



IN THE FIRST-TIER TRIBUNAL

Appeal No: EA/2016/0149

GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

CRAWFORD AND COMPANY ADJUSTERS (UK) LIMITED

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

CESHIRE EAST COUNCIL

Second Respondent

Hearing

Held on 28 March 2017 at Field House and 28 April 2017 both on the basis of written submissions.

Decision

We unanimously dismiss the appeal for the reasons set out below. There are no further steps to be taken by Cheshire East Council.

Background

1. On 17 July 2015, an explosion occurred at the Wood Treatment Limited ('WTL') site at Bosley, Macclesfield resulting tragically in four fatalities and many others being injured.
2. We are told that following the incident, the WTL site was immediately cordoned off by the Health and Safety Executive ('HSE') and police. All documents and physical exhibits were seized and remain in police or HSE custody to date. The police and HSE investigators remained on site for several months. An inquest into the deaths was opened and adjourned.
3. An HSE investigation is ongoing. We are told its purpose is to ascertain the cause of the explosion and to determine whether the owners and operators of the mill, or any other person, is criminally culpable for causing it. It is supported by a working group consisting of the police, Cheshire Fire and Rescue and Cheshire East Council (the 'Council').
4. Press reports within the Bundle of papers before us illustrated the devastating impact of the mill explosion and in September 2016 wrote that the investigation would continue for a long time. (See page 128 of the *Open Bundle*.)
5. Zurich Insurance is the property insurer of WTL. The Appellant are loss adjusters instructed by Zurich Insurance to assess the extent of the damage to property and identify any policy coverage issues. DAC Beachcroft LLP are solicitors advising Zurich in relation to policy coverage issues arising out of the explosion. They have sent the submissions on behalf of the Appellant.

The Request

6. On 12 October 2015, the Appellant wrote to the Council, requesting information as follows, (which we have been numbered for ease of reference):

“

1. Dates and nature of all Cheshire East Council attendances at WTL Bosley since July 2014.
2. Copy reports/site notes/photos from such visits.
3. All photographs of the site, internal and external, taken on the visits 01 & 09 July 2015.
4. Recognising that you are unable to release details of individual complainants/informants, can you please confirm the source of the information that led to the EXTRA visits being undertaken by Stephanie Bierwas (see attached letter) on 01 July 2015; i.e., resident, Environment Agency or similar authority another Council department (i.e. planning) etc.
5. Dates and nature of all complaints received by Cheshire East Council about the Bosley site since July 2014 and action taken, if any, on each occasion.
6. Reference is made within the letter of developing an installation action plan to ensure permit compliance. What are the plan and permit to which this requirement relates?
7. What is permit CEC/PPC/B/012? ”

7. On 5 November 2015, the Council disclosed part 1 of the request so far as it related to 'dates' and parts 4, 6 and 7. The remaining information was withheld relying on regulation 12(5)(b) of The Environmental Information Regulations 2004 ('EIR'). □ This appeal concerns parts 2, 3 and 5.¹ □
8. The Appellant progressed the matter and following the Information Commissioner's ('IC') investigation, she upheld the Council's position.

The Task of the Tribunal

9. The Tribunal's remit is set out in s.58 FOIA. It applies equally to environmental information appeals as a result of regulation 18 of EIR. In accordance with this section, the Tribunal considers whether the Decision Notice made by the Commissioner is in accordance with the law, and to the extent it involved exercising discretion, whether it should have been exercised differently. The Tribunal is independent of the Commissioner, and considers afresh the Appellant's complaint. The Tribunal may receive evidence that was not before the Commissioner, and make different findings of fact.
10. We have received a large number of submissions and evidence from the parties, some of which has been submitted on a confidential or 'closed' basis, including the requested information. We have not found it necessary to issue any of this Decision on a closed basis. We have carefully considered everything before us, even if not specifically referred to below.

