Upper Tribunal (Administrative Appeals Chamber)
Appeal Number: GI/2146/2010; Neutral Citation Number [2013] UKUT 075 (AAC)
Comprising 7 transfers by the First-tier Tribunal of appeals from decision notices issued by the Information Commissioner (see Open Annex 1 to the Decision and Reasons dated 18 September 2012)
Hearing Date: 24 January 2013

INFORMATION RIGHTS:

DECISION AND REASONS OF THE UPPER TRIBUNAL ON REQUESTS FOR LISTS AND SCHEDULES: 20 February 2013

Before:
Mr Justice Walker
Upper Tribunal Judge John Angel
Ms Suzanne Cosgrave

Between

Rob Evans (Appellant)
-and-
Information Commissioner (Respondent)
Concerning correspondence with Prince Charles in 2004 and 2005

Additional Parties:
(1) Department for Business, Innovation and Skills
(2) Department of Health
(3) Department for Children, Schools and Families
(4) Department for Environment, Food and Rural Affairs
(5) Department for Culture, Media and Sport
(6) Northern Ireland Office
(7) Cabinet Office

Representation:
For Mr Evans: Mr Aidan Eardley (instructed by Ms Jan Clements)
For the Commissioner: Mr Timothy Pitt-Payne QC (instructed by Mr Mark Thorogood)
For the Departments; Mr Jonathan Swift QC and Mr Julian Milford (instructed by the Treasury Solicitor)

DECISION OF THE UPPER TRIBUNAL ON LISTS AND SCHEDULES

1. This decision and the accompanying reasons both adopt the abbreviations and short forms used in Open Annex 1 to the Decision and Reasons dated 18 September 2012.

2. As regards Mr Evans's requests for lists and schedules, this decision supersedes the tribunal's interim order dated 7 November 2012. In relation to matters other than those requests, the interim order dated 7 November 2012 remains in place.

3. Pursuant to the tribunal's directions dated 27 November 2012:

> (1) the tribunal determines that it has power to rule on those parts of Mr Evans's appeals which complained of the Commissioner's refusal to order each Department to comply with his request for lists and schedules ("the lists and schedules request"), in particular because the tribunal's decision of 18 September 2012 allowing the appeals did not dispose of those parts of Mr Evans's appeals;
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> (2) the tribunal determines that it should exercise that power as a matter of discretion;
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> (3) in the exercise of that power the tribunal makes the further determinations set out in the remainder of this decision.

4. The tribunal determines that:

(1) Part 1 of the Act and/or Parts 2 and 3 of the Regulations required action by each Department as a minimum to the extent set out in sub-paragraph (2) below.

(2) As regards correspondence, or parts of it, which met the test set out in paragraph 7 of the Decision and Reasons dated 18 September 2012 ("advocacy correspondence"), the minimum required of each Department was that it comply with the lists and schedules request.

5. Accordingly:

(1) Those parts of Mr Evans's appeals to the tribunal which concerned lists and schedules are allowed.

(2) In relation to those parts of the Commissioner's decision notices which dealt with Mr Evans's requests for lists and schedules, without prejudice to the position on Mr Evans's other requests, the tribunal substitutes in each case:

> "The public authority shall within 35 days of the Upper Tribunal's decision dated 20 February 2013, as regards the documents identified in paragraph (a) below, provide to the complainant a schedule numbering each document and giving the information set out in paragraph (b) below:
>
> (a) the documents comprise each document dealt with in the Closed Annex dated 12 October 2012 to the Decision and Reasons dated 18 September 2012

("the Closed Annex") and which is identified in the Closed Annex as meeting all of the following requirements:

(i) it is held by the public authority;

(ii) it falls within the scope of the request, in the sense that whoever may have nominally been the sender or recipient of the document it in substance constituted correspondence which was either sent by Prince Charles to a minister in the public authority or sent by a minister in the public authority to Prince Charles;

(iii) the document or one or more parts of it constitute advocacy correspondence.

(b) the information is:

(i) the date of the document;

(ii) the sender of the document (whether Prince Charles or a minister, and if the latter the name of the minister);

(iii) the recipient of the document (whether Prince Charles or a minister, and if the latter the name of the minister);

(iv) whether the document is a letter or other form of correspondence and if the latter then a description of the form of correspondence used;

(v) the subject-matters covered by the document, or in a case where only part or parts of it are identified in the Closed Annex as constituting advocacy correspondence, the subject-matters covered by the part or parts so identified."

REASONS FOR DECISION ON LISTS AND SCHEDULES

A. Introduction

1. On 18 September 2012 we issued a document entitled "Decision and Reasons of the Upper Tribunal". Our decision ("the September Decision") which concerned correspondence between Prince Charles and government ministers during the period 1 September 2004 to 1 April 2005. Mr Evans had asked the Commissioner to order disclosure of such correspondence, but the Commissioner issued decision notices refusing to do so. Mr Evans appealed. The September Decision comprised two sentences as follows:

> The Upper Tribunal allows the appeals by Mr Evans. A further decision identifying information to be disclosed to Mr Evans, along with the terms of substituted decision notices, will be issued pursuant to the tribunal's directions dated 17 September 2012.

2. We discuss below certain aspects of our reasons ("the September Reasons") for that decision. At the outset, however, it is important to note that, in circumstances

described below, we have not issued the "further decision" contemplated by the second sentence quoted above. Mr Evans does not at present ask us to do so. It is common ground that whether we have power to do so will depend upon the outcome of judicial review proceedings issued by Mr Evans on 9 January 2013, seeking to quash the "executive override" certificate issued by the Attorney General on 16 October 2012.

3. What Mr Evans asks us to do is to issue a decision which will be separate from the "further decision" referred to in the September Decision. He says that the September Decision did not deal with the requests which he made to each Department for lists and schedules ("the lists and schedules requests"), that we have power to make a decision dealing with those requests, and that we should exercise that power in his favour. The Commissioner and the Departments say that we have no power to issue such a decision. If we do have power to do so, then the Commissioner agrees with Mr Evans that we should exercise that power, and accepts that the September Reasons will make it appropriate for us to exercise that power in the manner sought by Mr Evans. The Departments, however, say that if we have such power, then we should not exercise it, or if we do so, we should hold that Mr Evans was not entitled to the lists and schedules that he sought. We examine these matters below by reference to the following headings:

B. Background

4. This is a case which has been beset by delays. We referred to them in paragraph 16 of our reasons for the September Decision:

> 16. Cases concerning information rights are usually given priority by the First-tier Tribunal and the Upper Tribunal. The present case, however, concerns information about correspondence which took place some years ago. It raises complex questions which received initial attention from the Commissioner in 2005 and required more than 2 years intensive investigation and consideration by the Commissioner between February 2007 and December 2009. The parties have not sought any special direction as to urgency. It is nevertheless regrettable that the case has occupied the Upper Tribunal for two years. In large part this has been because at relevant stages we have found there to be a need for work that had not previously been envisaged. …

5. The work that had not previously been envisaged included resolution of disputes as to the procedure for a provisional draft of our decision and reasons to be seen and considered by appropriate persons. After considering written submissions from the parties we made directions on 30 August 2012. If those directions had remained unchanged, they would have enabled us on 18 September 2012 to substitute decision notices for those served by the Commissioner. We concluded, however, that the directions needed to be revised. The principal reason for this was that in our view there should be an opportunity, prior to the substitution of decision notices, for submissions on the redaction of personal data of individuals other than Prince Charles ("third party personal data"). We made provision for such an opportunity in our revised directions dated 17 September 2012 ("the September directions"). They are reproduced at annex 1 below. It will be seen that paragraphs 5A to 5C laid down a procedure under which there would be both closed and open written submissions so that we could issue an additional open annex dealing with principles governing redaction of such details.

