



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2026] CSIH 46
XA3/26 & XA8/26

Lord President
Lord Malcolm
Lady Wise

OPINION OF THE COURT

delivered by LORD PENTLAND, the LORD PRESIDENT

in the appeals

by

THE SCOTTISH MINISTERS

Appellants

against

THE SCOTTISH INFORMATION COMMISSIONER

Respondent

Appellants: Reid KC, D Welsh; Scottish Government Legal Directorate
Respondent: Dean of Faculty (Dunlop KC); Anderson Strathern LLP

30 October 2026

Introduction

[1] These appeals by the Scottish Ministers against two decisions of the Scottish Information Commissioner concern the interaction between freedom of information law and court orders made to protect complainers in criminal and civil proceedings involving allegations of sexual offences from being identified. It has long been recognised that there is a strong public interest in ensuring the protection of complainers against public humiliation, unnecessary embarrassment and vilification; their privacy and dignity must be safeguarded

as must their safety. Unless there is effective protection against such risks, complainers are liable to be reluctant to come forward, and sexual offending and misconduct may go unreported and unpunished.

[2] The appeals raise the question of how freedom of information rights should be reconciled with the need to protect complainers in circumstances where the possibility of jigsaw identification is in play; that is where there is a danger that seemingly innocuous pieces of information from multiple sources may be capable of being pieced together so that the identity of a complainer may be revealed to the public even though the court has ordered that this should not happen.

[3] The jigsaw identification issue arises in the following way. Under the Freedom of Information (Scotland) Act 2002, an applicant is entitled to information that is requested from a Scottish public authority that holds it, subject to certain qualifications. These appeals afford the court its first opportunity to consider the interpretation and application of section 26(c) of the 2002 Act. Section 26 provides as follows:

“Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act) —

- (a) is prohibited by or under an enactment;
- (b) is incompatible with an assimilated obligation; or
- (c) would constitute, or be punishable as, a contempt of court.”

[4] Unlike some of the other exemptions in the 2002 Act, the exemption created by section 26 is absolute in effect rather than being qualified (section 2). This means that if the section 26 exemption is engaged, there is no further public interest test to be considered (see section 2(1)(b)). The question as to whether the public interest in disclosing the information outweighs that of maintaining the exemption does not arise where the exemption is one which confers absolute exemption.

[5] The Ministers relied upon section 26(c) to withhold information relating to two complainers in response to two FOI requests. They took the view that disclosure of the information would breach and thereby be in contempt of orders made by the court. The applicants were dissatisfied with the responses and applied to the Commissioner for a decision. Following an investigation and review, the Commissioner issued two decision notices requiring the Ministers to disclose some, albeit not all, of the withheld information. The Ministers consider that in doing so the Commissioner made an error of law and have appealed to this court, under section 56(b)(ii) of the 2002 Act, asking it to quash the Commissioner's decisions insofar as he refused to apply the section 26(c) exemption to certain information and ordered its disclosure. The Ministers submit that this aspect of the Commissioner's decision should be set aside and the matter remitted to him for reconsideration. The Commissioner resists the appeal.

Factual background

[6] In August 2018, the former First Minister, the late Alex Salmond, raised proceedings against Leslie Evans, then Permanent Secretary to the Scottish Government, and the Scottish Ministers seeking judicial review of an internal investigation into complaints of workplace harassment by him during his tenure as First Minister. There were two complainers, referred to as Ms A and Ms B. Mr Salmond sought reduction of a decision report prepared by Ms Evans and three investigation reports prepared by Judith Mackinnon, a civil servant who had been appointed investigating officer, on the grounds that they were produced in circumstances which were procedurally unfair and tainted by apparent bias.

[7] On 8 October 2018, Lord Woolman made an order under section 11 of the Contempt of Court Act 1981 forbidding "publication by any means, including on social media" of:

“...the names and the designations, past and present, of the complainers referred to in the decision report which is the subject matter of this petition and any other information concerning those complainers which would lead to their identification.”