Procedural Matters

11. The Council did not seek to be a party to this appeal, and did not advance submissions. Having conducted its hearing on the papers, the Tribunal considered that an email from the Council to the Commissioner of 5 May 16² was a key document in the Commissioner's case. However, we were not satisfied that the email was clear or fully made sense.³
12. The Tribunal joined the Council as a party to the hearing and directed for it to clarify certain matters.⁴ Consequently, the panel has benefited from a statement from Cheshire Police ('Statement') and HSE who elaborated upon their positions⁵. We consider that this should have been procured at a far earlier stage in advance of the hearing. Not doing so necessitated: the panel reconvening; further directions and the clear need for the Appellant to be able to respond to the Statement; resulting in submissions in reply to its response by both Respondents that included an invitation by the Commissioner to seek further clarity from the Police. This approach does not seem to have taken into account the constraints of the Tribunal and need to progress the case in a proportionate and efficient manner.

¹ In considering the scope of this appeal, we have taken into account section 6 the Notice of Appeal at page 12 of the Open Bundle; the section 5 entitled 'Grounds of Appeal' at paragraphs 5 and 6 on page 14 of the Open Bundle; and the responses to the Directions of 3 April 2017.

² See page 100 of the Open Bundle.

³ See further the Open Directions of 3 April 2017.

⁴ See further, the Open Directions of 3 April 2017. In Closed Directions of 3 April, we also probed certain matters related to the contents of the Closed Bundle and were satisfied with the response received.

⁵ See paragraphs 24 and 25 below.

13. The Statement was initially provided on a 'Closed' basis. The panel reconvened to consider the further information, and found that whilst some of the information was clearly confidential, it was not self-evident that all of it was. Again, we consider that this should have been addressed by the Council in accordance with our Directions of 3 April. Our further directions provided the Council with an opportunity to proffer reasoning on the point. The Council accepted the partial disclosure of the Statement. The Appellant was given an opportunity to respond to the material that was provided to it. The panel considers the remaining 'closed' material to have been properly kept confidential.

The Legal Framework

FOIA or EIR

14. When considering a request for information, it is important to apply the relevant legislative regime. The effect of s.39(1) FOIA, is that requests for 'environmental information' must be decided by reference to EIR instead of FOIA. The definition of "environmental information" is found in regulation 2. It includes:

"(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements...

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);"□

15. Although not addressed in detail in the Decision Notice, it is not in dispute that the EIR is the relevant regime. The Appellant made clear why it considered that the EIR applied and the Council subsequently confirmed that the inspections had been undertaken by the Council's environmental protection officers and were carried out for officers to protect the environment. We agree with the parties on this, and find that the request falls within both regulations 2(c) and 2(f) EIR.

Regulation 12(5)(b)

16. Regulation 5(1) EIR creates a duty on public authorities to make environmental information available upon request.

17. For our purposes, regulation 12(1), (2) and (5) EIR provides:

“12(1) ... a public authority may refuse to disclose environmental information requested if –

(a) an exception to disclosure applies under paragraphs (4) or (5); and
(b) in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information.

□

(2) A public authority shall apply a presumption in favour of disclosure...

(5) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that its disclosure would adversely affect -...

(b) the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature” □

The Issues

18. The issues to address are:

- a. Was that Regulation 12(5)(b) ‘engaged’ because disclosure of the information would adversely affect on-going investigations?
- b. If so, where is the balance of public interest under regulation 12(1)(b)?

Issue A: Was Regulation 12(5)(b) engaged?

19. We received extensive (and not always succinct or focused) submissions in this appeal. In the interests of proportionality and ease of reference, we have set out below the submissions we consider have material relevance.

20. The Appellant’s submissions included:

- a. The Commissioner failed to properly apply the relevant test for disclosure in the EIR. The Decision Notice failed to address the relevant background to this matter; what the actual effect of disclosure would be and what identifiable harm or negative impact there would be. Taking a generalised approach, it did not properly consider in relation to each of the requested categories of information, the extent to which disclosure of that category of information would adversely affect the course of justice.
- b. None of the requested material falls within the exception and accordingly the presumption in favour of disclosure must prevail.
- c. The information requested would have no impact on the on-going investigation, or any future criminal trial. This is because (a) it pre-dates the explosion; (b) it is factual and limited in scope; and (c) the Council is not involved in the investigation itself.
- d. It is public knowledge that the Council visited the Mill before the explosion, the disclosure of the detail of those visits. Any recommendations made relating to health and safety issues as a

consequence of them, cannot prejudice the on-going investigation or the fairness of any subsequent criminal trial relating to the explosion.

