



**IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER**

Appeal No. UA-2021-002107-GIA

Appellant: Dr Michael Smith
First Respondent: The Information Commissioner

DECISION OF UPPER TRIBUNAL JUDGE MACMILLAN

Decision Date: 15 September 2022

Decided following an oral hearing by CVP on 27 July 2022

Representation:

Appellant: Dr Michael Smith represented himself
Respondent: Mr Michael White represented the Information Commissioner

Authorities considered:

Information Commissioner v Malnick [2018] UKUT 72 (AAC)

Montague v Information Commissioner and the Department for International Trade
[2022] UKUT 104 (AAC)

ON APPEAL FROM:

Tribunal: First-tier Tribunal (General Regulatory Chamber) Information Rights

Tribunal Case No: EA/2019/0374

Hearing Date: 12 February 2021 (remote via CVP)

Decision Date: 17 March 2021

DECISION

The decision of the Upper Tribunal is to dismiss the appeal.

REASONS FOR DECISION

Introduction

1. This appeal concerns a decision notice issued by the Information Commissioner ('the Commissioner') in relation to information requests made under s.1 of the Freedom of Information Act 2000 ('FOIA') to the Information Commissioner's Office as a public authority ('the ICO').
2. The Appellant is a data controller. In May 2018 he wrote to the ICO about changes to the ICO's practices following the introduction of the Data Protection Act 2018 and of the GDPR into domestic law. Correspondence continued over several months, in the course of which the Appellant made thirteen requests for information under s.1 FOIA ('FOIA requests'). These were made in June, July and August 2018 and in January 2019.
3. In November 2018 the Appellant complained to the Commissioner about the ICO's failure to respond to some of his FOIA requests and the adequacy of the response to others. The Commissioner upheld the Appellant's complaint.

The Information Commissioner's Decision Notice

4. In a decision notice dated 11 September 2019, the Commissioner decided that the ICO had breached its obligations under Part I FOIA to:
 - a. respond to the Appellant's requests within 20 working days;
 - b. clarify the nature of the information being sought; and
 - c. confirm or deny what of the requested information the ICO held.
5. As a consequence, and pursuant to s.50(4), the Commissioner required the ICO to take specified steps in order to respond to the Appellant's FOIA requests in accordance with Part 1 FOIA. The decision notice required the ICO to respond to the outstanding FOIA requests listed in an appendix within 35 working days.

The First-tier Tribunal's Decision

6. The Appellant appealed to the First-tier Tribunal ('FTT') under s. 57 FOIA. His grounds, in broad terms, were that the decision notice was defective because it did

not contain all of his outstanding FOIA requests, nor all of the FOIA requests he had brought to the Commissioner's attention in his s.50 complaint. The Commissioner subsequently conceded this point and also that, as a consequence, the decision notice was not in accordance with the law.

7. The Appellant initially relied upon 4 grounds of appeal before the FTT, relating to the deficiency of both the decision notice and its annex. The Commissioner conceded all substantial grounds. Separately, and during the course of the FTT proceedings, the ICO sent the Appellant what it considered to be the substantive response to all of his FOIA requests, including those that had been erroneously omitted from the 11 September 2019 decision notice.
8. The Appellant declined a proposal from the Commissioner to dispose of his appeal by way of a Consent Order¹ which, according to the FTT's decision, '*would have allowed the Appellant's appeal and recorded that the ICO, having issued a substantive response to the Appellant's requests, was not required to take further steps*'. This was because, in the Appellant's view, the ICO had provided inadequate substantive responses to the FOIA requests that had been omitted from the decision notice.
9. The Appellant argued that the FTT has jurisdiction to consider responses by the public authority that post-date the decision notice under appeal. He relied on the language of s.58 FOIA, read in conjunction with various Upper Tribunal decisions, in particular paragraph 102 of *Information Commissioner v Malnick* [2018] UKUT 72 (AAC) in which a three-judge panel, following the Court of Appeal's decision in *Birkett v Department for the Environment, Food and Rural Affairs* [2011] EWCA Civ 1606, [2012] AACR 32, decided that:

'...there is no limitation on the issues which the F-tT can address on appeal, and the focus of its task is the duty of the public authority'.
10. The Commissioner disagreed with the Appellant. His case, in essence, was that the FTT does not have jurisdiction to consider new issues that are different to the issues the Commissioner considered in the decision notice being appealed.
11. The FTT agreed with the Commissioner, having reviewed both the language of FOIA and a number of Upper Tribunal decisions to which the Appellant directed the tribunal. The FTT decided:

"[24] Unhindered by authority, it seems to the Tribunal that the wording of sections 57 and 58 FOIA are clear about the extent of the Tribunal's powers in an 'appeal to the Tribunal against the notice'. It seems clear to us that if an issue was not one which could have been considered by the Commissioner in

¹ Pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 SI 2009/1976, as amended

the decision notice then it is not one which can be appealed against to the Tribunal.

