IN THE UPPER TRIBUNAL **UA-2020-000324-GIA**
ADMINISTRATIVE APPEALS CHAMBER **UA-2020-000325-GIA**
(previously GIA-1640-2020 and GIA-1644-2020)
NCN: [2022] UKUT 104 (AAC)

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

Between:

UA-2020-000324-GIA

Mr Brendan Montague

Appellant

– v –

The Information Commissioner

1st Respondent

– and –

The Department for International Trade

2nd Respondent

UA-2020-000325-GIA

The Department for International Trade

Appellant

– v –

The Information Commissioner

1st Respondent

– and –

Mr Brendan Montague

2nd Respondent

Before: **Upper Tribunal Judge Wikeley**
Upper Tribunal Judge Wright
Upper Tribunal Judge Church

Decision date: 13 April 2022
Decided after a hearing on: 20 & 21 September 2021
Further written submissions 16 February, 2 March and 15 March 2022

Representation (as in UA-2020-000324-GIA):

Appellant: Mr Christopher Knight and Dr Sam Fowles of counsel
1st Respondent: Mr Peter Lockley of counsel, instructed by the ICO
2nd Respondent: Mr Eric Metcalfe of counsel, instructed by the GLD

DECISION

The decision of the Upper Tribunal is to allow the appeal by Mr Montague but to dismiss the appeal by the Department for International Trade from the decision of the First-tier Tribunal dated 26 August 2020.

As a consequence of our decision, and pursuant to section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007, we set aside the First-tier Tribunal's decision in EA/2019/0154, dated 26 August 2020, and remit Mr Montague's appeal to be considered afresh by the First-tier Tribunal.

If possible, the First-tier Tribunal should have the same constitution as the First-tier Tribunal whose decision we have set aside.

REASONS FOR DECISION

The principal questions of law raised by this appeal to the Upper Tribunal

1. The context of these two appeals concerns requests made by Mr Montague to the Department for International Trade ("DIT") about certain steps taken in the period before the United Kingdom left the European Union ("Brexit"). However, the primary appeal in these proceedings – *Montague v Information Commissioner and DIT*, also referred to under file reference UA-2020-000324-GIA, raises two legal issues of potential relevance to appeals under the Freedom of Information Act 2000 ("FOIA") more generally.

2. The first is the question of whether, when multiple FOIA exemptions are engaged by a single piece of information, the separate public interests in maintaining those different exemptions may be aggregated when weighing them against the public interest in disclosure ("the Aggregation Issue").

3. The second issue is the question of whether information that is disclosed after a public authority's decision on a request (for example, during the Commissioner's investigation, in the course of First-tier Tribunal proceedings or as a result of a Tribunal's decision) should be treated as in the public domain for the purpose of weighing the public interest in disclosure of any remaining requested information ("the Public Interest Timing Issue"). Included within this issue is whether a public authority's decision on a request includes any later decision on review by it of its initial decision refusing the request.

The Upper Tribunal's decision on the principal questions of law (in summary)

4. As to the Aggregation Issue, we conclude that FOIA does not permit aggregation of the separate public interests in favour of maintaining different exemptions when weighing the maintenance of the exemptions against the public interest which favours disclosure of the information sought.

5. As to the Public Interest Timing Issue, we conclude it is to be judged at the time the public authority makes its decision on the request which has been made to it and that decision making time does not include any later decision made by the public authority reviewing a refusal decision it has made on the request.

The factual context in which the principal questions of law arise

6. Mr Brendan Montague, the appellant in the primary appeal, is an investigative journalist who made a FOIA request to the DIT. The context of that request, and of these proceedings more generally, was the withdrawal of the United Kingdom from the European Union and the particular significance given in public debates about Brexit to the ability of the UK to negotiate and enter into its own trade deals.

7. Mr Montague made a FOIA request to the DIT in November 2017, seeking information about the Trade Working Groups ("TWGs") that were formed in the run up to Brexit. The DIT responded in February 2018 providing limited information, namely a list of countries that it was willing to confirm had commenced TWGs and the names of those TWGs. It also released a list of senior UK government representatives who had attended at least one TWG. The DIT upheld its response following an internal review in March 2018.

8. Mr Montague then complained to the Information Commissioner. In December 2018, during the Commissioner's investigation, the DIT confirmed it was content to disclose further information. It disclosed that information, comprising 69 extensively-redacted documents, in March 2019 with a revised refusal notice. It relied variously on section 27 FOIA (international relations), section 35 FOIA (formulation of Government policy) and section 40 FOIA (personal data) as a basis for withholding the redacted information. In some instances, it also relied on section 27(4) FOIA to neither confirm nor deny whether requested information was held.

9. On 29 March 2019, the Commissioner issued Decision Notice FS53733330, upholding the DIT's application of the exemptions. Mr Montague appealed to the First-Tier Tribunal ("the FTT"). The FTT heard the appeal over four days in December 2019 and February 2020, including hearing open and closed evidence from Mr Alty (the DIT's Director General: Trade Policy), as a witness on behalf of the DIT, and open evidence from Mr Montague and four further witnesses on his behalf.

10. The FTT gave a lengthy unanimous judgment, running to 121 paragraphs, in which it upheld the Commissioner's Decision Notice in relation to the main substantive material sought by Mr Montague's request, being the minutes of the TWGs. The FTT agreed with the Commissioner that the balance of the public interest narrowly favoured maintaining the exemptions at sections 27 and 35 FOIA. In relation to certain other and less detailed material (e.g. dates of meetings, "bare agendas" (i.e. agendas in the usual sense of the word, being a list of numbered headings of topics for discussion at a meeting, rather than more detailed annotated agendas), plans for establishing further TWGs, and schedules of forthcoming meetings) it found that the public interest favoured disclosure, and allowed the appeal to that extent. The FTT also upheld the approach of the DIT (as had been accepted by the Commissioner) to section 27(4) FOIA and section 40(2) FOIA and dismissed the appeal to that extent.

11. Mr Montague sought permission to appeal from the FTT, and in response to Mr Montague's appeal, the DIT sought permission to appeal out of time. On 16 October 2020, HHJ Shanks, who had presided at the FTT, refused Mr Montague permission to appeal and refused an extension of time for DIT to appeal. Upper Tribunal Judge Wright subsequently granted permission to appeal to both Mr

Montague (UA-2020-000324-GIA), on five grounds ('the Montague Appeal'), and to the DIT (UA-2020-000325-GIA), on two grounds ('the DIT Appeal').

The present appeals to the Upper Tribunal

12. Mr Montague's appeal (UA-2020-000324-GIA) challenges the FTT's conclusion that information requested from the DIT – particularly the minutes of the TWGs conducted on behalf of HM Government with foreign States up to 15 November 2017 – was exempt from disclosure by operation of sections 27(1) and (2) and 35(1) FOIA. Mr Montague does not challenge on this further appeal the application of sections 27(4) or 40(2) FOIA, where requested information was withheld on these bases. The Information Commissioner supports Mr Montague on the Aggregation Issue and the Public Interest Timing Issue but submits that his appeal should be dismissed in any event. The DIT contends that Mr Montague's appeal should be dismissed.

13. The DIT's cross-appeal (UA-2020-000325-GIA) challenges the FTT's conclusion that certain information requested – (i) the dates of all TWG meetings which had taken place; (ii) the "bare agendas" for such meetings; (iii) information about plans for the establishment of new TWGs; and (iv) schedules of forthcoming TWG meetings – was not exempt and was accordingly required to be disclosed. The Information Commissioner and Mr Montague both oppose the DIT's cross-appeal.

14. We ought to record at this stage that the DIT at the oral hearing before us clarified that, despite the breadth of its grounds on which it had been given permission to appeal, its appeal was only concerned with disclosure of the "bare agendas" of the TWG meetings. It therefore abandoned or withdrew its appeal against the FTT's decision that the DIT ought to provide to Mr Montague the information set out in paragraphs (a), (c) and (d) of the FTT's 'Substituted Decision Notice' of 22 July 2020. On 21 September 2021 we accordingly varied the Upper Tribunal's earlier order suspending the effect of the FTT's decision and ordered the DIT by no later than close of play on 24 September 2021 to supply Mr Montague, pursuant to his request of 15 November 2017, with the dates of all meetings of existing TWGs which had taken place; information about plans for the establishment of any new TWGs; and schedule(s) of forthcoming meetings of TWGs.

The Aggregation Issue

15. The issue of aggregation arises on this appeal because the FTT directed itself that it could and should aggregate the public interests in maintaining different exemptions. It said the following in this regard:

> "11. In the course of submissions Judge Shanks raised with the parties the issue of "aggregation", that is whether the public interest in maintaining different exemptions in relation to one piece of information should be aggregated when carrying out the public interest balancing exercise. Mr Lockley for the Commissioner submitted that there should be no aggregation and Mr Metcalfe for the DIT said there should (we have no record of what Dr Fowles said) but no-one referred us to any authorities or detailed argument on the issue.
>
> 12. In light of the Commissioner's stance, the Tribunal has itself researched the issue. It appears that the only relevant authorities relate back to 2010. In *Office of Communications v IC* [2009] EWCA Civ 90 the Court of Appeal decided in the context of the Environmental Information Regulations 2004 that the public interests

> in maintaining the exceptions provided by the Regulations should be aggregated; the issue was referred by a divided Supreme Court to the European Court of Justice and the ECJ decided that the Directive (2003/4/EC) underlying the EIR did require aggregation (see: *Office of Communications v IC* Case C71- 10, 28.7.2011). In a FOIA case decided after the Court of Appeal's judgment called *Home Office v IC* [2009] EWHC 1611 Keith J appears to have assumed at paras [25] and [38] that the principle also applied to FOIA cases. We are not aware of any further consideration of the position under FOIA in a reported case though we are aware that there has been some controversy on the point. Given the state of the case law and that we would generally regard it as unsatisfactory for different rules to apply in relation to EIR and FOIA we would propose, so far as it might be relevant, to apply the aggregation principle in this case. We note that it applies only where a particular item of information is covered by more than one exemption and that in practice it appears to have been of little utility in deciding actual cases."

16. It was, we think, in the end common ground before us, and in our view a fair reading of the FTT's decision in any event, that the FTT in fact aggregated the public interests in maintaining the exemptions under sections 27 and 35 of FOIA in respect of the main substantive information sought by Mr Montague. This can be seen from paragraphs 100-101 of the FTT's decision, where it put matters as follows:

> "**Conclusions on applicability of sections 27 and 35 and public interest in maintaining those exemptions**
>
> 100. We therefore conclude that sections 27 and 35 do apply to the withheld material on the basis that: (i) it was expressly agreed and/or implicitly understood that the meetings of the various TWGs held in 2017 were "confidential" in order that the parties could speak openly and frankly for their mutual advantage; (ii) information coming from foreign states during such meetings was therefore covered by section 27(2); (iii) the release of details of such meetings would have been likely to cause some prejudice to international relations in that foreign countries would be unhappy at the disclosure of those details in spite of the agreement or understanding that the meetings were confidential, and the UK's ability to engage with foreign countries in seeking to negotiate trade deals would also be somewhat impeded as a consequence; (iv) information collected in the course of the meetings related to the development of the government's trade policy in that it informed the process; and (v) the release of the details would make it more difficult in the remainder of the process to obtain such information and the process of development of trade policy would therefore be damaged. The risk and extent of such prejudice (and accordingly the weight of the public interest in maintaining the section 27 and 35 exemptions) was of some substance but not very weighty.
>
> 101. We turn to consider the public interest in disclosure and whether it is outweighed by that in maintaining the exemptions."