- e. The Commissioner also failed to take into account the Appellant's motivations in seeking the information, and the purposes for which it sought to use them. Any information disclosed to it would not be publicly disseminated. It would be used exclusively by the Appellant and Zurich in assessing WTL's insurance claim. Neither Zurich nor the Appellant nor DAC Beachcroft LLP act for or on behalf of WTL in any capacity whether in civil, criminal or regulatory proceedings or otherwise. The Commissioner wrongly considered the Appellant to be acting on behalf of WTL and wrongly understood disclosure of the requested information to the Appellant would effectively be disclosure of that information to WTL. (*See para.s 19 and 25 of the Decision Notice.*)
- f. Accepting that the question for determination is whether disclosure of the information to the world at large would give rise to the adverse effect, the identity and motive of the Appellant would still be relevant. The public authority is not allowed to disregard entirely the identity and motives of the requester when considering the likely effect of disclosure. The Commissioner states that disclosure would inevitably, be subject to widespread reporting in the media. There is no basis for the Council or the Commissioner to assume this given the nature of the request and identity of the requester.
- g. The Decision Notice was based on the prejudice that disclosure of the information would cause to criminal investigations. She cannot now say that it would also prejudice the right of a defendant to a fair trial as well. The Commissioner is not entitled to raise matters in his Decision Notice which were not raised by the public authority, nor to raise new matters on appeal that he did not raise in his Decision Notice. To do so is beyond the jurisdiction granted by section 50 and is therefore ultra vires.
- h. It cannot be the case that any information which has been passed to investigating authorities thereby becomes exempt from disclosure.
- i. In relation to photographs it is highly unlikely that disclosure would have any effect on the course of justice.
- j. It is unclear why further details as to the nature of each of the visits made by the Council to WTL on the dates already disclosed would have an adverse effect on the on-going investigation or the ability to conduct a fair trial. This is particularly insofar as the requested information is of the same or similar class to the information already disclosed, and the broad purpose of the visits being already known.
- k. As regards part 5 of the request, it is difficult to see how dates of any complaints received could have any of the prejudicial effects set out above. The dates of the Council's visits have been disclosed. The nature of the complaint presumably would be similar to those complaints referred to in the Manchester Evening News on 19 July

2015. It is difficult to see how disclosure of any action or inaction by the Council prior to the explosion, details of which have already been passed on to the investigating authorities would have an adverse effect on those investigations. Inaction may be embarrassing to the Council but that is not a reason for refusal of disclosure under regulation 12(5)(b).

- l. The Commissioner now asserts that the exception would be engaged because the ability of a person to receive a fair trial would be adversely affected if the decision maker's (jury's) ability to engage in objective analysis were undermined. This in turn would be the case only if such information (a) was reported; and (b) came to the jury's attention. In the aggregate therefore, the position is no higher than this. There is a possibility that disclosure of the information may affect the ability of a person to receive a fair trial. That is a long way short of satisfying the test under Regulation 12(5)(b) as clarified in Archer. The ability of any person to receive a fair trial would only be prejudiced in the event of a number of contingencies occurring, none of which are certain.
 - m. Local knowledge and interest in this matter is very significant. In the circumstances, it is highly unlikely that any trial of any liable party would be held locally. The fact of the Council's previous involvements with the site and problems with dust are well known. The site of the explosion has been the subject to a BBC documentary and considerable exchange of information on social media.
 - n. As the Commissioner rightly points, the Courts have developed strict rules governing media coverage of criminal trials so as to avoid prejudice of the very type upon which the Commissioner now seeks to rely.
21. The Appellant's substantiation of its points made in paragraph 20(i) to (k) include a letter from the Council to WTL of 14 July 2015 with photos that it stated were taken during the "*EXTRA inspection accompanied by my Team Leader...*"; and a press report from the Manchester Evening News of 19 July 2015.⁶ The latter stated:

"... We shouldn't assume anything. We mustn't go down the trail of assuming anything. **We will make all facts available of what we know.**

"There are on-going complaints, but when you have this nature of business, close to a community, there will be complaints about dust and noise and pollution which we as a council have been dealing with.