6. Our conclusion that substituted decision notices must await submissions as to third party personal data did not, in our view, prevent us from publishing our conclusion that we allowed the appeals by Mr Evans. In that regard the September Reasons stated that the public interest benefits of disclosure of "advocacy correspondence" falling within Mr Evans's requests would generally outweigh the public interest benefits of non-disclosure. In particular, the September Reasons included the following:

> 1. Mr Rob Evans, a journalist who has worked for the Guardian since 1999, has asked to see correspondence between Prince Charles and United Kingdom government ministers. … In argument on his behalf it has been made plain that it is only "advocacy correspondence" that he seeks. It is common ground that in the present case entitlement to disclosure broadly depends on the answer to a core question: will disclosure – including any breach of confidence or privacy that disclosure will involve – be in the public interest?
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> 2. In order to answer that question we have considered extensive evidence and submissions. …
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> …
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> 4. For reasons which we explain below, we conclude that under relevant legislative provisions Mr Evans will, in the circumstances of the present case, generally be entitled to disclosure of "advocacy correspondence" falling within his requests. The essential reason is that it will generally be in the overall public interest for there to be transparency as to how and when Prince Charles seeks to influence government. The Departments have urged that it is important that Prince Charles should not be inhibited in encouraging or warning government as to what to do. We have not found it necessary to make a value judgment as to the desirability of Prince Charles encouraging or warning government as to what to do, for even assuming this to have the value claimed by the Departments we do not think the

adverse consequences of disclosure will be as great as the Departments fear. In broad terms our ruling is that although there are cogent arguments for non-disclosure, the public interest benefits of disclosure of "advocacy correspondence" falling within Mr Evans's requests will generally outweigh the public interest benefits of non-disclosure.

…

9. We have given directions so that a decision can be made identifying information to be disclosed to Mr Evans, along with the terms of substituted decision notices. When that decision is made we will publish a further open annex on the principles governing redaction of personal details of individuals other than Prince Charles. Arrangements have been made for a closed annex setting out our analysis of the disputed information and the evidence and arguments dealt with in closed session. If there is no appeal against our decision, or any appeal is unsuccessful, then certain parts of the closed annex will no longer need to remain closed, and these will be in a conditionally suspended annex.

10. Each request was made in April 2005, and concerned the period between 1 September 2004 and 1 April 2005 ("the request period"). Each request asked the relevant department, as regards the request period, for:

> (1) A list of all correspondence sent by Prince Charles to each minister in the department, identifying the recipient, sender, and date, for each item of correspondence.
>
> (2) A similar list of correspondence sent by each minister in the department to Prince Charles;
>
> (3) Complete copies of each piece of correspondence listed;
>
> (4) A schedule giving a brief description of each document relevant to the request, including the nature of the document, its date, and whether it was being released or not.

…

243. We summarise at sections B5 and B9 of OA3 the Commissioner's conclusions as regards the requests for lists and schedules under the Act and the Regulations. The closing skeleton argument for Mr Evans indicated that these requests will not need to be considered if we accepted his arguments on the substance of the correspondence. In the result we have in broad terms reached the conclusions sought by Mr Evans on the substance of the correspondence. Accordingly it is not necessary for us to discuss the parties' contentions as regards lists and schedules. We do not set them out here, or seek to analyse them: if we are wrong in our broad

> conclusions as to the arguments on the substance, then it seems to us that the correct conclusion as regards lists and schedules will depend upon the reasoning adopted in reaching a different conclusion on the substance of the correspondence.
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> …
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> 251. For the reasons given in this judgment, along with those set out in the closed annex and the conditionally suspended annex, we unanimously allow these appeals. As indicated earlier, we have given directions so that a decision can be made identifying information to be disclosed to Mr Evans, along with the terms of substituted decision notices.

7. The September Decision was a decision to allow the appeals. This was not an "excluded decision" under section 13 of the Tribunals, Courts and Enforcement Act 2007. Accordingly, any party to the case had a right of appeal, exercisable only with permission, to the relevant appellate court under that section: see the decision of the Upper Tribunal in *LS v London Borough of Lambeth (HB)* [2010] UKUT 461 (AAC), [2011] AACR 27. It may be noted that the right of appeal is not limited to decisions disposing of all or part of a case.

8. After considering further representations from the parties, we concluded that the procedure laid down in the September directions should be modified. For that purpose we issued a procedural decision dated 12 October 2012 ("the October Procedural Decision"). At annex 2 below we reproduce the document which set out the October Procedural Decision. It will be seen that:

   (1) It included not only the October Procedural Decision but also the reasons for that decision.

   (2) It gave directions at paragraphs (1) to (5), and made provision for those directions to be suspended if there were timely applications for permission to appeal against one or more of:

      (a) The September Decision (see paragraph (6) of the October Procedural Decision);

      (b) The determinations made in the Closed Annex to the September decision (see paragraph (7) of the October Procedural Decision), or

      (c) Paragraph (1) of the October Procedural Decision (see paragraph (7) of the October Procedural Decision).

(3) The reasons for the October Procedural Decision explained in paragraph 10 that at a late stage we had received representations from the Treasury Solicitor on behalf of the Departments. These representations urged that paragraphs (1) to (5) of the October Procedural Decision should be suspended in the event that there was served on the Commissioner a certificate under section 53. In that regard, we said:

> That section provides that certain decision notices or enforcement notices shall cease to have effect if there is a timely certificate by an accountable person stating that on reasonable grounds the accountable person has formed the opinion that, in respect of the request or requests concerned, there was no relevant failure. In our view a certificate under section 53 is entirely different in character from any appellate process, and is not something that we need to anticipate. If there is a certificate under section 53, and any party considers that the certificate necessitates some change in anything we have said or done, then it will be open to that party to make an application to us on notice to other parties.

9. A second document issued on 12 October 2012 comprised Open Annex 4 to the September decision. It explained the background to the October Procedural Decision. Paragraph 5 noted that while we had received submissions on redaction which identified issues between the parties of a general nature, we thought it best for those issues to be revisited in the context of provisionally redacted documents. Paragraph 6 noted that, for the reasons given in Open Annex 4, in that document we determined only that principles governing redaction of personal data concerning individuals other than Prince Charles should be dealt with at a later stage in accordance with the October Procedural Decision.

10. Also on 12 October 2012 we issued two further annexes to the September decision. These further annexes were not seen by Mr Evans. They were issued only to the Departments and the Commissioner. They comprised a Closed Annex and a Conditionally Suspended Annex:

(1) The Closed Annex set out our discussion of issues dealt with in closed session, and reached conclusions as to whether particular documents were disclosable in whole or in part, subject only to provisional redactions sought by the Departments in order to protect third party personal data.

(2) The Conditionally Suspended Annex set out those parts of the Closed Annex which, if there were no appeal against the September Decision, or if any appeal were unsuccessful, could appropriately be made public.

11. On 16 October 2012 the Attorney General issued a certificate under section 53 of the Act and regulation 18(6) of the Regulations ("the certificate"). The certificate stated, among other things:

> In a judgment dated 18 September 2012… the Upper Tribunal… considered requests relating to information held by [the Departments] contained in correspondence between His Royal Highness, The Prince of Wales and Ministers in the Departments … It concluded that the Departments, in accordance with their obligations under [the Act and the Regulations] should have disclosed the majority of the information comprising that correspondence.
>
> As an accountable person within the definition of section 53(8) of [the Act], I have on reasonable grounds formed the opinion that, in respect of the requests concerned, there was no failure to comply with section 1(1)(b) of the Act or regulation 5(1) of the Environmental Information Regulations 2004.
>
> …

12. Also on 16 October 2012 the Attorney General published reasons for issuing the certificate. Among other things, the reasons stated:

> 1. Pursuant to section 53 of the Freedom of Information Act 2000 ("the Act") and regulation 18(6) of the Environmental Information Regulations 2004, I have today signed a certificate in respect of the Upper Tribunal's decision contained in a judgment dated 18 September 2012, and the conditionally suspended annex to that judgment dated 12 October 2012 (*Evans v (1) Information Commissioner (2) Seven Government Departments* [2012] UKUT 313 (AAC), "*Evans"*). That judgment found that the government departments had failed to comply with their obligations under the Act and Regulations in refusing to disclose various letters between The Prince of Wales and Ministers in seven government departments ("the Departments"). In reaching this decision, I have taken account of the views of Cabinet, former Ministers and the Information Commissioner.
>
> 2. It is my opinion as the accountable person in this case, that the decisions taken by the Departments not to disclose those letters in response to the relevant requests were fully in accordance with the provisions of the Freedom of Information Act and the Environmental Information Regulations 2004. Disclosure of any part of those letters was not required having regard to the balance of the public interests in disclosure and those against. …
>
> …
>
> 4. The Upper Tribunal's judgment concerned requests under the Act, and the Environmental Information Regulations for disclosure of

