EA/2021/0317

PATRICIA O'HANLON

Appellant:

and

THE INFORMATION COMMISSIONER

First Respondent

HEALTH AND SAFETY EXECUTIVE

Second Respondent

Hearing: 21 April 2022.

Before: Judge Brian Kennedy QC, Naomi Matthews, and David Cook

At: Evidence taken at Liverpool Family and Civil Court.

Representations:

The Appellant: as a Litigant in Person.

The First Respondent: Helen Wrighton, Solicitor, by written submissions.

The Second Respondent: Tom Tabori of Counsel.

Deliberations: 18 July & 1 August 2022 & 3 February 2023.

Result: Appeal allowed and substituted decision provided:

(See: Paragraph [65])

REASONS

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA") The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice ("DN") dated 28 September 2021 (reference IC-69441-C4S5) which is a matter of public record. By virtue of the Tribunal's Directions of 24 November 2021, the Health and Safety Executive ("HSE") was joined as Second Respondent.

Factual Background to this Appeal:

[2] Full details of the background to this appeal, Mrs. O'Hanlon's request for information and the Commissioner's decision are set out in the DN and not repeated here, other than to state that, in brief, the appeal concerns Mrs. O'Hanlon's contention that the HSE holds further information within scope of her request and that the information withheld under regulation 12(5)(b) should be disclosed. Further, the Commissioner held the following:

- HSE holds information within the scope of part [1] of the request and has therefore breached regulation 5(1) and regulation 5(2) of the EIR in respect of that part
- On the balance of probabilities, HSE holds no further information within scope of parts [2], [5], [7] and [11] of the request and has complied with regulation 5(1) in respect of those parts.
- HSE is entitled to rely on regulation 12(5)(b) to withhold information within scope of parts 2 and 11 of the request, and the public interest favours maintaining this exception.
- HSE failed to provide its internal review response within the statutory time period of 40 working days and, as such, breached regulation 11(4) of the EIR.

Chronology:

[3] 27 April 2020 Mrs. O'Hanlon wrote to the HSE and requested the following:

"I am asking that any documents or correspondence held by the HSE in relation to this site be released to me under the Freedom of Information Act. I believe the information requested to be in the public domain and the public interest and can see no reason why it should not be supplied.

I know from correspondence with HSE that HSE Inspectors visited the site on 31st January 8th, 10th and 20th February. [1] I am requesting copies of their reports and any other reports relating to HSE Inspectors' visits at this site.

[2] I understand from correspondence with HSE that complaints from members of the public, councillors and the MP were received between 30th January and 7th February 2020 and I am requesting copies of these complaints.

I am also requesting copies of:-

[3] The pre-demolition asbestos survey report

[4] The asbestos method statement

[5] Consignment notes for waste and hazardous waste removed from the site

[6] Construction Phase Plan

[7] F10 Notification

[8] Notification of Contravention

[9] Improvement Notice

[10] Action Plan

and [11] and correspondence between HSE, the MP, [Redacted] Council Officers and the developers of this site."

6 May 2020 HSE responded stating that the request had been handled under FOIA and advised that the requested information was exempt under section 30(1)(b) and section 41.

15 May 2020	Mrs. O'Hanlon requested an internal review. Mrs. O'Hanlon did not receive a review despite the Commissioner instructing HSE to provide the same on 30 November 2020.
5 August 2021	Following correspondence with the Commissioner, HSE advised that it had reconsidered the initial response provided and issued Mrs. O'Hanlon with a fresh response dated 9 August 2021. HSE conceded that it had erred in handling the request under the FOIA and that the correct legislation was the EIR.
22 August 2021	Mrs. O'Hanlon reverted to the Commissioner, the Commissioner understood the Appellant to be challenging the HSE's position in relation to requests one, two, five, seven and eleven.
28 September 2021	The Commissioner's DN was promulgated, and the Commissioner made the following findings: *"Request one – HSE held information within the scope of this part of the request and was ordered to provide Mrs. O'Hanlon with a response to this request that complied with the Regulations;* *Request two; five; seven and eleven – On the balance of probabilities, the Commissioner found that HSE held no further information within the scope of these requests but that it was entitled to rely on regulation 12(5)(b) to withhold the information which it did hold in relation to request two and eleven and that the public interest favored maintaining this exception."*
24 October 2021	Mrs. O'Hanlon filled her Notice of Appeal.

