Oxford Phoenix Innovation Ltd v 1. The Information Commissioner, 2. The Medicines and Healthcare Products Regulatory Agency
[2018] UKUT 192 (AAC)

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Appeal Nos. GIA/246/2016, GIA/247/2016, GIA/248/2016

Before: Upper Tribunal Judge K Markus QC

DECISION

The appeal in GIA/248/2016 is allowed on ground 1 only.

The appeals in GIA/246/2016 and GIA/247/2016 are dismissed.

The decision of the First-tier Tribunal is not set aside.

REASONS FOR DECISION

Introduction

1. Mr Levinson is an inventor of medical devices and the director of Oxford Phoenix Innovation Ltd ('OPI') which is the successor in title to JBol Ltd ('JBol'), of which Mr Levinson was also director. Mr Levinson has conducted these proceedings on behalf of OPI. In these Reasons I refer to either the Appellant or to Mr Levinson as appropriate to the context.
2. The Medicines and Healthcare Products Regulatory Agency ('MHRA') is an executive agency of the Department of Health and is responsible for regulation of medical devices.
3. These appeals concern a number of requests for information made under the Freedom of Information Act 2000 ('FOIA') by OPI, through Mr Levinson. In three decision notices the Information Commissioner had upheld the MHRA's refusal to provide the information pursuant to sections 14, 40, 41 and 44 of FOIA. On 3 November 2015 the First-tier Tribunal ("FTT') allowed in part one of OPI's three appeals against the Commissioner's decisions and dismissed the other two in their entirety. Following an oral hearing before me, attended by Mr Levinson but not the Respondents, I gave OPI permission to appeal on some grounds and refused permission to appeal on all other grounds. I summarised the grounds on which I had given permission to appeal as follows:
   a) **GIA/248/2016**:
      i) section 44 - whether the tribunal's decision as to remedy in relation to section 44 was lawful;
      ii) section 40(2) - whether the tribunal made adequate findings of fact and/or gave adequate reasons.
   b) **GIA/247/2016**: whether the tribunal made adequate findings of fact and/or gave adequate reasons in relation to the section 40(2) decision.

c) **GIA/246/2016**: section 14 - whether the tribunal improperly focussed on the requester rather than the request; whether the tribunal's decision was founded on sufficient evidence; whether the tribunal made adequate findings of fact and/or gave adequate reasons.

4. I gave reasons explaining the above in greater detail.

5. In the period between the grant of permission to appeal and the oral hearing of the appeal, there were numerous applications by Mr Levinson on behalf of the Appellant for directions and rulings, which I determined as they arose. I also made a number of directions requiring the parties to address or clarify particular matters relevant to the appeal. Mr Levinson made some further applications after the hearing as to which determinations have been issued separately from this decision.

6. Written submissions on the grounds of appeal were provided by both Respondents, addressing the grounds of appeal under three headings: Ground 1: Remedy; Ground 2: Personal Data; and Ground 3: Vexatiousness. Mr Levinson sent submissions in response, addressing a range of issues but, insofar as he addressed the grounds on which permission had been given, he focussed on Grounds 2 and 3. Prior to the hearing Mr Levinson notified the Upper Tribunal and the Respondents that he wished to attend only that part of the hearing which concerned Ground 3. Pursuant to my directions, he agreed with the Respondents that they would first address the Tribunal on Grounds 1 and 2 in his absence and that he would attend the hearing only in relation to Ground 3

7. At the oral hearing Mr Knight appeared for the First Respondent and Mr Metcalfe for the Second Respondent. On behalf of the Appellant, Mr Levinson attended and participated in the part of the hearing relating to Ground 3. As explained below, after the hearing the Respondents provided further written submissions on ground 1.

Background

8. These appeals are brought against a long and complex history which the FTT helpfully summarised in its reasons. I set out below only those aspects of the background which I consider necessary to a proper understanding of my decision.

9. Mr Levinson had invented a sterile midstream urine sample collecting device called the 'Whizz Midstream' which was manufactured and supplied by JBol. In October 2008 Mr Levinson had complained to the Health Protection Agency ('HPA') that rival urine sample containers, Sterilin and RBI, were being marketed wrongly labelled as sterile. This led to judicial review proceedings in which, ultimately, JBol was unsuccessful.

10. In 2009 MHRA had begun an investigation into the regulatory compliance of the Whizz Midstream and another device marketed by JBol, the 'Whizz Freedom'. This led to the unsuccessful prosecution of Jbol and Mr Levinson.

11. Mr Levinson believes that there was a conspiracy to drive him out of business. He says that there was a meeting in March 2009 attended by representatives of HPA, the Department of Health and the MHRA. Mr Levinson believes that, at that

meeting, these bodies decided how to proceed against him. He has consistently referred to the meeting as the 'DH Wannsee Conference", a reference to the meeting of senior Nazis at which the "final solution of the Jewish question" (the murder of all Jews within German reach) was first formulated. Mr Levinson says that, as a consequence of the MHRA's actions, JBol went into liquidation and he set up OPI which acquired JBol's litigation rights.

12. In December 2010 Mr Levinson, acting through Jbol, had made requests for information from the MHRA regarding its investigation of his complaint concerning the Sterilin device. The MHRA refused, relying on section 44 of FOIA. Proceedings in the First-tier Tribunal and Upper Tribunal ultimately led to disclosure of some of the information requested, by consent, in March 2014. OPI then made more than twenty applications to the FTT including for the consent decision to be set aside, for contempt and for costs. Following a hearing, Judge Warren dismissed the applications.

13. In March and April 2014 OPI made a number of requests for information from the MHRA. These are the requests with which these proceedings are concerned. The first request was made on 20 March 2014. There were 15 parts to the request relating to actions taken by the MHRA against Mr Levinson and JBol concerning the Whizz Midstream and Freedom products. The second request was made on 21 March 2014. It related to JBol's complaint to the MHRA regarding the RBI container and was in 12 parts. The MHRA disclosed some of the information relating to the first two requests and refused disclosure of the remainder, relying on exemptions under sections 40(2), 41, 44(1)(a) of FOIA. In its reply to the second request, the MHRA said that the file in the RBI matter had been closed in 2009 and referred to its policy for destroying files. This prompted the third, fourth and fifth requests on 16, 19 and 30 April respectively. In two letters each dated 14 May and in substantially the same terms, the MHRA refused to comply with the requests of 16 and 30 April, relying on section 14 of FOIA. I have not been able to find a refusal of the request of 19 April but the MHRA's decision on review, dated 16 June, referred to the MHRA having refused all three requests as did the Information Commissioner's decision notice. No issue has been taken in that regard in the FTT or here, and I proceed on the basis that the MHRA refused to comply with all three requests in the same terms on 14 May 2014.

14. On 16 May 2014 the MHRA reviewed the second request and discovered that the paper file on the complaint about RBI had not in fact been destroyed. The MHRA said it had made an honest mistake based on the fact that the policy was unwritten and systems were not in place to ensure that intended disposal dates were adhered to. After the hearing in the FTT, the MHRA also discovered other files relating to their responses to the first request. The FTT noted in its decision that these events had served "perhaps understandably, to feed Mr Levinson's suspicion and mistrust of the MHRA yet further".

15. The Information Commissioner upheld the MHRA's refusals in the three decision notices which formed the subject of the appeals to the FTT.

Ground 1: Remedy

Background

16. The MHRA had refused to disclose some of the information requested, relying on section 44(1)(a) of FOIA and section 237 of the Enterprise Act 2002. Section 44(1)(a) of FOIA provides an exemption if disclosure is prohibited by or under any enactment. Section 237 of the Enterprise Act 2002 prohibits the disclosure of specified information which relates to the affairs of an individual during the lifetime of the individual, or which relates to any business of an undertaking while the undertaking continues in existence. Section 239 provides that section 237 does not prohibit the disclosure of such information if the authority obtains the consent of the individual or of the person for the time being carrying on the business.

17. The Information Commissioner decided that the requested information was "specified information", that it related to an undertaking (JBol) which continued to exist, and that none of the provisions of the Enterprise Act which permitted disclosure of the information applied. Therefore the information was exempt from disclosure by reason of section 44(1)(a) of FOIA.