17. We need first to clear away an argument pursued by the DIT, and not entirely or explicitly abandoned by it, against Mr Montague raising the aggregation issue on his appeal to the Upper Tribunal. It might be kindest to say as little as possible about this argument given its lack of merit and its failure to understand the inquisitorial nature of the FTT and the Upper Tribunal. However, given the DIT did not withdraw the argument, we must confront it and say why it is wrong.

18. The argument as made by the DIT in writing was that Mr Montague could not raise the aggregation issue on this appeal because he had not raised it before the FTT and had therefore prevented the DIT from answering it in relation to the specific evidence heard by the FTT. It relied on *Ex p Firth, In re Cowburn* (1882)

19 Ch.D. 419. The DIT argued, perhaps logically, that the Upper Tribunal should not have granted permission to appeal on the aggregation issue because this point had not been considered, and it invited the Upper Tribunal to set aside the grant of permission to appeal on this point.

19. Whether this argument is an example of the proceedings being hard fought or may evidence a continuing sensitivity around Brexit, it is an argument wholly without merit and one we were surprised that a responsible Government department saw fit to pursue. Whatever Mr Montague's position may have been before the FTT, it is quite evident that it was the FTT which took the point on aggregation and decided it. Further, *Cowburn* is not a relevant legal authority because the correct approach to whether aggregation is mandated under FOIA is one purely of the law and is not dependent on any evidence. The evidence needed to address aggregation, if it is allowed for under FOIA, is a separate matter. In any event the DIT positively argues that the FTT made no legal error in its approach to aggregation under FOIA and it raises no complaint about the FTT's aggregation on the evidence. It is therefore an entirely synthetic argument. We are also mindful that if, as we consider is the case, the FTT was wrong as a matter of law under FOIA to aggregate, it would be a very curious result, indeed one inimical to our inquisitorial function, if the Upper Tribunal could not decide it had erred in law in so doing. We therefore decline to set aside the grant of permission on this ground.

20. The DIT's argument on this point altered dramatically at the hearing before us. It changed tack completely and argued instead that Mr Montague **had** raised arguments on aggregation before the FTT. However, the DIT contended that Mr Montague had positively argued for aggregating the public interests in favour of maintaining the exemptions. It pointed to Mr Montague's written submissions to the FTT of April 2019 in which it was submitted (at paragraph 17) that "the public interest in maintaining each of the exemptions may be aggregated". We note, however, that the next sentence in that paragraph of Mr Montague's submissions reads "When weighing the public interest, the focus must be on the public interest in maintaining the applicable exemption, rather than on all aspects of public interest that weigh against disclosure". The DIT further sought to draw support from paragraph 64 of those submissions, but it seems clear to us that that later submission was concerned with aggregating points in favour of disclosure. As we understood this new argument of the DIT, it was still that permission to appeal ought not to have been given on the aggregation issue, but this was based instead on Mr Montague not having given full disclosure of his stance before the FTT and not being able to now argue for a proposition he argued against before the FTT.

21. We do not accept the DIT's argument here either. First, in our view it reads too much into one sentence in Mr Montague's arguments before the FTT. That sentence may have been doing no more than seeking to faithfully record case law under the Environmental Information Regulations 2004 (the Court of Appeal's decision in the *Ofcom* case – see further below). Furthermore, the sentence does not sit entirely easily with the sentence which immediately follows it. Second, and following on from the first point, no one before us sought to argue that Mr Montague positively argued before the FTT that aggregation in maintaining the exemptions should take place. His stance before the FTT, at least as remembered by the FTT, is that he did not express a view on this issue. Thirdly, there is no rule of law that a party cannot alter its stance on a legal issue between

the FTT and the Upper Tribunal. Doing so may affect the view the Upper Tribunal takes of the legal merits of the argument, but if the argument appears as a good one the inquisitorial function of the Upper Tribunal should allow the argument to proceed in an appropriate case. Fourthly, the DIT's second argument against permission to appeal having been given on the aggregation issue is still faced with the fact that the FTT took it upon itself to decide the point on the appeal. If it was wrong in law to do so and that error of law was material to the decision to which it came, we do not see any proper basis on which permission to appeal ought not to have been given or should now be set aside.

22. We turn therefore to the merits of the argument on aggregation.

23. We heard policy arguments in favour of aggregation and against it. However, whether the public interests in favour of maintaining exemptions are capable as a matter of law of aggregation under FOIA has to be answered as a question of statutory construction of the relevant sections of that Act of Parliament. Sections 1 and 2 of FOIA are the core provisions for these purposes. They provide as follows.

> "**General right of access to information held by public authorities.**
> 1(1) Any person making a request for information to a public authority is entitled—
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
> (b) if that is the case, to have that information communicated to him.
> (2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
> (3) Where a public authority—
> (a) reasonably requires further information in order to identify and locate the information requested, and
> (b) has informed the applicant of that requirement,
> the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.
> (4) The information—
> (a) in respect of which the applicant is to be informed under subsection (1)(a), or
> (b) which is to be communicated under subsection (1)(b),
> is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.
> (5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).
> (6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny".
>
> **Effect of the exemptions in Part II.**
> 2(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—
> (a) the provision confers absolute exemption, or
> (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,

> section 1(1)(a) does not apply.
> (2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
> (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
> (3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—
> (a) section 21,
> (b) section 23,
> (c) section 32,
> (d) section 34,
> (e) section 36 so far as relating to information held by the House of Commons or the House of Lords,
> (ea) in section 37, paragraphs (a) to (ab) of subsection (1), and subsection (2) so far as relating to those paragraphs,
> (f) section 40(1),
> (fa) section 40(2) so far as relating to cases where the first condition referred to in that subsection is satisfied,
> (g) section 41, and
> (h) section 44."

24. The starting point is that section 1(1)(b) of FOIA confers a right ("is entitled") for a person to have information sought by them provided to them if it is held by the public authority *unless*, inter alia, it is exempt information under Part II of FOIA. Given the general and important constitutional right conferred by section 1 of FOIA, we consider that statutory cutting down of that right as set out elsewhere in FOIA needs to be carefully construed. The language of the Act should, where possible, be construed broadly and liberally in the context of FOIA's statutory purpose to make provision for the disclosure of information held by public authorities in the interests of greater openness and transparency: see *University and Colleges Admission Services v ICO and Lucas* [2014] UKUT 557 (AAC); [2015] AACR 25 at paragraphs [35] and [39] and, albeit in a different context but to similar effect, paragraphs [2] and [68] of *Dransfield v ICO and Devon CC* [2015] EWCA Civ 454; [2015] 1 WLR 5316.

25. The critical words, in our judgment, are those which appear in section 2(2)(b). These words are that "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information". The words we have underlined in section 2(2)(b) establish, in our view, the intention of Parliament that the public interest has to be in maintaining the exemption singular, not the public interest in maintaining exemptions in the plural. That, it seems to us, is the plain meaning of the wording used in the section when read alone and when read in the context of the rest of FOIA. Moreover, we are inclined to accept that aggregating the public interests against disclosure is likely to inhibit disclosure when compared to considering the public interest against disclosure in respect of each individual exemption, and thus is a pointer against reading aggregation into the Act as it would offend against the liberal reading of FOIA we have highlighted above.[1]

[1] We note that the Advocate General in the *Ofcom* case was of the view that aggregation of the interests against disclosure could "unquestionably" make a substantive difference to a request being refused.

26. We do not consider that the opening wording of "in all the circumstances of the case" in section 2(2)(b) alters this conclusion. The case may involve one exemption under Part II or several exemptions, and in each case all the circumstances of the case must be considered. But in each case the circumstances of the case that have to be considered are qualified by the words which immediately follow the comma, namely whether the public interest in maintaining the exemption outweighs the public interest in disclosing. The case, as we have said, may only involve one exemption or it may involve more than one exemption, but the circumstances of the case need to relate to whether the public interest in maintaining the exemption, or each exemption separately where there is more than one exemption in issue, is outweighed by the public interest in disclosing the information in that context. If section 2(2)(b) had been intended to permit aggregation of the public interests (plural) in favour of maintaining the exemptions then we would have expected clearer language to have been used to this effect, such as "the public interest in maintaining the exemption or, where applicable exemptions, outweighs the public interest in disclosing the information."

27. The above reading of section 2(2)(b) is supported, in our view, by the language used in the heading to section 2 of FOIA – "Effect of exemptions in Part II". Such headings may be taken into account as an aid to statutory construction: *R v Montila* [2004] UKHL 50; [2004] 1 WLR 314. Part II of FOIA contains a number of exemptions, some absolute and some qualified, and so it is necessary for the heading to refer to the plural – "*exemptions*" - in Part II. However, the short point is that the Parliamentary draftsperson in wording section 2(2)(b) as they did, and Parliament in approving that wording, would have had well in mind the distinction between an "exemption", singular, and "exemptions", plural, in Part II of FOIA. The focus on "exemption" in section 2(2)(b) seems to us to be a deliberate and clear use of the singular in circumstances where the draftsperson and Parliament would have plainly been alive to the need to use the plural, "exemptions", were that the intention.

28. The above reading of section 2(2)(b) also reads more consistently, in our judgment, with section 17(3)(b) of FOIA. Section 17 is concerned with the terms of the notice a public authority is to provide when refusing a request. It provides, insofar as is relevant to these appeals, as follows:

> "**Refusal of request.**
> (1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—
> (a) states that fact,
> (b) specifies the exemption in question, and
> (c) states (if that would not otherwise be apparent) why the exemption applies.
> (2) Where—
> (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—
> (i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
> (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

> (b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,
> the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.
> (3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—
> (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
> (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
> (4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information
> …….
> (7) A notice under subsection (1), (3) or (5) must—
> (a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
> (b) contain particulars of the right conferred by section 50."

The language of "the exemption" in section 17(3)(b) remains the same as in section 2(2)(b). We return to this point when discussing and contrasting the language of Article 4 of Directive 2003/4 EC below.

29. We reject the DIT's argument that section 6(c) of the Interpretation Act 1978 applies so as to read "exemption" as including "exemptions". Section 6(c) does not apply in our view because the structure of section 2 of FOIA provides the 'contrary intention' under section 6 of the Interpretation Act. We agree with the Information Commissioner that the better reading of section 2(2) of FOIA, is that, properly construed, it sets out a structured approach which involves the public authority deciding each applicable exemption separately, starting with any absolute exemption: per section 2(2)(a). It is perhaps instructive that the statutory language in section 2(2)(a) is also focused on each applicable singular absolute exemption: "is exempt information by virtue of <u>a</u> provision conferring absolute exemption". We recognise, of course, that in the case of an absolute exemption one will suffice to deny the applicant the information and no public interest balance is in play. That lessens, to an extent, the support which section 2(2)(a) may give to our reading of section 2(2)(b), but the choice of "a" and "the" in the two subsections does, we consider, put a focus on the singular rather than on any or all applicable exemptions. If no absolute exemption applies the public authority needs to consider, sequentially, the public interest in maintaining each qualified exemption that is engaged and balancing that exemption-specific public interest against the public interest in disclosure.

