THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: GIA/1694/2010

PARTIES

The Department for Environment, Food and Rural Affairs, the Information Commissioner and Simon Birkett (Campaign for Clear Air in London)

UPPER TRIBUNAL CASE NO: GIA/2098/2010

PARTIES

The Information Commissioner and the Home Office

DECISIONS ON APPEALS AGAINST DECISIONS OF THE FIRST-TIER TRIBUNAL

UPPER TRIBUNAL JUDGE: EDWARD JACOBS

DECISIONS OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

DEFRA v Information Commissioner and Simon Birkett: GIA/1694/2010

As the decision of the First-tier Tribunal (made on 11 May 2010 under reference EA/2009/0106) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 and the case is REMITTED to the tribunal for rehearing by a differently constituted panel.

DIRECTIONS:

A. The tribunal must undertake a fresh consideration of the issues raised by the appeal against the Information Commissioner's decision notice.

B. DEFRA is entitled as of right to rely on exceptions in addition to or substitution for those identified in its regulation 14 notice. This is subject to any case management direction or decision under the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI No 1976).

Home Office v Information Commissioner: GIA/2098/2010

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference EA/2010/0011, made on 24 May 2010, did not involve the making of an error on a point of law.

Application for permission to appeal to the Court of Appeal

The time limit for applying for permission to appeal to the Court of Appeal is one month: rule 44(4) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698).

REASONS FOR DECISIONS

1. *GIA/1694/2010* There are three parties to this appeal. The appellant is the Department for Environment, Food and Rural Affairs, which is the relevant public authority. The respondents are the Information Commissioner and Mr Simon Birkett, who is the person who requested the information. Just a small point on procedure and nomenclature. Mr Birkett was described as an additional party. Under the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI No 2698), all parties to an appeal are either appellants or respondents.

2. *GIA/2098/2010* The parties to this appeal are the Information Commissioner, who is the appellant, and the Home Office, which is the respondent and the relevant public authority. The person who requested the information did not take any part in the proceedings either before the First-tier Tribunal or the Upper Tribunal.

3. I directed that these appeal be considered at an oral hearing. The hearing was held over two days on 12 and 13 January 2011. I apologise for the delay in fixing the hearing.

4. I am grateful to all the counsel for their written and oral arguments. Ms Anya Proops of counsel appeared for the Information Commissioner in both appeals. Mr Jonathan Swift QC and Mr Alexander Ruck Keene of counsel appeared for DEFRA and the Home Office. Mr Gerry Facenna and Ms Laura John, both of counsel, appeared for Mr Birkett.

THE INFORMATION COMMISSIONER AND THE HOME OFFICE

A. What was in issue and how it arose

5. The issue I have to decide is whether a public authority that has initially relied on a particular exemption under the Freedom of Information Act 2000 may later rely on additional or different exemptions without the permission of the Information Commissioner or the First-tier Tribunal.

6. The issue arises in this way. I set out the relevant legislation later. The request for information was made by Mr H. As he has not taken any part in the proceedings, I have not named him. He asked for:

> 1 The release of all the evidence which the U.K. Border Agency relied upon when section 12 of the Asylum and Immigration (Treatment of Claimants) Act 2004 was presented to Parliament; and
>
> 2 The mentioned document which justified the decision to introduce section 12 of the 2004 Act.

The Home Office refused to provide the information in request 1 on the ground that to do so would cost more than the statutory limit of £600. It refused to provide the information in request 2 on the ground that it concerned the formation of government policy and the public interest was not in favour of disclosure.

7. Mr H complained to the Information Commissioner. He was not successful in respect of request 1, but succeeded in respect of request 2. The Commissioner agreed that the information concerned the formation of public policy, but considered that the public interest favoured disclosure.

8. The Home Office exercised its right of appeal to the First-tier Tribunal. Before the hearing, it had identified more relevant material that was within the scope of the request and argued that the information was exempt from disclosure on the grounds that it constituted personal data and that it was covered by legal professional privilege. As I understand it, there is no dispute that the Home Office took this position in good time for the tribunal and the Commissioner to deal with the appeal on that basis.

9. The First-tier Tribunal decided that the Home Office was entitled as of right to rely on the new exemptions and that, if it had been a matter of discretion, the tribunal would have

allowed the Home Office to do so. The tribunal then ordered disclosure subject to specified omissions and redactions.

B. No longer a live issue

10. Mr Swift told me that the Home Office had now provided the information. Accordingly, reliance on the new exemptions was no longer live in this appeal. Nonetheless, I decided to deal with the issue for these reasons. First, the parties wished me to do so. Second, it is an issue that has regularly arisen before the First-tier Tribunal, with different answers, and needs to be decided. Third, it does not depend on a detailed consideration of the particular facts of a case. I consider that these reasons justify me in proceeding with the appeal consistently with the decision of the House of Lords in *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450 and especially with the reasoning of Lord Slynn at page 457.

C. What was not in issue

11. Two matters were not in issue.

Changes of circumstances

12. There is an issue of the time at which the exemptions must apply. Specifically, what is the position if there is a change in law after the request that renders disclosure of the information unlawful or even illegal. That issue is before the Upper Tribunal in *GIA/3016/2010*. If a public authority is allowed to rely on an exemption that only becomes relevant following a change in the law, that would provide additional support for the conclusion I have reached.

The tribunal's powers under its rules of procedure

13. Nothing in this decision affects the First-tier Tribunal's powers under the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI No 1976). The tribunal may, in particular and as appropriate in a particular case, exercise its powers to regulate its own procedure (rule 5), to strike out cases and bar participation (rule 8), and to limit the evidence and submissions that it will receive (rule 15). Nor does it affects its power to award costs under rule 10. No one argued to the contrary and could not realistically do so.