18. The First-tier Tribunal agreed that the information was specified information but allowed the appeal as follows:

> "28. However, in so far as the information requested related only to the business of JBol Ltd, it seems very likely, based on what Mr Levinson told us about its financial position, that the company had by the time of the request ceased to be in existence so that section 237(2)(b) of the Enterprise Act 2002 would mean its disclosure would not have been prohibited. And, in so far as the information related only to the affairs of Mr Levinson personally, it is clear that he gave a valid consent to disclosure under section 239(3)…so that, unless another person's consent was also required…the information could be disclosed by reason of section 239(1)….
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> 29. We do not think that the Commissioner fully appreciated the possible effect of sections 237(2)(b) and 239 on the case. He appears to have taken the view that all the information requested would necessarily relate to the business or affairs of the complainant. We do not think that can be right: once the complaint was made any investigation or further action based on it were, we think, unlikely to have related to the business or affairs of others. He does not refer at all to Mr Levinson's form of consent. We are therefore of the view that this appeal should be allowed in part…
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> …
>
> *Remedy*
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> 32. The Commissioner only considered questions 2,3,4,8, 11 and 12 in his decision notice. It is not clear to us to what extent Mr Levinson has accepted that the other questions were dealt with by the MHRA satisfactorily nor what information answering the request the MHRA still holds … We therefore propose to allow the appeal in part and to direct the MHRA to review their answers to the request of 20 March 2014 in the light of the matters we refer to at para 28 and to take the action set out above.

19. The tribunal substituted the following decision notice:

> "**The Substituted Decision**
> The Public Authority did not deal with the Complainant's request for information made on 20 March 2014 in accordance with FOIA in that it failed properly to consider the effect, in relation to the prohibition in section 237 of the Enterprise Act 2002, of the

fact (a) that Jbol Ltd may have ceased to be in existence and (b) that Mr Levinson had consented to the disclosure of information relating to his affairs.

Action Required
The Public Authority is to review its records and inform the Complainant whether it now holds the information requested on 20 March 2014 and to supply the Complainant with any such information which it holds and has not already supplied to him which it is not prohibited from disclosing under section 237 of the Enterprise Act 2002 and is not exempt under sections 40(2) or 41 FOIA by 16.00 on 27 November 2015. It is to confirm to Complainant in writing at the same time that, in so far as it seeks to withhold information under section 44 FOIA and section 237 of the Enterprise Act 2002, it has considered the effect of (a) and (b) above."

The issue

20. I refused permission to appeal in relation to the FTT's decision at paragraphs 27-29 as to the application of section 44(1)(a). The Appellant also complained that the MHRA had not complied with FTT's substituted decision. In my reasons for giving permission to appeal I said that the Upper Tribunal did not have jurisdiction to address the question of non-compliance, but it seemed to me that the Appellant's complaints raised a more fundamental issue as to the powers of the FTT. I gave permission to appeal on the basis that it was arguable that the First-tier Tribunal erred in substituting a decision notice which remitted the matter back to the MHRA. I observed as follows:

> "The First-tier Tribunal's task, if it substitutes a decision notice, is to substitute the notice that could have been served by the Commissioner: section 58(1). Section 50(4) provides that where the Commissioner decides that the public authority has failed to communicate information where it is required to do so by section 1(1), the notice must specify the steps which must be taken for complying with the requirement. That therefore is what the tribunal's substituted decision notice should do: see the explanation by the Information Tribunal in Bowbrick v IC and Nottingham City Council, 28 September 2005 at paragraph 26. The above decision notice does not do that, but instead has sent the matter back to the authority to reconsider. I note that there is no express prohibition in the First-tier Tribunal remitting the matter to the original decision-maker. But what is the First-tier Tribunal's jurisdiction to do so? In Information Commissioner v Bell [2014] UKUT 106, Upper Tribunal Judge Jacobs decided that the First-tier Tribunal has no power to remit an appeal to the Commissioner. It may be that in the present case the First-tier Tribunal had this in mind when it made a decision that in effect cut out the Commissioner and sent the matter back to the public authority to determine. But, as I have set out, it is difficult to reconcile that with the statutory framework."

21. Shortly before the hearing of this appeal, a three judge panel of the Upper Tribunal, of which I was a member, issued its decision in Information Commissioner v Malnick and the Advisory Committee on Business Appointments [2018] UKUT 72 (AAC). Mr Knight relied on that decision as supporting his case under Ground 1. However shortly after the hearing the three judge panel issued a correction to paragraph 75 of Malnick. That was a paragraph on which Mr Knight had placed particular reliance and so I gave the parties an opportunity to make further submissions on ground 1 in the light of that correction. The Information Commissioner sent further written submissions, with which the MHRA agreed.

22. At the hearing, Mr Metcalfe for the MHRA had explained that all the information to which this ground relates and which is not exempt under another provision had been provided to the Appellant since the FTT's decision. If any of that material had not been received by the Appellant, the MHRA would send it again. This means the ground has become academic. Nonetheless, Mr Knight urged the Upper Tribunal to give guidance on the issue raised by Ground 1 because it arises regularly in practice. I have decided to address this ground. I am satisfied that, given the importance of the issue and that it is not dependent on the particular facts of a case, to do so is consistent with the decision of the House of Lords in R v Secretary of State for the Home Department ex p Salem [1999] 1 AC 450.

Legislative framework

23. The principal right of access to information under FOIA, and the corresponding obligations of public authorities, are found in section 1(1):

> (1) Any person making a request for information to a public authority is entitled—
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> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
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> (b) if that is the case, to have that information communicated to him.

24. By section 2, the right in section 1(1) is expressly subject to the exemptions in Part II.

25. Section 11 provides for the means by which communication is to be made. Section 17 makes provision for notification of a refusal of a request. For present purposes it is sufficient to explain that, where a public authority claims that information is exempt information, it must give notice which states that fact, specifies the exemption relied on and states why the exemption applies. If it claims that section 12 or 14 applies, it must give notice stating that.

26. The powers of the Commissioner are set out in section 50 FOIA which includes the following:

> "50 (1) Any person (in this section referred to as *"the complainant"*) may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.
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> …
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> (3) Where the Commissioner has received an application under this section, he shall either—
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> (a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or
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> (b) serve notice of his decision (in this Act referred to as a *"decision notice"*) on the complainant and the public authority.
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> (4) Where the Commissioner decides that a public authority—
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> (a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or
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> (b) has failed to comply with any of the requirements of sections 11 and 17,

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

27. The jurisdiction of the First-tier Tribunal on appeal against a decision of the Commissioner is set out in section 58:

> "58 (1) If on an appeal under section 57 the Tribunal considers—
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> (a) that the notice against which the appeal is brought is not in accordance with the law, or
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> (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
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> 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.
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> (2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

The parties' submissions

28. The starting point for the Respondents' submissions was that, as the FTT's power under section 58(1) to substitute a notice is the same as that of the Commissioner, one looks to section 50 to identify what the FTT can do. Section 50(4) permits the Commissioner to serve a notice specifying the steps that must be taken by the public authority to comply with the disclosure requirements in section 1(1) or for complying with the requirements of sections 11 or 17, and this is what the FTT did in this case.

29. Mr Knight, with whom Mr Metcalfe agreed, submitted that the precise form of the decision notice, and whether it is appropriate to specify a step, is a matter for the Commissioner (and therefore the FTT). He said that it is readily understandable why the FTT in this case served a decision notice requiring the MHRA to reconsider the application of section 44 rather than determining that matter itself. The FTT did not have the disputed information before it and the MHRA was not present. The information before the FTT suggested that some of the information may no longer be held by the MHRA. Only the MHRA could have confirmed what information was still held. The FTT's direction meant that the MHRA was obliged to supply to the Appellant information which had not already been supplied, was not exempt under sections 40(2) or 41 (those exemptions having been upheld by the FTT in respect of some of the information) and which the MHRA decided (having considered the FTT's analysis of the factual position) was not exempt under section 44. The substituted decision notice did not permit the MHRA to raise any new exemptions.

30. Mr Knight submitted that it was of considerable practical importance that the Commissioner and the FTT should be able to require a public authority to review its position and issue a further fresh refusal notice or disclose the information requested. If an authority decided that it did not hold the information, or relied on section 12 or section 14 so as to refuse to comply with section 1 FOIA, it would not have considered whether a substantive exemption applied. Mr Knight submitted that where in such cases the Commissioner decides that the authority

had wrongly refused to comply with section 1, she can decide under section 50(4)(b) that the authority has failed to comply with section 17, and direct that the appropriate steps to be taken under section 17 are to reconsider the request, decide what if any exemptions apply and issue a valid section 17 notice. Mr Knight submitted that otherwise the Commissioner would be required to compel the release of information to which a substantive exemption might apply but which had not been considered. The same would also apply where the authority had wrongly applied an exemption under FOIA rather than the Environmental Information Regulations.