[25] Thus, in the context of this case, that would mean that the Appellant could appeal against the failure of the Commissioner to consider all the requests in the decision notice. But the Appellant could not appeal against the contents of the responses subsequently made to those additional requests, because that was simply not an issue that was or could have been before the Commissioner when she prepared the decision notice.

...

[39]... it seems to us that the Appellant has misinterpreted the caselaw to mean that there is literally 'no limitation' as to what the Tribunal can consider on appeal... He has not recognised that the role of the Tribunal is to stand in the shoes of the Commissioner to re-consider that decision actually made (and substitute a decision notice that could have been made), but not to make new decisions which were not considered by the Commissioner at all. The Appellant does not recognise that the appeal must be 'against the notice' issued by the Commissioner.

[40] As the Commissioner says, it is not possible to appeal against any decision by the Commissioner as to what information to disclose, because she has never made that decision; only the ICO has, in its capacity as a public body that is subject to FOIA. The Commissioner has not (yet) reviewed that decision of the ICO, and only after such a review (and such a decision under s.50(4) FOIA) would section 57 FOIA allow for an appeal."

12. The FTT therefore determined, as a preliminary issue, that it had no jurisdiction to consider the Appellant's complaint about the ICO's later, substantive responses because the adequacy of these had not been before the Commissioner when the decision notice was issued.
13. The FTT allowed the Appellant's appeal against the decision notice and issued a substituted decision notice that required the ICO provide the Appellant with a response to all of the FOIA requests that were outstanding at the date of the decision notice, including those that had been previously omitted. The FTT then found as a matter of fact that the ICO had already provided substantive responses. The FTT therefore determined that no further steps were required.

Grounds of appeal and subsequent events

14. The Appellant has been granted leave to appeal on the limited ground of whether it is an error of law to decide that the FTT has no jurisdiction in a s.57 FOIA appeal to consider the nature and content of the public authority's responses to the Appellant which post-date the Commissioner's decision notice.

15. Permission was granted following an oral hearing on 21 November 2021. When granting permission Upper Tribunal Judge Jones noted that there was potentially some ambiguity in the case law. Judge Jones' observation, and the pleadings in this appeal, pre-date the decision of a three-judge panel in Montague v Information Commissioner and the Department for International Trade [2022] UKUT 104 (AAC), although this was one of the Upper Tribunal decisions included by the parties in the authorities bundle.
16. At the oral hearing I drew paragraphs 62 – 76 of Montague to the parties' attention and observed that these were potentially relevant to the issues raised by this appeal. Both parties were provided with an opportunity to serve additional written submissions on Montague after the oral hearing and both did so.
17. I am grateful to the parties for their detailed oral and written submissions, all of which I have considered.
18. Subsequent to the FTT's decision and in order to preserve his position, the Appellant made a further s.50 FOIA complaint to the Commissioner concerning the ICO's substantive responses to his FOIA requests. The Commissioner issued a further decision notice on 22 March 2022. This is the subject of a separate appeal by the Appellant, currently before the FTT.

Law

19. The statutory framework underpinning a s.50 decision notice is as follows. S.1 FOIA creates a universal right of access to information held by public authorities and does so in the following terms:

1.— General right of access to information held by public authorities.

(1) *Any person making a request for information to a public authority is entitled—*

(a) *to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

(b) *if that is the case, to have that information communicated to him.*

(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”.*

20. The minimal requirements of a valid request for information are set out in s.8. It must:

- a. be made in writing;
- b. state the name of the applicant;
- c. provide an address for correspondence; and
- d. describe the information being requested.

21. The public authority is required to respond to the applicant promptly, and in general must do so no later than 20 working days after the request is received or after the applicant has provided additional information requested by the public authority in order to clarify the request (s.10).

