DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

The **DECISION** of the Upper Tribunal is to allow the appeal by the Appellant (the Information Commissioner).

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) dated 30 June 2016 and promulgated on 6 July 2016 under file reference EA/2015/0277 involves an error on a point of law. The First-tier Tribunal's decision is set aside.

The First Respondent's appeal against the Information Commissioner's Decision Notice FS50588594, dated 1 March 2016, is remitted to be re-heard by a different First-tier Tribunal, subject to the Directions below.

This decision is given under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007.

DIRECTIONS

The following directions apply to the re-hearing:

(1) The new First-tier Tribunal should be freshly constituted.

(2) The new First-tier Tribunal should proceed on the basis that the Environmental Information Regulations 2014 govern the remainder of the disputed information within the scope of the request.

(3) These Directions may be supplemented by later directions issued by a Tribunal Case Worker, the Tribunal Registrar or a Tribunal Judge in the General Regulatory Chamber of the First-tier Tribunal.

This decision is given under section 12(2)(a) and 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007.

Representation

Appellant:	Ms Julianne Morrison of Counsel instructed by the Information Commissioner
1st Respondent:	Mr Rory Dunlop of Counsel instructed by the Government Legal Department
2nd Respondent:	n/a

REASONS FOR DECISION

Summary

1. The issue in this appeal before the Upper Tribunal has important practical implications for other cases involving information rights requests that may straddle the two statutory regimes under the Freedom of Information Act 2000 ('FOIA') and the Environmental Information Regulations 2004 (SI 2004/3391; 'the EIR') respectively.

2. The issue concerns how public authorities, the Information Commissioner and tribunals should approach cases in which some of the information within the scope of the request may on a proper analysis be "environmental information", subject to the EIR, while other information may be governed by FOIA.

3. In some cases this distinction may have little if any real significance (for example when the issue is whether a request is "manifestly unreasonable" for the purposes of regulation 12(4)(b) of the EIR or "vexatious" for the purposes of section 14 of FOIA). In other cases, especially where an exemption or exception may be available under one regime (typically FOIA) but not under the other (typically EIR), the distinction may be crucial.

4. In those cases where it matters, what methodology should be adopted for identifying environmental and other information respectively? Is a line by line analysis required? Or a document by document approach? Or some other approach altogether? This decision accordingly considers the relevance of the information tribunal's decision in *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth*, EA/2007/0072 ("*DBERR v IC and FoE*") in the light of the Court of Appeal's judgment in *Department for Business, Energy And Industrial Strategy (DBEIS) v Information Commissioner and Henney* [2017] EWCA Civ 844 ('*Henney*').

5. I can summarise my decision by saying I conclude in this case that the First-tier Tribunal adopted an approach to distinguishing environmental and other information which involved an error of law. I also decide that the disputed information, properly construed, was environmental information. I send the remaining issues in the case, i.e. whether the disputed information is subject to any exceptions (and if so which) under Part 3 of the EIR, back for hearing in front of a new First-tier Tribunal. There is a short separate closed annex to this open decision, which has been made available to the Appellant (the Information Commissioner) and the First Respondent (the Department for Transport) but not to the Second Respondent and requester (Mr Hastings).

6. I start by setting out the key legislative provisions under each of the two statutory regimes.

The legislation

The Freedom of Information Act 2000

7. Section 1(1) of FOIA sets out the "General right of access to information held by public authorities" in the following terms:

> "(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."

8. Section 1(2) of FOIA qualifies this statement of a general right of access to such information by reference to various other provisions in the Act, including section 2 (and so Part 2). Section 2(2)(a) (together with section 2(3)) and section 2(2)(b) then make provision for absolute and qualified exemptions respectively, the latter being subject to the public interest balancing test.

9. Section 37(1) of FOIA, in so far as is relevant, provides as follows:

> **"37. – Communications with Her Majesty, etc. and honours**.
> (1) Information is exempt information if it relates to—
> …
> (aa) communications with the heir to, or the person who is for the time being second in line of succession to, the Throne,".

10. Section 37(1)(aa) is an absolute rather than a qualified exemption and so the public interest balancing test does not apply (section 2(3)(ea)). Section 37(1)(aa) was added to FOIA with effect from 19 January 2011. This amendment (and the designation of that exemption as being absolute in nature) was effected by section 46(1) of, and paragraph 3 of Schedule 7 to, the Constitutional Reform and Governance Act 2010. As is well known, that change was made against the backdrop of a journalist's FOIA request made in 2005 to various Government departments about the Prince of Wales's correspondence with ministers, a request which in turn resulted in the Upper Tribunal's decision in *Evans v Information Commissioner* [2012] UKUT 313 (AAC); [2015] AACR 38 and ultimately the Supreme Court's decision in *R (on the application of Evans) v Attorney General* [2015] UKSC 21; [2015] 1 AC 1787.

11. Section 39 of FOIA deals with what might be termed 'demarcation disputes' between FOIA and EIR. If the requested information constitutes "environmental information" under the EIR, then it is exempt information under section 39 (there is no mirror provision under the EIR, excluding information from the scope of those Regulations if it is covered by FOIA). In such circumstances, the public authority is obliged to deal with the request under the EIR:

> **"39. – Environmental information**
> (1) Information is exempt information if the public authority holding it—
> (a) is obliged by environmental information regulations to make the information available to the public in accordance with the regulations, or
> (b) would be so obliged but for any exemption contained in the regulations.
> (1A) In subsection (1) 'environmental information regulations' means—
> (a) regulations made under section 74, or
> (b) regulations made under section 2(2) of the European Communities Act 1972 for the purpose of implementing any obligation relating to public access to, and the dissemination of, information on the environment.
> (2) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).
> (3) Subsection (1)(a) does not limit the generality of section 21(1)."

12. Finally, section 84 of FOIA (subject to qualifications that are immaterial for present purposes) defines "information" broadly as meaning "information recorded in any form".

The Environmental Information Regulations 2004

13. Regulation 2(1) of the EIR defines "environmental information" as follows, echoing to the letter the definition to be found in Article 2(1) of Directive 2003/4/EC:

> "'environmental information' has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—
>
> (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
>
> (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
>
> (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;
>
> (d) reports on the implementation of environmental legislation;
>
> (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and
>
> (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);".

14. The correct mode of referring to the individual component parts of this omnibus definition of "environmental information" in the EIR causes no little difficulty, as exemplified in the present proceedings. The Information Commissioner's Decision Notice in this case referred to e.g. regulation 2(a) or regulation 2(e). The problem with that usage is that it ignores the fact that the definition of "environmental information" is to be found, along with several other definitions, within regulation 2(1) (as opposed, say, to regulation 2(2)) of the EIR. Counsel in this appeal followed what is probably the conventional practice by referring to e.g. "regulation 2(1)(a)" and "regulation 2(1)(c)" respectively. That format (albeit substituting "Article" for "regulation") may be appropriate when referring to the Directive itself, as the relevant heads of the definition are indeed the parallel provisions in Article 2(1)(a) and Article 2(1)(c). However, this approach is not entirely satisfactory in the domestic context, as regulation 2(1) includes a further expression which has a definition divided into two parts, being sub-paragraphs (a) and (b), namely that defining the term "Scottish public authority". There may therefore be some scope for confusion, as on the face of it "regulation 2(1)(a)" might equally be read as a reference to the first limb of that latter expression. In this decision I have retained references to e.g. "regulation 2(1)(c)" where other original sources are cited and they have used that (not entirely accurate) formulation (including, it has to be respectfully noted, passages in the Court of Appeal's judgment in *Henney*). For my own part, however, I prefer to use the (admittedly slightly cumbersome) term "category (c) environmental information", or just "category (c)", when referring to that part of the regulation 2(1) definition under the EIR which covers "measures … and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements".