Relevant Legislation:

[4] (A) S1 The FOIA – General right of access to information held by public authorities

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

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

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

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

(3) Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

(4) The information—

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

In *Linda Bromley (and others) v Information Commissioner & the Environment Agency* (EA/2006/0072, 31 August 2007), the First-tier Tribunal stated at paragraph [13]:

"13. There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information. However, it argued (and was supported in the argument by the Information Commissioner) that the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner's findings of fact are reviewed. We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."

(B) *2004 No. 3391 FREEDOM OF INFORMATION ENVIRONMENTAL PROTECTION*

The Environmental Information Regulations 2004

12.— Exceptions to the duty to disclose environmental information

(1) Subject to paragraphs (2), (3) and (9), 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.

(3) To the extent that the information requested includes personal data of which the applicant is not the data subject, the personal data shall not be disclosed otherwise than in accordance with regulation 13.

(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that–

(a) it does not hold that information when an applicant's request is received;

(b) the request for information is manifestly unreasonable;

(c) the request for information is formulated in too general a manner and the public authority has complied with regulation 9;

(d) the request relates to material, which is still in the course of completion, to unfinished documents or to incomplete data; or

(e) the request involves the disclosure of internal communications.

(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–

(a) international relations, defence, national security or public safety;

(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;"

(c) intellectual property rights;

(d) the confidentiality of the proceedings of that or any other public authority where such confidentiality is provided by law;

(e) the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest;

(f) the interests of the person who provided the information where that person–

(i) was not under, and could not have been put under, any legal obligation to supply it to that or any other public authority;

(ii) did not supply it in circumstances such that that or any other public authority is entitled apart from these Regulations to disclose it; and

(iii) has not consented to its disclosure; or SI 2004/3391

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(g) the protection of the environment to which the information relates.

(6) For the purposes of paragraph (1), a public authority may respond to a request by neither confirming nor denying whether such information exists and is held by the public authority, whether or not it holds such information, if that confirmation or denial would involve the disclosure of information which would adversely affect any of the interests referred to in paragraph (5)(a) and would not be in the public interest under paragraph (1)(b).

(7) For the purposes of a response under paragraph (6), whether information exists and is held by the public authority is itself the disclosure of information.

(8) For the purposes of paragraph (4)(e), internal communications includes communications between government departments.

(9) To the extent that the environmental information to be disclosed relates to information on emissions, a public authority shall not be entitled to refuse to disclose that information under an exception referred to in paragraphs (5)(d) to (g).

(10) For the purposes of paragraphs (5)(b), (d) and (f), references to a public authority shall include references to a Scottish public authority.

(11) Nothing in these Regulations shall authorise a refusal to make available any environmental information contained in or otherwise held with other information which is withheld by virtue of these Regulations unless it is not reasonably capable of being separated from the other information for the purpose of making available that information."

Commissioner's Decision Notice:

[5] The Commissioner determined regarding part 1 of the request, that HSE does not hold the "Inspectors reports" that the Appellant requested but she found that HSE does hold information that falls within scope of that part of the request. As such, HSE's response to part 1 breached regulation 5(1) and 5(2) of the EIR.

[6] The Commissioner could not consider whether a public authority should hold information that an applicant is seeking; she can consider solely whether or not the information is held on the balance of probabilities. Regarding parts 2, 5, 7 and 11 the

Commissioner accepted HSE's explanation that any such information would be held in its corporate and electronic records management systems, that it has searched these systems and has not identified any further relevant information. The Commissioner therefore found that HSE has complied with regulation 5(1) of the EIR in respect of those parts of the request.

