IN THE UPPER TRIBUNAL **Appeal No.** GIA/850/2019 (V)
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (General Regulatory Chamber) (Information Rights)

Between:

The Information Commissioner

Appellant

- v –

Mr Ian Driver

First Respondent

and

Thanet District Council

Second Respondent

Before: Upper Tribunal Judge Wikeley

Hearing date: 23 November 2020

Representation:
Appellant: Ms Alexandra Littlewood of Counsel
1st Respondent: In person
2nd Respondent: Mr Tim Howes, Solicitor

DECISION

The decision of the Upper Tribunal is to allow the appeal. The decision of the First-tier Tribunal made on 21 December 2018 under number EA/2017/0218 was made in error of law. Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007, I set that decision aside and remit the case to be reconsidered by a fresh tribunal in accordance with the following directions.

Directions

1. **This case is remitted to a differently constituted First-tier Tribunal for reconsideration at an oral hearing (this may be a 'virtual' hearing e.g. by video platform).**

2. **The new Tribunal is to proceed on the basis that the threshold condition in section 41(1)(a) of FOIA is satisfied, i.e. that the exporters' names are information "obtained by the public authority from any other person".**

3. **The new Tribunal must therefore consider Mr Driver's further grounds of appeal relating to whether the confidential information exemption is engaged by virtue of section 41(1)(b).**

4. **The new Tribunal should also consider any further exemptions which are raised in accordance with the First-tier Tribunal's case management directions.**

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

This decision follows a remote hearing which had been consented to by all the parties. As required, I record that:

(a) the form of remote hearing was V (Skype for Business). A face to face hearing was not held because it was not practicable in the light of Government guidance on urgent matters of public health and the case was suitable for remote hearing, involving as it did pure matters of law. Further delay would not be consistent with the overriding objective;

(b) the documents that I was referred to were contained in the three bundles: the FTT core bundle, the UT core bundle and the (electronic) agreed authorities bundle;

(c) the order and decision made are as set out above.

REASONS FOR DECISION

Introduction

1. This appeal turns on the proper application of section 41 (information provided in confidence) of the Freedom of Information Act 2000 (FOIA) and in particular sub-section (1)(a).

2. Section 41 of FOIA provides as follows:

> "**41. Information provided in confidence**
>
> (1) Information is exempt information if—
>
> (a) it was obtained by the public authority from any other person (including another public authority), and
>
> (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

> (2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence."

3. In practice most cases on section 41 concern section 41(1)(b), namely whether disclosure of the information in question would amount to an actionable breach of confidence. The present appeal – at least for the time being – is solely concerned with the prior requirement or threshold condition that the information in question "was obtained by the public authority from any other person" (section 41(1)(a)).

The Upper Tribunal hearing

4. The parties to this appeal are the Information Commissioner (the Appellant), Mr Ian Driver (the FOIA requester and First Respondent) and Thanet District Council (TDC, the Second Respondent). I held a remote hearing of this appeal by Skype for Business on 23 November 2020. The Commissioner was represented by Ms Alexandra Littlewood of Counsel. Mr Driver represented himself. TDC was represented by its solicitor, Mr Tim Howes. I heard oral submissions at the hearing just as I would have done had we all been sitting 'face to face' in the tribunal hearing room. I am indebted to all concerned for their well-focussed written and oral submissions. The Commissioner's appeal to the Upper Tribunal was supported by TDC but resisted by Mr Driver.

5. The hearing and the form in which it was to take place had been notified in the 'daily cause list', along with information telling any member of the public or press how they could observe the hearing at the time it took place through Skype for Business. In the event I am satisfied that no member of the public or press sought to attend the hearing. I should add that I directed at the start of the hearing, under s.29ZA(1)(b) of the Tribunals, Courts and Enforcement Act 2007 (inserted by section 55 of, and paragraph 2 of Schedule 25 to, the Coronavirus Act 2020), that the Upper Tribunal was to use its reasonable endeavours to make a recording of these proceedings using the Skype for Business recording facility. This is to be preserved for a reasonable time in case a member of the public wishes to view the proceedings.