15. Such judicial pedantry aside, regulation 13 of the EIR then provides for certain exceptions to the obligation to disclose environmental information. However, notably there is no EIR equivalent to section 37(1)(aa) of FOIA. It follows that the categorisation of information as falling under either FOIA or the EIR respectively may be critical to the outcome of the proceedings in a case such as the present.

The background to Mr Hastings's information request

16. Mr Hastings is a journalist on the *Mail on Sunday*. He was interested in a meeting which took place in September 2014 between the Prince of Wales and two Government ministers from the Department for Transport (DfT) and Department for Communities and Local Government (DCLG) respectively. Mr Hastings made a detailed information request to each Department about that meeting, essentially in the same terms and expressly relying upon the EIR. The request to the DfT read as follows:

> "My request concerns a meeting which took place between John Hayes MP and His Royal Highness the Prince of Wales on 10 September 2014.
>
> 1. In the case of this meeting can you please provide copies of all correspondence and communications (including emails) between Mr Hayes and His Royal Highness the Prince of Wales which in any way relates to the meeting and the topics under discussion. Please note that reference to His Royal Highness the Prince of Wales should also include his Private Secretary and his private office. Please note that the reference to the Minister should include his Private Secretary and or his private office. This correspondence and communication could have been generated prior to the meeting taking place or it could have been generated afterwards.
>
> 2. In the case of this meeting can you please identify any other representative and or employees from the department who accompanied Mr Hayes? Can you please identify all other individuals at the meeting irrespective of whether they are connected to the department.
>
> 3. In the case of this meeting can the department please provide copies of all documentation, correspondence and communications (including emails) held by the organisation which in any way relates to the meeting and the topics under discussion at the meeting.
>
> 4. In the case of this meeting can the department please provide a list of all environmental topics covered at the meeting.
>
> 5. Can the department please provide copies of any briefing notes or similar which were issued to Mr Hayes and or any other departmental staff member or representative prior to the meeting taking place.
>
> 6. Can the department please provide copies of any correspondence and communications (including emails) between Mr Hayes and any other departmental employee which in any way relate to the meeting and the specific topics under discussion at those meeting. These communications could have predated the meeting or it could have been generated afterwards."

17. The DfT initially refused Mr Hastings's request. On internal review, it disclosed the name of the relevant DfT minister who had attended the meeting with the Prince of Wales. However, the DfT withheld other information on the basis of various

provisions in FOIA, namely sections 37(1)(aa) **(**communications with the heir to, or the person who is for the time being second in line of succession to, the Throne), 40(2) (personal information) and 41 (information provided in confidence). After initially responding in the same way as the DfT, the DCLG adopted a rather different stance to Mr Hastings's request. So, at least at first, the DCLG likewise simply refused to release any of the requested information, relying on section 37(1)(aa) of FOIA. However, at a later stage the DCLG shifted its position, agreeing that much of the information requested was indeed environmental in nature, which it duly released, but continuing to rely on section 37(1)(aa) of FOIA in relation to the limited amount of withheld information.

The Information Commissioner's Decision Notice

18. Mr Hastings complained to the Information Commissioner's Office (ICO) about the DfT's handling of his information request and in particular its application of FOIA rather than the EIR to that material. Following the ICO's investigation, and in so far as is material, the Information Commissioner's Decision Notice (FER0567018) stated his decision (and at that date the incumbent Commissioner was a 'he') in these terms:

> "1. The complainant has requested information relating to a meeting between John Hayes MP, a Minister at the Department for Transport (DfT), and His Royal Highness the Prince of Wales. The DfT withheld the information under section 37(1)(aa) – Communications with the heir to the throne, section 40(2) – personal information and 41 – information provided in confidence. It also explained that if the information was deemed to be environmental information and fall within the scope of the EIR it would be exempt under regulations 12(4)(e) – internal communications and 13 – personal information.
>
> 2. The Commissioner's decision is that the majority of the information constitutes environmental information and so should have been dealt with under the EIR. In respect of that information the Commissioner finds that the exception provided by regulation 12(4)(e) cannot be maintained in the public interest. However a small amount of the withheld environmental information is exempt under regulation 13. The DfT was correct to deal with the remaining information under FOIA and the Commissioner finds that information is exempt under section 37(1)(aa).
>
> 3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation. To disclose the environmental information that is not protected by regulation 13, as set out in the confidential annex that accompanies this notice."

19. The Information Commissioner set out his reasons for concluding that the majority of the information constituted "environmental information" at paragraphs 13 to 17 of the Decision Notice. Having noted the relevant statutory definitions, the following passage explained the Commissioner's reasoning:

> "16. The DfT has described the information as being on a meeting between government ministers and the Prince of Wales and, by extension, the subject of that meeting. However it argues that the subject of the meeting is too far removed from measures or activities affecting the environment whether directly or indirectly. The fact that the documents containing the withheld information may have been created for the purpose of the meeting should not distract from the actual content of the information. It is not possible to discuss that content in any detail in this notice. To do so would reveal something about the nature of the

meeting and so undermine the application of the exemptions/exceptions. However, having studied the information in question the Commissioner is satisfied that much of it does relate to both measures and activities likely to affect both the state of the environment directly and factors which in turn affect those elements. The Commissioner is satisfied that that part of the requested information is environmental information under regulation 2(c). The Commissioner's reasoning is explained in more detail in a confidential annexe which has been provided exclusively to the DfT.

17. There is one exception to this finding and this too is explained in the confidential annexe. The information in question is contained within one document. Access to the information in that document must therefore be considered under the provisions of FOI."

20. Those reasons were then expanded upon, by reference to the actual withheld information, in the five-page Confidential Annex to the Decision Notice (of which just over two pages were devoted to the categorisation issue, i.e. whether the requested information fell to be considered under FOIA or the EIR).

The First-tier Tribunal's decision

21. The DfT lodged an appeal with the First-tier Tribunal ("the Tribunal"). By the time the case came on for hearing, and doubtless in part in response to the view taken by the DCLG in relation to the parallel information request, the DfT had in fact decided to release most of the requested information which it held. The DfT continued to withhold certain limited passages which it considered did not constitute environmental information and so were exempt from disclosure by virtue of section 37(1)(aa) of FOIA. The Information Commissioner and Mr Hastings both contended that the remaining material in issue was environmental information within the meaning of category (c). So if the DfT was right, the remaining withheld information was necessarily subject to an absolute exemption under FOIA. If the Information Commissioner and Mr Hastings were correct, the issue of potential disclosure was subject to the public interest balancing test under the EIR.

22. Accordingly the Tribunal then heard, as a preliminary issue, the question of whether the material still in dispute was covered by FOIA or by the EIR. During this process the DfT disclosed, at the Tribunal's prompting, a small amount of additional information so as to provide the context for the environmental information that had already been released. This extra material was simply the repeated use of a sub-heading labelled 'Lines to take'. The result was that by the end of the hearing the Tribunal was effectively concerned with a nine-page document, most of which had already been disclosed under the EIR, and in respect of which only two pages remained in dispute. The Tribunal unanimously agreed with the DfT that the remaining withheld information fell to be considered under FOIA (and so, necessarily, was exempt from disclosure by reason of section 37(1)(aa)). The Tribunal expressed its reasoning in the following terms:

"Discussion

20. We share the Commissioner's concern, as described by Miss John, that it may often be highly problematic for the Commissioner or the Tribunal to have to undertake its own 'hypothetical redaction' or 'blue pencil' exercise, in order to determine whether the result supports the public authority's contention that certain information within a document or documents is exempt because it falls under the FOIA regime (with its exceptions), rather than under that of the EIR. As Mr Dunlop in effect acknowledged in oral argument, the solution to that potential problem lies in requiring the public authority to make good its case, by

undertaking the relevant work and presenting the result to the Commissioner or Tribunal. The Tribunal finds that the correct approach is, accordingly as follows.

