IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2011/0061
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50344341

Dated: 14 February 2011

Appellant: Ian Benson

Respondent: Information Commissioner

Additional Party: The Governing Body of Sheffield Hallam University

On the papers

Heard at: Field House London

Date of hearing: 14 September 2011

Date of decision: 6 October 2011

Before

Angus Hamilton

Judge

and

Anne Chafer

and

Paul Taylor

Subject matter: s 36 Freedom of Information Act 2000

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal for the reasons set out below.

REASONS FOR DECISION

Introduction

1. There was no dispute between the parties as to the relevant legislation to be considered in this case and the relevant provisions are helpfully and correctly set out by the Commissioner in his Response to the Appeal at paras 5-11. For the sake of completeness a copy of the Response is attached to this Judgement at Annex A. The Response is not however incorporated into the Judgement and only those parts specifically referred to as being approved are approved by the Tribunal.

2. The factual background to this Appeal is also not in dispute between the parties and it is also correctly summarised by the Commissioner in the Response at paras 15-20.

The complaint to the Information Commissioner

3. On 15 August 2010 the Appellant complained to the Commissioner.

4. On 14 February 2011 the Commissioner issued his Decision Notice. The Commissioner found that the Public Authority had correctly applied the exemption in section 36(2)(c) of FOIA. The Commissioner did not consider the exemptions in section 40(2) or 31(l)(a) of FOIA (also claimed by the public authority) save that he commented that he did not believe that the time spent considering the operation of any exemption could be correctly taken into account when considering the appropriate limit.

5. The Commissioner found that the Public Authority had breached section 17(3) of FOIA by failing to explain, by the time of its internal

review, why the public interest factors that favoured the maintenance of a qualified exemption outweighed the public interest in disclosure of the information. The Commissioner did not require the public authority to take any steps as a result.

The appeal to the Tribunal

6. On 5 March 2011 Mr Benson submitted an appeal to the Tribunal (IRT). His Grounds of Appeal are set out in the Open Bundle of Documents before us at pp 38-41.

7. In the Commissioner's Response the Grounds of Appeal are summarised at paragraph 44. The Tribunal noted that the Appellant in his Reply to the Response did not challenge this summary. The Tribunal also noted that although Mr Benson's Reply set out 'Further Grounds for Appeal' these were largely a restatement or expansion of the existing grounds. Mr Benson did however in his 'Further Grounds for Appeal' assert that the Commissioner had erred in concluding that the public interest favoured maintaining the section 36 exemption.

8. The Commissioner's summary of the Grounds of Appeal was as follows:

(1) The Appellant was not given an opportunity to comment on information supplied by the Public Authority to the Commissioner before the decision was reached and published. In particular, he has not seen any evidence presented by the Public Authority to explain how the release of the emails would render its IT systems inoperative. Further, he did not have an opportunity to comment on the allegation that he had previously disrupted the activities of an unnamed university, which he assumed was a reference to Plymouth where he had campaigned about the university's slogan. Further, he did not have an opportunity to comment on the Public Authority's evidence of

transparency and whether staff were willing to exercise their rights under FOIA;

(2) The Public Authority only published 23.3% of its staff email addresses. However, universities on average published 42% of staff email addresses and, for example, Cambridge University published 9,232 email addresses comprising 90.8% of their staff;

(3) The Public Authority had not adopted alternative steps, such as using online forms, publishing email addresses only in searchable databases or displaying email addresses in image format. This demonstrated that the Public Authority had exaggerated the extent of the problem;

(4) There was an error in the Decision Notice, in that it claimed that if the Appellant contacted 5,291 members of staff at the Public Authority twice a year and each member of staff spent 30 seconds deleting the email each time, this would cause 881 hours of disruption to the Public Authority. However, the correct outcome of this calculation is only 88.1 hours. Further, it would only take 3 seconds to delete an unwanted email and therefore any alleged disruption would only be 8.81 hours; and

(5) Generally, it was relevant that universities regarded the Appellant's FOIA requests as a problem to be dealt with and he had seen derogatory comments about himself and his medical problems on higher education bulletin boards. The Appellant has also provided the Tribunal with a copy of legal advice provided to the Association of Heads of University Administration by the law firm Martineau.

The questions for the Tribunal

9. The Tribunal took the summary of the Grounds of Appeal, together with the assertion that that the Commissioner had erred in concluding that the public interest favoured maintaining the section 36 exemption, as the questions to be considered.

Evidence

10. The parties agreed that this matter should be considered 'on the papers' only and we have heard no live evidence or oral submissions. No parties or representatives have attended the hearing.

11. We have considered, from the Appellant, the Notice and Grounds of Appeal, the Appellant's Reply to the Commissioner's Response and the Appellant's Reply to the Second Respondent's Response

12. We have considered, from the Commissioner, the Decision Notice, and the Response to Appeal.

13. We have considered, from the public authority, the Response to Appeal.

Analysis of Grounds of Appeal

Ground 1

14. The Appellant argues that the Commissioner did not give him an opportunity to challenge information given in support of the exemptions claimed by SHU.

15. The Commissioner responds by stating that this is a procedural matter, thus is not a valid ground of appeal.

16. However, the Commissioner goes on to address the three main issues which fall within ground 1, in summary, as follows:

    a. In relation to evidence supplied by SHU to demonstrate that its IT systems would be rendered inoperable, SHU had in fact set out its position in correspondence with the Appellant. As a result, the Appellant had been able to make submissions in response, as a consequence of which the Commissioner had given little weight to SHU's argument in relation to "denial of service" ("DoS") attacks.

    b. The Commissioner then addresses the Appellant's issue concerning the allegation that he had disrupted the activities of Plymouth University using information obtained under the Freedom of Information Act ("FOIA"). He notes that the Appellant has not denied that he conducted a campaign against them, only that this caused any disruption. The Commissioner asserts that he did not make any finding of fact about this campaign or whether it had caused disruption. Instead he took into account the likelihood of potential disruption through disclosure of the requested information to the general public.

    c. Finally in relation to ground 1, the Commissioner accepts that he took SHU's evidence, relating to their transparency and the willingness of staff to make use of FOIA, into account. However, he notes that nothing in the Appellant's notice of appeal has changed his view in relation to this and with regard to the balance of public interest.

17. The second respondent (SHU) also address these points, relying primarily on the Commissioner's arguments, reiterating in particular that they are under no obligation to provide their evidence to the Appellant during the course of the Commissioner's investigation.

