IN THE UPPER TRIBUNAL **Appeal No. GIA/779/2019**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (General Regulatory Chamber)

Driver and Vehicle Licensing Agency (DVLA)

(Appellant)

-v-

The Information Commissioner

(First Respondent)

and

Mr Edward Williams

(Second Respondent)

Before: Upper Tribunal Judge Wikeley

Ruling date: 27 October 2020

Decided on consideration of the papers

Representation:

Appellant:	Ms Christina Michalos QC
First Respondent:	Mr Nicholas Martin, Solicitor
Second Respondent:	In person

RULING ON THE APPELLANT'S RULE 14 APPLICATION

The Appellant's application under rule 14(1)(a) is granted.

The Upper Tribunal's Order is that the Second Respondent may not publish the electronic documents and bundles (including the skeleton arguments) provided in accordance with the case management directions for the purposes of these proceedings. For the avoidance of doubt, this Order includes both the First-tier Tribunal electronic bundle and the Upper Tribunal electronic bundle. The First-tier Tribunal's decision in *Williams v Information Commissioner and DVLA* [2019] UKFTT 2017_0180 (GRC) (06 February 2019), as publicly available on Bailii, is excluded from the scope of this Order.

This ruling is made under section 11 of the Tribunals, Courts and Enforcement Act 2007 and rules 2, 5, 14(1)(a), 21 and 22 of the Tribunal Procedure (Upper Tribunal) Rules 2008. It was corrected under rule 42 on 30 October 2020.

REASONS

Introduction

1. Initially the Appellant (from now on, the DVLA) and the Second Respondent (from now on, Mr Williams) made competing applications for an Upper Tribunal order. These were respectively not to publish or for publication of the electronic open core bundle in this appeal. Mr Williams subsequently withdrew his application. I grant the DVLA application prohibiting publication on the web for the following reasons.

The wider context

2. In summary, Mr Williams made a FOIA request to the DVLA for information about the use of data obtained through the DVLA's 'Keeper At Date Of Event' (KADOE) service. A typical use of the KADOE service is for parking companies to request drivers' details for the purpose of recovering unpaid parking fines. The DVLA refused the request. The Information Commissioner upheld that refusal in her Decision Notice. Mr Williams appealed to the First-tier Tribunal (FTT). To cut a very long story short, and also to cut several corners, the FTT allowed Mr Williams's appeal and ruled that the exemption relied upon (FOIA s.31) was not engaged. The DVLA now appeals on various grounds to the Upper Tribunal. The hearing is scheduled for 4 and 5 November 2020. In preparation for that hearing, the Government Legal Department (GLD), which acts for the DVLA in these proceedings, has provided the Upper Tribunal and the parties, in accordance with case management directions, with an agreed open core bundle of documents in electronic format. The parties are also in the process of exchanging skeleton arguments.

The immediate context

3. In an email dated 14 October 2020 (at 19:26) Mr Williams posed the following question to the GLD: "is your skeleton argument and the OPEN bundle okay to publish, or are you saying that it's privileged (I don't think it is)."

4. In a further e-mail on the same day, timed at 20:19, and in response to GLD's communications (see below), Mr Williams wrote as follows:

> "I apply for an Order declaring that I can legally publish everything the GLD/DVLA has emailed me. I intend to post it online and solicit comment to assist me with resisting this appeal. I have no lawyer. So comments might be useful.
>
> Rule 14 is to protect disputed information etc. not OPEN bundles and submissions/ skeletons.
>
> Rule 14 is not in place and cannot be applied to OPEN material or OPEN bundles.
>
> In any event, the serious harm test below is not met. The GLD has spent a lot of money on a QC, it is in the public interest to see if they money was well spent or not."

