



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

**Appeal No. UA-2021-001979-GIA
[2024] UKUT 178 (AAC)**

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

Between:

Mr S Dally

Appellant

- v -

The Information Commissioner

Respondent

Before: Upper Tribunal Judge Mitchell

Hearing:

6 August 2023, conducted remotely from the Rolls Building, central London, with both parties appearing by way of video-link.

Representation:

Appellant: In person.

Respondent: Mr B Mitchell, of counsel, instructed by the Solicitor to the Information Commissioner.

DECISION

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

The decision of the First-tier Tribunal, taken on 15 February 2021 under case reference EA 2020/0252, involved the making of an error on a point of law. Under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal sets aside the First-tier Tribunal's decision. Under section 12(2)(b)(i) of the 2007 Act, the

Upper Tribunal remits this case to the First-tier Tribunal for reconsideration in accordance with the following directions:

(1) The First-tier Tribunal is to re-decide Mr Dally's appeal against a decision notice given by the Information Commissioner on Mr Dally's complaint against Knowsley Council's refusal to disclose certain information to him under the Freedom of Information Act 2000.

(2) The appeal is to be decided by a differently constituted First-tier Tribunal.

(3) The First-tier Tribunal is to hold a hearing before deciding Mr Dally's appeal.

(4) If either party wishes to rely on any further written evidence or submissions, these are to be received by the First-tier Tribunal within **one month** of the date on which this decision is issued.

(5) The First-tier Tribunal is to make arrangements to ensure that the Upper Tribunal's closed reasons for its decision (contained in a separate document) are stored securely, in accordance with the Tribunal's document retention policies, and not disclosed to Mr Dally.

Directions (3) and (4) above may be varied by direction given by the First-tier Tribunal.

(OPEN) REASONS FOR DECISION

Glossary

1. In these reasons:

- "1963 Act" means the Animal Boarding Establishments Act 1963;
- "2018 Regulations" means the Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018;
- "Commissioner" means the Information Commissioner;
- "Council" means Knowsley MBC;

- “DEFRA” means the Department for the Environment, Farming and Rural Affairs;
- “FOIA” means the Freedom of Information Act 2000;
- “MDH” means Merseyside Dogs Home.

Background

2. This case concerns Mr Dally’s request that the Council disclose to him certain information related to MDH (the request itself is set out in paragraph 4 below). To put the relevant request for information in context, I shall set describe some prior correspondence connected with the Council’s arrangements for dealing with stray dogs:

(a) 14 February 2019, the RSPCA wrote to the Council’s Chief Executive:

“...complaints allege that [Merseyside Dogs Home] does not have a dog boarding licence which it would require as it has the stray contract from Knowsley Council.

I would be grateful if you could let me know if Knowsley MBC licences Merseyside Dogs Home and if so has an inspection of its premises been completed since the [2018 Regulations] came into effect in October 2018...”;

(b) 19 February 2019 at 14:19, a Council official emailed DEFRA:

“Can you please advise us as to whether rehoming centres operated by charities require to be licensed under [the 2018 Regulations]. Also do stray dog reception centres need to be licensed. We have one site which is a charity rehoming centre where they board dogs which they own while they try to find them new homes. The same site also hosts a stray dog reception centre, where dog wardens bring strays to be assessed before being transferred to a licensed establishment in another borough.

It is our opinion that neither the charity rehoming centre nor stray dog reception centre currently need to be licensed under [the 2018 Regulations].

Any clarification you could provide will be welcomed”;

(c) 19 February 2019 at 15:07, a DEFRA official responded by email to the Council’s email of the same date:

“the intention was not to catch rehoming centres or stray dog reception centres. We are separately considering the licensing of rehoming centres...”;

(d) 20 February 2019, a Council official emailed Mr Dally:

“...it is our understanding that Merseyside Dogs Home operates as a charity rehoming centre/reception centre for stray dogs and that those dogs are then transported to licensed facilities for boarding. The Council therefore has no power to licence the Dogs Home in these circumstances.

Despite our previous legal advice on this matter we have recently clarified the position with DEFRA so that we could be certain that our information was correct. DEFRA have advised that they are considering the future licensing of rehoming centres. They have also confirmed that the current licensing regime does not apply to rehoming or stray dog reception centres of this nature...”;

(e) 28 March 2019, the Council’s Chief Executive wrote to the RSPCA in response to their letter of 14 February 2019:

“...under section 149 of the Environmental Protection Act 1990...where the owner of a stray dog cannot be identified, we are then legally obliged to kennel the dog for seven days...

“Animal Wardens Limited... provides a commercial service to enable local authorities to fulfil [their responsibilities under section 149]. The company is currently contracted to provide the stray dog collection and kennelling service for...Knowsley Council...The arrangement was that Animal Wardens Limited would first seek to reunite lost dogs with their owners and then, where this was not possible, then seek to rehome unwanted dogs as far as possible.

...the service provided by Animal Wardens Limited...allowed stray dogs to be rehomed with new families and therefore minimised the need for dogs to be euthanised after the statutory seven-day period...

Under the contract, the local authorities pay Animal Wardens Limited the costs associated with boarding dogs for the statutory seven-day period (including the costs of accommodation...). The contract makes it clear that all stray dogs...must be boarded at a fully licensed kennel. Dogs cannot be boarded at Merseyside Dogs Home for the seven-day statutory period, as Merseyside Dogs Home does not have the relevant licence.

All stray dogs...are initially taken to Merseyside Dogs Home for assessment...most dogs...are reunited with their owners very quickly...so dogs are kept at Merseyside Dogs Home for a maximum of 24 hours to enable them to be reunited with their owners as soon as possible.

The contract requires all dogs which are not claimed within that initial 24-hour period to be transferred to licensed kennels, where they will be kept for up to seven days as required by legislation...

The four councils involved in the contract are fully aware of the relationship between Animal Wardens Limited and Merseyside Dogs Home – the nature of the ownership and governance is transparent and was declared before the contract was awarded.

Merseyside Dogs Home

...Merseyside Dogs Home operates in the manner outlined above. It is a charitable rehoming centre/stray dog reception site which is currently exempt from requiring a licence under the [2018 Regulations].

I understand that the RSPCA and a number of Members of Parliament are now aware of this exemption in the legislation and have called upon the Government to address the situation...

Nevertheless, at the present time (and assuming that Merseyside Dogs Home continues to operate as a charitable rehoming centre for dogs which they own

and/or as a reception centre for stray dogs which are then transported to licensed facilities), the Council has no power to license the facility.