> correspondence between The Prince of Wales and Ministers in the Departments for the period between 1 September 2004 and 1 April 2005. The Departments turned down the requests, and the Information Commissioner upheld the Departments' decisions. In broad terms, the Upper Tribunal allowed appeals against those decisions. It ordered the Departments to disclose 27 of the 30 items of correspondence which it found to be within the scope of the requests. Those 27 items of correspondence fell into a category which the Tribunal described as "advocacy correspondence".
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> …
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> 22. Having therefore taken into account all the circumstances of the case, I am satisfied that the public interest, at the time of the requests (and also at the present time) fell (and falls) in favour of non-disclosure. …

13. On 29 October 2012 the Tribunal advised the parties that it proposed to make the following order:

> Upon the issue by the Attorney-General of a certificate under section 53 of the Freedom of Information Act 2000;
>
> And it being common ground that the certificate has the consequence that, unless it is withdrawn or set aside, the tribunal's decision of 18 September 2012 allowing the appeals ceases to have effect,
>
> The tribunal orders that:
>
> 1. All directions and orders by the tribunal for steps to be taken after 18 September 2012 shall cease to have effect.
>
> 2. There be liberty to apply in the event that the certificate is withdrawn or set aside.
>
> 3. Subject to the foregoing, there be no further order in this appeal.

14. This led to a letter in reply from Mr Evans's legal adviser:

> We note from para 243 of the Tribunal's judgment dated 18 September 2012 that no decision has yet been made on the release of lists and schedules. As that paragraph correctly records, Mr Evans did not ask the tribunal to determine that issue in the event that his arguments in respect of the correspondence itself were accepted. However, in light of the Attorney General's certificate under s.53 in relation to the release of the correspondence itself, the issue whether Mr Evans is entitled to receive the lists and schedules now arises acutely. We are writing to invite the Tribunal to rule on whether the lists and the schedules should be released.

> It is the Appellant's view that the Tribunal already has the material it needs to make a determination of this issue but we recognise that the Tribunal may with to give (or the other parties may wish to seek) directions as to submissions on that issue.
>
> As a decision has yet to be handed down on the appeal in connection with the request for lists and schedules, it would not be appropriate to agree the Tribunal's current proposed order at this stage.

15. Although the letter of 1 November 2012 said that it was written "to invite" the tribunal to rule on whether lists and schedules should be released, it was in substance an application for the tribunal to rule that the Commissioner had been wrong to hold that the Departments were entitled to refuse to provide the lists and schedules requested by Mr Evans. We shall accordingly refer to the letter of 1 November 2012 as "the November application". We considered observations on that application, and on 7 November 2012 we made an interim order ("the November interim order"). This stated in paragraph 1 that all existing directions and orders by the tribunal for steps to be taken after 18 September 2012 were suspended so that they would not have effect without a further order. Paragraphs 2 and 3 of the November interim order set out a timetable within which the Commissioner and the Departments were to provide a written response to the November application, and Mr Evans was to provide a written reply.

16. On 8 November 2012 the Departments lodged written submissions. They stated that the tribunal had issued "a final, perfected judgment on 18 September 2012" which had found in paragraph 243 that it was unnecessary for the tribunal to consider whether lists and schedules should be released. It was submitted that nothing in that judgment left open for further determination any issue relating to the release of lists and schedules, and that accordingly the tribunal had no power to make any further ruling within these proceedings in that regard. The final paragraph added that if Mr Evans sought a schedule disclosing information about the content of the correspondence itself this would circumvent the certificate, and added:

> It would be wholly inappropriate for the Tribunal to make any order which had such effect; and Mr. Evans' proper recourse (if any) is by way of application for judicial review of the decision to make the section 53 certificate.

17. The Commissioner advised on 9 November 2012 that he adopted a neutral stance on the November application.

18. In a written reply dated 16 November 2012 Mr Evans submitted that the tribunal had contemplated that it would go on to consider the request for lists and schedules should its decision on the substance of the correspondence be overturned. Points made by the Departments about an inability to reopen the judgment were said by Mr Evans to be misdirected, in that they addressed a situation which has not, in fact, arisen. The reply confirmed that Mr Evans sought a ruling disclosing

information about the content of the correspondence. This would not "circumvent" the certificate, which related only to the substance of the correspondence.

19. We concluded that in order to resolve these issues we should direct an oral hearing of three questions. Directions for such a hearing were issued on 27 November 2012 ("the November directions"). Paragraph 1 of the directions identified the three questions as follows:

> (1) the question whether the tribunal now has power to rule on that part of Mr Evans's appeal which complained of the Commissioner's refusal to order disclosure of lists and schedules;
>
> (2) if the tribunal has such power, the question whether it can and should decline to exercise that power as a matter of discretion;
>
> (3) if the tribunal has such power and exercises it, what decision or decisions it should reach.

20. When considering what had been said by the parties it seemed to us that it might be important to understand how it was said that the September Decision gave rise to an ability to invoke section 53. In that regard paragraph 3 of the November directions required that skeleton arguments in advance of the hearing should:

> … include observations on the following possible analysis of the statutory basis for actions that occurred on 18 September 2012 and thereafter, and the ways in which that analysis, or any alternative analysis that is proposed, may affect the answer to question (1):
>
> (A) On 18 September 2012 the tribunal's decision allowed the appeals, and the tribunal stated that it planned to issue substituted decision notices.
>
> (B) When eventually issued, those substituted decision notices would take effect under s 58(1) as decision notices of the Commissioner ("Commissioner's decision notices") allowing Mr Evans's appeals to the Commissioner, which in due course could be the subject of enforcement procedures under the enforcement provisions in the Act.
>
> (C) Until such replacement Commissioner's decision notices are issued the original Commissioner's decision notices remain in force.
>
> (D) The Attorney-General, when issuing his certificate under s 53 on 16 October 2012, must have been proceeding on the basis of propositions that:
>
> > (a) the words "decision notice" in s 53(1) are broad enough to go beyond Commissioner's decision notices (all of which, for the reasons at para (C) above, were at that time such as to impose no obligation on the Departments) and to include the tribunal's decision of 18 September 2012;

(b) in this regard the definition of "decision notice" in section 84 of the Act does not limit the meaning of those words in s 53, because in s 53 "the context otherwise requires";

(c) in these circumstances there was no need for him to wait until the tribunal issued substituted decision notices.

(E) If the propositions at paragraphs (A) to (D) above are correct, what do the words "cease to have effect" in section 53(2) mean in the context of a tribunal decision allowing an appeal (assuming that "decision notice" in s 53(1) includes such a decision), and in particular do they mean that the tribunal has not allowed the appeal and accordingly has yet to determine it?

(F) If it is said that the propositions at paragraphs (A) to (D) above are not correct, what impact does this have on the answer to the question posed in paragraph (E) above?

21. On 9 January 2013 Mr Evans sought permission to apply for judicial review of the certificate. The grounds for seeking judicial review asserted that invocation of section 53 could only be justified in law in a case where the government could point to "cogent and compelling reason", and that the present was not such a case. The merits or demerits of what is urged in the grounds are not matters for us and we make no comment upon them.

22. In that regard, we record, but conclude that we need make no substantive observations on, the parties' comments on the possible analysis at paragraph 3 of the November directions:

(1) It was common ground that propositions (A) to (C) are correct.

(2) Mr Evans, in his skeleton argument served on 20 December 2012 pursuant to the November directions, commented that:

(a) Proposition (D) assumes too much in the Attorney General's favour. It is unlikely he conducted any such analysis. The likelihood was that he had regard to s.53(4), which sets time running, for the purposes of s.53, from the date on which an appeal is "determined", and, out of an abundance of caution, issued his certificate within 20 working days of the Tribunal handing down judgment, notwithstanding there was no decision notice on which his certificate could bite.

(b) In fact, the words "decision notice" in s.53(1) have the meaning which is given to them by s.84 of the Act, save that the context requires them to be read to include a substituted notice issued by the Upper Tribunal pursuant to s.58(1)(b), as well as a notice served by the Commissioner

pursuant to s.50(3)(b). The context does not require any broader interpretation. What the context requires is that the words in s.53(4) "the day on which that appeal… is determined" be construed to mean "the day on which the Tribunal refuses the appeal or issues a substituted decision notice". If that construction is adopted, then the perceived anomaly which has led to the premature use of the veto in this case does not arise. The Attorney General could and should have waited until there was a substituted decision notice before issuing his certificate.