18. In relation to these arguments the Tribunal concluded that this is not a valid ground of appeal as it does not appear to raise anything which demonstrates that the Decision Notice is not in accordance with the law; similarly nothing which amounts to an exercise of discretion by the Commissioner which ought to have been exercised differently.

Ground 2

19. The Appellant's second ground relates to the lower percentage of email addresses published by SHU on the Internet in comparison with other universities and the argument that the Commissioner did not take this into account. The Tribunal interpreted this as an argument that the Commissioner ought to have exercised his discretion differently.

20. In response the Commissioner argues that he did indeed take this into account, noting that other universities publishing a higher percentage of email addresses deploy techniques to prevent disclosure of whole lists via the internet, such as links to searchable databases. He also considers the necessity of publishing whole staff email lists and notes that SHU do have addresses for staff with public facing roles on its site.

21. SHU state that based on their experience, publication of a higher percentage of email addresses would lead to further "spam" and "phishing" attacks. They also indicate that the Appellant himself has acknowledged the approach taken by other universities, designed to prevent access to whole lists.

22. The Tribunal concluded that the Commissioner has given appropriate weight to the potential disruption and prejudice to SHU's business, basing this on evidence of previous "spam" and "phishing" attacks following inadvertent disclosure of email address lists.

Ground 3

23. The appellant claims that SHU have exaggerated the extent of the potential problem of spam and asserts that as they adopt no steps to prevent it, this is proof of exaggeration. Such steps include the use of on-line forms, searchable databases or the display of email addresses in image format.

24. In his direct response to this ground, the Commissioner appears to focus on why SHU do not consider it necessary to publish a complete list of staff email addresses rather than whether SHU have exaggerated the extent of the problem. Whilst this analysis is useful in establishing why publication is unnecessary, his response to ground 2 is more relevant and helpful. Here he considers whether the risk has been overstated by SHU and concludes that it has not, basing his judgement on the evidence provided by SHU in relation to previous attacks, as discussed at paragraph 11 above.

25. SHU point to their submissions in relation to ground 2, reiterating that in their opinion and based on empirical evidence, there exists a real risk of disruption due to increased spam and phishing attacks.

26. The Tribunal concluded that whilst it may be true that SHU's lack of preventative measures already puts them at risk, this does not mean that the risk is non-existent. Nor does it follow that they should increase the risk by disclosure of full lists to the general public.

Ground 4

27. The Appellant highlights an error of calculation in the Decision Notice relating to the number of hours of disruption which would be caused by him sending two emails per year to all staff members. The error magnifies the estimated disruption by a magnitude of ten, resulting in a figure of 881 hours. The actual result of the calculation should be 88.1 hours. This, he claims, has meant that the Commissioner has given

SHU's argument greater weight than should otherwise have been accorded. He goes on to argue that in fact it should only take 3 seconds to delete an unwanted email, thus resulting in 8.81 hours per annum across all staff.

28. The Commissioner has acknowledged the error (made by SHU) and agrees that the Appellant's figure of 88.1 hours is the correct outcome of the calculation.

29. Notwithstanding the error, the Commissioner makes clear that he has taken into account the potential disruption caused by emails from other likely sources given that disclosure is to the general public and indeed potentially worldwide.

30. The same scenario is claimed by SHU, who also highlight the risk posed by "spam" and "phishing" attacks resulting from potentially worldwide disclosure.

31. The Tribunal concluded, based on the evidence provided in relation to other attacks following inadvertent disclosure of email lists, that there is a real likelihood of further incidents of this nature with the prospect of significant disruption.

32. Despite the Appellant's assurances about his own IT security measures and intentions, the Tribunal agreed that disclosure has to be regarded as to the world at large thus the likelihood of disruption on a larger scale is real and must therefore be taken into account.

Ground 5

33. The Appellant has expressed concern that a concerted effort is in place to frustrate his FOIA requests and provides evidence in the form of legal advice from the law firm "Martineau". He alleges that the Commissioner has failed to take this fact into account.

34. Similarly that no regard has been given to the evidence of derogatory comments about him posted on bulletin boards by university staff.

35. In response the Commissioner asserts that whilst he does fully support the proper exercise of rights under FOIA, he does not believe that SHU have acted improperly in dealing with the Appellant's request. He goes on to state that argument is irrelevant in any event, in relation to the consideration of section 36(2)(c).

36. SHU have attested that they dealt with the Appellant's request *"...in accordance with appropriate policies, with careful consideration and in good faith*".

37. The Tribunal accepted that it must feel rather intimidating to discover that a law firm is issuing advice on how to deal with your requests under FOIA but considered this issue to be irrelevant to the consideration of the exemption in question.

38. The Tribunal acknowledged that the alleged comments relating to the Appellant's health are both unpleasant and unnecessary but not pertinent to whether the exemption under s.36 was appropriately claimed

Has the exemption in s.36(2) been properly claimed?

39. In order for the exemption to be properly engaged, the public authority's "*qualified person*" must give a reasonable opinion to the effect that disclosure of the requested information would, or would be likely to prejudice the effective conduct of public affairs (in other words, the carrying out of its core function).

40. Taking each element of this in turn; firstly, the Tribunal agreed that SHU's Vice Chancellor is the "*qualified person*" for the purposes of this exemption.

41. It is clear that the Vice-Chancellor gave his opinion on this matter at the time that the request was being considered, i.e. 20th May 2010 and also at the time of internal review, 19th July 2010.

42. In relation to the issue as to whether the Qualified Person's opinion that disclosure would be likely to prejudice the effective conduct of public affairs was objectively reasonable – the Tribunal carefully considered all the relevant submissions but ultimately approved and adopted the detailed analysis set out by the Commissioner at paragraphs 29-33 of the Commissioner's Response.

The Balance of Public Interest

43. Finally in relation to whether the public interest in maintaining the exemption outweighed the public interest in disclosing the information – again the Tribunal considered the submissions from the parties but were ultimately most persuaded by and therefore approved and adopted the analysis at paragraphs 34-41 of the Commissioner's Response

For all these reasons the Tribunal dismisses this appeal.