6. I was satisfied in all the above circumstances that the hearing therefore constituted a public hearing (with members of the public and press being able to attend and observe the hearing, were they so minded), that no party had been prejudiced and that the open justice principle had been respected. There was no need for any closed session or to refer to any closed material.

The background to the appeal

7. The background to this appeal was conveniently set out in the opening paragraphs of the First-tier Tribunal's decision:

> "1. This appeal concerns information sought under the Freedom of Information Act 2000 ("FOIA") on settlements concluded between Thanet District Council ("TDC") and businesses involved in the export of live animals from the port of Ramsgate ("Ramsgate").
>
> 2. On 12 September 2012 there was an incident at Ramsgate involving a particular exporter which resulted in the death of more than 40 sheep. The

> exporter was prosecuted, resulting in fines and a suspended sentence. TDC imposed a ban on the export of live animals from Ramsgate from 13 September 2012. This ban was restrained by an interim injunction on 16 October, and a number of exporters brought proceedings for damages against TDC for losses caused by the ban. In ***Barco de Vapor & Ors v Thanet District Council*** [2014] EWHC 490, the High Court held that the ban had been unlawful and that TDC was liable in damages. TDC settled its liability to the two named parties in this case by way of a consent order. Their identities are in the public domain. TDC subsequently entered into settlement agreements with five other exporters. These five settlement agreements contain the information in issue in this appeal.
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> 3. On 8 April 2016, the Appellant made a request to TDC for information about damages payments and legal fees related to the export of live farm animals from Ramsgate. The first request was:
>
> > "For the financial year 2013-14 how much money was spent by Thanet Council in damages payments to the live animal exporters and legal fees. Could you break down the damages payments by recipient name which may be a company or an individual. Could you identify separately money spent by Thanet Council on its own legal fees and money spent by Thanet Council to cover the legal costs of the live animals exporters."
>
> Substantially the same requests were made for the years 2014-15, 2015-16 and 2016-17, together with two additional questions which are not the subject of this appeal."

8. The outcome of Mr Driver's requests and the ensuing investigation by the Information Commissioner is covered by paragraphs 4-8 of the First-tier Tribunal's decision. In short, and by the close of that investigation, TDC had disclosed the amounts of the individual payments made to the five parties who had reached out of court settlements. However, the Council maintained its reliance on section 41 of FOIA (breach of confidence) as the basis for withholding the identities of those five parties. The Information Commissioner in turn concluded that TDC was correct to rely on section 41 (see Decision Notice FS50640981). Mr Driver then appealed to the First-tier Tribunal.

The proceedings before the First-tier Tribunal

9. The Tribunal held an oral hearing on 3 December 2018. Mr Driver attended and TDC were represented by counsel. The Information Commissioner did not attend (I return to this feature of the case later; see paragraphs 39-42 below). The Tribunal allowed Mr Driver's appeal. It summarised the parties' arguments (paras 9-11), identified the agreed issues (paras 12-13), dealt with (and dismissed) TDC's late application to rely on two other exemptions (paras 14-21), outlined the evidence (paras 22-26) and set out the applicable law (paras 27-30). The final section in the decision, headed 'Discussion and conclusions', analysed the parties' submissions (paras 31-36) and then set out the Tribunal's conclusions (paras 37-40).

10. The Tribunal identified the first (and, in the event, the only) issue for determination as whether section 41 is engaged "in circumstances where the

withheld information is contained in a settlement agreement" (para 13a). The Tribunal set out its reasoning as follows:

> "37. We agree that settlement agreements are a type of contract, containing mutual obligations by both parties which are enforceable in the courts under contract law. We are not bound by either of the First-Tier Tribunal decisions referred to or by the Commissioner's guidance, but we can take these into account in making our decision. We also agree that, in principle, a contract would not normally contain information "obtained" by a public authority from another person. As described in ***Derry***, a contract contains the mutual obligations of the contracting parties. A contract contains the result of negotiations, not a set of information provided by one party to another.
>
> 38. The withheld information in this case is the names of the five exporters, which becomes more significant if matched up with the information on individual settlement sums which has already been disclosed. We do not agree with the Commissioner that these names are in themselves information obtained by TDC from another person. Each exporter may have originally contacted TDC to make a claim for compensation, and in doing so disclosed their names. However, the names of the contracting parties are an essential part of the mutually agreed terms in each settlement agreement. It would be an artificial distinction to distinguish the names of the parties from all other contractual terms.
>
> 39. We have considered TDC's argument that the agreements are based on commercially sensitive information about how the five exporters' claims for compensation have been calculated. The withheld information is the names, not the sums paid. We do accept that the effect of revealing the names associated with each sum would show how much each exporter had negotiated by way of a payment. However, we are mindful that this was a negotiation – the amount paid would not necessarily equate to the amount originally claimed. The negotiations may have been based on specific information provided by each exporter, such as accounts and invoices, but this specific information is not contained in either the withheld information or the settlement agreements as a whole. This is not a case such as that referred to in ***Derry*** (paragraph 32(e)), where the contract itself contains technical information which may have been provided in confidence.
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> 40. For the above reasons, we therefore find that the withheld information was not obtained by TDC from another person. This means that the exemption in section 41 is not engaged. As TDC has not been permitted to rely on any other exemptions, the appeal is upheld and the withheld information is to be disclosed in accordance with the substitute Decision Notice set out at the start of this decision."

11. Accordingly, the Tribunal set aside the Information Commissioner's Decision Notice and substituted the following notice:

> "The Council did not act correctly in withholding the residual requested information under section 41(1) because this is not information obtained

> from another person within the meaning of that section. The Council is to disclose the following information requested by the appellant within 35 days: the names of the five parties paid the sums in compensation listed in the Council's email to the appellant dated 3 August 2017."

The Information Commissioner's grounds of appeal

12. The Information Commissioner then appealed to the Upper Tribunal, permission having been granted by the First-tier Tribunal. By the time the matter came on for hearing in November 2020, the Commissioner advanced three grounds of appeal. The first was that the Tribunal below had erred in law in concluding that the parties' names were not obtained from the exporters. The second was that the Tribunal had further erred in law in finding that the parties' names were a mutually agreed term in each settlement agreement. The third was that in refusing TDC's application to rely on two additional exemptions the Tribunal had failed to take into account a relevant consideration, namely fairness to the five exporters concerned.

Ground 1: were the exporters' names "obtained" by the public authority?

13. The Commissioner's first ground of appeal was that the First-tier Tribunal had erred in law in concluding that the parties' names had not been "obtained" from the exporters. The Tribunal's reasoning was set out at paragraphs 37-39 of its decision (see paragraph 10 above). In Ms Littlewood's submission, the Tribunal had in effect applied a general rule that information contained in a contract with a public authority cannot be regarded as having been obtained from a third party, regardless as to where the information originally came from. In doing so, the First-tier Tribunal had placed reliance on the decision of the Information Tribunal (the forerunner of the FTT) in *Derry City Council v Ryanair* (EA/2006/0014), and in particular this observation (at paragraph 32(c)):

> "It might be said that the effect of any contract is that each contracting party informs the other of the obligations which it will undertake and of its agreement to accept the counterparty's obligations in return. Such a two-way flow might be characterised as a process by which the public authority obtained information from the other party. However, we think that this imposes too great a strain on the language of the Act and that the correct position is that a concluded contract between a public authority and a third party does not fall within section 41(1)(a) of the Act."

14. To like effect, the Tribunal relied on the decision in *Department of Health v Information Commissioner* (EA/2008/0018), where the Information Tribunal had said that contractual terms "were mutually agreed and therefore not obtained by either party" (at paragraph 34).