> (1) If a public authority contends that information associated with environmental information is exempt from disclosure by reason of FOIA, the authority has to identify what the allegedly exempt information is.
>
> (2) Where the authority does so, the Commissioner/Tribunal will decide if the environmental information is coherent/comprehensible without the other information. As Miss John submits, that would be a question of fact, to be determined in each particular case.
>
> (3) If the Commissioner/Tribunal concludes that the environmental information is not coherent/comprehensible, then both sets of information must be disclosed as environmental information subject to the EIR regime **unless the predominant purpose of the entire information is not environmental**.
>
> (4) The application of the 'predominant purpose' test serves, amongst other things, to avoid the 'tail wagging the dog', in that the presence of a small amount of environmental information within an overall set of information that is non-environmental will not cause the entire set to be disclosed in the face of a FOIA exemption, which is not present in the EIR.

21. We have earlier recorded that the DfT accepted, in the course of the hearing, that certain words within otherwise now disclosed passages should, in fact, be disclosed. The words in question are, in each case, 'lines to take'. We are fully satisfied that the remaining disputed material (marked in green in the closed bundle) is not environmental information and that its severance from the disclosed environmental information does not render the latter incoherent or unintelligible. Whilst we accept that the disclosure of both sets of information might render the whole more interesting from a journalistic perspective, the disclosed information makes perfect sense on its own. As is plain, it is briefing material in connection with the meeting between Ministers and the Prince of Wales. We are entirely satisfied that the withheld material is not, in its own terms, environmental information within the meaning of regulation 2 of the EIR. The disclosed material, by contrast, is about the government's activities in the environmental field, as well as the Prince's project in Poundbury, Dorset. Further details about the withheld information are contained in the Closed Annex to this decision.

22. Having deliberated on 13 April, we announced at the hearing that we had determined the preliminary issue in favour of the DfT and that the appeal would, accordingly, be allowed.

23. We accordingly found that the Commissioner's notice of decision is not in accordance with the law, to the extent that it required disclosure of the material highlighted in green in the closed bundle."

23. Having decided the preliminary issue as it did, the Tribunal did not go on to (and nor did it need to go on to) address the question of the potential application of any of the exceptions under regulation 13 of the EIR. It should also be noted that the Tribunal held its final hearing on 13 April 2016, and so obviously did not have the advantage of being referred to the Court of Appeal's judgment in *Henney*. Although the Tribunal hearing in the present case was after the Upper Tribunal's decision in

Henney (handed down in December 2015: see [2015] UKUT 671 (AAC)), it does not appear that any submissions were made by the parties in respect of that decision. Indeed, the only case cited by the Tribunal itself was the information tribunal's decision in *DBERR v IC and FoE*.

The proceedings before the Upper Tribunal

The Upper Tribunal's open session

24. The disposal of this further appeal before the Upper Tribunal was delayed for some time as the case was stayed pending the outcome of the Court of Appeal's judgment in *Henney*. Following the lifting of the stay, I held an oral hearing of the Information Commissioner's appeal at Field House in London on 24 April 2018. The Information Commissioner was represented by Ms Julianne Morrison of Counsel and the Department for Transport by Mr Rory Dunlop of Counsel. I am grateful to both counsel for their helpful skeleton arguments and oral submissions. Those thanks are also extended to Miss Laura John who had previously been appearing for the Information Commissioner but who was unable to appear at the Upper Tribunal hearing.

25. I recognise that Mr Hastings, as the requester, may still retain a very real interest in the outcome of this appeal, even if he has limited active involvement in the latter stages of these proceedings. He had told the First-tier Tribunal that in his view the Prince of Wales was subject to the EIR, given that the Prince is interested in the environment and the meeting in question was convened to discuss environmental issues. Whilst that is a refreshingly straightforward view, such an approach may not sit easily with the principles in the case law for determining whether information falls to be considered under the FOIA or EIR regimes. Mr Hastings was not represented at the Upper Tribunal hearing and did not attend.

The Commissioner's two grounds of appeal and the DfT's response

26. There are two strands to the Information Commissioner's appeal to the Upper Tribunal. Strand 1 is the Commissioner's submission that the First-tier Tribunal (or FTT)'s approach to the question of whether the disputed information was "environmental information" within regulation 2(1) of the EIR was incorrect as a matter of law. Strand 2 is the Commissioner's contention that the Tribunal had also arrived at the wrong substantive conclusion to that question by virtue of having adopted that erroneous approach.

27. Ms Morrison emphasised that "the appeal is brought in view of the implications of the FTT's Decision for other cases, rather than because of its operation in this particular case" (Commissioner's skeleton argument at §2). The fundamental issue, in her submission, was whether (and, of so, when and how) information that fell within the scope of a particular request could be separated into "environmental information" falling under the EIR regime or "other information" coming under FOIA. By way of shorthand this was referred to by all concerned as "the severance issue".

28. The Information Commissioner's appeal was underpinned by three high level propositions (skeleton argument at §3). The first was that the legal approach to the severance of 'other' FOIA material from environmental information must ensure a holistic view is taken of whether the requested information is "environmental". The second was that the legal approach to severance must be workable, irrespective of how little or how much information had been requested. The third was that the approach adopted must enable the Information Commissioner and the First-tier Tribunal to reach independent conclusions on what information was found to be "environmental information". The Information Commissioner contended that the

Tribunal's approach in this case had failed properly to address each of those three principles.

29. Ms Morrison (and indeed, before her, Miss John) further submitted that in broad terms the following approach should be adopted by tribunals faced with a severance issue. First, the meaning of "environmental information" had to be construed widely. Second, the document containing the requested information had to be considered as a whole and the question asked as to whether the requested information was information "on" one or more matters specified in regulation 2(1) of the EIR. Third, where a public authority has severed composite parts of the information as being respectively environmental and putatively non-environmental in nature, then both parts needed to be considered so as to ask whether the parts were separately information "on" one or more of the matters set out in regulation 2(1) of the EIR, as adumbrated by the information tribunal's decision in *DBERR v IC and FoE* (at paragraph [29]).

30. The DfT, on the other hand, contended that the Tribunal's decision displayed no material error of law and so resisted the Information Commissioner's appeal. Mr Dunlop framed the question before the Upper Tribunal as being one of how to reconcile legal principle with practical reality. The legal principle was the settled point that "information" under both the EIR and FOIA is not limited to documents; rather, any individual document may include different pieces of information. That suggested, at least in theory, a sentence by sentence deconstruction might be necessary to identify which information fell under which statutory regime. The practical reality was that a line-by-line analysis would be unduly onerous and, in cases with large amounts of information, wholly impracticable.

31. The answer to the conundrum, in Mr Dunlop's submission, and hence the way to reconcile legal principle with practical reality, was to adopt a proportionate approach. Such an approach involved the following three steps. First, the First-tier Tribunal was under an obligation to make proportionate attempts to separate out the individual pieces of information that fell within the scope of the request. Second, the Tribunal then had to consider which regime applied to each of those pieces of information. Third, the Tribunal had to decide whether disclosure of each piece of information was required under the applicable regime, whether FOIA or EIR. Mr Dunlop further contended that the Tribunal's approach in this case was consistent with that taxonomy and accordingly revealed no material error of law.

