Neutral citation number: [2025] UKFTT 54 (GRC)

Case Reference: FT/EA/2024/0146

First-tier Tribunal

General Regulatory Chamber

Information Rights

Heard: on the papers

Heard on: 13 September 2024 and 29 November 2024

Decision given on: 22 January 2025

Before

TRIBUNAL JUDGE FOSS
TRIBUNAL MEMBER CHAFER
TRIBUNAL MEMBER TAYLOR

Between

KATIE THOMAS

Appellant

and

(1) THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is allowed to the extent that the Judicial Appointments Commission was not entitled to rely on s40(2) of the Freedom of Information Act 2000 to withhold the number of candidates who were graded C in the Judicial Appointment Commission selection exercises for the roles of High Court Judge in 2020, 2021 and 2022, or the role of Circuit Judge in 2021.

Substituted Decision Notice: the Judicial Appointments Commission was entitled to withhold the number of candidates who were graded C in the Judicial Appointment Commission selection exercises for the roles of High Court Judge in 2020, 2021 and 2022, and the role of Circuit Judge in 2021, pursuant to s21 FOIA as that information was accessible by other means, namely in the data published by the Judicial Appointments Commission to the Senior Salaries Review Board on 13 January 2023.

DECISION AND REASONS

Introduction

1. This appeal concerns a request made by the Appellant under the Freedom of Information Act 2000 ("FOIA") on 18 May 2023 for information from the Judicial Appointments Commission ("JAC") relating to various judicial selection exercises, specifically the situational questions and specimen answers, and scoring frameworks used in those exercises, details of the candidates' scores, and certain JAC Board Minutes ("the Request").

2. On 14 June 2023, the JAC refused the Request, relying on s36(2)(c) FOIA (prejudice to the effective conduct of public affairs), s40(2) FOIA (personal data) and s22 FOIA (information intended for future publication).

3. On 21 September 2023, the JAC maintained its position upon internal review in relation to the application of s36(2)(c) FOIA, only partially in relation to the application of s40(2) FOIA, and not in relation to s22 FOIA (the relevant information having been published by this stage).

4. The Appellant complained to the Information Commissioner ("the Commissioner"). This is an appeal against the Commissioner's Decision Notice Reference IC-268295-K8Q1 dated 28 March 2024, wherein he concluded that the JAC was entitled to rely on s36(2)(c) and s40(2) FOIA in refusing disclosure.

5. The JAC was not a party to the appeal. On 14 May 2024, it confirmed to the Tribunal that it did not wish to participate in the appeal.

6. The hearing of this appeal took place on 13 September 2024 and 29 November 2024. Neither party appeared at the hearing, each being agreeable to the Tribunal determining the appeal on the papers. The Tribunal was satisfied, pursuant to Rule 32(1)(b) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the Tribunal Rules") that it could properly determine the issues without a hearing.

7. A week before the appeal was heard on 13 September 2024, the Appellant invited the Respondent to agree that all the documents filed with the Tribunal in this appeal, including the final hearing bundle, be made available to the public. The Respondent refused to agree.

8. In our decision, we have narrated in detail the various positions of the parties and the JAC as they have sought to articulate them throughout their engagement with the Request, her complaint and this appeal. In so doing, we have been at pains to adopt, so far as possible and relevantly to the issues we must determine, the language used by each of the three of them. Our decision therefore substantially records or reflects the relevant material before us.

9. We give the entirety of our reasons for our decision in this single, OPEN judgment.

The Request

10. On 18 May 2023, the Appellant requested the following from the JAC [1]:

> "*Situational and other questions and specimen answers*
> *(1) Please provide copies of all situational and other questions and specimen answers for the following exercises:*
> *(a) High Court selection exercises for 2020, 2021 and 2022.*

[1] The Decision Notice records, in error, that the Appellant also requested copies of all situational and other questions and specimen answers, together with the scoring framework and details of scores in relation to "any DCJ selection exercise conducted in 2021 and 2022", and that the request relating to the Circuit Judge exercise referred to "any specialist CJ exercise conducted in 2021 and 2022". We understand that reference to a request in these terms in the Decision Notice arose from confusion caused by a previous draft of the request. The request which is the subject of this appeal is that set out above.

(b) The CJ exercise for 2021.

(2) Please provide the scoring framework to mark candidates in respect of the above selection exercises.

(3) Please provide details of how each of the candidates (anonymised appropriately) appointed to the above positions scored in such selection exercises.

Board Minutes

(4) Please provide copies of the Commissioners' April 2023 and May 2023 board minutes."

11. The Appellant asked the JAC to note that she did not seek any person's personal data.

The JAC's response to the Request

12. On 14 June 2023, the JAC responded to the Request.

Part 1 of the Request (Situational Questions and Specimen Answers)

13. The JAC refused to disclose the Situational Questions and Specimen Answers sought in relation to the High Court Judge selection exercises for 2020, 2021 and 2022, and the Circuit Judge selection exercise for 2021.

14. The JAC relied on s36(2) FOIA:

a. the release of the information requested would, or would be likely to, prejudice the effective conduct of public affairs because there was a good likelihood that the situational and other questions and specimen answers might be used or referred to, in part or full, in future judicial appointment exercises.
b. it was the reasonable opinion of Dr Richard Jarvis, the JAC Chief Executive, and the Qualified Person for the purposes of s36 FOIA, who had reviewed the Request, that the information should not be disclosed.
c. the JAC acknowledged a public interest in transparency but concluded that disclosure of this information would not be in the public interest as it would mean that such material could not be used to assist future exercises, thus

placing additional burdens on judicial resource who were key in producing the information. Accordingly, the JAC concluded that the public interest test was not met as disclosure had the potential to be detrimental to the judicial appointment process.

Part 2 of the Request (Scoring Framework)

15. The JAC refused to disclose the Scoring Frameworks sought in relation to the High Court Judge selection exercises for 2020, 2021 and 2022, and the Circuit Judge selection exercise for 2021 "*for the reasons mentioned*". Although the JAC did not give any further explanation, we take the JAC to have meant they were relying on reasons similar to those it relied on pursuant to s36(2) FOIA in relation to the Situational Questions and Specimen Answers.

16. The JAC did, however, refer the Appellant to the information contained in the JAC's "Annual reports", saying that it provided "*some general guidance on the criteria and scoring process how candidates are assessed. This states that in order to promote the objective assessment of candidates, the JAC assesses candidates in bandings as follows: A = Outstanding, B = Strong, C= Selectable, and D = Not Presently Selectable. These bandings are assigned by JAC selection panels, which usually consist of a lay panel chair, a judicial member, and another lay panel members. JAC Commissioners, sitting as the Selection and Character Committee, make the final decisions on bandings when deciding which candidates are most meritorious to be recommended for appointment for each role.*"

Part 3 of the Request (Anonymised Scores)

17. The JAC refused to disclose the Anonymised Scores sought in relation to the High Court Judge selection exercises for 2020, 2021 and 2022, and the Circuit Judge selection exercise for 2021 on the basis that that information was exempt from disclosure under s40(2) FOIA: the information contained personal data. It did not explain how or why such information contained personal data.