30. The above reasoning is sufficient in our judgment to dispose of the DIT's argument relying on section 6c of the Interpretation Act. We should add that we

do not consider our reasoning gains any material support from paragraphs [82]-[84] of the Upper Tribunal's decision in *ICO v Malnick and ACOBA* [2018] UKUT 72 (AAC); [2018] AACR 29.

31. We acknowledge that our reading of FOIA on the issue of aggregations stands contrary to binding case law as to the effect of the equivalent provision in the separate, albeit related, field governing access to environmental information under the Environmental Information Regulations 2004 ("the EIR") and Directive 2003/4 EC on public access to environmental information ("the Directive"). Indeed, it was the desire for equivalence between these environmental information regimes and FOIA which seemingly influenced the FTT in this case to find in favour of aggregating the public interests in favour of maintaining the exemptions. We therefore need to spend a little time in examining the key case on aggregation under the EIR and the Directive. We say immediately, however, that the reason we do not consider that the case law under the EIR and the Directive provides the answer for FOIA is because the governing language in the relevant legal texts is materially different.

32. The leading case on aggregation under the EIR and the Directive is *Office of Communications v Information Commissioner* (Case C-71/10) [2012] 1 CMLR 7 ("the *Ofcom* case"). Before setting out what was decided by the Court of Justice of the European Union in the *Ofcom* case, we need first to set out the relevant parts of the EIR and the Directive.

33. Regulation 12 of the EIR, which in regulation 12(1)(b) includes a provision equivalent to that in section 2(2)(b) of FOIA, provides so far as is material as follows:

> "**Exceptions to the duty to disclose environmental information**
> **12.**—(1) ……a public authority may refuse to disclose environmental information requested if—
> (a) an exception to disclosure applies under paragraphs (4) or (5); and
> (b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information
> …..
> (4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—
> (a) it does not hold that information when an applicant's request is received;
> (b) the request for information is manifestly unreasonable;
> (c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;
> (d) the request relates to material which is still in the course of completion, to unfinished documents or to incomplete data; or
> (e) the request involves the disclosure of internal communications.
> (5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect—
> (a) international relations, defence, national security or public safety;
> (b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
> (c) intellectual property rights;
> (d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;
> (e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

> (f) the interests of the person who provided the information where that person—
> (i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;
> (ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and
> (iii) has not consented to its disclosure; or
> (g) the protection of the environment to which the information relates."

34. The underlining is ours and has been added for emphasis. The language of "the exception" in regulation 12(1)(b) is a very close mirror of the wording used in section 2(2)(b) of FOIA. However, the EIR seek to put into effect in domestic law the terms of the Directive and so regulation 12(1)(b) has to be read consistently with the relevant text in the Directive and the case law of the CJEU on that wording. The wording of the relevant part of the Directive is materially different from the language used in FOIA and this has led us to conclude that the aggregation result in the *Ofcom* case does not read across to FOIA.

35. The material part of the Directive in relation to regulation 12 of the EIR is Article 4, which provides, insofar as is relevant, as follows (we have underlined the most material part of Article 4 which in our view relates to regulation 12(1)(b) of the EIR):

> "Article 4
>
> Exceptions
>
> 1. Member States may provide for a request for environmental information to be refused if:
>
> (a) the information requested is not held by or for the public authority to which the request is addressed. In such a case, where that public authority is aware that the information is held by or for another public authority, it shall, as soon as possible, transfer the request to that other authority and inform the applicant accordingly or inform the applicant of the public authority to which it believes it is possible to apply for the information requested;
>
> (b) the request is manifestly unreasonable;
>
> (c) the request is formulated in too general a manner, taking into account Article 3(3);
>
> (d) the request concerns material in the course of completion or unfinished documents or data;
>
> (e) the request concerns internal communications, taking into account the public interest served by disclosure. Where a request is refused on the basis that it concerns material in the course of completion, the public authority shall state the name of the authority preparing the material and the estimated time needed for completion.
>
> 2. Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect:
>
> (a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law;
>
> (b) international relations, public security or national defence;
>
> (c) the course of justice, the ability of any person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;

> (d) the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy;
>
> (e) intellectual property rights;
>
> (f) the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for by national or Community law;
>
> (g) the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless that person has consented to the release of the information concerned;
>
> (h) the protection of the environment to which such information relates, such as the location of rare species.
>
> The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal. Member States may not, by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment."

36. It is the broader language of "the interest served by the refusal" in Article 4 which, in our judgment, is the critical distinction between Article 4 and section 2(2)(b) of FOIA.

37. The issue which the CJEU had to determine in the *Ofcom* case was whether aggregation of the interests against disclosure was allowed under Article 4(2) of the Directive and the EIR. The case arose in the context of a request for information about the sites of mobile telephone masts. Ofcom refused the request. The Information Commissioner ordered the information to be disclosed and the Information Tribunal (as it then was) dismissed Ofcom's appeal from that decision. The High Court upheld the Information Tribunal's decision. It held that there was a general duty to disclose and that the exceptions to that duty were tightly drawn. The High Court considered that the wording of regulation 12(1) of the EIR indicated that the exceptions must be considered 'exception by exception' and that this was supported by Article 4(2) of the Directive. The Court of Appeal allowed Ofcom's further appeal: *Ofcom v ICO* [2009] EWCA Civ 90. It concluded that references to 'an exception' under regulation 12(1)(a) of the EIR, and the similar wording in regulations 12(1)(b) of the EIR, had to be read as being to 'one or more exceptions' and that this reading was consistent with the Directive. It was the Court of Appeal's decision in the *Ofcom* case to which paragraph 17 of Mr Montague's submission to the FTT referred (see paragraph 19 above). On a further appeal, the Supreme Court was split 3:2 on this issue, see [2010] UKSC 3, and so referred the following question to the CJEU on the Directive.

> "Under [Directive 2003/4], where a public authority holds environmental information, disclosure of which would have some adverse effects on the separate interests served by more than one exception (in casu, the interests of public security served by Article 4(2)(b) and those of intellectual property rights served by Article 4(2)(e)), but it would not do so, in the case of either exception viewed separately, to any extent sufficient to outweigh the public interest in disclosure, does the Directive require a further exercise involving the cumulation of the separate interests served by the two exceptions and their weighing together against the public interest in disclosure?"

38. The CJEU answered that question as follows.

> "22 It should be noted that, as is apparent from the scheme of Directive 2003/4 and, in particular, from the second subparagraph of Article 4(2) thereof, and from recital 16 in the preamble thereto, the right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information only in a few specific and clearly defined cases. The grounds for refusal should therefore be interpreted restrictively, in such a way that the public interest served by disclosure is weighed against the interest served by the refusal.
>
> 23 It should be observed that, according to the introductory wording in Article 4(2) of Directive 2003/4, 'Member States may provide for' exceptions to the general rule that information must be disclosed to the public. That provision does not specify any particular procedure for examining the grounds for refusal in cases where a Member State has provided for such exceptions on that basis.
>
> 24 In that regard, it should be noted, first, that the second sentence of the second subparagraph of Article 4(2) provides that '[i]n every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal'. As the Advocate General stated in her Opinion, that sentence has an independent function, separate from that of the first sentence of the same subparagraph. The first sentence of the second subparagraph sets out the duty to weigh each of the grounds for refusal against the public interest served by disclosure of the information. If the sole purpose of the second sentence of the second subparagraph of Article 4(2) of Directive 2003/4 were to establish that duty, that sentence would be no more than a redundant and unnecessary repetition of the meaning conveyed by the first sentence of the same subparagraph.
>
> 25 Secondly, it should be observed that, when the interests involved are weighed, a number of separate interests may, cumulatively, militate in favour of disclosure.
>
> 26 Recital 1 to Directive 2003/4 sets out the various reasons for disclosure; they include, in particular, 'a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and … a better environment'.
>
> 27 It follows that the concept of 'public interest served by disclosure', referred to in the second sentence of the second subparagraph of Article 4(2) of that directive, must be regarded as an overarching concept covering more than one ground for the disclosure of environmental information.
>
> 28 It must accordingly be held that the second sentence of the second subparagraph of Article 4(2) is concerned with the weighing against each other of two overarching concepts, which means that the competent public authority may, when undertaking that exercise, evaluate cumulatively the grounds for refusal to disclose.
>
> 29 That view is not undermined by the emphasis placed in the second sentence of the second subparagraph of Article 4(2) on the duty to weigh the interests involved '[i]n every particular case'. Such emphasis is intended to stress that interests must be weighed, not on the basis of a general measure, adopted by the national legislature for example, but on the basis of an actual and specific examination of each situation brought before the competent authorities in connection with a request for access to environmental information made on the basis of Directive 2003/4 (see, to that effect, Case C-266/09 *Stichting Natuur en Milieu and Others* [2010] ECR I-0000, paragraphs 55 to 58).

> 30 Moreover, the fact that those interests are referred to separately in Article 4(2) of Directive 2003/4 does not preclude the cumulation of those exceptions to the general rule of disclosure, given that the interests served by refusal to disclose may sometimes overlap in the same situation or the same circumstances.
>
> 31 It should also be pointed out that, since the various interests served by refusal to disclose relate, as in the case in the main proceedings, to the grounds for refusal set out in Article 4(2) of Directive 2003/4, taking those interests into consideration cumulatively when weighing them against the public interests served by disclosure is not likely to introduce another exception in addition to those listed in that provision. If weighing such interests against the public interests served by disclosure were to result in a refusal to disclose, it would need to be acknowledged that that restriction on access to the information requested is proportionate and accordingly justified in the light of the overall interest represented jointly by the interests served by refusal to disclose.
>
> 32 In those circumstances, the answer to the question referred is that Article 4(2) of Directive 2003/4 must be interpreted as meaning that, where a public authority holds environmental information or such information is held on its behalf, it may, when weighing the public interests served by disclosure against the interests served by refusal to disclose, in order to assess a request for that information to be made available to a natural or legal person, take into account cumulatively a number of the grounds for refusal set out in that provision."

39. Parts of the CJEU's analysis coincides with our own about FOIA: for example, that the grounds for refusal of a request for environmental information should be interpreted restrictively and also in its analysis in paragraph 29 of the words "[i]n every particular case" (see our paragraph [26] above).