While we have taken previous legal advice on this matter, we have recently (in view of the interest which you have raised) sought further clarity from [DEFRA], so that we could be absolutely certain that our interpretation was correct. The Department has confirmed that the licensing regime does not apply to stray dog rehoming or reception centres of this nature. Should the Government introduce separate licensing arrangements for such centres at some future point, we will take the appropriate licensing action immediately.

...Whilst we have no statutory duty to licence and inspect Merseyside Dogs Home, the facility must still comply with the requirements of the Animal Welfare Act...

...As part of our ongoing investigation into [allegations made about Merseyside Dogs Home], Council animal welfare officers carried out an unannounced visit to Merseyside Dogs Home...and found no significant concerns or evidence to suggest that the facility was operating unlawfully...”;

(f) on 29 March 2019, Mr Dally’s M.P. emailed him repeating, in substance, the content of the Council’s letter of 28 March 2019 to the RSPCA (a similarly worded letter had also been sent to the M.P.).

3. The Commissioner believes that Mr Dally’s underlying concern is that MDH requires a licence to operate under the 2018 Regulations but that the Council have wrongly failed to require it to obtain a licence.

4. I now come to Mr Dally’s request for information, made to the Council on 11 September 2019:

“(1) Please provide me with a copy of the advice received by DEFRA and a copy of all correspondence between Knowsley Council and DEFRA relating to the advice provided by DEFRA, to which [*name of official redacted*] refers. If no correspondence exists, please provide me with a note or notes of any telephone or face to face discussions with DEFRA.

Please confirm specifically whether or not DEFRA advised that the commercial boarding by Merseyside Dogs Home of stray dogs, which did not belong to them, was licensable activity.

(2) Please provide me with details of the previous legal advice relating to the kennelling of stray dogs to which [*name of official redacted*] refers, including the specific legal advice sought and the legal advice received. Again, if no actual correspondence exists, please provide me with a note or notes of any telephone or face to face discussions relating to the advice received.

Please confirm specifically whether or not the previous advice stated that the commercial boarding by Merseyside Dogs Homes of stray dogs, was licensable activity.”

5. The Council provided the information described in the first part of Mr Dally’s request but not that in the second part. The Council relied on section 42(1) of FOIA, which provides that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information. I note that, while this appeal has focussed on withheld legal advice, the withheld information also included an email in which a Council environmental health official sought legal advice (see paragraph 24 of the Commissioner’s decision notice).

The Information Commissioner’s decision

6. The Commissioner rejected Mr Dally’s complaint against the Council’s refusal to provide the information sought in the second part of his request. The Commissioner decided that the Council correctly determined that the information fell within section 42(1) of FOIA, and agreed that the public interest in maintaining this exemption from disclosure outweighed the public interest in disclosure.

7. Paragraphs 39 and 40 of the Commissioner’s decision notice took on significance in these proceedings and so I shall set them out in full:

“39. The Commissioner has reviewed the withheld correspondence carefully. While she is unable to specify the contents in detail, she would note that, while it relates to MDH, it dates from several years ago and does not relate specifically to the requirements for MDH (nor any other premises) to be licensed.

40. As such, she is satisfied that the email seeking advice does not misrepresent facts about MDH in the manner suggested by the complainant. Nor indeed does it relate to the Animal Welfare Regulations 2018, dating, as it does, considerably before that legislation came into force.”

8. The Commissioner concluded that there was no compelling reason favouring disclosure of the information. The balance of public interests favoured maintaining the section 42(1) FOIA exemption.

First-tier Tribunal's decision

9. Mr Dally appealed unsuccessfully to the First-tier Tribunal against the Commissioner's decision notice. The Tribunal found that there was no public interest in disclosure of the information sought by Mr Dally and dismissed his appeal. Regarding the arguments advanced by Mr Dally, the Tribunal's reasons included the following:

(a) while Mr Dally made claims about the current legality of MDH's operations, and said that an MP had been misled, the Council's letter to the MP, “explicitly states that the advice was taken some time ago and the Council has confirmed with DEFRA that its interpretation is correct” (paragraph 10 of the Tribunal's reasons);

(b) questions as to the current legality of MDH's operations were distinct from “the question of legal advice obtained some time before the [2018 Regulations] made some changes to the position of some kennels” (paragraph 11);

(c) disclosure of old legal advice would not assist in resolving any problems at MDH.

10. I should add that paragraph 8 of the First-tier Tribunal's reasons records the Commissioner's acknowledgement that paragraphs 38 and 39 of his decision notice contained factual errors “relating to claims made” by Mr Dally. However, these errors were not considered relevant to the merits of Mr Dally's appeal.

Legislative background

Freedom of Information Act 2000

11. The general right of access to information held by public authorities under section 1(1)(b) of FOIA is subject to the provisions of section 2 (section 1(2)).

12. Section 2 of FOIA gives effect to the various exemptions from disclosure provided for in Part II of the Act. Unless a provision confers absolute exemption from disclosure, section 2(2) provides:

“(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –
... (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

13. Section 42(1) of FOIA, which is within Part II of the Act, provides that “information in respect of which a claim to legal professional privilege... could be maintained in legal proceedings is exempt information”. It is not disputed that the withheld information is exempt information under section 42(1).

Environmental protection legislation (stray dogs)

14. Section 149(3) of the Environmental Protection Act 1990 confers on an appointed local authority officer power to seize and detain stray dogs. If no owner claims a stray dog within seven days of its seizure, the officer has power to dispose of the dog in various ways, which include “giving it to an establishment for the reception of stray dogs” (section 149(6)).

15. The Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018 (2018 Regulations) came into force on 1 October 2018. The 2018 Regulations replaced, in relation to England, the Animal Boarding Establishments Act 1963. Under regulation 3, a local authority is the licensing authority for any licensable activity carried on at premises in its area. It is not disputed that the Council is a licensing authority under the 2018 Regulations.

16. The licensable activities specified in Schedule 1 to the 2018 Regulations include the following:

“4. Providing or arranging for the provision of accommodation for other people’s cats or dogs in the course of a business on any premises where the provision of that accommodation is a purpose of the business by—

- (a) providing boarding for cats;
- (b) providing boarding in kennels for dogs;
- (c) providing home boarding for dogs; or
- (d) providing day care for dogs.”

17. In determining whether an activity is being carried on in the course of a business, paragraph 1 of Schedule 1 to the 2018 Regulations requires the licensing authority to take into account whether the operator “earns any commission or fee from the activity”.