18. The JAC did, however, refer the Appellant to the evidence provided by the JAC on 13 January 2023 to the Senior Salaries Review Body ("SSRB") as part of the SSRB's annual review of judicial pay. It said that the evidence covered recruitment for salaried and fee-paid roles in both courts and tribunals and included both legal and non-legal posts, including the specific exercises mentioned in the Request. It provided the Appellant with a link to that material, saying that it included the "grading of applications" for the specific selection exercises subject of the Request.

Part 4 of the Request (JAC Board Minutes)

19. The JAC refused to disclose the JAC Board Minutes sought on the basis that the information requested was exempt from disclosure under s22 FOIA, namely that the information was intended for publication at a later date: it was expected that the JAC Board Minutes would shortly be placed on the JAC's website after they had been cleared by the JAC Board for publication.

The Appellant's request for an internal review

20. On 1 August 2023, the Appellant sought an internal review of the JAC's refusal of the Request.

21. In relation to Situational Questions and Specimen Answers, the Appellant sought:
    a. a copy of the authorisation identifying Dr Jarvis as the Qualified Person for the purposes of s36 FOIA.
    b. copies of the submission, and all related communication, issued to him to elicit his Qualified Person opinion.
    c. a copy of his opinion.
    d. information about when past selection exercises had been used for future selection exercises.

22. The Appellant also disputed the JAC's application of the public interest test, saying that the case for disclosure was overwhelming given that the JAC had been under intense scrutiny in the past few months as to its operation of the judicial appointments system, the public was entitled to know how candidates were expected to answer situational questions by reference to specimen answers, and whether the JAC applied "*it*" consistently across the candidates who are interviewed. The case for disclosure was particularly strong, she said, because the use of these exercises in the future was likely to be in breach of the "*merit*" and "*diversity*" principles.

23. In relation the Scoring Frameworks, the Appellant requested the JAC's reasons for refusal by reference to s36(2) FOIA, and a review of that refusal, for the same reasons she had supplied in relation to her request for a review of the JAC's refusal to disclose the Situational Questions and Specimen Answers.

24. In relation to Anonymised Scores, the Appellant said that no person's personal data would or could be disclosed by provision of the anonymised information she sought, as the JAC had supplied it to the SSRB. She clarified that the <u>only</u> information she required in this context was whether there were any candidates

recommended for appointment for each of the relevant selection exercises who were graded C or D.

25. In relation to JAC Board Minutes, the Appellant noted that the relevant Minutes had now been published on the JAC's website but that they did not refer to any litigation currently involving the JAC. She asked whether such litigation had been or was discussed at the JAC's Board meetings and why there was no mention of the same in the Minutes.

Result of the internal review

26. On 21 September 2023, the JAC responded to the Appellant's request for an internal review.

27. The JAC maintained its reliance on s36(2) FOIA to withhold Situational Questions and Specimen Answers and Scoring Frameworks. In elaborating its position in this context, it said:
    a. the JAC did not agree with the Appellant's description of the JAC having been the subject of "*intense scrutiny in the last few months*"; the public as a whole did not have any compelling reason to suspect wrong-doing or impropriety with respect to JAC selection exercise materials, in particular those requested by the Appellant; the public would not expect or feel entitled to know how candidates were expected to answer situational questions, rather the public would overwhelmingly have confidence in the members of the judiciary who drafted the questions and related scoring frameworks and specimen answers.
    b. there was a public interest in understanding how the JAC ensured candidates were marked consistently but that this was better achieved by providing information about the processes deployed by the JAC to ensure consistency, for example: the use of independent panel members, calibration meetings, observation of interviews, an Assigned Commissioner to oversee each exercise, and the operation of an Advisory Group, including judges and practitioners from a range of backgrounds, who reviewed the test and selection materials before they were used, and who met every six weeks throughout the year, details of which could be found on the Quality Assurance pages of the JAC's website.
    c. the public interest favoured not releasing the information: disclosure would mean that the content of the selection test materials and scoring framework would be in the public domain, and could not, therefore, be used again

(whether in the same form or where elements of previous questions might be used in the drafting of a new question); and drafting fresh material, without the use of previous materials, for each exercise would require significant judicial resource, detracting from judicial availability for court work.

28. The JAC accepted that s40(2) FOIA was not applicable to the Anonymised Scores because the Appellant had requested anonymised information. It noted that the Appellant had now clarified this part of the Request to focus only on the application of C and D grades and said it was providing further information which encompassed the actual numbers of A or B graded candidates selected (rather than the number of A and B candidates at selection day, which is what was included in the SSRB evidence), and the details for C and D grades in the relevant selection exercises. We set out that information in full because, as will become apparent, part of it is important in our determination of part of this appeal.

High Court Judge

Reporting Year	Total Selections (s87 and s94)	Percentage of selections graded A or B	Percentage of selections graded C
2019/20	17	100%	0%
2020/21	17	100%	0%
2021/22	9	*	*

Circuit Judge

Reporting Year	Total Selections (s87 and s94)	Percentage of selections graded A or B	Percentage of selections graded C
2020/21	53	68%	32%
2021/22	62	60%	40%

29. The JAC explained that:
    a. no candidates "are" (which we took to mean candidates "are not generally") recommended for appointment having been graded D save in exceptional circumstances where a candidate awarded a D in one exercise (such as High Court Judge) may be recommended for another role (such as

s9(4) Deputy High Court Judge) where this was set out in the Vacancy Request.

b. it was important to note that gradings were an internal assessment measure of a candidate's performance in a particular selection exercise and against the specific criteria for that role at that time. They did not indicate performance upon appointment. Caution should be exercised when comparing gradings awarded across a period of years.
c. any cells marked with an asterisk (which, in fact, just applied to the A or B, and C, grades for the High Court Judge selection exercise in 2021/22) signified the omission of data due to numbers of candidates being below 10, which meant that there was an increased risk that individuals could be identified from that data.

30. It was evident from this last observation, therefore, that although the JAC said that it no longer maintained that the Anonymised Scores were exempt from disclosure as personal data pursuant to s40(2) FOIA, it was, in fact, still withholding these two items of data on the basis that they might constitute personal data i.e. there was a risk that the information, if disclosed, might lead to identification of individuals.

31. In relation to JAC Board Minutes, the JAC addressed the Appellant's further question about the JAC's Board's discussion about litigation, by confirming that such discussion had taken place but that it was exempt from disclosure pursuant to s42(1) FOIA (legal professional privilege). It said that it was important that the JAC had a safe space in which to seek and receive, as well as discuss, legal advice and ongoing litigation; release of the information requested would undermine the principle of privilege and risk future advice being affected by the potential for legal advice to become public; the principle of legal professional privilege served the wider administration of justice and protected the rights of clients to access independent legal advice, which was particularly important where litigation and other legal matters were "live". Consequently, the JAC saw no wider public interest for releasing or publishing the information.

32. The JAC provided the Appellant with copies of: the ministerial authorisation issued to Dr Jarvis (the by then former Chief Executive of the JAC) to act as a Qualified Person under FOIA; a copy of the submission by which a JAC official asked Dr Jarvis to give his Qualified Person opinion; and Dr Jarvis' opinion.