"I think we need to be very calm about what that could mean and might not mean. We really mustn't prejudge anything. The police and HSE need to investigate, but **we do have complaints that we have monitored and taken care of and we will make all that available to you.**

"We were there to clean up a situation of dust particles in the area, at the exterior to it, that shouldn't have been in there and we did clear it up and we have got before and after pictures showing what a job they did and they did comply completely with our orders..." (*Emphasis added*).

⁶ See pages 60-63 and 108 of the Open Bundle.

22. The Commissioner's submissions included:

- a. Disclosure would adversely affect the course of justice, because it would adversely affect the ability to conduct an enquiry and the ability to conduct a fair trial.
- b. The HSE has gathered evidence relating to the (a) extent of on-going health and safety problems or concerns at the Mill; (b) extent to which WTL, or any other person, was aware of any such problems, and; (c) steps (if any) taken by WTL to remedy or mitigate those problems prior to the explosion on 17 July 2015. It is under consideration and may, depending on the outcome, give rise to and form part of the evidence in criminal proceedings for corporate manslaughter. The requested information forms part of the evidence under consideration in the ongoing criminal investigation.
- c. The explosion and subsequent investigations are a continuing source of media interest. In particular, the regional press interest is intense (*See pages 105 to 129 of the Open Bundle*). Media coverage of the information is likely (i.e. more probable than not) be relevant to any subsequent trial. That coverage, which will inevitably be partisan and partial, would colour the decision-maker's view of the evidence before he or she had an opportunity to consider it in the sober, and controlled, context of the investigative process or trial.
- d. Given the nature of the withheld material, if it were published before any criminal trial, it may allow a defendant or defendants to argue that their right to a fair trial was prejudiced by that disclosure. Such an adverse effect on the criminal justice process is clearly an adverse effect for the purposes of regulation 12(5)(b) EIR. Furthermore, the public interest in preventing such an adverse effect clearly outweighs the public interest in disclosure. The risk of adverse pre-trial publicity undermining a fair trial is well known. Because of that risk, the Courts have developed strict rules governing media coverage of criminal trials. An example is the rules on strict liability contempt in criminal proceedings. (*See Attorney General v Birmingham Post and Mail Ltd [1999] 1 WLR 361*).
- e. The evidence relating to the explosion, and the culpability of WTL or any other person in bringing it about, must be considered objectively by the relevant decision-maker. In the context of a criminal trial, that decision maker will be a jury. It is axiomatic that the investigation or subsequent trial into the explosion would be adversely affected if the decision-maker's ability to engage in such objective analysis were undermined.
- f. In response to the Appellant's argument that the material is factual and limited in scope, regulation 12(5)(b) applies to any information the disclosure of which would adversely affect a criminal investigation or fair trial. It does not matter that the information is factual. The majority of information relevant to any criminal investigation or trial will be factual in nature. The question is whether or not the factual material is

relevant to those proceedings, and if so whether its disclosure would (that is, would be more than probable than not) prejudice them.

- g. In response to the Appellant's argument that the material pre-dates the explosion, the point at which the information was created is equally irrelevant. (*See Watts v Information Commissioner EA/2007/022, 20 November 2007 at paragraph 6*).
 - h. The role of Council in holding the information in the on-going criminal investigation or trial is irrelevant. Otherwise, a requester could compel a public body to produce information which is being used in criminal proceedings because that body is not, itself, conducting those proceedings, rendering regulation 12(5)(b) meaningless.
 - i. The Appellant's arguments related to the purpose for which it seeks the information does not assist it. The withheld information is plainly of relevance to the on-going criminal investigations, which are also concerned with assessing the culpability and fault of WTL because it has the potential to shed light on the culpability or fault.
 - j. The argument that the Appellant wishes to use the information for purely commercial reasons, and has no intention to publish it generally does not assist it. This is based on a misunderstanding of Information Rights law. Disclosure is not, and cannot be, limited to providing information to a specific requestor exclusively for their private use. The EIR exists to increase transparency surrounding environmental information held by public authorities. Public authorities must, proceed on the basis that any information disclosed by it is disclosed to the entire world, and assess the impact of such disclosure accordingly.
23. The Commissioner also provided Closed Submissions that substantiated her position by specific reference to the requested information. They were provided in confidence because they directly refer to and reveal the requested information.
24. In response to the Tribunal's directions, the Council forwarded the Statement of 19 April 2017, which the HSE agreed with. This included:

"On receipt of the request, I understand that DI Jones considered the nature of the information sought, the circumstances, nature and extent of the current criminal investigation and the risks posed by disclosure on any subsequent criminal case.