The Upper Tribunal's closed session

32. In addition to the usual open part of the proceedings I also held a closed session in the Upper Tribunal appeal. If Mr Hastings had attended the open part of the Upper Tribunal proceedings, then he would have been entitled on the day of the hearing to be given an agreed "gist" of the closed session, formulated in such a way that it helped him understand the arguments in broad terms, while at the same time not actually disclosing the disputed material. In fairness (and so in the interests of transparency, so far as that is possible) it seems to me he should now see that gist in writing. I am indebted to both counsel for their helpful and comprehensive agreed gisted note of that closed session, which I now approve and reproduce here in full:

> "1. At the hearing of the appeal on 24 April 2018 a brief closed session was held. The purpose of the closed session was to allow the representatives of the Department and the Information Commissioner to develop points made in open by reference to the specific contents of the disputed information.
>
> 2. For the Department, Mr Dunlop developed his submissions to the effect that:

a. The disputed information had been broken down into chunks / different types of information.

b. The first issue for the Tribunal was whether the Department had gone too far in breaking the information into chunks. It was clear from looking at the disputed information that they had not gone too far. The Department had drawn a perfectly sensible line. Different parts of the document naturally fell into different categories. There is no scope for interfering with the FTT's decision that the divisions were appropriate. It was certainly not perverse.

c. The second issue for the Tribunal was whether the severed and withheld part of the information was environmental – i.e. fell within the definition of environmental information pursuant to Regulation 2(1). Their finding that it was not environmental was a finding of fact which was not perverse. Indeed, the finding was clearly correct as the withheld information was not 'on', or even 'connected to' any measure falling within Reg. 2(1)(c). Because it was not even 'connected to' any such measure, paragraphs 45-49 of *Henney* (on the purposive interpretation of 'on') are not relevant. Even if that is wrong, and paragraphs 45-49 of *Henney* are relevant, those paragraphs could not assist the ICO. The severed information would not help the public engage in debate about any measures likely to affect the environment, e.g. government policy in relation to housing development.

d. While there may be a public interest in seeing some of the information, Parliament has enacted an absolute exemption under section 37 FOIA.

3. For the Information Commissioner, Ms Morrison developed her submissions to the effect that:

a. The information had not been carved up in order to arrive at 'manageable chunks'. Instead the dividing line appears to have been drawn by reference to a distinction between substantive (information primarily on a measure) and administrative information.

b. The withheld information provides the context of the disclosed information, which should be disclosed in order to fulfil the purpose of the Aarhus regime.

c. The decision of the FTT, in open and closed, did not grapple with the correct test under Regulation 2(1)(c). It is accepted that viewed in isolation, the withheld information does not constitute intrinsically environmental information. However, it is information on or concerning measures within Regulation 2(1)(c) and, accordingly, is subject to the Regulations not FOIA.

4. In reply, Mr Dunlop:

a. Pointed out that information does not have to 'voluminous' before it can be broken down into chunks. Even a ten-page document may sensibly and appropriately be broken down into different 'chunks'.

b. Said that the reasons of an expert tribunal should be read on the assumption that they knew what tests to apply. That assumption could only be displaced if there were powerful reasons for doing so."

The Upper Tribunal's analysis

The DBERR v IC and FoE approach

33. It was rightly common ground between the parties that the EIR and FOIA regimes are each concerned with requests for *information*, and not for *documents*. Obviously, a single document, whether succinct or substantial, may well contain what is on proper analysis both "environmental information" and "other information". What then is the proper approach to such a classification exercise? It seems to have been generally accepted that the information tribunal's decision in *DBERR v IC and FoE* correctly stated the law (see, for example, P. Coppel, *Information Rights: Law and Practice*, 4th edn, 2014, p.552 and J. Macdonald QC and R. Crail, *Macdonald on the Law of Freedom of Information*, 3rd edn, 2016, p.179). The information tribunal, of course, was the statutory predecessor to, and has been subsumed within, the First-tier Tribunal (General Regulatory Chamber).

34. The context of the information tribunal's decision in *DBERR v IC and FoE* is important. Friends of the Earth had made a request to the Department of Trade and Industry (latterly DBERR) asking for information about meetings and correspondence between ministers (and senior civil servants) and CBI representatives. Both DBERR and the Information Commissioner took the view that the disputed information fell for consideration under FOIA. The information tribunal, however, accepted the submission made on behalf of Friends of the Earth to the effect that the Department and the Commissioner had adopted too narrow a construction of the term "environmental information". The tribunal held that meetings to consider climate change fell within regulation 2(1) of the EIR as did information on supply, demand and pricing in relation to energy policy (at paragraph [27]). The tribunal also recognised that individual documents may contain both environmental and non-environmental information (at paragraph [28]).

35. For present purposes the key passage in the information tribunal's reasoning in *DBERR v IC and FoE* was as follows:

> "29. Under s.39 FOIA information that is covered by the definition of environmental information under EIR is exempt under FOIA and is to be dealt with under the Regulations. It is therefore necessary for us to consider which jurisdiction to apply to the Disputed Information. This is not easy because some documents may contain both environmental and other information. How should we approach such documents? Where a document divides easily into parts where the subject matter of each part is easily identifiable this should enable the document to be considered in parts so as to decide which information is caught by EIR. Where this is not the case do we need to review the document in exacting detail to decide which parts or even paragraphs or sentences are subject to EIR or FOIA? To do so would be an extremely onerous approach on those needing to apply the law. But our information laws are based on requests for information not documents. We believe Parliament may not have appreciated such a consequence and that where possible would have wanted a pragmatic approach to be taken. Therefore we find that where the predominant purpose of the document covers environmental information then it may be possible to find that the whole document is subject to EIR. Where there are a number of purposes and none of them are dominant then it would appear that the public authority has no choice but to review the contents of the document in detail. In deciding which statute applies the public authority cannot, of course, take into account the fact that one piece of legislation may be more favourable to it than another. There is no suggestion that this has happened in this case."

36. The information tribunal in *DBERR v IC and FoE* went on to make the following further observations:

> "How should the Tribunal deal with documents covering many subjects under FOIA
> 33. Most of the Disputed Information is comprised of documents covering many subjects. This is largely because the documents comprise notes of meetings which covered a wide range of subjects. This has resulted in the Commissioner reviewing the Documents in some detail and making decisions sometimes in relation to paragraphs and even sentences. As already observed this is an extremely onerous process and clearly raises concerns for dealing with such requests.
>
> 34. This was not the original approach of BERR who seemed to have claimed exemption(s) per document. However during the investigation of the complaint both BERR and the Commissioner seem to have resorted to a much more detailed analysis partially arising out BERR's original disclosure of heavily redacted documents.
>
> 35. Was the Commissioner right to take this approach? As with environmental information, public authorities are required to deal with requests under s.1(1) FOIA for 'information'. Information is defined under s.84 as 'information recorded in any form.' There is no reference to 'documents'. We therefore find that the Commissioner's approach is correct, despite the onerous implications.
>
> 36. In deciding this case we have therefore had to undertake a detailed examination of all the Disputed Information and have appreciated at first hand the size of the task. However we would observe that we infrequently have to take this approach to documents, largely because most documents tend to be based on a single issue or predominantly one subject matter where exemptions are able to be properly claimed in relation to the whole document."

37. Understandably, and especially in the absence of any binding authority on the categorisation or severance issue, the parties' submissions to the Tribunal in the present case centred round the information tribunal's observations in *DBERR v IC and FoE*. Indeed, paragraphs [28]-[29] and [33]-[36] of the decision in that appeal were cited at length in the Tribunal's decision, along with a summary of the parties' respective arguments: see paragraphs [10]-[19] of the decision now under appeal. This was followed by the crucial passage of the Tribunal's reasoning in paragraphs [20] and [21] (see paragraph 22 above), setting out the basis for the Tribunal's conclusion that the remaining disputed requested information fell for consideration under FOIA (and not under the EIR). Although the Tribunal did not say so in as many words that it was purporting to adopt the same approach as set out in *DBERR v IC and FoE*, it is arguable that this may have been the Tribunal's intention. This much is apparent from the adoption of the phraseology of the "predominant purpose" test in sub-paragraphs (3) and (4) of the Tribunal's paragraph [20].