Appellant's complaint to the Commissioner and the Commissioner's Investigation

33. On 12 October 2023, the Appellant complained to the Commissioner. The Commissioner investigated.

34. In the course of responding to the Commissioner's investigation, the JAC conceded that in relation to the request for JAC Board Minutes, it was not appropriate for the JAC to rely on the s42 FOIA exemption (legal professional privilege) because the information in question was not actually recorded; it was provided orally to the JAC Board.

35. In relation to Anonymised Scores, the JAC explained to the Commissioner that it had omitted to disclose to the Appellant the A or B, and C, grades for the High Court Judge selection exercise in 2021/22 (the two percentage figures marked by asterisks in the table we have set out above) on the basis that provision of information in relation to a pool of 10 people or fewer risked identification of the individuals concerned. It went on to say that:
    a. the data in question was the personal data of the relevant individuals because it contained sensitive and private details about their abilities and performance in the specific context of selection for the role of High Court Judge, and the results could reveal information about the individual's intellectual abilities.
    b. given that the Appellant knew the identity of the 9 High Court Judges appointed in the 2021/22 selection exercise, it would be significantly easier for her to identify which judges performed in the higher and lower grade categories.
    c. the disclosure of grades without the individuals' consent could lead to negative consequences, such as discrimination, stigmatising or misuse of the information.
    d. the JAC did not seek explicit permission from individuals to share their grades "*in an identifiable manner*"; there was no explicit consent granted for the dissemination of test scores in this way; candidates would not anticipate that their personal information would be shared in such a manner.

36. The JAC maintained that it was right to withhold such information in reliance on s40(2) FOIA.

The Decision Notice

37. By his Decision Notice, the Commissioner decided that he did not need to consider further the JAC's position in relation to the JAC Board Minutes because he

accepted the JAC's explanation that the information had been provided orally to the Board and was not, therefore, held in recorded form within the meaning of FOIA.

38. In relation to the Situational Questions and Specimen Answers, and the Scoring Frameworks, the Commissioner was satisfied that the information was exempt from disclosure pursuant to s36(2) FOIA:
    a. on the basis of the JAC's arguments and evidence, it was reasonable to argue that disclosure of the withheld information would be likely to prejudice the effective conduct of public affairs, namely the selection process for judicial appointments; and it was reasonable for Dr Jarvis, as the Qualified Person, to reach that view.
    b. in assessing the balance of the public interest in favour of disclosure against the public interest in maintaining the exemption in this case, he had had regard to his assessment of the public interest balance in another case (for which he provided the Decision Notice reference number) involving a request to the JAC for the scoring framework for "*various selection exercises*", where he had found that avoiding the need to create new situational scenarios by a drafting judge who would thereby be prevented from working on judicial casework, outweighed the public interest in openness and transparency. Specifically, he said "*having considered the public interest factors applicable to this case, the Commissioner is satisfied that the similarity between this case and* [the other case] *is such that he is able to reach the same decision about the balance of the public interest.*"

39. In relation to the Anonymised Scores, the Commissioner was satisfied that the information was exempt from disclosure pursuant to s40(2) FOIA:
    a. the issue for him to decide was whether disclosure would enable an individual to be identified from "*apparently anonymised information*".
    b. he had considered a similar request for information in a second other case in which he had issued his Decision Notice on 14 September 2022, and that he had decided in that case that the JAC was entitled to withhold the information pursuant to s40(2) FOIA.
    c. he noted the Appellant's objection to the JAC's position that providing scores for 10 or fewer candidates lacked logic and that the JAC had not explained how fewer than 10 candidates might be identified but 10 or more would not be. He concluded that:

i. the information requested "*both relates to, and identifies, the individuals concerned*" and was, therefore, personal data.
ii. he had reached that conclusion on the basis that the focus of the information "*is the individuals who were appointed, and how they were scored, and that such information is clearly linked to them*".
iii. in the circumstances of this case, he was further satisfied that "*the individuals concerned would be reasonably likely to be identifiable from a combination of the requested information and other information which is likely to be in, or come into, the possession of others, such as those with knowledge of the judicial role concerned and of the candidates who were appointed*".
iv. having considered all the factors applicable to this case, he was satisfied that the similarity between this case and the (second) other case was such that he was able to reach the same decision without the need for further analysis.

The Appellant's appeal and Grounds of Appeal

40. On 18 April 2024, the Appellant appealed against the Decision Notice (save in relation to the Commissioner's decision as to part 4 of the Request (JAC Board Minutes).

41. The Appellant's Grounds of Appeal were, in summary, as follows:
    a. the other cases to which the Commissioner had referred were, together with a third other case, the subject of extant appeals to the First-tier Tribunal. In those appeals (we shall refer to them as the "Other Appeals"), the Commissioner's caseworker was the subject of criticism. The Appellant put the Commissioner to strict proof in this case that the same caseworker and other staff involved in the production of the Decision Notices in the cases subject to the Other Appeals had not been involved in the preparation of the Decision Notice in this case; if they were, then the Decision Notice in this case should be set aside on the basis that its formulation was not, or could not be seen to have been, independent.
    b. the Appellant said that she "*refers to the documents and evidence in* [the Other Appeals] *and adopts them for the purposes of her appeal against the current DN, notwithstanding that those documents and evidence are not repeated in full herein*."
    c. the Commissioner had accepted without any enquiry the JAC's assertions in relation to the Situational Questions and Specimen Answers, and the Scoring Framework; the Commissioner had failed to make any enquiry about when (and how often) past situational scenarios had been used in

subsequent selection exercises. If, as the Appellant contended, there was no proof of this, there could be no conceivable basis to withhold the production of this information even on the JAC's case. The JAC's Document Retention policy was that documents were only retained by the JAC for 5 years, so the likelihood that the situational scenarios would be used again was highly unlikely. In any event, the policy of using past situational scenarios in future selection exercises was contrary to the provisions of sections 63[2] and 64[3] of the Constitutional Reform Act 2005 (although she did not elaborate at all on that point).

d. the public interest test carried out by the JAC and the Commissioner was wholly inadequate; the Appellant referred to the thorough analysis of that test carried out by the appellant(s) in the Other Appeals, and adopted it for the purpose of the instant appeal, inviting the Tribunal to find that the case for disclosure was overwhelming.

e. in relation to Anonymised Scores, neither the JAC nor the Commissioner had explained how a candidate might be identified by disclosure of the requested information; the Appellant referred to and adopted the contentions advanced by the appellant(s) in the Other Appeals; she said there was no analysis of how provision of information relating to selection exercises in which fewer than 10 candidates participated or were appointed, might reveal their personal data; there was no logic as to why the information marked with an asterisk should not be provided by the JAC. In any event, similar information was disclosed by the JAC to the SSRB in selection exercises involving fewer than ten candidates, and further information about candidates in exercises with fewer than 10 appointments had been given by the JAC in response to another FOIA request; the Commissioner's decision in this case showed how dangerous it was not to conduct an independent case-by-case analysis of each individual complaint to the Commissioner and, instead, simply to accept what a public authority said to the Commissioner in response to a complaint.

