) that the application has been withdrawn or abandoned.

...

(4) Where the Commissioner decides that a public authority –

- (a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or

- (b) has failed to comply with any of the requirements of sections 11 and 17, the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.

...

- (7) This section has effect subject to section 53.

57. – Appeal against notice served under Part IV.

- (1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.
- (2) A public authority on which an information notice or an enforcement notice has been served by the Commissioner may appeal to the Tribunal against the notice.
- (3) In relation to a decision notice or enforcement notice which relates –
 - (a) to information to which section 66 applies, and
 - (b) to a matter which by virtue of subsection (3) or (4) of that section falls to be determined by the responsible authority instead of the appropriate records authority, subsections (1) and (2) shall have effect as if the reference to the public authority were a reference to the public authority or the responsible authority.

58. – Determination of appeals.

- (1) If on an appeal under section 57 the Tribunal considers –
 - (a) that the notice against which the appeal is brought is not in accordance with the law, or
 - (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
- (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

Mechanism of disclosure – GDPR concerns

- 17. At this point, we consider it useful to reflect on the process to be undertaken where, as here, the application of section 40 of FOIA is relied upon and how any balancing of the public interest is undertaken by the public authority in question.
- 18. Assuming that the information sought is “personal data” relating to a data subject (which is the case here), the exemption is engaged if one of the three conditions are met (see section 40 (2) (b) of FOIA).
- 19. In this appeal we are concerned with the first condition which requires any disclosure of such information to be in accordance with Article 5(1)(a) GDPR. That is, disclosure

under FOIA (and thus processing) must (i) fair, (ii) transparent and (iii) one of the conditions in Article 6 must be met. We consider it necessary to set it out in full, as it applied at the date of the ICO's decision:

Article 6 Lawfulness of processing

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

- (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
- (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
- (c) processing is necessary for compliance with a legal obligation to which the controller is subject;
- (d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;
- (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
- (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks.

2. Member States may maintain or introduce more specific provisions to adapt the application of the rules of this Regulation with regard to processing for compliance with points (c) and (e) of paragraph 1 by determining more precisely specific requirements for the processing and other measures to ensure lawful and fair processing including for other specific processing situations as provided for in Chapter IX.

3. The basis for the processing referred to in point (c) and (e) of paragraph 1 shall be laid down by:

- (a) Union law; or
- (b) Member State law to which the controller is subject.

The purpose of the processing shall be determined in that legal basis or, as regards the processing referred to in point (e) of paragraph 1, shall be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. That legal basis may contain specific provisions to adapt the application of rules of this Regulation, inter alia: the general conditions governing the lawfulness of processing by the controller; the types of data which are subject to the processing; the data subjects concerned; the entities to, and the purposes for which, the personal data may be disclosed; the purpose

limitation; storage periods; and processing operations and processing procedures, including measures to ensure lawful and fair processing such as those for other specific processing situations as provided for in Chapter IX. The Union or the Member State law shall meet an objective of public interest and be proportionate to the legitimate aim pursued.

4. Where the processing for a purpose other than that for which the personal data have been collected is not based on the data subject's consent or on a Union or Member State law which constitutes a necessary and proportionate measure in a democratic society to safeguard the objectives referred to in Article 23(1), the controller shall, in order to ascertain whether processing for another purpose is compatible with the purpose for which the personal data are initially collected, take into account, *inter alia*:

(a) any link between the purposes for which the personal data have been collected and the purposes of the intended further processing;

(b) the context in which the personal data have been collected, in particular regarding the relationship between data subjects and the controller;

(c) the nature of the personal data, in particular whether special categories of personal data are processed, pursuant to Article 9, or whether personal data related to criminal convictions and offences are processed, pursuant to Article 10;

(d) the possible consequences of the intended further processing for data subjects;

(e) the existence of appropriate safeguards, which may include encryption or pseudonymisation.

(e) the existence of appropriate safeguards, which may include encryption or pseudonymisation.

20. It is evident from this that there is limited scope for the balancing of the public interest with the rights of the data subject.
21. While we agree with Dr Kirkham's submission in his reply at [15] that balancing exercises are not all the same, equally we note that the starting point for a balancing exercise may differ; and, as a matter of general law, the weight to be attached to the interests weighed may vary considerably. The conclusions we draw from the case law to which we were taken, including Cox v ICO [2018] UKUT 119 AAC and Information Commissioner v Halpin [2019] UKUT 29 (AAC) is that while the presumption under FOIA is that information will be disclosed *unless* exempt, under the GDPR regime, personal data will be processed only where necessary and subject to stringent protections. And, consent to the use of the data must be informed. It can, also be withdrawn.
22. As an aside, we note that we are here not for the purpose of the preliminary issue concerned with whether Mr Dransfield had in fact consented to disclosure, but a scenario in which the ICO could otherwise rely on section 40. We note also that the balancing exercise, so far as it exists in Article 6 GDPR focusses on whether interests are being overridden, not that they may be.