The issue in Henney

38. As noted above, the present appeal was lodged with the Upper Tribunal in September 2016 but had been stayed pending the outcome of the Court of Appeal's decision in *Henney* ([2017] EWCA Civ 844) on appeal from *Department for Energy and Climate Change v Information Commissioner and Henney* ([2015] UKUT 671 (AAC)). The Court of Appeal in *Henney* was not directly concerned with the severance or categorisation issues discussed in the extracts from *DBERR v IC and*

FoE cited above. Rather, as Beatson LJ, giving the only substantive judgment in the Court of Appeal, observed:

> "6. In very general terms, the issue between the parties is when and whether information on a measure which does not in itself affect the state of the elements of the environment or the factors referred to in regulation 2(1)(a) and (b) of the EIR, can be information 'on' another measure which does. In this case, the measures are respectively the document containing the information, the Project Assessment Review about the communications and data component, and the Smart Meter Programme as a whole. It is common ground that the programme as a whole was likely to affect the relevant elements and factors. In the Upper Tribunal, the Judge (at [93]) identified the Smart Meter Programme as the relevant measure, without considering whether the communications and data component itself was a measure, and so did not express a view as to whether the communications and data component was itself likely to affect the relevant elements and factors."

39. Against that background, Beatson LJ posed the issue before the Court of Appeal in the following terms: "The question before us concerns the extent to which it is permissible to look beyond the document containing the information and to have regard to what the Upper Tribunal described as the 'bigger picture' to identify the 'measure' that the information in it is 'on'" (paragraph 7). Thus the question before the Court was one of statutory construction, namely the proper approach to the definition of "environmental information" in regulation 2(1) of the EIR, and in particular category (c). The Court was therefore not directly concerned with what might be described as the "procedural" or "mechanical" categorisation or severance issues identified in *DBERR v IC and FoE*, namely how one deals in practice with a document that may, on a proper analysis, contain both "environmental information" and "other information".

Henney in the Court of Appeal and "environmental information"

40. It is axiomatic that the EIR must be interpreted purposively against the background of both the Aarhus Convention and Directive 2003/4/EC and also that the term "environmental information" is to be given a broad meaning (*Henney* in the Court of Appeal at paragraphs 14 and 16). Such general principles of construction for the EIR as were not in dispute had been set out at paragraphs 32-37 of the Upper Tribunal's decision in *Henney* and were subsequently endorsed by the Court of Appeal at paragraph 12, footnote 3 of its own judgment. For the record I repeat them here:

> "The general principles of construction for the Environmental Information Regulations
>
> 32. There was a fair amount of common ground between the parties as to the proper approach to be taken to the interpretation of regulation 2(1) of the EIR. The following general principles were not in dispute.
>
> 33. First, regard must be had to the European and international antecedents of the EIR. Thus the definition of "environmental information" in regulation 2(1) of the EIR must be construed in compliance with Directive 2003/04/EC which follows, but also expands upon, the definition of that term in the Aarhus Convention. Recital 5 of the Directive makes it plain that the EU legislature intended to ensure that EU law was compatible with the Aarhus Convention in terms of the right of access to environmental information.

34. Second, while *The Aarhus Convention: An Implementation Guide* does not have binding force, courts and tribunals are entitled to have regard to its guidance (*Solvay and Ors v Région wallone* Case C-182/10 at [27]). The *Implementation Guide* advises that "The clear intention of the drafters … was to craft a definition that would be as broad in scope as possible, a fact that should be taken into account in its interpretation" (p.50). Conversely, just as the definition of "environmental information" must be read broadly, the exceptions in regulation 12 of the EIR must be construed restrictively (see Article 4(4) of the Aarhus Convention and Recital (16) to the Directive).

35. Third, that emphasis on a broad interpretation of the expression "environmental information" has been echoed in the domestic case law; see e.g. *Secretary of State for Communities and Local Government v Venn* [2014] EWCA Civ 1539 at [10]-[12] *per* Sullivan LJ, citing the CJEU's judgment in *Lesoochranárske VLK v Slovenskej Republiky* (Case C-240/09) [2012] QB 606 ("the *Brown Bear* case").

36. Fourth, although the expression "environmental information" must be read in a broad and inclusive manner, one must still guard against an impermissibly and overly expansive reading that sweeps in information which on no reasonable construction can be said to fall within the terms of the statutory definition. The CJEU, dealing with the earlier Directive 90/313, held that it was not intended "to give a general and unlimited right of access to all information held by public authorities which has a connection, however minimal, with one of the environmental factors mentioned in Article 2(a). To be covered by the right of access it establishes, such information must fall within one or more of the three categories set out in that provision" (*Glawischnig v Bundesminister für Sicherieit und Generationen*, Case C-316/01, at [25]).

37. There is also a general acceptance that the principle set out in *Glawischnig* applies equally to Directive 2003/04/EC as to its predecessor (see Opinion of Advocate-General Kokott in *Stichting Natuur en Milieu (Environment and consumers)* [2010] EUECJ C-266 at [44] and [58] and also *Evans v Information Commissioner (Correspondence with Prince Charles in 2004 and 2005)* [2012] UKUT 313 (AAC) at paragraph 235(1) and (2)). As another FTT has neatly put it, one must avoid imperilling "the principle of legal certainty by extending the meaning of words beyond their normal meanings" (*Uttlesford* at paragraph [28]). In that context it may be significant that the examples given in regulation 2(1)(a)-(c) are illustrative only, rather than exhaustive (referring to the elements of the environment, factors and measures respectively, "such as …."; see further *Implementation Guide* p.50). In contrast, the categories of environmental information set out in regulation 2(1)(d) and (e) are expressed in self-contained terms which are essentially parasitic on the preceding provisions."

41. Accordingly, given that the Directive is to be accorded a broad meaning, "the statutory definition in regulation 2(1)(c) does not mean that the information itself must be intrinsically environmental" (*Henney* at paragraph 45). There are, however, limits to this broad approach. As the Court of Appeal held (at paragraph 52), reinforcing an observation in the Upper Tribunal's decision:

"… The question is not simply whether there is a 'sufficiently direct link' between the disputed information and the Smart Meter Programme. The Judge at §36 made clear that 'although the expression "environmental information" must be read in a broad and inclusive manner, one must still guard against an impermissibly and overly expansive reading that sweeps in information which on

no reasonable construction can be said to fall within the terms of the statutory definition'."

42. What else does *Henney* tell us? The focus of the Court of Appeal's analysis was necessarily, given the factual matrix of that case, specifically on category (c) of the EIR definition, namely:

> ""environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on—
>
> (a)… ;
>
> (b)… ;
>
> (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;".

43. The Court of Appeal's judgment provides the following four important lessons about the definition of "environmental information" in regulation 2, and category (c) in particular.

44. First, there is an important conceptual difference between the definitions of "information" under sections 1(1) and 84 of FOIA on the one hand and on the other "environmental information" within category (c) of the regulation 2(1) definition. The focus of the former is on the actual information itself – whereas the latter is not concerned just with the nature of the information itself but also involves a focus on the relevant measure. Thus "it is therefore first necessary to identify the relevant measure. Information is 'on' a measure if it is about, relates to or concerns the measure in question" (*Henney* at paragraph 37).

45. Second, any tribunal that in future frames its analysis in terms of considering the disputed information in the light of "the bigger picture", as a means of determining whether it is on a proper analysis "environmental information", faces the prospect of being sent to sit on the judicial naughty step. According to the Court of Appeal, the use of such a phrase is "unhelpful" (see *Henney* at paragraph 44) as it risks deflecting attention from the statutory definition in category (c) and so "can appear to go beyond the familiar principle of construction that determines meaning in the light of the relevant context" (see paragraph 35).

46. Third, in applying category (c) of the EIR definition, a tribunal should not have regard to issues with which the information is <u>not</u> concerned, or issues with which the information is <u>merely connected</u>. That said, the tribunal "is not restricted by what the information is specifically, directly or immediately about … Nothing in that language [of category (c)] requires the relevant measure to be that which the information is 'primarily' on" (*Henney* at paragraph 39). Thus there will be "some types of information that are relevant to a project which itself has some environmental impact [which] do not amount to environmental information within the regulation" (at paragraph 40). But equally the Court of Appeal recognised that "identifying the measure that the disputed information is 'on' may require consideration of the wider context, and is not strictly limited to the precise issue with which the information is concerned" (at paragraph 43). So, context good, bigger picture bad (at paragraph 44).