In January 2019, the Ministers conceded Mr Salmond’s petition. The Ministers and Mr Salmond lodged a joint minute asking the court to pronounce the various orders necessary to resolve the petition. In paragraph 5 of the joint minute, the Ministers gave an undertaking to the court that:

“...save insofar as necessary to comply with any lawful requirement, to co-operate with any criminal investigation, or as may otherwise be approved by the Court, the respondents will not cause or permit the publication or dissemination to any other person of the said Investigating Officer’s report or any of the statements or other material taken or prepared by her in the course of preparing same.”

On 8 January 2019, the court made orders giving effect to the joint minute, including recording the undertaking in paragraph 5. Breach of an undertaking to the court may amount to contempt of court (*Graham v Robert Younger Limited* 1955 JC 28).

[8] Thereafter, Mr Salmond was prosecuted in the High Court of Justiciary for alleged sexual offences. Ms A and Ms B were among the complainers. Mr Salmond’s trial commenced on 9 March 2020. On 10 March 2020, the trial judge, the Lord Justice Clerk (Lady Dorrian), made an order at common law and in terms of section 11 of the 1981 Act prohibiting disclosure of “...the names and identity and any information likely to disclose the identity” of the complainers. Mr Salmond was acquitted of all charges on 23 March 2020. On 11 February 2021, the Lord Justice Clerk varied her order such that it now prohibited:

“...the publication of the names and identity and any information likely to disclose the identity of the complainers in the case of *HMA v Alexander Elliot Anderson Salmond*, as such complainers in those proceedings”.

[9] The orders made by Lord Woolman and the Lord Justice Clerk remain in force. The Scottish Ministers remain bound by their undertaking to the court as recorded in the Minute

of Proceedings before Lord Pentland on 8 January 2019. Publication of information short of the identity or job titles of the complainers, but sufficient to enable those in “the governmental and political communities” to identify them, has been held to amount to a contempt of court (*Murray v HM Advocate* [2022] HCJAC 14; 2022 JC 181, paragraph [68]).

[10] On 24 November 2023 Mr Salmond commenced proceedings against the Ministers alleging misfeasance in relation to their handling of the complaints referred to in the judicial review. On 29 November 2023 Lord Fairley made an order at common law and under section 11 of the 1981 Act prohibiting the publication of the name or any information which would otherwise identify a person named in the pleadings as someone who had given evidence in the criminal proceedings brought against Mr Salmond.

[11] From this account of the history of events, it can be clearly seen that the court has made concerted efforts to try to ensure that the identities of those who made complaints against Mr Salmond should not be publicly disclosed. Deliberate breach of any of the orders would amount to contempt of court. There can be no doubt that were the complainers’ identities to be revealed, their safety and that of their families could be endangered.

The Commissioner’s decisions

[12] On 13 January 2019, the then First Minister, Nicola Sturgeon, referred herself to the independent advisers on the Scottish Ministerial Code, to examine whether she had breached the Code in respect of a series of meetings she had with Mr Salmond before and during the Ministers’ investigation. James Hamilton, a member of the Bar of Ireland, was the independent adviser who investigated whether Ms Sturgeon had breached the Code. On 22 March 2021, Mr Hamilton published a redacted report in which he concluded that Ms Sturgeon had not breached the Code.

Decision notice 279/2025

[13] On 5 April 2021, an applicant submitted an FOI request to the Ministers, seeking “all written evidence” submitted to Mr Hamilton’s investigation. This appeal is the second time the applicant’s FOI request has come before this court.

[14] The Ministers initially took the position that they did not hold any information relevant to the request; all such information was in the hands of Mr Hamilton, who, as an independent adviser, was not subject to the freedom of information regime set out in the 2002 Act. The applicant applied to the Commissioner for a decision under section 47(1) of the 2002 Act. The Commissioner found that the Ministers did hold the information for the purposes of the 2002 Act and directed them to review the applicant’s request. This court dismissed an appeal by the Ministers against the Commissioner’s decision on 6 December 2023 (*Scottish Ministers v Scottish Information Commissioner* [2023] CSIH 46; 2024 SC 159).