18. Paragraph 5 of Schedule 1 to the 2018 Regulations provides that the licensable activity specified in paragraph 4 “does not include keeping a dog...on any premises pursuant to a requirement imposed under, or having effect by virtue of, the Animal Health Act 1981”. The Control of Dogs Order 1992 is made under section 13 of the 1981 Act. Article 4 of the 1992 Order provides for certain uncollared dogs to be seized and treated as stray dogs under section 149 of the Environmental Protection Act 1990. As I have mentioned, section 149(3) permits an appointed local authority officer to seize and detain a stray dog. Subject to various conditions, where a stray dog has been detained for seven clear days, the appointed officer may “dispose of the dog” (section 149(6)).

19. Where the licensable activity under the 2018 Regulations is providing day care for dogs, paragraph 20 of Schedule 4 imposes a general licence condition that “no dog may be kept on the premises overnight”.

Grounds of appeal

20. In granting Mr Dally permission to appeal against the First-tier Tribunal’s decision, the Upper Tribunal said this:

“18. I note that Mr Dally does not seek disclosure [of information in the form of legal advice to which section 42(1) of FOIA applies] as part of a dispute directly connected to the subject matter of the advice...

19. I grant Mr Dally permission to appeal on the ground that the First-tier Tribunal arguably erred in law by making findings of fact for which there was no supporting evidence and / or failed to give adequate reasons for its findings of fact. The findings of fact in question are:

(a) the finding that the council's March 2019 letter 'explicitly stated' that advice was taken some time ago. The third page of the letter refers to 'previous legal advice' but I cannot identify any part of the letter which says more than that the advice was taken at some point in the past which could, of course, be either fairly recently or some time ago. This aspect of the tribunal's reasons related to Mr Dally's argument that the council misrepresented that it had taken legal advice about the application of the 2018 Regulations to MDH and the council's stray dog arrangements;

(b) the finding that DEFRA confirmed that the council's "interpretation is correct". Currently, and subject to the Commissioner's response to this appeal, my reading of the Tribunal's reasons is that it found DEFRA had confirmed its agreement with the council's view that its particular arrangements for discharging its statutory responsibilities in relation to stray dogs complied with the law. The Council's email of 19 February 2019 asked DEFRA whether a charity rehoming centre and a stray dog reception centre would be required to be licensed. DEFRA's response was simply "the intention was not to catch rehoming centres or stray dog reception centres". The Council's letter of March 2019, after a detailed description of the relevant contractual arrangements, stated that DEFRA "has confirmed that the licensing regimes does not apply to stray dog rehoming or reception centres of this nature". Arguably, the Tribunal's reasons failed adequately to explain why DEFRA's very general statement amounted to confirmation that the Council's interpretation of the law, as it applied to the Council's arrangements, was correct.

20. It is at least arguable that the above findings led to the Tribunal failing adequately to deal with Mr Dally's argument that the factors tending to support the public interest in disclosure of the withheld legal advice included the Council's misrepresentation of advice received about the lawfulness of its arrangements for dealing with stray dogs in its area. This is the second ground of appeal.”

21. The parties' arguments have focussed on ground 1. Having reflected on the content of ground 2, I agree with the parties' approach. Ground 2 is really concerned with materiality (in the event that the arguable errors described in ground 1 are made out) and it was unnecessary for materiality to have been made the subject of a discrete ground of appeal.

The Commissioner's arguments

22. These reasons describe the Commissioner's 'open' arguments that is arguments which may be presented to Mr Dally without revealing the nature of the withheld information. A separate document, containing the Upper Tribunal's 'closed' reasons, deals with the Commissioner's closed arguments.

General principles

23. The Commissioner argues that Mr Dally's case is 'essentially factual' and, accordingly, he cannot succeed unless he establishes that the First-tier Tribunal reached an irrational conclusion. As the Upper Tribunal said in *Callender Smith v the Information Commissioner and the Crown Prosecution Service* [2022] UKUT 60 (AAC):

"33...the Upper Tribunal is not engaged in re-performing the balancing of public interests itself but only determining if there was an error of law in the way in which the FTT struck the balance, for example by failing to take into account material matters, coming to an irrational conclusion or misinterpreting or misapplying the legislation and authorities on how to conduct the public interest balancing exercise."

24. As an expert tribunal, which is familiar with the application of the public interest balance under FOIA, the First-tier Tribunal's decisions warrant a degree of respect (see *Oxford Phoenix Innovation Limited v the Information Commissioner and the Medicines and Healthcare Products Regulatory Agency* [2018] UKUT 192, at [53]).

25. The Commissioner emphasises the inherent value in preserving and respecting legal professional privilege, which is reflected in a number of authorities: *DBERR v O'Brien & the Information Commissioner* [2009] EWHC 164 (QB), at [51]; *Cabinet Office v the Information Commissioner* [2014] UKUT 461 (AAC), at [50]; *Callender Smith* at [49]. The Commissioner submits that this is why maintenance of legal

professional privilege carries ‘inherent weight’ in section 2 of FOIA’s balancing of public interests; he relies on Wyn Williams J’s judgment in *DBERR v O’Brien and the Information Commissioner* [2009] EWHC 164 (QB):

“41...A person seeking information from a government department does not have to demonstrate that “exceptional circumstances” exist which justify disclosure. Section 42 is not to be elevated “by the back-door” to an absolute exemption...it is for the public authority to demonstrate on the balance of probability that the scales weigh in favour of the information being upheld. That is as true of a case in which section 42 is being considered as it is in relation to a case which involves consideration of any other qualified exemption under FOIA. Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise once it is established that legal professional privilege attaches to the document in question...

48...In the light of the consistent line taken by the Tribunal as to the weight to be attached to the public interest against disclosure in-built into legal professional privilege (an approach which I have found to be the correct one) it was incumbent upon the Tribunal in the instant case to give significant weight to that interest. Further the Tribunal was obliged to consider whether the weight to be given to the public interest considerations militating against disclosure were countered by considerations of at least an equal weight which supported an order for disclosure.

...51. [that inherent weight] means that it was not necessary to demonstrate any specific prejudice or harm from the specific disclosure of the documents in question.

...53...The in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight. Accordingly, the proper approach for the Tribunal was to acknowledge and give effect to the significant weight to be afforded to the exemption in any event; ascertain whether there were particular or further factors in the instant case which pointed to non-disclosure and then consider whether the features supporting disclosure (including the underlying public interests which favoured disclosure) were of equal weight at the very least.”