42. The Appellant invited the Tribunal to set aside the Decision Notice and require the JAC to provide her with the requested information.

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[2] s63: the Commission, in performing its functions under this Part, must have regard to the need to encourage diversity in the range of persons available for selection for appointments.

[3] s64: Provides for Guidance about Procedures (including the Commission identifying persons willing to be considered for selection and assessing such persons for selection), and at s65(3) "*The purposes for which guidance may be issued under this section include the encouragement of diversity in the range of persons available for selection.*"

The Commissioner's Response

43. On 28 May 2024, the Commissioner responded to the Grounds of Appeal, in summary, as follows:
    a. the Appellant's references to Other Appeals were misplaced: Decision Notices and First-tier Tribunal decisions are not binding, and each case turns on its own facts.
    b. the identity of the caseworker(s) involved in the promulgation of the instant Decision Notice formed part and parcel of the Commissioner's conduct of his investigation, which fell outwith the jurisdiction of the Tribunal.
    c. the Appellant had not raised any new challenges to the exemptions which were already before the Commissioner when drafting his Decision Notice.

Appellant's Reply to the Response

44. On 16 June 2024, the Appellant replied to the Commissioner's Response, in summary, as follows:
    a. maintaining her adoption of the matters set out in the Other Appeals.
    b. referring to the decision of the Court of Appeal *Kate Thomas v the JAC* [2024] EWCA Civ 665, issued on 13 June 2024[4], in which she was the Claimant. She said that the Court of Appeal could not have made it clearer how important transparency and fairness were to the process of judicial appointments;
    c. insisting that the JAC had failed at all stages to act transparently and fairly, and the Commissioner had unfairly and unlawfully supported the JAC's position.
    d. seeking to strike out the Response on the basis that the Commissioner had failed to set out how the statutory provisions and case authorities cited by him in his Response, supported his position.
    e. seeking, for factual completeness and accuracy, full details from the Commissioner of the communications between him and the JAC.
    f. denying that her reference to Other Appeals was a ground of appeal, rather that she would simply be referring to the matters set out in the Other Appeals to support her grounds of appeal.
    g. confirming that the issues to be determined in this appeal were:
        i. whether the involvement of the caseworker in the Other Appeals in the preparation of the Decision Notice in this case, led to the conclusion that the Decision Notice should be set aside.

[4] A successful application by the Claimant for permission to appeal the refusal of Swift J to grant her permission to bring judicial review proceedings against the JAC in respect of its decision in 2022 not to recommend her for appointment as a Circuit Judge.

ii. whether the JAC was entitled to rely on s36 FOIA to withhold the Situational Questions and Specimen Answers, and the Scoring Frameworks requested
iii. whether the JAC was entitled to rely on s40(2) to withhold the Anonymised Scores.

Appellant's application to the Tribunal of 25 June 2024

45. By application dated 25 June 2024, which came before me on 14 August 2024 to be decided on the papers, the Appellant sought the following orders:
    a. that the Commissioner be debarred from participating in these proceedings pursuant to Rule 8(7) of the Tribunal Rules, on the basis that neither the Decision Notice nor the Commissioner's Response explained how any individual's personal data might be compromised if the information requested by the Appellant was provided to her in the form requested by her, and that, accordingly, the Response did not comply with Rule 23 of the Tribunal Rules[5]: the Appellant was entitled to know the full basis of the Commissioner's opposition to her case.
    b. that the Commissioner disclose all communications passing between the Commissioner and the JAC as addressed in the Appellant's Grounds of Appeal and her Reply to the Commissioner's Response.
    c. that the Commissioner disclose all material about the occasions on which past situational questions had been used in future selection exercises, so far as such material was in the possession or control of the Commissioner.
    d. that the JAC disclose all material about the occasions on which past situational questions had been used in future selection exercises, so far as such material was not in the possession or control of the Commissioner.

46. I refused all the applications, with reasons. However, I directed the following:
    a. that the Commissioner should serve written submissions setting out his full grounds for opposing the Appellant's appeal as to the application of s40(2) FOIA on the facts of this case.
    b. that the Commissioner should provide an indexed, paginated bundle of (1) all the communications between the Commissioner and the JAC by which the Commissioner investigated the Appellant's complaint, and (2) any representations made, and evidence provided, by the JAC to the Commissioner during that investigation in support of the JAC's refusal to

[5] Rule 23(3): *The Response must include a statement as to whether the respondent opposes the appellant's case and, if so, any grounds for such opposition which are not contained in another document provided with the response.*

provide any information sought by the Request. If the Commissioner wished any of such material not to be disclosed to any person, including the Appellant, it should make the appropriate application under Rule 14 of the Tribunal Rules.

Further submissions and disclosure from the Commissioner

47. On 3 September 2024, the Commissioner served written submissions ("Information Commissioner's Response to C[ase] M[anagement] D[irection]s") addressing the application of s40(2) FOIA. The essence of those submissions was this:

> "*Due to the fact the Appellant knows the 9 candidates (hence being akin to the 'motivated inquirer' quoted in Spivack) combined with what the percentages are the Commissioner maintains the actual identification is possible and hence the information is personal data, and should be withheld under s40(2) FOIA. It is not possible to elaborate further without revealing the contents of the withheld information which would defeat the purpose of the appeal.*"

48. Also on 3 September 2024, the Commissioner filed a bundle of communications between the Commissioner and the JAC relating to this appeal, redacting (1) JAC staff member names and mobile telephone numbers and (2) the percentage figures responsive to Part 3 of the Request which the JAC was withholding under s40(2) FOIA. He supplied the latter separately to the Tribunal unredacted, and applied pursuant to Rule 14(6) of the Tribunal Rules for that unredacted material to be held as CLOSED. The Tribunal was satisfied that that material should be so held.

The Appellants' Response to the Commissioner's further submissions

49. On 5 September 2024, the Appellant served a Response to the Information Commissioner's Response to CMDs. She complained that the Commissioner had wrongly construed my direction of 14 August 2024 as limited to elaborating his case in relation only to the application of s40(2) FOIA to justify withholding the two percentage figures.

50. The Appellant objected to the Commissioner's articulation of matters, saying this:

> "*Taking it at its highest, the reformulated position of the Respondent is that the publication of the names of the judges, together with generic information about how*

many judges were in the top, middle or bottom groups, might identify those judges' personal data. That is complete nonsense. The public knows that all judges will have attained a Grade, A, B or C. Seeking the number of judges in each group will not compromise their data. That is because the public will have no knowledge about whether a Judge who was appointed was a Grade A, B or C judge, simply that he fell within one of those grades. For example, there is no rule that the first judge whose appointment is advertised scored a Grade A and the last judge a Grade C.

If, as is customary, the names of the 9 judges have been advertised on the Judiciary website, that information is available to the public at large. The Respondent does not set out how that information, together with information requested by her, would identify which of the named judges (all of whom were appointed) were graded A, B or C.

...

If the names of the 9 judges have been advertised, it is difficult to know how being provided with information about how many "A", "B" or "C" grades were achieved among those judges would identify the actual grades that each judge attained. It is undisputed that each of the judges would have attained a Grade A, B or C to be appointed. Suppose that the information provided was that 2 judges achieved a Grade A, 4 a Grade B and the rest a Grade C, how, it must be questioned, would the motivated [sic] inquirer [intruder]" know the grades of each judge."