D. The case in outline

14. Counsel adopted three different positions.

15. Mr Swift argued that public authorities had a right to change the exemptions on which they relied, subject only to the First-tier Tribunal's case management powers. He analysed the structure of the legislation and argued that there was no express provision that limited the exemptions on which a public authority could rely and no scope for implying one. He argued that the discretion that some panels of the First-tier Tribunal had exercised was without any statutory basis, express or implied, and was in any event applied inconsistently on differing criteria.

16. Ms Proops argued that public authorities could only change the exemptions on which they relied at the discretion of the Commissioner or the First-tier Tribunal. She argued for a purposive construction. Any restriction on the obligation to disclose information should be construed narrowly and any time limits should be strictly enforced. The express language of the legislation did not allow for a public authority to raise new exemptions. The potentially harsh consequences of this interpretation were ameliorated by an implied discretion to allow new exemptions to be raised at a later stage.

17. Mr Facenna argued that public authorities were committed to the exemption identified in the section 17 notice. (His argument was presented in relation to the Environmental Information Regulations 2004 (SI No 3391), but he argued that the position was the same as under the Freedom of Information Act 2000.)

18. I have essentially accepted Mr Swift's argument. I analyse the handling of the request by the public authority as an administrative one that does not involve any commitment as to the future. And I analyse the nature of the duties imposed on the Information Commissioner and the First-tier Tribunal as requiring them to consider any new exemptions identified by the public authority. As a whole, the structure is not consistent with a prohibition on raising new exemptions. As to a discretion, Ms Proops accepted that there had to be some exceptions and acknowledged that in other circumstances it would be exercised as 'of course'. As my analysis below shows, the need for further exceptions or 'of course' circumstances appears under the pressure of analysis. By the end, the discretion has effectively dissolved. And without any discretion to ameliorate its harshness, the case for a complete ban on raising new exemptions becomes even weaker.

19. In view of the approach I have taken, the terms of any discretion and its application by the First-tier Tribunal no longer arise.

E. Freedom of information

The legislation

20. Information has become in effect a new form of property. It has developed in the law on privacy, confidentiality and freedom of information. This case is concerned with the last of these.

21. Section 1 of the Freedom of Information Act 2000 provides:

1 General right of access to information held by public authorities

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

Sections 9, 12 and 14 provide that a public authority is not obliged to comply with the request in specified circumstances: payment of fees (section 9); cost of compliance would exceed the appropriate limit, which is £600 (section 12); and vexatious or repeated requests (section 14). These provisions are all in Part I of the Act.

22. Section 2 makes provision for exemptions in Part II of the Act:

2 Effect of the exemptions in Part II

(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,

section 1(1)(a) does not apply.

(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—

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Subsection (3) contains a comprehensive list of the exemptions that are absolute. They include:

(f) in section 40—

(i) subsection (1), and

(ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section …

23. The Home Office initially relied on section 12 and the exemption in section 35(1)(a):

35 Formulation of government policy, etc

(1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—

(a) the formulation or development of government policy,

(b) Ministerial communications,

(c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or

(d) the operation of any Ministerial private office.

24. Before the First-tier Tribunal, the Home Office relied on the exemptions in sections 40(2) and 42:

40 Personal information

(1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

(3) The first condition is—

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—

(i) any of the data protection principles, or

(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

(5) The duty to confirm or deny—

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either—

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

(7) In this section—

“the data protection principles” means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

“data subject” has the same meaning as in section 1(1) of that Act;

“personal data” has the same meaning as in section 1(1) of that Act.

42 Legal professional privilege

(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.

Analysis

25. The right to information arises when a request is made. The public authority’s response is in relation to that request and is limited by the scope of that request. The right is a qualified one in that it is subject to the exemptions in sections 9, 12 and 14 and Part II. In some cases, the authority must not disclose information. An obvious example is section 44(1)(a), which exempts information for which disclosure ‘is prohibited by or under any enactment’. If the exemption is not absolute, the right to information is subject to the balance of public interest. Generally, though, the Act does not require the authority to rely on an exemption, whether absolute or not. It may decide not to rely on an exemption from the outset or it may change its mind later. Ms Proops did not argue that this later change of position required the exercise of a

discretion by the Information Commissioner or the First-tier Tribunal. She would have had considerable difficulty doing so, as the public authority is entitled to release information without reference to the Commissioner. But it is as much a change of position as relying on a new exemption. To that extent at least, the public authority is not committed to its initial position.

26. I am content to proceed on the basis that, as Ms Proops argued, exemptions should be interpreted narrowly. That is not necessarily incompatible with the public authority being allowed to raise a new exemption. Interpretation and reliance are different concepts that are not necessarily related.

27. The Act imposes on the public authority a duty to make a judgment on the balance of the public interest. The test is where the balance lies, not where the authority considers that it lies. In other words, the test is directly one of the public interest and is not mediated through the opinion of the authority. This is significant for the tasks undertaken by the Information Commissioner and the First-tier Tribunal. They are not concerned with whether the authority genuinely or reasonably formed its judgment. This is in contrast to the particular exemption under section 36(2), which applies if a qualified person forms the reasonable opinion that disclosure would prejudice or impede the effective conduct of public affairs.