15. Ms Littlewood explained that the Commissioner accepted both that a settlement agreement was a form of contract and that (at least as a general rule) a contract contained a series of mutually agreed obligations which did not constitute information "obtained by the public authority from any other person" within the meaning of section 41(1)(a). However, the Commissioner's position was that even though the exporters' names were recorded in, and an essential part of, the settlement agreements, it remained the case that the information as to names had been obtained by TDC. The Tribunal's approach, she argued, had

wrongly focussed on how the information had been recorded by the public authority and not where it came from.

16. Ms Littlewood's submissions in relation to the case law were two-fold. First, she argued that the First-tier Tribunal had misapplied the two Information Tribunal decisions. Second, she contended that the Tribunal had failed to apply the principles laid down in the *Browning* litigation.

17. As to the former, the Information Tribunal decisions, of course, were not binding on the First-tier Tribunal, as it very properly recognised. Leaving that point aside, *Derry City Council* did not seek to lay down a general rule to the effect that section 41 was not engaged where information was contained in a contract. Both *Derry City Council* and *Department of Health* had nothing to say about the contracting parties' names and whether they can fall within section 41. Furthermore, on the facts of both those first instance decisions, the identities of the contracting parties were in the public domain. Neither supported the proposition that the fact that information was recorded in the settlement agreements was of itself determinative of the section 41 issue. As such, the Tribunal had wrongly applied a blanket rule that information contained in a contract could not constitute information obtained by the public authority from a third party. Moreover, the Commissioner's published guidance on section 41(1)(a), echoing the decisions in *Derry City Council* and *Department of Health*, could not cover every eventuality.

18. As to the latter, and more importantly, Ms Littlewood relied on the *Browning* litigation at each level of the appellate hierarchy. That case concerned a journalist's request under FOIA to the Department for Business, Innovation & Skills (DBIS) for the identities of companies which had applied for export licences to sell "controlled goods" (a euphemism for military equipment) to Iran. In the First-tier Tribunal (see *DBIS v Information Commissioner and Browning* (EA/2011/0044)), counsel for Mr Browning (Mr Coppel) had argued that the names of the licence applicants had not been obtained by the public authority. Rather, he said, they had been created by DBIS in the records it held and in the licences it issued. The First-tier Tribunal in question was singularly unimpressed by this "resourceful" submission:

> "54. This seems to us, with respect, an impossible proposition. DBIS records information which it receives – "obtains" – in an application form submitted by the applicant. What DBIS creates is its own internal document recording and repeating the information obtained ... Mr. Coppel's interpretation would nullify the s.41 exemption, save where the information happened to be held in a document supplied by the provider of the information. That the exemption should be dependent upon such an irrelevant chance is inconceivable."

19. In the Upper Tribunal, a strong three-judge panel (Charles J, Mitting J and UT Judge Andrew Bartlett QC) likewise dismissed the appellant's argument that the requested information was not "obtained" by the Department but simply recorded by it ([2013] UKUT 236 (AAC) at paragraph 90):

> "As a matter of ordinary language and by reference to the underlying purposes of FOIA generally, and of s.41 itself, it is clear that the information sought that is now held and recorded by the Department (i.e.

> the identities of companies who applied to it for licences) was obtained by the Department from the applicant companies. It derives from the fact that the applications were made to the Department (as the licensing authority) with the consequence that the Department obtained the information in and through the application; the Department did not create it, or only record it."

20. A challenge to that Upper Tribunal ruling also received pretty short shrift in the Court of Appeal ([2014] EWCA Civ 1050; [2014] 1 WLR 3848 at [38]-[39]). The Court refused permission to appeal on that ground, agreeing with the First-tier Tribunal (as approved by the Upper Tribunal) in that case, which had described this (as noted above) as "an impossible proposition". According to the Court of Appeal:

> "39. The FOIA is concerned with "information", not the form in which it is communicated or held. It is plain from section 41(1)(a) and section 84 that the exemption relates to information recorded in any form provided that it was obtained from another person in circumstances where its disclosure would constitute an actionable breach of confidence. Here, the disputed information concerns the identity of the applicant companies. That information was obtained from them through the medium of their applications. It is fanciful to suggest that their confidentiality rights could be put in jeopardy by the way in which the public authority chose, for internal purposes, to process the information."