40. The CJEU's critical analysis, however, is in paragraph 28 of its decision, which depends on the wording of the sentence we have underlined in Article 4 above and in drawing an equivalence, based on an overarching approach, between the grounds *for* disclosure and those grounds which stand against disclosure. The overarching approach for disclosure is founded on the various reasons for disclosure found in recital 1 to the Directive and the breadth of the words "the public interest served by disclosure" in the sentence we have underlined. The CJEU in paragraph 28 of its decision applies the same overarching approach to the specified grounds *against* disclosure. It seems to us that it did so for two reasons. The first is because of the language used in the sentence which immediately precedes the one we have underlined in Article 4 – "The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure" – and the CJEU's view (see paragraph 24 of its decision) that this sets out a requirement to weigh each of the grounds for refusal against the public interest served by disclosure of the information. The second is because of the wide nature of the words ""the interest served by refusal". Neither of these legal considerations have any equivalent or analogue in FOIA.

41. The point of difference between Article 4 of the Directive as interpreted by the CJEU in the *Ofcom* case and section 2(2)(b) of FOIA is the language used in each legal instrument. We agree with Mr Montague that the language of "the interest served by refusal" used in Article 4 contrasts with the words "the public interest in maintaining the exemption" found in section 2(2)(b). The latter is a linguistic attachment to a particular exemption whereas the former is concerned more generally with the outcome of the refusal. It is in this context that the

language of section 17(3)(b) of FOIA returns to have relevance. Notwithstanding that the title of section 17 deals with the perhaps more general outcome of the refusal of a request, the language used in section 17(3)(b) remains the more specific "maintaining the exemption".

42. It is for all these reasons that we have concluded that the aggregation of the public interests arising under different qualified exemptions against disclosure is not permitted by FOIA, whatever the position may be, or have been, under the Directive and the EIR.

43. Nor is there any binding *ratio* which requires us to conclude differently. The cases which have arisen under the EIR and the Directive are distinguishable precisely because the Directive is a different legal regime with a materially different relevant legal wording. As for the High Court's decision in *Home Office v IC* [2009] EWHC 1611 (Admin), strictly speaking it is not binding on us as it is a decision of a coordinate jurisdiction: *Chief Supplementary Benefit Officer v Leary* [1985] 1 WLR 84 and *Gilchrist v Revenue and Customs Commissioners* [2014] UKUT 162; [2015] Ch. 183. In any event, we agree with the FTT that the High Court proceeded on an assumption, which was *obiter* in any event, that the aggregation conclusion of the Court of Appeal in the *Ofcom* case under the EIR and the Directive applied equally to FOIA. Similar assumptions, without any argument, were also made by the Upper Tribunal in *Evans v ICO* [2012] UKUT 313 (AAC) at para. [207] and *Home Office v IC and Bingham Centre for the Rule of Law* [2015] UKUT 308 (AAC) at para. [51]. The only reasoned decision in which aggregation of the public interests against disclosure under different exemptions was seemingly found to apply under FOIA is that of the First-tier Tribunal in *Department of Health v ICO* (EA/2013/0087). As a decision of the First-tier Tribunal it cannot bind us. We also consider the decision to be wrong.

44. The FTT therefore erred in law in concluding that aggregation of the public interests against disclosure arising under different qualified exemptions is permitted by FOIA.

45. Our conclusion means we do not need to address the question of how such aggregation could rationally take place were it permitted by FOIA. The issue arises because the CJEU in the *Ofcom* case did not say aggregation of differing exceptions against disclosure was required under the Directive but only that it 'may' take place: see paragraph [28] of the CJEU's decision. The First-tier Tribunal in the *Department of Health* case referred to above mapped out some of the issues and problems that may arise when a decision maker seeks to lawfully and rationally exercise such a discretion. One example is the extent to which the public interests to be aggregated overlap or are connected. If they do not overlap at all, the rational basis for aggregation may be lacking. On the other hand, if the public interests directly coincide it may be difficult to identify which interests stand to be aggregated, or why aggregation is needed and what it would add. We sympathise with those that need to address these issues under the EIR, but it is not an issue which arises under FOIA.

46. We did not receive any real assistance from either the ICO or the DIT on why the FTT's wrong legal approach on aggregation was not a material error of law, as they both contended. Their arguments rose no higher than it was to be doubted that the FTT's error of law here was material as the public interests in play against disclosure under sections 27(1) and 35(1) of FOIA were 'broadly similar' in any event. Neither party took us through any of the evidence to make good this

proposition. In such a situation, and given the FTT's conclusion that the public interest in disclosure was only "narrowly outweighed" by the public interest in maintaining the exemption (paragraph 114 of the FTT's decision), we are not prepared to conclude that the error of law here was immaterial in circumstances where the FTT's approach to the evidence before it was mistaken from the outset because of its wrong view about the law and how it was to be applied to that evidence. Even ignoring the other errors of law we identify in the FTT's decision, it is not glaringly obvious to us that the public interests against disclosure under sections 27 and 35 of FOIA coincided.

The Public Interest Timing Issue

47. The time at which the public interest considerations fall legitimately to be considered on a FOIA request is in play in this appeal. This is because in its consideration of "a number of factors which go substantially to reduce the public interest in disclosure of the withheld material", the FTT relied (in paragraph 110 of its decision) on information which had come into the public domain well after the DIT had made its decision to refuse Mr Montague's request.

48. We agree with the parties that, like the aggregation issue above, the answer to when the public interest considerations fall to be judged is to be provided by construing the relevant statutory provisions in context.

49. In paragraph 110 of the decision the FTT stated that:

> "…..there was a body of material that was (or should have been) disclosed under Mr Montague's FOIA request which was of some substance in itself, in particular the existence of particular TWGs, the dates of their meetings, the names of senior UK officials attending and (as we have found) plans for the establishment of new TWGs and any schedule of forthcoming meetings of TWGs. The public was not therefore wholly in the dark on these matters as at March 2018."

It was not disputed before us that some of the information listed in this paragraph by the FTT was only disclosed to Mr Montague by the DIT in March 2019, during the course of Mr Montague's complaint to the Information Commissioner, and some of the information referred to in the paragraph was information the FTT was ordering should be disclosed by 28 August 2020.

50. Even putting to one side for the moment the issue of what as a matter of law is the correct date for assessing the public interest balance, the FTT's closing sentence in paragraph 110 is not easy to understand in terms of its relevance to the public interest balancing exercise with which the FTT was engaged. Assuming at this stage that March 2018 is the correct date, the sentence relies on information which the public could have had no knowledge of in March 2018 (for example, the dates of the TWG meetings, which were only disclosed to Mr Montague in March 2019), as indicating that the public were not wholly in the dark a year earlier about the meetings. Further, the whole of paragraph 110 was stated by the FTT to be a 'factor' which went substantially to reduce the public interest in disclosure of the withheld information. However, either the March 2019 information disclosed to Mr Montague was irrelevant to the public interest balance or it was not. It cannot be taken into account and ignored at the same time. The sentence is thus confused and confusing, and at a minimum indicates confused (and thus inadequate) reasoning on the part of the FTT.

51. The confusion is not helped by the FTT's use of the phrase "or should have been" earlier in paragraph 110. This appears to suggest that information that ought to

have been disclosed, but had not been, at the relevant time may nonetheless count as a 'factor' *against* disclosing that information, which is illogical. Insofar as the words 'should have been disclosed' were instead intended to refer to the information the FTT was itself ordering should be (and ought to have been) disclosed by the DIT (for example, the 'bare agendas' for the meetings), we can see no proper basis for the proposition that information which at the time of the FTT's decision was still to be disclosed is relevant to the public interest balancing exercise the FTT purported to be conducting as at 6 March 2018. The case law we refer to below, such as *Evans* and *APPGER*, address a debate about whether the correct date for assessing the public interest balance is the date of the public authority's refusal decision (perhaps including the date of any internal review of the decision) or is the date of the FTT's hearing on a challenge to such a refusal decision which has been upheld by the Information Commissioner. On any analysis, however, both dates cannot be correct, but the FTT in paragraph 110 appears to run both of the dates together or at least finds relevance in the circumstances obtaining on both of them.

52. We say all of the above having taken into account that earlier in its decision (at paragraph 10) the FTT, in a general exposition of the relevant law on the appeal, had stated that it was well established that the date at which the public interest balance was to be assessed was "the date of the public authority's refusal to disclose the information" and that "[e]vidence about subsequent events is only relevant in so far as it throws light on the position as it was at that date". Save for whether the date of the public authority's refusal to disclose the information extends to the date of any internal review of its original refusal decision, which we address below, what is said by the FTT in paragraph 10 of its decision is a correct statement of the law. However, that makes its subsequent reasoning and approach in paragraph 110 if anything all the more difficult to understand. For example, the evidence of what was later disclosed to Mr Montague could only credibly cast light on the fact that such information had not been disclosed to him by the DIT at the date of the refusal decision.

53. The DIT sought to defend the FTT's approach by arguing that it did not err in taking into account the information which had been disclosed to Mr Montague in March 2019. It argued that the material date was the date of the public authority's final decision on the request following any internal review, and here that decision was in December 2018 which had led to the further information being disclosed in March 2019. It relied on a First-tier Tribunal's decision in *Ministry of Justice v IC and Cowling* (EA/2020/0136) from March 2021. We do not accept the DIT's argument here or the view of the FTT in *Cowling* which is not binding on us and which we find unpersuasive. We should add that even ignoring the wider public interest timing issue, the DIT's argument fails to provide any adequate explanation for why the FTT returned to March 2018 in the final sentence in paragraph 110. Nor does it provide any answer to the question why information which had not even disclosed by March 2019 was relevant to the public interest balance.

54. On the public interest timing issue, it has been settled practice, if not law, since the Supreme Court's decision in *R(Evans) v HM Attorney General* [2015] UKSC 21, [2015] 1 AC 1787, that the balancing of the public interest factors in favour and against disclosure falls to be judged "as at the date of the original refusal" (para. [73]). The full context on this point is in paragraphs [72] and [73] of *Evans*:

> "72……It is common ground, in the light of the language of sections 50(1), 50(4) and 58(1), which all focus on the correctness of the original refusal by the public authority, that the Commissioner, and, on any appeal, any tribunal or court, have to assess the correctness of the public authority's refusal to disclose as at the date of that refusal…….
>
> 73. However, although the question whether to uphold or overturn (under section 50 or sections 57 and 58) a refusal by a public authority must be determined as at the date of the original refusal, facts and matters and even grounds of exemption may, subject to the control of the Commissioner or the tribunal, be admissible even though they were not in the mind of the individual responsible for the refusal or communicated at the time of the refusal to disclose (i) if they existed at the date of the refusal, or (ii) if they did not exist at that date, but only in so far as they throw light on the grounds now given for refusal….."

55. This conclusion on public interest timing was made in a context where (per paragraph [39] of *Evans*) the refusal decision may have been assumed to include the period up to when the public authority "ought to have concluded its internal review of the decision to refuse the request".

56. *Evans* was followed and affirmed in *APPGER v IC and FCO* [2015] UKUT 377 (AAC); [2016] AACR 5, and later still in *Maurizi v IC and CPS* [2019] UKUT 262 (AAC). The Upper Tribunal summarised the issue before it on this point in *APPGER* at paragraph [44].