31. Similarly, Mr Knight submitted, if the FTT did not have power to require the MHRA to review its position and either disclose the information or issue a further fresh refusal notice, the effect would be to oblige the FTT to order disclosure of information in circumstances where it had not seen the information and where it may be exempt and where, without the authority having had an opportunity to consider an exemption, disclosure my interfere with the rights of third parties or lead to the authority in breaking the law. This would be contrary to the pragmatic approach of the Upper Tribunal in Information Commissioner v Gaskell [2011] UKUT 296 (AAC).

Discussion and conclusions on ground 1

32. The circumstances with which Mr Knight was concerned, as summarised above, involve a public authority refusing to provide information as a result of the application of what might be described as a "gateway" to the duty to disclose information under FOIA. If an authority does not hold the information, or if sections 12 or 14 FOIA apply, then there is no duty to disclose the information. There is no need to consider whether the information is exempt from disclosure. The Respondents' concern is that, where the authority has been found to have wrongly closed the gate at that initial stage and so has not considered whether a substantive exemption applies, it should then be given an opportunity to decide whether any substantive exemption applies.

33. The present appeal is not concerned with such cases. The MHRA did not close the gate at the initial stage. It refused to disclose the information in question because it considered that the substantive exemption under section 44 of FOIA applied. The question which arises in this appeal is whether the FTT was bound to decide for itself whether that exemption (or any other exemption, if it arose) applied or whether it was open to the FTT to require the public authority to reconsider that question. For reasons which I now explain, I conclude that the FTT must decide whether the information is exempt.

34. The task of the FTT, standing in the shoes of the Information Commissioner, is to decide whether the authority has complied with the requirements of Part 1 of FOIA. Specifically, this involved deciding whether the authority had failed to communicate information pursuant to section 1(1) or whether it had failed to comply with a procedural step under sections 11 or 17. In the present case there was no issue regarding the MHRA's compliance with the procedural steps. The issue was whether it had complied with its substantive obligation under section 1(1), which meant whether the information was exempt under section 44. The FTT was bound to determine that matter. Without doing so, the FTT could not

decide whether the request had been dealt with in accordance with the requirements of Part I. As the three judge panel said in Malnick at paragraph 80:

> "Section 50(2) requires the Commissioner to make a decision unless one of the specified exceptions applies, and section 50(3)(b) then requires the Commissioner to serve a notice of her decision. Thus, unless an exception under section 50(2) applies, the Commissioner's task is to make and serve notice of her decision as to whether the public authority has dealt with the request in accordance with Part 1. Unless any issue arises as to compliance with sections 11, 16 or 17, the only issue will be whether the authority has complied with section 1, and so the Commissioner must decide whether any of the disputed information is exempt in any respect and, if so, specify that respect."

35. Section 50(4) provides for the decision notice to "specify the steps which must be taken by the authority for complying with that requirement", the words "that requirement" referring to the requirement in either subparagraph (a) or in (b) with which the public authority has failed to comply. Thus the decision notice must first identify in what respect the authority has failed in its statutory duty either under section 1(1) or under sections 11 or 17, and then specify the steps required to comply with *that* requirement. In other words, the decision notice must require the authority to correct the failure which has been found to have occurred. In the absence of a finding that the authority has failed in either of the respects in section 50(4)(a) or (b), no steps can be specified.

36. This approach is consistent with the decision in Malnick in which, at paragraph 102, the Upper Tribunal noted that the focus of the FTT's task under section 58 is the duty of the public authority and "the tribunal must consider everything necessary to answer the core question whether the authority has complied with the law." The statutory provisions do not allow the FTT to avoid determining whether the authority has dealt with a request in accordance with the requirements of Part 1 and, instead, to send the matter back to the public authority.

37. Mr Knight submitted that the FTT's decision in this case was consistent with that duty. The FTT found that the authority's reasons for relying on section 44 were defective, and that was a finding that the authority had failed to comply with the requirements of section 17. Mr Knight recognised that the submission depended on section 17 having a substantive as well as procedural content, requiring that a refusal notice must state a valid exemption in order to comply with that section. He sought support from paragraphs 74 and 75 of the decision in Malnick in which the Upper Tribunal analysed the nature of decision-making under FOIA as follows:

> "74. The first decision-maker in the statutory process is the public authority. Its duties are found in Part 1 of FOIA. An authority must confirm or deny whether requested information is held, and communicate the information which it holds, unless a relevant exemption applies: section 1(1). If an authority communicates information it must do so in accordance with section 11. Where it refuses to either confirm or deny, or to communicate information, it must issue a refusal notice in accordance with section 17 setting out all the exemptions claimed and why they apply. A public authority which correctly applies one of the exemptions on which it relies but incorrectly relies on others, and provides reasons and information in accordance with section 17, has complied with its duties under Part 1. It has complied with its duties under section 1

> because section 1 permits it to withhold information to which any exemption applies. It has complied with its duties under section 17 because it has set out the basis on which it is claiming all exemptions relied on. It does not matter that it also incorrectly relies on other exemptions because the scheme of Part 1 means that, although a public authority must state all the exemptions which it relies upon, it need only be right about one of them.
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> 75. This analysis is consistent with the powers of the IC to issue a decision notice under section 50(4). Under paragraph (a) the IC must require a public authority to take steps to correct a failure to communicate information or issue confirmation or denial where it is required to do so by section 1(1). But where one exemption is correctly relied on by the authority, there has been no failure to comply with section 1(1) even if the other claimed exemptions do not apply. This explains why section 50(4) does not make any provision for a decision notice to address those other exemptions. Under paragraph (b), the Commissioner must specify the steps to be taken to correct a failure to comply with sections 11 or 17. But, even if an authority wrongly relied on some exemptions included in its refusal notice, this would not amount to a failure to comply with either section."

38. If in these passages the Upper Tribunal had said that section 17 required an authority to be correct about one exemption, that would have supported Mr Knight's contention that section 17 has a substantive content. But that is not what the Tribunal said. It said that the authority must be correct about an exemption in order to comply with Part 1. The Upper Tribunal then made clear that it is section 1 which requires an exemption to be correctly relied upon, and section 17 which requires proper notification of all exemptions relied on.

39. Mr Knight's submission is also inconsistent with the decision in DEFRA v Information Commissioner and Birkett [2011] UKUT 39. At paragraph 45 Upper Tribunal Judge Jacobs drew a distinction between section 50(4)(a), which addresses substantive compliance with the duties in section 1, and section 50(4)(b) which addresses compliance with the procedural requirements of sections 11 and 17. And at paragraph 32 Judge Jacobs said:

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

40. Mr Knight said that, if section 17 is limited to matters of process, an authority could comply with that provision by relying on an obviously inapplicable exemption. That may be so, but it would be of no avail to the authority because doing so would lead to an adverse decision by the Commissioner under section 50(4)(a). It would not enable the authority to avoid its obligations under FOIA. Indeed, if the Commissioner is not empowered to require an authority to reconsider a request, that may well provide an incentive against an authority abusing section 17 in such a manner.

41. Moreover, Mr Knight's analysis means that the Commissioner could consider whether an authority has complied with its section 1 duty under either paragraph (a) or (b) of section 50(4) and effectively elides the two subparagraphs. On his approach, there is no reason why section 50(4) should not simply provide for the Commissioner to decide that an authority "has failed to comply with the requirements of Part 1" rather than, as it does, identifying two separate categories

of breach of duty set out in subparagraphs (a) and (b). In order to address this, Mr Knight suggested that the difference between the two subparagraphs is: "If the Commissioner can properly determine that the public authority has not relied on any exemption which would warrant withholding disclosure, and has had a fair opportunity in accordance with the statutory scheme to consider possible exemptions[1], then section 50(4)(a) will be the appropriate course and section 50(4)(b) will add nothing". But that adds an unwarranted gloss to the subsection and confuses the requirements of fairness, which apply to decision-making by both the Commissioner and the FTT, with the specific powers and duties in sections 50 and 58.

42. I agree with Mr Knight that, where an authority has failed to identify an exemption in its refusal notice, that is failure to comply with a requirement of section 17 and so pursuant to section 50(4) the Commissioner would require the authority to issue a refusal notice which identifies the exemption relied on and explains why it applies. I also agree that it is difficult to think of such a direction arising in practice save where the Commissioner has not determined whether an exemption applies and that, in such a case, the steps required of the authority mean that it may consider the question of exemption for itself. However, I do not agree that this means that section 17 has a substantive content. The obligation to notify a decision does not arise until a decision has been made, but that does not mean that the notification obligation itself is anything other than procedural in nature.