26. The caselaw’s recognition of the significant inherent weight given to the public interest in non-disclosure (preserving legal professional privilege), in a section 42 case, is explained by the wider importance of respecting legal professional privilege. As Lord Taylor CJ explained in *R v Derby Magistrates’ Court ex parte B* [1996] AC 487, at 507Dff:

“The principle which runs through all these cases...is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.”

27. The ‘place’ of legal professional privilege as a fundamental condition of the administration of justice, submits the Commissioner, means that, even in the absence of case-specific public interest prejudice occasioned by disclosure, there remains an inherent prejudice against disclosure. This must be recognised in the application of section 2’s balancing of public interests (*Cabinet Office v the Information Commissioner* [2014] UKUT 461 (AAC)). The inherent weight in maintaining legal professional privilege may, of itself, be sufficient to outweigh the public interests in disclosure. As authority, the Commissioner relies on *Callender Smith*, at [49]:

“The FTT was entitled to reject many of the CPS’s additional factors...so as to, essentially, only leave the inherent weight in the “non-disclosure” side of the scales. There is no error of law in so doing – the authorities cited permit that the inherent weight afforded to non-disclosure of LPP material alone may outweigh the pro-disclosure factors.”

Specific arguments

28. The key issue before the First-tier Tribunal, submits the Commissioner, was whether the Council misrepresented the content of the “previous legal advice” to which it referred in correspondence. In this respect, the Commissioner argues that the Council’s representation contained three core elements: (i) MDH operates as a charity/rehoming centre to which stray dogs are transported from other licenced premises; (ii) the Council has no power to licence such premises; (iii) the Council had previously taken legal advice “with the implication that that legal advice confirmed its understanding that the LA had no power to licence such premises”. The Commissioner

invites the Upper Tribunal to consider those core elements against the content of the withheld information (including the closed legal advice).

29. The Commissioner argues that, over the course of this case, Mr Dally's description of the supposed misrepresentation has altered:

(1) initially, Mr Dally argued for a compound misrepresentation: the Council misrepresented the facts of MDH's operations to its own lawyer so that the Council's repetition of the advice received misled the public;

(2) during the Commissioner's investigation, and before the First-tier Tribunal, Mr Dally questioned whether the Council had been advised that MDH did not require a licence, and, if no such advice had been received, the Council's misled those with whom it corresponded about MDH. At this point, Mr Dally considered that the content of the advice had been misrepresented by the Council in connection with the Commissioner's investigation;

(3) Mr Dally argues that the misrepresentation arose because the Council indicated that the "previous legal advice" related to the 2018 regulations and not the predecessor licensing regime under the 1963 Act.

30. Having set out the content of the 'previous advice' in a closed portion of the Commissioner's written submissions, the open submissions go on:

"32...To the extent that the [Council] subsequently indicated that it had advice that MDH did not need a licence, it was clearly correct to say that it had received this advice (whether that advice is substantively correct or not is not a matter for FOIA and the Commissioner expresses no opinion on it). Consequently, [Mr Dally's] second formulation of the misrepresentation (during the Commissioner's investigation and before the FTT...) is not borne out.

33. [Mr Dally's] first formulation of the misrepresentation (that the [Council] misrepresented the facts such that the advice was given on an incorrect premise...) also is not borne out by the contents of the advice. The request for advice from the [Council's] officer states the [Council's] understanding of the facts:

"[redacted: closed]"

34. [redacted: closed] See, for example, the [Council's] statement to [Mr Dally] on 20 February 2019:

“It is our understanding that [MDH] operates as a charity rehoming centre/reception centre for stray dogs and that those dogs are then transported to licensed facilities for boarding.”

35. Even if [Mr Dally] is correct that the [Council] is factually mistaken about how MDH operates, it is not a misrepresentation of the advice it received on the basis of its understanding of the facts, which it has publicly stated elsewhere. [Mr Dally's] first formulation of the alleged misrepresentation cannot be borne out as a result.

36. [Mr Dally's] first formulation of the alleged misrepresentation is that the [Council] has stated publicly that it received advice in relation to the current rather than previous legal regime...However, the [Council's] statements did not expressly state that it received advice under one legal regime or another. It stated only that it had received “*previous*” advice without elaboration. The [Council's] statements...also do not rely heavily on the existence of the legal advice but rather present it as background context to the core point, which is the [Council's] substantive understanding of the licensing rules and its view that DEFRA's communications supported that understanding. While the statements could be construed in the manner advanced by [Mr Dally], they could reasonably also be interpreted simply as stating a background issue...The Commissioner considers that the most appropriate interpretation of the [Council's] statements is that it referenced the previous legal advice as a background issue to underline the consistency of its application and interpretation of the old and current legal regimes, which are broadly similar in substance. It would not be right to characterise this as a misrepresentation. However, [Mr Dally] did not raise this issue before the FTT as an issue for it to decide, so it had no opportunity to make findings of fact on exactly how those statements should be interpreted. It is inappropriate now for [Mr Dally] to adopt one (highly contestable) interpretation of the statements and base his appeal upon it.”

31. Ground 1 is based, submits the Commissioner, on the factual assertion that the Council misrepresented the advice received. However, Mr Dally's first two formulations of the alleged misrepresentation are unarguable on the facts. The third formulation was

not advanced before the First-tier Tribunal and it is not open to Mr Dally to rely on it in these proceedings. In any event, this formulation is factually flawed and would have been rejected by the Tribunal had it been advanced. For these reasons, it was open to the Tribunal to find that the Council did not misrepresent the advice and decide the appeal on that basis. In the absence of misrepresentation, Mr Dally's appeal to the First-tier Tribunal was bound to fail.

32. Turning to the content of ground 1, its first aspect concerns the First-tier Tribunal's finding that the Council's letter to the local MP/RSPCA "explicitly stated that the advice was taken some time ago". The Commissioner accepts that the letter included no such statement. However, the issue of law is whether the Tribunal "made a perverse error" in finding that the letter conveyed that the advice was taken some time ago. The letter itself referred to "previous" legal advice and went on to state that the issue had been revisited "recently". This conveys that the previous advice was not given recently. The phrase 'not recent' may reasonably be interpreted as 'some time ago'. The Tribunal's finding was not perverse. Mr Mitchell, for the Commissioner, also submits that, if properly analysed, the regulatory triggers under the 1963 Act and under the 2018 Regulations are, in substance, the same so that, if the Council did make a misleading statement, it was only at a superficial level and without any real substance.

