# *Recent decisions of the Information Commissioner and Tribunals*

***John Fitzsimons, Barrister with Cornerstone Barristers, highlights points of interest from decisions of the Upper Tribunal and First-Tier Tribunal from October 2020***

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## Driver and Vehicle Licensing Agency (DVLA) v Information Commissioner and Mr Edward Williams (Rule 14 Order) [2020] UKUT 310 (AAC), 27th October 2020

### Summary

In this discrete case management application pursuant to Rule 14 of the Upper Tribunal Rules (governing the use of documents and information), the Upper Tribunal ('UT') considered:

- whether the requester, Mr Williams, needed the permission of the UT to publish the electronic open bundle and skeleton arguments on the internet;
- if so, what power does the UT have to allow or restrict such publication; and
- whether, in the circumstances of the case, Mr Williams should be granted such permission. The UT concluded that permission was required, that it had the power to restrict or allow such publication under its rules of procedure, and that in the circumstances of this case, permission would not be granted.

### Facts

The issue arose against the background of a case in which Mr Williams made a Freedom of Information Act 2000 ('FOIA') request for information about the use of data obtained through the Driver and Vehicle Licensing Agency's ('DVLA') 'Keeper at Date of Event' ('KADOE') service. The DVLA refused this request and this refusal was upheld by the Commissioner. The FTT allowed Mr Williams' appeal on the basis that the section 31 exemption relied upon was not engaged. The matter came before the UT following an appeal by the DVLA and the substantive outcome of the case is the subject of a separate (unpublished at the time of writing) decision.

The issue about publication of the open bundle and skeleton arguments arose because Mr Williams checked with the DVLA whether they were content for him to publish these. His motivation for seeking to publish them was that he was a litigant in person, and so hoped to publish the material in order to solicit comment online to assist him with the appeal. His correspondence with the DVLA prompted them to make a formal Rule 14 application to the Tribunal that Mr Williams not be permitted to publish the electronic bundle and skeleton argument provided to him. They did so on the basis that the DVLA's expectation "is that documents it provided in the context of the proceedings would be used only for the purpose of the proceedings", and that the DVLA had a "property right" in the electronic bundles and had not given permission for them to be used for any purposes other than those stated.

The Commissioner expressed her view as being that "the contents of the hearing bundles before the Upper Tribunal are only open to the parties to the proceedings (unless closed under Rule 14) and not for onward disclosure or dissemination other than for use in connection with the proceedings, such as obtaining legal advice." She explained that her office "has not understood it to be permissible to unilaterally publish such bundles, or indeed correspondence relating to the proceedings, online." In this regard, the Commissioner noted that there is a similar approach set out in Civil Procedure Rules ('CPR') 31.22 and 5.4C whereby the Court ultimately retains control of what information can be published and shared.

On the other hand, Mr Williams contended that there was no UT rule specifying that he could not publish the material, and indeed had he published it, he queried what cause of action the other parties could successfully rely upon to sue him. He reminded the UT that the proceedings are public, and noted that the DVLA had not cited any prejudice it would suffer were publication to take place.

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## The Upper Tribunal's decision

### 1. Permission required?

The UT began by noting that it was unpersuaded that Mr Williams had an absolute right to publish the electronic core bundle on the internet by virtue of his rights under Article 6 of the European Convention of Human Rights ('ECHR'). Mr Williams had argued that were he to be prevented from publishing, this would fetter his ability to get legal advice and thus undermine his Article 6 rights.

Despite Mr Williams having no absolute right to publication, the UT noted that this was not the same as saying he needed to seek the UT's permission to do so. The DVLA submitted that the answer lay in the common law doctrine of the implied undertaking in litigation, namely that "documents and information which are disclosed in litigation are subject to an implied undertaking that these will not be used other than for the purposes of the litigation concerned."

The UT considered this doctrine by reference to *Tchenguiz v Director of the Serious Fraud Office* [2014] EWCA Civ 1409, where Jackson LJ explained the rule against using documents disclosed in discovery for a 'collateral purpose' and explained how the obligation to give discovery is an invasion of the litigant's right to privacy and confidentiality. As such, an invasion is justified only because there is a public interest in ensuring that all relevant evidence is provided to the court in the current ligation. It follows that the use of those documents should be confined to that litigation. Jackson LJ further explained that the rule against using disclosed documents for a collateral purpose promotes compliance with the disclosure obligation.