The relevant background to that is as follows below.

Wood Treatment Limited are a suspect in a corporate manslaughter investigation. This status arises from an explosion at premises owned/occupied by Wood Treatment Limited (at the Bosley site) in July 2015 and involves an investigation into the deaths of four employees and injuries caused to others (in some cases very significant injuries). At this stage Cheshire Constabulary have yet to interview a representative of the Limited Company, though arrangements for this are being progressed at present and the Company have been asked to nominate the appropriate representative...

As well as a corporate manslaughter investigation, two Company Directors, [xx] have been interviewed as suspects in respect of gross negligence manslaughter as well as breach of the HASAWA. This is a very significant incident in the local

community involving the investigation of what can only be described as some of the most serious of criminal offences.

In respect of the individuals under investigation, they have engaged in a fact finding interview (effectively a first account and not a “challenge” interview). They have also engaged in a second interview to comment on plans / layout information provided by witnesses and offered observations in respect of dust / debris. This second phase is also “fact finding”. The investigation has then continued. This means that the information provided is checked, issues identified and a full evidential review conducted leading to a further interview. The final interview stage includes advance disclosure of relevant material and an interview at which matters are put to the individuals concerned. It is at that stage that disclosure would be made. I am instructed that the anticipated start date for this phase is July 2017.

The material requested is almost certainly part of the prosecution case in any subsequent proceedings. Provision of information to Wood Treatment Limited can only be regarded as also affording access to that information by its Directors (identified above). **This investigation is complex, of the utmost severity and clearly in the public interest that it be able to run its course without risk of prejudice...**

DI Jones quite rightly expressed concerns that **disclosure of the information requested may adversely affect the course of justice and in particular impact upon the ability of Cheshire Police / HSE to prepare and conduct the final interview phase without risk of prejudice.** It is relevant in our view that, at that stage, the need to withhold the information would be short-lived given the prospective timetable for interview and thus arguably fair, reasonable and proportionate.

However, what we can now say is that the investigation has moved on and we factor in the fact that the interview plans are largely complete, the documents outlined would have been in the possession of WTL prior to the incident at the mill premises at Bosley (and thus have already been seen by the requestor⁷) and they will be provided in any event shortly ahead of the interview phase. With that in mind, the investigation has moved forward and the risks existing at the time of our observations are perhaps less concerning now than they were at that time... our comments relate purely to the list of information requested as identified above.

I am not aware of any other requests and our comments relate solely to this information not any further or wider information requests.” *(Emphasis Added.)*

25. In the ‘Open’ version of the letter submitted by the Council to the Tribunal of 20 April 2017, it stated:

“... Cheshire police have confirmed that at the current time it is anticipated that the withheld information will be provided to [both directors of WTL] ... as Advanced Pre-Action Disclosure within the next 8 weeks...”

Our Findings

26. We find that regulation 12(5)(b) was properly engaged because at the time of the request, it is more probable than not that disclosure of the information would adversely affect the course of justice, and/or the ability

⁷ It is noted that the Police seem to have misunderstood the identity of the requester. Given that the request under EIR is considered a disclosure to the world at large, we do not consider this germane.

of a public authority to conduct an inquiry of a criminal or disciplinary nature.