> "The issue of principle that arises here is the date at which the public interest balancing test is to be applied (we call this the "public interest timing point"). The question is whether the public interest should be assessed by reference to the circumstances at or around the time when the request was considered by the public authority (including the time of any internal review) or rather by reference to the circumstances as they exist at the time of the tribunal hearing (in this instance the Upper Tribunal reconsideration hearing). In the present case, all parties before the F-tT had proceeded on the basis that the applications of the exemptions and the public interest balance were to be considered at or around the time of (at the latest) the date of the FCO's internal review (in June 2009). This shared understanding was in accord with the prevailing orthodoxy."

57. It needs emphasising that it was not disputed in *APPGER* that the date of the public authority's decision refusing the request would include any timeous review of that decision by the authority. This, as the three-judge panel of the Upper Tribunal said in *APPGER*, was based on the "prevailing orthodoxy".

58. The focus of the parties' arguments has shifted somewhat over the course of this appeal to the Upper Tribunal, not least in response to directions we issued following the oral hearing. Those directions were materially in the following terms:

> "1. We regret the need for these further directions. However, our deliberations on one of the issues of wider importance on Mr Montague's appeal – the "public interest timing issue" – means that at present we are minded to conclude that none of the parties' arguments on this issue is correct. Our provisional view is that the correct time for determining the balance of the public interests arguably ought to be the date the public authority makes its decision on the request which has been made to it but that decision making time does not include any later decision made by the public authority reviewing the refusal decision it has made on the request.
>
> 2. In this case the date the Department for International Trade ("DIT") refused (the bulk of) the request was 8 February 2018. It would appear that no further information may have been put into the public domain between that date and the

> DIT's first review on 6 Mach 2018. To that extent it may be argued that the difference between these two dates is not material on the facts of this case. However, even if this is the case, the assessment of materiality can only properly be made once it has been decided what the correct date is at which the competing public interests are to be judged.
>
> 3. At present we consider it is arguable that the conclusion set out in the first paragraph above is supported by the language of "as at the date of the original refusal" (our emphasis) used in paragraph [73] of *R(Evans) v HM Attorney General* [2015] UKSC 21, [2015] 1 AC 1787. We are not currently persuaded that either of the two other main authorities cited to us on this point – *APPGER v IC and FCO* [2015] UKUT 377 (AAC); [2016] AACR 5 and *Maurizi v IC and CPS* [2019] UKUT 262 (AAC) - decided as part of their *ratio* that the public authority's decision includes any in-time review of its original refusal. In *APPGER* it appears it was simply accepted as part of the "prevailing orthodoxy" that the review decision was included. And the language in *Maurizi* (at paragraph [163]) of the Information Commissioner inquiring "into the way in which a public authority completed the activity of responding to a request for information made under FOIA" does not seem to us to really advance matters as the question remains *when* the law requires the request to be answered. In answering that question we note that the legality of the public authority's actions under FOIA is to be judged, by the Information Commissioner under section 50 of FOIA, in terms of whether that public authority dealt with the request in accordance with the requirements of Part I of FOIA. There is, as we understand it, no requirement in Part I of FOIA for a public authority to carry out a review of its decision refusing the request. We therefore struggle at present to identify the legal basis for a review decision forming part of the decision-making function on which a public authority is to be judged under FOIA.
>
> 4. We are concerned, however, that the above possible answer to the "public interest timing issue" is not one which the parties have addressed to date, the focus being on whether the DIT's second review, in December 2018, could be taken into account. We are further mindful that, despite the Information Commissioner inviting the Upper Tribunal to "give a definitive ruling, so as to put the position beyond doubt" on the "public interest timing issue", that was seemingly from the Information Commissioner's perspective that it was settled law that an in-time review was included in the 'public authority's decision' and that the "unfinished business" concerned whether a second, out of time review could be included. We have sought to indicate above why we consider this perspective may be flawed. However, we consider that given the shape of the parties' arguments to date, they should have an opportunity to set out any further arguments they may wish to make on the "pubic interest timing issue"."

59. We are grateful for the further arguments all the parties have made in response to the above directions. The Information Commissioner continues to argue that the public interest timing issue is to be answered by focusing on the date of the public authority's initial decision refusing the request **and**, where applicable, the date of any internal review of that decision, as long as that review has been conducted in time. Mr Montague now pins his colours more firmly to the mast of the public interest timing being answered only as at the date the request is refused. The DIT supports the Information Commissioner's argument but seeks to go further by continuing to argue the public interest timing issue is to be judged as at the date of the public authority's "final" decision on the request, which on the facts of this appeal would extend to the DIT's second review decision in December 2018.

60. We do not accept the argument that the public authority's decision refusing the request includes the upholding of that decision following the internal review of that decision by the authority. It is an argument with no clear statutory basis, arguably stands contrary to the wording used by the Supreme Court in *Evans*, and lacks material support from *APPGER* because the point was not in issue in that case. We also do not consider that *Maurizi* decides this point conclusively in favour of the refusal decision including the upholding of that decision on review.

61. Although the language in *Evans* of original refusal may be explained simply on the basis of it identifying the public authority's refusal as opposed to any later stage of decision making on the same request, the structure of sections 50 and 58 of FOIA do not lend themselves to either the Information Commissioner or the First-tier Tribunal making decisions to refuse the request. This is a point to which Lord Neuberger refers and appears to have considered was well made in paragraph [72] of *Evans*, albeit it was based on a commonality of argument before the Supreme Court in that case. Seen from this perspective, the views of the Upper Tribunal in *Evans*, as recorded in paragraph [39] of the Supreme Court's judgment in *Evans* (see paragraph 54 above), may provide a point of contrast with the language of the 'original refusal' decision.

62. The Information Commissioner's function under section 50(1) of FOIA is to decide "whether…a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I [of FOIA]". We will return shortly to address what the 'requirements' of Part I include. The short point, however, is that they involve no requirement for a public authority to review its decision refusing the request. Moreover, if the Information Commissioner finds that a public authority has failed to communicate information under section 1(1) when it ought to have done so, has failed to communicate the information by an appropriate means (per section 11 of FOIA), or has not given the requestor an appropriate notice of its refusal decision (per section 17 of FOIA), by section 50(4) he is required to serve a decision notice on the public authority specifying the steps the public authority must take to remedy the failure. As a matter of statutory language, the Information Commissioner is not himself charged with redeciding the request. Even the enforcement notice provisions in section 52 of FOIA are about the Information Commissioner requiring the public authority to remedy a mistake it has made under Part I. The Information Commissioner is still provided with no statutory basis for deciding the request. He is to decide whether the public authority dealt properly with the request. Likewise, the FTT's role under section 58 is focused on the correctness of the Information Commissioner's notice under appeal. Again as a matter of the statutory language, the FTT's function is not to redecide the request.

63. When read in context the language of 'original decision' in *Evans* therefore supports a conclusion that the competing public interests have to be judged at the date of the public authority's decision on the request under Part I of FOIA and prior to any internal review of that initial decision. And *Evans* certainly lends no support to the DIT's argument about the appropriate date here being the 'final' decision of the public authority whenever so made.

64. Nor, in our judgment, does either *APPGER* or *Maurizi* advance matters any further on this issue of when precisely the date of the public authority's refusal decision is to be identified. The positing in paragraph [52] of *APPGER* of the Information Commissioner being "charged with assessing past compliance with

FOIA" does not take matters any further forward as it leaves unanswered when precisely the public authority is to comply with a request for information under FOIA. Nor, for the same reasons, do we consider *Maurizi*'s reference (at paragraph [163]) to the Information Commissioner inquiring "into the way in which a public authority completed the activity of responding to a request for information made under FOIA" really advances matters. The issue remains when the law requires the request to be answered.

65. However, both decisions assist in pointing to the need to identify, if possible, in the primary legal source, FOIA, the obligation on the public authorities as to when it is to decide a request. As we have referred to above, the critical wording is that of whether the public authority has dealt with a request for information in accordance with the requirements of Part I of FOIA. The requirements of Part I of FOIA in terms of deciding a request for information are all concerned with the (initial) decision on the request for information. Nothing in Part I of FOIA imposes any obligation on a public authority to review a refusal decision and redecide it. Section 1(1) falls within Part I and, as we have seen, sets out the core FOIA duty if a public authority holds the information requested to communicate that information to the requestor subject to, inter alia, an exemption not applying to that information. Section 1 of FOIA does not, however, provide any time frame for the public authority deciding the request, although it does in section 1(3) put a hold on the need to comply with subsection (1) if the public authority reasonably requires further information in order to identify and locate the information requested.

66. Section 10, which is also in Part I of FOIA, does provide the time frame. It is titled "Time for compliance with requests" and provides so far as is relevant as follows.

> "10.-(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
>
> (2) Where the authority has given a fees notice to the applicant and the fee is paid in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.
>
> (3) If, and to the extent that—
>
> (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
>
> (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,
>
> the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.
>
> (4) The Minister for the Cabinet Office may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with, the regulations."

67. Section 10 needs to be read with section 17, which is also in Part I of FOIA and which concerns the notification by a public authority of a refusal of a request.

(Presumably no notice is required under the Act where a request is met in full as compliance with the request is sufficient in itself to satisfy section 1.) We have set out the key parts of section 17 earlier in this decision. The important point for present purposes is that both sections 10 and 17 are concerned with the time limit(s) for complying with the request and what must be set out when refusing a request. The need to make a decision on the request, whether to meet or refuse it, is not explicitly provided for in FOIA, save for in section 17(2), but is necessarily implicit in the function of the public authority in responding to the request. Crucially, however, the decision is made on the request and once made, as far as Part I of FOIA is concerned, brings to an end that which the public authority is required by law to do by Part I of FOIA. There is nothing in Part I of FOIA, or elsewhere in the Act, that imposes any obligation on a public authority to review a decision it has made to refuse a request.

68. Even where a complaints procedure is referred to in respect of the handling of a request for information, in section 17(7)(a), it is expressly acknowledged that a public authority is not required to have such a procedure in place. We repeat for convenience the language in section 17(7)(a) of FOIA: "A notice under subsection (1), (3) or (5) must….contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure" (our underlining added for emphasis). On the assumption that such a procedure may cover an internal review of the refusal decision, section 17(7)(a) makes explicit that it is not a requirement of Part I of FOIA to have such a procedure.

69. Nor in our view can such a reviewing decision making function be insinuated into Part I as somehow part of the decision making required under Part I. To do so in our judgment would extend beyond any decision making that a public authority is required to make by necessary implication under Part I of FOIA. It would also stand contrary to section 17(7)(a), both for the reasons given immediately above, but also because the "complaint" about the handling of the request for information (i.e. a request for internal review) is contemplated by that subsection as being separate from the handling of the request for information (including the refusal decision).

70. We therefore reject the arguments of the Information Commissioner and the DIT that section 17(7)(a) of FOIA provides material support for an internal review carried out by a public authority forming part of the requirements of Part 1 of FOIA. The most that section 17(7)(a) requires is that *if* an internal review procedure is provided by a public authority, it informs the requestor of this fact. Not to provide that information where an internal review procedure is provided by the public authority would be a breach of Part I of FOIA. But it is a very long way from this requirement to provide information – to tell the requestor when their request has been refused that a complaints procedure exists or does not exist – to imply that an internal review which is provided by a public authority and is then used by the requestor is a decision making step which is required by Part I of FOIA.