(c) As to (E) and (F), on the true construction of s.53, there has not yet been any decision notice and the appeal has not yet been determined.

(3) At paragraph 31 of his grounds for seeking judicial review Mr Evans said that the power to certify only arose in relation to a statutory decision or enforcement notice. At footnote 9 the grounds explained that a substituted decision notice had not yet been issued, adding that it was proper in the judicial review claim "to focus on the Attorney's decision (albeit prospective, or even premature) on its substantive legal merits."

(4) The Departments, at paragraphs 12 to 22 of their skeleton argument served on 9 January 2013 pursuant to the November directions, set out reasons for concluding that the possible analysis at proposition (D) was correct. Among other things, they contended that Parliament could not have intended it to be impossible to exercise the section 53 power in cases such as the present. As to proposition (E), they contended at paragraph 24 that the words "cease to have effect" apply only to the part of the judgment that requires the public authority to make disclosure by way of compliance with the Act or the Regulations. They did not deal with proposition (F).

(5) The Commissioner, at paragraph 14 of his skeleton argument served on 18 January 2013 pursuant to the November directions, agreed with the analysis of the Departments.

23. An oral hearing in accordance with the November directions took place on 24 January 2013.

C. Power to rule on lists and schedules

24. Our prime concern when asked to make a particular ruling would ordinarily be to seek to give effect to the overriding objective. That objective is set out in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules, SI 2008 No. 2698, as amended ("the Upper Tribunal Rules"). It is that we should deal with cases justly and fairly. As regards the November application, however, it is contended that we have no power to embark upon that process.

25. What has happened in the present case so as to give rise to a question about our powers? Key features of the history set out in section B above are these:

(1) The September Decision allowed the appeals.

(2) The September Decision also stated that a further decision would identify information to be disclosed to Mr Evans, along with the terms of substituted decision notices.

(3) The September Reasons began by:

(a) describing Mr Evans's request to see correspondence;

(b) noting that in argument on his behalf it had been made plain that it was only "advocacy correspondence" that he sought; and

(c) recording our conclusion that under relevant legislative provisions Mr Evans would, in the circumstances of the present case, generally be entitled to disclosure of "advocacy correspondence" falling within his requests.

(4) The September Reasons said at paragraph 9 that we had given directions so that a decision could be made identifying information to be disclosed to Mr Evans, along with the terms of substituted decision notices.

(5) The September Reasons at paragraph 10 recorded the full terms of Mr Evans's requests, including his requests for lists and schedules.

(6) The September Reasons at paragraph 243 said that:

(a) the closing skeleton argument for Mr Evans indicated that his requests for lists and schedules would not need to be considered if we accepted his arguments on the substance of the correspondence;

(b) we had in broad terms reached the conclusions sought by Mr Evans on the substance of the correspondence, and accordingly it was not necessary for us to discuss the parties' contentions as regards lists and schedules; and

(c) we did not set out those arguments, or seek to analyse them: if we were wrong in our broad conclusions as to the arguments on the

substance, then it seemed to us that the correct conclusion as regards lists and schedules would depend upon the reasoning adopted in reaching a different conclusion on the substance of the correspondence.

(7) The Closed Annex on 12 October 2012 identified information to be disclosed to Mr Evans, subject only to provisional redactions sought by the Departments in order to protect third party personal data. It did not identify the terms of substituted decision notices.

(8) The October Procedural Decision, also on 12 October 2012, required information to be provided to Mr Evans so that such issues as arose in relation to third party personal data could be identified and directions given as to their resolution.

(9) On 7 November 2012, following issue of the Attorney General's certificate on 16 October 2012, the November interim order suspended all existing directions and orders for steps to be taken after 18 September 2012. In these circumstances:

(a) the obligation to provide the information required by the October Procedural Decision was suspended,

(b) we have not determined what, if any, information comprising third party personal data must be disclosed to Mr Evans, and

(c) we have not identified the terms of substituted decision notices, nor have we substituted any notices.

26. What are our powers in these circumstances? It is common ground that the Upper Tribunal's powers for present purposes are statutory only. They comprise particular powers under the Act, which must be read with general provisions in the Tribunals, Courts and Enforcement Act 2007 ("the TCE Act").

27. Our particular powers in relation to information rights are those which under the Act were formerly conferred on the Information Tribunal. They are set out in sections 57 and 58 of the Act:

> 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. Despite the use of the word "or" linking "allow the appeal" and "substitute such other notice" in section 58(1), it is well established that this word must, in the context of appeals by applicants for information, be read conjunctively: see the decision of the Information Tribunal in *Guardian Newspapers Ltd and Brooke v Information Commissioner and British Broadcasting Corporation* EA/2006/0011&0013 (08.01.07) at paragraphs 16 to 23.

29. Thus if the tribunal allows an appeal against a Commissioner's decision notice it will, in the case of an appeal by an applicant for information, and may, in the case of an appeal by a public authority, "substitute such other notice as could have been served by the Commissioner". For present purposes relevant requirements for such a notice are set out in section 50(4) of the Act:

> (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.

30. These provisions in the Act do not address the particular circumstances which have arisen in the present case. Mr Eardley, who appears in support of the November application on behalf of Mr Evans, submits that we must apply the general principles identified by the Court of appeal in *Aparau v Iceland Frozen Foods plc* [2000] ICR 341. In our view Mr Eardley accurately summarised those principles

(see Moore-Bick J at p. 350 C to E, Mance LJ at pp. 351H to 352D, and Peter Gibson LJ at p. 353 B to G) as follows:

> A statutory tribunal exhausts its jurisdiction once it has delivered a final decision disposing of all the issues before it, subject (a) to any express provision in its governing statute which permits the tribunal to review its decision, and except that (b) its jurisdiction may be revived if, and to the extent that, an appellate court remits to it an issue for determination

31. Mr Swift QC and Mr Milford, appearing on behalf of the Departments, in submissions adopted by Mr Pitt-Payne QC on behalf of the Commissioner, said that Mr Evans's reliance on *Aparau* was misplaced. It was not a decision about this tribunal's statutory jurisdiction, but about the different jurisdiction of, and different rules applicable to, the Employment Tribunal. Indeed it concerned not only a different jurisdiction, but also an entirely different question whether the Employment Tribunal has power to entertain issues beyond the scope of those remitted to it by the Employment Appeal Tribunal following a successful appeal.

32. We do not consider that any of the matters identified in the preceding paragraph casts doubt on the relevance to the present case of the general principles summarised by Mr Eardley. It was because the statutory powers of the Employment Tribunal made no special provision that the Court of Appeal held (see p. 350C) that "[it], like any other tribunal, has exhausted its jurisdiction once it has delivered a final decision disposing of all the issues before it." It is right that the specific question which arose in the case concerned what the tribunal could do when a point was remitted to it. However that question was answered by determining that neither under its general statutory powers (including a power of review), nor under the jurisdiction conferred on it by remittal, did the tribunal have power to allow a party to amend its case to raise issues which were not previously before it.

33. There is more force in the remaining point made by the Departments. This is that *Aparau* was not concerned with a judgment dealing with some (but not all) of the issues before the tribunal. We accept that *Aparau* is not, therefore, authority for the proposition that a statutory tribunal must decide all issues relating to a case before it can have exhausted its powers in respect of any part of the case.

34. At this stage of the analysis it is helpful to turn to general provisions found in the TCE Act and to the Upper Tribunal Rules. As Mr Swift points out, subject to immaterial exceptions, section 10 of the TCE Act gives power to the Upper Tribunal to review a decision made by it on a matter in a case. Under section 10(4) if it has reviewed a decision, it may in the light of the review correct accidental errors, amend reasons, or set the decision aside. Under section 10(3), however, tribunal procedure rules may limit the exercise of the power of review in certain respects. The Upper Tribunal Rules appear by rule 46 to have limited the exercise of the power to review to cases where an application for permission to appeal has been received, and even then the power can be exercised only in certain narrowly

defined circumstances. In conjunction with this, under a specific rule-making power conferred in paragraph 15 of Schedule 5 to the TCE Act, the Upper Tribunal Rules by rule 43 make separate provision in relation to setting aside of a decision:

> Setting aside a decision which disposes of proceedings
>
> 43(1) The Upper Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if-
>
> (a) the Upper Tribunal considers that it is in the interests of justice to do so; and
>
> (b) one or more of the conditions in paragraph (2) are satisfied.
>
> (2) The conditions are-
>
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
>
> (b) a document relating to the proceedings was not sent to the Upper Tribunal at an appropriate time;
>
> (c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
>
> (d) there has been some other procedural irregularity in the proceedings.