[15] Following the court’s decision, the Ministers reviewed their response to the applicant’s FOI request and responded by letter on 23 January 2024. Once again, they refused the FOI request. They provided the applicant with links to certain publicly available documents published by the Scottish Parliament but otherwise advised him that they considered the information exempt from disclosure under sections 26(c), 30(c) (“effective conduct of public affairs”) and 38(1)(b) (“personal data”) of the 2002 Act. The present appeals concern only the Ministers’ decisions to withhold information in reliance on section 26(c).

[16] The applicant once again applied to the Commissioner for a decision and once again the Commissioner found in his favour in decision notice 279/2025, issued on 27 November 2025.

[17] The Ministers submitted to the Commissioner that disclosure of the withheld information would, were it to be combined with other information in the public domain, contribute to identification of two complainers.

[18] In relation to the Ministers' reliance on section 26(c), the Commissioner noted that the court orders referred to above remained in place. However, at paragraph 78 of his decision, he observed:

“...the question the Commissioner must consider is whether all of the information redacted by the Authority under section 26(c) of FOISA would identify the complainers or otherwise breach the undertaking.”

The Commissioner obtained the information that the Ministers claimed was exempt information under section 26(c) by issuing an information notice under section 50 of the 2002 Act. The Commissioner then proceeded to consider the means reasonably likely to be used to identify the complainers, the high level of public speculation, and the fact that given Mr Salmond's public profile any information disclosed was highly likely to be scrutinised, in conjunction with other information already in the public domain, in an attempt to identify the complainers. He further considered the information in the context of other publicly available information to assess the risk of jigsaw identification, as well as carrying out his own research.

[19] The Commissioner agreed with the Ministers that some of the information withheld fell within the scope of the section 26(c) exemption. This information was exempt from disclosure on the basis that to disclose it could constitute contempt of court.

[20] The Commissioner was not, however, satisfied that the Ministers had provided him with sufficiently compelling arguments to allow him to conclude that disclosure of the remaining information withheld under section 26(c) would lead to the identification of one or more of the complainers. The Commissioner considered that he had to reach a conclusion

based on the exemptions applied by the Ministers and on the submissions they made. It was not for him to identify as exempt information that the Ministers had not marked as such or otherwise to make the case on their behalf.

[21] In a crucial section of his decision (paragraph 86) the Commissioner reasoned as follows:

“In view of the information already in the public domain, the Commissioner agrees that disclosure of this information (which he considers would not directly identify individuals) would permit assumptions to be made regarding the identity of one or more complainers. However, he is not satisfied that disclosure of this information, would – even when the above context (including what information is, or may be, known by others) is taken into account – allow for the confirmation or refutation of such assumptions (i.e. lead to their identification).”

[22] The Commissioner therefore concluded that the Ministers were not entitled to withhold the remaining information under the exemption in section 26(c).

Decision notice 315/2025

[23] On 6 December 2023, a second applicant made a request to the Ministers, for “all evidence” (as opposed to just “written” evidence) submitted to Mr Hamilton’s inquiry. The history of that FOI request substantially mirrored that of the FOI request in 279/2025, with the Ministers declining to provide the information sought, relying upon the same exemptions and the second applicant referring the matter to the Commissioner for a decision under section 47(1) of the 2002 Act. The Commissioner issued decision notice 315/2025 on 22 December 2025, requiring the Ministers to produce certain of the information that the Ministers maintained was exempt information.

[24] The Commissioner’s reasoning in decision notice 315/2025 was identical to that supplied by him in decision notice 279/2025.

[25] For ease of reference, we shall refer in the remainder of this opinion mainly to decision notice 279/2025.

Grounds of appeal

[26] The Ministers appealed against decision notice 279/2025 on 8 January 2026 and against 315/2025 on 23 January 2026. On 20 February 2026, this court ordered that the appeals be dealt with in tandem, and the appeal against notice 279/2025 be designated the lead appeal. Section 56 of the 2002 Act provides that an appeal against a decision of the Commissioner may be made on a point of law only.

[27] Both appeals proceed on the same grounds. First, the Ministers argue that the Commissioner misdirected himself by considering whether it was for him alone (and not the Ministers or the court) to determine whether disclosing the information would constitute, or be punishable as, contempt of court. He decided that it was for him to so determine. That was misconceived: the only body which could decide whether disclosure of the information would amount to contempt was the court. Instead, in circumstances where there was a real possibility of jigsaw identification, the Commissioner ought to have asked whether the Ministers had a proper basis to invoke section 26(c). The approach he adopted placed the Ministers in the impossible position of being ordered to disclose information where that disclosure might realistically result in their being found to be in contempt of court.