51. The Appellant asked:
    a. that the Commissioner be debarred from further participating in the appeal, as he had failed to set out his full grounds for opposing the Appellant's case as to the application of s40(2) FOIA on the facts of this case;
    b. if the Commissioner refused to agree that all the documents filed with the Tribunal, including the final hearing bundle, should be made available to the public, that the Tribunal, in line with the principle of open justice, order that the Appellant be permitted to make such material available to the public.

The hearing on 13 September 2024

52. We had before us at the hearing an OPEN bundle, and a CLOSED bundle containing the withheld information, in respect of which the Commissioner had sought, and has been granted, a direction pursuant to Rule 14(6) of the Tribunal Rules that the material in that bundle should not be disclosed to any person, including the Appellant.

53. After the hearing on 13 September 2024, we were provided with further written submissions from the Appellant dated 11 September 2024, which, by administrative oversight, had not been provided to us in time for that hearing. The Commissioner elected not to provide any responsive submissions thereto.

54. The Appellant noted at the start of those submissions that she had not, as at 11 September 2024, received a final trial bundle. We asked the Commissioner to address that issue, which he did by email to the Tribunal dated 19 November 2024, copied to the Appellant. He confirmed that he had filed with the Tribunal and served on the Appellant the OPEN bundle on 3 September 2024, that the Appellant had informed him that she had not received the link to the OPEN bundle, and that the Commissioner had then emailed the Appellant, copying in the Tribunal, with screenshots of the link and a PDF version of the OPEN bundle, receipt of which the Appellant acknowledged. We are not aware that the Appellant has disputed this. We are satisfied that the Appellant was in receipt of the OPEN bundle before the hearing on 13 September 2024.

55. We were satisfied that we could properly determine the appeal without an oral hearing. The parties were agreeable. Accordingly, we reconvened on 29 November 2024 to consider the Appellant's further submissions of 11 September 2024.

The legal framework

56. The relevant provisions of FOIA are as follows:

> **Section 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.

...

Section 2

Effect of the exemptions in Part II

…

(3) 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.

…

Section 36

Prejudice to effective conduct of public affairs

…

(1) 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-

…

(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.

Section 40

Personal information

...

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

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

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

...

Section 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.

57. The import of section 58 is that the right of appeal to the First-tier Tribunal involves a full merits consideration of whether, on the facts and the law, the public authority's response to the FOIA Request is in accordance with Part 1 of FOIA (Information Commissioner v Malnick and ACOBA [2018] UKUT 72 (AAC); [2018] AACR 29, at paragraphs [45]-[46] and [90]. In accordance with the decision of the Upper Tribunal in Montague v Information Commissioner and DIT [2022] UKUT 104 (AAC), at [86], "*the public authority is not to be judged on the balance of competing*

interests on how matters stand other than at the time of the decision on the request which it has been obliged by Part 1 of FOIA to make."

58. "Personal data" means any information relating to an identified or identifiable living individual (s3(2) Data Protection Act 2018 ("DPA")). An identifiable living individual means a living individual who can be identified, directly or indirectly, in particular by reference to:
    a. an identifier such as a name, an identification number, location data or an online identifier (s3(3)(a) DPA); or
    b. one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual (s3(3)(b) DPA).

Analysis

59. We should say at the outset that in approaching the issues for determination by us in this appeal, we have not considered any aspect of Decision Notices in other cases referred to by the Commissioner, or the Other Appeals.

60. Although both parties have referred to material generated in other complaints to the Commissioner or other appeals against Decision Notices issued by the Commissioner in other cases, they have not placed that material before us, save for a set of closing submissions provided by the Appellant, which were generated in one of the Other Appeals, to which the Appellant is not a party. It is not for the Tribunal to search for material generated in other complaints to the Commissioner or other appeals, and to identify what parts of it may be germane to the issues before the Tribunal for instant determination. We have not undertaken such an exercise. It is for the parties to place before the Tribunal all evidence and arguments which they wish the Tribunal to consider.

61. In any event, each appeal must be decided by reference to its own facts and the precise legal issues it engages. For example, where any relevant exemption relied on by the Commissioner engages consideration of the public interest, the public interest must be assessed by reference to the specific facts of the request and at the time the request is refused. Accordingly, applying, as the Commissioner appears to have done in this case, a blanket approach to the public interest across a number of complaints pursued by different parties in relation to different requests made at different times is wholly unsatisfactory. Even were it to be the case that different cases raised near-identical factual issues and public interest considerations (at the

same point in time), it would at the very least be incumbent upon the Commissioner to articulate that similarity so that the propositions which, in his submission, flow from that similarity can be properly tested. He has not done so.

62. Similarly, it is not open to the Appellant simply to refer to arguments raised by other appellants in other cases and require the Tribunal to identify their application to the instant case.

63. The Tribunal is not bound by Decision Notices or First-tier Tribunal decisions in other cases. The Tribunal assesses an appellant's request and the public authority's response de novo. That exercise must be self-contained on the facts of the case before the Tribunal.

64. We informed the Appellant before we reconvened on 26 November 2024 that we would not consider submissions made in other appeals, and we afforded her the opportunity to provide further written submissions to the Tribunal, if she wished. The Appellant declined that opportunity.

Parts 1 and 2 of the Request

65. Information is exempt from disclosure under s36(2)(c) FOIA if, in the reasonable opinion of a qualified person, disclosure of the information under FOIA would, or would be likely to, prejudice the effective conduct of public affairs. Even if we find that s36(2)(c) FOIA is engaged, because 36 FOIA is a qualified exemption, we must then decide whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

66. Whether s36(2)(c) FOIA is engaged raises two connected points for our consideration: the question of prejudice, and the reasonableness of the opinion of Dr Jarvis.

67. The approach to be taken in prejudice cases was set out in the First-tier Tribunal decision of Hogan v Information Commissioner [2011] 1 Info LR 588, as approved by the Court of Appeal in Department for Work and Pensions v Information Commissioner [2017] 1 WLR 1:
    a. first: the applicable interests within the relevant exemption must be identified.

b. second: the nature of the prejudice being claimed must be considered. It is for the decision maker to show that there is some causal relationship between the potential disclosure and the prejudice, and that the prejudice is "*real, actual or of substance*".
c. third: the likelihood of occurrence of prejudice must be considered. The degree of risk must be such that there is a "*real and significant*" risk of prejudice, or there "*may very well*" be such prejudice, even if this falls short of being more probable than not.

Opinion of the Qualified Person

68. Dr Jarvis was authorised by letter dated 10 October 2022 from Rachel Maclean MP, Minister of State of Justice, to act as the Qualified Person in respect of the JAC, in his capacity as the JAC's Chief Executive in accordance with s36(5) FOIA.