The UT endorsed the views of Jackson LJ, but accepted that this was a matter upon which the 'Tribunal Procedure Rules' are silent. However, it noted that in the CPR context, there is a workable solution which is equally sensible to apply in the tribunal context. In this regard, it noted that the implied undertaking at common law is codified in the CPR in respect of disclosed documents (CPR 31.22; see also 32.12 regarding witness statements).

Furthermore, the UT observed that the Court of Appeal has held in the employment tribunal context that the implied undertaking applies by analogy: see *IG Index Ltd v Cloete* [2014] EWCA Civ 1128. Indeed, the UT took the view that the IG Index Ltd case represented Court of Appeal authority to the effect that (by analogy) the implied undertaking should be treated as applying in the UT in the present case. As a consequence, it concluded that Mr Williams would require permission for publication of the bundle on the internet and it was for him to make such an application for permission.

### 2. Power of the UT to allow or restrict publication

Turning to the second question of what power the UT has to allow or restrict publication: first, the UT observed that section 25(1) and (2)(b) of the Tribunals, Courts and Enforcement Act 2007 provides that in relation to the production and for the inspection of documents, the UT has the same powers, rights and authority as the High Court. Section 25(3)(b) further provides that this equivalence of powers, rights and authority 'shall not be taken …to be limited by anything in Tribunal Procedure Rules other than an express limitation.'

With this in mind, the UT accepted that Rule 14 is only concerned with those seeking to prevent publication rather than those seeking to allow it. As such, it turned to case law (*Aria Technology Ltd v HMRC and Situation Publishing Ltd* [2018] UKUT 0111 (TCC)) which explains that it has an inherent power to grant a third party access to any documents relating to the proceedings that are held in the UT records, and has a duty under common law to do so in response to a request by an applicant unless the UT considers, on its own motion or on application by one or more of the parties, that any documents or information in them should not be disclosed to other persons.

The Tribunal noted that this approach was consistent with Supreme Court authority on the subject of open justice, most recently reaffirmed in *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38. Having made clear that it has a power to allow publication, the UT then turned to consider its power to restrict it. In this regard, the UT noted that Rule 14(1)(a) states that 'the Upper Tribunal may make an order prohibiting the disclosure or publication of specified documents or information relating to the proceedings.'

However, the Rule does not say anything about the circumstances in which the power should be exercised and when considering that question, the Tribunal noted that one has to reason from first principles. Rule 14 may thus be invoked in a wide variety of circumstances, including where material is contained in an open bundle, depending on the facts of the case.

### 3. Should permission be granted in this case?

Having concluded that Mr Williams did require permission to publish the electronic bundle on the internet and that the UT does have the power to permit or restrict such publication, the UT turned to consider whether, in the circumstances of the case, Mr Williams should be granted permission to do so.

On the facts of this case, the DVLA raised concerns about copyright and data protection in respect of unredacted email addresses, phone numbers and other personal data in the bundle. The UT deemed it unnecessary to consider the copyright issues and decided in favour of the DVLA solely on the data protection points. It further endorsed six other reasons why in this case permission to publish should be refused. These reasons included the fact that the publication would not be for open justice purposes, but for a collateral purpose of seeking free legal advice; that there is no limitation to the non-parties to whom disclosure is sought; and that any documentation authorised to be published by the Tribunal would then be outside the control of the Tribunal and/or the parties – in

particular beyond the jurisdiction of the Court.

Finally, Mr Williams had argued that the fact that as a litigant in person he could share the bundle with family and friends meant that there had been a publication to the world in any event. However, the UT contended that there was a "world of difference" between such informal consultation and publication of material on the web. As to Mr Williams' point about whether the other parties would have any cause of action against him were he to have published, the UT noted "it would not pronounce on hypothetical civil litigation." However, it explained that Mr Williams would certainly now be at risk of being found in contempt were he to publish the material in question after the UT's order.

## Points to note

From a practical perspective, this case serves as an important warning for parties to proceedings before the tribunals: they do not have an automatic right to publish the material contained in the bundle for the hearing. In many ways this seems to sit uneasily with the fact that the tribunal proceedings take place in public, and anyone can attend the hearing and listen to a detailed discussion about the contents of the bundle. What then is the difficulty in allowing such interested members of the public to also see the documents in question?