28. The issues and competing interests that arise under the public interest test will depend to some extent on the exemptions that are in play. To the extent that the exemption initially relied on by an authority governs any future consideration of the public interest, it limits the scope of the issues and interests that are taken into account. This is significant, because the person requesting the information and the public authority cannot necessarily be relied upon to identify and take account of all the issues and interests that may be relevant. Suppose that the information covered by a request includes information about persons who are being prosecuted by the authority. The person requesting the information may not realise this. If the authority does not rely on a relevant exemption (section 30 in this example), the question arises that I repeatedly asked at the hearing: who ensures that those persons' interests are taken into account? Their interests may be an important, perhaps even decisive, element in the balance of public interest. They have no role in the information rights process. One way, perhaps the most likely way, that these bodies will become aware of the interests of third parties is if the public authority raises a new exemption. On Ms Proops' argument, their protection is a matter of discretion that provides a balance between the interests of certainty and protecting the public interest in appropriate cases. But why should the protection of the interests of third parties be a matter of discretion? Can their interests, and the public interest of which they are part, be outweighed by the interests of certainty in the operation of the information rights process? Should they have to be put into a balance?

29. In summary, a public authority is allowed to change its position to disclose information. If it is not allowed to change its position to rely on another exemption, this may hamper a full consideration of the public interest and prevent the interests of third parties being taken into account.

F. The role of the public authority

30. The public authority must comply with its duties under section 1(1) 'promptly and in any event not later than the twentieth working day following the date of receipt' of the request: section 10(1).

31. If the authority considers that it is not required to comply with section 1(1)(a) or (b) in reliance on an exemption in Part II, it must comply with section 17:

> **17 Refusal of request**
>
> (1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—
>
> (a) states that fact,
>
> (b) specifies the exemption in question, and
>
> (c) states (if that would not otherwise be apparent) why the exemption applies.
>
> (2) Where—
>
> (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—
>
> (i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
>
> (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and
>
> (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,
>
> the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.
>
> (3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where—

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (1), (3) or (5) must—

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.

Analysis

32. As I read section 17, what the authority has to do is to identify the information covered by the request and then either disclose it or say why it is not doing so. That is an administrative process.

33. Mr Swift pointed out that section 17 is not a formal decision that is subject to a form of appeal under section 50. I would generalise that submission and say that the process undertaken by the public authority is not an adjudicative procedure that results in a decision. I note the contrast between the language of section 17 and section 50. Under the former, the language suggests a degree of informality: the public authority *gives* the applicant *notice* that *specifies* an exemption and *states* why it applies. Under the latter, the language suggests a degree of formality: the Commissioner *serves* a *decision notice* that *requires* steps to be taken to remedy a *failure to comply*. That reflects the Commissioner's role as a decision-maker rather than an administrator. (I also note that section 50 merely provides for an application to determine whether the public authority has acted in compliance with Part I, not directly for a

challenge to the section 17 notice. However, that wording is necessary in order to include an application if the public authority has not given a notice as required.)

34. I note that under section 17(1) the public authority must identify the exemption on which it *is relying*. That suggests a current position. If the authority were committing itself for the future, I would have expected *relies*.

35. Legislation has to be interpreted so that it is workable. No administration is perfect. Documents can be misplaced, overlooked or difficult to find. Officials may fail to identify the potential application of exemptions. They may also make accidental mistakes, for example by wrongly overwriting an earlier notice or incorrectly completing a template when drafting the section 17 notice. I asked Ms Proops how such accidental mistakes could be corrected. She replied that the Commissioner would 'of course' exercise the discretion to allow this.

36. Ms Proops told me that the Information Commissioner was concerned about some public authorities who are less than conscientious in performing their duties under the Act. They do not consider the request for information properly, and they then refine and redefine their position as the case comes first before the Commissioner and then before the First-tier Tribunal. They were called by a variety of names during the hearing; I have chosen to call them cavalier. I doubt that the position for which Ms Proops was arguing would have any effect on these authorities. That position is the one that the Commissioner currently applies, apparently without benefit. Touched as I am by the faith that Ms Proops had in the potential influence of a decision of the Upper Tribunal, I suspect that it was unrealistic. Even one of my decisions would probably only make cavalier authorities look for other ways to avoid taking their responsibilities seriously or be inventive in finding excuses for not doing so. One obvious approach is to fail to find information or to claim that it was misfiled and only discovered later. Ms Proops' argument only works in respect of public authorities that are not only cavalier but unimaginative as well. Indeed, the position for which she argued could prove counterproductive. If one of these cavalier authorities cannot be sure that it can rely on a new exemption for information that it discovers late, it may chose not to disclose it.

37. Mr Swift told me that the Commissioner had never felt sufficiently concerned about cavalier authorities to mention this problem in a Report under section 49. That may be so, but it does not answer Ms Proops' argument. The problem she identified is a potential one that forms part of the context in which the legislation has to be interpreted and supports her argument for a purposive interpretation. The flaw in her argument is that it posits a problem in such terms that by its very nature it is intractable to any effective solution, whether the one she proposed or another.

38. Ms Proops also drew my attention to the Principles for Administrative Justice identified by the Administrative Justice and Tribunals Council and to the Council's concern that public bodies should make the right decision first time round. I do not question the wisdom of the Council's concern for good quality decision-making by public bodies. But it is equally important that, once a mistake has been identified, it should be corrected. Good administrative practice recognises the possibility of errors made in good faith and the power to correct them. It is not a matter for discretion, even a discretion that would be exercised as of course. It is a matter of right, in the interests of good administration, to be allowed to correct at least accidental slips. Even courts have that power in respect of their decisions. Once it is shown that the authority must have some power to correct accidental mistakes, it is difficult as a

matter of interpretation to justify preventing it making other changes to its position. After all, who apart from the authority is able to say whether or not a mistake was accidental?