5. The 'serious harm test' referred to by Mr Williams was a reference to rule 14(2)(a) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698; 'the Upper Tribunal Rules'). The GLD's solicitor then replied to Mr Williams's original e-mail in the following terms (14.10.2020 at 19:57):

> "I provided an electronic copy of the Open Bundle to you to assist you in the proceedings, and for no other purpose, and you do not have my client's permission to publish it.
>
> I provided a copy of the Core Bundle and skeleton argument to you only for the purposes of the proceedings, as directed by the tribunal. I did not provide them for any collateral

> purpose, and I do not believe that the tribunal made those directions for any reason other than for the purposes of enabling the parties participation in proceedings in this difficult Covid-19 times. You do not have my client's permission to publish them. Documents provided in the course of proceedings have a different status from documents provided under an FOI request.
>
> Any permission to use the electronic documents provided to you for a collateral purpose would have to come from my clients. I am not in a position to take instructions this evening, so you do not have permission.
>
> The documents provided are not privileged, but as far as I am concerned they were clearly provided in the context of legal proceedings, and were provided in that electronic form, only for the purposes of the proceedings, and that was the understanding of the Tribunal and of the parties.
>
> I am accordingly applying for a protective order under Rule 14(1)(a) of the Upper Tribunal Rules that you may not publish those electronic documents. Please do not do so pending the Tribunal's determination of that issue, or pending instructions from my client to me (if sooner). Please note that I will likely be taking the day off tomorrow, and this matter does not appear urgent, so I would be grateful for your patience."

6. Shortly afterwards GLD made a more formal application as follows (e-mail 14.10.2020 at 20:10):

> "I am applying for an immediate order under rule 14(1)(a) and under the general case management powers of the Tribunal that Mr Williams may not publish the electronic documents and bundles provided to him. They were provided for the purposes of the proceedings and the Tribunal's case management powers should and can in my view be exercised to limit their use accordingly. This is even more so the case in current circumstances in which parties cannot be expected to cooperate and produce e-bundles if other parties decide to publish those bundles at the press of a button. The reasons for this application are set out in my email exchange below with Mr Williams.
>
> I suspect this may be novel issue for the Tribunal but it is an important one. In pre-covid hearings Mr Williams did not have and would not have had an electronic copy of the bundle. My client's reasonable expectation is that documents it provided in the context of the proceedings would be used only for the purpose of the proceedings. Further, I assert a property right of my client in the electronic bundles (which it prepared at its expense), and it gave permission to use them only for the purposes stated."

7. On 21 October 2020 Mr Williams then notified the Tribunal and the parties that he was withdrawing his own application "because I do not need the permission of the Upper Tribunal to publish the relevant data. Rule 14 is only for those seeking to prevent, not wanting permission for, publication. My motive for publishing is to seek legal advice, the Upper Tribunal's jurisdiction does not extend to interfering with the manner in which I seek legal advice any more than it does to interfering with how I receive that advice. My right to seek legal advice is part of my right to a fair hearing. Notwithstanding this, I will withhold publication, pending the DVLA's application."

The parties' core submissions

8. I then made directions for the parties to make submissions on the issues arising from the DVLA's application. I am grateful to them all for complying with the tight timetable, albeit with a little slippage.

9. Counsel on behalf of the DVLA has provided a detailed written submission setting the scene as follows:

> "**Introduction**
>
> 1. The issue at the core of this case is whether Requester in this case (the Second Respondent, Mr Williams – hereafter R2) is entitled to publish documents sent to him by the DVLA and the open e-bundle on the internet or otherwise. He initially applied to do so and then withdrew this application asserting that he did not need permission. The DVLA has made a counter-application to prohibit publication under r.14.
>
> 2. This is an exceptional application by R2. As far as the DVLA legal team are aware, there are no cases in which any tribunal or Court has ordered or permitted publication of an entire e-bundle nor any reported decisions on this issue.
>
> 3. It is important to emphasise at the outset that this is not actually an application about open justice. Open justice concerns scrutiny of the judicial decision making process; in other words, the public and the media looking in to the litigation and those requesting access being given access. Almost all of the authorities concern applications for access to documents; this is not the same as an application for internet publication prior to a hearing for the purposes of seeking legal advice. The present issue concerns a party to litigation seeking to broadcast material out to the public for the purposes of seeking unspecified legal advice from unspecified quarters.
>
> 4. Even journalists, whilst entitled to obtain copies of certain documents, do not acquire an untrammelled right to publish those documents in their entirety. They remain subject to various laws that restricts such publication, as set out further below."

10. I agree that these appear to be unchartered waters in the tribunal arena. For that reason, I propose to append this ruling to the decision on the substantive appeal following the hearing next week.