35. Under rule 43 the power to set aside is conferred in relation to "a decision which disposes of proceedings". This must be read in the light of rule 1, where "dispose of proceedings" is stated to be an expression which "includes, unless indicated otherwise, disposing of a part of the proceedings".

36. Thus the Upper Tribunal Rules appear to have conferred, where relevant criteria are met, a power to set aside a decision, or part of a decision, disposing of a part of the proceedings. This, as it seems to us, is at least an indication that the Upper Tribunal Rules have been drafted on the basis that in a case not falling within rule 43 it would not have been possible, under the tribunal's statutory jurisdiction, to set aside a decision disposing of a part of the proceedings. Mr Eardley did not suggest that the criteria under rule 43 are met in the present case.

37. For these reasons we approach the matter on the footing that if the September Decision disposed of that part of the proceedings which was concerned with the lists and schedules requests, then we would have no power to consider the November application. It follows that we do not need to express any view on arguments based on section 53 in support of such a conclusion.

38. Did the September Decision dispose of that part of the proceedings which was concerned with the lists and schedules requests? We think it abundantly clear that it did not.

39. Mr Swift submitted that in order to identify what was disposed of one must read both the decision and the reasons. We agree. Paragraph 243 of the September Reasons, submitted Mr Swift, showed that what the tribunal did was not to put off a decision on lists and schedules but to say that they were not being dealt with. As to that, however, paragraph 243 must be read in context.

40. The lists and schedules requests were noted in paragraph 10, and not referred to again until paragraph 243. With those two exceptions, the whole of the September Reasons were concerned with Mr Evans's request for correspondence. Paragraph 243 explained why this was so. It was because of a concession by Mr Evans: if we accepted his arguments on the correspondence then he would not need us to deal with lists and schedules. Underlying that concession was the obvious point that if Mr Evans had the correspondence then he could make his own lists and schedules. What was being said was, "If I have a decision ordering disclosure of the correspondence, then I do not need to ask for lists and schedules."

41. In the September Reasons we were, as explained in paragraph 4, setting out why we had concluded, under relevant legislative provisions Mr Evans would, in the circumstances of the present case, generally be entitled to disclosure of "advocacy correspondence" falling within his requests. That conclusion meant that the appeal must be allowed. In paragraph 243 we said that our conclusion on the correspondence, in conjunction with Mr Evans's concession, meant that we did not need to discuss the parties' contentions as to lists and schedules.

42. It would in our view be manifestly unfair and unjust to read this as a disposal of the part of the case concerned with the lists and schedules requests. Our intention was that we would shortly issue substituted decision notices requiring disclosure of the advocacy correspondence sought by Mr Evans. When that happened there would no longer be a need to deal with the lists and schedules requests. Until it happened, however, we were not disposing of those requests. We had no reason to do more than explain that in the light of the concession we did not need in the September Reasons to deal with the arguments about lists and schedules. Moreover it would have been inconsistent with Mr Evans's concession for us to proceed then and there to dispose of the lists and schedules requests at a stage when we had not yet issued substituted decision notices requiring disclosure of the correspondence.

43. For all these reasons we conclude that we have power to rule on Mr Evans's requests for lists and schedules.

D. Should we exercise the power?

44. If we have power to rule on Mr Evans's requests for lists and schedules, then both Mr Evans and the Commissioner agree that we should exercise it. Mr Pitt-Payne identified an important factor which led the Commissioner to agree with Mr Evans on this aspect. It was this: if we did indeed have power to make a ruling, there was a part of the case which had not been the subject of the Attorney General's certificate and which we had not ruled on. It was undesirable that there should be part of the case left in limbo, and it should be put right.

45. Mr Swift urged that we should not exercise any such power. He submitted, first, that there would be no good reason to do so. That submission, however, is answered by the powerful point identified by Mr Pitt-Payne. A second submission by Mr Swift was that the truly exceptional circumstances in which discretion can be exercised to reopen appeals in the civil courts do not apply. As to that, however, for the reasons given in section C above, we are not re-opening anything.

46. The final submissions on this point made by Mr Swift relied on the Attorney General's certificate. Mr Swift submitted that the certificate was made on the basis that disclosure of the subject matter of the correspondence would damage Prince Charles's preparations to become king and that the public interest lay in not disclosing it. It would be wrong as a matter of discretion, submitted Mr Swift, to disclose information covered by reasoning in the certificate and thereby to bypass the certificate. In our view these points are more appositely made in relation to the next question, which concerns how we should exercise any power to rule on the lists and schedules requests. In any event the answer to them is that the certificate is concerned only with our decision about disclosure of correspondence. It has no wider effect.

E. What decision should we make?

47. Mr Eardley submitted that our decision should require disclosure of lists and schedules. The reasons for reaching such a decision were those articulated in the September Reasons, save that the public interest in withholding the information which would be set out in the lists and schedules is even weaker, given their much more limited potential for causing any adverse consequences. He was supported by Mr Pitt-Payne in this sense: while the Commissioner stood by submissions previously made in relation to correspondence, he recognised that our reasoning in rejecting his submissions on the correspondence would inevitably lead us to conclude that the public interest balance lay in favour of disclosure of lists and schedules.

48. Mr Swift submitted that disclosure of lists and schedules would lead to damaging speculation about the nature of the correspondence. Inferences would be drawn that Prince Charles had written on particular topics or expressed particular views. The effect would be to inhibit Prince Charles and ministers from exchanging views, and consequently to damage Prince Charles's preparation for kingship. At the same

time, on the basis of the public interest factors set out in the September Reasons, the public interest in disclosure of lists and schedules is significantly less than the public interest in disclosure of the substance of the letters themselves. The public interest balance under s.2(2)(b) FOIA is consequently, submitted Mr Swift, decisively in favour of maintaining the exemptions applying to lists and schedules.

49. We are satisfied that in relation to those parts of the appeals which concern the lists and schedules requests we should substitute decision notices requiring disclosure of the information sought in those requests. The reasons for disclosure that we gave when considering disclosure of correspondence apply, albeit with lesser force, as regards lists and schedules. To the extent that they are of lesser force because the information to be provided will be limited, there will be a corresponding weakening effect on factors relied on in opposing the production of lists and schedules. In particular as regards subject matter, information on which was expressly or implicitly sought in the lists and schedules requests, the public interest in disclosure remains strong. The reason is that disclosure of subject matter will enable the public to know the topics covered in advocacy correspondence. In so far as there is a particular concern that disclosure of subject matter will lead to inference, speculation, and misperception, we repeat what we said at paragraph 188 of the September Reasons:

> There is, as it seems to us, a short answer to all the various ways in which the Departments have sought to rely on dangers of "misperception" on the part of the public. It is this: the essence of our democracy is that criticism within the law is the right of all, no matter how wrongheaded those on high may consider the criticism to be.

50. There are two formal aspects of our decision which we mention here. The first is that while the requests made a division between lists and schedules, we consider that the information sought can more conveniently be disclosed in a single schedule. The second is that at the hearing on 24 January 2013 we raised with the parties a concern as to whether we can substitute decision notices in relation to part only of the Commissioner's decisions leaving over, in accordance with the November interim order, what may happen in relation to the balance. The parties were in agreement that there was no obstacle to our taking this course.

F. Conclusion

51. For the reasons given above we unanimously allow these appeals in relation to the lists and schedules requests, and as set out in paragraph 5(2) of our decision we substitute those parts of the Commissioner's decision notices which dealt with Mr Evans's requests for lists and schedules, replacing them with decisions requiring disclosure by each department of a schedule of information. The November interim order, issued so as to put on hold our directions concerning disclosure of correspondence following the Attorney General's certificate, remains in place in relation to matters other than the lists and schedules requests.