33. The second aspect of ground 1 relates to the First-tier Tribunal's finding that the letter to the local MP/RSPCA stated that "the Council had confirmed with DEFRA that its interpretation is correct". It is argued that this conveyed DEFRA's agreement with the Council's view that its arrangements for dealing with stray dogs complied with the current law, which is said not to be a supportable interpretation of DEFRA's very general statement that "the intention was not to catch rehoming centres or stray dog reception centres. We are separately considering the licensing of rehoming centres...". The Commissioner argues that this is an "over-reading" of the Tribunal's reasons. While the Council did not raise the case of MDH with DEFRA, its factual understanding was that MDH was a rehoming centre or stray dog reception centre. Therefore, it was reasonable for the Council to infer that (a) the law operated as DEFRA intended (no licence required for rehoming centres); and (b) if MDH was required to hold another type of licence, DEFRA would have said so since it added that it was "separately considering" whether such a licensing system should be introduced. In turn, it was not perverse for the Tribunal to have agreed with that analysis.

34. In any event, submits the Commissioner, even if the First-tier Tribunal's findings were flawed, as described in ground 1, such errors would have made no difference to

the outcome and were immaterial. In paragraphs 11 and 12 of the Tribunal's reasons, it correctly found that the public interest could not be served by disclosure of the withheld legal advice. If the Upper Tribunal holds that the Tribunal's findings were legally flawed, it must go on to consider whether the Tribunal erred in law in its assessment of the public interest balance. The Commissioner submits that the Tribunal's balancing exercise did not involve any error of law:

(a) the issue for the Upper Tribunal is not whether it considers the Tribunal's decision to have been correct, it is whether the decision was lawful and not an irrational conclusion;

(b) the Tribunal's finding that there was no particular public interest in disclosure rested on its conclusion that the real public interest issue concerned whether the Council and MDH had acted lawfully. Disclosure of the legal advice was not necessary to assess that, as the Tribunal explained in paragraphs 11 and 12 of its reasons. This was a finding that was open to the Tribunal on the evidence. Throughout, Mr Dally's main concern has been whether the Council lawfully exercised its licensing functions. The Council has publicly stated its understanding of the law so that disclosure of the legal advice would serve little or no public interest. Indeed, disclosure would be contrary to the public interest given the inherent weight in favour of maintaining the protection of legal professional privilege;

(c) even if the Upper Tribunal were to find a public interest in disclosure, that would not invalidate the Tribunal's conclusion that disclosure would "erode the principle of legal professional privilege". And even if there had been a misrepresentation, and disclosure would advance the public interest, it would only do so to a moderate extent. Disclosure could not necessarily be said to command significant weight in the public interest balancing exercise and, absent that, the Tribunal's decision could not be considered unlawful. This is because disclosure would involve the erosion of "a fundamental condition on which the administration of justice as a whole rests": *DCLG v Information Commissioner & WR* [2012] UKUT 103 (AAC), quoting *R v Derby Magistrates Court ex parte B* [1996] AC 487, at 507.

35. If Mr Dally wishes to challenge the Council's exercise of its licensing functions, he may do so by, for instance, making a claim for judicial review. It follows that disclosure of the legal advice would serve little or no public interest and would in fact be contrary to the public interest given the inherent weight in favour of maintaining legal professional privilege. Furthermore, the legal advice sheds no light on the content of

DEFRA's advice so that "the transparency needed to see whether the LA correctly summarised DEFRA's position is shown by disclosing DEFRA's email of 19 February 2019". That email has already been disclosed.

Appellant's arguments

Whether the Appellant has changed his position / case

36. Mr Dally rejects the argument that he has changed position regarding the nature of the Council's misrepresentation. He argues that his position has not changed, rather it has "evolved due to the fact that further facts had been disclosed by the Commissioner in the DN". Mr Dally goes on:

(a) his 8 November 2019 request for review of the Council's refusal to disclose the withheld information argued that the Council made misrepresentations when seeking legal advice about whether MDH's activities were licensable. Mr Dally wrote:

"When seeking advice regarding the boarding of dogs at [MDH], Knowsley Council appears to have made at least two misrepresentations, namely the fact that [MDH] does not receive a fee for the boarding of stray dogs and that only dogs belonging to [MDH] are kennelled at their premises";

(b) the Council's letter to the local MP/RSPCA indicated that it had received legal advice to the effect that kennelling of stray dogs for up to 24 hours was not a licensable activity under the 2018 Regulations. At the internal review stage, Mr Dally did not know that the legal advice was sought several years ago (he learnt of this in the Commissioner's subsequent decision notice). Mr Dally reasonably assumed "at the time" that the advice was sought much more recently since it was described as advice about the kennelling of dogs under the 2018 Regulations, which had only recently come into force. He did not know, and could not have known, that the Council misrepresented this legal advice until made aware that the advice was sought 'several years ago'. Mr Dally's reliance on the letter to the local MP/RSPCA cannot properly be construed as him changing his position regarding the nature of the alleged misrepresentation;

(c) regarding the advice that the Council received from DEFRA, Mr Dally's stance has been consistent. The Council misrepresented that DEFRA had confirmed that kennelling of dogs at MDH did not require a licence. The Council did not provide

DEFRA with any description of MDH's activities so that DEFRA's response could not properly have been read as confirmation that MDH did not require a licence;

(d) before the First-tier Tribunal, Mr Dally argued that the letters to the local MP/RSPCA did not indicate that legal advice was received some time ago. The Council wrote that advice had been sought "on this matter", which could only have been reasonably read as a reference to the subject matter of the letter namely whether MDH was exempt from licensing under the 2018 Regulations. Moreover, this letter was written in response to a RSPCA enquiry about the application of the 2018 Regulations to MDH. Mr Dally did not, as the Commissioner now argues, at any point submit that the Council must have received incorrect advice. At all times, his case was that the Council could not have accurately described the advice received.