69. He expressed an opinion that the disclosure of the information sought by parts 1 and 2 of the Request would be likely to prejudice the effective conduct of public affairs – in particular that "*should the interview questions/material and/or marking schedules be disclosed then the JAC will be unable to use any part or parts of these in any subsequent exercise whether in their original or an amended format.*"

70. He was also of the view (by expressly adopting the reasons contained in the official submission sent to him seeking his opinion, that):
    a. "*should the questions/material and/or marking schedules be disclosed, the JAC will be unable to use any part or parts of these in any subsequent exercise whether in their original or an amended format as this would provide any applicant who had previously sat the questions with a significant advantage over others.*"
    b. JAC officials would be "*inhibited in their delivery of future exercises for this and other jurisdictions if judicial colleagues were less willing to become involved or inhibited in the scope of their involvement in the development of situational questions as at present they are the single point of provision for this aspect of the JAC selection process.*
    c. while there was an argument that if some of the material which was now over 3 years old, had not been re-deployed by the JAC, then the likelihood of it being re-deployed was remote but given that the JAC could be called on at short notice to run an exercise it must have the flexibility to deploy old tests in order to meet those needs.

The applicable interests within the s36 FOIA exemption

71. The JAC is a creature of the Constitutional Reform Act 2005. Its creation evinced a radical change in the way the judiciary is appointed. The Act provides for selection by the JAC of candidates for appointment, solely on merit and subject to equal merit provision, and subject to the JAC being satisfied that a candidate is of good character. The Act requires the JAC, in performing its functions under the Act, to have regard to the need to encourage diversity in the range of persons available for selection for appointments.

72. We find that the JAC's processes, intended to support the discharge of its statutory functions, and constituting a key part of the appointment of an independent judiciary, constitute the conduct of public affairs, and are the relevant applicable interests within the meaning of s36 FOIA.

A causal relationship between the disclosure and prejudice which is real, actual or of substance

73. We find a causal relationship between disclosure of the details of the JAC selection process, as sought by the Request, and prejudice to the JAC's processes, and that such prejudice would have been real, actual or of substance.

74. Having reviewed the withheld information, we are satisfied that it was the work product of highly skilled and experienced authors. It was also evidently the product of considerable time and effort. The content of the Situational Questions and Specimen Answers was substantial and deeply textured, as was the separate Scoring Framework. The former was clearly designed not only to test candidates as thoroughly as possible on the instant issues before them but to enable candidates to reveal to those questioning them their general intellect and their character. The latter was clearly designed not only to support assessors in achieving consistency and fairness across their appraisals of candidates on the instant issues before them, but to enable their full engagement with the candidates more generally.

75. We can see that parts of the withheld information could usefully be extracted for use or adaptation (at short notice or otherwise) for inclusion in future exercises. We can also see, in a short notice context, that having to prepare new material of similar quality, may well impose an excessive, and possibly impossible, burden on suitable authors, and, with regard specifically to Situational Questions and Specimen Answers, for which we are told the judiciary are the single point of

provision, divert judicial resources away from the day-to-day business of the Courts. To that extent, we accept that disclosure might adversely impact the JAC's ability efficiently to deliver future exercises.

76. We also consider (although this was not a point taken by the JAC in refusing the Request) that a candidate who had had sight of the Situational Questions and Specimen Answers as a consequence of disclosure under FOIA, might have a significant advantage if faced with that same, or substantially recycled, material in any subsequent exercise. That would create an unfair process, preventing both a proper assessment of that individual candidate's abilities against the required competencies for the role, and (to the extent that this forms any part of the process) a proper, relative assessment of candidates overall.

77. In our view, these matters would constitute a real and substantial prejudice to the JAC's processes, and, consequently, its function.

78. We observe, for completeness, that we do not understand or accept the JAC's argument (adopted by Dr Jarvis as one of several factors submitted to him) that disclosure of the material under FOIA would give an advantage to any applicant who had previously sat the questions. Such an advantage would not be the effect of disclosure under FOIA, rather it would be the result of the candidate already having seen the material in a previous exercise.

79. Additionally, it is not obvious to us that the need to produce fresh material would mean judges would be "*less willing to become involved or inhibited in the scope of their involvement in the development of situational questions*" (again included in the expressed opinion of Dr Jarvis). We can see that a specific, short notice context requiring a quick turnaround of material by a limited pool of judges might be unwelcome or unworkable at that specific point in time, but not that it would necessarily give rise to a general unwillingness or inhibition.

80. However, neither of these observations in relation to the opinion of Dr Jarvis means that we do not consider that his opinion was, overall, reasonable. We find that it was.

The likelihood of the occurrence of the prejudice

81. The question of the meaning of likelihood was addressed by the Tribunal in John Connor Press Associates v Information Commissioner (EA/2005/0005, 25 January 2006): "We interpret the expression "likely to prejudice" as meaning that the

chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk." In so doing, the Tribunal drew on the judgment of Munby J in R (on the application of Lord) v Secretary of State for the Home Office [2003] EWHC 2073 (Admin) (a Data Protection Act case) who said: "Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not." [100].

82. We adopt the interpretation of "*likely to prejudice*" as meaning that the chance of the prejudice being suffered is more than a hypothetical or remote possibility; there is a real and significant risk.

83. Dr Jarvis opined that prejudice would be likely to occur from disclosure of the withheld material for the reasons set out in the submission sent to him but, in particular, because the JAC would then be unable to re-use the material. In this regard, the submission which he considered in order to formulate his opinion, accepted that there was an argument that where certain of the withheld material which was over three years old had not been re-used, then the likelihood of its re-use was remote but that the JAC could be called upon to run selection exercises at short notice, so that it must have the flexibility to deploy old tests in order to meet such needs.

84. Dr Jarvis did not identify, and we have not seen, any specific example of any of the withheld material being re-used, whether at short notice or otherwise. The submission made to Dr Jarvis stated that the likelihood of material over three years old being re-used was remote. That might reasonably be taken to imply that material under three years old was likely (or more likely) to be re-used, although we accept that that is speculation on our part.

85. In its refusal of the Request, however, the JAC said that there was a "*good likelihood*" that the withheld information might be used, in part or in full, in future judicial appointment exercises, although in articulating that likelihood, it did not distinguish between the categories of material by reference to their age.

86. Looking at matters in the round, we accept that disclosure of the withheld information under FOIA, that is to say, to the world, would prevent its re-use and would be likely to impact adversely on the JAC's functions. We do not find that the prospect of that was only a hypothetical or remote possibility; it was clearly in the contemplation of the JAC, and of Dr Jarvis, whose opinion we consider reasonable in all the circumstances.

87. We find that s36(2)(c) FOIA was engaged.

The Public Interest

88. Having found that s36(2)(c) was engaged, we must consider whether the public interest in maintaining the exemption outweighed the public interest in disclosing that information.

89. The Appellant's Grounds of Appeal were short on this point. She said simply this (and repeated it in her written submissions of 11 September 2024):

> "*...the "public interest" test carried out by the JAC, and the IC is wholly inadequate. The Appellant refers to the thorough analysis of that test carried out by the appellant in the Mithani appeals, adopts it for the purpose of her appeal against the DN, and invites the Tribunal to find that the case for disclosure is overwhelming.*"

90. For the reasons we have already given, it is not appropriate for a Tribunal to search out the arguments of appellants in other Tribunal appeals, and construe which parts of them may be relevant to the instant appeal.