[28] Second, even if the Commissioner had asked himself the correct question, his approach to answering it was incorrect. He had considered whether the information would allow for the definitive confirmation or refutation of existing assumptions as to the complainers' identities. That was to place the threshold too high. The orders prevented the disclosure of "any other information...which would lead to their identification" and "any

information likely to disclose the identity of the complainers". The entire purpose of the orders was to prevent jigsaw identification; there was thus no need for the information to be definitive. The Commissioner had considered an irrelevant factor and failed to consider the correct test in law.

Summary of submissions

The Ministers

[29] In support of the first ground of appeal the Ministers submitted that it was not the Commissioner's role to determine whether disclosure of information was contemptuous. In the first (and usually the only) instance it was for the public authority to decide whether an exemption applied and in the case of section 26(c) whether disclosure of information would be a contempt of court. Given the possibility of jigsaw identification, the Ministers' task was a difficult one. Views on whether disclosure amounted to contempt of court could legitimately differ.

[30] The purpose of section 26(c) was to prevent freedom of information legislation from being used to subvert court orders. If a court had determined that some information should not be published it was not the purpose of freedom of information legislation (or the role of a public authority or the Commissioner) to undermine that. This explained why section 26 was an absolute rather than a qualified exemption.

[31] The Commissioner's argument that a decision by him to order release of the information would be a complete defence to any allegation of contempt was misconceived; it could not be reconciled with the view expressed by the Extra Division in *Dumfries and Galloway Council v Scottish Information Commissioner* [2008] CSIH 12; 2008 SC 327 that the parenthesised words "otherwise than under this Act" in section 26 applied to the prohibition

rather than the disclosure. The final arbiter of whether disclosure of information amounted to contempt was the court, not the Commissioner. Where there was a real possibility of jigsaw identification the question for the Commissioner was whether the Ministers had a proper basis for applying the exemption.

[32] As to the second ground of appeal, the Commissioner had set the bar too high in assessing whether there was likely to be identification of the complainers. The question had to be addressed on a broader basis than asking whether there was a definitive piece of information that would categorically identify them. A disclosure which permitted, or created a real risk, danger or chance of, their identification to a section of the public would breach the orders. Although not relied on in submissions to the Commissioner, that was the authoritative position following *Murray*. The correct question was whether disclosure of the information would constitute a contempt? It would be a contempt to create a real risk of identification to a section of the public. Whether the information would enable the public at large to confirm or refute assumptions was beside the point; the information would be significantly more revealing to those within governmental and political circles, in which the complainers probably moved.

The Commissioner

[33] The Commissioner had carefully considered the materials and held that some information should be disclosed, and some should not. In doing so, he had done what the 2002 Act required him to do. He had found, on the facts, that the exemption in section 26(c) had not been properly applied.

[34] The Ministers' interpretation of section 26(c) defied the plain terms of the provision. Information was exempt if disclosure by the authority, otherwise than under the 2002 Act,

would constitute contempt of court. There was no warrant for interpreting section 26(c) as referring to a “real risk” or “realistic prospect” of contempt.

[35] The words “otherwise than under this Act” applied to the three sub-clauses in section 26. They were a qualifying phrase, the effect of which was that disclosure compelled under the 2002 Act could not itself constitute a contempt of court. A public authority that disclosed information under the 2002 Act did not display the deliberate or wilful defiance of the court’s authority required to constitute contempt.

[36] Failure to comply with a decision of the Commissioner was itself certifiable to the Court of Session and punishable as a contempt of court (section 53). The 2002 Act would be internally incoherent if both compliance and non-compliance with orders of the Commissioner could be contempt of court. The purpose of section 26(c) was to exclude such a possibility; there was no risk of the Ministers being somehow forced into contempt. If a public authority did not have a choice to resist disclosure, because it had been ordered by the Commissioner, then the public authority could not be in contempt. The Commissioner’s order provided a complete shield against any finding of contempt in respect of information disclosed pursuant to that order. The necessary deliberate act constituting contempt could not be present as one would not be acting deliberately if one were acting under compulsion.