Signed:

Paul Walker

John Angel

Suzanne Cosgrave

20 February 2013

Annex 1: The September Directions

Directions made by the Upper Tribunal, 30 August 2012, revised 17 September 2012

A breach of any of the directions below may be punishable by imprisonment, fine or other sanctions under section 25 of the Tribunals, Courts and Enforcement Act 2007.

1. Drafts of the tribunal's decision and reasons may be seen by named persons only:
(1) The provisional draft open judgment will be that part of the judgment, along with any revisions or proposed revisions, which the tribunal notifies to the confidential closed group of named persons as a provisional draft of what it intends to make available publicly.
(2) The reconsidered draft open judgment will be that part of the judgment, along with any revisions or proposed revisions, which the tribunal on further consideration of the provisional draft open judgment notifies to the confidential open group of named persons as a draft of what it intends to make available publicly.
(3) The draft closed annex will comprise those parts of the judgment, along with any revisions or proposed revisions, in which the tribunal discusses the disputed information and other closed material made available to the tribunal. In these directions the term "closed annex" includes any appendix to that annex.
(4) The draft conditionally suspended annex will comprise parts of the closed annex, along with any revisions or proposed revisions, in which the tribunal determines and discusses, otherwise than by reference to material which must remain closed, the content of such of the disputed information which it considers ought to be provided to the Appellant. The conditionally suspended annex will not be made available to the Appellant or publicly prior to the date on which the tribunal determines that the conditional suspension has expired. The tribunal envisages that, as regards the conditionally suspended annex, this date will be the latest of (a) the final determination of any application by the Information Commissioner or a relevant Government Department for permission to appeal the decision of the tribunal as regards that annex, and if permission is granted, the final determination of the appeal, and (b) the time limited for seeking permission to appeal from the tribunal, and if the tribunal refuses permission, for seeking permission to appeal from the Appeal Court. However determination of the date will in all cases remain a matter for the tribunal.

2. All drafts are provided to the named persons in confidence, and accordingly:
(1) neither the draft itself nor its substance nor the outcome indicated by that draft may be disclosed to any person other than a named person permitted to see that draft;
(2) the parties and the named persons must take all reasonable steps to ensure that confidentiality is preserved in accordance with these directions;
(3) no action is to be taken (other than such preparations as named persons may discuss among themselves) in response to any draft before the open judgment has been formally published.

3. The named persons are as follows
(1) named persons in the confidential closed group:
Counsel for the Information Commissioner: Timothy Pitt-Payne QC
Information Commissioner's Office: Graham Smith (Deputy Commissioner), Mark Thorogood (Solicitor-Group Manager)
Counsel for the Additional Parties: Jonathan Swift QC, Julian Milford
Treasury Solicitor: Louise Marriott, Adam Rossiter, Neera Gajjar
Cabinet Office: Sir Jeremy Heywood (Cabinet Secretary), Chris Martin (Principal Private Secretary to the Prime Minister), Callum Miller (Deputy Prime Minister's Office), Ciaran Martin (Constitution Director), Roger Smethurst (Head of Knowledge and Information Unit), Mike Pigott (Information Manager), Simon Whitbourn (Lawyer, Cabinet Office Legal Advisers)
Royal Household: HRH The Prince of Wales, William Nye (Principal Private Secretary to the Prince of Wales), Doug King (Assistant Private Secretary to The Queen), Doug Precey (Head of Secretariat, Private Secretary's Office), Gerrard Tyrrell (Senior Partner, Harbottle & Lewis).

(2) named persons in the confidential open group will comprise all named persons in the confidential closed group, and:
Appellant: Rob Evans
Counsel for the Appellant: Michael Fordham QC, Aidan Eardley
Solicitor for the Appellant: Jan Clements, Zoe Norden

4. (1) The provisional draft open judgment and the draft closed annex will be emailed, marked "RESTRICTED", to Mr Thorogood and Mr Rossiter on Tuesday 4 September 2012 and may be forwarded by them, on the basis set out in these directions, to named persons in the confidential closed group.
(2) No later than noon on Friday 7 September 2012 Mr Thorogood on behalf of the Information Commissioner and Mr Rossiter on behalf of the Additional Parties shall submit:
(a) A list comprising typing corrections and other obvious errors in writing, or, in exceptional circumstances going beyond the correction of typographical errors and the like, so that changes can be incorporated, if the tribunal accepts them, in the reconsidered draft open judgment and in all parts of the final judgment; and
(b) A written submission as to (i) any material in the provisional draft open judgment which needs to be in the conditionally suspended annex or the closed annex and (ii) any material in the draft conditionally suspended annexes which needs to be in the closed annexes only.

5. (1) The reconsidered draft open judgment will be emailed, marked "RESTRICTED", to Ms Clements, Mr Thorogood and Mr Rossiter on Tuesday 11 September 2012 and may be forwarded by them, on the basis set out in these directions, to named persons in the confidential open group.
(2) No later than noon on Friday 14 September 2012 Ms Clements on behalf of the Appellant, Mr Thorogood on behalf of the Information Commissioner and Mr Rossiter on behalf of the Additional Parties shall submit a list comprising typing corrections and other obvious errors in writing, or, in exceptional circumstances going beyond the correction of typographical errors and the like, so that changes can be incorporated, if the tribunal accepts them, in the published open judgment.

5A. (1) No later than noon on Wednesday 19 September 2012 the Additional Parties shall provide to the tribunal (a) copied to the Information Commissioner, closed written submissions as to personal details of individuals other than Prince Charles which they submit should be redacted from documents (or parts of them) which would fall for disclosure in accordance with the draft closed annex ("the proposed redactions"), and (b) copied to the Appellant and the Information Commissioner, open written submissions as to the legal basis said to warrant the proposed redactions
(2) Upon compliance with sub-paragraph (1) above,
(a) no later than noon on Monday 24 September 2012 the Appellant and the Information Commissioner may provide to the tribunal, copied to the Additional Parties, open written submissions in answer on the legal basis said to warrant the proposed redactions;
(b) no later than noon on Monday 24 September 2012 the Information Commissioner may provide to the tribunal, copied to the Additional Parties, closed written submissions in answer on the proposed redactions;
(c) no later than noon on Wednesday 26 September 2012 the Additional Parties may provide to the Information Commissioner and the tribunal closed written submissions in reply as to the proposed redactions;
(d) no later than noon on Wednesday 26 September 2012 the Additional Parties may provide to the tribunal, copied to the Appellant and the Information Commissioner, open written submissions in reply as to the legal basis said to warrant the proposed redactions.

5B. (1) The draft conditionally suspended annex, and any proposed revisions to the draft closed annex (such proposed revisions to include identification of any permitted redactions of personal details of individuals other than Prince Charles), will be emailed, marked "RESTRICTED", to Mr Thorogood and Mr Rossiter on Friday 28 September 2012 and may be forwarded by them, on the basis set out in these directions, to named persons in the confidential closed group.
(2) No later than noon on Tuesday 2 October 2012 Mr Thorogood on behalf of the Information Commissioner and Mr Rossiter on behalf of the Additional Parties shall submit:
(a) A list comprising typing corrections and other obvious errors in writing, or, in exceptional circumstances going beyond the correction of typographical errors and the like, so that changes can be incorporated, if the tribunal accepts them, in the conditionally suspended annex;
(b) A written submission as to any material in the draft conditionally suspended annex which needs to be in the closed annex only; and
(c) A written submission as to any material in the closed annex but not in the draft conditionally suspended annex which could properly be included in the conditionally suspended annex.

5C. (1) A draft additional open annex dealing with the principles governing redaction of personal details of individuals other than Prince Charles will be emailed, marked "RESTRICTED", to Ms Clements and/or Ms Norden, Mr Thorogood and Mr Rossiter on Friday 28 September 2012 and may be forwarded by them, on the basis set out in these directions, to named persons in the confidential open group.

(2) No later than noon on Tuesday 2 October 2012 Ms Clements or Ms Norden on behalf of the Appellant, Mr Thorogood on behalf of the Information Commissioner and Mr Rossiter on behalf of the Additional Parties shall submit a list comprising typing corrections and other obvious errors in writing, or, in exceptional circumstances going beyond the correction of typographical errors and the like, so that changes can be incorporated, if the tribunal accepts them, in the additional open annex.