[7] The Commissioner found at the time that the Appellant submitted her request for information to HSE, on 27 April 2020, HSE's investigation into the incident in question was still live. As such, the Commissioner accepted that if this material were to be disclosed during the investigation, it would make those involved in the incident less likely to volunteer further information to the HSE. Further. the Commissioner accepted that it would also potentially make the public and involved parties less likely to volunteer information to HSE in its HSWA investigations of future incidents. Second, disclosing the information in this case would frustrate HSE's efficient investigation of the incident. This is because, given the circumstances, and the interest of different parties in the incident, the Commissioner considered that disclosure could have generated further correspondence and queries to HSE, distracting it from its investigation.

[8] The Commissioner decided that HSE was entitled to rely on regulation 12(5)(b) [*see underlined at **4 (B)** 12 (5) (b) above*] to withhold the complaint correspondence and HSE's correspondence with a developer. She considered disclosing this information at the time of the request would have prejudiced HSE's ability to carry out its investigation. The Commissioner went on to consider the public interest test associated with this exception and found greater public interest in HSE being able to conduct an efficient and robust investigation – in the current case and in the future.

Appellant's Grounds of Appeal:

[9] The Appellant stated that the Commissioner erred in concluding, on the balance of probabilities, that the HSE did not hold any or any further information in relation to parts two; five and eleven of her requests.

[10] In relation to the second request, the Appellant could not agree that on the balance of probabilities, HSE holds no further information within the scope of part 2 of her request. The Appellant referred to correspondence from the 4th of March to 5th February 2020 to argue the same.

[11] The fifth limb of the Appellant's request concerns consignment notes for waste and hazardous waste removed from the site. The Appellant contended that these notes should be in HSE's possession.

[12] The Appellant's eleventh request sought correspondence between, HSE, Sefton Council officers, the MP and the developers of the site. The Appellant argued that the correspondence existed on the basis that the Sefton Council Environmental Protection and Building Control were in contact with HSE in February 2020. Further, that the MP's office was advised by a Sefton Council officer to contact HSE. The Appellant averred that "…we know..." two Council departments were "…in contact…" with HSE in February 2020.

[13] The Appellant contended that the Inspectors' Reports should be disclosed as it is in the public interest. The Appellant considered the public to be the victims and argued that they have been contaminated. The Appellant seeks justice for the residents. The Appellant stated that the HSE knowingly allowed unlawful demolition on a contaminated site.

Commissioner's Response:

[14] In relation to the second request, the Commissioner did not consider the Appellant's argument that further information is held as being anything else but an expression of dissatisfaction with the way in which the HSE described document 1(b).

[15] In response to the fifth limb of the Appellant's request the Commissioner adopted and repeated §31 of her DN which states as follows:

> *"all of its corporate information is held within COIN or within HSE's electronic records management system - CM9. HSE confirmed to the Commissioner that*

it has undertaken a full search of these systems and the only information [about the investigation] that HSE holds is held in COIN. The Commissioner understands HSE to mean that it did not identify any new information relevant to the above four parts of the request."

[16] Further, the Commissioner reiterated that she cannot consider whether a public authority should hold information that an applicant is seeking; she can consider solely, whether or not the information is held; on the balance of probabilities.

[17] In consideration of the Appellant's eleventh request, the Commissioner noted that document 1(b) refers to contact between Sefton Councilors and HSE but largely in the form of telephone calls, this does not disturb the conclusion that there was no recorded information falling within the scope of the request. However, with regards to the email from HSE to the ward councilor dated 5th February 2020, the Commissioner invited both the Appellant and the HSE to confirm whether this email is in dispute or if it is held. Additionally, the Commissioner stated that there is no evidence that the MP's Office did in fact contact HSE.

[18] The Commissioner ordered the HSE to issue a response to the request for the Inspectors' Reports. This may result in the disclosure or the refusal to disclose the reports requested. If the HSE refuse to disclose the reports, the Commissioner invited the Appellant to make a fresh complaint to the Commissioner's Office. In relation to the second and eleventh limbs of the quest, the Commissioner will keep her position under review, otherwise, the Tribunal is invited to uphold the DN and dismiss the appeal.