23. In any event, as is now accepted by all parties, Mr Dransfield has now given his consent, although whether that consent had been given prior to the decision is in issue. Thus, the section 40 exemption would not apply.

Discussion

24. We bear in mind that underlying much of the argument is the fact that Mr Dransfield has now consented to the disclosure of material held by the ICO which fell within the request.
25. We begin our discussion of the issues with the submission from the ICO that in effect, there is a jurisdictional issue arising from Evans and the combined effect of sections 50, 57 and 58 of FOIA, and that it is that which underpins the reasoning in APPGER and Maurizi.
26. We accept that, as a statutory tribunal, the FtT only has the jurisdiction conferred on it, but equally it has the power to consider whether it does have jurisdiction – see Sugar v BBC [2009] UKHL 9 and Fish Legal [2015] UKUT 52(AAC) which is binding on us, at [55].
27. The effect of sections 50, 57 and 58 of FOIA was considered in Evans at [73] and [74]:

73. However, although the question whether to uphold or overturn (under section 50 or sections 57 and 58) a refusal by a public authority must be determined as at the date of the original refusal, **facts and matters and even grounds of exemption may, subject to the control of the Commissioner or the tribunal, be admissible even though they were not in the mind of the individual responsible for the refusal or communicated at the time of the refusal to disclose (i) if they existed at the date of the refusal, or (ii) if they did not exist at that date, but only in so far as they throw light on the grounds now given for refusal** [emphasis added]– see Coppel on Information Rights 4th ed (2014), paras 28-022 and 28-024, and *Department for The Environment, Food and Rural Affairs v Information Comr (Birkett)* [2011] EWCA Civ 1606, [2012] PTSR 1299 . Although Birkett was a decision on the 2003 Directive and EIR 2004 , it seems clear that the reasoning of Sullivan LJ (summarised at para 21 of the decision) applies with equal force to the procedures under sections 50, 57 and 58 . Given the language of section 53(2) , when compared with that of section 50(4) and section 58(1) , it seems to me that it must also apply to the accountable person when issuing a section 53 certificate.

74. Therefore, before the Commissioner on a section 50 application, or before the tribunal on a section 57 appeal, **it would often be open to the parties (as they did in this case) to rely on factual evidence, expert evidence, or assessments of possible risks, or even exemptions, which may not have been known to, or in the mind of, the person who was responsible for the original decision to refuse the section 1 request** [emphasis added]. However, it would not be open to the parties, or at least not nearly so easily open to them, to rely on such matters on an appeal from the First-tier Tribunal to the Upper Tribunal or from the Upper Tribunal to the Court of Appeal, which can only be brought on a point of law (see para 16 above).