6. The directions above must be respected by all those who have sight of any draft or part of it, or who learn the content or outcome of any draft or part of it or of the draft judgment as a whole or any part of it.

7. The legal advisers to the parties must take reasonable steps to ensure that prior to receipt of any draft each named person has had sight of paragraphs 1 to 6 above and understands both the effect of those paragraphs and the potential consequences if they are not complied with.

8. The tribunal proposes to deal with any applications for consequential orders in writing, and on this basis does not propose to hold a formal hand down of the published judgment.

9. The parties will, subject to the remainder of this paragraph, be given one working day's notice of the date and time when the open judgment (with the exception of the additional open annex referred to in paragraph 5C above and paragraph 10 below) will be e-mailed to the parties and formally published so as to become publicly available. It is currently expected that this will be Tuesday 18 September 2012. Shorter notice may be given if in the view of the tribunal there are circumstances, for example something published in the media, which require this.

10. With the same reservation as in paragraph 9 above, the parties will be given one working day's notice of the respective dates and times when each of (1) the additional open annex will be e-mailed to the parties and formally published so as to become publicly available; and (2) the closed annex and the conditionally suspended annex will be emailed to the Information Commissioner and the Additional Parties.

(Dated) 17 September 2012

[End of Annex 1]

Annex 2: The October Procedural Decision

PROCEDURAL DECISION AND REASONS OF THE UPPER TRIBUNAL,
12 October 2012

…

DECISION OF THE UPPER TRIBUNAL

The tribunal's decision of 18 September 2012 ("the September 2012 decision") allowed the appeals of Mr Evans. At that stage the tribunal deferred its consideration of substituted decision notices in order to enable the parties to make submissions as to the principles governing the redaction of personal data of individuals other than Prince Charles. The tribunal's directions of 17 September 2012 ("the September 2012 directions") provided for representations to be made in that regard. Having considered those representations, in order to proceed, in a manner which is fair to all concerned, to make such decisions on the appeals as it considers appropriate under section 58 of the Freedom of Information Act 2000 and regulation 18 of the Environmental Information Regulations, the tribunal directs:

(1) The additional parties shall no later than 4pm on Monday 12 November 2012 lodge with the tribunal and provide to other parties:

(a) subject to any "provisional redactions" asserted to be lawful in order to protect personal data of individuals other than Prince Charles, copies of the documents or parts of documents which the closed annex to the September 2012 decision states must be disclosed; the provisional redactions must be clearly identified so as to distinguish them from any other redactions which the tribunal may have determined should be made.

(b) a schedule giving for each relevant document an anonymised identifier for each individual whose data has been redacted and setting out in relation to that individual the reasons for the redaction; in the case of an individual whose personal data have been redacted from more than one document, the same identifier shall be used in relation to each document;

(c) any evidence upon which they rely in support of their case for the redactions; in this regard:

(i) such evidence must address, among other things, whether the individual is now living, and if not the date on which the individual died;

(ii) such evidence must, among other things, also address, as at the date of the document and any other date said by the additional parties to be

relevant, the profession of the individual, the name or type of organisation for which the individual worked, the seniority of the individual within that organisation, and the extent to which the individual had at the date of the document or has on any later date sought or been the subject of public debate or media reporting or comment;

(iii) evidence which would or might identify the individual concerned shall be provided only to the tribunal and the Commissioner.

(d) open and, to the extent necessary, closed submissions in support of their case that the data in question constitute personal data which should be redacted under section 40 or regulation 13.

(2) Within 28 days of compliance with paragraph (1) by the additional parties, the appellant must lodge with the tribunal and copy to other parties a schedule identifying

(a) such of the "provisional redactions", and assertions and evidence supplied to him in support of them, as he contests; and

(b) proposed directions for determining such issues as may arise in that regard.

(3) Within 14 days of compliance with paragraph (2) by the appellant, the Commissioner and the additional parties must lodge with the tribunal and copy to other parties their submissions in response as to proposed directions.

(4) Within 14 days of compliance with paragraph (3) by the Commissioner and the additional parties, the appellant must lodge with the tribunal and copy to other parties his submissions in reply as to proposed directions.

(5) The tribunal will thereafter give further directions.

(6) If prior to 4pm on Thursday 18 October 2012 the tribunal receives an application by the respondent or any of the additional parties for permission to appeal as regards the September 2012 decision, then the operation of paragraphs (1) to (5) above is suspended until further order.

(7) If paragraphs (1) to (5) above are not suspended pursuant to paragraph (6) above, but prior to 4pm on Monday 12 November 2012 the tribunal receives an application by the respondent or any of the additional parties for permission to appeal against any of the determinations made in the closed annex to the September 2012 decision or the

decision in paragraph (1) above, then the operation of paragraphs (1) to (5) above is suspended until further order.

REASONS FOR DECISION

1. In these reasons we adopt the short forms used in the decision above, in the September 2012 decision and in the September 2012 directions. The procedures that we have adopted have had the following consequences:

   (1) The September 2012 decision was our primary determination in this matter: it allowed the appeals. We reached the conclusion that under relevant legislative provisions Mr Evans will, in the circumstances of the present case, generally be entitled to disclosure of "advocacy correspondence" falling within his requests. Our essential reason was that it would generally be in the overall public interest for there to be transparency as to how and when Prince Charles seeks to influence government.

   (2) At the time of the September 2012 decision the Commissioner and the Departments had received a draft of the proposed Closed Annex to that decision. In the draft we identified the documents or parts of documents which, in the light of our conclusion in the September 2012 decision, would be disclosable. We also gave our reasons. However, we did not at that stage make any determinations as to the consequences of our conclusion. The reason for not doing so was that we had not had submissions about redaction of personal data of individuals other than Prince Charles.

   (3) The next step was accordingly for the parties to lodge submissions on redaction. The September 2012 directions contemplated that, in a new Open Annex 4 to the September 2012 decision, we would then set out our reasoning on the relevant principles. We envisaged that in the Closed Annex we would modify our previous draft where our reasoning had the consequence that in our view redactions could lawfully be made. The September 2012 directions would thus, as contemplated in section N of the reasons accompanying the September 2012 decision, enable us to make a decision identifying information to be disclosed to Mr Evans, along with the terms of substituted decision notices.

   (4) The response of Mr Evans was to make submissions first, that no redaction should be permitted, and second, that if there were to be redactions then further work is needed in order to determine precisely what redactions may lawfully be made. For reasons explained below, we have rejected the first but accepted the second. We do not think that this ought to hold up identifying the documents and parts of documents which, subject only to any lawful redactions, are disclosable. We have accepted – and neither the Commissioner nor the Departments have made substantive submissions contesting – Mr Evans's submission that on this basis the next stage is for that

material to be disclosed, subject only to it being provisionally redacted. This will mean that for the time being Mr Evans does not see material for which the Departments, after an opportunity to consult the individuals concerned, seek redaction. However he will see the balance of the material and thus be able to make submissions on redaction in context. In this way it seems to us that our determinations identifying information to be disclosed to Mr Evans, and leading to a conclusion as to the terms of substituted decision notices, can be made in stages.

(5) Accordingly we have today issued to the Commissioner and the Departments the Closed Annex to the September 2012 decision. Also today we have published the new Open Annex 4 to the September 2012 decision. As will be seen, rather than determining principles governing redaction, the new Open Annex 4 explains why we have decided that a staged process is needed. In the Closed Annex we set out our determinations as to the documents or parts of documents which, in the light of our conclusion in the September 2012 decision, are disclosable, subject only to determination of redactions in the next part of our staged process. This in due course will lead to determinations as to whether some or all of the provisionally redacted information should be disclosed to Mr Evans, and as to the terms of substituted decision notices.

2. The relevant history is that in accordance with the September 2012 directions the Departments, the Commissioner, and Mr Evans lodged open submissions on relevant principles. In addition, however, Mr Evans submitted that the tribunal should either

(1) impose a procedural bar, refusing to allow the Departments to seek redactions, even if the Act and the Regulations would permit them; or

(2) adopt a staged procedure, under which the tribunal would defer a final decision on redactions until Mr Evans has seen provisionally redacted versions of the information that the tribunal considers should be shown to him.