Our decision is unanimous

Signed:

Angus Hamilton DJ(MC)
Judge Date: 6 October 2011

APPENDIX A

IN THE MATTER OF AN APPEAL TO THE (FIRST-TIER) TRIBUNAL (INFORMATION RIGHTS)

EA/2011/0061

BETWEEN:

IAN BENSON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

INFORMATION COMMISSIONER'S RESPONSE

INTRODUCTION

1. This Response is served in accordance with Rule 23 of the Tribunal Procedure (First- Tier) (Information Rights) Tribunal Rules 2009 ("the 2009 Rules"). It responds to an appeal brought under section 57 of the Freedom of Information Act 2000 ("FOIA").

2. The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice dated 14 February 2011 (reference FS50344341).

3. As required by Rule 23(7) of the 2009 Rules, a copy of this Response has been sent to the Appellant at the same time as it has been sent to the Tribunal.

4. The Commissioner intends to oppose this appeal. The grounds upon which he relies are set out below.

RELEVANT STATUTORY FRAMEWORK

5. Under section 1(1) of FOIA a person who has made a request to a public authority for information is, subject to other provisions of FOIA:

   (1) entitled to be informed in writing by the public authority whether it holds information of the description specified in the request (section 1(1)(a)); and

(2) if the public authority does hold the information, to have that information communicated to him (section 1(1)(b)).

6. Section 2(2) of FOIA provides as follows:

> "*(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."*

7. Section 36 of FOIA is a provision of Part II and, by virtue of section 2(3), it is an absolute exemption in relation to information held by the House of Commons or the House of Lords and is otherwise a qualified exemption. Section 36(1) provides that section 36 applies to any information held by a public authority which is not a government department or the Welsh Assembly Government.

8. Section 36(2) provides as follows (emphasis added):

> "*(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—*
>
> *(a) would, or would be likely to, prejudice—*
>
> *(i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or*
>
> *(ii) the work of the Executive Committee of the Northern Ireland Assembly, or*
>
> *(iii) the work of the Cabinet of the Welsh Assembly Government.*
>
> *(b) would, or would be likely to, inhibit—*
>
> *(i) the free and frank provision of advice, or*
>
> *(ii) the free and frank exchange of views for the purposes of deliberation, or*
>
> *(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.*"

9. The section is varied in respect of statistical material by virtue of section 36(4) of FOIA, which is not relevant to this appeal.

10. The qualified person is defined by section 36(5) of FOIA. The public authority in this appeal is not listed in section 36(5)(a)-(n) and therefore, by virtue of section 36(5)(o), the qualified person in this case is:

"*(i) a Minister of the Crown,*
(ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
(iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown" (emphasis added).

11. If a public authority refuses to communicate the information to the complainant and relies on a qualified exemption, section 17(3) of FOIA requires it to state its reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

12. Under section 50(1) of FOIA, any person 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 of FOIA.

13. Except where a complainant has failed to exhaust a local complaints procedure, or where the complaint is frivolous or vexatious, subject to undue delay, or has been withdrawn or abandoned, the Commissioner has a duty to consider whether the request has been dealt with in accordance with the requirements of Part I of FOIA and to issue a Decision Notice to both the complainant and public authority.

14. Where the Commissioner decides that a public authority 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 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.

THE FACTUAL BACKGROUND TO THIS APPEAL

15. On 26 April 2010 the Appellant requested the following information from the Governing Body of Sheffield Hallam University (the Public Authority):

"*FOI Request – Staff E-mail Addresses*
I would like to request the following information under the provisions of the Freedom of Information Act. I would ask you to send your response by e-mail.
A list of the workplace e-mail addresses for all staff.
By workplace I am referring to corporate e-mail addresses ending in .ac.uk.
By staff I am referring to all individuals employed by your institution.
Please note that I do not require any segmentation of the list or any associated details"

16. The request had been made to every university in the UK and the Appellant told the Public Authority that he required this information to inform the staff about his website and that each member of staff would be invited to suggest topics worthy of investigation in confidence. The Appellant owned a website that enabled all universities to receive requests for information simultaneously. He believed that the website should be able to investigate higher education matters through FOIA requests and publish the results.

17. The Public Authority had 5,291 staff email addresses, including those for temporary staff. Approximately 1,100 staff email addresses were published on its website; these were not available in a list format.

18. The Public Authority responded on 20 May 2010. It confirmed that it held the requested information. However, it stated that it believed that it was entitled to withhold the information on the following three grounds:

    (1) Section 36(2)(c);

    (2) Section 40(2); and

    (3) Section 31(1)(a) of FOIA.

19. On 29 May 2010 the Appellant wrote to the Public Authority to request an internal review. He challenged the application of each of the exemptions.

20. Following further correspondence, on 10 August 2010 the Public Authority communicated the results of its internal review to the Appellant. It explained that it had considered all the arguments raised and had decided to uphold its position. It provided further detail about the application of the exemptions:

    (1) In relation to section 36(2)(c) of FOIA, it explained that the decision had been taken by the appropriate individual on the basis of relevant evidence and its past experiences. It explained that believed that the disclosure of the whole list of staff email addresses would prejudice the Public Authority's ability to offer an effective public service or meet its wider objectives and purposes, namely to provide education and conduct research. The qualified person had also considered the public interest test and concluded that it favoured maintaining the exemption. The Public Authority relied on the Tribunal decision of *Ministry of Defence v Information Commissioner and Evans* EA/2006/0027. The Qualified Person had reconsidered the matter in light of the points made by the Appellant in his letter seeking a review, but this had not changed the outcome because it believed that email traffic would be greater if the list of staff email addresses was disclosed;

(2) In relation to section 40(2) of FOIA, the Public Authority explained that it believed that its 5,291 staff email addresses were personal data and that this was in line with the Commissioner's advice. Its data protection policy explained that the information would only be given out where reasonable and necessary for the performance of an individual's roles, unless they provided their consent. The Public Authority provided detail about why it did not believe that the disclosure of the information would accord with any of the conditions in Schedule 2 of the Data Protection Act 1998 and therefore would contravene the first data protection principle and engage the exemption in section 40 of FOIA. It explained that it was mindful that the email addresses of those who were appropriately senior or in public facing roles would not be caught by section 40(2). However, it believed that it would exceed the cost limit to identify those individuals; and

(3) In relation to section 31(1)(a) of FOIA, the Public Authority explained that it continued to believe that the release of information would create an extra risk of a denial of service attack against it, which was an offence under the Computer Misuse Act 1990, and that disclosure of the email addresses would prejudice the prevention or detection of crime.