Appellant's Reply:

[19] The Appellant invited the Tribunal to determine that the Commissioner erred in her decision as she did not have all the available information in her possession at the time, she provided her DN. The Appellant referred to COIN extracts which reveal correspondence in which the HSE deliberately concealed. The Appellant criticized the Commissioner for closing the case. Further, the Appellant referred to an asbestos report which was not disclosed but in the possession of HSE.

[20] The Appellant agreed with the Commissioner that she is dissatisfied with the HSE's handling of the matter. The Appellant added that the HSE should release the additional information as instructed by the Commissioner on 28th September 2021. The Appellant alleged wrongdoing on the account of the HSE, the Appellant argued that the HSE were negligent in their use of the site.

[21] The Appellant, in response to the use of regulation 12(5)(b), contended that this regulation has been applied in order to withhold correspondence. The Appellant noted that the information must be disclosed even if there would be an adverse effect on the environment. The adverse effect on the environment in this case concerns the release of chrysotile fibers throughout the site as a result of the mishandling of asbestos. The Appellant referred to *DCLG v the Information Commissioner & WR* [2012] UKUT 103 (AAC) (28 March 2012), to ground his request for the redacted sections in the COIN reports titled "Note Details". The Appellant highlighted the public concern in this case which favors disclosure.

[22] In relation to regulation 12(9), the Appellant seeks the email exchanges between ASSET and HSE and AMARK and HSE which were identified in the COIN extracts. The Appellant referred to the Commissioner's own guidance and how the HSE based its release of the ASSET Asbestos Survey on regulation 12(9). The Appellant stated that this should be applied to the email correspondence. The Appellant requested that the Tribunal uphold the appeal. The Appellant also requested an oral hearing to clarify any points raised by the Tribunal.

Second Respondent's Response:

[23] In response to the request for copies of their reports and any other reports relating to HSE Inspectors' visits at this site, the HSE argued if the Appellant is unhappy with the scope of that disclosure, the Appellant's next step is to lodge a complaint with the Commissioner. The HSE referred the Commissioner's DN at §41 and notes that the there is no appeal before the Tribunal which concerns a complaint against the Commissioner.

[24] The HSE conducted a further, broader search for the requested information within COIN, email accounts and the notebook of the replacement Investigating Inspector. Following this search the HSE identified that it holds the following information within the scope of Part 1 of the Request:

a. *Internal emails between the original Investigating Inspector and the Principal Inspector covering visits to Saville Road in Lydiate ("the Site") on the 31.1.2020 and 1.2.2020, and further internal emails between 5-6.2.2020 between the inspectors instructing them to inspect. These events are not recorded in COIN, and largely precede the first COIN entries for this case, beginning on 6.2.2020. Whilst not being formal IMPACT inspection reports nor recorded in COIN, the content of these emails could reasonably be characterised as site visit reports as the Investigating Inspector is reporting what he has seen at the Site on specific dates and what further actions may be required (e.g. further visits). Regs 12(5)(b) and 13 apply, for the reasons given by the DN in relation to Parts 2 and 11 of the Request, including, inter alia, the ongoing nature of the investigation at the time of the original response to the Request; plus it is internal communications occurring at that particular time, requiring a safe space for free and frank expression. Nonetheless, in line with the partial COIN disclosure with the 9.8.2021 internal review ("IR"), HSE elects to disclose the parts of this internal correspondence to the Appellant to the extent of disclosure already made pursuant the parallel HSE complaints process.*
b. *Copies of notebook entries made by the second Investigating Inspector on 20.2.2020, recording steps taken in the investigation. These are not 'reports' in the sense of being drafted for the purpose of giving an account of what the investigating inspector observed, did and investigated, but on a broad reading of 'reports' the public function exercised by HSE means that inspectors' reports to a degree give account to their supervisors and others who wish to see a record of what the inspector observed, did or investigated. On that broader meaning, these notebook entries also fall within Part 1 of the Request and are thus 'held'. Nonetheless, reg 12(5)(b) applies and the public interest balance weighs in favour of non-disclosure for reasons given by the IC in its DN.*