22. The public authority is also required to confirm or deny whether the requested information is held (s.1(1)(a)) and, if held, to communicate the information to the applicant (s.1(1)(b)) unless:

- a. One of the exemptions in Part II FOIA applies to the information (s.2);
- b. The public authority has served a fee notice which remains unpaid (s.9);
- c. The cost of complying with the request would exceed ‘the appropriate limit’ set by regulation (s.12); or
- d. The request is vexatious or is a repeated request (s.14).

23. Where the public authority refuses a request for information, it must give the applicant a notice that states the exemption or exception upon which the refusal is based (s.17). The public authority must also explain why a claimed exemption applies

to the requested information unless doing so would undermine any interests the refusal is designed to protect.

24. An applicant who is unhappy with the public authority's response to their FOIA request may make an application (a complaint) to the Commissioner under s.50:

50.— Application for decision by Commissioner.

(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.

...

25. Therefore, s.50(4) permits the Commissioner to specify in a decision notice further steps to be taken by the public authority in relation to:
- a. The requirement to confirm or deny whether requested information is held;
 - b. The requirement to communicate the requested information;
 - c. The means by which requested information is to be communicated; and/or
 - d. The requirement to explain to the applicant why an information request has been refused.
26. If a public authority fails to comply with steps specified in a decision notice the Commissioner may, at his discretion, certify the public authority's failure to the High Court, where the public authority may be dealt with as if it had committed a contempt of court (s.54(1) & (3)).
27. Ss. 57 & 58 provide a right of appeal against a s.50 decision notice and set out the tribunal's jurisdiction:

57.— Appeal against notice served under Part IV.

(1) Where a decision notice has been served, the complainant or the public authority may appeal to the Tribunal against the notice.

...

58.— Determination of appeals.

(1) If on an appeal under section 57 the Tribunal considers—

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

28. Where a public authority fails to comply with the terms of a substituted decision notice issued by the FTT under s.58(1), any application to certify this failure as a potential contempt of court must be made to the tribunal (s.61).

The parties' submissions

29. The Appellant's view, in essence, is that the FTT inherits the Commissioner's s.50(1) obligation to decide whether a public authority has dealt with a FOIA request in accordance Part I and, following the Upper Tribunal's decisions in Birkett, Malnick and RS v Information Commissioner and North East Derbyshire District Council [2015] UKUT 0568 (AAC), the FTT should approach this as a holistic question to be determined as at the date of the FTT's decision.
30. Without wishing to do a disservice to the Appellant's carefully constructed submissions, they may be summarised as follows:
- a. In a s.57 FOIA appeal, the FTT conducts a *de novo* consideration of the issues, standing in the shoes of the Commissioner (Malnick [90]). The FTT must decide whether the decision notice **is not** in accordance with the law, not whether it **was not** in accordance with the law (Birkett [59-60]).
 - b. The Upper Tribunal decided in Malnick that there is no limitation on the issues the FTT may decide on appeal. Having identified circumstances in which the FTT is unable to remit a decision notice to the Commissioner for reconsideration, the Upper Tribunal concluded that:

"[102] These conclusions are entirely consistent with the wide scope of the tribunal's duties and powers under section 58. The decision in Birkett means that there is no limitation on the issues which the FTT can address on appeal, and the focus of its task is the duty of the public authority. This means that the tribunal must consider everything necessary to answer the core question whether the authority has complied with the law, and so includes consideration of exemptions not previously relied on but which come into focus because the exemption relied upon has fallen away. It cannot be open to the FTT to remit consideration of new exemptions to the Commissioner, because to do so would be incompatible with the FTT's obligation under section 58 to consider those matters for itself."
 - c. The principle of 'no limitation on the issues' is not limited to the FTT's consideration of FOIA exemptions. In the Appellant's view, the FTT failed to focus on the duty of the public authority. The FTT should have considered whether the ICO had complied with Part I FOIA in relation to his requests, including those the ICO had responded to since the decision notice was issued.
 - d. S.58 permits the FTT to substitute such other notice as could have been served by the Commissioner. Further, the FTT must also take into account events occurring after the date of the decision notice (RS [93]). Therefore, the FTT had wrongly restricted its approach by only considering what decision notice could have been issued by the Commissioner in relation to

matters that were before the Commissioner when the decision notice was issued.