39. As I have said, even the most diligent public authority may fail to find relevant information. This new information may raise new exemptions. The authority is under a duty to disclose the existence of this information. Assuming that the authority was diligent and acted throughout in good faith, why it should it not also be allowed to raise any relevant exemptions without the permission of the Commissioner or the First-tier Tribunal? Under section 2, are not the information and the exemptions that apply intimately connected? Can they be separated like this?

40. Ms Proops repeatedly referred to the public authority as electing the exemption that it relied on in, and as being functus after, the section 17 notice. Mr Swift argued that these were not appropriate concepts in this context. I agree, but I did not understand Ms Proops to be using them in their strict legal sense. If she was, I do not understand how their effect could be overridden by a discretion in the Information Commissioner or the First-tier Tribunal. I took election and functus as being no more than different ways of making Ms Proops' point that the public authority had no right to rely later on additional or different exemptions.

41. Ms Proops also said that the exemption relied on in the section 17 notice created a legitimate expectation for the person requesting the information. As Mr Swift pointed out, the expectation was that the request would be dealt with in accordance with the legislation. Moreover, it is a strange expectation that is subject to the discretion of the Commissioner or the tribunal. Again, I did not understand Ms Proops to be using this concept in its strict legal sense.

42. In summary, the processing of a request for information is an administrative matter, not a formal decision-making one. There is nothing in the nature of that process that involves a commitment and the interests of good administration require that the public authority should at least have the ability to correct accidental mistakes.

G. The role of the Information Commissioner

43. The Information Commissioner has duties relating to good practice under sections 47 and 48 and is required to report to Parliament at least once a year under section 49. In terms of enforcement, the Commissioner has the power to serve decision notices under section 50, information notices under section 51 and enforcement notices under section 52. These can be enforced as contempt of court on a certificate by the Commissioner under section 54. The key provision on this appeal is section 50:

> **50 Application for decision by Commissioner**
>
> (1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.

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

(a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,

(b) that there has been undue delay in making the application,

(c) that the application is frivolous or vexatious, or

(d) that the application has been withdrawn or abandoned.

(3) Where the Commissioner has received an application under this section, he shall either—

(a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or

(b) serve notice of his decision (in this Act referred to as a "decision notice") on the complainant and the public authority.

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

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

(b) has failed to comply with any of the requirements of sections 11 and 17,

the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.

(5) A decision notice must contain particulars of the right of appeal conferred by section 57.

(6) Where a decision notice requires steps to be taken by the public authority within a specified period, the time specified in the notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, no step which is affected by the appeal need be taken pending the determination or withdrawal of the appeal.

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

Analysis

44. This section must be interpreted in accordance with its terms in a way that both makes the complainant's right to apply for a decision effective and is consistent with the Commissioner's other powers and duties.

45. The terms of the section give some indication of the Commissioner's powers and duties. First, the application must relate to the way the public authority dealt with the request for information. The request, therefore, limits the scope of the Commissioner's consideration. Second, the Commissioner may consider issues of both substance and procedure. That is shown by subsection (4)(b) which makes separate provision for failure to comply with section 11, which deals with the means by which communications may be made, and section 17. The Commissioner may, therefore, give a decision that the public authority was in breach of section 17 for failing to identify a relevant exemption. Third, the Commissioner is entitled to initiate enquiries. The Commissioner must either make a decision or decline to do so. Subsection (2) provides for the circumstances in which the Commissioner may decline to make a decision. They indicate matters for a preliminary consideration that may involve initiating some enquiries. And the power to serve an information notice under section 51 relating to compliance with Part I shows that the potential exists for enquiries on other matters. Fourth, if the Commissioner decides to make a decision, subsection (4)(a) shows that the Commissioner must consider whether the authority failed to communicate information where it is required to do so. That requires the Commissioner to make an independent judgment of whether information is within the scope of any particular exemption and, for those exemptions that are not absolute, of whether or not the public interest favours disclosure. I note that under subsection (4)(a) the public authority's obligation is stated in the present tense. In contrast, under subsection (4)(b) failures to comply with procedural matters in sections 11 and 17 are stated in the past tense.

46. There is a question whether the words 'in any specified respect' refer to the application that is made or to the decision that the Commissioner is asked to give. Ms Proops argued that it was the former and that it limited the scope of the Commissioner's consideration. Mr Swift argued that it was the latter. Even if Ms Proops is correct that the words govern the application, I do not accept that they limit the scope of the consideration that the Commissioner has to give to the application. This would not be a realistic interpretation given the possible nature of complainants and the circumstances in which they may be placed. As to the complainants, they vary on a spectrum from the uninformed and unrepresented at one extreme to the expert, informed and competently represented at the other. As to the circumstances in which complainants may be placed, they are by definition people who have not seen the information. A person in that position cannot, and cannot be expected to, identify all the respects in which a public authority may have failed to deal with the request in accordance with Part 1. This must be done by someone else. And that someone can only be the public authority or the Information Commissioner. And they are only protected if this is a duty, not a discretion.

47. Moreover, there is the public interest to be considered. I have already discussed the possibility that neither the complainant nor the public authority may initially be aware of, or be concerned to protect, interests that must properly be taken into account. Ms Proops accepted that the Commissioner had a responsibility to identify and investigate some issues. She accepted the Commissioner's duty to ensure the protection of personal data. She also recognised that in limited circumstances the Commissioner might identify a possible new exemption and invite the parties to consider whether it applied. That is too limited a role for the Commissioner under this section. Ms Proops argued that it was primarily the public authority's duty to comply with the Act. She emphasised the difficulties for the Commissioner in undertaking an open-ended enquiry into every conceivable exemption that might possibly apply. I accept that point, but it does not mean that the Commissioner's role is as restricted as

she argued for. The public interest has to be identified and protected, whether it favours disclosure or non-disclosure. As I have already said, the issue is not the genuineness or reasonableness of the public authority's assessment of that interest. If the Commissioner has no duty to look beyond what the authority has relied on in the section 17 notice, how is it possible to say whether the authority has failed to comply with Part I? I accept that this is an incomplete protection, as the authority can disclose information and not seek to rely on a relevant exemption. But that is not a reason to limit the Commissioner's initiative when protection is possible.