c. *An Asbestos Sample Report for Saville Road, by ASSET Ltd, dated 24.3.2020, procured for the duty holder and disclosed by ASSET Ltd to HSE on 3.4.2020 ("Sample Report"). Part 3 of the Request was for "The pre-demolition asbestos survey report". HSE confirmed in their formal submission to the IC that it did not hold a pre-demolition asbestos report and this remains factually correct. This was because the duty holder did not acquire a pre-demolition asbestos survey prior to demolition and such a report cannot be obtained post demolition. As part of HSE's investigation of this Site, HSE served the duty holder with a Notice of Contravention requiring him to obtain an asbestos survey report (though it was not a pre-demolition report). The duty holder engaged the services of ASSET Ltd to provide an asbestos sampling report and although the Sample Report is not a pre-demolition survey report, HSE are content that it falls within scope of the Request as it is, broadly, a report relating to HSE's investigation of the Site. Reg 12(5)(b) applies and at the date of the original refusal the public interest balance would have weighed in favour of non-disclosure for reasons given by the IC in its DN. If the Sample Report had been identified at the time of the original Request, HSE would have declined to release it, relying on reg 12(5)(b). That is because the information it contains may have formed evidence to support prosecution of the duty holder, should HSE have deemed this an appropriate course of action. However, now that HSE has concluded its investigation of the duty holder, though the relevant date remains that of the original refusal, HSE has decided to make disclosure, subject to reg 13 redactions, because of the following factors: (i) the report identifies the presence of asbestos throughout the Site in a range of material which has been deemed 'high risk' and the Site is open to the elements and surrounded by residential properties, whereas disclosure of the report into the public domain would have no detrimental impact on the company engaged to undertake the sampling exercise; (ii) whilst it might have a detrimental impact on the duty holder, disclosure of this report is unlikely to cause any additional detriment to the duty holder as there is already information within the public domain associated with this Site and the presence of asbestos; and (iii) it is an expert report not a communication from the duty holder or a third party.*

[25] In response to the request for complaints from members of the public, councilors and the MP that were received between 30th January and 7th February 2020, the HSE identified three complaints as having been received within the specified period. The Commissioner clarified that the Appellant already has two out of the three complaints in her possession, on this basis the Appellant made the following submissions in relation to the remaining complaint titled, a concern received from a member of the public dated 30.1.2020; but withheld, in reliance on regulations 12(5)(b) and 13:

> *"Even redacting personal data from document [2]a will enable [the Appellant] to identify who the complainant was that raised the concern with HSE. HSE acknowledge she is likely to know this information already but that is not something HSE can consider under FOI. We must determine if disclosure of information we have received in confidence via our concerns process to the world at large serves the overall public interest. As the statutory body responsible for enforcing health and safety legislation in the UK, HSE provide those who wish to raise concerns with us a safe and secure environment in which to do this. If we subsequently start disclosing concerns raised with us into the public domain, even in an anonymized format, this is likely to dissuade individuals from bringing concerns to HSE's attention and this would not serve the overall public interest. On this basis we uphold the decisions previously made."*

[26] Further, the HSE accepted, endorsed, and adopted the reasons outlined at §35-38 and §45-50 of the Commissioner's DN. Additionally, the HSE operate a Concerns and Advice Team or CAT that allows anyone to raise a concern with HSE. People who predominantly use this service are members of the public, trade union representatives and employees. Notifiers have the option to either remain anonymous when raising a concern or allow HSE to disclose their name to the company they are raising a concern about. Notifiers raise concerns with HSE on the premise the information they provide to us will remain confidential and will only be used for the purposes upon which it was collected i.e. to investigate a health and safety concern. If HSE start disclosing notifiers' names and the details of the concern raised into the public domain in response to FOI/EIR requests, HSE is likely to see a significant decline in the number

of concerns raised with it. There is a high probability that notifiers will have greater fear of reprisals. HSE is of the view disclosure of this information into the public domain would not serve the overall public interest.