31. The Appellant disagrees with the FTT's conclusion that, where a s.50 decision notice has been issued which specifies steps to be taken by the public authority pursuant to s.50(4), it is open to the requester to make a further s.50 complaint in respect of the public authority's execution of those steps. He submits that Parliament cannot have intended to introduce such an iterative process which would allow a public authority to engineer excessive delays. Further, he submits that there is no guarantee that the Commissioner will issue a successive decision notice in response to a second s.50 complaint, at which point the only available remedy would be of judicial review, which the Appellant considers unsatisfactory.
32. Mr White, on behalf of the Commissioner, submits that there was no error of law by the FTT. In his view:
 - a. the FTT has a broad, appellate, *de novo* jurisdiction but only in relation to the decision notice issued by the Commissioner.
 - b. The FTT has no jurisdiction to consider a different question to the one that was before the Commissioner. The FTT's determination of whether a decision notice is in accordance with the law involves a reconsideration of the question of which the Commissioner was seized. In this case, that question was whether the ICO needed to respond to the Appellant's FOIA requests. The adequacy of the ICO's subsequent substantive responses to these requests is a different question.
 - c. Mr White disagrees with the Appellant's interpretation of *Malnick*, *Birkett* and *RS*. In particular, he submits that paragraph 102 of *Malnick* must be understood in context. The Upper Tribunal was explaining why the FTT has jurisdiction to consider exemptions that were not considered in the decision notice. Mr White describes this as the FTT considering a sub-issue of the question the Commissioner was seized of at the relevant time, namely 'should the requested information be disclosed?' He argues that the prohibition identified by the Upper Tribunal in *Malnick* is against remitting that same question back to the Commissioner for reconsideration.
 - d. In Mr White's view there is little assistance to be found in previous Upper Tribunal decisions concerning the FTT's powers in a FOIA appeal, as recognised by Judge Jones when granting permission. Mr White submits that the issue raised in this appeal is a matter of statutory interpretation. He points out that nothing in FOIA prevents a successor s.50 complaint from being made in relation to a single FOIA request, including following a 'no steps' decision notice/substituted decision notice. The iterative process this creates, Mr White suggests, ensures the proper investigation of more complex FOIA complaints.

Analysis

33. One of the unique aspects of an appeal under s.57 FOIA is that it concerns the rights of an individual in relation to a third party who is often not a party to the proceedings. The Commissioner, whose decision notice is the subject of the appeal, is invariably the respondent. The decision notice decides whether the public authority's response to a FOIA request, about which a complaint has been made, is in accordance with Part I FOIA. The FTT must determine whether "*the [decision] notice against which the appeal is brought is [...] in accordance with the law*".
34. The FTT's task was reviewed by a three-judge panel in Malnick:

"[90]...The question to be addressed under section 58(1)(a) is whether the decision notice is "in accordance with the law". Although the statutory language is less than helpful, this formulation embraces all errors, and is not limited to the traditional taxonomy of errors of law. As is clear from section 58(2) and Birkett (see paragraph 45 above), the FTT exercises a full merits appellate jurisdiction and so stands in the shoes of the IC and decides which (if any) exemptions apply. If it disagrees with the IC's decision, the IC's decision was "not in accordance with the law" even though it was not vitiated by public law error."
35. The Appellant argues that, when stepping into the shoes of the Commissioner, the FTT should not only determine *do novo* the question that was before the Commissioner at the date of the decision notice but also decide whether the public authority has, since then, dealt with the FOIA request in accordance with its Part 1 obligations. This suggestion is misconceived for a number of reasons.
36. Firstly, it requires the FTT to assume the role of regulator. In the Appellant's appeal, for example, the FTT would have to determine both whether the Commissioner's decision notice is in accordance with the law and, without a prior decision against which an appeal has been brought, whether the ICO's subsequent substantive responses to the Appellant's previously unanswered requests were in accordance with Part I FOIA. There is no support in the language of FOIA or in the Tribunals, Courts and Enforcement Act 2007 for such a proposition. The FTT's jurisdiction under s.57 is to hear appeals against first instance regulatory decisions. It considers the regulator's decision afresh and is empowered by s.58(1) to serve any notice that the regulator **could have** served at the time of the decision notice.
37. Put another way, the hierarchy of decision making in the context of FOIA requests is, reduced to simple terms:
 - a. Following a FOIA request, the public authority decides how to respond in accordance with s.1(1);