21. The Appellant complained to the Commissioner on 15 August 2010. The Appellant specifically asked the Commissioner to consider the following:

(1) The University already published 1,100 email addresses on its website;

(2) According to his understanding, these email addresses would be sufficient should someone nefarious wish to target the University with a denial of service attack;

(3) Therefore, the provision of all the email addresses would not increase the risk of such an attack; and

(4) He was not convinced by the arguments about section 31(1)(a) and explained that he did not see email addresses as being the equivalent to providing information to potential burglars about empty houses (referring to EA/2006/0060, on which the Public Authority relied).

THE COMMISSIONER'S DECISION

22. The Commissioner found that the person designated as the Qualified Person for the Public Authority was the Vice Chancellor (Professor Phillip Jones) (paragraph 17 of the Decision Notice).

23. The Commissioner checked the format of the withheld information and confirmed that there were 5,291 addresses. These were mostly in the format j.bloggs@shu.ac.uk (unless there

were two people with the same surname and same initial, in which case they chose their own designation that included their surname) (paragraph 18).

24. Three exemptions were relied on by the Public Authority. The Commissioner decided to consider section 36(2)(c) of FOIA first, given that it would cover all of the withheld information if it had been correctly applied (paragraph 19).

Section 36(2)(c) - engagement

25. The Commissioner first considered whether the exemption was engaged. He reminded himself that his role was to decide whether the qualified person's opinion that the disclosure would, or would be likely to, prejudice the conduct of public affairs was a reasonable one (paragraph 21).

26. The Public Authority had asked the Qualified Person whether it was likely that the disclosure would result in prejudice to the effective conduct of public affairs. The Commissioner noted that this question was slightly differently framed from the statutory question of whether disclosure would be likely to prejudice the effective conduct of public affairs, but that this made no material difference (paragraphs 23 and 24). The Commissioner found that the Qualified Person's decision was that he was of the view that the chance of the prejudice being suffered was more than a hypothetical possibility and that there was a real and significant risk (paragraph 25).

27. The Commissioner considered whether the Qualified Person's decision was reasonable. He reminded himself at paragraph 26 that he had to:

(1) Ascertain who the qualified person was;

(2) Establish that an opinion had been given;

(3) Ascertain when the opinion had been given; and

(4) Consider whether the opinion was objectively reasonable and reasonably arrived at.

28. In relation to the first three criteria, the Commissioner was satisfied that the Qualified Person was the Vice Chancellor of the Public Authority and that he had given his opinion on 20 May 2010 and also (during the internal review process) on 19 July 2010 (paragraph 27).

29. As for the fourth criterion, the Commissioner reminded himself that the opinion had to be both objectively reasonable and also reasonably arrived at; this criterion required detailed analysis (paragraph 28).

30. The Commissioner considered the material that had been before the Qualified Person and concluded that he appeared to have taken into account relevant considerations and did not

appear to have been influenced by irrelevant considerations (paragraphs 30 and 31). The Commissioner found that the Qualified Person had reasonably arrived at his decision that disclosure would be likely to prejudice the effective conduct of public affairs (paragraph 31).

31. The Commissioner considered whether the Qualified Person's opinion that disclosure would be likely to prejudice the effective conduct of public affairs was objectively reasonable. The Public Authority relied on the following reasons, which are set out at paragraph 32 of the Decision Notice:

(1) The Public Authority was worried about receiving Spam which it believed would disrupt it from carrying out its public duty. It explained that it had 5,291 email addresses and even if only two emails were sent a year to each and 30 seconds were spent reading each of them, this would still amount to 881 hours of working time. It explained that depending on the number of emails that it received, there could be a potentially unlimited drain on its resources;

(2) It explained that the request itself was unlikely to be a one-off as the information requested would become less useful with time. The Commissioner did not accept that this argument had any weight, given that future requests would be considered on their own merits;

(3) The Public Authority noted that the disclosure of the list of staff email addresses under FOIA would not be just to the Appellant but to the whole public at large. Therefore, irrespective of the Appellant's intentions, the Public Authority considered that it had to exhibit caution about the release of the information to the whole public;

(4) It explained that it had evidence that the Appellant had used information obtained through FOIA to conduct a targeted campaign against another university. The Public Authority was concerned that disclosure of the whole list would enable its functions to be disrupted by a similar campaign;

(5) The Public Authority explained that email was crucial and underpinned its core business. It said that email was used by all administrative, managerial and academic staff, it was the key to contacting overseas teaching partners and also to contact workplaces where students are on placement. IT supported the university's teaching and research. HR, finance and student information systems were run by its IT staff. It explained that disruption to its email service at key times would be highly difficult to manage due to the nature of its role, for example during admissions (particularly in clearing), online graduation or extension deadlines. In conclusion, all its key services were dependent on email;

(6) The Public Authority had calibrated its website so that emails that were part of its core business were directed to the correct place enabling enquiries to be dealt with by those individuals without duplication and in the most efficient way. The Public Authority explained that its staff had expressed concern about the number of emails that they were receiving and the university had introduced a policy to address those concerns. It explained that it was worried that further unnecessary emails would cause its staff stress and it believed that this would prejudice the effective conduct of public affairs;

(7) It explained in addition that its staff had varying knowledge of IT and awareness of potential phishing attempts or email scams and it felt it prudent to protect its staff. In addition, it believed that the receipt of unexpected emails would lead to members of its staff making queries to other staff because they were concerned that their personal data was not receiving appropriate protection. This had happened before when there had been a spam incident resulting from its inadvertent previous disclosure of part of its directory in 2007. While the Commissioner noted that there was a distinction between unplanned and planned disclosures, he was still content that this was a relevant consideration;

(8) The Public Authority explained that it might be burdened with legal and financial liabilities which resulted from successful phishing attacks. The Public Authority explained that it had had four complaints about this matter in the past and that similar claims might have more success if it could be proved that the likelihood of phishing attacks was connected to a disclosure it had made; and

(9) Finally, it provided detailed evidence of an attack that it had received after the inadvertent disclosure of part of the staff directory in 2008. The Commissioner noted that there were two attacks and he received details about how they operated and their effect on the university. While the Commissioner noted that there was a distinction between unplanned and planned disclosure, the Commissioner was still content that this was a relevant consideration.