47. Fourth, once the line between environmental and other information has been properly identified, then the decision as to which side of the line particular information falls is fact and context-specific:

> "46. The question is how to draw the line between information that qualifies and information that does not. The example given by the judge (a report focussed on the public relations and advertising strategy of the Smart Meter Programme) and other examples canvassed at the hearing show that there may be difficulties in doing this. Mr Facenna [*for Mr Henney*] recognised that not all information would qualify but submitted that the example given by the Judge would do so because having access to information about how a development is to be promoted will enable more informed participation by the public in the programme. His example of information that would not qualify was information relating to a public authority's procurement of canteen services in the department responsible for delivering a road project. This information would not qualify because it is likely to be too remote from or incidental to the wider project to be 'on' it for the purposes of regulation 2(1)(c)."

48. Reading between the lines, it seems that the Court of Appeal accepted there was some force in counsel's critique of the example I gave in *Henney* of information that might not be environmental information (a report dealing with the public relations and advertising strategy of the Smart Meter Programme). With the benefit of hindsight, I agree that my example may have not reflected the true breadth of the definition of environmental information in the light of the EU jurisprudence. In the Court of Appeal, Beatson LJ continued as follows:

> "47. In my judgment, the way the line will be drawn is by reference to the general principle that the regulations, the Directive, and the Aarhus Convention are to be construed purposively. Determining on which side of the line information falls will be fact and context-specific. But it is possible to provide some general guidance as to the circumstances in which information relating to a project will not be information 'on' the project for the purposes of section 2(1)(c) because it is not consistent with or does not advance the purpose of those instruments."

49. The Court of Appeal's judgment then referred to the recitals to the Aarhus Convention and the Directive, although the remainder of the Court's analysis was actually more directed towards the particular issues that arose on the facts of *Henney* itself. Beatson LJ's conclusion was that the observations in His Lordship's judgment were "not intended to provide a gloss on the statutory definition in regulation 2(1)(c). It will be necessary to consider each case on its own facts in order to determine whether disputed information can properly be said to be 'on' a given measure and to have regard to the purpose of the EIR and the Directive" (at paragraph 57).

The DBERR v IC and FoE approach in the light of Henney

50. We have seen that *DBERR v IC and FoE* and *Henney* dealt with separate albeit related issues. *DBERR v IC and FoE* – which, as noted, carries no precedential status but has generally been taken as accurately stating the law – was (at least in part) concerned with the mechanical process of severing and then categorising information in a 'mixed' document as either environmental information or other (FOIA) information. The focus of *Henney* is on the logically prior question as to what constitutes "environmental information" in the first place. Given the way the issue before it was framed, it followed that the Court of Appeal did not need to concern itself with the nitty-gritty of how to sort out the environmental wheat from the non-environmental chaff where both types of information appear in the same document.

51. In my judgment the information tribunal's approach in *DBERR v IC and FoE* has stood the test of time (and subsequent case law authority) well.

52. In the first place, and on the issue of principle, there is no question but that the information tribunal's broad approach in *DBERR v IC and FoE* to the meaning of "environmental information", reflecting the purposes of Directive 2004/3/EC, was consistent both with the then emergent case law as well as with subsequent authorities, notably *Henney* itself. The tribunal's conclusion on the facts of that case as to which of the disputed material was environmental information was plainly correct.

53. In the second place, what then of the information tribunal's suggested approach to the severance and categorisation issues? In my assessment the information tribunal's conclusion that "where the predominant purpose of the document covers environmental information then it may be possible to find that the whole document is subject to EIR" (at paragraph [29]) is broadly consistent with the approach to the regulation 2(1) definition as approved by the Court of Appeal in *Henney*. For example, the *DBERR v IC and FoE* approach properly reflects the fact that for the purposes of e.g. category (c) the information in question need not be "intrinsically environmental" (*Henney* at paragraph 45), so long as one avoids sweeping in information "which on no reasonable construction can be said to fall within the terms of the statutory definition" (*Henney* at paragraph 52). The tribunal's *modus operandi* in *DBERR v IC and FoE* also chimes with the Court of Appeal's recognition in *Henney* that "identifying the measure that the disputed information is 'on' may require consideration of the wider context, and is not strictly limited to the precise issue with which the information is concerned" (at paragraph 43).

54. That said, in a post-*Henney* world tribunals would be well advised not to borrow the language of "predominant purpose" from *DBERR v IC and FoE* (at paragraph [29]) and/ or that of "predominantly one subject matter" (at paragraph [36]). I entirely take Ms Morrison's point that the definition in regulation 2(1) of the EIR requires consideration of whether the information within the scope of the request is "on" one or more of the matters specified in that definition. To that extent, it necessarily requires consideration of its subject matter, and so I reject Mr Dunlop's submission that the Information Commissioner is seeking to impose a different test instead of the statutory language. However, the obvious risk now is that the deployment of phraseology such as "predominant purpose" in a First-tier Tribunal's decision may lead an appellate tribunal or court to suspect that the first instance tribunal has applied an impermissible gloss to the statutory language and so erred in law. Tribunals may instead find it helpful to bear in mind at all times the Court of Appeal's reminder in *Henney* that it is necessary "to consider each case on its own facts in order to determine whether disputed information can properly be said to be 'on' a given measure and to have regard to the purpose of the EIR and the Directive" (at paragraph 57).

The First-tier Tribunal's approach in the present case

55. So where does all that leave this particular Tribunal's decision?

56. Ms Morrison's central argument for the Information Commissioner can be summarised thus: in the present case the Tribunal went about the process of categorising the disputed information in the wrong way. In short, she submitted that the Tribunal had started with the disaggregated information in isolation in 'silos' and had then worked backwards from there to the issue of classification. Accordingly, Ms Morrison argued, the Tribunal had failed to apply the contextualised and holistic

approach to the definition of "environmental information" mandated by *Henney*, by which information had to be viewed in the wider context of what it was 'on'.

57. I agree with that critique, and essentially for the following three main reasons.

58. First, in paragraph [20] of its decision, the Tribunal set out, in four steps, what it described as "the correct approach" for dealing with cases where a document contains what the public authority asserts is both environmental and non-environmental information (see paragraph 22 above). Although in part the Tribunal appears to be following the line taken in *DBERR v IC and FoE* (see paragraphs 35 and 36 above), the difficulty with its approach is that the test as set out here by the Tribunal turns on the coherence or comprehensibility of the component parts of the composite information as the public authority has identified them. It does not in terms consider what the information is 'on'. A public authority may well be able to disaggregate information which it acknowledges as being environmental information in such a way that the material disclosed under the EIR is coherent and comprehensible. Yet this may result in other information which is in reality likewise 'on' the matters identified in the regulation 2(1) definition as being severed, to be dealt with separately under FOIA. It is necessary to consider the subject matter of both parts of the disputed information, and the link between them, as well as taking a holistic approach to the information, in order to decide whether the supposed non-environmental information can indeed be properly regarded as being 'on' something other than one of the matters enumerated in the regulation 2(1) definition.

59. Secondly, it is plain from paragraph [21] of the Tribunal's decision that it applied the four-step test identified in the previous paragraph. The remaining disputed material (marked in green in the closed bundle and running to about two pages of A4, albeit the information in question was generously laid out) was found to be not environmental information because "its severance from the disclosed environmental information does not render the latter incoherent or unintelligible". There is really no way of hiding from the reality here – the Tribunal was assessing the status of the still disputed information by reference to its impact on the already disclosed environmental information rather than in its own right. Similarly, the (very short) closed annex to the Tribunal's decision, as with paragraphs [20]-[21] of its open decision, focuses on what is essentially a coherence test for the already disclosed information.