- b. Following a complaint about the response, the Commissioner decides whether the public authority has acted in accordance with Part I FOIA; and
 - c. Following an appeal against the Commissioner's decision notice, the FTT decides whether the notice is in accordance with the law.
38. The Appellant's proposition appears to be that, during stage (c), the FTT can make any decision that the Commissioner could at stage (b) – or, alternatively, that stage (b) can be bypassed – in relation to any subsequent responses given at stage (a) by the public authority generated by the same FOIA request. There is no support in either FOIA or in case law for such a view.
39. Secondly, the FTT would have to reach a decision about the public authority's subsequent responses without necessarily hearing the public authority's explanation of events. In addition to the unfairness of such a process, it would be in stark contrast to the Commissioner's investigation of a complaint, during which there is invariably direct correspondence between the Commissioner and the public authority before a decision notice is issued. Moreover, the Commissioner is empowered to compel the public authority's co-operation with his investigation, if required.
40. By contrast the FTT's powers are limited. The Tribunal's Procedure Rules allows the FTT to join the public authority as a party to the appeal but the FTT generally only does so at the public authority's request. For the FTT to compel joinder and active participation under the Procedure Rules would be a significant procedural development. Whilst that by itself should not act as a bar, nothing in the applicable legislation or case law suggests that a public authority should be required to participate in a s.57 FOIA appeal.
41. Thirdly, the Appellant's approach would allow a complaint made under s.50 FOIA to become something of a moveable feast. As confirmed in *Birkett* ([46]), the complainant in a s.50 application is not expected to identify all potential respects in which a public authority may have failed to comply with Part I FOIA obligations. The Commissioner's investigation of the complaint must not therefore be limited to the potential failings identified by the complainant. However, having investigated the complaint, the Commissioner has a duty to state whether "*in any specified respect*" the public authority has failed to respond as required by Part I FOIA (*Malnick* [78]). The Commissioner states his findings in relation to any failure by the public authority in the decision notice. This also informs the complainant of the outcome of their complaint.
42. An appeal under s.57(1) is essentially an appeal against the outcome of a complaint. Nothing in the language of s.57, which refers simply to '*an appeal to the Tribunal against the notice* [served]', suggests that the complainant is permitted to introduce a wholly new complaint, either in addition or in substitution, the subject matter of which is incapable of having been the subject matter of the

Commissioner's decision notice. Although there may be good reasons why appeals linked to the same FOIA request should be heard together, that is a matter of case management rather than extension of jurisdiction.

43. Fourthly, whilst I am not persuaded that the 'no limitation' principle identified at paragraph 102 of *Malnick* should be understood as applying only to exemptions – mainly because not every decision notice concerns exemptions – s.57(1) imposes a statutory limitation on the issues that may be considered by the FTT. The right of appeal to the tribunal arises solely in relation to the Commissioner's decision notice. The FTT considers, *de novo*, the decision taken by the Commissioner and, applying *Birkett* and *Malnick*, the FTT must not restrict its considerations to the matters the Commissioner has considered when making that decision, or indeed to the subject matter of the s.50 complaint. Within that context there is no limit on the issues the FTT can address, provided they concern the decision notice that is being appealed.
44. Finally, and as previewed at the oral hearing, it seems to me that the more recent decision of the Upper Tribunal in *Montague* provides the remaining piece of this particular puzzle. That case was primarily concerned with the question of whether the applicable date at which the Commissioner (at stage (b)) and the FTT (at stage (c)) must "*consider ... whether the authority has complied with the law*", was the point at which the public authority responded to the FOIA request (or by which it had failed to respond) or the point at which it carried out any internal review of the Part I FOIA response.
45. The three-judge panel in *Montague* decided that the relevant point in time for the purpose of the decision notice was the date of the public authority's response about which the complaint had been made, and that the proper way in which to reflect any subsequent response was when specifying steps under s.50(4) (emphasis added):

*[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...

...

[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)].”