28. In *APPGER*, having noted [48] to [49] that the Supreme Court's observations were obiter, the Upper Tribunal considered that they were at the almost binding end of the spectrum, and held:
52. Second, the judgment of the Supreme Court confirms and powerfully supports the view that taken as a whole, the language of the statutory scheme indicates that the Commissioner (and the FTT) is charged with assessing past compliance with FOIA, not with monitoring ongoing compliance. That scheme is that a request is made to a public authority and a natural and sensible reading of the language of the provisions relating the application that can be made to the Commissioner and then an appeal of his decisions (see sections 50, 57 and 58) is that they relate to how the public authority dealt with the request and then to whether the Commissioner erred in law on that issue.
 53. It is well established that the Commissioner and the FTT can consider evidence that post dates the decisions of the public authority and that on appeal the FTT reconsiders the application to the Commissioner and makes its own decision. But there is nothing unusual about a decision maker taking account of later evidence to inform an historical position.
 54. Third, there is room for the view that there may be unfortunate practical consequences whichever construction of the public interest timing point is adopted.
 55. In a case such as the *Badger Trust* where a "safe space" argument is raised it is readily understandable why the requester and the FTT would feel frustrated in having to consider a case on an historical basis if by the time the matter is before the FTT there are obvious and powerful arguments supporting the view that the safe space has expired. But as has happened the public authority can accept this and provide the information without a further request being made or pursuant to such a request.
 56. In other cases, and this is an example, there are clearly disadvantages in the Commissioner and then the FTT and then further appellate tribunals and courts being faced with a moving target on public interest issues. This is particularly so when one remembers that the trigger to the FOIA jurisdiction is a request to a public authority holding information. Indeed it seems to us that Parliament would not have intended that the public authority would effectively be removed as the decision maker because the passage of time and changes in circumstances even if the last date for appellate tribunals and courts was the hearing before the FTT. Rather it seems to us that Parliament would have intended that the requester should make a further request if he wished to rely on changes over time to the public interest factors.
 57. Fourth, this view of Parliamentary intention and the conventional understanding do not result in any asymmetric unfairness as to the relevance of post-assessment developments. Rather, the decision in *Information Commissioner v HMRC and Gaskell* [2011] UKUT 313 (AAC); [2011] 2 Info LR 11, applying earlier authority, that section 50(4) gives the Commissioner a discretion not to order disclosure reflects an overall intention to promote results that reflect the balance of public interest by the making of requests for disclosure from time to time and a residual discretion in exceptional circumstances to avoid a disclosure that should have been made earlier but now should not be because of changes in circumstances. This does not reflect different approaches to the primary arguments whether the request has been dealt with in accordance with Part 1 of FOIA but a residual discretion on remedy if it has not been.

29. In summary, the ICO's argument is that on a proper construction of its functions under section 50 FOIA its functions are limited to assessing how a request for information "has been dealt with" by a public authority and the Tribunal's jurisdiction is described with reference only to the Commissioner's decision (by use of the term "against the notice") Thus, it does not have the jurisdiction to consider the public interest as at the date of decision.
30. Dr Kirkham, and by extension, Mr Dransfield, submit that is based on a misreading of Evans and seek to place reliance in particular on the passages highlighted above. They also seek to rely on the mechanisms by which the exemptions in sections 12 and 14 of FOIA apply and can be applied at a stage after the request is made. It is submitted further that the ICO has erred in failing proactively to consult Mr Dransfield as a data subject as the processing of his data involved *any* consideration of his data, not just disclosure, and that processing had to be done in compliance with Article 5 GDPR. This, it is said, amounts to an error of law which engages section 50 of FOIA.
31. We remind ourselves that the FtT is a creation of statute; its powers are limited. We are satisfied that, on the basis of the reasoning in Evans and in APPGER the FtT is confined when considering whether an exemption applies, to a consideration of the factual matrix which existed at the time of that decision. As it is, however, conducting an appeal, it can take into account material not before the public authority (as can the ICO) which may show that the findings of fact were wrong, or the law was wrongly applied. The additional material may show that the public authority was wrong, albeit with the benefit of hindsight, but what it is not permitted to do is consider a different factual matrix as at the date of the hearing.
32. It is of note that the language used in the statutes looks backwards, and insofar as the decision in Maurizi at [166] to [168] suggests that a contrary interpretation could be adopted, we consider that, as did the Upper Tribunal, we are bound by both APPGER and Evans to the effect that the FtT must consider the public interest and the factual matrix as it existed at the date of decision.
33. We do not accept that the ICO has misrepresented Evans. If, for example, Mr Dransfield had in fact consented to disclosure of the relevant material prior to the date of decision, then evidence to that effect could be adduced. That is within the ambit of Evans at [74]. But that is not the same as permitting a *subsequent* consent to disclosure to be taken into account in determining whether the section 40 (2) exemption applied as the issue is whether consent existed at the date of the public authority's decision, whether it was aware of it at the time or not.
34. We do not accept that this requires the FtT to use a "time machine", as Dr Kirkham submits. What is required is a need to find facts as they existed at a specific point of time in the past and whether, as at that date, a specific exemption applied.
35. Contrary to what Dr Kirkham submits, we do not consider this impractical. Courts and Tribunals are accustomed to making findings about the circumstances at a particular time in the past; that is what they do. In our view, Dr Kirkham over-complicates the

process. Insofar as there may be an evidential problem, owing to a lack of records, the problems identified are speculative on the facts of this appeal. There may, we accept, be difficulties, in some cases in determining the facts as at a specific date, but that is not in our view a reason to depart from established principles. And, we bear in mind that the disclosure by parties may well need to extend beyond the date of the relevant decision to material which sheds light on the position as at that date.