32. On the other hand, the Commissioner took into account the points made by the Appellant and set these out at paragraphs 33 to 35:

(1) The Public Authority had published 1,100 of its email addresses and the Appellant said that this in itself had not caused an adverse impact;

(2) There was no evidence to suggest that publishing a full list would increase the risk to the Public Authority of, for example, a denial of service attack. However, the Appellant accepted that there was a difference between the current availability of the 1,100 email addresses (which the Public Authority accepted were necessary for the

performance of an individual's role or duties) and the disclosure of a full list containing 5,291 email addresses;

(3) The Appellant would use the list responsibly. However, the Commissioner stated that it was important to note that disclosure of information under FOIA should be regarded as disclosure to the world at large;

(4) The Appellant had evidenced that equivalent public authorities had not withheld the same information as the Public Authority. While the Commissioner noted that the application of an exemption is discretionary, he reminded himself to consider whether the prejudice has been overstated by this Public Authority given the alternative approach taken by the others;

(5) The Commissioner took into account the Appellant's submissions about denial of service attacks;

(6) The Appellant submitted that disclosing the staff email addresses would not materially affect the amount of email traffic. The Commissioner rejected this submission because the Public Authority had provided evidence of spikes in traffic that had resulted from the disclosure of part of the directory in the past; and

(7) The Appellant submitted that sophisticated IT systems ought to be able to counteract any possible prejudice that the Public Authority would experience through the disclosure of the list. The Commissioner accepted that there was some merit in this argument, but concluded that the existence of IT security did not mitigate the prejudice to a significant extent because a method of attack could vary and there was always likely to be a time delay between the problem being noted and counteracted.

33. Having considered the above arguments, the Commissioner concluded that the Qualified Person's opinion was objectively reasonable (paragraphs 36 to 37). The Commissioner was satisfied in the particular circumstances of this case that it was reasonable for the Qualified Person to conclude that the disclosure of the withheld information to the public would be likely to cause an adverse effect to the Public Authority's ability to carry out its core functions. He considered that in this case the evidence supported the opinion of the Qualified Person because the Public Authority provided evidence that the disclosure of similar information had had an adverse effect in the past. The Commissioner also accepted that the Public Authority should be entitled to organise itself so that the correct members of staff received the correct emails, to prevent both duplication and wastage of its limited resources. Section 36(2)(c) of FOIA was therefore engaged.

Section 36(2)(c) – the balance of the public interest

34. The Commissioner considered whether the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

35. The Commissioner set out at paragraph 40 the factors in favour of disclosure which had been identified by the Public Authority:

(1) The strong public interest in ensuring transparency in the activities of public authorities;

(2) The public interest in ensuring that members of the public were able to contact appropriate staff within the public authority; and

(3) The public interest in staff being able to access certain external services for their work.

36. The Commissioner found that, even though the email addresses on their own added little to the public understanding of how the Public Authority operated, their disclosure might facilitate or support scrutiny by allowing the Appellant to invite the Public Authority's staff to raise issues of concern. He therefore concluded that the arguments about accountability should be given some weight in this case. However the weight of those arguments was mitigated by further evidence that had been provided by the Public Authority that there was real awareness of freedom of information within the University, that there were set channels for members of staff to request management information and that the Public Authority had already provided a facility to allow staff to raise issues anonymously. (paragraph 43) The Commissioner also recognised that there was a public interest in knowing the number of staff and who was employed by public funds. In addition, there was a public interest in making it possible to contact relevant individuals where their expertise would merit their contact. However, he noted that in this case the number of staff was known and that the list by itself provided no information that would enable specific individuals to be selected. (paragraph 44) The Commissioner took into account that the services offered by the Appellant would be useful to individual members of the Public Authority's staff (paragraph 45).

37. The Commissioner summarised at paragraph 48 the factors put forward by the Public Authority in favour of maintaining the exemption in section 36 of FOIA, which he grouped by theme:

(1) The provision of the list to the public would undermine the channels of communication and lead to a consistent loss of time from the public authority's core functions; and

(2) The provision of the list to the public would leave the Public Authority and its staff more open to phishing attacks and the resulting problems that might be suffered.

38. The Commissioner was satisfied that the first theme of arguments would amount to a fairly severe prejudice, whose extent and frequency would be potentially unlimited. He was therefore satisfied that these public interest factors should be given real weight in this case and that they favoured the maintenance of the exemption. (paragraph 49)

39. The Commissioner was satisfied that the second theme of arguments would amount to a severe prejudice, whose extent and frequency would be potentially unlimited. The presence of IT security systems could not be taken into account, because future attacks might be able to cause damage before the IT security systems could intervene. These arguments had real weight and favoured the maintenance of the exemption. (paragraph 50)

40. The Commissioner broadly accepted the Appellant's submissions about the extent of any risk of an increase to the potency of denial of service attacks and concluded that disclosure of the list would not lead to a severe risk. He decided to give little weight to the Public Authority's public interest arguments about this matter. (paragraph 51)

41. The Commissioner considered the balance of the public interest arguments and noted that there was some weight to the arguments on each side. He considered that in the circumstances of this case the weight of public interest factors maintaining the exemption were greater than those that favoured disclosure. He was satisfied that disclosure of the staff email addresses to the public would be highly likely to prejudice the Public Authority's core functions, both because it would undermine the channels of communications and also because it would leave it open to spam emails and their consequences. Given the negative impact this would have on the Public Authority, the Commissioner concluded that the public interest favoured maintaining the section 36 exemption. (paragraph 53)

Other matters

42. Having found that the Public Authority had correctly applied the exemption in section 36(2)(c) of FOIA, the Commissioner did not consider the exemptions in section 40(2) or 31(1)(a) of FOIA (paragraph 55), save that he commented (in footnote 3) that he did not believe that the time spent considering the operation of any exemption could be correctly taken into account when considering the appropriate limit.

43. The Commissioner found that the Public Authority had breached section 17(3) of FOIA by failing to explain, by the time of its internal review, why the public interest factors that favoured the maintenance of a qualified exemption outweighed the public interest in disclosure of the information (paragraph 56). The Commissioner did not require the Public Authority to take any steps as a result (paragraph 59).