21. Mr Driver valiantly tried to distinguish *Browning* on the basis that it concerned information contained in licences, namely a liberty to do something on terms that were laid down by the relevant public authority on a "take it or leave it" basis. There was, therefore, no element of negotiation or mutual agreement. However, as Ms Littlewood observed, a licence is simply one form of contract. Moreover, there is an obvious analogy between the present case and *Browning*. Both cases concern the identities of exporters in a controversial trade who provided information, including their identities, to a public authority; the fact that one was to claim compensation and the other was to apply for a licence is not material. *Browning* is also directly concerned with the significance of a party's name. It is high authority for the proposition that names are not mutually agreed terms, but rather factual information obtained by the public authority from the applicant, and so engage section 41(1)(a). It cannot be the case that rights regarding confidential information are determined by the happenstance of how the public authority processes the information it has obtained.

22. Mr Driver advanced several other arguments in support of his submission that the First-tier Tribunal had adopted the correct approach to section 41(1)(a). Most notably, he emphasised the principles of transparency and accountability underpinning FOIA and referred to the Commissioner's acknowledged role as guardian of FOIA. He expressed his concern that the Commissioner's approach to section 41(1)(a) would drive the metaphorical coach and horses through the provision. A threshold provision which represented a minor and little-used exemption would now, he suggested, have much wider ramifications. As he pointed out, there must be thousands or even millions of public sector contracts involving expenditures of billions of pounds. If the Commissioner's reading was correct, then the public would be denied the right to see the names of those individuals and entities contracting with public authorities.

23. I do not doubt the sincerity of Mr Driver's concerns. However, I consider they are misplaced for a number of reasons. In no sense was Ms Littlewood advocating the redaction of names in public sector contracts on a blanket basis. Moreover, the Commissioner's reading is entirely consistent with the Court of Appeal's judgment in *Browning*, and I am unaware of any evidence (anecdotal or otherwise) that section 41(1)(a) has been relied upon inappropriately in the intervening six years. In very many cases the names of parties to public sector contracts will be in the public domain anyway, and so the section 41 exemption will simply not arise. Where section 41 is in play, the heavy lifting, as Ms Littlewood put it, will be done in the context of section 41(1)(b), where the public interest in transparency can be properly weighed along with other material factors. Furthermore, and in any event, the present case did not concern a public sector contract in the conventional sense, e.g. for the provision of goods or services, but an out of court settlement, in respect of which the presumption usually is that confidentiality applies.

24. Mr Driver also put forward a superficially attractive linguistic argument, developed more fully in his written response to the Commissioner's appeal. This turned on the plain meaning of section 41(1)(a). His submission was that the withheld information had not been *obtained by* the Council but rather *provided to* the Council by the exporters, who were acting entirely on their own initiative. In doing so, he relied on the Shorter OED's primary definition of the verb 'to obtain' as meaning to secure or gain as the result of request or effort. Mr Driver stressed that FOIA uses the verb in its active sense and the subject of the verb is clearly the public authority. Accordingly, for the purposes of section 41, information is only exempt if it is acquired by the public authority as a result of its own request or other initiative. Ingenious though this argument is, it cannot stand against the clear authority of the Court of Appeal's decision in *Browning*. Furthermore, there was no suggestion on the facts in *Browning* that DBIS actively solicited the exporters to apply for licences and provide their names.

25. Mr Driver also sought to develop a more general argument about the importance of transparency in public life e.g. by reference to section 26 of the Local Audit and Accountability Act 2014 and the Local Government Transparency Code 2015. However, section 26 does not provide an absolute right to inspect documents protected by commercial confidentiality or which contain personal information. In any event, the governing legislative code in the present appeal is FOIA.

26. It follows from the above that the Commissioner's first ground of appeal succeeds.

Ground 2: were the exporters' names mutually agreed terms?