Indeed, the decision also seems to raise more questions than it answers. It draws on case law in the civil and employment law contexts which does not map easily into the information tribunal context. This is chiefly because the nature of the rationale for the common law doctrine of the implied undertaking in litigation is based on the fact that the obligation to give discovery is an invasion of the litigant's right to privacy and confidentiality, and a rule against using disclosed documents will promote compliance with the disclosure obligation.

However, under the CPR, there is an obligation to disclose documents on which a party relies; which adversely affect his own case; which adversely affect another party's case; and which support another party's case (CPR 31.6). Similarly, in the employment law jurisdiction, the Employment Tribunal may order disclosure 'as might be ordered by a county court' (Rule 31).

***"Many litigants in person may wish to share a bundle with a wider local community, particularly in the context of an appeal under the EIRs concerning planning law issues. It is not entirely clear from this decision whether in doing so, they must first seek permission."***

By contrast, the scope of disclosure in the Information Tribunal is governed by Rule 15 of the First-tier Tribunal (General Regulatory Chamber) Rules. This is a far less burdensome requirement on parties, as it simply notes that the Tribunal may give directions for the parties to exchange lists of documents which are relevant to the appeal, or relevant to particular issues, and the inspection of such documents. It follows that any potential privacy or confidentiality impact is likely to be less pronounced in the FTT, and the rationale for importing a common law concept into its proceedings applies with far less force.

The decision is also difficult to understand from a principled perspective, as it implicitly accepts that litigants in person may share court documents with friends and family. However, it draws no principled distinction between sharing with those types of non-parties and sharing with other non-parties on the internet. At what point is a litigant in person, or indeed any other party, under an obligation to seek the permission of the Tribunal or the consent of the other parties for publication? Is the key concern the extent of the disclosure (i.e. the number of people) or is it more about scope (i.e. people beyond friends and family)? Many litigants in person may wish to share the bundle with a wider local community, particularly in the context of an appeal under the Environmental Information Regulations 2004 ('EIRs') concerning planning law issues. It is not entirely clear from this decision whether in doing so, they must first seek permission. However, it is clear that in light of this decision, any party wishing to share an open bundle in tribunal proceedings, should pause to consider whether permission is required.

## Department of Health and Social Care v Information Commissioner [2020] UKUT 299 (AAC), 29th October 2020

### Summary

This was an appeal by the Department of Health and Social Care ('DHSC') which considered the balance between two important public interests: the need for civil servants to formulate and develop government policy for the public good in a manner which is not inhibited by undue publicity, and the public interest in transparent government and freedom of information. Analysing the correct approach to be taken to section 35(1)(a) FOIA, the Upper Tribunal ('UT') ultimately concluded that save for one minor aspect of its closed decision, the FTT's decision should be upheld as it had correctly applied the exemption.

### Facts

DHSC appealed a decision by the FTT whereby the FTT concluded that certain draft versions of the Government's Childhood Obesity Plan ('the Plan') should be disclosed to Buzzfeed News. The background was that in August 2016, the government published a policy document

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called 'Child Obesity. A Plan for Action.' The Plan announced a number of policy measures, including the high-profile proposal of an introduction of a soft drinks industry levy.

On the day before publication, a journalist from Buzzfeed had requested copies of every official draft version of the Plan. Although three official drafts fell within the scope of the request, it was refused. Buzzfeed then made a second request for copies of working (i.e. non-official) drafts 1, 35 and 68 of the Plan. Again, this request was refused. DHSC relied on the exemption from the requirement to disclose information relating to the formulation or development of government policy under section 35(1)(a) FOIA.

On appeal to the Information Commissioner, the Commissioner agreed that the exemption was engaged, but held that the public interest in disclosure outweighed the public interest in maintaining the exemption. The Commissioner required DHSC to disclose the three official drafts and drafts 1, 35 and 68.

## The FTT decision

The DHSC appealed the Commissioner's decision to the FTT. The lead author of, and lead policy official for, the Plan gave evidence. He explained that development of the policy was an "iterative process" and that the draft is a result of multiple meetings, discussions, analysis and evidence-gathering. He further explained that officials need to have a "safe space" to develop policy privately.

Taken in isolation, it was the policy official's view that the requested drafts provide little context of the process of decision-making and would provide the public with a very limited understanding of the policy development process. He further noted that there were significant differences between the drafts and the published Plan, and explained in a closed hearing his reasons for stating that the disclosure could cause significant harm to DHSC's relationship with its stakeholders.