THE NOTICE OF APPEAL

44. The Notice of Appeal challenges the Commissioner's Decision Notice on grounds that:

(1) The Appellant was not given an opportunity to comment on information supplied by the Public Authority to the Commissioner before the decision was reached and published. In particular, he has not seen any evidence presented by the Public Authority to explain how the release of the emails would render its IT systems operative. Further, he did not have an opportunity to comment on the allegation that he had previously disrupted the activities of an unnamed university, which he assumed was a reference to Plymouth where he had campaigned about the university's slogan. Further, he did not have an opportunity to comment on the Public Authority's evidence of transparency and whether staff were willing to exercise their rights under FOIA;

(2) The Public Authority only published 23.3% of its staff email addresses. However, universities on average published 42% of staff email addresses and, for example, Cambridge university published 9,232 email addresses comprising 90.8% of their staff;

(3) The Public Authority had not adopted alternative steps, such as using online forms, publishing email addresses only in searchable databases or displaying email addresses in image format. This demonstrated that the Public Authority had exaggerated the extent of the problem;

(4) There was an error in the Decision Notice, in that it claimed that if the Appellant contacted 5,291 members of staff at the Public Authority twice a year and each member of staff spent 30 seconds deleting the email each time, this would cause 881 hours of disruption to the Public Authority. However, the correct outcome of this calculation is only 88.1 hours. Further, it would only take 3 seconds to delete an unwanted email and therefore any alleged disruption would only be 8.81 hours; and

(5) Generally, it was relevant that universities regarded the Appellant's FOIA requests as a problem to be dealt with and he had seen derogatory comments about himself and his medical problems on higher education bulletin boards. The Appellant has also provided the Tribunal with a copy of legal advice provided to the Association of Heads of University Administration by the law firm Martineau.

GROUNDS FOR RESISTING THE APPEAL

45. The appeal is without merit for the reasons given below.

46. The Commissioner primarily relies on the reasons given in the Decision Notice for his conclusions that:

(1) The exemption in section 36(2)(c) of FOIA was engaged, in that the Qualified Person had reasonably arrived at the objectively reasonable opinion that disclosure would be likely to prejudice the effective conduct of public affairs; and

(2) In all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

47. Turning to the grounds of appeal, the Appellant's first ground of appeal is a procedural complaint that he did not have an opportunity to comment on the information provided by the Public Authority. Before responding to the Appellant's specific complaints, the Commissioner respectfully makes the preliminary observation that there is no rule that information provided to him by a public authority must be forwarded to the complainant for comment and vice versa. When investigating a complaint, the Commissioner's practice is to ask the public authority and the complainant for further information as required for the determination of that particular complaint. Given the nature of his role, the Commissioner does not operate in the same manner as a formal Court i.e. with a structured process of complaint, response and reply. It is occasionally necessary for the Commissioner to ask further questions in order to obtain clarification or additional information as the investigation develops. It would significantly delay the process if every response had to be sent to the other party for comment; this would render it difficult for the Commissioner to resolve any complaint, with a potentially never-ending stream of comment and counter-comment. Instead, the Commissioner uses his discretion to ask the other party to comment on issues when in his view that may be necessary in order for the matter to be resolved fairly in all the circumstances.

48. The Appellant complains that he did not have an opportunity to comment on three specific issues. For the reasons set out below, the Commissioner denies that the Appellant was subjected to any procedural unfairness. In any event, the Commissioner submits that this is not a valid ground of appeal and makes no difference to the correct decision on the application of section 36(2)(c) of FOIA.

49. The first allegation is that the Appellant did not see the evidence provided by the Public Authority to explain how the release of the emails would render its IT systems inoperative. However, the Public Authority had set out its position in correspondence with the Appellant and he had made submissions to the Commissioner in response. As a result, the Commissioner gave little weight to the Public Authority's public interest arguments about the risk of denial of service attacks.

50. The second issue is that the Appellant considers that he has not had an opportunity to comment on the Public Authority's allegation that he had previously disrupted the activities of

another unnamed university, which he assumed to be a reference to Plymouth. In the Notice of Appeal, he explains that he had campaigned against Plymouth University's slogan that it was "*the enterprise university*" and that this had included emailing 275 members of staff at Plymouth University in order to seek their views on the slogan. The Appellant denies having disrupted the activities of the University of Plymouth. The Notice of Appeal explains that his campaign received encouragement and was reported in the Plymouth Herald and Times Higher Education.

51. In this case, the information provided by the Public Authority stated that it did not feel that it could rely on the Appellant's assurances that his use of the email list would be limited to a couple of emails per week. It relied on the campaign in Plymouth and provided the Commissioner with copies of the Times Higher Education article (which included the Appellant's own comments on the article, which had been published online) and Plymouth Evening Herald.

52. The Decision Notice stated that the Public Authority had explained that it had evidence that the Appellant had used information obtained through FOIA to conduct a targeted campaign against another university. It recorded that the Public Authority was concerned that disclosure of the whole list would enable its functions to be disrupted from a similar campaign. The Appellant does not deny that he conducted a campaign and in fact he has provided the Tribunal with the same Times Higher Education article. The potential issue between the Appellant and the Public Authority is whether the Public Authority was right to be concerned that a similar campaign would disrupt its functions. The Commissioner did not make any finding of fact about this campaign or the extent (if any) to which it had caused disruption at Plymouth University. Instead, the Commissioner properly reminded himself that disclosure was to the world at large and he did not focus on the risk of disruption by the Claimant's own emails. Given the evidence produced by the Public Authority of the disruption caused by previous disclosure of some staff email addresses and the other factors set out in the Decision Notice, the Commissioner was right to conclude that section 36(2)(c) had been properly applied by the Public Authority.

53. The third issue is that the Appellant considers that he has not had an opportunity to comment on the Public Authority's evidence of transparency and the willingness of staff to exercise their rights under FOIA. The Public Authority's evidence on this point was one of the factors taken into account by the Commissioner. However, the information now provided by the Appellant in his Notice of Appeal does not change the balance of the public interest.

54. The second ground of appeal complains that the Commissioner did not take into account the extent to which other universities published staff email addresses. However, the Public Authority provided information to the Commissioner that other higher education institutes published staff directories in a searchable format where it was not possible to access the whole list and this was for the very reason that a list could lead to spam attacks (and therefore

denial of service attacks). The disclosure of a list of all staff email addresses would create a significantly higher risk. In any event, the Commissioner expressly reminded himself to consider whether the prejudice has been overstated by this public authority, given the alternative approach by the others. The Commissioner approached the Public Authority's evidence about the risk with this background in mind and correctly concluded that section 36(2)(c) of FOIA had been properly applied.