43. This does not mean that, where the Commissioner or FTT decides that the basis on which an authority refuses to disclose information is incorrect, it will necessarily follow that the authority must be required to disclose the information without consideration first being given to whether there is any other proper basis for refusing to do so. As was decided in Birkett, the Commissioner and the FTT are required to make an independent judgment of whether information is within the scope of any particular exemption, and their consideration is not limited by the scope of the application made to the Commissioner nor to the exemptions relied on by the authority (paragraphs 45 to 50). A public authority may change its position and rely on new exemptions and, as Judge Jacobs pointed out at paragraph 51, if an issue merits further inquiry the Commissioner may serve an information notice under section 51. Similarly, if the FTT requires further information before deciding information is exempt, it may adjourn the proceedings and issue appropriate directions. Thus, in the present case, the FTT could have given directions for such further information and submissions as were required to enable it to decide whether the information in question was exempt under section 44.

44. In the light of the above I endorse the neat summary of the position by the First-tier Tribunal in Bowbrick v Information Commissioner and Nottingham CC EA/2005/2006 at paragraph 26:

> "Moreover s.50(4) provides for what the Commissioner should do in a case where he considers that the public authority has failed to communicate information. In such a case the decision notice must specify the steps which must be taken for complying

[1] The underlining was in Mr Knight's skeleton argument

> with the requirement. In other words, the decision notice does not simply require the public authority to go back and have another go at complying with the Act. The Commissioner's decision notice would require the disclosure of specified information within a time period. Similarly where the Tribunal serves a substitute decision notice, the substitute decision notice needs to set out the information to be disclosed within a time period. Alternatively, the substitute decision notice might acknowledge that all the relevant information has been communicated, but has been done so late, or that the public authority had failed to comply with other procedural requirements of FOIA."

45. This approach does not impose an undue burden on the Commissioner or the FTT nor does it risk a public authority being required to disclose information which is in fact exempt. It results in a procedurally simpler solution than that of the Commissioner or the FTT remitting a case to the authority for further consideration and, if the authority maintains its decision to refuse to provide the information, giving fresh notification under section 17 with the consequent risk of a second complaint to the Commissioner and onward appeal to the FTT.

46. It follows that the FTT's decision in this case was in error of law. It decided that the MHRA had "failed properly to consider" certain matters relevant to the application of section 237 Enterprise Act but it did not answer the core question whether the information was exempt under section 44 of FOIA. It did not make the findings necessary to support the conclusion that the MHRA had not dealt with the request in accordance with the requirements of Part 1 of FOIA. Moreover, there was not a proper basis for the FTT to specify the steps to be taken by the MHRA because the FTT had not decided that the MHRA had failed in either of the respects within section 50(4)(a) or (b).

47. As I have said above, this case does not engage the concerns identified by Mr Knight in respect of "gateway" cases. However, I do not consider that there is anything in my analysis which gives rise to difficulty in those cases. If, for example, the Commissioner decides that a public authority has wrongly relied on section 12 to refuse to comply with a request, this means that the request has not been dealt with in accordance with the requirements of Part 1. That is because, where section 12 does not apply (and assuming that sections 9 or 14 are not in play), section 1 means that the public authority must either disclose the information or correctly rely on an exemption. The authority which has wrongly relied on section 12 has not complied with section 1. The Commissioner does not need to consider whether an exemption applies in order to decide that the authority has failed to comply with Part 1, and the authority will then be bound to disclose the information or notify some other basis for refusing to do so.

48. Although I allow the appeal on this ground, I do not set aside the decision as the error is now immaterial. The MHRA has provided such of the requested information which is not exempt under sections 40(2) or 41.

Grounds 2 and 3: General principles on findings and reasons

49. Grounds 2 and 3 are both principally concerned with the adequacy of the FTT's findings of fact and reasons. It is helpful therefore to preface my consideration of those grounds with a summary of the established principles as to the approach to be taken by the Upper Tribunal in such appeals.

50. In R (Jones) v First-tier Tribunal (Social Entitlement Chamber) [2013] UKSC 19; [2013] 2 AC 48, at [25], Lord Hope said:

> "It is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it."

51. In Re F (Children) [2016] EWCA Civ 546 Sir James Munby P explained the position as follows:

> "22 Like any judgment, the judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in SP v EB and KP [2014] EWHC 3964 (Fam), [2016] 1 FLR 228, para 29, there is no need for the judge to "incant mechanically" passages from the authorities, the evidence or the submissions, as if he were "a pilot going through the pre-flight checklist."
>
> 23 The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360. I confine myself to one short passage (at 1372):
>
> > "The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case … These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."
>
> It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffmann's phrase, the court must be wary of becoming embroiled in "narrow textual analysis"."

52. These principles have been applied by the Upper Tribunal in a number of information rights cases. I was referred to one, UCAS v Information Commissioner & Lord Lucas [2014] UKUT 557 (AAC), in which at [59] the Upper Tribunal said that "it is unrealistic to expect a Tribunal to set out every twist and turn in its assessment of the evidence and its consequential reasoning". Applying Jones, the question was "whether the Tribunal has done enough to show that it has applied the correct legal test and in broad terms explained its decision".

53. Moreover, the FTT is an experienced specialist jurisdiction which routinely considers certain questions under FOIA, including under sections 14 and 40. As Upper Tribunal Judge Wikeley commented in Department for Work and Pensions v Information Commissioner & Zola [2014] UKUT 334 (AAC) at [27]:

> "… the relevant standard is well known to the Tribunal and to the parties, being part of the normal currency of information rights litigation, and so the Tribunal did not need to articulate all its dimensions fully…."

54. To similar effect on appeal ([2016] EWCA Civ 758 at [34]), Lloyd Jones LJ said

> "Given such expertise in a Tribunal, it is entirely understandable that a reviewing court or Tribunal will be slow to interfere with its findings and evaluation of facts in areas where that expertise has a bearing. This may be regarded not so much as requiring that a different, enhanced standard must be met as an acknowledgement of the reality that an expert Tribunal can normally be expected to apply its expertise in the course of its analysis of facts."

55. The above guidance is relevant to my consideration of both grounds 2 and 3. I address ground 3 first because the FTT's findings as to Mr Levinson's conduct which it relied on in relation to section 14 are also relevant to the decision under section 40(2). It follows that, if the FTT made an error of law in relation to the former, I would need to consider whether that infected its decision as to the latter.

Ground 3: Vexatiousness

Background

56. When the MHRA told the Appellant, in its response to the second request, that it no longer held the RBI file, it stated that its policy at the relevant time was that, if no prosecution was raised from an initial investigation, the paper file would be destroyed after three years. On 16 April 2014, the Appellant sent the following request to the MHRA:

> "1. What was the name of the policy that if there was no prosecution the paper file would be destroyed
> 2. When ie what date was this policy instigated and by whom and if no name is provided give reason
> 3. What was the seniority level of the person who instigated this policy of destruction of paper files after 3 years
> 4. What occurred prior to the instigation of this policy of destruction of paper files after 3 years
> 5. What is the policy where a prosecution case is raised - how long are the files kept in that instance.
> 6. What is the current policy of the MHRA on destruction of paper files of investigation and if it was different to the above when was it changed.
> 7. Is it not the case that by law all documents must be kept for a minimum of 7 years
> 8. Why was the documentation not transferred to electronic storage
> 9. How are the files destroyed?"

57. On 19 April the Appellant sent a further request:

> "11. What date was the file relating to the RBS matter destroyed
> 12. Who ordered the destruction of the RBS file - please send a copy of all and any correspondence in this regard. If none was sent why was the file destroyed.
> 13. How was the RBS file destroyed and what remains - is it just the cover or nothing at all -
> 14. How are files stored before they are destroyed - in what facilities
> 15. How are files stored once they have been destroyed"

58. On 30 April the Appellant made a further request:

> "Can you provide me with
> a) The current records management system of the MHRA
> b) All the previous record management systems since 2000
> c) A history of changes including the signing off author of them of the records management system
>
> Can you also provide the policy document that permits in reply to FOI requests, complaints, the MHRA signs off itself as customer services and refuses to identify who is dealing with the FOI and or complaints especially given the stated objective of the Govt and the MHRA of accountability and transparency."

59. On 14 May 2014 the MHRA wrote two letters to the Appellant that it would not comply with the requests, pursuant to section 14 of FOIA. It set out at its reasons in some detail, relying on the guidance given by the Upper Tribunal in Dransfield v Information Commissioner and Devon CC (see below):

> "This request is, in our view, essentially a continuation of the lengthy and ongoing dispute that you have been pursuing against the Agency – since 2009 – regarding the investigation of an RBI container."