- a. We accept and adopt the reasons given by the Commissioner to the extent that they are set out in paragraph 22 above as well as her Closed Submissions.
- b. It is highly likely that a disclosure of the requested information under EIR would bring media attention. This is because of the rare and significant nature of the fire, and the attention and broad coverage to date. (*See the Appellant's own submissions, which includes acknowledgement of social media covering the event – see paragraph 20(m)*).
- c. Such attention would most probably have an adverse effect on the ability of the bodies responsible for the investigation to conduct their inquiry. The focus of the investigative bodies needs to be on the investigation itself and progressing with it. The investigative bodies need to be able to decide if and when it is appropriate to disclose potentially sensitive matters to those it interviews. This is clear from the Statement⁸, which we have no compelling reason not to accept and do so.⁹ The ability of the Police, to conduct its investigation without interference and with control of what information is disclosed and when, would clearly be compromised if the material had already been published.
- d. As well as the adverse effect of disclosure to those being interviewed by the Police, the Commissioner additionally reasoned that publishing the material would have further adverse effects. She reasoned that media attention from the disclosure would be partisan or impartial. (*See paragraph 22(d)*). We accept that this would be inevitable where for instance, anyone using social media is not always constrained by a professional need to be fair and impartial. There is a strong risk (i.e. far more probable than not) that this would colour a jury member's view on the contextual events at the outset of any trial. Additionally, there would be a strong risk that the disclosure and subsequent media attention would allow a defendant to argue that their right to a fair trial had consequently been prejudiced. Both occurrences would adversely affect *'the course of justice, ability of a person to receive a fair trial or of a public authority to conduct an inquiry of a criminal or disciplinary nature'*.
- e. We agree with the Appellant's point that refusal to disclose is only permitted to the extent of the adverse effect, and have duly taken this into account. However, we consider that the regulation is engaged for all of the material requested.

27. We are not persuaded by the submissions of the Appellant.

- a. The Appellant seems to have argued that the Respondents' position is that in aggregate there is a possibility that disclosure of the information

⁸ See paragraph 24 above.

⁹ Save for the inaccuracy set out in footnote 7.

may affect the ability of a person to receive a fair trial. However, this is based on number of contingencies occurring, none of which are certain such that it cannot be said that the adverse effect is more probable than not. We have considered that there are a number of potential adverse effects of disclosing the material and that each would be more probable than not to apply, such that the combined effect would be that disclosure would be highly likely to have an adverse effect. Even if we are wrong on this, we consider that disclosure would trigger risks of a jury member's view being coloured by consequent media attention and the Defendant/s arguing that their right to a fair trial had been prejudiced. Given the utter importance in the right to receiving (and arguably perceiving) a fair trial, that trigger of risk is in itself an adverse effect on the *'the course of justice, ability of a person to receive a fair trial or of a public authority to conduct an inquiry of a criminal or disciplinary nature'*. We would note that because an exception under EIR is considered to be engaged, this does not mean that the material would necessarily be withheld.¹⁰

- b. We agree with the Appellant that merely passing on information to the investigating authorities would not make it become exempt from disclosure. However, this is not an accurate description of events since certain information requested by the Appellant was disclosed. It is also not an accurate description of the relevant stages in considering whether an exception applies as set out in paragraph 17 above. In any event, the Commissioner has provided detailed reasoning and our decision is made after carefully reviewing the material and arguments before us, including the requested information. We consider that the applicable regulation 12(5)(b) does apply to every category part of the information requested and that Statement from the Police (confirmed by the HSE) seems to us sufficiently strong, understandable, and compelling.
- c. The Appellant's argument that the material itself cannot prejudice the on-going investigation or the fairness of any subsequent criminal trial was a 'mere assertion'. We disagree, based on reviewing the material and the arguments before us. That the Appellant had seen photos sent by letter from the Council to WTL, is entirely different from disclosing information under EIR, and in any event, we must consider the status of the particular information that has been withheld. Likewise, the comments made in the Manchester Evening News do not alter our requirement to consider whether EIR applies to the information, (although they may be relevant to illustrate the public interest in disclosure).
- d. Likewise, the Appellant made 'mere assertions' relating to new arguments by the Commissioner¹¹ and the relevance of material being factual; limited and predating the explosion. A reading of regulation

¹⁰ Paragraph 17 above makes clear the relevant stages in considering whether an exception applies.

¹¹ It is not clear on what basis the Appellant asserts that the Commissioner is limited in its ability to raise new matters, and the assertion seems to us to be entirely wrong. The Tribunal's consider matters afresh and the parties may advance new evidence and arguments. In any event, it is factually inaccurate to assert that the Decision Notice raised matters not raised by the Council.

12(5)(b) shows that it is clearly not limited in the ways suggested by the Appellant.