27. The Commissioner's second ground of appeal was that the Tribunal had erred in law in finding that the parties' names were a mutually agreed term in each settlement agreement. At the end of paragraph 38 of its decision, the Tribunal reasoned as follows:

> "… the names of the contracting parties are an essential part of the mutually agreed terms in each settlement agreement. It would be an artificial distinction to distinguish the names of the parties from all other contractual terms."

28. In doing so, Ms Littlewood submitted that the Tribunal had erred in law; the parties' names were not "mutually agreed terms" – the parties' names were facts and non-negotiable. As such, the Tribunal had fallen into error by failing to make a distinction between the contracting parties' names and the mutually agreed terms of the settlement agreements. The Commissioner's own guidance and the tribunal's decision in *Derry City Council* were concerned with the contents of the contract and not the identities of the contracting parties. Ms Littlewood relied on the dicta of Lord Millett in *Homburg Houtimport BV v Agrosin Ltd* [2004] 1 AC 715 at 794C. One of the key issues in that shipping case was the identity of the parties to the bills of lading. Lord Millett explained the position as follows:

> "175. The identity of the parties to a contract is fundamental. It is not simply a term or condition of the contract. It goes to the very existence of the contract itself. If it is uncertain, there is no contract. Like the nature and amount of the consideration and the intention to create legal relations it is a question of fact and may be established by evidence…"

29. Mr Driver invited me to uphold the First-tier Tribunal's reasoning. His argument was that the parties' names were an essential part of each settlement agreement and it was indeed artificial to distinguish those names from other contractual terms. He out forward a creative argument to counter Ms Littlewood's reliance on Lord Millett's dicta. Mr Driver pointed out Lord Millett's observation that a party's name was "not simply a term or condition of the contract". This, Mr Driver contended, meant that the parties' names were intrinsic terms or conditions of the contract as well as being something else.

30. I am not persuaded by Mr Driver's submission. Even if a party's identity is a term of the contract (in the sense e.g. of a clause providing that "the contracting parties are AB and CD"), that identity cannot by any stretch of the imagination be described as a "mutually agreed" term. A party's identity goes to the core of its legal personality and is a non-negotiable fact. As Lord Millett explained, it "goes to the very existence of the contract itself. If it is uncertain, there is no contract".

31. Instead, I prefer Ms Littlewood's analysis. The Tribunal misdirected itself by focussing on the "mutually agreed terms". The relevant issue under section 41 was not whether the parties' names were distinguishable from the other contractual terms but rather whether those names had been obtained in the first instance by the public authority from third parties. As the Tribunal itself had noted (at para 38), the exporters had disclosed their names to TDC by making a claim for compensation in the first place. The Tribunal took its collective eye off the ball in that respect.

32. The second ground of appeal therefore succeeds.

Ground 3: did the Tribunal err in its approach to the additional exemptions?

33. The Commissioner's third ground of appeal was that in refusing TDC's application to rely on two additional exemptions, the First-tier Tribunal had failed to take into account a relevant consideration, namely fairness to the five exporters concerned.

34. The background was that in its skeleton argument, filed just over a fortnight before the first instance hearing, TDC had sought permission to rely on sections 42 (legal professional privilege) and section 43 (commercial interests). The Tribunal dealt with the preliminary issue on additional exemptions at paragraphs 14-21 of its decision. The Tribunal reviewed the opposing arguments (paras 14-16), decided it would not accede to the application (para 17) and explained its reasoning (paras 18-21).

35. Ms Littlewood's submission was that, in refusing TDC's application, the First-tier Tribunal had failed to have regard to the issue of fairness to the five exporters whose interests were most likely to be prejudiced by the refusal to permit reliance on the two additional exemptions. While recognising that there was a high bar for an appellate court or tribunal to interfere in a case management decision, she contended that the Tribunal had failed to take into account matters which should have been taken into consideration. As such, the Tribunal's decision was accordingly "so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge" (*Walbrook Trustee (Jersey) Ltd v Fattal* [2008] EWCA Civ 427 at [33] – and see to the same effect the authorities discussed in *Wrottesley v HMRC* [2015] UKUT 637 (TCC) at [9] to [13]).