11. The Information Commissioner – who, in a sense, is holding the ring in the substantive appeal as a disinterested third party – takes the following view:

> " … the Commissioner's understanding is that the contents of the hearing bundles before the Upper Tribunal are only open to the *parties* to the proceedings (unless closed under Rule 14) and not for onward disclosure or dissemination other than for use in connection with the proceedings, such as obtaining legal advice. The Commissioner has not understood it to be permissible to unilaterally publish such bundles, or indeed correspondence relating to the proceedings, online.
>
> The Commissioner considered the approach adopted to be similar to the approach set out in Civil Procedure Rules 31.22 and 5.4C whereby the Court ultimately retains control of what information can published and shared. Whilst these are of course separate rules, the Commissioner considers the same important policy reasons for the approach adopted in the Civil Procedure Rules to apply to Upper Tribunal hearing bundles. In particular, from the Commissioner's perspective as the regulator for data protection, the Commissioner notes that there may be instances where the hearing bundles contain the names or other details of individuals which are necessary for the parties to know for the purposes of the proceedings, but would not be appropriate to disclose to the world. Accordingly the Commissioner understood the position to be that should a party wish to otherwise disseminate information contained within a hearing bundle, or correspondence relating to

the proceedings, they would need to seek the permission of the Upper Tribunal in the first instance, unless the information was to only be sent to a legal advisor for the purposes of obtaining legal advice, or otherwise used for the purposes of the proceedings.

When considering any application for the wider dissemination of information connected to the proceedings open justice is of fundamental importance. However as noted in *Cape Intermediate Holdings Limited v Dring* [2017] EWHC 3154 (QB) at [127] this is to be balanced against other factors. The Commissioner considers this to be important in the context of Upper Tribunal bundles where further redactions to what could be a large bundle may be required.

To this end the Commissioner understood documents such as the pleadings and skeleton arguments to be capable of disclosure on request, and indeed any document referred to at a hearing of the matter (subject to an opportunity for review). However she did not understand hearing bundles in their entirety to be capable of such disclosure, especially given that a further review may identify further redactions that would be required if the information were to be disclosed to the world."

12. Mr Williams's position is admirably clear, as shown by his characteristically robust final submissions (emphases as in the original submission):

"1. I do not agree that there an *implied undertaking* not to publish. CPR is irrelevant. UT rules count here, that's all.

2. I don't need permission to publish. I withheld asking for legal advice (by publication) on grounds of good manners to the UT, and because this issue needs sorting to help others in the future.

3. If I had published, upon what cause of action could I be (**successfully**) sued? None.

4. In nearly all tribunal cases appellants represent themselves. They get the papers, they have no lawyer, they show papers to family, friends, neighbours, colleagues etc. and ask "***What do you reckon***?" There is another phrase for this group of people - ***the world***. Papers don't come with a confidentiality clause to sign.

5. Does the DVLA/GLD or ICO have a right to privacy? No. What about witness statements? No, they were in OPEN. Email addresses, phone numbers? In public domain.

7. The FTT and UT proceedings are in public except CLOSED.

8. Reasons for my wanting to publish are irrelevant. You either can or you can't publish. It is for applicant DVLA to prove you can't and they have pleaded **no prejudice** to the UT appeal, not even close.

9. Does any tribunal OR COURT have the power to diminish the unqualified right to seek receive legal advice? No.

10. Relevant authority - legal assistance in civil matters: HUDOC - European Court of Human Rights

CASE OF AIREY v. IRELAND (Application no. 6289/73) -
"Furthermore, litigation of this kind, in addition to involving **complicated points of law,** necessitates proof of adultery, unnatural practices or, as in the present case,

> cruelty; to establish the facts, expert evidence may have to be tendered and witnesses may have to be found, called and examined. What is more, marital disputes often entail an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court."
>
> **For these reasons, the Court considers it most improbable that a person in Mrs. Airey's position (see paragraph 8 above) can effectively present his or her own case.** This view is corroborated by the Government's replies to the questions put by the Court, replies which reveal that in each of the 255 judicial separation proceedings initiated in Ireland in the period from January 1972 to December 1978, without exception, the petitioner was represented by a lawyer (see paragraph 11 above).
>
> The Court concludes from the foregoing that the possibility to appear in person before the High Court does not provide the applicant with **an effective right of access** and, hence, that it also **does not constitute a domestic remedy whose use is demanded by Article 26** (art. 26) (see paragraph 19 (b) above)."