Conclusions

46. The circumstances of this appeal are similar to those outlined as a hypothetical case at paragraph 76 of *Montague*. In November 2018 the Appellant made a s.50 complaint to the Commissioner about, in broad terms, the ICO’s failure to respond to his FOIA requests. The extent to which the ICO had responded as required, as at the date of the Appellant’s complaint, was the issue about which the Commissioner made a decision. This was also the subject matter of the 11 September 2019 decision notice with which the FTT was concerned on appeal.
47. The task of the FTT was to decide whether the decision notice was in accordance with the law. It did so by determining afresh the issue about which the ICO had made decision. The parties agreed that a substituted decision notice was required because the Commissioner’s decision notice was incomplete. The FTT reached the same conclusion.
48. The adequacy or otherwise of the ICO’s substantive responses, issued following the decision notice, is not the subject matter of the 11 September 2019 decision notice. Neither was it the subject of the Appellant’s November 2018 complaint. The notice sets out the Commissioner’s decision about whether, in any specified respect, the ICO had failed to deal with the Appellant’s FOIA requests in accordance with the requirements of Part I. The Commissioner’s decision in relation to that broad question was that, in the responses provided to the Appellant at the date of complaint, the ICO had failed to comply with its s.1 FOIA obligations. The decision notice specified steps the ICO still had to take as at the date of the notice.
49. By the date of the FTT’s decision the picture had changed because the ICO purported to have taken the specified steps. It had issued a substantive response to all of the Appellant’s FOIA requests, including to those that had been erroneously omitted from the Commissioner’s decision notice.
50. There was no material error by the FTT in its approach to the ICO’s substantive FOIA responses. The FTT decided *de novo* that the ICO had not acted in accordance with Part 1 FOIA at the date of the Appellant’s complaint, issued a substituted decision notice that included the previously omitted FOIA requests and specified that no further steps were required of the ICO, as at the date of the FTT’s decision. The FTT’s jurisdiction was limited to the subject matter of the 11 September 2019 decision notice, in relation to which an appeal had been brought.

51. The Appellant is correct in his observation that the FTT can “*substitute other such notices as could have been served by the Commissioner*” up to the date of the FTT’s decision, but this only applies to the subject matter of the original decision notice. The subject matter of a decision notice will generally be a specified response (or lack of response) by a public authority to a FOIA request. The correct way to reflect the effect of any subsequent response by the public authority in the decision notice is the approach taken by the FTT in the Appellant’s case.
52. The ICO’s substantive responses to the Appellant’s FOIA requests are not the subject matter of the 11 September 2019 decision notice. The adequacy of these later responses was not an issue the Commissioner could have considered at that time. A decision about whether the ICO’s substantive responses are in accordance with Part 1 FOIA requires the Commissioner to consider a substantially different question. The FTT has no jurisdiction to consider a new question of this nature unless and until the Commissioner has issued a decision notice concerning whether, in any specified respect, the ICO’s substantive responses are in accordance with Part 1 FOIA, and then following an appeal under s.57.
53. I agree with Mr White that there is nothing in the language of FOIA that prohibits a second complaint being made under s.50, nor a successive decision notice being issued, in relation to a subsequent, substantially different response by a public authority to a FOIA request. Neither is it prohibited by case law.
54. Paragraph 85 of *Malnick* confirms that s.50 should be construed as only allowing one decision notice to be issued by the Commissioner in relation to the same **complaint**. This prohibition exists in order to preserve finality in decision-making. However, there is no prohibition against a different complaint being made, and a successive decision notice being issued, in relation to a response by a public authority under Part 1 FOIA in relation to which the Commissioner has not previously made a decision.
55. It was open to the Appellant to make a further s.50 complaint to the Commissioner in relation to the ICO’s substantive responses to his FOIA requests. He has in fact done so.

Summary conclusions

56. It was not an error of law for the FTT to decide, in an appeal against a decision notice issued under s.50 FOIA, that the tribunal has no jurisdiction to consider a subsequent response by the public authority under Part I of the Act which post-dates the decision notice and which was not the subject of the s.50 complaint with which the decision notice is concerned. However, it is open to the tribunal to reflect the effect of the public authority’s subsequent response in any substituted decision

notice issued, when specifying whether the public authority is required to take specified steps pursuant to s.50(4).

57. Where, following a s.50 decision notice or s.58 substituted decision notice, a public authority provides a subsequent response to the information request, nothing in the Act prohibits the information requester from making a further s.50 complaint, or the Commissioner from issuing a successive decision notice.
58. I therefore dismiss this appeal.

Moira Macmillan
Judge of the Upper Tribunal

Authorised for issue: 15 September 2022