91. We have, therefore, considered the public interest arguments in favour of disclosure identified by the Appellant in her communications with the JAC, namely her request for an internal review. She said this:

> "*On the basis that the JAC has been under intense scrutiny in the past few months about how it operates the judicial appointments system, and that the public is entitled to know how candidates are expected to answer situational questions by reference to specimen answers, and whether the JAC applies it consistently across the candidates who are interviewed, the case for disclosure is overwhelming. This is particularly so because the use of these exercises in the future is likely to be in breach of the "merit" and "diversity" principles.*"

92. We note also that, in her written submissions of 11 September 2024, the Appellant provided the Tribunal with references to a number of public and press reports about the operations of the JAC, which were critical of, or at least raised questions as to, the effectiveness of the JAC, with a particular focus on its approach to tackling diversity in the judiciary. She did not articulate how, nor was it evident that, such scrutiny informs an assessment of the public interest in disclosure of the specific, withheld information subject of the Request at the date of its refusal in

June 2023. We do not find that such matters constitute a public interest factor in favour of disclosure.

93. The Appellant's identification as a public interest factor in favour of disclosure, of the fact that the public was entitled to know how candidates were expected to answer situational questions by reference to specimen answers (which we take to mean that the public is entitled to know, by reference to specimen answers, how candidates are expected to answer situational questions), is flawed: it asserts as an answer the very question to be determined. We reject this argument.

94. We do not understand the Appellant's argument as to consistency: she refers to the public being entitled to know whether the JAC applied "*it*" consistently across the candidates who were interviewed, but it is unclear what "it" is, whether the system generally which she said had been under intense scrutiny, or something else.

95. The JAC took the reference to consistency as a reference to marking. It accepted that there was a public interest in understanding how the JAC ensured that candidates were marked consistently. It said that that was met by:
    a. the JAC providing information about its processes such as the use of independent panel members, calibration meetings, observation of interviews, and each exercise being overseen by an Assigned Commissioner; and
    b. the existence of an Advisory Group which included judges and practitioners from a range of backgrounds, which reviewed the test and selection materials before they were used and met every six weeks throughout the year, as detailed on the Quality Assurance pages of the JAC's website (to which the JAC provided a link for the Appellant's benefit).

96. It is not obvious to us from that limited account of matters that such checks and balances as the JAC describes specifically addressed consistency in marking, either in the selection exercises subject of the Request or generally, although they, or some of them, might have done.

97. However, we are clear that disclosure of the Situational Questions, Specimen Answers and Scoring Frameworks in the selection exercises subject of the Request would not have advanced public understanding of the *consistency* of marking either in the selection exercises subject of the Request or generally. It seems to us that only review of the scoring framework completed for *every* candidate in any

given selection exercise (and we have not seen those in relation to any selection exercise) is likely to do that.

98. The Appellant's final argument for the public interest favouring disclosure was that the use of situational questions in the future was likely to be in breach of the "merit" and "diversity" principles. She did not say how or why this should be the case, and we cannot divine it from the material before us. Accordingly, we are unable to find that such an issue was a public interest factor in favour of disclosure.

99. The Commissioner's balance of the public interest test in the Decision Notice was incomprehensible: he referred simply to similarities with another case, which he accordingly adopted in this case. He did not explain what those similarities were. On the face of the Decision Notice, no balance of the public interest factors in favour of and against disclosure on the facts of this case was undertaken by the Commissioner.

100. We accept that there is a public interest in the transparency of the judicial selection process generally and the accountability of those responsible for it.

101. However, the Appellant has not demonstrated, nor have we identified, any public interest in June 2023 (the date of refusal of the Request) in disclosure of the withheld material which is the subject of the Request i.e. the Situational Questions, Specimen Answers and Scoring Frameworks in the specific selection exercises identified by the Appellant (either viewed in isolation or simply as part of the broader cadre of judicial selection tools) which outweighed the public interest in such information being exempt from disclosure.

102. We accept that those members of the JAC who are tasked with its leadership and day-to-day operations are well placed to assess the consequences of disclosure of such material. We consider the opinion of Dr Jarvis to weigh heavily in support of the public interest in maintaining the exemption from disclosure outweighing the public interest in disclosure.

103. By way of general observation: we consider that there is a fine balance between transparency on the one hand and potentially damaging intrusion on the other. Disclosure in this case would have exposed the detailed content of a selection process which is intended to be highly competitive year on year, address highly technical subject matter across several specialist fields, engage the trust and confidence of candidates and assessors alike, and promote fairness. We think there is something potentially invidious in opening for public scrutiny the minute detail

of the tools designed to implement such a process. In our view, that would risk degrading the selection processes in question by inviting commentary as to the sufficiency or scope of the test material which, no matter how unfair or unjustified, might extend to speculative and uninformed comment on the candidates selected on the basis of it, as well as enabling mischievous comparisons between different selection exercises.

104. We consider that the public interest in understanding the quality of the judicial selection process was already well served in June 2023 by (1) the detailed publication by the JAC of data (including grading) across individual selection exercises and (2) the processes and people-roles engaged in the preparation, conduct and overview of selection exercises, as described by the JAC in its response to the Appellant's request for an internal review.

105. We find that the public interest in maintaining that the withheld information was exempt from disclosure under s36(2)(c) FOIA outweighed any public interest in disclosure of that information.

106. Accordingly, we are satisfied that the JAC was entitled to withhold the Situational Questions and Specimen Answers and the Scoring Framework pursuant to s36(2)(c) FOIA.

Part 3 of the Request

107. Initially, the Appellant asked for details of how each of the candidates (anonymised appropriately) appointed to the relevant positions scored in the relevant selection exercises.

108. The JAC refused to disclose that information on the basis that it was exempt from disclosure because, so the JAC said, it contained personal data. It did not properly address what data within the information requested, constituted personal data or how.

109. Instead, the JAC directed the Appellant to the evidence it had sent to the SSRB.

110. That evidence addressed the percentage of candidates in any given pool of candidates who had scored either (1) grade A or B in a single data set (i.e. that set

did not identify what percentage had scored A and what percentage had scored B), or (2) grade C.

111. So, in relation to the High Court Judge role, the SSRB evidence showed this:

High Court Judge

Year	Recommended for immediate appointments	Number of A and B candidates at selection day	A and B candidates as a percentage of total selections
2019-20	17	17	100%
2020-21	17	17	100%
2021-22	9	9	100%

112. In relation to the Circuit Judge role, the SSRB evidence showed this:

Circuit Judge

Year	Recommended for immediate appointments	Number of A and B candidates at selection day	A and B candidates as a percentage of total selections
2019-20	30	29	67%
2020-21	53	41	77%
2021-22	62	39	63%

113. When seeking an internal review, the Appellant clarified that, in fact, the only information she required in the context of Anonymised Scores, was whether there were any candidates recommended for appointment for each of the relevant exercises who were graded C or D. She was told that D grades were effectively irrelevant because candidates who were graded D were not generally recommended for appointment.