The issues that fall for decision

13. The DVLA contends that three issues arise for decision, namely:

> (1) does Mr Williams need the Upper Tribunal's permission to publish the electronic bundle on the web?;
> (2) if he does, what is the power of the Upper Tribunal to allow or restrict publication?;
> (3) should permission be granted to Mr Williams to publish?

14. I agree with that taxonomy. All parties, explicitly or implicitly, accept that the first of those issues is the critical question that arises on this application.

(1) Does Mr Williams need permission to publish the electronic bundle on the web?

15. Mr Williams's case is that, as a starting point, he does not need the Upper Tribunal's permission to publish the electronic bundle on the web. He explains that "my motive for publishing is to seek legal advice, the Upper Tribunal's jurisdiction does not extend to interfering with the manner in which I seek legal advice any more than it does to interfering with how I receive that advice. My right to seek legal advice is part of my right to a fair hearing." Accordingly, I need to address Mr Williams's argument that his rights to a fair trial under article 6 of the European Convention on Human Rights (ECHR) are such that he is entitled, as of right and as a litigant in person without the benefit of professional legal advice, to publish the core bundle with a view to receiving legal advice from unnamed third parties. There are at least two difficulties with this submission (leaving aside the somewhat speculative nature of the assistance that is envisaged).

16. The first is that as Upper Tribunal Judge Wright observed in *Moss v Information Commissioner and the Cabinet Office* [2020] UKUT 242 (AAC) at paragraph 153:

> "… it appears at least very doubtful whether Article 6(1) does apply in the context of requests made under FOIA. The closest authority on the point comes from an earlier iteration of the *Sugar* litigation... In *Sugar v BBC (No.1)* [2008] EWCA Civ 191; [2008] 1 WLR 2289, the Court of Appeal rejected an argument that Mr Sugar's Article 6(1) rights were engaged in the consideration of his request for information."

17. Judge Wright further held as follows:

> "154. The important point for present purposes from *Sugar (No.1)* is its focus on the need for disclosure of information relating to the requester's personal or private situation. Just

> as in *Sugar (No.1)*, there is nothing in the information Mr Moss requested that related to his personal or private situation. In the context of FOIA, *Sugar (No.1)* on its face limits 'civil rights' under Article 6(1) to the private or personal rights of individuals. However, as I have said the information sought by Mr Moss did not fall into this category, and the basis of his case founded on *Magya*r has to do with him requesting the information in order to be able to provide it to the public."

18. I acknowledge that I have not had the benefit of detailed argument on this point, but Judge Wright's analysis is compelling and I consider I should follow it.

19. Secondly, and even if I am mistaken and ECHR Article 6(1) indeed bites in the way that Mr Williams claims, I do not consider that *Airey v Ireland* (1979-80) 2 EHRR 305 stands as authority for quite the broad proposition he asserts. It is true that *in the specific circumstances of that case* the Strasbourg court concluded that Article 6 required the provision of legal assistance where "such assistance proves indispensable for effective access to court" (at [26]). However, in making that assessment one must consider variables such as the nature of the right being protected, what is at stake for the appellant and the complexity of the procedure involved. In that context I bear in mind that the FTT and the Upper Tribunal are inquisitorial jurisdictions and in this case the tribunals and Mr Williams have the benefit of the active participation of the Information Commissioner as a neutral third party. *Airey v Ireland*, applied on the present facts, does not require a state either to provide legal assistance or even to permit an unrepresented litigant to broadcast the electronic core bundle to all and sundry on the web. As a matter of common law, and irrespective of Article 6(1), Mr Williams certainly has a right to seek legal advice. I agree I have no power to make an order stopping Mr Williams from seeking legal advice. But that in and of itself does not permit publication of the electronic core bundle to all the world, akin to a FOIA right.

20. It follows that Mr Williams has not persuaded me that he has an absolute right to publish the electronic core bundle on the web. But that may not be quite the same as saying he needs to seek the Upper Tribunal's permission to do so. What is the basis for the DVLA's submission that he must seek permission to do so? The DVLA's argument is that the answer lies in the common law doctrine of the implied undertaking in litigation, namely that "documents and information which are disclosed in litigation are subject to an implied undertaking that these will not be used other than for the purposes of the litigation concerned. The use of those documents should be confined to use within that litigation... The requirement that a party must disclose confidential documents and other private information in any civil proceedings is regarded as a very real invasion of that party's privacy" (Appellant's written submissions at §16).