60. Thirdly, the Tribunal went on in paragraph [21] of its decision to confirm that it was "entirely satisfied that the withheld material is not, *in its own terms*, environmental information within the meaning of regulation 2 of the EIR" (emphasis added). This was in contrast to the disclosed information which was about government's activities in the environmental arena (and the Prince's project at Poundbury). Information on the latter subjects on any analysis obviously falls within the definition of environmental information. But, as the Court of Appeal made clear in *Henney*, "the statutory definition in regulation 2(1)(c) does not mean that the information itself must be intrinsically environmental" (at paragraph 45).

61. For those reasons I agree with Ms Morrison that the Tribunal as a matter of law applied the wrong test.

A postscript – the Upper Tribunal's (very) recent decision in Cieslik

62. Following the hearing, and at the same time as submitting the agreed gist of the closed session, both counsel invited me to read the decision of Judge Markus QC in *DfT, DVSA and Porsche Cars GB Ltd v Information Commissioner and Cieslik* [2018] UKUT 127 (AAC) (*Cieslik*) (a decision signed off by the Judge on 12 April 2018 but

for some reason not published on the Upper Tribunal (AAC)'s decisions website until 2 May 2018). I was invited in particular to read paragraphs 33-35 and 50-67 of that decision, as those paragraphs also involved the interpretation and application of the Court of Appeal's decision in *Henney* to the facts at issue in that case. That appeal concerned a Driver and Vehicle Standards Agency (DVSA) safety test report on an alleged throttle defect in a Porsche Cayman. The legal issue was whether that safety test report fell for consideration under the EIR (as the First-tier Tribunal had found) or rather under FOIA.

63. Judge Markus concluded that the Tribunal had confused the steps involved in carrying out an activity with the activity itself. Thus "[a]lthough running a car engine was a necessary element of carrying out the safety test, that did not of itself mean that, on a purposive approach to the EIR, the test affected environmental elements or factors. It fails to reflect the principle established by the Court of Appeal in *Henney* and in *Glawischnig* that information which has only a minimal connection with the environment is not environmental information" (at paragraph 33). Earlier Judge Markus had set out her analysis of the effect of the Court of Appeal's judgment in *Henney* in the passage at paragraphs 17-27 of her decision, which expresses rather more crisply and more clearly the points I have also endeavoured to make above.

64. In holding that the Tribunal had erred in law, Judge Markus concluded as follows:

> "35. Although the FTT used some of the language of purpose and context, it did not address whether and in what way knowledge of the disputed information, which concerned the safety of the Porsche Cayman, could contribute to the Directive's purpose. The FTT did not give any consideration to whether access to the information would contribute to greater awareness or, free exchange of views about or more effective participation in environmental decision-making, or to a better environment. The FTT did not address any considerations such as those listed by the Court of Appeal at paragraph 43. Nor did the FTT reflect on whether its literal approach to the definition of environmental information led to an impermissibly broad reading that included information which could not reasonably be said to fall within the regulation. The FTT's reasoning, set out above, demonstrates a fundamentally flawed approach which is inconsistent with the approach established by European case law and confirmed by the Court of Appeal in *Henney*."

65. Remaking in part the decision under appeal, the Judge then provided her own analysis of whether the safety test report fell within category (c) of the EIR definition of environmental information (at paragraphs 49-67). The requester (Mr Cieslik)'s case, in summary, was that "the information from the safety test might help to show that the environmental tests for noise or CO_2 emissions were invalid. He submits that disclosure of information about the safety test may shed light on why DfT appears to have hidden an environmental concern and will give a better awareness of environmental matters and, ultimately, contribute to a better environment" (at paragraph 47). However, following a detailed analysis of the competing arguments, Judge Markus held as follows (at paragraph 66):

> "the link between the requested information in this case and Mr Cieslik's case theory is too tenuous to support a conclusion that the information is *on* that theory (Mr Pitt-Payne [*for Porsche Cars GB Ltd*]'s approach); and for the same reasons any link between the activity (the safety test) and any environmental issues is too tenuous to mean that the safety test affected or was likely to affect the environmental elements or factors (my approach)."

66. The Judge's decision in *Cieslik* and in particular the analysis at paragraphs 49-67 also confirms beyond any doubt that, once the right line has been identified at the boundary of FOIA and the EIR, then the question of whether particular information falls one side of that line or the other is necessarily fact-specific. However, Judge Markus did not need to address in *Cieslik* the specific issue that has arisen for decision in this appeal.

Guidance on documents that include both environmental and other information
67. In their respective submissions Ms Morrison and Mr Dunlop advanced competing proposals on how tribunals should deal with cases in which particular documents, properly analysed, may include some material which is environmental in nature and some information which is governed by FOIA. These are summarised above at paragraphs 29 and 31.

68. In my view the methodology advocated by Ms Morrison best reflects the correct legal position. It involves the following three stages.

69. First, the starting point for a tribunal's analysis is that "environmental information" in regulation 2(1) of the EIR must be construed broadly (see e.g. recitals (1), (2), (10) and (16) and Article 1 of Directive 2003/4/EC and the case law discussed above).

70. Second, the document containing the requested information must be considered as a whole. Tribunals should ask themselves whether the requested information as a whole is information 'on' one or more of the matters identified in the regulation 2(1) EIR definition.

71. Third, where the public authority has disaggregated the information in the document into information which it accepts is environmental information (and so governed by the EIR) and information which it considers is other information (and so subject to FOIA), the tribunal must ask itself whether those component parts are separately information 'on' one or more of the matters set out in regulation 2(1) of the EIR. To that extent the approach set out by the information tribunal in *DBERR v IC and FoE* (at paragraph [29]) is helpful.

72. There are in turn three reasons why I endorse the approach advocated by Ms Morrison (at paragraph 29) as opposed to that advanced by Mr Dunlop (at paragraph 31).

73. The first reason is concerned with the relationship between the two statutory regimes and in particular the effect of section 39 of FOIA. It will be recalled there is no provision under the EIR excluding from its scope information that is subject to FOIA. Rather, section 39 of FOIA provides that information that is environmental information must be dealt with under the EIR regime. It follows that a logical starting point – in a case that may involve both types of information – is to identify first the information that falls within the regulation 2(1) definition under the EIR. And that, in turn, requires one to begin with the holistic approach approved by *Henney*. Ms Morrison's analysis accordingly starts on the right footing.

74. The second reason for preferring Ms Morrison's approach is that it accords proper weight to the way in which "information" is itself defined respectively under the EIR and FOIA. Under FOIA (see section 84), "information" simply means "information recorded in any form". The focus is on the bare data by itself. Under regulation 2(1) of the EIR, however, "environmental information" is defined contextually. As Judge Markus put it in *Cieslik*, the EIR definition "focusses on the relevant measure (or

activity) and not solely the nature of the information itself" (at paragraph 49). Again, that difference of approach is accorded centre stage in the second stage of Ms Morrison's analysis.

75. The third (and inter-connected) reason is that, in keeping with the Aarhus Convention and the Directive, the Information Commissioner's approach is firmly grounded in principle. Mr Dunlop's arguments, attractive as they were, were heavily reliant on invoking the twin *means* of proportionality and pragmatism but failed to give sufficient weight to the *end* of an Aarhus/Convention/*Henney*-compliant approach to the identification of "environmental information". In cases such as the present (and all the more so in appeals with far greater volumes of disputed material) there is a real danger in not seeing the EIR forest because of all the trees (I should make it clear this is a turn of phrase, and not an impermissible extra-statutory gloss such as "the bigger picture"). In such circumstances there needs to be a light on the headlands, a beacon steering the public authority (and then the Commissioner and the Tribunal) clear of the rocks of legal error – and the Aarhus/Convention/*Henney* principles provide the navigational tool that is missing from centre place in Mr Dunlop's suggested approach.