71. It is, moreover, important to note that the language of section 17(7(a) is not expressly about a 'review decision making mechanism' possibly being made available by the public authority. All that is contemplated by section 17(7)(a) is that a public authority may have in place a procedure for dealing with "complaints" about the handling of the request for information. That language does not

necessarily compel a public authority which has a complaints procedure in place to include within it a full merits reconsideration or review of its refusal of the request. The language of section 17(7)(a) of FOIA does nothing, therefore, to require an internal full merits review to be made under Part I of FOIA, even where a public authority has in place the complaints procedure contemplated by that subsection.

72. A further argument made by the Information Commissioner and the DIT on the relevance of an internal review decision made by the public authority, and such a decision forming part of the requirements of Part I of FOIA, rests on section 50 of FOIA and subsection (2)(a) of that section in particular. Section 50 provides, so far as is material, as follows:

> "**Application for decision by Commissioner.**
>
> 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.
>
> (2) On receiving an application under this section, the Commissioner shall make a decision unless it appears to him—
>
> (a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,
>
> (b) that there has been undue delay in making the application,
>
> (c) that the application is frivolous or vexatious, or
>
> (d) that the application has been withdrawn or abandoned.
>
> (3) Where the Commissioner has received an application under this section, he shall either—
>
> (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
>
> (b) serve notice of his decision (in this Act referred to as a "decision notice") on the complainant and the public authority.
>
> (4) Where the Commissioner decides that a public authority—
>
> (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
>
> (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.
>
> (5) A decision notice must contain particulars of the right of appeal conferred by section 57.
>
> (6) Where a decision notice requires steps to be taken by the public authority within a specified period, the time specified in the notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, no step which is affected by the appeal need be taken pending the determination or withdrawal of the appeal."

73. We reject this argument as well. In our judgment, all section 50(2)(a) of FOIA is concerned with is providing a procedural mechanism that allows, but does not require, the Information Commissioner to put on hold his consideration of an

application made under section 50(1) of FOIA until the requestor has exhausted any complaints procedure the public authority may have put in place pursuant to the Code of Practice made under section 45 of FOIA. The function of section 50(2)(a) is procedural only and is a limited and negative one. It entitles the Information Commissioner not to address the application but it does not require him not to do so. Less so does it make the public authority's decision on the complaint a requirement of Part I of FOIA. The use of the word "shall" in the opening clause of section 50(2) only places a requirement on the Information Commissioner. Furthermore, that requirement is only to decide the application where none of the exceptions in subsection (2)(a)-(d) apply. But the Information Commissioner would be entitled on the language of section 50(2), if he so wished and his resources allowed, to decide a section 50(1) application even where the requestor had not exhausted the public authority's complaints procedure. The proper and rational basis for the Information Commissioner so acting may not be evident, but the important point in our judgment is that the limited reach of the language of requirement ("shall") used by Parliament in section 50(2) of FOIA says nothing about whether an internal review decision made pursuant to section 45 of FOIA is required by Part I of FOIA.

74. We therefore reject the DIT's argument that the language of section 50(2) of FOIA requires a requestor to exhaust the public authority's complaints procedure before applying to the Commissioner under section 50(1) of FOIA. That is simply not what section 50(2) says. Moreover, this argument also misses the point because it fails to demonstrate why steps taken by a requestor and public authority pursuant to a complaints procedure made under the Code of Practice, which itself is made under section 45 of FOIA, amount to a requirement under Part I of FOIA, given that neither sections 45 or 50 appear in Part I of FOIA.

75. The Information Commissioner, with whom the DIT agrees, argues further that section 50(2)(a) of FOIA shows that when making his decision under section 50 of FOIA he must take account of the outcome of any complaints procedure. We do not necessarily disagree with this forensic observation. However, it does not follow from this that that outcome necessarily falls to be taken into account as part of whether the public authority dealt with the request for information in accordance with the requirements of Part I of FOIA. This begs the very question in issue, namely what is the legal basis for that outcome being part of a requirement of Part I of FOIA when it manifestly is not required by anything in Part I?

76. Furthermore, this argument ignores that the Information Commissioner may legitimately take account of the outcome of the review decision under section 50 of FOIA otherwise than in determining whether the request for information was dealt with in accordance with the requirements of Part I of FOIA. Take the example where no information is provided in response to a request but the information is then provided in full under the public authority's complaints procedure. It would in our judgement be open to the Information Commissioner to decide on any section 50 complaint made by the requestor that the public authority had not acted in accordance with requirements of Part I of FOIA in refusing the request, and issue a Decision Notice to that effect under section 50(3)(b) and (4)(a), but, because the information had since been provided in full, specify in that Notice that no further steps need be taken by the public authority: see to like effect *Information Commissioner v HMRC and Gaskell* [2011] UKUT 296 (AAC) (at paragraphs [24]-[31]), *Home Office v ICO and Cobain* [2015] UKUT

27 (AAC) and *Sturmer v ICO and North East Derbyshire District Council* [2015] UKUT 568 (AAC) (at [para. [92]).

77. We would add the following on the closing wording of section 50(4) of FOIA, though we stress that we have had no argument on this point and as a result are not expressing a definitive view on it, and are also mindful that the Upper Tribunal in *Gaskell* considered the wording to be ambiguous. A further consideration is that the point we have made in paragraph 76 above can obtain simply on the case law referred to at the end of that paragraph. However, it appears at least arguable that the critical wording, which we underline for emphasis, of section 50(4) – the decision notice must specify the steps which must be taken [by the public authority to comply with a requirement under Part I of FOIA that did apply to it at the time of its decision on the request] – only require (the first "must") steps which must be taken to be specified in the Decision Notice. The language used does not dictate that steps must be taken in all circumstances. All the language requires is that *where* steps remain to be taken by the public authority to meet the requirements of Part I of FOIA, those steps **must** be specified in the Decision Notice.

78. It is convenient to address at this stage the policy arguments made by the Information Commissioner for why the in-time internal review stage should count as part of a public authority's decision making on the request, or, to use the language of *Evans*, as part of its "original refusal". These policy arguments were, effectively, that to enable the in-time review decision process to count as part of the original refusal would encourage public authorities to adopt such review procedures and more generally would promote compliance with FOIA and the Code of Practice: per sections 45 and 47 of FOIA (see further below for their terms). We are not persuaded that the necessarily imprecise and somewhat ephemeral nature of the Information Commissioner's obligations under section 47 of FOIA can drive a statutory result which otherwise is unobtainable under ordinary canons of statutory construction. Furthermore, for the reasons we have just given (in paragraph 77), our construction of FOIA is not inimical to the Information Commissioner seeking to promote compliance with the requirements of FOIA. The focus as to public authorities seeking to provide that compliance simply needs to be on the point at which it decides the request, but any internal review decision making may still inform whether the public authority may be required to take steps under a Decision Notice following the Information Commissioner's consideration of an application made by the requestor against the refusal of their request.

79. A further argument advanced before us in favour of an in-time review counting within the period of a public authority's refusal decision founded on sections 45 and 47(1)(b) of FOIA. Neither section is, however, in Part I of FOIA. Both sections are in Part III, which is concerned with the "General Functions of the Minister for the Cabinet Office, Secretary of State and Information Commissioner".

80. Section 45, insofar as is relevant, is in the following terms.

> "**Issue of code of practice by the Minister for the Cabinet Office.**
>
> 45.-(1) The Minister for the Cabinet Office shall issue, and may from time to time revise, a code of practice providing guidance to public authorities as to the practice which it would, in his opinion, be desirable for them to follow in connection with the discharge of the authorities' functions under Part I.

(2) The code of practice must, in particular, include provision relating to—

(a) the provision of advice and assistance by public authorities to persons who propose to make, or have made, requests for information to them,

(b) the transfer of requests by one public authority to another public authority by which the information requested is or may be held,

(c) consultation with persons to whom the information requested relates or persons whose interests are likely to be affected by the disclosure of information,

(d) the inclusion in contracts entered into by public authorities of terms relating to the disclosure of information,

(da) the disclosure by public authorities of datasets held by them, and

(e) the provision by public authorities of procedures for dealing with complaints about the handling by them of requests for information…..

(3) Any code under this section may make different provision for different public authorities.

(4) Before issuing or revising any code under this section, the Minister for the Cabinet Office shall consult the Commissioner.

(5) The Minister for the Cabinet Office shall lay before each House of Parliament any code or revised code made under this section."

81. Section 47(1) of FOIA states as follows.

"**General functions of Commissioner.**

(1) It shall be the duty of the Commissioner to promote the following of good practice by public authorities and, in particular, so to perform his functions under this Act as to promote the observance by public authorities of—

(a) the requirements of this Act, and

(b) the provisions of the codes of practice under sections 45 and 46."

82. We were shown part 5 of the Code of Practice made under section of 45 of FOIA. This deals with 'Internal Reviews'. This states, inter alia, that "[i]t is best practice for each public authority to have a procedure in place for dealing with disputes about its handling of requests for information. These disputes will usually be dealt with as a request for an "internal review" of the "original decision". This part of the Code continues "[i]t is usual practice to accept a request for an internal review made within 40 working days of the [refusal decision]" and "[t]he internal review procedure should provide a fair and thorough review of procedures and decisions taken in relation to the Act…[including] decisions taken about where the public interest lies if a qualified exemption has been used".

83. We can leave to one side whether provision for internal review of a refusal decision falls within the *vires* of section 45(1) and whether such a review is 'in connection with' public authorities' functions under Part I if, as we have held, those decision making functions end when the request has been decided and either met or refused. We can also leave to one side whether the internal review contemplated by the Code is a full merits review in which all matters can be redecided or is instead just a review of the processes by which the public authority came to its refusal decision. The language in the Code may point more to the former. Imprecision and flexibility in such language is in the nature of what the

Code is, which is guidance to public authorities on what it is considered it would be 'desirable' for them to do.

84. The central difficulty for the argument made relying on sections 45, 47(1)(b) and the Code is that none of them impose any requirement, either generally under FOIA or more specifically under Part I of FOIA, on the public authority to carry out an internal review of a refusal decision. The general guidance made and perhaps sanctioned under section 45 is in our judgment too slender a branch on which to hang the argument that a public authority's refusal decision includes any decision it may make on an internal review of that decision. The terms of section 47(1) of FOIA, if anything, stand against that argument as they draw a distinction between promoting observance of the requirements of FOIA and the Code. Promoting the observance of what effectively in legal terms is a voluntary Code concerning internal reviews cannot convert such reviews into stages of decision making that are required by Part I of FOIA.

85. Returning to *APPGER*, its language of "the Commissioner (and the FTT) is charged with assessing past compliance with FOIA" is to be understood, in our judgment, as meaning complying with the requirements of Part I of FOIA. It cannot and should not be taken as meaning compliance generally with or under any of the provisions of FOIA, such as the Code of Practice. Likewise, Upper Tribunal Judge Mitchell's speaking in paragraph [163] of *Maurizi* of the Commissioner under section 50(1) of FOIA inquiring "into the way in which the public authority completed the activity of responding to a request for information under [FOIA]" cannot mean how it generally and as a matter of fact completed that activity. As a matter of fact, the activity of responding to the request may have included carrying out an internal review of the refusal decision. But that review action was not an activity which was required by Part I of FOIA, and it is only the latter with which the Information Commissioner is concerned under section 50(1) of FOIA.