Following a variety of procedural issues in respect of the draft decision and the scope of redactions required for any disclosure of drafts, the FTT concluded that one draft should be withheld in its entirety, one should be disclosed in its entirety, and the others should be disclosed in redacted form. DHSC appealed.

## The grounds of appeal

The FTT itself granted permission to appeal. The five open grounds of appeal were that:

- the FTT misdirected itself in law and failed to give proper weight to the prejudice to the public interest that would be caused by disclosure;
- the FTT failed to place any weight on the harm that disclosure would cause to the public interest in protecting the "safe space" for policy formulation;
- the FTT misdirected itself on the question of whether the draft versions of the Plan related to "live" policy formulation;
- the FTT erred in directing that some drafts should be disclosed in redacted form; and
- this had caused it to focus on the contents of the document as individual packets of information, rather than considering the documents as a whole or considering the whole of the information in a document as a package.

There was also a closed ground of appeal concerning the scope of the material contained in the open gist of the hearing before the FTT.

## The Upper Tribunal's decision

The UT began by setting out the scope of section 35(1)(a) FOIA, noting that its purpose is to protect "the efficient, effective and high-quality formulation and development of government policy" (*HM Treasury v Information Commissioner* (EA/2007/0001), paragraph 57(4)). However, the exemption is not absolute and by virtue of section 2(2)(b) FOIA, it will only apply if 'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.' The UT reminded itself of case law which explains that "the central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case" (*Department for Education and Skills v Information Commissioner and Evening Standard* (EA 2006/00006).

The UT also explained that the exemption relates only to the formulation and development of policy as distinct from delivery of policy objectives and from implementation. The timing of any request for information is therefore important. The need for a safe space may be diminished or even superseded by the finalisation and publication of a policy. It further noted that the content-based approach established by the authorities means that there is no automatic or class-based exception to disclosure for live policy-making. The weight to be given to the fact that policy-making is live is a matter for the FTT to decide and the public interest will vary from case to case. Section 35(1)(a) is thus not 'a trump card' for a public authority.

The UT also considered whether the Commissioner and tribunal should consider the force of the exemption within a whole of a draft document or whether a 'sentence by sentence' approach was permissible. On this, the UT noted that "there is a middle ground between the disclosure of a document as a package and a zealous, miscroscopic analysis which runs the risk of confusion and the possibility of even an informed or professional reader (such as a journalist) becoming misled. Where that middle ground lies is a matter for the FTT to determine."

## Ground 1 (the FTT misdirected itself in law)

The UT then considered each ground of the appeal. Turning to the first ground, the argument on behalf of DHSC here was essentially that the FTT failed to give proper weight to the inherent prejudice to the public interest that disclosure would have to live policy formulation, and that the FTT's decision would have a chilling effect on civil servants. However, the UT noted that it was clear from the FTT's decision that it recognised the public interest in a safe space. Indeed, it stated in terms that "civil servants and subject experts need to be able to engage in free and frank discussion of all the policy options internally, to be able to expose their merits and demerits and possible implications."

The FTT further recognised that on the facts of the present case, the disclosure of background evidence or broad, high level intentions would cause a lower risk of harm than the disclosure of detailed policy proposals. In those circumstances, the UT could not accept an argument that the FTT minimised or failed to give due weight to the public interest in safe space.

DHSC had further submitted that the FTT had failed to give proper weight to its witness' evidence, which it should have done as that witness had expertise which the FTT did not have. However, agreeing with the Commissioner's submissions, the UT noted that the FTT is the specialist judicial forum for the application of the FOIA, and can be expected to have a general understanding of government. Accordingly, the UT concluded that the FTT had directed itself properly in law and reached a reasonable conclusion on the evidence before it.

***"This case is interesting because it reminds parties before the Tribunal that when it comes to disclosure, there is a middle ground between the disclosure of a document as a package and a zealous, microscopic analysis which runs the risk of confusion and the possibility of even an informed or professional reader (such as a journalist) becoming misled. That middle ground will always be a matter for the first instance FTT to determine."***

## Ground 2 (the FTT failed to place any weight on the harm that disclosure would cause)

On the second ground, DHSC emphasised the risk "that a slow creep into disclosure of draft policies would weaken record-keeping as civil servants would be slower to write things down." It further argued that had the FTT properly directed itself in law, it would have concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure. Unsurprisingly, the UT gave these arguments short shrift. It characterised them as an attempt to reargue factual matters falling outside the UT's error of law jurisdiction.