[37] The Ministers’ approach would effectively make them the primary decision-maker under section 26(c) and relegate the Commissioner to a supervisory role capable of intervening only where the Ministers lacked any reasonable basis for their position. This would subvert the statutory scheme. The Commissioner was the independent decision-maker charged with determining whether exemptions had been properly applied. The Ministers’ approach would substitute a rationality or reasonableness test for the

Commissioner's independent assessment – a standard found nowhere in the 2002 Act and inconsistent with the Commissioner's statutory functions.

[38] Ground one failed because it was obviously the Commissioner who must make the decision and he had asked the correct question – would disclosure of the information breach the order? He had carefully reviewed the withheld information and concluded that some of it would breach the court orders, but other parts of it would not do so. No error of law had been identified in that approach.

[39] The second ground of appeal was without merit. The Commissioner had not imposed a requirement that information had to be definitive before the exemption could apply. Rather he had assessed whether disclosure of the information would lead to the identification of the complainers, taking account of all reasonably likely means of identification, including jigsaw identification, from information in the public domain. The question of whether particular information would, if disclosed, lead to identification of complainers was one of fact and degree, not one of law. The Ministers' challenge was in substance an attempt to re-argue the merits of the Commissioner's factual assessment. The Commissioner had the advantage of having personally reviewed all the withheld information, having obtained it by formal information notice.

[40] There had been no reference by the Ministers before the Commissioner to the decision in *Murray* or any suggestion that any of the information before the Commissioner would breach the test in *Murray*. The Commissioner was not in fact aware of *Murray*. It was not for the Commissioner to go off on a frolic of his own by tracking down case law not cited to him. It was not an error of law to fail to address a submission not advanced (*Hickey v Secretary of State for Work and Pensions* [2018] EWCA Civ 851; [2018] 4 WLR 71, at 52; *AL v Secretary of State for the Home Department* [2026] EWCA Civ 370; [2026] 3 WLUK 640, at 79;

Secretary of State for the Home Department v Hirtie [2026] EWCA Civ 1000; [2026] 7 WLUK 623 at 56; *Taylor v Scottish Ministers (No 2)* [2019] CSIH 11; 2019 SLT 681, at [34]).

Analysis and decision

[41] While it is undoubtedly surprising and unfortunate that the Ministers did not rely, in their submissions to the Commissioner, on the decision in *Murray v HM Advocate* [2022] HCJAC 14; 2022 JC 181, it would be unconscionable for this court to ignore what was authoritatively stated in that case about the meaning and purpose of the various orders pronounced in the civil and criminal proceedings arising out of the investigation into allegations of sexual misconduct by Mr Salmond. We acknowledge that in some circumstances a decision maker cannot be faulted for having failed to address points not made to him by the parties. The issue of jigsaw identification was, however, clearly in play before the Commissioner. *Murray* conclusively laid down the aim of the orders in the context of the danger of jigsaw identification. It would be unrealistic and contrary to principle for this court not to apply the law as stated in that case.

[42] In *Murray* the petitioner had published a series of articles on his website and a social media post which were found to have contained information liable to identify four of the complainers who testified at Mr Salmond's trial. He was held to be in contempt of court for breaching the order pronounced by the Lord Justice Clerk (Dorrian) and was sentenced to eight months' imprisonment. The petitioner presented a petition to the *nobile officium* to have the finding of contempt and the consequent sentence quashed. Amongst other grounds of challenge, he argued that the court had erred in holding that it was sufficient that there was a risk of identification by a particular section of the public rather than the public as a whole.

[43] The petition came before a full bench. In the court's opinion delivered by the

Lord Justice General (Carloway), the following was stated at paragraph [57]:

"The trial of Alex Salmond was an extremely high profile event. Feelings were running high between his supporters and others who seemed to enjoy the prospect of his political demise. The revelation of the identities of the complainers would be likely to result in considerable abuse and harassment (particularly on social media) of them. There was a real danger that they would be physically harmed. It was obvious that they would be persons who had had significant contact with the former First Minister, probably in the workplace context. Quite apart from the risks of direct abuse of the particular complainers, it was important, in the interests not only of their dignity and privacy and those of other potential complainers in other settings but also of the general public in having sexual offences reported, investigated and tried, that their identities were kept from public gaze (*Brown v UK*, page CD200) [*Brown v UK* (44223/98) (2002) 35 EHRR CD197]."