86. For the reasons set out above, in our view there is no basis for a public authority to be found under section 50 not to have dealt with the request for information in accordance with the requirements of Part I of FOIA if it did not offer to review its refusal decision or made a mistake in the process of reviewing its decision. What the public authority has to show is that its refusal of the request was in accordance with Part I of FOIA. It is not required to show that it acted in accordance with considerations outwith Part I. The public authority is not to be judged on the balance of the competing public interests on how matters stand other than at the time of the decision on the request which it is has been obliged by Part I of FOIA to make.

87. We therefore conclude that the FTT erred in law in its decision, and in paragraph 110 of that decision in particular, in not confining itself to assessing the balance of the competing public interests for and against disclosure on the basis of matters as they were at the date of DIT's (initial) refusal decision of 8 February 2018. Some information was provided by the DIT to Mr Montague on that date but for present purposes it is the decision of the DIT to refuse the rest of the request which amounts to the refusal decision.

88. It is likely to be the case (though this may need to be established on the evidence if disputed on the remitted appeal) that nothing of any material relevance changed

in terms of the competing public interests, including the information in the public domain, between the date of the refusal decision on 8 February 2018 and that decision being upheld by the DIT on internal review on 6 March 2018.

89. We have already highlighted in paragraphs 49-52 above the confused reasoning of the FTT in paragraph 110 of its decision. The wider error the FTT made in that paragraph was on the face of it to weigh in the effect on the public interest balance disclosures that only took place *after* 8 February 2018, including moreover disclosures that were yet to take place.[2] This was the wrong legal approach. The correct approach was for the FTT to ask, in respect of each piece of information separately, whether at the date of the 8 February 2018 refusal decision, the public interest in maintaining a given exemption outweighed that in favour of disclosure, taking account of anything that was already actually in the public domain as at 8 February 2018.

90. The Information Commissioner and the DIT argue that any error of law the FTT made in paragraph 110 of its decision was not material to the decision to which it came because paragraph 110 was but one out of five factors which the FTT considered went "substantially to reduce the public interest in disclosure of the withheld material": per para. 106 of the FTT's decision. We do not accept this argument. It is true that paragraph 110 was one of five factors but we cannot discern with any degree of confidence the weight the FTT attached to each of those factors, and particularly that (wrongly) identified in paragraph 110, when determining the substantial reduction in the interests favouring disclosure. And perhaps more importantly, when the FTT set out its conclusion on the public interest balance that 'substantial reduction' only meant that (per para. 114 of the FTT's decision) "the public interest in maintaining the exemptions *narrowly outweighed* the public interest in disclosure of the withheld material in so far as it consisted of minutes of the TWG meetings, even in the case of the US working group" (the italics are ours and have been added for emphasis). In what was obviously a very finely balanced assessment of the competing public interests, we cannot conclude that the mistake the FTT made in paragraph 110 would have made no difference to its decision. We need put it no higher than had the FTT rightly ignored most of the information to which it referred in paragraph 110 (that is, information which was not in the public domain on 8 February 2018), it *may* have come to a different conclusion.

Mr Montague's other grounds of appeal

91. We can deal with other grounds of appeal advanced by Mr Montague rather more briefly.

92. He argues firstly that the FTT erred in law in its conclusion that section 27 of FOIA was engaged. Section 27 of FOIA is concerned with 'international relations' and provides, insofar as is relevant on this appeal, as follows.

> "27.-(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

[2] That this is what the FTT did is supported by the refusal of permission decision made by the presiding judge of the FTT on 16 October 2020 where he stated (at paragraph 14 of that refusal decision) "the Tribunal was considering the public interest in disclosure of agendas and minutes of TWG meetings; it was obviously relevant to consider this in the context of information about TWGs that was disclosed *or disclosable* to the public" (our italics for emphasis).

> (a) relations between the United Kingdom and any other State,
>
> (b) relations between the United Kingdom and any international organisation or international court,
>
> (c) the interests of the United Kingdom abroad, or
>
> (d) the promotion or protection by the United Kingdom of its interests abroad.
>
> (2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.
>
> (3) For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held."

93. The main criticisms levelled by Mr Montague against the FTT finding that section 27 was engaged are that it did not specify which limbs of section 27(1) it found were made out on the evidence and that such findings were not supported by the evidence before it, particularly the evidence of Mr Alty, who was a senior official within the DIT, either taking that evidence on its own or when measured against the evidence put before the FTT on behalf of Mr Montague. Reading the FTT's decision fairly and as a whole we do not consider either criticism is justified in error of law terms.

94. We would accept that despite its length, endeavour and general care for the detailed evidence before it, the decision of the FTT may not at times have been as carefully constructed as it might have been in its analysis of the evidence before it. This is not helped by the FTT running together, we think probably because of its views on aggregation, its consideration of sections 27 and 35 of FOIA. We also accept that the FTT did not in its decision explicitly set out, by reference to the specific sub-paragraphs in section 27(1), which limbs of that subsection were established on the evidence. However, despite these considerations, in our judgment what the FTT in fact said in paragraph 96 of its decision shows that it considered it was section 27(1)(a), (c) and (d) which were made out on the evidence. The relevant part of paragraph 96, in which we have underlined the parts which map over to s.27(1)(a), (c) and (d), reads:

> "Overall, we conclude that disclosure in March 2018 of the content of the minutes of meetings of the TWGs that had taken place as at November 2017 would have involved a breach of confidentiality which would have been at least likely to <u>cause prejudice to the UK's relations with other states and its interests and their promotion</u>."

95. As for the argument that Mr Alty's evidence could not support such findings, despite the able submission of Mr Knight for Mr Montague, we struggled to see how this was any more than a dispute about the evidential worth of Mr Alty's evidence as we were asked to see it and an attempt to usurp the evaluative judgement of the specialist FTT that had heard from Mr Alty.

96. We accept that the FTT made strong criticisms of aspects of Mr Alty's evidence – criticisms which largely form the basis of one of the DIT's grounds of appeal – but it did not reject the totality of his evidence or his relevant experience in the field. Nor do we read the evidence put before the FTT on behalf of Mr Montague as conclusively establishing that all the information he had requested should be

disclosed. Having considered the evidence of Mr Alty and that put forward for Mr Montague, the FTT considered the evidence before it in relation to the 'confidentiality of TWG meetings' (some of this was in a closed session before the FTT), and said of this evidence (at paragraph 90):

> "Although this evidence was not all it might have been, we accept that the general understanding among the states participating in the TWGs would have been that the discussions were to be considered confidential and that their content would not be disclosed without the agreement from the other party."

This and the other evidence the FTT discussed in paragraph 90 and from paragraphs 91-95 (some of which was taken in closed and so has been redacted from the open decision of the FTT which Mr Montague has seen), shows that the FTT made an evaluative assessment of Mr Alty's evidence which was not irrational. Moreover, it provides an adequate basis for its conclusion in paragraph 96, which we have set out in paragraph 94 above.

97. Nor do we consider there is anything of real substance in error of law terms in the criticism Mr Montague makes about the FTT's approach to the weight to be given to the DIT's evidence. We find no real tension between the FTT saying in paragraph 6 of its decision that when assessing the extent and likelihood of prejudice which may be caused by disclosure under section 27 "appropriate weight" needs to be attached to evidence from Government and its experienced advisors and later stating, in paragraph 67 of the decision, in respect of Mr Alty's position and his evidence, that "the Tribunal must always give due deference to the institutional knowledge and views of the executive (without, we add, slavishly or unquestioningly accepting them)". We can identify no difference between giving *due* deference and *appropriate* weight to such evidence. Nor, given the criticisms the FTT made of Mr Alty's evidence and the conclusions it drew from that evidence, do we consider any credible argument can be made for the FTT having given him undue deference or according his evidence inappropriate weight. The FTT in the end found that the public interest in maintaining the exemption under section 27 was weaker than Mr Alty had asserted. That was a finding it was entitled to make.

98. Further, insofar as this is made as a separate criticism, no error was made by the FTT in saying that such an approach to specialist governmental evidence was <u>always</u> needed under section 27 of FOIA. A First-tier Tribunal that gave no weight to such evidence would very likely err in law, although the level of weight which would be appropriate would depend on the status of the Government witness and the quality of their evidence.

99. The last point taken by Mr Montague under this ground of appeal is based on the fact that the FTT had before it, in open (in fact supplied by one of Mr Montague's witnesses), the terms of the UK and USA TWG which only necessitated confidentiality in respect of information and documents produced by the USA to and in the TWG. It was argued that the FTT failed sufficiently to address in its decision the basis on which any of the relevant exemptions in section 27 were engaged in respect of the UK's contributions to the UK-USA TWG, which by the terms of that TWG could have been disclosed. We are persuaded by the Information Commissioner's arguments that there is no merit in this argument.

100. The most relevant part of the request here would be the request for the agendas of this particular TWG meeting and its minutes. It is not apparent to us that it was argued by Mr Montague before the FTT that the UK's contributions to the

agendas and in the minutes of the UK-USA TWG were separately disclosable. Furthermore, and particularly absent such an argument, we do not consider it was either necessary or proportionate for the FTT to have to engage in a line by line analysis of each of the TWGs given the more general (in this respect) nature of the requests in issue before it and the volume of information before it. In addition, this aspect of the 'section 27 ground of appeal' as it was formulated in the application for permission to appeal, and on which basis permission was granted, focused on section 27(2) of FOIA. The argument was, in terms, that the finding that section 27(2) applied to the UK-USA TWG, when section 27(2) is concerned with information obtained from another State, failed to take into account that it could not cover the UK's contributions to the UK-USA TWG. However, the flaw in this argument is that it leaves out of account section 27(1) of FOIA and its application to that TWG. For the reasons we have given in paragraph 94 above, we are satisfied that the FTT found that all the TWGs were covered by section 27(1)(a), (c) and (d) of FOIA. Section 27(1) focuses on the UK's interests abroad and with other States and the FTT was entitled to conclude that those provisions also covered the UK-USA TWG. We are also not persuaded that any clear basis for safely separating out the UK's contributions to the UK-USA TWG, a differentiation which would need not to involve touching on the USA's contributions (see paragraph [16] of *FCO v IC and Plowden* [2013] UKUT 275 (AAC)), was ever properly in issue before the FTT. We note in any event that, if necessary, such a distinct and discrete argument about the request covering disclosure of the UK's contributions to the UK-USA TWG can be made by Mr Montague to the First-tier Tribunal to whom we are remitting this appeal.

101. Mr Montague also made detailed criticisms of the FTT's approach to finding that section 35(1) of FOIA applied to the requested information. As we agree with one of his arguments on section 35 and consider the FTT did err materially in law on the basis of that argument, we do not consider we need to address any of his other arguments on the exemption in section 35(1) applying to the information requested. Those arguments can, if necessary, be subsumed in the issues the First-tier Tribunal may need to consider on the remitted appeal.