36. Strictly speaking, given the Information Commissioner has succeeded on the first two grounds of appeal, there is no need to decide this third ground. However, in deference to Ms Littlewood's careful arguments, I will address the point. In sum, I do not find this ground made out. It is not just that the bar for appellate interference in first instance case management decisions is a high one. It is also that a pragmatic view must be taken of the adequacy of the First-tier Tribunal's reasoning. As Lord Hope stated in *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19, it is:

> "well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. 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" (at para [25]).

37. Furthermore, the extent of any reasons required for an interlocutory decision will be very much context-specific and will typically be short; see e.g. *Carpenter v Secretary of State for Work and Pensions* [2003] EWCA Civ 33 and *KP v Herts CC* (SEN) [2010] UKUT 233 (AAC). In the present case the First-tier Tribunal was plainly alive to the issue of the potential prejudice to the five exporters (see e.g. its reasons at paras 10b and 11c). The mere fact that the Tribunal omitted specifically to mention the exporters' interests in its discussion and analysis at paras 14-21 does not mean they were disregarded, not least as the exporters' interests were at the heart of the public authority's claim to rely on the new exemptions of legal professional privilege and commercial interests.

38. It follows that I dismiss the third ground of appeal, although this makes no difference to the outcome.

One final matter

39. There is one final matter to mention. This was a case in which the Information Commissioner did not take an especially active role in the original First-tier Tribunal proceedings. True, the Commissioner filed a written response, settled by counsel (not Ms Littlewood) to Mr Driver's appeal. This indicated that the Commissioner considered the matter suitable for a paper hearing and (without meaning any disrespect) did not propose to attend any oral hearing, being "conscious of the need to steward the public purse" (at §4). However, the Commissioner helpfully prepared and provided the bundles for the hearing. As anticipated, the Commissioner did not then send a representative to the hearing.

40. The result was that the First-tier Tribunal did not have the benefit of an up to date response from the Commissioner to all of Mr Driver's carefully researched arguments. Her original written response was dated 27 November 2017. Since then there had been a 5-page response from TDC (12 December 2017) and a detailed reply by Mr Driver (25 February 2018), running to over 20 printed pages. In the course of this, Mr Driver raised for the first time (and this is not meant as any criticism) legal arguments based on the *Derry City Council* and *Department of Health* cases. I further note that when giving permission to appeal, the First-tier Tribunal observed that it had not been made aware of any authority on the question of whether the names had been obtained by TDC rather than being mutually agreed terms in the settlement agreement.

41. Had the Information Commissioner applied for permission to file a further written submission in response to Mr Driver's reply on his appeal, or changed her mind and opted for her representative to attend the oral hearing, then it is entirely possible the Tribunal's attention would have been drawn to relevant case law such as *Browning* and *Homburg Houtimport BV v Agrosin Ltd*. That may in turn have avoided the need to have this appeal to the Upper Tribunal. As it is, however, Mr Driver is still waiting for his substantive grounds of appeal to be determined and both he and TDC (as well as the Commissioner herself) have been put to trouble and expense in contesting these appellate proceedings. The Commissioner's decision not to appear at first instance may be seen as a false economy.

42. I appreciate the Information Commissioner does not have a bottomless purse and simply cannot be represented at all First-tier Tribunal hearings. I also recognise that hindsight is a wonderful advantage, but the controversial nature of the subject matter in the present appeal was such that perhaps alarm bells should have been ringing. Obviously, the working practices of the Commissioner's legal department are a matter for her, but I would hope that the decision not to appear at a final hearing is kept under review as new submissions are made. Certainly, in this case at least, greater engagement on the Commissioner's part throughout the First-tier Tribunal proceedings would have been helpful to all concerned.

Conclusion

43. I therefore allow the Information Commissioner's appeal on the first and second grounds (but not the third) and remit the case to a freshly constituted First-tier Tribunal, subject to the directions above.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue on 26 November 2020