3. Section A of Mr Evans's written submissions dealt with the proposed procedural bar. Mr Evans submitted that while a public authority may rely on a new exemption at any stage (*Home Office v ICO* and *DEFRA v ICO & Birkett* [2011] UKUT 17 (AAC), upheld on appeal at [2012] Env LR 24), the tribunal nevertheless retains its full case management powers (see first instance decision [13]; CA decision [28]). Mr Evans urged that in the extraordinary circumstances which have arisen here, the tribunal should decline to deal with this belatedly raised issue, in the exercise of its case management powers. In particular:

(1) It has been open to the Departments to seek to rely on section 40 and regulation 13 in respect of third party names at any time since the requests were first made in 2005. No explanation has been provided (at least not to Mr Evans) as to why the issue has only been raised for the first time now, well past the eleventh hour, when it cannot have escaped the Departments' legal advisers for this long.

(2) The only way in which the issue could be dealt with properly would involve a staged procedure, entailing Mr Evans being put to yet further expense, and yet further delay, before he obtains definitive versions of the information to which he is entitled. Given the enormous delays already encountered in this case, and the very considerable costs of pursuing the appeal, such further delays and costs should not be countenanced. They would, in themselves, be unfair and unjust, contrary to the overriding objective.

(3) Unlike some late-reliance cases, there is no danger here that requiring the Departments to disclose the correspondence without first considering the new issue would put them in a position where they might find themselves acting unlawfully, as disclosure of personal data by order of a court is lawful under section 35(1) of the Data Protection Act 1998.

(4) In these circumstances, the unexplained failure of the Departments to raise this issue earlier should be viewed as such a dereliction of their duty to help the tribunal to further the overriding objective and to co-operate with the tribunal under rule 2(4) of the Upper Tribunal Rules that the tribunal can and should refuse them permission to raise this issue, or should debar them from further pursuing it. These steps could be taken either under the tribunal's general case management powers in rule 5 or under rule 8(3)(b), which allows a respondent or interested party to be debarred from further participation in part of the proceedings where it has failed to co-operate with the tribunal to an extent that the tribunal cannot deal with the proceedings fairly and justly.

4. We consider that a procedural bar would be inappropriate, in particular as it would be unfair to the individuals in question. There are three reasons which both individually and taken together lead us to that conclusion.

(1) The need to consider redaction of personal data of individuals other than Prince Charles arises under section 40 and regulation 13. It is true that the Departments did not prior to September 2012 make submissions to the tribunal on whether there should be redaction as regards individuals other than Prince Charles. They had, however, relied upon section 40 and regulation 13 in each department's "final response" to Mr Evans's request, without at that stage distinguishing between personal data of Prince Charles and personal data of others. The Commissioner's decision notices upheld each department's final response. They did not examine the position as regards personal data of others, and it was not necessary for them to do so. If we had dismissed Mr Evans's appeals it would not have been necessary for us to do so. Having allowed the appeals, however, it seemed to us desirable that there be submissions on the question of redaction as regards individuals other than Prince Charles. We did not think it necessary to enquire why there had been no earlier reference to this question by the Departments – or indeed the Commissioner. Even if there had been earlier submissions to the tribunal by the Departments on whether there should be redaction as regards individuals other than Prince Charles, we would have directed in accordance with the overriding objective that this question should be reserved for later consideration if necessary.

(2) We do not accept that raising the issue now, rather than earlier, will cause additional expense to Mr Evans. Section B of his written submissions identified the procedures which Mr Evans advocated as appropriate in a case where disclosure had been agreed subject to redaction as regards individuals. Procedures of this kind will involve expense once provisionally redacted documents are disclosed. That expense would not have been avoided if the issue had been raised earlier.

(3) It is important that the tribunal should not ride roughshod over the personal interests of any individual. We do not need to decide whether a decision by us preventing the Departments from seeking to protect those interests would be a defence to any complaint under the Data Protection Act. What is important is that, in so far as the Act and the Regulations enable the personal interests of others to be protected, we should not harm those interests if the question whether they are entitled to protection can be examined without substantial unfairness to others. Examining that question in the present case will not in our view involve substantial unfairness to Mr Evans. We acknowledge that this case has required considerably longer than expected in order to arrive at the September 2012 decision, and that there may be further delay if there is an appeal. We acknowledge also that determining whether there should be redaction as regards individuals other than Prince Charles will involve a further delay in reaching a final decision. However it will not involve a delay in making available the substance of the disclosable documents. In the absence of any appeal, the procedural decision above requires that they be made available within 1 month, albeit that certain parts of certain documents will be subject to the provisional redactions.

5. Section B of Mr Evans's written submissions dealt with the proposed staged procedure. Mr Evans submitted that redacting names from correspondence which, in the tribunal's view, should be disclosed in the public interest, is a highly fact-sensitive issue requiring fine-grained analysis. If the documents were disclosed with provisional redactions he would be able to judge whether the redactions interfered with his ability to understand the meaning, context or significance of the correspondence, and would be able to raise the matter with the tribunal if he formed the view that the redactions were unlawful. In that regard he envisaged that the Departments would be required to provide open evidence which (while falling short of actually identifying the third parties) would need to give an indication of the person's role, seniority, exposure to the media and so on. He added that the Departments would also be required to make open submissions, by reference to that open evidence and the redacted documents, making a case for the preservation of the redactions.

6. The Commissioner made no submissions on this aspect of the matter.

7. The Departments said that they were neutral on whether the issue of redaction should be dealt with now or whether it should be dealt with at a later stage, as proposed by Mr Evans. They saw good sense in dealing with the matter now, and avoiding further delay and cost, and did not consider that dealing with the matter now would put Mr Evans to any disadvantage. On the other hand, they had no strong objection to his proposed directions.

8. We accept that there should be a staged procedure. In our view this will enable fairness to all concerned. It will enable Mr Evans to see the context, in the form of the specific document, and in that context to decide whether he is content to accept the provisional redactions. If he is not content, then he and the other parties will be able to suggest open and closed procedures which, having regard to the provisionally redacted documents, will best enable the tribunal to examine the Departments' contentions about them in a manner which is fair to all concerned. We do not propose at this stage to determine what those procedures should be. Nor do we propose at this stage to make any substantive ruling as to the principles governing whether there should be redaction as regards individuals other than Prince Charles. As explained in Open Annex 4 to the September 2012 decision, the only ruling we make at this stage is that principles governing redaction of personal data concerning individuals other than Prince Charles should be dealt with at a later stage.

9. We do, however, think it desirable to return to the point made earlier that it is important that the tribunal should not ride roughshod over the personal interests of any individual. The submissions we have received thus far on relevant principles have, in the case of the Departments, dealt with personal interests of individuals in a generalised way. Those from the Commissioner and Mr Evans have drawn attention to factors which could involve closer examination of the particular circumstances of the individual. We draw attention to the fact that personal data of an individual are not necessarily confined to the name of that individual. It seems to us desirable that more active consideration should be given to a closer involvement of the individual in question in ensuring that relevant personal data are identified, and that the views of that individual, and relevant evidence which that individual can provide, are put before the tribunal.

10. Paragraphs (6) and (7) of our decision above cater for the possibility that the Commissioner or the Departments may lodge applications seeking permission to appeal from the September 2012 decision, from the determinations in the closed annex to that decision, or from the Procedural Decision itself. In that event paragraphs (1) to (5) of the Procedural Decision will be suspended. Whether and in what terms those paragraphs should cease to be suspended may depend upon the precise nature of the applications, upon their outcome, or upon other factors. At a late stage we received representations from the Treasury Solicitor on behalf of the Departments that the same should apply in the event that there was served on the Commissioner a certificate under section 53. That section provides that certain decision notices or enforcement notices shall cease to have effect if there is a timely certificate by an accountable person stating that on reasonable grounds the accountable person has formed the opinion that, in respect of the request or requests concerned, there was no relevant failure. In our view a certificate under section 53 is entirely different in character from any appellate process, and is not something that we need to anticipate. If there is a certificate under section 53, and any party considers that the certificate necessitates some change in anything we have said or done, then it will be open to that party to make an application to us on notice to other parties.

Signed:

Paul Walker

John Angel

Suzanne Cosgrave

12 October 2012

[End of Annex 2]