37. Insofar as the Commissioner's response to ground 1 is predicated upon Mr Dally's supposed change of position, it rests on false premises:

(a) the Commissioner's first formulation of the asserted misrepresentation does not reflect 'historical truth'. In any event, the Commissioner appears to concede that the Council sought legal advice on the basis that MDH "operates as a charity-rehoming centre/reception centre for stray dogs and that those dogs are then transported to licensed facilities for boarding". While the actual basis on which advice was sought remains unknown to Mr Dally, he submits that the Commissioner's argument show that, upon seeking advice, the Council did not disclose that MDH kennelled dogs on behalf of the Council for up to 24 hours in return for a fee. Whatever the basis for the advice and the precise nature of the arrangements made with MDH, the Council must have known that it was incorrect to describe their legal advice as having confirmed that stray dog kennelling by MDH for up to 24 hours was not licensable under the 2018 Regulations. The Council must also have known that DEFRA had not been asked to advise whether a licence was required by MDH;

(b) the supposed second formulation – advice may not have been received about MDH's need to obtain a licence – was based on paragraph 39 of the Commissioner's decision notice, which stated that the advice did not relate to the requirement for any premises to have a licence. Mr Dally was entitled to take that statement at face value until the Commissioner subsequently conceded that it was an inaccurate description. This supposed second formulation of the misrepresentation was attributable to the Commissioner's mistake, not any change of position by Mr Dally;

(c) the supposed third formulation of the alleged misrepresentation – the Council said that the previous legal advice related to the 2018 Regulations rather than the 1963 Act regime – is styled by the Commissioner as a new point that cannot be advanced before the Upper Tribunal on appeal and, in any event, is factually flawed. However, before the First-tier Tribunal Mr Dally argued that if the Council sought advice about the 1963 Act regime, its subsequent descriptions of the advice were clear misrepresentations. It is therefore simply incorrect to argue that this formulation of the misrepresentation was not part of Mr Dally’s case before the Tribunal. Regarding the Commissioner’s argument that, had the third formulation been before the Tribunal, it would have been bound to reject it, Mr Dally argues that this downplays the significance of the legal advice that the Council said it received by presenting it as ‘background context to the core point’ namely the Council’s understanding of the 2018 Regulations and its view that its understanding was supported by DEFRA. However, the reference to previous legal advice ‘on this issue’ was of fundamental importance in reassuring the local MP and the RSPCA that the Council correctly decided that MDH did not require a licence.

Ground 1

38. Regarding the first aspect of ground 1, Mr Dally submits that it is a misuse of language to equate the phrase “explicitly states that the advice was taken some time ago” (the First-tier Tribunal’s words) with the phrase “we have previously sought legal advice on this matter” (the phrase used in the Council’s letter). Moreover, the legal advice was clearly taken before the Council had contacted DEFRA and the letter to the RSPCA was written only 37 days after DEFRA’s advice was received. From that chronology, all that could have been deduced with any certainty was that the Council sought legal advice some time before 19 February 2019 (the date of the Council’s letter) and it was irrational for the Tribunal to have interpreted the Council’s letter as explicitly stating that the advice was taken ‘some time ago’. Given the relatively recent introduction of the 2018 Regulations, that interpretation could only have been intended to convey that the advice related not to the 2018 Regulations but to the 1963 Act. That was not a supportable interpretation, given the actual words used in the Council’s letter. Mr Dally further argues that the only reasonable interpretation of the Council’s letter was that legal advice had been taken recently and in connection with the licensing regime under the 2018 Regulations (it now transpires that this was not so). The Tribunal’s unjustified interpretation of the Council’s letter dealt a severe blow to Mr Dally’s case that the Council’s misrepresentation was a factor adding weight to the public interest in disclosure of the withheld legal advice.

39. Mr Dally's skeleton argument for the Upper Tribunal hearing identifies what he submits are significant differences between the 1963 Act regulatory regime and the 2018 Regulations. Mr Dally's argument may be that these differences support his case that the Council represented that they had taken advice on the application of the 2018 Regulations. He also argues that the Council perversely decided that MDH's activities were not licensable under the 2018 Regulations.

40. The second aspect of ground 1 concerns the First-tier Tribunal's finding that "the Council had confirmed with DEFRA that its interpretation is correct". The Commissioner's submissions are built, submits Mr Dally, on the assertion that, while the Council did not discuss MDH specifically with DEFRA, its factual understanding is that MDH is a rehoming or stray dog reception centre and that was the reference point for DEFRA's 'confirmation'. Mr Dally argues that this supposed understanding 'flies in the face' of the evidence before the Tribunal. The Council's letters to the MP and the RSPCA, written some 37 days after receipt of DEFRA's advice, show that the Council believed that MDH was not just a rehoming, or stray dog reception, centre. The Council was also fully aware that MDH kennelled dogs on behalf of the Council for up to 24 hours, in return for a fee. No reasonable tribunal could have found that the Council sought advice from DEFRA regarding its and MDH's actual kennelling arrangements.

41. Mr Dally rejects the Commissioner's argument that, even if the First-tier Tribunal erred, its error made no difference to the outcome. The Tribunal made a finding of fact that the Council did not misrepresent the legal advice, and the conclusions in paragraphs 11 and 12 of its reasons flowed from that finding. Misrepresentation was at the heart of this case (it was the main plank of Mr Dally's case that the public interest favoured disclosure) so that a flawed analysis of the misrepresentation question cannot be considered immaterial.

42. At the hearing, Mr Dally relied on the First-tier Tribunal's decision in *Crothers v Information Commissioner* (EA/2018/0074) in support of the proposition that the inherent weight in maintaining legal professional privilege may be overcome where the content of legal advice has been misrepresented.

43. At the hearing, Mr Dally also argued that the following considerations added weight to the public interest in disclosure of the withheld information:

(a) MDH continued to operate without a license despite kennelling stray dogs for up to 24 hours;

(b) the Council's public statement that a 2018 audit showed that MDH was complying with most of the conditions set in its contract with the Council was 'simply not true';

(c) another local authority has required Animal Wardens Ltd, which sub-contracts with MDH, to seek a licence;

(d) the Charity Commission took enforcement action to address a conflict of interests between Animal Wardens Ltd and MDH.

44. Mr Dally submits that, if this appeal succeeds, the preferable course is for the matter to be remitted to the First-tier Tribunal for re-hearing.

Closed session of hearing

45. There was a closed session during the hearing of this appeal before the Upper Tribunal and the submissions made during that session are dealt with in a closed version of these reasons. Following the closed session, the following 'gist' of the session, which was agreed with Mr Mitchell for the Commissioner, was communicated to Mr Dally in open session:

"The Commissioner's counsel made submissions which compared advice given by a council assistant solicitor, in response to a request for advice from an Environmental Health Officer, with the regulatory requirements under the 2018 Regulations.