21. On any sensible construction that principle would permit a party to share documents disclosed in the course of legal proceedings with their legal adviser, but not to publish the material to the world with a view to soliciting advice from as yet unknown individuals who may or may not be legal professionals and may or may not be subject to professional codes of ethics. The genesis of the implied undertaking doctrine was explained by Jackson LJ in *Tchenguiz v Director of the Serious Fraud Office* [2014] EWCA Civ 1409

> "55. Before the enactment of the Civil Procedure Rules 1998 it was an established rule that documents disclosed upon discovery could not be used for any collateral purpose without either the consent of the disclosing party or the leave of the court. See *Riddick v Thames Board Mills Ltd* [1977] QB 881; *Harman v Secretary of State for the Home Office* [1983] AC 280. I shall refer to this as "the collateral purpose rule".
>
> 56. The courts have stated the rationale of the collateral purpose rule on a number of occasions. First, a party receiving documents on discovery impliedly undertakes not to

> use them for a collateral purpose. Secondly, the obligation to give discovery is an invasion of the litigant's right to privacy and confidentiality. This is justified only because there is a public interest in ensuring that all relevant evidence is provided to the court in the current litigation. Therefore the use of those documents should be confined to that litigation. Thirdly the rule against using disclosed documents for a collateral purpose will promote compliance with the disclosure obligation."

22. Mr Williams makes the very fair point that the present proceedings are not governed by the CPR, but rather by the Upper Tribunal Rules. The DVLA's response to that is that the Upper Tribunal has held that "While they do not apply to proceedings in the UT, the CPR can provide helpful guidance where the UT Rules are silent or uncertain in scope and the UT should generally follow a similar approach in exercising its powers under the UT Rules" (*Aria Technology Ltd v HMRC and Situation Publishing Ltd* [2018] UKUT 111 (TCC), [2018] 1 WLR 4377 at paragraph 18). That may well be right, depending on the context, but I bear in mind also the observations of the three-judge panel, presided over by the then Senior President, in *R (on the application of LR) v FTT (HESC) and Hertfordshire CC* [2013] UKUT 294 (AAC); [2013] AACR 27:

> "30. We also consider that it is generally right to be wary of reading concepts from the CPR into Tribunal Procedure Rules. The 2007 Act provides in section 22 and schedule 5 for the structures and procedure for making rules as to the practice and procedure to be followed in the First-tier Tribunal and Upper Tribunal, provisions which are distinct from those applicable to the CPR. It is desirable that tribunal users can look at one set of rules and know where they stand, without the risk of other provisions being read in by analogy from other sources. If those who make Tribunal Procedure Rules wish to mirror the CPR, there is nothing to prevent them from doing so expressly. Of course, there may sometimes be questions of mechanics for dealing with a particular procedural problem where Tribunal Procedure Rules are silent and a workable solution has been devised under the CPR which it is equally sensible to apply in the tribunal context. But as to principles, we can readily understand, and endorse, the reluctance of the three judge panel, presided over by Walker J, CP, in *CB v Suffolk CC (Enforcement Reference)* [2010] UKUT 413 (AAC); [2011] AACR 22 at [22] to import extraneous principles from the High Court into decisions of the Upper Tribunal in contempt proceedings and of Black J and Upper Tribunal Judge Turnbull, respectively in *R(Howes) v Child Support Commissioners* [2007] EWHC 559 and *R(CD) v First-tier Tribunal* [2010] UKUT 181 (AAC), to do so in relation to decisions of the First-tier Tribunal (or its predecessor) in relation to whether to extend time and we are similarly cautious in the context with which we are concerned."

23. I consider, however, that this is a case where the "Tribunal Procedure Rules are silent and a workable solution has been devised under the CPR which it is equally sensible to apply in the tribunal context". It is not a question of simply importing the CPR. The implied undertaking at common law is codified in relation to civil litigation in the CPR in respect of disclosed documents (in CPR 31.22; see also CPR 32.12 regarding witness statements). CPR 31.22 provides as follows:

> "(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –
>
> (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
>
> (b) the court gives permission; or
>
> (c) the party who disclosed the document and the person to whom the document belongs agree.

> (2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the court, or referred to, at a hearing which has been held in public."