60. The Commissioner agreed that the requests were vexatious, for the following reasons:

> *"Background and history of the requests*
>
> 18. The MHRA has told the Commissioner that, taken in isolation, these requests would probably not be considered vexatious. However, the requests form part of a long standing dispute between the complainant and the MHRA. The dispute concerns various classification and enforcement matters to do with products the complainant has designed, and those of other manufacturers.
>
> 19. The dispute goes back to 2009 and, to date, the complainant has submitted over 50 FOIA requests to the MHRA, in addition to a large volume of other complaints and correspondence.
>
> 20. The Complainant has, on occasion, used abusive or aggressive language and terminology about MHRA staff in his long correspondence with the MHRA, for example references to Nazism, anti-Semitism and comparing individuals with people involved in the 'Baby P' case. The complainant has also made other unsubstantiated accusations of criminality and corruption against MHRA staff.
>
> 21. The Commissioner has reviewed the background to this case that the MHRA has provided, which includes evidence of the complainant's past behaviours. It is apparent that the complainant also has a tendency to submit a new information request on receipt of the MHRA's answer to a previous request, so that the requests become distant from the complainant's original concerns; what has been termed 'vexatiousness by drift' in *Wise v Information Commissioner (GIA/1871/2011; EA2010/0166)*. The requests that are the subject of this notice appear to be examples of this.
>
> 22. The MHRA has also drawn the Commissioner's attention to appeal EA/2011/0238, which was brought in response to the Commissioner's decision in a separate case (FS50364598). The Tribunal observed:
>
> "… it is well-established law and plain good sense that a request must be judged by reference to any previous history of relations between requester and public authority…"

> 23. The Commissioner has therefore considered the wider factors behind the requests that are the subject of this notice, and noted the Tribunal's comments in EA/2011/0238. He has concluded that the requests do not have a serious purpose and agrees with the MHRA that they appear to be a continuation of the complainant's long standing dispute with the MHRA regarding its investigation into a urine sample collection device.
>
> *Impact on authority versus purpose and value of the requests: are the requests likely to cause disproportionate or unjustified level of disruption, irritation or distress?*
>
> 24. The MHRA has told the Commissioner that, taken in isolation, responding to these requests would be unlikely to cause the MHRA a significant level of disruption. However, as part of a long standing campaign, the Commissioner considers that dealing with these requests would have the cumulative effect of causing MHRA a disproportionate level of distraction. And any distraction would be unjustified given his conclusion at paragraph 23 that the requests do not have a serious purpose.
>
> *Are the requests proportionate and justified?*
>
> 25. The MHRA told the complainant that it had destroyed a paper file that fell within the scope of their information request FS50551392, only to subsequently find it in its offsite storage facility. The Commissioner accepts that this mistake could lead to mistrust in how the MHRA manages its records and a desire to be reassured. However, he has had sight of the MHRA's full explanation for this mistake, which it provided to the complainant in its internal review of FS50551392. And the Commissioner notes the recommendations for improving its records management practices that MHRA identified as a result. The MHRA also went on to disclose additional information to the complainant following its internal review of FS50551392.
>
> 26. The Commissioner considers that the MHRA has adequately addressed the shortcoming in its response to the complainant's request FS50551392, and that the complainant's requests which are the subject of this notice are unjustified and disproportionate.
>
> 27. Given the background to the requests, the disproportionate level of distraction they would impose and the fact that they do not appear to have a serious purpose, the Commissioner is satisfied that the requests are vexatious and that, under section 14 of the FOIA, the MHRA is correct not to comply with them."

The First-tier Tribunal's decision

61. When the Appellant appealed to the FTT, he challenged a number of the Commissioner's findings of fact and the assessments of fairness, legitimate interests and necessity. Amongst other things, he denied that there had been over 50 requests for information, denied the allegations as to his behaviour towards staff, and provided an alternative explanation as to his comments about Baby P and Nazism.

62. Referring to the decisions of the Upper Tribunal and the Court of Appeal in Dransfield v Information Commissioner and Devon CC [2012] UKUT 440 (AAC) and [2015] EWCA Civ 454, the FTT noted "in particular that it is appropriate to look at a request under FOIA in the context of previous dealings between the requester and the public authority". The tribunal explained its decision to dismiss the section 14 appeal as follows:

> "37. There is no doubt that these requests arise out of the on-going dispute between Mr Levinson and the MHRA which we have described above, and he did not really

argue to the contrary. He was quite open in saying that he believed there was a conspiracy against him and that the MHRA "… had been at war…" with him since 2009. Although he has been acting through different companies we also have no doubt at all that Mr Levinson is personally responsible for all the litigation and all the FOIA requests and his complaints about the fact that the Information Commissioner had designated him and not Phoenix as the complainant have no substance. Although he took exception to some of the figures produced we are quite satisfied that he has made something like 50 FOIA requests over this period, including the six multi-part requests which are referred to above. He did not argue with the suggestion that he sent 36 emails to the MHRA between 18 and 27 March 2014 after the hearing before Judge Warren and, as we have said, Phoenix made no fewer than twenty applications after that hearing which were heard on 23 October 2014. Although he took exception to the suggestion that he had used "abusive or aggressive language" in the course of his dealings with the MHRA and pointed out that some of the statements relied on by the Commissioner were taken out of context and arose some years before 2014, he was quite content to repeat to us during the hearing that the meeting in March 2009 which we refer to in para 3 above was like the Wannsee conference (which must be regarded as somewhat provocative) and it is clear that he has been very free in making serious accusations against the MHRA and its staff (and against the Commissioner) in the context of his FOIA requests without really being able to substantiate them.

38. We recognise that Mr Levinson may be sincere in his belief that there is a conspiracy against him. We recognise that he may be sincere in saying that he has genuine concerns about public health issues which are motivating him to seek information from the MHRA. We recognise that the MHRA has not always "covered itself in glory" in its dealings with him and that this may well have fed his existing suspicions. And we recognise that what was said about the paper file in response to his FOIA request of 21 March 2014 was odd and gave rise to legitimate questions (see paras 13 and 14 above). But, looking at the whole picture objectively as disclosed in the papers and through the course of these proceedings, we are of the firm view that, by 16 April 2014, his continued use of the right to seek information under FOIA in the context of his on-going dispute with the MHRA, in the remorselessly persistent and aggressive way we have described, had become a manifestly unjustified, inappropriate and improper use of the procedure. He was in effect "carrying on the war by other means" and the MHRA were entitled to say: "Enough is enough."

39. We therefore agree with the Commissioner that these requests were vexatious and we dismiss the appeal in relation to that finding."

Legal principles

63. In Dransfield the Court of Appeal largely approved the guidance of the Upper Tribunal in the same case. This guidance has since been summarised by Upper Tribunal Judge Knowles QC (as she then was) in the cases of CP v Information Commissioner [2016] UKUT 427 (AAC) and Y v Information Commissioner [2016] UKUT 475 (AAC). It suffices for present purposes to cite from the summary in CP by Judge Knowles of the Upper Tribunal's decision in Dransfield (paragraph numbers taken from her decision in CP):

"22. … It held that the purpose of section 14 must be to protect the resources of the public authority from being squandered on disproportionate use of FOIA [paragraph 10]. That formulation was approved by the Court of Appeal subject to the qualification that this was an aim which could only be realised if "*the high standard set by*

> *vexatiousness is satisfied*" [see paragraph 72 of the *Dransfield* judgment in the Court of Appeal…].
>
> 23. The test under section 14 is whether the request is vexatious not whether the requester is vexatious [paragraph 19]. The term "*vexatious*" in section 14 should carry its ordinary, natural meaning within the particular statutory context of FOIA [paragraph 24]. As a starting point, a request which is annoying or irritating to the recipient may be vexatious but that is not a rule. Annoying or irritating requests are not necessarily vexatious given that one of the main purposes of FOIA is to provide citizens with a qualified right of access to official documentation and thereby a means of holding public authorities to account [paragraph 25]. The IC's guidance that the key question is whether the request is likely to cause distress, disruption or irritation without any proper or justified cause was a useful starting point as long as the emphasis was on the issue of justification (or not). An important part of the balancing exercise may involve consideration of whether or not there is an adequate or proper justification for the request [paragraph 26].
>
> 24. Four broad issues or themes were identified by Upper Tribunal Judge Wikeley as of relevance when deciding whether a request is vexatious. These were: (a) the burden (on the public authority and its staff); (b) the motive (of the requester); (c) the value or serious purpose (of the request); and (d) any harassment or distress (of and to staff). These considerations were not exhaustive and were not intended to create a formulaic check-list [paragraph 28]. Guidance about the motive of the requester, the value or purpose of the request and harassment of or distress to staff is set out in paragraphs 34-39 of the Upper Tribunal's decision.
>
> 25. As to burden which is of relevance in this appeal, the context and history of the particular request, in terms of the previous course of dealings between the individual requester and the public authority in question, must be considered in assessing whether the request is properly to be described as vexatious. In particular, the number, breadth, pattern and duration of previous requests may be a telling factor [paragraph 29]. Thus, the greater the number of previous FOIA requests that the individual has made to the public authority concerned, the more likely it may be that a further request may properly be found to be vexatious….
>
> 26. A requester who consistently submits multiple FOIA requests or associated correspondence within days of each other or who relentlessly bombards the public authority with email traffic is more likely to be found to have made a vexatious request [paragraph 32]. The Upper Tribunal considered the extensive course of dealings between Mr Dransfield and Devon County Council which, in the relevant period, comprised some 40 letters and several FOIA requests when coming to the conclusion that his request was vexatious [see paragraphs 67-70].
>
> 27. Ultimately the question was whether a request was a manifestly unjustified, inappropriate or improper use of FOIA. Answering that question required a broad, holistic approach which emphasised the attributes of manifest unreasonableness, irresponsibility and, especially where there was a previous course of dealings, the lack of proportionality that typically characterises vexatious requests [paragraphs 43 and 45]."