48. Ms Proops argues that this is a matter of discretion, but the identification and protection of the public interest is not a matter of discretion. Remember that there is a balance that has to be struck between the public interests in disclosure and non-disclosure. Ms Proops' argument favours disclosure and therefore the public interest in disclosure. This produces a distortion in the balancing exercise, which under section 2(1)(b) and (2)(b) is presented as an even-handed one.

49. In summary, the Commissioner has to decide whether the public authority did what it should have done under Part I of the Act. In doing so, the Commissioner has a range of powers and duties under section 50. Some are spelt out. Others are derived from the nature of the process and the circumstances in which it has to operate. In order to make section 50 effective and consistent with the full range of the Commissioner's powers and duties, it is necessary for the Commissioner to take the initiative in appropriate circumstances and to do so as a matter of duty, not of discretion. Given the limitations on what can be achieved without cooperation, the Commissioner must inevitably rely on the parties, and especially on the public authority to identify what is relevant.

50. It may be helpful to explain how I see the role of the Commissioner in the section 50 process. The Commissioner is under a duty to consider whether the request has been dealt with in accordance with Part I. That duty must be performed in respect of the information available, and the arguments presented, to the Commissioner. The consideration is limited by the terms of the request for information. Within those limits, it must cover the position of the complainant, the public authority and any third parties who may be affected. As to the complainant, the starting point will be the terms of the application under section 50(1). As the complainant will not have seen the information, the Commissioner must always consider any issues that the complainant would not have been able to identify without seeing that information. Beyond that, the extent to which the Commissioner considers issues not raised in the application will depend on the competence that the complainant appears to have. As to the public authorities, the starting point will be the section 17 notice. They may also suggest that different or other exemptions may apply. Public authorities will generally be able to look after their own interests. However, the Commissioner may need to consider points in favour of an inexperienced public authority. As to third parties, the Commissioner must always be alert to their interests if they are not being protected by the complainant or the public authority.

51. The Commissioner will probably be able to make a decision on the information provided. There may, though, be cases in which it is clear from the information provided that there is an issue that merits further enquiry. If so, the Commissioner has power to serve an information notice under section 51.

52. To emphasise, the Commissioner does not have to consider every exemption, only those that merit consideration on the information presented. Nor does the Commissioner have to launch any investigation into every aspect of every exemption. The Commissioner is, though, expected to be more proactive in the protection of third parties.

53. Ms Proops reacted strongly against this suggestion when I put it to her in argument. She regarded it as an unwarranted departure from the way the legislation had been implemented that was based on a misconception of the respective roles of the public authorities and the Commissioner and would be an imposition for the Commissioner's already overburdened staff. I regret that I failed to explain sufficiently clearly the nature of the process that I had in mind. I trust that it is clear from what I have just said that Ms Proops' fears were unfounded. I do not have any personal experience of how the Commissioner operates, but I suspect that what I have described is not very different from what a conscientious member of the Commissioner's staff would do anyway.

H. The role of the First-tier Tribunal

54. Section 57 gives the complainant and the public authority the right to appeal against a decision notice, information notice and enforcement notice. There is no limit to the grounds on which the appeal may be brought. The powers of the tribunal are governed by section 58:

> **58 Determination of appeals**
>
> (1) If on an appeal under section 57 the Tribunal considers—
>
> (a) that the notice against which the appeal is brought is not in accordance with the law, or
>
> (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
>
> the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.
>
> (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

Analysis

55. Ms Proops argued that section 58(1) was classically appellate and section 58(2), by extending the section to include matters of fact, made it classically appellate plus. I do not find it helpful to analyse and define these concepts or to classify section 58 in terms of them. I can see no advantage in filtering the meaning of the language through these idealised concepts. It is better to concentrate on the language and function of the section.

56. As to the language of the section, Ms Proops drew attention to the terms of section 86 of the Care Standards Act 2000:

86 Appeals against inclusion in list

(1) An individual who is included (otherwise than provisionally) in the list kept by the Secretary of State under section 81 may appeal to the Tribunal against—

(a) the decision to include him in the list; …

(2) Subject to subsection (5), an individual who has been provisionally included for a period of more than nine months in the list kept by the Secretary of State under section 81 may, with the leave of the Tribunal, have the issue of his inclusion in the list determined by the Tribunal instead of by the Secretary of State.

(3) If on an appeal under subsection 1 or determination under subsection (2) under this section the Tribunal is not satisfied of either of the following, namely—

(a) that the individual was guilty of misconduct … which harmed or placed at risk of harm a vulnerable adult; and

(b) that the individual is unsuitable to work with vulnerable adults,

the Tribunal shall allow the appeal or determine the issue in the individual's favour and (in either case) direct his removal from the list; otherwise it shall dismiss the appeal or direct the individual's inclusion in the list.