[27] HSE acknowledges that some of the concerns raised with HSE have come from Councillors, an MP's office, and Sefton Council, but HSE does not view these concerns differently to any other concerns raised with HSE. These individuals also have the right to know that any concerns that they raise with HSE will remain confidential and will not be disclosed into the public arena, and HSE depends on their trust in that process. The HSE identified further complaints from the Concerns and Advice Team falling within the scope of Part 2 of the request but not identified as held at the time of the request.

[28] In response to the request for consignment notes for waste and hazardous waste removed from site, the HSE highlighted that the Commissioner's DN accepted that no further information was held within the scope of this part of the request. Subsequently, a further search conducted by HSE has not revealed any consignment notes for waste and hazardous waste removed from the Site. HSE stated that they requested a copy of the consignment note from AMARK Asbestos Removal, but this was never received.

[29] In relation to the request for any correspondence between HSE, the MP, Sefton Council officers and the developers of this site, the HSE identified that as a result of the Commissioner's investigation it held photographs, a newspaper article and email correspondence between HSE and the duty holder. HSE stated that it disclosed the photographs and newspaper article but withheld the email correspondence relying on regulations 12(5)(b) and 13. The HSE contended that Appellant's grounds of appeal only challenge the Commissioner's decision as to what is held and then merely to state that some information from the duty holder has been disclosed. Further, in relation to the email of 5.2.2020 sent to the Appellant by HSE, the HSE have not been able to identify this email as being held but note that it would already be held by the Appellant. As a result of further searches in response to the appeal, the HSE have located the following further information identified as falling within Part 11 of the request but not identified as held at the time of the request:

a. *Email to HSE from ASSET Ltd, a third party engaged by the duty holder to undertake sampling of material at the Site, dated 24.3.2020, forwarding the Sample Report on the presence of asbestos. HSE withholds this email from disclosure in reliance on the exception in reg 12(5)(b) and 13.*
b. *An 6-13.2.2020 email exchange starting with an exchange between the duty holder and Sefton Council, then Sefton Council and HSE, then internally within HSE between the original investigating inspector, and the investigating inspector who replaced the original inspector. Internal communications between HSE personnel falls outside the scope of Part 11 of the Request. HSE withholds the remainder of the email exchange from disclosure in reliance on the exception in reg 12(5)(b) and 13.*
c. *Attached to the 6-13.2.2020 email exchange, a risk assessment for operations tasks, dated 10.2.2020, completed by the duty holder and an asbestos removal method statement produced for the duty holder. Whilst this type of information is not generally publicly published, it is available to anyone who visits the Site for a particular period of time therefore it does not constitute confidential information. Therefore, though reg 12(5)(b) applies, the public interests favours disclosure, subject to reg 13 redaction in the method statement.*

[30] The HSE contended that they do not hold any further information after the additional disclosure because of the broadened scope search. The HSE maintained that the exceptions apply as does the public interest balance. The HSE is content for the matter to be dealt with on the papers.

Appellant's Reply:

[31] The Appellant filed a response to the submissions made by HSE on 14 February 2022. In response, the Appellant stated that HSE failed to include Part 7 of her appeal. The Appellant sought the F10 notification form relating to the start of development on the site, which the Appellant asserted is a statutory requirement. The Appellant averred that an extract was released to her by HSE on 9th August 2021. This extract included information relating to the construction phase from 1st June 2020 to 8th March 2021. The Appellant argued that this was never requested.

[32] The Appellant clarified that the challenge is against the Commissioner's decision on what is held on the basis that an F10 notification relating to the start of the development on the site should be held on the basis that it is a statutory requirement.

Second Respondent's Supplemental Response:

[33] The HSE sought permission from the Tribunal on 14 March 2022 to file a supplemental response. The HSE referred to the Construction (Design and management) Regulations 2015 ("CDM Regs") to explain the need for a F10 form from a duty holder. The F10 database allows the HSE to search for specific construction papers. The HSE received an F10 notification under regulation 6 of CDM from the duty holder on 24.05.2020.