36. We consider also that if, for example, it was open to a party to show that the appropriate date for assessing an exemption or the public interest was the date of hearing, that would complicate appeals significantly, and possibly to the detriment of those seeking information. We do not, however, accept that there is properly an analogy with judicial review and the deprecation of "rolling reviews". In Judicial Review the court or Tribunal is, in most cases, concerned only with the material actually before the decision maker and does not make findings of fact. We note also that the person seeking information can, if there is a change in circumstances, make a fresh request.
37. Dr Kirkham and Mr Dransfield seek to rely on the operation of sections 12 and 14 of FOIA as further support for their argument that the ICO's interpretation of the date at which the public interest is to be considered is wrong in law.
38. We have, as Dr Kirkham submitted, we should, considered FOIA as a whole. We note that the general principle is that information held by public authorities should be disclosed, subject to exemptions. We accept that, as the ICO submits, they are different in character in that they operate as a balancing exercise to protect public resources. Both also require evaluations whereas the exemption under section 40 (2) is absolute, and, it is concerned with the interests not of the public authority but of third parties.
39. Much of the submissions on this point went well beyond the issue identified, and go to the feasibility of operating both sections, and indeed, insofar as they relate to the difficulties that arise from the processing data under the GDPR, significantly beyond the scope of this appeal and the preliminary issue. While it may well be that there is merit in the system applicable under the law of Victoria, Australia, whereby a data subject is asked if he wishes to consent to disclosure, it is not a matter on which we can adjudicate. Whether or not the GDPR can be construed as importing such a requirement is also out with the scope of the issue under consideration. In any event, we consider that under the GDPR, consent to the processing of data to the extent of it being disclosed once and for all, as would be the case if Mr Dransfield's data were disclosed under FOIA, would have to comply with the GDPR. Any analysis of whether consent had been given would inevitably be fact sensitive.
40. That said, we consider that the balancing exercise to be carried out under sections 12 and 14 is different from the exercise undertaken in deciding whether an exemption applies but their function is different. We note the submission that, in effect, section 14 could have the effect of limiting the effectiveness of appeals if invoked post-decision, but the same can be said of powers to strike out. It is not a means by which section 40

(2) can be interpreted. Further, the effectiveness of both section 12 and section 14 and their objectives would be undermined if they could not be invoked post-decision.

41. Whether the ICO was, as Dr Kirkham submits, not looking after Mr Dransfield's interests in not consulting him with regard to the request made, we do not consider that relevant to the narrow preliminary issue raised here. Any analysis of duties under the GDPR would, given the nature of the consent which may or may not have been given prior to the decision is fact-sensitive and requires findings of fact to be made on evidence presented.
42. There may, as Dr Kirkham submits, be evidential difficulties in determining whether Mr Dransfield had in fact consented to disclosure prior to the ICO's decision. But that is for fact-finding. It may well be that it results in a larger disclosure exercise than might otherwise have been the case, but that is what the legislation requires.
43. In conclusion, returning to the questions put at [4]:

(1) When considering an exemption under section 40 (2) of FOIA, is the Tribunal bound to make the assessment of the public interest at the point the decision was made? That is, is the reasoning in APPGER v ICO & FCO [2015] UKUT 377 (AAC) and Maurizi v The Information Commissioner and The Crown Prosecution Service [2019] UKUT 262 (AAC) applicable?

A: The Tribunal is bound by the reasoning in APPGER and Maurizi to make the assessment of the public interest at the date of decision.

(2) If so, are there any exceptions to the general rule which may apply on the facts of this appeal?

A: There are no applicable exceptions, save that the issue of when consent was given will be in issue as will the issue of whether the processing of Mr Dransfield's data by disclosure is contrary to the GDPR

(3) If not, what is the appropriate point for the consideration of the public interest?

A: not applicable

Additional Matters

44. Mr Dransfield has in his submissions on this issue, both in writing and oral, and in the documents adduced, sought to raise issues about corruption and unlawfulness on the part of the ICO, the former president of the GRC, and others involved in the hearing. This is wholly inappropriate and even if supported by relevant evidence, which it is not, was not a matter within the narrow scope of this hearing. Hearings before the First-tier Tribunal are not the place for unfounded and unsubstantiated allegations of fraud and corruption to be made. Mr Dransfield does not assist himself or his arguments in so doing,

Signed

Date: 28 February 2022

Upper Tribunal Judge Rintoul

Promulgation Date 1st March 2022

(sitting as a judge of the First-tier Tribunal)