This section was discussed in *Joyce v Secretary of State for Health* [2009] 1 All ER 1025. Ms Proops argued that section 58 was not drafted in those terms and could not be interpreted to have that effect. Section 50 could not have been drafted in those terms. It is, as Ms Proops accepted, a compendious provision that provides for an appeal against all three possible notices that the Commissioner might make under section 50 – a decision notice, an information notice and an enforcement notice. Wording such as section 86(3) could not apply to either an information notice or an enforcement notice. Nor could it apply to all possible forms of decision notice. It could not apply to a decision notice that there had been a breach of section 11 or a defect in the form or content of the section 17 notice. None of this means that the wording of section 58 may not produce the same effect as section 86(3) in cases such as this. Ms Proops argued that different appeal provisions could have been made for different forms of decision. That is, of course, correct, but attempting to draw conclusions from alternative (and cumbersome) methods of drafting is extremely problematic. I have to interpret and apply the terms of the section as it stands.

57. As to the function of the section, the First-tier Tribunal hears appeals under a variety of legislation. There are various formulations in different legislation, but generally they have in common that the tribunal is required to undertake a fresh consideration of the case on the evidence and arguments put to it. That is what I expect to find in the case of an initial appeal from a decision-maker in a public body, as the tribunal will give the case the first judicial consideration. It is the nature of such an appeal that there is generally no restriction on the issues, evidence or argument that the tribunal can consider. This is, of course, subject to any express or implied limitation.

58. That is what section 58 does. The tribunal is required to consider whether the Commissioner's decision notice was in accordance with law. That directs attention to the contents of the notice and the scope of the Commissioner's duty under section 50. And that directs attention to whether the public authority is required to disclose the information. There is nothing in the language of the section or inherent in the nature of the tribunal's task to limit the scope of that consideration. In other words, the section imposes the 'in accordance with the law' test on the tribunal to decide independently and afresh. It is inherent in that task that the tribunal must consider any relevant issue put it by any of the parties. That includes a new exemption relied on by the public authority.

59. I note that under subsection (1)(a) the test is whether the Commissioner's decision notice *is* in accordance with the law, not whether it *was*. That emphasises that the test is undertaken afresh at the time of the hearing. The date as at which it has to be applied was not before me.

60. In summary, the nature of the appeal before the First-tier Tribunal requires it to consider the response that the public authority should have made afresh. It must apply the law afresh to the request taking account of the issues presented at the hearing or identified by the First-tier Tribunal.

I. Policy issues

61. None of the individual points I have made about the legislation and the way it has to operate is individually decisive against Ms Proops' interpretation. Cumulatively, however, they create a legislative structure that is incompatible with the limitation on the public authority's rights and with the existence of the discretion that she asserts for the Information Commissioner and the First-tier Tribunal. I have considered whether any of her policy arguments change that position.

62. Ms Proops emphasised the uncertainty that Mr Swift's interpretation would produce for those who request information. She was supported by Ms Facenna in pointing out the inconvenience and cost when the whole basis of a case is changed. I do not underestimate the sheer frustration, delay and financial cost that can be involved. Mr Birkett's experience in *DEFRA* provides a graphic example. However, this is a matter of degree. The position of those who request information is inherently uncertain. They do not know the information and have to work partly in the dark. And the case may change significantly once the Commissioner has seen the information and served a decision notice. A change of position by the public authority may make little or no difference or it may make things worse, possibly considerably worse. The difference will vary from case to case. Moreover, the effect would be the same if the Commissioner or the tribunal exercised the discretion to allow the new exemption to be raised. Certainty would only be enhanced in those cases in which the discretion was not exercised. Looking at the matter overall, certainty is not a sufficient reason to bar a public authority from raising a new exemption without permission.

63. One aspect of Ms Proops' certainty issue was the need to prevent a public authority misleading an applicant, potentially over months and years. She also made the related point that if the authority is free to change its case, it has no incentive to get it right at the outset, which is surely desirable. I have already dealt with these points when discussing cavalier authorities and good administrative practice.

64. If a public authority is allowed to raise an exemption for the first time before the First-tier Tribunal, the effect is to bypass the role played by the Commissioner. That role is an important one in the structure. However, the case put to the First-tier Tribunal may change dramatically from that put to the Commissioner even if it proceeds on the basis of the same exemption. Moreover, it is not unknown for an appeal system to bypass the role of the initial decision-maker. There is nothing inherently contradictory between this effect and the type of structure created by the Act. The experience of social security is relevant here. For half a century, either party was free to raise any issue on appeal and tribunals were required to take account of all changes of circumstances down to the date of the hearing. The effect could be to bypass the role of the Departmental decision-maker and deprive the claimant of a right of appeal on matters of fact. It worked, although it caused some difficulties, and was left in place by the legislature until the Social Security Act 1998.

65. The Act does make some provision for the Commissioner to deal with public authorities who are not performing their duties properly and in time. The Commissioner has power to make recommendations of good practice to an authority under section 48 and report to Parliament under section 49 either in the annual report or a special report. The Commissioner also has power to serve enforcement notices and certify that there has been a failure to comply for possible punishment as contempt. All these powers operate in a way that does not impede the identification of the public interest, which is central to the operation of the Act. The existence of these powers reduces the force of Ms Proops' policy arguments.

J. The approach of the courts to new issues

66. I was referred to what May LJ said in *Jones v MBNA International Bank* on 30 June 2000:

> Civil trials are conducted on the basis that the court decides the factual and legal issues which the parties bring before the court. Normally each party should bring before the court the whole relevant case that he wishes to advance. He may choose to confine his claim or defence to some only of the theoretical ways in which the case might be put. If he does so, the court will decide the issues which are raised and normally will not decide issues which are not raised. Normally a party cannot raise in subsequent proceedings claims or issues which could and should have been raised in the first proceedings. Equally, a party cannot, in my judgment, normally seek to appeal a trial judge's decision on the basis that a claim, which could have been brought before the trial judge, but was not, would have succeeded if it had been so brought. The justice of this as a general principle is, in my view, obvious. It is not merely a matter of efficiency, expediency and cost, but of substantial justice. Parties to litigation are entitled to know where they stand. The parties are entitled, and the court requires, to know what the issues are. Upon this depends a variety of decisions, including, by the parties, what evidence to call, how much effort and money it is appropriate to invest in the case, and generally how to conduct the case; and, by the court, what case management and administrative decisions and directions to make and give, and the substantive decisions in the case itself. Litigation should be resolved once and for all, and it is not, generally speaking, just if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis. There may be exceptional cases in which the court would not apply the general principle which I have expressed. But in my view this is not such a case.