24. The Court of Appeal has held that — notwithstanding the absence of any specific statutory provision — the implied undertaking applies in the employment tribunal by way of a common law implication; see *IG Index Ltd v Cloete* [2014] EWCA Civ 1128; [2015] ICR 254 at [28]:

> "28. There is, however, no express provision in either the 2004 or 2013 Rules restricting the use of disclosed documents. I would, however, regard it as implicit that the same restriction on disclosure by the recipient should apply as arises under CPR 31.22. The common law would necessarily imply some form of undertaking and the appropriate implication is that the person to whom disclosure is made pursuant to these Regulations should be under the same restriction as if he had given disclosure in the county court."

25. I agree with the DVLA's submission that this is Court of Appeal authority to the effect that (by analogy) the implied undertaking should be treated as applying in this Tribunal. As a consequence, the Upper Tribunal's permission is required before publication on the web is permissible. Accordingly, it was strictly for Mr Williams to make that application and not for the DVLA to make an application under rule 14 to prohibit publication.

(2) What is the power of the Upper Tribunal to allow or restrict publication?

Introduction

26. Section 25(1) and (2)(b) of the Tribunals, Courts and Enforcement Act 2007 provides that in relation to the production and inspection of documents, the Upper Tribunal has the same powers, rights and authority as the High Court. Section 25(3)(b) further provides that this equivalence of powers, rights and authority "shall not be taken … to be limited by anything in Tribunal Procedure Rules other than an express limitation".

The Upper Tribunal's power to allow publication

27. Mr Williams is correct to argue that "rule 14 is only for those seeking to prevent, not wanting permission for, publication." Rule 14 is accordingly considered in the next section. So, we must look elsewhere for the Upper Tribunal's power to *permit* publication. Case law provides assistance in this respect. In *Aria Technology Ltd v HMRC and Situation Publishing Ltd*, Upper Tribunal Judge Sinfield concluded (at paragraph 20) that "the UT has an inherent power to grant a third party access to any documents relating to proceedings that are held in the UT records and has a duty under common law to do so in response to a request by an applicant unless the UT considers, on its own motion or on application by one or more of the parties, that any documents or information in them should not be disclosed to other persons." Judge Sinfield further recognised as follows:

> "25. It is clear from *Guardian News* and the cases cited in it that there is a strong presumption, founded on the open justice principle, that non-parties should be allowed access to documents relating to proceedings that are held in the UT records. That presumption is particularly strong where access is sought for a proper journalistic purpose. Correspondingly, in my opinion, a party that seeks to prevent access for a proper journalistic purpose must provide cogent reasons, supported by evidence, why the UT should not allow access."

28. Having carried out the requisite balancing exercise, Judge Sinfield held that the non-party journalist in that case was entitled to copies of various documents filed with the Upper Tribunal, being the taxpayer's notice of appeal, their grounds of appeal and the HMRC response to that appeal. This was in the context of proceedings that were ongoing in the Upper Tribunal. The same judge (albeit sitting in the Tax Chamber of the First-tier Tribunal) held in *Hastings*

Insurance Services Ltd v HMRC and KPMG [2018] UKFTT 478 (TC) that a non-party (KPMG) was entitled to see HMRC's statement of case and the parties' skeleton arguments on an application made after the tribunal's decision on the appeal had been issued.

29. The decisions in *Aria Technology Ltd* and *Hastings Insurance Services Ltd* are consistent with the principles pertaining to the principle of open justice as reaffirmed by the Supreme Court in *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38; [2020] AC 629. The starting point of Lady Hale's analysis was as follows:

> "41. The constitutional principle of open justice applies to all courts and tribunals exercising the judicial power of the state. It follows that, unless inconsistent with statute or the rules of court, all courts and tribunals have an inherent jurisdiction to determine what that principle requires in terms of access to documents or other information placed before the court or tribunal in question. The extent of any access permitted by the court's rules is not determinative (save to the extent that they may contain a valid prohibition). It is not correct to talk in terms of limits to the court's jurisdiction when what is in fact in question is how that jurisdiction should be exercised in the particular case."

30. All that said, I agree with the DVLA submission that there are three important points of distinction between the present case and the authorities considered above. First, this case does not involve a request for access by a non-party; it is a request by a party to publish to the world (or, rather an insistence by the party that he has the right to do so). Second, the matter has been raised prior to the hearing and the intention is to publish before the hearing. Third, the request (or rather insistence) is not in fact for the purposes of open justice at all (i.e. to enable scrutiny of the decision making or to understand why decisions are taken); it is for the speculative purpose of allowing one party to seek 'legal advice' via the internet.