64. Judge Knowles noted that in the Court of Appeal:

> "28. … Arden LJ rejected the submission that past requests were relevant only if they tainted or infected the request which was said to be vexatious. She held that a rounded approach was required which did not leave out of account evidence which was capable of throwing light on whether the request was vexatious. In the

> *Dransfield* case the FTT had erred by leaving out of account the evidence in relation to prior requests that had led to abuse and unsubstantiated allegations directed at the local authority's staff. That evidence was clearly capable of throwing light on whether the request directed to the same matter was not an inquiry into health and safety but a campaign conducted to gain personal satisfaction out of the burdens it imposed on the authority [paragraph 69, judgment]."

65. Judge Knowles cited from paragraph 68 of Arden LJ's judgment, including:

> "… the starting point is that vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one, and that is consistent with the constitutional nature of the right. The decision maker should consider all the relevant circumstances in order to reach a balanced conclusion as to whether a request is vexatious. If it happens that a relevant motive can be discerned with a sufficient degree of assurance, it may be evidence from which vexatiousness can be inferred. If a requester pursues his rights against an authority out of vengeance for some other decision of its, it may be said that his actions were improperly motivated but it may also be that his request was without any reasonable foundation. But this could not be said, however vengeful the requester, if the request was aimed at the disclosure of important information which ought to be made publicly available…"

66. Finally, in summarising her decision, at paragraph 2 Judge Knowles said:

> "The high hurdle for satisfaction of the section 14(1) test requires an appropriately detailed evidential foundation before the tribunal which addresses the course of dealings between the requester and the public authority. This need not be compendious or exhaustive but must explain those dealings in sufficient detail and put them into context."

The parties' submissions

67. Mr Levinson said that the FTT's decision failed to meet the standard set out in paragraph 2 of CP. He said that the FTT failed to address the underlying merits of his complaint against the MHRA, and the public importance of the issue. The MHRA had been allowing a competitor product to be marketed as sterile although it was not sterile. He referred to paragraph 68 of Arden LJ's judgment, and in particular the emphasis which she gave to the value of the information sought. Mr Levinson said that it was of prime importance to the public to know how records regarding medical products are kept or destroyed. He also referred to Arden LJ's comment at paragraph 70 that an authority had to respond to requests in good faith, and said that MHRA has done nothing in good faith. He said that the MHRA had previously been criticised by Lloyd-Jones LJ for its lack of candour in other proceedings. He said that the FTT failed to mention that in all proceedings and arbitrations between him and the MHRA, his view about the technical issues had been upheld. Mr Levinson said his requests were fully justified given the inadequacy of the MHRA's responses to previous requests, referring to the Information Commissioner's guidance "Dealing with vexatious requests" at paragraph 61. He claimed that it was in that context that his references to the Baby P case were relevant, in that he was saying that MHRA had failed to do what it should have done.

68. As for the findings about his past behaviour, Mr Levinson said that this had occurred several years previously and the MHRA had not found it offensive. On the contrary staff had treated his behaviour as a joke. It could not reasonably be said that his behaviour had caused a "disproportionate or unjustified level of disruption, irritation or distress" (referring to the ICO's guidance). Staff at the MHRA had goaded him to go further, making comments such as "Let's see what the flavour of the month says". He referred to the transcript of a telephone conversation between himself and a member of staff of the MHRA which he says shows that the staff member was contemptuous of him. Moreover, he submitted that the FTT fell into the error identified by Judge Knowles QC at paragraph 40 of CP in that the FTT failed to give adequate scrutiny to the previous FOIA requests or indeed to any of the past course of dealings, relying instead on a superficial count of the number of FOIA requests made.

69. Mr Levinson submitted that the FTT's reasons are inadequate. The FTT did not explain why the comparison between the March 2009 meeting and the Wannsee Conference was "provocative" nor what other serious accusations he had made against the MHRA and staff. Neither the High Court nor the Divisional Court had been concerned about his reference to Wannsee and it was a fair description of the meeting which was "surreptitious, quiet and designed to destroy". He said that the FTT was wrong to describe his use of FOIA as "manifestly unjustified" and its conclusions at the end of paragraph 38 were simply wrong.

70. Mr Knight's response, supported by Mr Metcalfe, was that the FTT did not err in law, alternatively even if the reasons were deficient the conclusion was plainly correct on the facts. He accepted that the FTT's reasoning did not "follow every twist and turn" but that it is hard to imagine a clearer section 14 case than this one. Even the immediate context of the requests with which these proceedings are concerned provides a sufficient basis to conclude that the requests were vexatious. Mr Knight referred to the fact that here had been a compromise of the previous appeal in March 2014, yet almost immediately afterwards Mr Levinson made two similar requests for information, albeit regarding different products. As the FTT noted, part of the second request was for information of which Mr Levinson was well aware. This was against a background that in the same month Mr Levinson had sent 36 emails to MHRA and made over 20 applications to the FTT (these were the subject of a further decision by Judge Warren in October 2014). Mr Knight submitted that the MHRA could have relied on section 14 in response to the first and second requests. It did not, and responded to the requests in accordance with FOIA. Yet as soon as it told Mr Levinson that it did not have a file, Mr Levinson sent the further three requests, comprising numerous separate parts, relating not only to matters relevant to the loss of the file in question but to much broader issues such as the entire records management systems of the MHRA, present and past since 2000.

Discussion and conclusions on ground 3

71. When I gave permission to appeal I had raised a concern that the FTT may have focussed on the requester rather than the request. On reflection I am satisfied that there was no error in that regard. The authorities make clear that the context and history of dealing between the requester and the public authority are relevant to section 14. Indeed, a request may be tolerably benign and only vexatious by

reference to the context and history. It is unavoidable that that will involve consideration of the conduct of the requester. Ultimately, however, the question is whether those background matters render the particular request vexatious. I am satisfied that that is how the FTT approached the present case. It is clear from paragraph 38 of its reasons, and the FTT's consideration of the position as it was in April 2014, that it relied on past behaviour in order to decide whether the requests made in April 2014 were vexatious.

72. The FTT's reasons at paragraphs 36 to 38 must be read in the context of the decision as a whole. Earlier in the reasons, the FTT had set out the relevant background to these requests. At paragraph 36 the FTT explained that it went through the contents of the MHRA's decision letter[2] in detail with Mr Levinson. Thus the FTT had turned its attention to the matters relied on in the letters, which were abusive or aggressive language, burden on the authority, unfounded accusations, and frequent or overlapping requests. The letters gave specific examples with regard to each. Thus, in relation to abusive or aggressive language, the MHRA referred to unsubstantiated accusations that staff had made false and misleading statements and attempted to twist the law, as well as the references to the Wannsee Conference and Baby P. In relation to burden, the MHRA referred to having received 57 FOIA requests, the time spent on general correspondence, complaints, internal and ICO reviews, tribunal cases and judicial reviews. In relation to unreasonable persistence, the MHRA referred to Mr Levinson's pursuit of the issues since 2009, and gave the most recent example of Mr Levinson's application to the FTT in March 2014 making various complaints and allegations about the MHRA and asking the FTT to re-open an appeal which had only just been determined by consent.

73. The FTT noted at paragraph 37 that much of the evidence was not disputed. Mr Levinson did not dispute that he had sent 36 emails over a nine day period in March, and had made twenty applications to the FTT. He did not dispute the language that he had used in his dealings with the MHRA.