- e. The Appellant asserts relevance to its motive and intended use for the requested information, including that there would in fact be no adverse effect because there would not be a publication of the material. However, it provided no legal basis for its arguments. Based on the arguments before us, we accept the reasoning given by the Commissioner. For these purposes, a disclosure under EIR is a publication and so is deemed to be made to the world at large. Assurances by a requester as to the Appellant's use cannot be relied on. Generally, a public authority is not required to withhold information requested, and might decide to come to a private arrangement, but this would be outside of the EIR regime.
28. It is noted that in the Statement the Police expressed an intention to provide the material to those being interviewed shortly ahead of the interview phase. They considered that with the investigation having moved forward, the risks existing at the time of their observations were perhaps less concerning than they had been. The Council additionally explained that the Police had confirmed when it was anticipated that the withheld information would be provided to both directors of WTL under a process of Advanced Pre-Action Disclosure. This does not affect our decision. This is because (a) in considering the application of the regulation, we take into account the risks as they were at the time of the EIR request and its consideration by the Council; and (b) a disclosure under a pre-action process to relevant persons, is not akin to a disclosure under EIR to the world at large.
29. It is also noted that in relation to any prejudice to the investigation arising from disclosure, the Statement explained that *"disclosure of the information requested may adversely affect the course of justice and in particular impact upon the ability of Cheshire Police / HSE to prepare and conduct the final interview phase without risk of prejudice."* The Appellant sought to emphasise that regulation 12(5)(b) required there 'would' be an adverse effect. The Commissioner then invited the Tribunal to seek clarification from the Police if minded to ascribe any particular weight to the use of 'may' as opposed to 'would'. She also suggested that the emphasis may have changed with time since the request had been made some time before the Statement. The Council also responded stating that the Statement was not intended to provide their definitive position on the possible prejudice arising from disclosure in this case. However, we had not received a substantial amount from the Council setting out its position.
30. In any event, we do not think it would be appropriate to ascribe particular weight to the use of 'may' instead of 'would'. It is of course not possible to say with certainty what 'would' happen in the future. The standard applied in construing 'would' under regulation 12(5)(b), is whether it is 'more likely than not' that disclosure would bring the adverse effect. The use of 'may' in the Statement does not imply that it is not more likely than not. Having considered the matter in the round, we find that it is more likely than not that disclosure would bring the stated adverse affect

as at the time the request was made and considered by the Council. This is for the reasons set out above. We further note that the Police emphasised the importance of the investigation being able to run its course without risk of prejudice. We have explained in paragraph 27(a) above why we consider that the trigger of risk is in itself an adverse effect.

Issue B: The Balance of Public Interest

31. The Appellant has not challenged the Commissioner's approach to the balancing exercise, and has focused its arguments on whether the exception 12(5)(b) is engaged. Nevertheless, in one of its submissions, it asks the Tribunal to consider the balance of public interest. We have considered the Commissioner's arguments, with specific reference to the material itself, based on the position at the time of the request and its consideration by the Council.

32. We accept and adopt the arguments advanced by the Commissioner.

33. We note the public interest in disclosure, based in particular on transparency. The request for information was made quite some time after the incident had occurred. There is substantial importance in understanding all aspects of it as soon as practicable. The press cuttings we have seen illustrate this. The text stated in the Manchester Evening News of 19 July 2015 (*set out above*), made clear that the public had been assured that all available facts would be made known. The public interest in disclosure would in part be satisfied by any future trial being held in public, with the media reporting, subject to appropriate judicial control.

34. Notwithstanding paragraph 33, the public interest in withholding the information substantially outweighs the interest in disclosure. We accept that the criminal investigation is complex and very serious. It is critical that authorities be allowed to carry it out in a focused, fair and effective manner, and the space to do so without risk of prejudice. Any future criminal trial should be allowed to run its course without risk of pre-judgment or bias on the part of the jury.

35. In conclusion, whilst there is a presumption in favour of disclosing environmental information, and the factors in favour of maintaining the exception in Regulation 12(4)(b) carry great weight and we do not consider that the factors in favour of disclosure come close to making the scales level.

36. Our Decision is unanimous.

Other

37. It is also noted that the Commissioner's reference to criminal proceedings in the Decision Notice was inaccurate as no proceedings

have commenced. However, this does not have a material effect on the appeal.

Judge Taylor

3 July 2017

Promulgated – 17 July 2017