55. The third ground of appeal is that the Public Authority had not adopted alternative steps to publish the staff email addresses. However, the Commissioner took into account the various methods used by the Public Authority to enable third parties to contact the university and its staff. The Public Authority provided evidence that it had published topic-specific email addresses for queries and that staff in public-facing roles generally also had publicly available email addresses. Whilst there might be some circumstances in which it would be useful for all staff to be emailed by a third party, that had to be balanced against the disadvantages (including increased Spam for the majority of staff and the problems caused by an increase in email traffic generally). The Public Authority had carefully considered the matter in order to strike the right balance.

56. The fourth ground of appeal is that there was an error in the Decision Notice in the calculation of the number of hours it would take for staff to deal with two emails per years from the Appellant. The Commissioner accepts that the calculation provided by the Public Authority was incorrect and regrets any confusion caused by its inclusion in the Decision Notice. However, the figure was an illustration only. Further, it was based on the Claimant sending two emails to each member of staff each year and, as the Commissioner then properly reminded himself, disclosure would be to the whole world; the disruption caused by disclosure of the email addresses would not be limited to the time spent dealing with the Claimant's own emails. For this reason, the correction to the calculation does not affect the application of section 36(2)(c) of FOIA.

57. The Appellant's fifth ground of appeal is that the Commissioner failed to take into account that universities regard his FOIA requests as a problem to be dealt with and that, for example, he had seen derogatory comments about himself and his medical problems on higher education bulletin boards. The Commissioner fully supports the proper exercise of the rights created by FOIA. He has no reason to believe that the Public Authority in this case did not act in good faith in dealing with the Claimant's request. In any event, the issue on this appeal is whether section 36(2)(c) was properly applied.

CONCLUSIONS

58. The Tribunal is invited to dismiss the appeal and uphold the Commissioner's Decision Notice.

59. The Commissioner is content for the case to be dealt with without a hearing.

Rachel Kamm
11KBW Chambers

For and on behalf of the Commissioner

DATED this 5th day of April 2011

[redacted]

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case No. GIA/3085/2011

Appellant:	Mr Ian Benson
First Respondent:	The Information Commissioner
Second Respondent:	Sheffield Hallam University

DECISION OF THE UPPER TRIBUNAL

A LLOYD-DAVIES

JUDGE OF THE UPPER TRIBUNAL

ON APPEAL FROM:

Tribunal Case No:	EA/2011/0061
Tribunal:	First-tier Tribunal (Information Rights)
Hearing date:	14 September 2011

IN THE UPPER TRIBUNAL **Case No.** GIA/3085/2011
ADMINISTRATIVE APPEALS CHAMBER

Before **A Lloyd-Davies Judge of the Upper Tribunal**

DECISION

My decision is that the decision of the tribunal made on 14 September 2011 involved the making of an error of law. I set that decision aside and remit the case for rehearing by a differently constituted tribunal.

REASONS

1. On 26 April 2010 the appellant, Mr Benson, requested the following information from the Governing Body of Sheffield Hallam University ("SHU"):-

> "FOIA requests – Staff E-Mail Addresses
>
> I would like to request the following information under the provisions of The Freedom of Information Act. I would ask you to send your response by e-mail.
>
> A list of the workplace e-mail addresses for all staff.
>
> By workplace I am referring to corporate e-mail addresses ending in .ac.uk.
>
> By staff I am referring to all individuals employed by your institution.
>
> Please note that I do not require any segmentation of the list or any associated details."

Mr Benson had made similar requests to every higher education institution in the UK. SHU had 5,291 staff e-mail addresses of which approximately 1,100 were published on SHU's website: these were not available in a list format.

2. SHU replied to Mr Benson's request on 20 May 2010. It confirmed that it held the requested information. It stated it believed that it was entitled to withhold the information under three provisions of the Freedom of Information Act 2000 ("FOIA"), namely section 31(1)(a), section 36(2)(c) and section 40(2). On 29 May 2010 Mr Benson wrote to SHU to request an internal review. He challenged the application of each of the exemptions. SHU on its review upheld its previous position. Mr Benson complained to the Information Commissioner on 15 August 2010. The Information Commissioner decided to consider section 36(2)(c) first, since if it had been correctly applied it would cover all the withheld information.

3. Section 36(2) provides as follows:

"(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –

...

(c) would otherwise prejudice, or would be likely otherwise to prejudice the effective conduct of public affairs."

The exemption is a qualified exemption.

By virtue of section 36(5)(o)(iii) and the relevant ministerial order the qualified person is the vice-chancellor of SHU. He gave his opinion both for the purposes of the response to the initial request and for the purposes of the internal review.

4. On 14 February 2011 the Commissioner issued his decision notice. He found that SHU had correctly applied the exemption in section 36(2)(c): he did not consider the exemptions in section 31(1)(a) or section 40(2). The Commissioner found that SHU had not complied with section 17(3) of FOIA by failing to explain, by the time of its internal review, why the public interest factors that favoured the maintenance of a qualified exemption outweighed the public interest in disclosure of the information; however the Commissioner did not require SHU to take any steps as a result of this finding. Mr Benson appealed to the First-tier Tribunal (Information Rights) on 5 May 2011. The tribunal dismissed Mr Benson's appeal following a paper hearing to which all parties had agreed. Mr Benson applied for permission to appeal to the First-tier Tribunal, which was refused on 1 November 2011. I held an oral hearing of Mr Benson's renewed application for permission to appeal, following which I granted to Mr Benson permission to appeal on 10 December 2012. In my grant of permission to appeal I identified two issues which I then considered merited further consideration.

5. The first issue that I identified was whether the First-tier Tribunal had dealt adequately with Mr Benson's evidence that significant numbers of higher education institutions publicly provided e-mail addresses for their staff in what is conveniently described as "harvestable" form, that is to say in a form which meant that these addresses could be downloaded (either by use of specialist software or otherwise) so as to provide a proportionately bigger list of retrievable e-mail addresses than was provided by SHU: he provided a schedule showing that the University of Cambridge published 90.8% of its staff e-mail addresses and that the University of Sheffield (a neighbour of SHU) provided over 60% of its staff e-mail addresses in "harvestable" form and supplied a printout of those latter harvestable addresses (see pages 388 – 403 of the First-tier Tribunal bundle). This compared unfavourably with the 23% provided by SHU. ("Harvestable" e-mail addresses are to be contrasted with those e-mail addresses which are only obtainable in "searchable" form, namely by the searcher having the name of the target member of staff).