114. Despite that clarification by the Appellant, the JAC then disclosed the following data to the Appellant:

High Court Judge

Reporting Year	Total Selections (s87 and s94)	Percentage of selections graded A or B	Percentage of selections graded C
2019/20	17	100%	0%

2020/21	17	100%	0%
2021/22	9	*	*

Circuit Judge

Reporting Year	Total Selections (s87 and s94)	Percentage of selections graded A or B	Percentage of selections graded C
2020/21	53	68%	32%
2021/22	62	60%	40%

115. The asterisks supplied as part of the 2021-22 High Court Judge selection data were withheld by the JAC on the basis that that the pool in question was fewer than 10, which, it said, risked identifying the individuals concerned (although it gave no explanation as to how that should be the case).

116. In its exchanges with the Commissioner during the Commissioner's investigation, the JAC said that "*It* [the A or B, and C scores of candidates for the High Court Judge role in the 2021/22 selection exercise] *is the individuals'' personal data because it contains sensitive and private details about the individual's abilities and performance in the specific context of selection for High Court Judge. The results could reveal information about the individual's intellectual capabilities.*"

117. The JAC erred in a number of respects.

118. Even if an anonymised score did contain sensitive and private details about an individual's abilities and performance (although we cannot see how that would be the case), that would not make it personal data within the meaning of the DPA. Personal data is any information relating to an identified living individual or a living individual who can be identified directly or indirectly by the information.

119. At no time did the JAC explain why it was that anonymised scores in a pool of 10 people or fewer could identify any relevant living individual directly or indirectly, whether by reference to other information which might reasonably be likely to be used, including information sought out by a motivated enquirer. It did not identify the relevance of the number 10, as opposed to any other number. The thrust of the JAC's concerns instead rested in some unspecified risk of identification but that was insufficient. The test is whether it is possible to identify

a specific individual solely by reference to the data available (*NHS Business Services Authority v Information Commissioner and Spivack* [2021] UKUT 192 (AAC). The JAC did not address that.

120. Moreover, as can be seen from the 2021-22 High Court Judge data previously provided by the JAC to the SSRB which we have set out above, the JAC had, in fact, *already* published information showing that fewer than 10 i.e. 9 candidates in that exercise had been graded A or B, that those graded A or B constituted 100% of the pool, and, by implication, therefore, no-one had been graded C. By that means, the JAC had published the very information it was refusing to disclose to the Appellant, and the question of whether disclosing the C grade data would or could disclose personal data, was never engaged.

121. If the Appellant had persisted in her request to know how many anonymised candidates had scored A or B (i.e. individually and not part of a single data set of A or B), then it seems to us that the only context in which disclosure of that information could identify a living individual (and therefore constitute personal data), would be if:

a. only two grades were awarded across the pool i.e. A or B, or A or C, or B or C; and
b. each candidate was told their own grade; and
c. only one candidate in a particular exercise was graded one of those two grades (in any given permutation), and all the other candidates were graded the other i.e. assuming, for the sake of argument, that there were 10 candidates, and 9 were graded A, and 1 was graded B, the candidate graded B would be able to identify that all the other candidates had been graded A and, therefore, who they were. That would be data which would identify those candidates and, prima facie, engage s40(2) FOIA.

122. As it was, the number of candidates who *individually* scored A or B (i.e. not being presented as a single dataset of A or B grades) was not provided to us, so we are unable, in that event, to conclude whether disclosure of the grade of each anonymized candidate might effectively disclose personal data, engaging s40(2) FOIA. However, that was not the issue before us on the basis of the Appellant's refinement of the Request. Ultimately, the Appellant's question was about C grades.

123. We are sympathetic to the Appellant's frustration at the way both the JAC and the Commissioner have approached this part of the Request. The JAC refused to disclose information in relation to a data set of fewer than 10 at the same time as actively pointing the Appellant to the evidence it had sent to the SSRB of a data set of fewer than 10. Additionally, it failed to note that the answer sought by the Appellant (as to the C Grade) rested in that published data.

124. Moreover, the Commissioner failed, most notably in his final submissions, to avert to the Appellant's refined request for C grades only (thus falling into the same error as the JAC did), and to interrogate the Appellant's complaint that his approach lacked any logic, instead maintaining firmly, wrongly, and without any explanation, that knowledge of the identities of the 9 successful candidates combined with "w*hat the percentages are*" meant that "*actual identification is possible*."

125. We do not consider that the JAC was entitled to rely on s40(2) FOIA to refuse disclosure of Anonymized Scores, as refined by the Appellant to relate only to C grades in the relevant selection exercises.

Part 4 of the Request

126. At the time of the hearing, this part of the Request (JAC Board Minutes) was no longer in issue. Therefore, we make no finding in relation to it.

Other Matters

127. At a hearing of an appeal, the Tribunal has jurisdiction to determine whether the public authority's response to a FOIA request is in accordance with Part 1 of FOIA.

128. By her Reply to the Commissioner's Response to the appeal, the Appellant stated that an issue to be determined in this appeal was whether the possible involvement of a caseworker at the Commissioner's Office in the Appellant's complaint giving rise to this appeal, in the Commissioner's investigations and decisions giving rise to the Other Appeals, required the Decision Notice in this case to be set aside. That is not an issue to be determined in this appeal. It is no part of the Tribunal's jurisdiction to make findings about individual aspects of, or the role of any individual in, the Commissioner's investigations.

129. As a separate matter: by her written submissions of 11 September 2024, the Appellant noted that she had requested the JAC to confirm to her that it had dealt with the Request within the time limit prescribed by FOIA, and that she had, as at 11 September 2024, yet to receive such confirmation. The Appellant asked the Tribunal to direct the JAC to provide the Appellant with such confirmation and, if the JAC was unable to produce it, to direct that the JAC was in breach of s10 FOIA (time for compliance with request). It does not seem to us that this forms any part of the Appellant's appeal against the Decision Notice, and we decline to make the direction sought.

130. To the extent that, upon receipt of this decision, the Appellant still wishes any document filed with the Tribunal in this appeal or any part of the hearing bundle to be made available to the public by her, she must make an appropriate application to the Tribunal.

Conclusion

131. We conclude that the JAC was entitled to rely on s36(2)(c) FOIA to withhold the Situational Questions and Specimen Answers and the Scoring Frameworks in relation to selection exercises for the roles of High Court Judge in 2020, 2021 and 2022, and the role of Circuit Judge in 2021 but that the JAC was not entitled to rely on s40(2) FOIA to withhold the number of Anonymised C Scores in relation to the same exercises.

132. Consequently, to that latter extent only, we find that the JAC's response to the Request was not in accordance with Part 1 of FOIA. Accordingly, and to that extent only, we find that the Decision Notice is not in accordance with the law and the Appellant's appeal is allowed.

133. We substitute a Decision Notice to the effect that the Judicial Appointments Commission was entitled to withhold the number of candidates who were graded C in the Judicial Appointment Commission selection exercises for the roles of High Court Judge in 2020, 2021 and 2022, and the role of Circuit Judge in 2021, pursuant to s21 FOIA as that information was accessible by other means, namely in the data published by the Judicial Appointments Commission to the Senior Salaries Review Board on 13 January 2023.

Signed: ***Judge Foss*** Dated: 16 January 2025