102. Section 35 of FOIA provides a qualified exemption in respect of the formulation of Government policy. It provides so far as is material as follows.

> "35.-(1) Information held by a government department…..is exempt information if it relates to—
>
> (a) the formulation or development of government policy,
>
> (b) Ministerial communications,
>
> (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
>
> (d) the operation of any Ministerial private office."

103. The material part of the FTT's reasoning on section 35(1) applying to the requested information is found in paragraph 98 of its decision. It is important for context, however, to note that the FTT in the immediately preceding paragraph had found against the DIT's case on section 35(1) as it had been advanced by Mr Alty. We set paragraphs 97-99 out in full given their relationship to each other.

> "97. The DIT's case in relation to section 35 of FOIA is really set out in Mr Alty's first statement at paras 15-16 and 31-35 at OB/1/10-11. In short he says that material from the TWGs "informs [trade] policy development" and that "policy positions must remain confidential at whatever stage of development" because they may need to change and there needs to be a "safe space" for officials in this Appeal No: EA/20190154 43 process. At para 32 he makes the point that detailed negotiating policy positions cannot be disclosed in advance as this would " ... undermine tactics, strategy and ultimately potential success" and he refers to the fact that some of the documents in the withheld material include internal analysis, [redacted text]. We are afraid we cannot accept the case that Mr Alty makes here: as far as we can see, the minutes of the TWG meetings do not contain any policy positions (save that the Government is keen to secure roll-over agreements and FTAs after Brexit, which is well known) and those parts which set out commentary by UK officials are accepted as being out of scope of the request; rather, as the DIT itself has maintained, they are an exercise in information-gathering and exploration with a view to informing policy positions which will be established at a later stage when it comes to negotiating deals. To that extent we accept that the information exchanged at the meetings "relates to" the formulation of government policy but we do not accept the nature of the damage which Mr Alty suggests would flow from disclosure of the contents of the discussions.
>
> 98. However, we do think a case can be made for saying that the public interest underlying section 35 may be damaged by disclosure of the agendas and minutes of TWG meetings on a somewhat different basis, ie that officials could be inhibited in the way they collect and record information from foreign states in the TWG process if such minutes were likely to be published for fear that anything they ask or discuss will find itself in the newspapers and be the subject of "lurid headlines" at a time when positions are still being developed on the UK side; [redacted text]. Further, it may well be that foreign states would have become less willing to share information and views in the context of these meetings if the content of discussions was likely to be published, which would itself tend to undermine the process of gathering information; and ultimately disclosure may lead to foreign states not participating in the TWG process at all, which would clearly have a damaging effect on the process of policy formulation in this area.
>
> 99. On that rather narrower basis, we accept not only that section 35 applied to the withheld material but also that disclosure may have damaged the public interest in maintaining the exemption, though the extent of such damage is somewhat speculative and difficult to pin down."

104. We do not accept, as the DIT argued, that anything in paragraph 97 of the FTT's decision shows it finding that section 35(1) was engaged, let alone that the public interest against the information being made publicly available had been established under section 35(1) by the DIT's case. It seems to us clear that the FTT's conclusion in paragraph 99 of its decision that section 35(1) was engaged and that disclosure of the agendas and minutes of the TWGs may have been against the public interest was based on what is said in paragraph 98 of the decision.

105. The problem, however, and the error of law the FTT made here is that the case it considered could be advanced "on a somewhat different basis" in paragraph 98 of its decision was one that had not been advanced by the DIT and was not a case of which Mr Montague had had any notice, and so he had not been in a position to contest that case before the FTT. This is not a point about the FTT taking into account matters which it viewed as being relevant to an exemption in issue before it. Nor is it about whether the FTT was right or not in concluding as

it did in paragraph 98. (And no one before us sought to argue they were the only possible conclusions any rational tribunal could have arrived at on the evidence.) It is an issue of fair procedure. It was fundamentally unfair to Mr Montague for the FTT to decide the appeal on a case he had had no opportunity to meet, and it amounts to a material error of law on the part of the FTT.

106. On its own reasoning, the matters the FTT relied on were ones which had not been advanced by the DIT or Mr Alty. Further, although the second consideration the FTT identified in its paragraph 98 (beginning "Further, it may well be that foreign states…") may have had a foundation in the arguments made under section 27 and so would not have been unknown to Mr Montague (albeit not expressly within a section 35(1) context), we could identify no basis on which the first consideration on which the FTT relied in paragraph 98 – 'that officials could be inhibited in the way they collect and record information from foreign states in the TWG process if such minutes were likely to be published for fear that anything they ask or discuss will find itself in the newspapers and be the subject of "lurid headlines" at a time when positions are still being developed on the UK side' – was clearly put in issue under section 35 of FOIA during the FTT proceedings by any party or by the FTT itself.

107. We accept what Mr Lockley, who also appeared for the Information Commissioner before the FTT, told us that this 'chilling effect' argument was not one which was made to the FTT. However we do not accept his argument that any unfairness here was minimal and thus immaterial because the FTT downplayed this consideration as a factor in paragraph 100(iv) and (v) of its decision. This is to ignore the role this chilling effect point had in the FTT finding in paragraph 98 that section 35 applied and disclosure may damage the public interest under it: it was one of only two points on which the FTT relied in that paragraph. Mr Lockley also relied on matters which had been before the FTT in closed and to which he drew our attention in a closed session. However, by definition those are matters which were and remain unknown to Mr Montague. That cannot be a basis for him knowing that 'chilling effect' was an issue which needed to be addressed under section 35(1) on his appeal to the FTT. Nor can it cure the unfairness to him of not knowing in the open sessions before the FTT that it was in issue and needed to be addressed.

108. Mr Montague also made other arguments concerning the FTT's 'conduct of the public interest balance'. However, as we have found that the FTT misdirected itself at the outset on the aggregation issue in approaching the public interest balance, we do not consider it is necessary for us to address those other arguments.

The DIT's Appeal

109. There are two grounds on which the DIT has permission to appeal. The first is that the FTT gave insufficient weight to the degree of confidentiality to be attached to TWGs. The second is that the FTT erred in law in concluding that disclosure of the "bare agendas" would cause only minimal prejudice. We agree with the Information Commissioner and Mr Montague that neither ground has any merit in error of law terms. Arguments about weight to be given to the evidence or which challenge directly an assessment of prejudice are seeking to encroach on the fact-finding jurisdiction of the FTT. They are no more than factual merits criticisms of the evaluative judgements to which the FTT came on the evidence before it.

110. The first ground of the appeal includes that the FTT made inaccurate and highly unfair criticisms of Mr Alty's evidence in paragraphs 67-69 of its decision. Insofar as this amounts to an error of law argument, we consider that those paragraphs show no more than the FTT dealing properly with evidence before it, including the deficits in it, but also highlighting (in paragraph 67) Mr Alty's "personal experience, expertise and integrity". The unfairness put forward by the DIT was not any failure to take account of Mr Alty's evidence or other procedural irregularity. It was really no more than a proxy for the DIT disagreeing with the FTT's view of Mr Alty's evidence because the DIT considers it should have been accepted. That is not an error of law argument.

111. Nor, insofar as it was being advanced by the DIT, is there any merit in the argument that the view the FTT took of Mr Alty's evidence was perverse. Again, this is just a proxy by the DIT for an argument that his evidence should have been accepted. Moreover, irritation that the FTT criticised the DIT's witness and its presentation of the closed material does not amount to an error of law either. Upper Tribunal appeal proceedings are not some form of general complaints procedure about the FTT.

112. We bear in mind too that despite its criticisms of Mr Alty's evidence, the FTT expressly found in favour of the DIT that the TWG meetings were confidential: see paragraph 100 of its decision at point (i). The FTT then considered the public interest in favour of disclosure and found in respect of most of what had been requested that these did not outweigh the public interest in maintaining the exemption(s). Where it parted company from the DIT, insofar as remains relevant on the DIT's appeal before us, was in relation to the "bare agendas". It explained why in paragraph 115 of its decision.

> "….in relation to the "bare agendas" (ie the contents of agendas excluding material which is out of scope or covered by section 40), we take a different view. We consider that the public interest in disclosing the areas and topics of discussion as shown by agenda items would have outweighed the minimal prejudice to confidentiality/foreign relations and policy formulation that disclosure of these in March 2018 would have involved. It is significant in this context that we were not referred to any particular agenda item which was in itself sensitive or controversial and that the majority have been voluntarily disclosed in any event."

113. On the evidence before it, this was a conclusion the FTT was entitled to reach and it has provided an adequate explanation for why it came to this conclusion on that evidence. In particular, the FTT was obviously entitled to attach specific weight to the fact that no evidence of any sensitive or controversial agenda item had been put before it and that the majority of the agendas had already been disclosed.

114. We also reject the DIT's argument that the FTT failed to take proper account of the existence of confidentiality agreements and their strength and arrived at irrational findings on such agreements. The closed version of the FTT's decision at paragraph 88 shows the FTT had regard and took proper account of the agreements which were put before it by the DIT. Its judgment that "very little direct evidence was given [about] specific commitments relating to confidentiality" was one it was entitled to make on the evidence and was not perverse. The fact that the Information Commissioner may have taken a different view of this evidence is not relevant as the FTT was not reviewing her decision but exercising a *de novo* appellate jurisdiction. Further, the FTT's view in paragraph 91 of its decision,

that it did not consider "a high degree of confidentiality attached the TWG meetings", was one which it was entitled to come to for the reasons it gave in that paragraph and based on the evidence it had seen. The DIT's arguments to the contrary are no more than attempts by it to disagree on the evidence and seek to have us re-evaluate that evidence.

115. The DIT's second ground of appeal is also without merit. It is a factual merits argument attempting to rerun as an error of law argument and it cannot get over the reasoning the FTT gave in paragraph 115 of its decision for why it was treating the "bare agendas" differently and ordering their disclosure. The different view that the FTT had taken about the minutes of the meetings (i.e. "discussions" – see paragraph 93 of the FTT's decision) not being disclosable is plainly in a different context and provides no inconsistency with its judgement on the "bare agendas", particularly given that no evidence of any sensitive or controversial bare agenda topics had been put before the FTT. It was for the DIT to evidence its case before the FTT and it cannot now seek to criticise the FTT on the basis of sensitive or controversial agendas which it did not put before the FTT.

Conclusion

116. For the reasons given, the decision of the FTT was made in error of law. We are not satisfied that the errors of law which we have found the FTT made were not material to its decision. Accordingly, we set aside the decision to which the FTT Tribunal came and remit Mr Montague's appeal to be considered afresh by a First-tier Tribunal. This First-tier Tribunal should, if possible, have the same constitution as the FTT whose decision we have set aside as this may allow the remitted appeal to focus on the areas where we have found the FTT erred in law and on the arguments of Mr Montague which we have not needed to address in this decision.

Nicholas Wikeley
Judge of the Upper Tribunal

Stewart Wright
Judge of the Upper Tribunal

Thomas Church
Judge of the Upper Tribunal

Authorised for issue on 13 April 2022