31. If this was an application for disclosure of certain specified documents in the present appeal and had been made by a non-party, such as an official responsible for policy-making at the AA or RAC, or by the motoring correspondent of a national newspaper, then the above authorities would be definitely in point. But that is not this case.

The Upper Tribunal's power to restrict publication
32. So far as the power to restrict publication is concerned, rule 14(1) of the Upper Tribunal Rules further provides as follows:

> "(1) The Upper Tribunal may make an order prohibiting the disclosure or publication of—
> (a) specified documents or information relating to the proceedings; or
> (b) any matter likely to lead members of the public to identify any person whom the Upper Tribunal considers should not be identified."

33. The DVLA application in the present proceedings has been made explicitly under rule 14(1)(a). It is not premised on the alternative basis of rule 14(1)(b). Nor does it engage with rule 14(2), where the 'serious harm test' referred to by Mr Williams (see above) is applied.

34. So far as rule 14(1) is concerned, the power to make this type of order reflects the fact that "there may be circumstances in which it would not be appropriate for evidence to be disclosed to the public" (see E. Jacobs, *Tribunal Practice and Procedure*, 5th edn (2019), Legal Action Group, §10.190). But the terms of rule 14(1), and rule 14(1)(a) in particular, only take us so far. As Jacobs observes, "Rule 14(1) contains broad powers to withhold disclosure. However, it only identifies the potential subject matter of the power. It says nothing of the circumstances in which the power should be exercised" and, moreover, "under (a), the only condition is that the document or information must be capable of being specified" (§10.192 & §10.193). As to the exercise of the power, one is therefore thrown back onto first principles so,

as Jacobs puts it, this "will have to be considered in the light of the overriding objective and of the factors relevant to non-disclosure, including the principle of open justice" (§10.195).

35. It follows that Mr Williams's contention that "Rule 14 is to protect disputed information etc. not OPEN bundles and submissions/ skeletons. Rule 14 is not in place and cannot be applied to OPEN material or OPEN bundle" is misplaced, as it only tells part of the story. It is certainly true that rule 14 is widely used in the FOIA jurisdiction as a means of protecting disputed information. However, rule 14 applies across the board and may be invoked in other circumstances. Nowhere in rule 14 is there any restriction such that the power to make a rule 14(1)(a) order cannot be exercised where material is contained in an open bundle.

(3) Should permission be granted to Mr Williams to publish the bundle on the web?

36. Having concluded that Mr Williams does require permission to publish the electronic core bundle on the web, and that the Upper Tribunal has the power to permit or restrict such publication, the third and final question is whether, in the circumstances of this case, Mr Williams should be granted permission to do so.

37. The DVLA raises a number of arguments as to why Mr Williams should be refused permission in the present case. These include submissions relating to copyright (written submissions at §26-§34). I do not propose to discuss those arguments as I have reached the conclusion it is unnecessary to do so. Rather, I consider that permission should be refused in this case principally for data protection reasons (an issue identified by the Information Commissioner in her submissions). The DVLA puts the point as follows in its written submissions:

> "35. Any trial bundle will contain numerous examples of unredacted email addresses, phone numbers, personal data of all types. Again, it is one thing to allow a non-party (particularly a professional journalist) access to a copy of such documents for open justice reasons; it is entirely another to endorse publication on the internet.
>
> 36. Internet publication (as distinct from access which could be managed by say undertakings to the Court not to publish personal data) carries with it practical problems. In order to avoid Court endorsed infringement of the GDPR, someone would need to engage in a process of redaction."

38. Mr Williams argues by way of rejoinder that e-mail addresses and phone numbers, all of which are plainly personal data, are in the public domain by being in the open bundle. The short answer to that is that they are not, or at least not yet, as the public hearing has yet to take place.

39. The DVLA advances a total of 11 different reasons why it contends that publication on the internet should be "approached with caution". In addition to the data protection implications, the first six of those reasons are sufficient, to my mind, to justify the conclusion that permission to publish should be refused in this case. Those reasons, which I adopt and endorse, are as follows:

> "38.1. Publication to the world at large is entirely different from granting non-party access to particular individuals (especially journalists) for a legitimate purpose.
>
> 38.2. It is contrary to the policy underlying the implied undertaking not to use documents for collateral purposes. This undertaking requires that use of disclosed documents is confined to use within that litigation. Publication on the internet of all disclosed documents, including the trial bundle, would fundamentally undermine that rationale. It would deter

parties from agreeing to include documents in a trial bundle if they knew they would end up on the internet.