67. I do not find it helpful to consider the approach of the courts to issues that were not previously relied on for three reasons.

68. First, the circumstances that May LJ was discussing are not comparable. He was concerned with cases that have been the subject of previous proceedings, whereas, in the information rights structure, the decision of the First-tier Tribunal is the first judicial proceeding.

69. Second, in my experience the practice of the Court of Appeal is more flexible than such statements suggest, at least in public law proceedings. In *Campbell v South Northamptonshire District Council v Campbell* [2004] 3 All ER 387, the Court allowed the appellant to raise a new human rights argument without explaining why. In contrast, in *Secretary of State for Work and Pensions v Hughes (a Minor)* [2004] EWCA Civ 14, the Court refused to consider the merits of an appeal for which the Commissioner had given permission on the ground that the issue had not been raised before him. These cases cannot be reconciled solely by reference to the factors identified by May LJ. Since I wrote this passage, the Court of Appeal has delivered judgment in *Miskovic and Blazej v Secretary of State for Work and Pensions* [2011] EWCA Civ 16, in which it has discussed the approach in public law cases in more flexible terms than *Jones*.

70. Third, the authorities relate to the courts, not to tribunals, which may be less formalistic. The practice varies between tribunals. The Social Security and Child Support Commissioners were always open to new issues being raised, especially in the interests of claimants, and acted inquisitorially to raise issues themselves. The Administrative Appeals Chamber of the Upper Tribunal follows that approach in social security and child support cases. In contrast, the Employment Appeal Tribunal is less open to new issues: *Kumchyk v Derby City Council* [1978] ICR 1116. The approach taken in a particular tribunal must depend on the terms of the legislation and on the nature of the issues, the parties and their representation.

K. Disposal

71. The First-tier Tribunal directed itself correctly on the Home Office's entitlement to raise new exemptions. As no other error of law has been suggested, I have dismissed the appeal.

DEFRA v THE INFORMATION COMMISSIONER AND SIMON BIRKETT

L. The issue and how it arises

72. The issue I have to decide is whether a public authority that has initially relied on a particular exception under the Environmental Information Regulations 2000 (SI No 3391) may later rely on additional or different exceptions without the permission of the Information Commissioner or the First-tier Tribunal. In *Information Commissioner v Home Office*, I have decided that under the Freedom of Information Act 2000 a public authority has the right to raise new exemptions, subject only to the case management powers of the First-tier Tribunal. The Regulations create a structure that is essentially similar to that established by the Act and apply, with appropriate modifications, the enforcement provisions in the Act. The issue for me is whether there is anything in the environmental legislation that changes my analysis.

73. The issue arises in this way. I set out the relevant legislation later. The request for information was made by Mr Birkett under regulation 5. He is concerned with air quality in London. Pursuant to that, he asked for information relating to a meeting that was held on 22 January 2009 between the Mayor of London and the Parliamentary Under-Secretary at the Department, Lord Hunt.

74. Initially, the Department relied on the exception in regulation 12(4)(e). Mr Birkett applied for a decision of the Information Commissioner under section 50 of the Act. The Commissioner decided that the Department should disclose all the information it held. This decision was made without seeing the information in dispute and without allowing the Department to respond to Mr Birkett's arguments.

75. Before the First-tier Tribunal, the Department relied additionally on regulation 12(5)(b) and (d) and regulation 13. Mr Birkett said that he was neutral on the application of regulation 13. The tribunal refused to allow the Department to rely on these new exceptions. It decided that the Department was not entitled to do so as of right and declined to exercise its discretion to allow it to do so.

M. What was not in issue

76. As in *Information Commissioner v Home Office*, the time as at which the exemption must apply was not in issue. Nor was there any dispute about the tribunal's case management powers under Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

N. The issue under the Freedom of Information Act 2000

77. In *Information Commissioner v Home Office*, I decided that a public authority had a right to rely on new exemptions under the Act. To the extent that the Regulations merely produce the same structure as the Act, with minor changes of language and content, the same reasoning applies and I do not repeat it here. What I have to consider in this case is whether the particular provisions identified by Mr Facenna require a different interpretation.

O. The Aarhus Convention 1998

78. The Regulations can be traced to the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Article 9 deals with **Access to Justice**. Mr Facenna referred me to Article 9.4:

> 4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

P. Directive 2003/4/EC

79. The EU gave effect to the Aarhus Convention in this Directive. Mr Facenna referred me to some of the Recitals:

(1) Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.

(5) On 25 June 1998 the European Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ('the Aarhus Convention'). Provisions of Community law must be consistent with that Convention with a view to its conclusion by the European Community.

(7) Disparities between the laws in force in the Member States concerning access to environmental information held by public authorities can create inequality within the Community as regards access to such information or as regards conditions of competition.

(16) The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases. Grounds for refusal should be interpreted in a restrictive way, whereby the public interest served by disclosure should be weighed against the interest served by the refusal. The reasons for a refusal should be provided to the applicant within the time limit laid down in this Directive.