## Ground 3 (the FTT misdirected itself on the interpretation of 'live')

Turning to ground 3, DHSC submitted that the FTT was wrong to conclude that some parts of the information in a single draft should be treated as no longer live, leading to their disclosure in an otherwise redacted document.

It argued that the effect of this approach was to undermine the purpose of the FOIA, wrongly treating policy development as something that is amenable to a bright line demarcation, creating unnecessary confusion and undermining the public interest balancing process.

However, the simple answer to these submissions, as the UT noted, was that they faced the insuperable obstacle that the question of whether a policy is live is one of fact. Just because the launch of the Plan was described as "the start of a conversation", ongoing work in relation to obesity generally does not mean that individual policies or measures remain in a state of formulation or development. As the FTT had in mind that there is no absolute divide between policy formulation and its implementation, and recognised that officials may need to dip in and out of safe spaces, there was no error in its approach.

## Grounds 4 and 5 (the FTT was incorrect in directing that some drafts should be disclosed in redacted form, and this had caused an incorrect focus)

On grounds 4 and 5, the DHSC challenged the redaction exercise carried out in respect of certain drafts that were to be disclosed. Ground 4 argued that all of the information was so intertwined that there was no public interest in disclosing parts of it which could be said to outweigh the public interest in maintaining the exemption in relation to the entirety of the drafts. By ground 5, DHSC submitted that the FTT was wrong to focus on the contents of documents as individual packets of information and failed to go on to consider each document as a whole or the information as a package.

The UT noted that the FTT's decision makes it plain that it was aware of its duty to consider the information in context. It accepted the Commissioner's submission that, while generally a line by line approach will not be necessary, it may be appropriate in some cases. In this case it was law-

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ful (and indeed appropriate) for the FTT to consider individually each of the different policies in the drafts. While an "over-zealous, microscopic approach may lead to confusion and thereby compound rather than promote the public's understanding of policy-making", the DHSC here had "an adequate opportunity to submit further evidence and make submissions — including oral submissions — on individual redactions. The Department chose not to do so."

DHSC explained that the level of work involved in further redacting is a time-consuming matter and a drain on resources which detracts from its important policy work. However, the UT observed that:

- it is a feature of the FOIA as interpreted by courts and tribunals that redactions may be part of the FOIA process; and
- such work makes it easier for the UT to deal with individual aspects of, or limits to, the redactions on which neither the FTT nor the UT had any focussed submissions. The UT noted that it simply was not put in a position to interfere with the approach to the material which the FTT (with the assistance of its specialist members) adopted.

Finally, on the closed ground of appeal, which could only be stated in broad terms, the UT did accept that on one matter the FTT failed to deal fairly with one aspect of the evidence to the extent that this was an error of law. Save in this single respect, the appeal was dismissed.

## Points to note

This case is interesting because it reminds parties before the Tribunal that when it comes to disclosure, there is a middle ground between the disclosure of a document as a package and a zealous, microscopic analysis which runs the risk of confusion and the possibility of even an informed or professional reader (such as a journalist) becoming misled.

That middle ground will always be a matter for the first instance FTT to determine.

The case is also interesting because many of the grounds in this appeal appeared to be attempts to relitigate the merits of the way in which the FTT struck the balancing exercise in respect of the section 35(1)(a) exemption. However, the UT made it perfectly plain (as one might well expect it to) that it will only confine itself to errors of law and as such was satisfied that the FTT reached a reasonable conclusion on the evidence.

Finally, the decision is interesting because of the way in which the UT refuses to tolerate any submissions that there should be some sort of deference shown by the FTT towards witnesses appearing on behalf of public bodies because of their knowledge about the workings of government.

The decision emphasises how the FTT is a specialist judicial forum for the application of the FOIA, and as such can be expected to have a general understanding of government. In this regard, the decision aligns with that of *Department for Education and Skills v Information Commissioner and Evening Standard* (EA/2006/0006), where an argument that the FTT had no real alternative to accepting the evidence of eminent witnesses on the effects of disclosure was considered, but rejected.

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