Counsel argued that the regulatory triggers under both regulatory regimes were materially the same so that the Council's description of the advice given was not capable of being considered a misrepresentation. At least, in referring to 'previous advice', it is contestable which regulatory regime was being referred to and, as a result, cannot properly be considered a misrepresentation of the advice received."

46. In response to this 'gist', Mr Dally argued that the Council's Chief Executive Officer was very clear which regulatory regime was being referred to in his letters to the local MP and RSPCA. Mr Dally draws attention to the Officer's reference to MDH being 'currently exempt' so that, in referring to 'this matter', the Officer must have been

referring to the issue of MDH ‘escaping’ from the current regulatory net (under the 2018 Regulations).

Conclusions

What I am not deciding

47. I wish to make it very clear that I am not deciding any of the following questions:

(a) whether MDH’s activities were licensable under the 2018 Regulations;

(b) whether the Council failed properly to discharge its licensing functions under the 2018 Regulations or its statutory functions in relation to stray dogs;

(c) whether the Council misrepresented, or made misleading statements about, operations at MDH;

(d) whether the Council misrepresented or made misleading statements about legal advice given to it in connection with the licensing of dog kennels / accommodation;

(e) whether or not legal professional privilege is being used to shield the Council from being held properly accountable for the exercise of its licensing functions.

48. It is not necessary to decide any of those questions in order to decide this appeal which is why I say nothing about any submissions relating to those questions.

What was Mr Dally’s case before the First-tier Tribunal?

49. The Commissioner argues that Mr Dally’s case before the Upper Tribunal seeks to rely on a matter that was not part of his case before the First-tier Tribunal. The Commissioner styles this as Mr Dally’s third formulation of the alleged misrepresentation namely that the Council misrepresented that it had received legal advice as to whether MDH required a licence under the 2018 Regulations.

50. Mr Dally’s submissions to the First-tier Tribunal included the following:

“it is submitted that the Commissioner ought to have determined whether the Council did in fact receive legal advice, as it has stated, that no license was

required for the boarding of stray dogs at [MDH] on behalf of Animal Wardens Ltd. If no such advice was received, then the Council has clearly misled the public in stating that it was so advised.

...There is therefore a compelling public interest in disclosure of the legal advice, as this will confirm whether or not Knowsley Council did in fact seek advice as to whether the commercial boarding of dogs at [MDH] on behalf of Animal Wardens Ltd was licensable activity, and the extent to which the local MP, councillors and members of the public have been misled by the Council and by its sub-contractor [MDH]”.

51. In my judgment, the only tenable reading of those submissions is that Mr Dally advanced a case by reference to the question whether, under the current regulatory regime (the 2018 Regulations), MDH carried on a licensable activity. When those submissions were advanced (and the prior request for information made), MDH's activities could not have been licensable under the 1963 Act because that Act ceased to have effect in relation to England in October 2018. Given the phrasing of Mr Dally's submissions, and his correspondence with the Council about licences and MDH, whose focus was not on the question whether MDH had been correctly regulated under the 1963 Act, it is in my view clear that Mr Dally's case before the First-tier Tribunal included arguments that: the Commissioner erred by failing to address the question whether the Council received legal advice that MDH did not require a licence under the 2018 Regulations; if no such advice had been received, the Council's had misled the local MP and the public; in assessing the competing public interests for and against disclosure of the withheld information, weight should be given to the fact that disclosure would confirm the extent to which the Council had misled the local MP and the public. I therefore reject the Commissioner's argument that Mr Dally's case before the Upper Tribunal is formulated in such a way as to rely on a point that was not part of his case before the First-tier Tribunal.

Why this appeal succeeds

52. The Council's email to Mr Dally of 20 February 2019 included the words, “despite our previous legal advice on this matter, we have recently clarified the position with DEFRA so that we could be certain that our information was correct”. The Council's letter to the local MP/RSPCA said, “while we have taken previous legal advice on this matter, we have recently (in view of the interest which you have raised) sought further clarity from [DEFRA], so that we could be absolutely certain that our interpretation was

correct". The Commissioner's decision notice revealed that the Council's legal advice dated 'from several years ago' and the First-tier Tribunal itself said that it related to a time before the 2018 Regulations came into force. The First-tier Tribunal's decision notice was dated 22 July 2020, and the 2018 Regulations came into force on 1 October 2018.

53. The First-tier Tribunal found that the Council's letter to the local MP, which was in materially the same terms as its letter to the RSPCA, "explicitly states that the advice was taken some time ago". By 'some time ago', the Tribunal meant before the 2018 Regulations came into force; that is shown by paragraph 11 of the Tribunal's reasons which states that the current legality of MDH's operations is "distinct from the question of the legal advice obtained some time before the [2018 Regulations] made some changes to the position of some kennels".

54. The First-tier Tribunal's finding that the Council had 'explicitly' stated that the legal advice was taken some time ago clearly lacked any evidential support. The only explicit statement made by the Council relating to the age of the legal advice was that it was 'previous legal advice'. That would be of no consequence if the substance of the Tribunal's finding – that the Council's letter conveyed that legal advice was taken some time ago, before the 2018 Regulations came into force – was properly supported by the evidence and adequately reasoned. In my judgment, however, the finding was not adequately reasoned. Some intermediary explanation is required in order for 'previous legal advice' to be equated with 'advice taken some time ago'. As Mr Dally argues, 'previous legal advice' could mean advice given a few days ago or decades ago. Since Mr Dally's case before the Tribunal was that the Council had misleadingly given the impression that it had taken legal advice about whether MDH required a licence under the 2018 Regulations, the finding that the Council had itself said that the advice was taken 'some time ago' (which, according to the Tribunal, was before the 2018 Regulations came into force) needed to be explained because it dealt a severe blow to the prospects of Mr Dally's appeal succeeding. This is because Mr Dally's case was that the public interest in disclosing the withheld legal advice was given weight by the Council having misrepresented that it had received legal advice about whether MDH's activities were licensable under the 2018 Regulations. The absence of any explanation as to why 'previous legal advice' should be read as 'advice taken some time ago' renders the Tribunal's reasons inadequate.

55. The other aspect of ground 1 concerns the First-tier Tribunal's finding that "the Council has confirmed with DEFRA that its interpretation was correct". Why was this

relevant? As I understand it, Mr Dally's case before the Tribunal included that the Council's alleged misrepresentation of DEFRA's communication provided further support for the argument that the Council had misleadingly sought to convey the impression that the legality of current arrangements at MDH was not in doubt.