80. Article 4 deals with **Exceptions**. Mr Facenna referred me to Article 4(2) and (16):

2. Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect: …

The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal. Member States may not, by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment. …

5. A refusal to make available all or part of the information requested shall be notified to the applicant in writing or electronically, if the request was in writing or if the applicant so requests, within the time limits referred to in Article 3(2)(a) or, as the case may be, (b). The notification shall state the reasons for the refusal and include information on the review procedure provided for in accordance with Article 6.

81. Article 6 deals with **Access to Justice**. Article 6(1) is implemented by the application to the Information Commissioner under section 50 of the Act. Article 6(2) is implemented by the appeal to the First-tier Tribunal under section 57.

> 1. Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive.
>
> 2. In addition to the review procedure referred to in paragraph 1, Member States shall ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final. Member States may furthermore provide that third parties incriminated by the disclosure of information may also have access to legal recourse.
>
> 3. Final decisions under paragraph 2 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this Article.

Q. The Regulations

82. The Regulations give effect to the Directive. As I have said, the structure of the Regulations is essentially the same as that of the Freedom of Information Act. The exceptions that the Department has relied on are:

> **12 Exceptions to the duty to disclose environmental information**
>
> (1) Subject to paragraphs (2), (3) and (9), a public authority may refuse to disclose environmental information requested if—
>
> (a) an exception to disclosure applies under paragraphs (4) or (5); and
>
> (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.
>
> (2) A public authority shall apply a presumption in favour of disclosure.
>
> (3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.
>
> (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

…

(e) the request involves the disclosure of internal communications.

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—

…

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;

…

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law; …

13 Personal data

(1) To the extent that the information requested includes personal data of which the applicant is not the data subject and as respects which either the first or second condition below is satisfied, a public authority shall not disclose the personal data.

R. Analysis

83. There is no question about the relevance and authority of those provisions. The Regulations have to be interpreted to give effect to the Directive that in turn gives effect to the Convention. The issue is whether they displace my analysis in *Information Commissioner v Home Office*. I do not consider that they do.

84. The legislation is concerned to ensure that, subject to the balance of the public interest, there is openness for environmental information. Reasons have to be provided to explain why the public authority is relying on an exception. And they must be provided within a time limit. So far, that is the same as under the Act. Unlike the Act, there is provision for the provision of remedies that must be effective and fair. But effectiveness includes effectiveness at ensuring the provisions of the legislation are applied. And fairness includes fairness for all. Both have to be applied to serve the public interest that is central to the environmental legislation, just as it is to the Act. I notice that Article 6(2) of the Directive affords specific recognition to third parties. That provision reinforces my focus on the protection of third parties in my analysis of the Act.

85. I note that in Recital (16) to the Directive the need to comply with time limits is grouped together with the public interest. I do not make too much of that, but it is an indication that they form a package. That creates a context in which the duty to give reasons must operate in a way that gives full effect to the protection of the public interest, or at least does not impede its protection.

86. The Directive provides that access to environmental information must be uniform through the EU. That is what I would expect for the protection of competition. But that is

limited to access. The Directive could not require uniformity within the access to justice in different member States. That is something that has to be fitted into the domestic legal systems, which differ widely. Inevitably, there will be some variation in the precise way that Article 6 is implemented. There is scope for States to adopt their own approaches to issues such as the scope of appeal rights. This is consistent with the decision of the European Court of Justice in *van Schijndel and van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* (Cases C-430/93 and C-431/93) [1995] ECR I-4705. I have not relied on those cases as they were not put to the parties and their context was different. However, they do decide that it is for member States to decide on the scope of judicial proceedings.

87. For those reasons, I see nothing in the specific provisions of the environmental legislation that justifies, still less requires, a different analysis from the Act.

S. The decisions of the European Court of Justice

88. Mr Facenna referred me to two decisions of the European Court of Justice, decided on the Directive 90/313/EEC: *Commission of the European Communities v French Republic* (Case C-233/00) [2003] ECR I-6625; and *Pierre Housieaux v Délégués du conseil de la Région de Bruxelles-Capitale* (Case C-186-04) [2005] ECR I-3299.

89. I accept that the relevant provisions of that Directive are directly comparable to those of Directive 2003/4. I also accept that both decisions decide that compliance with the time limit is mandatory and that it is unlawful not to rely on all relevant exceptions within the time allowed. However, I accept Mr Swift's argument that they do not assist in showing whether it is permissible to raise new exceptions later. The Court said that failure was unlawful and section 50(4)(b) of the Act allows the Information Commissioner to so decide. But the Court said nothing of the consequences of failure. Nor was it dealing with scope of enforcement provisions in domestic legislation.

T. A reference to the European Court of Justice

90. Mr Facenna argued that if I could not decide in his favour, I should refer a question to the European Court of Justice. I have decided not to refer a question, because I consider that the proper analysis is clear enough not to require one.

U. The procedure before the Information Commissioner

91. Mr Swift complained of the Information Commissioner's failure to allow the Department to make representations in the course of the application under section 50 of the Freedom of Information Act. I do not need to deal with this matter. If the Commissioner did not act in accordance with the principles of natural justice, the breach was cured by the appeal to the First-tier Tribunal. There is no general rule to that effect (*Calvin v Carr* [1980] AC 574), but the nature of the procedure before the tribunal under section 58 of the Act has that effect. It is a full rehearing of the issues put to it. Any breach of natural justice by the Commissioner can have no continuing impact after such a hearing.

V. Disposal

92. As the First-tier Tribunal misdirected itself on the Department's entitlement to rely on new exceptions, it made an error of law. That is why I have set its decision aside.

Signed on original **on 26 January 2011**	**Edward Jacobs** **Upper Tribunal Judge**