Conclusion

76. I therefore conclude that the Information Commissioner succeeds as regards Strand 1 of her appeal. In other words the First-tier Tribunal's approach to the question of whether the disputed information was "environmental information" within regulation 2(1) of the EIR involved an error of law. Strand 2 was the Commissioner's submission that the Tribunal had also arrived at the wrong substantive outcome by virtue of having adopted that approach. Of course, it is entirely possible that the Tribunal may have arrived at the correct substantive outcome, despite having misdirected itself in law on the proper approach to the resolution of that question. In any event, at this stage I set aside the Tribunal's decision as being in error of law (Tribunals, Courts and Environment Act 2007, section 12(2)(a)).

The onward disposal of the present appeal

Introduction

77. It will be recalled that the Tribunal dealt with the appeal on a preliminary issue basis as to the applicable regime. Realistically there are two choices open to me now. The first is to remit the case in its entirety to a new First-tier Tribunal without further ado (which Tribunal would have first to decide whether the requested information is "environmental information" and then – depending on the outcome – proceed to deal with the appeal as a FOIA or an EIR case accordingly). The second is to determine the preliminary issue myself. If the disputed information is found to be subject to the FOIA regime, then of course section 37(1)(aa) operates as an absolute exemption and remittal would serve no useful purpose. If EIR is found to be the applicable regime, then it would probably be appropriate to remit the matter to a new Tribunal to consider any EIR exemptions. I say that as I have not been addressed on those issues and do not have the benefit of any findings of fact by the Tribunal. There would appear to be no good reason for the Upper Tribunal to assume the role of primary fact finder in that regard.

78. I have concluded that I should remake the decision on the applicable regime, essentially for much the same reasons as Judge Markus gave for taking the same course of action in *Cieslik*. I do not consider that I need to obtain further information or evidence in order to do so. I have had the benefit of detailed written and oral submissions about the correct approach, both in open and closed session, and made by reference to the disputed material and the evidence. Remitting the question of the

applicable regime to the First-tier Tribunal will mean that the parties will have to go over much of that ground again, no doubt at considerable further expense.

A summary of the parties' submissions on the applicable regime

79. Ms Morrison's primary submission is that the Tribunal erred in its conclusion that the remaining disputed information in this case could be severed from the remainder and was not "environmental information" for the purposes of the EIR definition. The disputed information, she contends, does not have a clearly identifiable and distinct subject, separate from the remaining information (which the DfT concedes is environmental information). Rather, she argues it is inextricably linked to the subject of the remaining information, namely the meeting and the matters that were to be discussed.

80. Mr Dunlop's starting point was that the Tribunal was entitled to find that the withheld information was not, on its own, environmental and the DfT was accordingly entitled to sever it from the disclosed environmental information. For the most part, he submitted, the disclosed information was environmental in nature as it was information about government policies in the environmental arena. The withheld material, by contrast, "was administrative information relating to the Prince of Wales' attendance at that meeting" (response to the appeal at §26). The two sets of information may have both related to the same meeting, but that was a 'mere connection' between the withheld information and the matters in categories (a) to (f) inclusive of the EIR definition.

81. I need not provide more than that bare summary of the parties' respective positions, not least given the very helpful and comprehensive agreed and gisted summary provided by counsel of the submissions in closed (see above at paragraph 32).

The Upper Tribunal's analysis

82. The starting point, as Judge Markus ruled in *Cieslik,* must be "to identify the measure or activity that the disputed information is 'on'. The measure or activity must affect or be likely to affect the elements or factors in subparagraphs (a) or (b)." In doing so, I bear in mind the principles to be extracted from *Henney* and the earlier case law. Thus the term "environmental information" must be construed broadly and there is no requirement that "the information itself must be intrinsically environmental" (*Henney* at paragraph 45). Similarly, "the Tribunal is not restricted by what the information is specifically, directly or immediately about" (*Henney* at paragraph 39) That said, there are plainly limits to the broad and purposive approach to be adopted (see *Henney* repeatedly, e.g. at paragraphs 35, 40, 45 and 52). *Cieslik* was a case in point which on its facts fell on the FOIA side of the EIR/FOIA demarcation line, as the connection was no more than incidental. As Judge Markus explained, "any link between the activity (the safety test) and any environmental issues is too tenuous to mean that the safety test affected or was likely to affect the environmental elements or factors" (at paragraph 66).

83. In determining the question of what the withheld information is 'on', one must have therefore have regard to the Court of Appeal's guidance in *Henney*:

> "43. It follows that identifying the measure that the disputed information is 'on' may require consideration of the wider context, and is not strictly limited to the precise issue with which the information is concerned, here the communications and data component, or the document containing the information, here the Project Assessment Review. It may be relevant to consider the purpose for which the information was produced, how important the information is to that

purpose, how it is to be used, and whether access to it would enable the public to be informed about, or to participate in, decision-making in a better way. None of these matters may be apparent on the face of the information itself. It was not in dispute that, when identifying the measure, a tribunal should apply the definition in the EIR purposively, bearing in mind the modern approach to the interpretation of legislation, and particularly to international and European measures such as the Aarhus Convention and the Directive. It is then necessary to consider whether the measure so identified has the requisite environmental impact for the purposes of regulation 2(1)."

84. So what then is the "measure or activity that the disputed information is 'on'"? Mr Dunlop would have me decide that it was simply "administrative information relating to the Prince of Wales' attendance" at the meeting in question. I do not accept that submission for two inter-related reasons.

85. First, Mr Dunlop's characterisation or description of the information is an unduly narrow reading. In any event, as already noted, the question is not whether or not the information in dispute is in some way intrinsically environmental information. Rather, a broad and purposive approach must be taken, and in my assessment the information in question provides the context to better understand the already released information. The released environmental information is essentially a series of bullet points about housing policy which, taken by itself, would not look out of place in a party political manifesto. The disputed information sets the context for that information – in much the same way as do the three words "lines to take", which appear at the start of paragraphs 6 to 9 inclusive of the document and which were released at the 11th hour at the Tribunal's instigation. It is not simply stand alone "administrative information" but rather part of a briefing note 'on' the environmental subject in hand.

86. Second, the measure or activity that the released information was 'on' was, for the most part, government policy on housing issues, and government policy on housing is self-evidently something that will affect or is "likely to affect the elements and factors referred to in (a) and (b)" of the relevant EIR definition. The disputed information was produced for the express purpose of providing the framework for the discussion of those policies. While it was certainly not crucial to a full understanding of the released information, that is not the proper test to be applied. The disputed information was more than merely connected to, or incidental to, that other plainly environmental information. Nor is it the case that the proper test is whether release of the disputed information will, of itself, necessarily enable members of the public to participate in decision-making in a better way. Rather, Recital (1) of the Aarhus Convention proceeds on the basis that "increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment". Greater public access to environmental information is thus an end in itself (see also Article 1 of the Directive), which may lead on to other public goods (such as increased participation in decision-making) – but those public goods are not the benchmark for defining whether particular pieces of information are environmental in nature.

87. For those reasons (and for the reasons set out in the closed annex) I conclude that the disputed information is "environmental information" within the terms of category (c) of the EIR definition of that expression.

Conclusion

88. I therefore conclude that the decision of the First-tier Tribunal involves an error of law. I allow the Information Commissioner's appeal and set aside the decision of the Tribunal (Tribunals, Courts and Enforcement Act 2007, section 12(2)(a)). I also conclude that, on the correct approach, the remaining disputed information (marked green in the closed bundle) is all "environmental information" within the meaning of that term in regulation 2(1) of the EIR and so the request for information must be determined in accordance with that regime. However, it is not appropriate for me to decide whether the information is subject to any of the exceptions under the EIR. I accordingly remit the appeal to a differently constituted First-tier Tribunal for consideration of those matters (Tribunals, Courts and Enforcement Act 2007, section 12(2)(b)(i)) in accordance with the Directions set out at the head of these reasons.

Signed on the original
on 31 May 2018

Nicholas Wikeley
Judge of the Upper Tribunal