56. The finding that the Council had confirmed with DEFRA that "its interpretation was correct" appears in paragraph 10 of the First-tier Tribunal's reasons. That paragraph began by stating that Mr Dally "makes a number of claims about the current illegality of the arrangements" at MDH. The reference to 'correct interpretation' may have been intended to convey that the Council's interpretation of the current legality of arrangements at MDH was confirmed by DEFRA. However, another possible reading is that DEFRA simply confirmed the Council's understanding of the law relating to licensing of dog kennels, rather than confirmed the Council's understanding of how the law applied to the circumstances at MDH. If paragraph 10 is considered in isolation, it is not possible to determine which reading of the Tribunal's finding is correct (the reading which matches the meaning that the Tribunal intended to convey). However, the Council's March 2019 letters gave a detailed description of relevant contractual arrangements before stating that DEFRA "has confirmed that the licensing regime does not apply to stray dog rehoming or reception centres of this nature" (emphasis added), which lends weight to the argument that the Tribunal's finding was intended to convey that DEFRA had confirmed that MDH did not require a licence under the 2018 Regulations.

57. It is true that DEFRA's email was consistent with the legal understanding expressed in the Council email that sought DEFRA's advice. But Mr Dally did not argue otherwise. His argument before the First-tier Tribunal concerned the Council's subsequent recounting of the content of DEFRA's email. The Tribunal's reasons do not address this argument and were therefore inadequate. It is not clear from paragraph 10 of the Tribunal's reasons whether or not it accepted Mr Dally's argument that the Council had misleadingly conveyed the impression that DEFRA had confirmed the legality of the current licensing situation at MDH. Since this was part of Mr Dally's wider case on misrepresentation and, in consequence, the public interest in disclosing the legal advice, the argument should have been addressed. The fact that the DEFRA email, unlike the withheld legal advice, was disclosed to Mr Dally and put before the Tribunal, did not obviate the need to address this aspect of Mr Dally's case.

58. So, I have decided that, in finding that the Council had stated that the legal advice was taken some time ago and that DEFRA had confirmed the correctness of the

Council's interpretation of the law, the First-tier Tribunal erred. Were these errors material and thus errors on points of law? The materiality question is whether, had the errors not been made, the Tribunal could have made a different decision.

59. I do not accept the Commissioner's argument that the First-tier Tribunal could not have arrived at a different decision had its decision been free of the errors just described. It is true, as reflected in the case law authorities, that the public interest in maintaining the exemption from disclosure for information that attracts legal professional privilege carries inherent weight. However, this is not an absolute exemption from disclosure and there are aspects of the case which lead me to conclude that, had Mr Dally made out his case regarding misrepresentation / misleading statements on the part of the Council, the Tribunal might have concluded that the public interest in disclosure outweighed that in maintaining the exemption. While the maintenance of legal professional privilege is undoubtedly very important (for the reasons described in the authorities cited by the Information Commissioner), it is necessary to be mindful of its capacity to shield a public authority from justified criticism and avoid the transparency and accountability that are the cornerstone of freedom of information laws. I should add that I express no view as to whether the Council's actions may be open to justified criticism. My point is simply that, if Mr Dally establishes the misrepresentation which he alleged, he might be able to persuade a Tribunal that this adds weight to his argument that the public interest in disclosing the withheld information outweighs that in maintaining the exemption from disclosure. I also note that it is now clear (because the First-tier Tribunal said so in its open decision) that the withheld legal advice relates to licensing legislation that ceased to have effect in relation to England in October 2018. Accordingly, Mr Dally might be able to persuade a Tribunal that the fact that the advice does not relate to the Council's current licensing functions (under the 2018 Regulations) adds further weight to the public interest in disclosing it. This is not intended to be an exhaustive list of matters that a Tribunal might be persuaded adds weight to the public interest in disclosing the withheld information.

60. Mr Dally submits that, in the event of this appeal succeeding, the Upper Tribunal should remit his appeal against the Commissioner's decision notice to the First-tier Tribunal for re-determination. The Commissioner does not argue otherwise. I therefore direct that Mr Dally's appeal against the Commissioner's decision notice is to be re-decided by a differently constituted First-tier Tribunal (see the directions given above). I should add that, had I decided to re-decide the First-tier Tribunal's decision, I would have invited the Council to apply to be made a party to the proceedings. As the

beneficiary of the legal professional privilege which attaches to the withheld legal advice, fairness would have required the Council to be given the opportunity to participate in proceedings that might result in that privilege being lost. I also wish to record that the matters described in paragraph 59 above are not in any way intended to influence the First-tier Tribunal when it comes to re-decide Mr Dally's appeal against the Commissioner's decision notice nor to influence any party's freedom to advance whatever case they wish before the First-tier Tribunal.

61. I shall now explain why I am not persuaded by those arguments advanced by the Commissioner that have not already been dealt with:

(a) I do not agree that Mr Dally's case is essentially factual. Mr Dally has established that the First-tier Tribunal gave inadequate reasons for his decision which is an error of law not fact;

(b) as the Commissioner invited me to do, I have considered what the Commissioner considers to be the 'core elements' of the Council's representations against the withheld information. In separate closed reasons for this decision, I explain why that exercise has not persuaded me to dismiss this appeal;

(c) I do not need to deal with those of the Commissioner's submissions which argue that the public interest in maintaining the exemption from disclosure outweighs that in disclosing the withheld information. This is because I am not re-deciding Mr Dally's appeal against the Commissioner's decision notice;

(d) it is argued that the regulatory triggers under the 1963 Act and the 2018 Regulations are so similar that advice about one regulatory regime amounts in substance to advice about the other. That may (or may not) be the case. But, if it is the case, I do not consider that it deals a fatal blow to Mr Dally's argument that the Council made a misleading statement that it received legal advice about the application of the 2018 Regulations to MDH and that such a statement adds weight to be public interest in disclosing the withheld information. Even if the regulatory triggers are effectively the same under both regulatory regimes, it does not necessarily follow that a statement that advice has been taken under one regime, when it has not, is incapable of being a misleading statement.

62. Finally, I thank the parties for their patience in awaiting this decision. I understand that they were informed that, due to my absence from duties, and subsequent limited duties, while recovering from injuries sustained in an accident, this decision would be delayed. Nevertheless, it has still taken much longer than I would have liked to complete this decision and I apologise for the frustration this is likely to have caused.

Mr E Mitchell

**Judge of the Upper Tribunal.
Authorised for issue,
on 12 June 2024.**

Section 12 of the Tribunals,
Courts and Enforcement Act 2007.