6. The Commissioner submitted to the First-tier Tribunal (paragraph 54 of its response on page 55 of the First-tier Tribunal bundle)

"However, [SHU] provided information to the Commission that other higher education institutions published staff directories in a searchable form where it was not possible to access the whole list and this was for the very reason that a list [i.e. a harvestable list] could lead to spam attacks (and therefore denial of service attacks)."

7. Mr Benson replied:

"I do not accept that the [SHU] submission made any reference to how other universities went about publishing e-mail addresses. In any case the figures I submitted initially to the ICO and subsequently with my appeal showed the numbers of e-mail addresses published openly without any restriction of access. I have not quoted any numbers for e-mail addresses that are available only in some restricted way such as via searchable databases."

8. On this issue SHU (at paragraph 5.5.2 on page 72 of the First-tier Tribunal bundle) stated:

"[SHU] acknowledges that other higher education institutions publish a higher percentage of e-mail addresses. However it would seek to highlight that these e-mail addresses are published in such a way that whole lists of staff e-mail addresses cannot be accessed. [Mr Benson] has confirmed that this is also his understanding."

9. Mr Benson responded to SHU in the following terms (page 75 of the First-tier Tribunal bundle):

"All the figures that I have quoted regarding proportions of staff e-mail addresses openly published by other universities referred to those e-mail addresses that can be harvested using automated methods. For the obvious reason that it would take me four years to assemble I have never attempted to gather or document the proportion of the university staff e-mail addresses which are only available through manual research.

I have read through the entirety of my previous submissions and am at a loss to understand how [SHU] could claim agreement to their statement. For the avoidance of doubt I entirely reject the SHU statement that other universities only publish higher proportions of e-mail addresses in ways that prevent whole lists being accessed."

For the avoidance of doubt I attach the list of 5,535 available staff e-mail addresses from the neighbouring University of Sheffield as gathered using automated methods on 8 May 2011. A more thorough automated search could have been undertaken and would have produced a larger total."

10. In essence, therefore, Mr Benson was arguing before the First-tier Tribunal that other universities provided a far larger proportion of staff e-mail addresses in "harvestable" form than did SHU. Each of the respondents, however, was seemingly seeking to say that those universities who published a greater proportion of their e-mail addresses than SHU did so in a manner which was non-harvestable.

11. The First-tier Tribunal dealt with this issue in the following manner in paragraphs 19 – 22 of its decision which were as follows:

> "19. Mr Benson's second ground relates to the lower percentage of e-mail addresses published by SHU on the Internet in comparison with other universities and the argument that the Commissioner did not take this into account. The Tribunal interpreted this as an argument that the Commissioner ought to have exercised his discretion differently.
>
> 20. In response the Commissioner argues that he did indeed take this into account, noting that other universities publishing a higher percentage of e-mail addresses deploy techniques to prevent disclosure of whole lists via the internet, such as links to searchable databases. He also considers the necessity of publishing whole staff e-mail address lists and notes that SHU do have addresses for staff with public facing roles on its site.
>
> 21. SHU state that based on their experience, publication of a higher percentage of e-mail addresses would lead to further "spam" and "phishing" attacks. They also indicate that [Mr Benson] himself has acknowledged the approach taken by other universities, designed to prevent access to whole lists.
>
> 22. The Tribunal concluded that the Commissioner has given appropriate weight to the potential disruption and prejudice to SHU's business, basing this on evidence of previous "spam" and "phishing" attacks following inadvertent disclosure of the e-mail address list."

12. Each of the respondents submits that paragraphs 20 and 21 which I have just cited are an accurate summation of the submissions made to the First-tier Tribunal. In my judgment, however, this misses the point: the First-tier Tribunal wholly failed to deal with Mr Benson's evidence as to the extent to which other universities had "harvestable" sites. It is nowhere mentioned. I would go further than this: by quoting only the submissions made by the respondents in paragraphs 20 and 21 above, the First-tier Tribunal was, in my view, tacitly adopting those submissions as a part of its decision. I recognise that paragraph 22 refers to "spam" and "phishing": but the Tribunal's conclusions on this might well have been affected by its unbalanced approach to the evidence and submissions which it had received.

13. I have considered carefully whether the failure on the part of the First-tier Tribunal which I have identified above is sufficiently material to mean that its whole decision must be set aside. I conclude that the failure is material: if the Tribunal had taken into account Mr Benson's evidence as to the extent of which other universities staff e-mail addresses were harvestable it might well have approached the question of both the reasonableness of the vice-chancellor's opinion and the question of the balance of public interest in a different fashion. I consider that Mr Benson is entitled to a fair evaluation of the evidence that he produced; this has not been given; and on this ground alone I set the decision of the First-tier Tribunal aside. (I add that I have ignored, for the purposes of this decision, the further evidence adduced by Mr Benson and attached to his skeleton argument which was before me when I granted

permission to appeal: this was not before the First-tier Tribunal, which cannot be faulted for not taking it into account).

14. There are two further points. First, I do not consider that this is a case where I should substitute my own decision since Mr Benson is entitled to have the benefit of the expertise of the lay members of the First-tier Tribunal, which expertise I only have in very much less measure. Secondly, the fact that Mr Benson has succeeded in his appeal before the Upper Tribunal is of no predictive weight as to what the newly constituted First-tier Tribunal may decide.

15. I can deal with the second ground on which I granted permission to appeal more shortly. I referred to the decision of the Scottish Information Commissioner in Benson v University of Glasgow, 8 December 2010, decision number 2006/2010. As has been pointed out by the respondents, the legislation corresponding to Section 36 of FOIA is markedly different in Section 30 of the Freedom of Information Act (Scotland) 2002. First, substantial prejudice or the likelihood of substantial prejudice has to be shown as opposed to merely prejudice. Secondly, there is no requirement for the reasonable opinion of a qualified person. Thirdly, on its facts this decision was markedly different. Glasgow University in fact published all staff e-mail addresses on its website, but in a format which it was accepted would have taken at least 25 hours to harvest. The Scottish Commissioner decided that there was no substantial prejudice in the University publishing a full list, since the list available was not reasonably accessible. In the event the Commissioner declined to make any order to the University, since Mr Benson had, by the time of the Scottish Commissioner's decision, successfully downloaded the e-mail addresses by automated means. I therefore consider that the Scottish decision, as a matter of law, does not take Mr Benson's appeal any further.

16. For the reasons given in paragraphs 12 to 13 above I allow Mr Benson's appeal.

(Signed)

A Lloyd-Davies
Judge of the Upper Tribunal

(Date) **11 December 2013**