74. The FTT took into account that Mr Levinson felt that the MHRA had been "at war" with him and that the requests arose out of the on-going dispute between Mr Levinson and the MHRA. The FTT noted that Mr Levinson did not dispute this. In any event, this was clearly a conclusion which the FTT was entitled to reach on the evidence. Indeed, Mr Levinson's submissions in the appeal before me were founded on his claim as to the merits of his position in the underlying dispute which he claimed he pursued, including through these requests, in the public interest.

75. The FTT recognised that some of the conduct had occurred some time earlier but noted that the comparisons with Wannsee, for instance, had been repeated by Mr Levinson during the FTT hearing and that he had freely made other unsubstantiated and serious accusations.

[2] The FTT referred to a letter, although as already noted above there were two letters of the same date in the bundle, each in substantially the same terms. Nothing turns on the FTT's use of the singular.

76. The MHRA had attached to its letters of 14 May 2014 a table setting out the 57 requests which Mr Levinson had made to date. In error, the table was omitted from the bundle before the FTT but it was included in the papers for the Upper Tribunal. The omission from the FTT bundle is not material. Mr Levinson has not disputed the accuracy of FTT's statement that he had made around 50 FOIA requests, nor could he credibly do so given the evidence that I have seen. The table shows that between October 2008 and April 2014 there was only one extended period when requests were not made (between April 2011 and May 2013), that period roughly coinciding with the Commissioner's, the FTT's and the Upper Tribunal's consideration of the section 14 issue in EA/2011/0238 (referred to in paragraphs 22 and 23 of the Commissioner's Decision Notice, cited above, and to which I refer below).

77. I reject Mr Levinson's complaint that the FTT undertook only a "superficial count" of previous requests whereas section 14 requires more. The FTT did not rely only on the volume of requests but on the fact that they were all made in the context of his on-going dispute with the MHRA. The FTT summarised this in the factual background at the start of its reasons. I have already said that the FTT clearly took into account the factors relied on in the MHRA's letters which included the persistent nature of the requests on the same or overlapping issues and in the face of previous tribunal determinations. In addition, the FTT in this case had before it (and referred to) the substantial requests in the other appeals which were before it in the same proceedings.

78. The FTT's finding that Mr Levinson had "been very free in making serious accusations against the MHRA and its staff …. without really being able to substantiate them" is to be understood against the evidence which was before the FTT including that referred to in the MHRA's letters. I reject Mr Levinson's complaints that the FTT failed adequately to explain what conduct it was referring to in its decision. The MHRA's letters set out the conduct in question and gave examples. So did the Information Commissioner's Decision Notice. There was no need for the FTT to repeat the details of the conduct in its reasons. It is clear what it was referring to. Mr Levinson did not deny the actual language he was alleged to have used, although he denied that it was abusive or aggressive. Language and behaviour of the character of which complaint was made by the MHRA in April 2014 had been considered in a previous appeal, EA/2011/0238. This was referred to in the Commissioner's Decision Notice and in the Commissioner's written submissions to the FTT. That tribunal referred to the "Highly offensive comparisons of the conduct of MHRA staff with Nazi officials and party leaders, imputations of bribery and corruption and claims that the MHRA had behaved corruptly like the health authorities which failed to prevent the gross abuse and finally the murder of "Baby P" or fraudulently in the context of the Fraud Act, 2006." That tribunal dealt with what Mr Levinson claimed to be justifications for his allegations and the language used, as well as his complaints about the MHRA's conduct towards him, and concluded

> "… we cannot imagine a clearer case for a public authority to conclude that a requester is insulting and harassing its staff and defaming the authority. Taken as a whole, we judge Mr Levinson's communications with the MHRA to be quite outrageous in tone and a gross abuse of the FOIA regime. Moreover, he seemed

> oblivious to the fact that, as a Jew of considerable standing and talent, his grotesquely expressed accusations, coupled with references to the fate of family members in the Holocaust, might be all the more offensive and unacceptable"

79. Mr Levinson strongly disagrees with that tribunal decision. That is not the point. The MHRA's position in that appeal ant the tribunal's decision make abundantly clear that the behaviour was highly offensive. Moreover, in correspondence with the Commissioner the MHRA explained (page 82):

> "The complainant has a previous track record of making unwarranted and offensive remarks to Agency staff e.g. numerous – unsubstantiated – accusations of corruption and criminality, and many references to Nazism and anti-Semitism, despite having been asked to refrain from doing so and despite the fact that two of the officers who have previous had contact with him both lost family members in the Holocaust. We are aware that when the complainant gains the identity of an individual, he has often added them to his list of contacts…."

80. This letter was in the FTT bundle. It was written in the context of the MHRA's reliance on section 40(2) in response to the second request, but it is revealing more generally as to the impact of Mr Levinson's conduct on staff. There was ample evidence to support the FTT's assessment of the nature and effect of his conduct.

81. I am satisfied that the FTT's conclusion that the comparison with Wannsee was "somewhat provocative" was properly open to it and, indeed, was something of an understatement. This, and the FTT's description of Mr Levinson's accusations being "serious", is a fair (if modest) description of his comparison of the MHRA staff with Nazis and with the social workers involved with Baby P (so that, in Mr Levinson's words, the MHRA staff were guilty of "an abrogation of duty and integrity as to place the conduct in the failure field of the utterly horrific life of Baby P"). In the Upper Tribunal hearing Mr Levinson said that he was not alleging that the MHRA or its staff were like Nazis; the reference to Wannsee was a reference to the "concept" of what the MHRA was trying to do to him. This is an unconvincing denial of what Mr Levinson was undoubtedly doing and is wholly inconsistent with statements which he made in which he clearly compared the MHRA to Nazis. To take one example of many, a letter written to the Chief Executive of the MHRA in April 2010: "Your intent is to destroy us and had many Jews and other marginalised oppressed citizens in Nazi Germany realised this sooner many more would be alive. We want to live and survive…the MHRA apply a Nurenberg [sic] type of law of discrimination…I shall write one day about the Empireistic [sic] English Civil Servant v the Nazi German Civil Servant".

82. This was one of a number of quotes from letters written by Mr Levinson, which the Information Commissioner had set out for the FTT and copies of which were in the FTT bundle. They support the FTT's conclusion about the very grave accusations made. It was open to the FTT to conclude that Mr Levinson had not substantiated the allegations such as those of cynical attempts to marginalise him, bias, a "vile and sickening abrogation of duty and integrity", corruption, totalitarianism, intent to cause him a heart attack, malice, institutionalised racism, and more. Mr Levinson has identified no factual material to substantiate such accusations.

83. The FTT bundle contained voluminous correspondence from Mr Levinson to the MHRA in which he conducted himself in what the FTT described as a "remorselessly persistent and aggressive way". Given the volume of the correspondence, complaints, requests and appeals which are evidenced in the documentation and what Mr Knight described (justifiably) as the "grotesque, offensive and antagonistic language" used, the FTT's characterisation of his conduct is somewhat modest and certainly not unjustified.

84. In EA/2011/0238 the FTT had addressed the tone of the internal emails between the MHRA staff of which Mr Levinson also complains in this appeal. It decided that the silly frivolity in those emails did not detract from the offensive character of Mr Levinson's behaviour. Moreover, that tribunal noted that, while the tone of some was disrespectful and improper, they were not anti-semitic and did not suggest that they provoked Mr Levinson's "more insulting utterances". The tribunal said it was "a reasonable reaction to the barrage to which MHRA was subjected". I am satisfied that, although the FTT's reasoning in the present appeal is slender, when read in the light of its summary of the background and context, the contents of the MHRA's letters, the materials in the FTT bundle, and those facts which Mr Levinson agreed, there was a more than adequate factual foundation for its conclusion.

85. Mr Levinson submitted that the FTT failed to take into account that the MHRA had accepted that he felt "genuinely aggrieved" by the issues which he pursued and that he was not deliberately attempting to waste the agency's time. But the FTT's reasons show that the it recognised the sincerity of Mr Levinson's beliefs and motivations for seeking information from the MHRA and the FTT placed that it in the balance of considerations. However, it was not the FTT's role to determine the merits of the underlying dispute.

86. I reject Mr Levinson's complaint that the FTT failed to take into account the previous behaviour of the MHRA in relation to the requests in March and April 2014. The FTT specifically referred to the MHRA's failings and said that Mr Levinson's complaints about its behaviour had some force.

