



Practice Note

Closed Material in Information Rights Cases

1. It is a general principle of tribunal practice that hearings are in public with all parties entitled to be present throughout; and that the documents provided to the tribunal by any party are seen also by all the other parties.
2. In the information rights jurisdiction, there are some cases in which this principle must be modified.
3. In some appeals, the tribunal is able to make its decision without looking at the information whose disclosure is disputed. These can and do proceed normally. Sometimes however, the public authority cannot properly explain its case without showing the disputed information to the tribunal. Put another way, sometimes the tribunal cannot check, on behalf of the citizen, that the public authority is entitled to an exemption under the Freedom of Information Act 2000 or the Environmental Information Regulations 2004, without seeing the disputed information for itself. Obviously, though, disclosure of the information to everyone in the proceedings would defeat the object of the exercise. There is no point in deciding whether information should or should not be disclosed, if it already has been. Similar difficulties can occur with supporting evidence and arguments.
4. In these circumstances the law permits the tribunal to deviate from the normal rule but only so far as is necessary to ensure that the purpose of the proceedings is not defeated. Any such deviation must be authorised by a judge.
5. Rule 14(6) GRC Rules empowers the tribunal to give a direction that certain documents or information be disclosed to the tribunal but not to the other parties to the appeal. The Information Commissioner and the public authority are normally under a duty to disclose to the tribunal all the material they hold which is relevant to the appeal. Should

they wish any of that material to be withheld from the requester then one of them must apply to the judge for a direction to that effect.

6. The application must be in writing. It should include a draft of the requested direction and enclose a copy of material which the applicant seeks to withhold. The reasons for withholding the information must be given. In respect of the disputed information it will be sufficient to say that the tribunal needs to see it in order to evaluate the evidence properly. In the case of other material, greater explanation may be required. On receipt of the application, tribunal staff will, unless there is good reason not to do so, tell all the other parties that it has been made; but they will send a copy of the application only to the judge.
7. When considering the application, the judge will first ask whether it is possible for a hearing to take place within the normal rules of disclosure. If yes, (s)he will give directions accordingly. If not, the judge will make a direction under Rule 14(6) stating the information which is to be withheld. It is common to refer to the withheld information as “closed material”.
8. Care must be taken, when drafting the direction, not to give away the nature or content of the withheld information. That said, it may be possible, by providing an index to the documents, for example, to give an idea of what material has been withheld. The public authority and the Information Commissioner will be expected to assist the Tribunal in this respect.
9. The judge will limit non-disclosure to what is necessary. For example, it may be possible to edit a document so that at least some of it is disclosed even though some has to be withheld. If the judge’s provisional view is that some but not all of the material should be withheld, tribunal staff will write to the requesting party with a new proposed draft. This is to give the applicant for the direction a chance to add further comments and to ensure that the later draft is clear and correct.
10. Once the judge makes a direction under Rule 14(6) the Tribunal must conduct the proceedings so as not to undermine its effect. All parties must co-operate in this. The judge will also be vigilant as to whether, as events unfold, the direction might require amendment.
11. There are likely to be consequences for any hearing which takes place. It may be that all the parties being present for all of the hearing would undermine the effects of a Rule

- 14(6) direction. If so, Rule 35(4)(c) permits the tribunal to exclude one of the parties for some of the time.
12. If this happens, the judge will explain to the excluded party, usually the citizen, what is likely to happen during the closed part of the hearing. The judge may ask if there are any particular questions or points which (s)he would like put to the other parties while (s)he is absent.
 13. Before the closed part of the hearing ends, the tribunal should discuss with the remaining parties:-
 - (a) What summary of the closed hearing can be given to the excluded party without undermining the Rule 14(6) direction.
 - (b) Whether, in the course of the closed session, any new material has emerged which it is not necessary to withhold and which therefore should be disclosed.
 14. The tribunal's final decision and reasons must also be recorded so as not to undermine the effect of any Rule 14(6) direction.
 15. We are still perhaps working out the practical effects of Rules 38(2) and 14(10). They do not mean that a closed part of the decision is always needed whenever closed material has been seen. Where the Tribunal orders disclosure it may be necessary for part of the decision to remain closed until after the period for an appeal has expired.
 16. It may be prudent in complex cases for a draft of the decision to be shared with the public authority/IC in advance to reduce the risk of inadvertent disclosure.
 17. Tribunal practice may require further modification in cases involving matters relating to national security. See Rule 14(9).

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