[44] In paragraphs [60] and [61] the court summarised the law on contempt of court:

"[60] Contempt of court is 'constituted by conduct that denotes wilful defiance of, or disrespect towards, the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law itself' (*Robertson and Gough v HM Advocate*, Lord Justice Clerk (Gill), para 29 [[2007] HCJAC 63; 2008 JC 146]). There is no strict liability. Where there is a court order in place, which prohibits a particular action, and a person deliberately does something which breaches that order, that is sufficient to prove the crime, including any mental element. The deliberate conduct constitutes the wilful defiance of the court. It is not a defence to say that, albeit that his actions did deliberately breach the order, a person nonetheless thought that he was acting in such a way as to avoid a finding of contempt. It will not do to say that deliberate acts, which are in breach of a court order, were not intended to constitute criminal conduct when, as a matter of fact, they did by contravening that order. In that sense, although it might have been better phrased, the court of first instance was correct to say that an intention to breach the order was 'beside the point'.

[61] The mental element relates to the deliberate nature of the publication, not to whether the publisher, in his inmost thoughts, meant to breach the order. Strict liability is not in play where deliberate publication is, as here, admitted. The only remaining question is whether the material, viewed objectively, was likely to identify the complainers. It might have been better to use 'liable' rather than 'likely', since there is no element of probability involved. If material which is deliberately published produces a real or substantial risk of identification, that is determinative of this issue."

[45] The court went on to address the purpose of the orders pronounced by the Lord Justice Clerk (Dorrian) and explained the risks of jigsaw identification in the circumstances of the case. It said the following at paragraphs [67] and [68]:

“[67] The order of the court, whose validity is not challenged, was a prohibition of the ‘publication of ... any information likely to disclose the identity of the complainers’. The purposes of such an order has already been explored, but one is the protection of the complainers’ dignity and privacy. In order to achieve that result, the order must at least prevent identification of a complainer within the community in which she either lives or works. The court of first instance was correct to hold that it would be sufficient, for a breach to occur, if the publication created a real risk of identification to a ‘section of the public’. It is not necessary for it to identify the complainer to the public as a whole.

[68] In this case there were pieces of the jigsaw in place which would enable the public as a whole to see that the complainers would be likely to be part of Mr Salmond’s governmental or political team. The revelation of further details regarding their jobs and places where they worked with Mr Salmond would enable, at least, those in the governmental and political communities to identify who they were. Although that would be enough to constitute a breach, the court of first instance held that the ability to identify the complainers went beyond those communities, as the petitioner had intended, and extended to the general public. That, according to the court, was plain from the terms of the article of 18 January (*Yes Minister Fan Fiction*) and continued with the post-order publications. As was made clear in its opinion concerning the application for permission to appeal to the UK Supreme Court, the court’s finding of contempt was not based on the ability of a section of the public to identify the complainers. It was much broader than that. It is clear from comments on the petitioner’s articles that members of the public were able to identify some of the complainers.”

[46] Where a person is dissatisfied with the decision of a public authority to disclose information, he or she may apply to the Commissioner for a decision whether the authority has dealt with the request for information in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (section 47). Where the Commissioner decides that the authority has not dealt with the request for information in accordance with Part 1, he must specify the provision with which the authority has failed to comply and the respect in which it has so failed. He must also specify the steps which, in his opinion, the authority must take to comply with the provision and the time within which those steps must be taken

(section 49). Section 50 empowers the Commissioner to serve an information notice on a public authority requiring it to provide him with such information as he may specify *inter alia* for the purpose of determining whether the authority has complied with the provisions of the 2002 Act.