38.3. An application to publish on the internet is in effect an application for indiscriminate third party access by the world. It is for the applicant to justify why he seeks it and how granting him access will advance the open justice principle. He has not cogently justified third party access by the world which is exceptional.

38.4. This application (because it concerns publication prior to a hearing with a view to publication to the world) is not about open justice nor is it for the purposes of open justice (as expounded by the Supreme Court in *Dring* – namely understanding and scrutinising judicial decision making and that process). It is for a collateral purpose of seeking free legal advice via the internet.

38.5. There is no clear indication of where this is intended to be published or who it is said would be willing to offer free legal advice. There is no limitation to the non-parties to whom disclosure is sought.

38.6. Any documentation authorised to be published by the Tribunal would then be outside the control of the Tribunal and/or the parties – in particular beyond the jurisdiction of the Court."

40. I readily accept that Mr Williams, as a litigant in person, may feel disadvantaged and may wish to seek legal advice. I also accept that good quality professional legal advice may be out of his reach for financial reasons. However, as the DVLA points out, there are various sources of pro bono legal advice and he is perfectly entitled to disclose copies of the material to any such legal advisors. Indeed, this was pointed out to Mr Williams in my earlier case management directions dated 5 May 2020:

"The request that the Upper Tribunal provide Mr Williams with a lawyer
11. The Upper Tribunal has no power (or resources) to provide Mr Williams with a lawyer. It is entirely a matter for him, but Mr Williams may wish to explore the possibility of obtaining free representation at any future hearing from an organisation such as the Bar Pro Bono Unit (www.weareadvocate.org.uk) (although I understand they require a referral from another agency) or a specialist lobby group such as the Campaign for Freedom of Information, which has experience of appearing before the Upper Tribunal in FOIA / EIR cases."

41. Finally, there are two other points made by Mr Williams in his submissions which I should address. First, he argues that the fact that as a litigant in person he could share the bundle with family and friends means that there has been publication to the world in any event. I disagree – there is the world of difference between such informal consultation and publication of material on the web, for the reasons identified by DVLA in its written submissions (at §24). Secondly, Mr Williams asks the rhetorical question, which he answers himself: "If I had published, upon what cause of action could I be (successfully) sued? None". It is not for me to pronounce on hypothetical civil litigation. I will simply say that I am grateful to Mr Williams for the responsible way in which he has held back from publication pending resolution of this matter. However, I must make the point that were he now to act in breach of the Order I have made in this case then he is at risk of being found to be in contempt. The Upper Tribunal has the same powers to punish for contempt as the High Court (see section 25 of the Tribunals, Courts and Enforcement Act 2007).

42. My ruling and the Order that I make is in the following terms:

The Appellant's application under rule 14(1)(a) is granted.

The Upper Tribunal's Order is that the Second Respondent may not publish the electronic documents and bundles (including the skeleton arguments) provided in accordance with the case management directions for the purposes of these proceedings. For the avoidance of doubt, this Order includes both the First-tier Tribunal electronic bundle and the Upper Tribunal electronic bundle. The First-tier Tribunal's decision in *Williams v Information Commissioner and DVLA* [2019] UKFTT 2017_0180 (GRC) (06 February 2019), as publicly available on Bailii, is excluded from the scope of this Order.

43. I should add that I have considered carefully whether an exception should be made for the skeleton arguments in these proceedings. In that context I recognise that the data protection considerations may not apply to these documents. I also put to one side for the present any copyright issues. Even so, I am satisfied that the other factors identified at paragraph 39 above are sufficient to justify their inclusion in the rule 14(1)(a) Order. I also recognise that in *Hastings Insurance Services Ltd*, where skeleton arguments were released, the circumstances were very different in that they were disclosed after their use in a public hearing to a named third party whose arguments had succeeded in the balancing exercise undertaken.

Nicholas Wikeley
Judge of the Upper Tribunal

Authorised for issue: 27 October 2020
Corrected under r.42: 30 October 2020