87. I have set out above paragraph 68 of Lady Arden's judgment in which she emphasised the significance of the value of the information requested: "important information which ought to be made publicly available". The FTT's acknowledgment of Mr Levinson's "genuine concerns about public health issues" along with its description of the value to the NHS of the device in question, shows that it was aware of the public interest dimension in this case, but it did not make a definite finding of the importance of the information or whether it should be made publicly available. However, it is important to acknowledge what was sought by the requests with which this ground is concerned. They did not seek information about the device or any matters directly related to public health. They sought information about the MHRA's handling of the file in question and its broader policies for records management. As the FTT noted, the MHRA's response to the second request was odd and gave rise to legitimate questions. It referred to the MHRA's explanation for its mistake. These passages show that the FTT had in mind the value of the information requested. But paragraph 38 of the tribunal's decision shows it balanced that against "the whole picture objectively". The fact that there had once been a genuine dispute does not stop a request

becoming "vexatious by drift" (see Dransfield in the Upper Tribunal). That is what the FTT decided here. In the FTT's assessment, Mr Levinson was using FOIA as a means of "carrying on the war by other means". The tribunal clearly meant that any proper purpose to the request had been overshadowed and extinguished by his improper pursuit of the "war" with the MHRA. and that was why it concluded that the MHRA was entitled to say "Enough is enough".

88. In conclusion, I am satisfied that there was no material error of law by the FTT in deciding that the requests were vexatious. This ground of appeal is dismissed.

Ground 2: Section 40(2)

Legal framework and principles

89. The effect of section 40(2) of FOIA is that a request for personal data of an individual other than the applicant may only be disclosed if disclosure is compatible with the data protection principles set out in the DPA. Section 40(2) confers an absolute exemption without the application of the public interest balancing exercise. Nonetheless as will be seen the public interest is relevant in deciding whether disclosure would contravene a data protection principle.

90. The relevant data protection principle in this case is the first. It is set out in Part I of Schedule 1 as follows:

> "1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless- (a) at least one of the conditions in Schedule 2 is met…"

91. The only relevant condition in this case is condition 6(1) which provides:

> "The processing is necessary for the purposes of legitimate interests pursued by...the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

92. The assessment of fairness involves a balancing exercise, recognising the various interests of the data subject (in this case, the MHRA officers), the data controller (the MHRA) and third parties (such as the Appellant).

93. In Goldsmith International Business School v The Information Commissioner & Home Office [2014] UKUT 0563 (AAC) at [34]-[42] the Upper Tribunal set out the approach to be taken when considering the application of condition 6(1) as follows (with citation of authorities omitted):

> "35. Proposition 1: Condition 6(1) of Schedule 2 to the DPA requires three questions to be asked:
>
> (i) Is the data controller or the third party or parties to whom the data are disclosed pursuing a legitimate interest or interests?
>
> (ii) Is the processing involved necessary for the purposes of those interests?
>
> (iii) Is the processing unwarranted in this case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject?"
>
> 36. Proposition 2: The test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

37. Proposition 3: "Necessity" carries its ordinary English meaning, being more than desirable but less than indispensable or absolute necessity.

38. Proposition 4: Accordingly the test is one of "reasonable necessity", reflecting the European jurisprudence on proportionality, although this may not add much to the ordinary English meaning of the term.

39. Proposition 5: The test of reasonable necessity itself involves the consideration of alternative measures, and so "a measure would not be necessary if the legitimate aim could be achieved by something less"; accordingly, the measure must be the "least restrictive" means of achieving the legitimate aim in question.

40. Proposition 6: Where no Article 8 privacy rights are in issue, the question posed under Proposition 1 can be resolved at the necessity stage, i.e. at stage (ii) of the three-part test.

41. Proposition 7: Where Article 8 privacy rights are in issue, the question posed under Proposition 1 can only be resolved after considering the excessive interference question posted by stage (iii)."

Background

94. The Appellant had requested the identities of the officers of the MHRA who had dealt with and investigated JBol's complaint regarding the Whiz Midsream and RBI products. It is not disputed that the information constituted personal data and that the individuals had not consented to disclosure of the information.

95. In correspondence with the Information Commissioner, the MHRA had explained that Mr Levinson held an unsubstantiated belief that specific officers were biased against him. It said that the officers were not senior and did not have an outward facing role, they would not expect that their names would be released, and it was not clear how identifying the officers advanced Mr Levinson's interests. The MHRA also said that disclosing the names would risk distress to the officers. It referred to Mr Levinson's "track record of making unwarranted and offensive remarks to Agency staff" and said that when he "gains the identity of an individual, he has often added them to his list of contacts – we are keen that these officers do not find themselves targeted with similar accusations." The Commissioner accepted these representations in deciding that the information was exempt under section 40(2).

The First-tier Tribunal's decision

96. The FTT set out the applicable legal principles at paragraph 23:

> "Section 40(2) provides an absolute exemption for information which is the personal data of any person if its disclosure would contravene a data protection principle. As a very general rule in this area, disclosure of personal data will not contravene a data protection principle if the disclosure:
>
> > is necessary for the purposes of legitimate interests pursued by the … third … parties to whom the data are disclosed, except where the [disclosure] is unwarranted in any particular case by reason of prejudice to the rights and freedoms and legitimate interests of the data subject
>
> [see: the first data protection principle in Schedule 1 to, and para 6(1) of Schedule 2 to, the Data Protection Act 1998].

> In a case like this, that will involve a consideration of the nature of the role and the seniority of the officers concerned and the utility and importance of the disclosure of the officer's identity."

97. The FTT's conclusion regarding section 40(2) was as follows:

> "31. The MHRA relied on section 40(2) in relation to the identity of the officers who dealt with the complaint... There can be no doubt that this information is the personal data of the officers concerned. We cannot see that it was necessary for the purposes of any legitimate interest which Mr Levinson or Phoenix were pursuing to know the identity of the officers and, in any event, the disclosure would have been unwarranted since there was a risk, based on his conduct generally, that Mr Levinson would use the information in a way that would cause them unnecessary distress. We therefore uphold the Commissioner's decision on this aspect of the case too."

Discussion and conclusions on ground 2

98. The FTT did not set out what legitimate interests Mr Levinson or OPI were pursuing in seeking the identity of the officers. In the grounds of appeal to the FTT (for example, paragraphs 74-77) the Appellant had relied on the importance of accountability and transparency and, more specifically, to find out whether there had been any conflict of interest in those handling the investigations in question. In the Decision Notices the Information Commissioner acknowledged the need for accountability and transparency but found that any public interest in disclosure of the identities of the officers was low given the other processes adopted by the MHRA to ensure professionalism and probity of its staff and the fact that the subject of the requests had occurred a number of years ago.

99. It would have been better if the FTT had specifically identified the interests relied on by the Appellant, particularly his the claim was not just of a general interest in transparency and accountability but a more focussed concern about detecting conflicts of interest. But I do not consider that this deficiency in the tribunal's reasons constituted a material error of law. The passages dealing with section 40(2) must be read in the context of the decision as a whole and, in particular, the tribunal's findings relating to the section 14 decision. The FTT's view was that there was no substance to the allegations made by the Appellant about the MHRA or its officers, and that Mr Levinson's use of the FOIA procedure had been unjustified for some time. These considerations would also have informed the FTT's conclusion regarding section 40(2). Once the unsubstantiated concerns about the conduct of the MHRA and its officers (which included those regarding alleged conflicts of interest) are set aside, all that was left was a general interest in transparency and accountability. The Appellant had not identified any necessity in disclosing the names of the officers for that purpose. In those circumstances, there was nothing of substance that the FTT could have added to its consideration of necessity. Issues under Goldsmith propositions 4 and 5 simply did not arise.

100. In accordance with proposition 2 in Goldsmith, there being no necessity in disclosure of the names, the balancing test under stage (iii) did not arise. But, in any event, the FTT decided that the prejudice to the rights and interests of the officers in question outweighed any interest in disclosure. The tribunal's pithy explanation for this at the end of paragraph 31 is easily understood when one

considers its description of the background to the case, in particular at paragraphs 2-3 and 9, its conclusions relating to section 14 and the background materials to which the FTT had regard and which I have discussed above. The FTT had found that Mr Levinson had freely made unsubstantiated allegations against the MHRA staff, and that he had been remorselessly persistent and aggressive. The tribunal had considered the MHRA's letters of 14 May which set out these matters in greater detail. It is implicit in the FTT's decision that the release of the names of the MHRA officers would risk exposing them to a campaign of complaints and accusations of the same character as Mr Levinson had conducted over many years.

101. I am satisfied therefore that there was no material error of law by the FTT in deciding that the identities of the officers were exempt under section 40(2) FOIA and I dismiss this ground of appeal.

Signed on the original
on 11th June 2018

Kate Markus QC
Judge of the Upper Tribunal