[47] In our opinion these provisions clearly impose a responsibility on the Commissioner to reach his own independent view on the question of whether a public authority has dealt with an information request in accordance with the provisions in the 2002 Act. There is nothing to suggest that the Commissioner must in some way defer to the view of the authority on what the 2002 Act requires it to do in response to an application. The Commissioner's function is *inter alia* to adjudicate on cases where a public authority considers that good reason exists for not disclosing information. He must decide whether information falls within one of the exempted categories and in the case of a qualified exemption whether withholding the information is fair in all the circumstances (*Beggs v Scottish Information Commissioner* [2016] CSIH 23; 2016 SC 615, paragraph [14]). While it is no doubt correct, as the Ministers submitted, that views may differ on whether information falls to be disclosed, the Commissioner is responsible for deciding in appeals brought before him whether the requested information requires to be released under the 2002 Act or whether it can properly be withheld. He must reach his decision based on his own independent consideration of the issues, applying the scheme and rules set out in the 2002 Act. The Commissioner's role is not analogous to that of a court exercising the supervisory jurisdiction in applications for judicial review where a margin of deference to the authority must sometimes be extended because it is the primary decision-maker. There is nothing in the 2002 Act to support such a construction of the powers conferred on the Commissioner.

If the Commissioner is satisfied that the public authority has misapplied the provisions of the 2002 Act, it is his duty to uphold an appeal.

[48] We are satisfied that the Commissioner correctly understood his role in determining whether the Ministers had been entitled to withhold certain information on the basis that the absolute exemption in section 26(c) applied to the information. He sought to address the question of whether disclosure of the information would amount to a contempt of court. He did not misdirect himself by misunderstanding his statutory function and what his responsibilities entailed.

[49] All that said, when carrying out his responsibility to decide whether the Ministers had complied with their duty to deal with the requests in accordance with Part 1 of the 2002 Act and in particular whether they had been correct to withhold some information under and in terms of section 26(c), it was essential for the Commissioner correctly to understand the purpose, meaning and effect of the court orders and the nature of disclosures which would constitute a breach of them. These had been authoritatively explained in *Murray*.

[50] In paragraph 86 of decision notice 279/2025 (and paragraph 80 of decision notice 315/2025) the Commissioner acknowledged that, in view of the information already in the public domain, disclosure of the withheld information would “permit assumptions to be made regarding the identity of one or more complainers”. Despite this, the Commissioner was not satisfied that disclosure of the information would “allow for the confirmation or refutation of such assumptions (i.e. lead to their identification).” This analysis fails to reflect a sound appreciation of the correct approach to what may amount to breach of the orders, as explained in *Murray*. Its effect is to set the bar for the commission of contempt at too high a level. It is sufficient for a breach of the orders if disclosure of the information would produce a real or substantial risk of identification (*Murray* paragraph [61]). There is no

element of probability involved. If, as the Commissioner accepted, there would be a risk of assumptions being made about the complainers' identities due to release of the information, this would serve to heighten the danger of their being identified. The orders would thereby be breached. It is not a prerequisite of their being breached that assumptions should be capable of being confirmed as the Commissioner reasoned. That approach carries with it a flavour of certainty or definitiveness which is not essential for there to be a breach. It is sufficient if disclosure of the information would create a real risk of identification of the complainers in the communities in which they lived or worked.

[51] In addressing the question of whether release of the information would amount to a contempt of court it is crucial to bear clearly in mind that the fundamental purpose of the orders was to protect the complainers' dignity and privacy and to protect their safety.

Permitting assumptions to be made about their identities is inconsistent with the objective of the orders and amounts to a material misdirection in law.

[52] For these reasons we are satisfied that the Commissioner erred in law in ordering disclosure of the withheld information. We shall accordingly allow the appeals, quash the decisions in so far as they ordered the disclosure of material withheld because of the claimed section 26(c) exemption, and remit to the Commissioner to reconsider his decisions in the light of this court's opinion and the terms of the judgment in *Murray*. No doubt he will wish to invite further submissions on how that decision should be applied in the circumstances of the present appeals.

[53] Given the view we have taken of the issues, it is not necessary to resolve the dispute between the parties as to the meaning and effect of the words which appear in brackets in section 26 "(otherwise than under this Act)". We do not consider that anything turns on the meaning of that phrase in the context of the present appeals.

[54] We shall reserve all questions of expenses.