[34] The HSE contended that, subsequent to a search of the F10 database, the relevant information was disclosed to the Appellant in the form of an Excel spreadsheet. Further, that the database does not hold any other notifications relating to the site that pre-dates June 2020. Despite the F10 notification information being outside the scope of the Appellant's request, it was disclosed on the basis that the public interest weighed in favour of disclosure from the perspective of transparency.

[35] The HSE explained that the obligation to notify the HSE of a notifiable construction project falls on the client and this information is only held when provided by the duty holder. In this instance, the duty holder failed to notify the HSE prior to commencing work on the site in January 2020. Therefore, failing to comply with regulation 6 of the CDM regulations. The HSE stated that after a full search of their corporate systems, they do not hold any other F10 notifications in relation to the development of the site at the time of the request.

Witness Evidence of Jane Cloherty:

[36] Ms. Cloherty is employed by the Second Respondent as a Disclosure Manager. She manages the Second Respondent's Disclosure Unit. Ms. Cloherty is responsible for undertaking Internal Reviews and making submissions to the Commissioner.

[37] In her witness statement, Ms. Cloherty provided: (i) background to this appeal, with specific reference to the Second Respondent's investigation of demolition work at "the Site"; (ii) the complaints process; (iii) the Second Respondent's record-keeping and reporting systems; and (iv) the chronology of and the response to the Appellant's request for information.

[38] Ms. Cloherty conducted a further broader search for the requested information in response to the appeal. Ms. Cloherty stated that the Second Respondent's corporate information is held within COIN or within their electronic records management system (CM9).

[39] In relation to Part 1: "copies of their reports and any other reports relating to HSE Inspectors' visits at this site", Ms. Cloherty stated that the Second Respondent holds further information within the scope of part 1 of the Request. Ms. Cloherty stated that internal emails between the original Investigating Inspector and the Principal Inspector covering visits to the Lydiate Site on the 31.1.2020 and 1.2.2020, and further internal emails between 5-6.2.2020 between the Inspectors instructing them to inspect were held. Ms. Cloherty believed that the content of these emails could reasonably be characterized as site visit reports. Further, whilst she considered that Regulations 12(5)(b) and 13 apply, she elected to disclose the parts of this internal correspondence to the Appellant.

[40] In addition, Ms. Cloherty found copies of notebook entries made by the second Investigating Inspector on 20.2.2020, recording steps taken in the investigation. Ms. Cloherty stated in evidence that these are not reports in the sense of being drafted for the purpose of giving an account of what the investigating inspector observed, did and investigated. Ms. Cloherty considered that these entries fall within Part 1 of the Request, however, she decided that they be withheld on the basis of Regulation 12(5)(b). She believed that the public interest favours non-disclosure.

[41] Ms. Cloherty stated that elected to disclose an asbestos sample report for Saville Road, by ASSET Ltd, procured by the Duty holder subject to regulation 13 redactions, because: (i) the reports identifies the presence of asbestos throughout the site in a range of material…whereas disclosure of the report into the public domain would have no detrimental impact on the company engaged to undertaking the sampling exercise;

(ii) disclosure is unlikely to cause any additional detriment to the Duty holder as there is already information within the public domain; and (iii) it is an expert report not a communication.

[42] Concerning Part 2: "complaints from members of the public, councilors and the MP were received between 30th January and 7th February 2020, Ms. Cloherty conducted further searches. Ms. Cloherty found additional information falling within the scope of Part 2 but not identified as held as the time. Ms. Cloherty dealt with the information as follows:

a. Complaint from the Appellant via HSE's Concerns and Advice Team ("CAT") on 31.1.22 – withheld on the basis of regulation 12(4)(b) as deemed already held by the Appellant.
b. Three complaints received via CAT from members of the public, dated 2, 4 and 7.2.20 – withheld on the grounds that regulation 12(5)(b) applies.
c. Two complaints received via CAT from the MP's office, dated 6 and 7.2.2020 - withheld on the grounds that regulation 12(5)(b) applies. Further, additional requests by the Appellant are not of the Request in this case and are outside of the scope of her Request and this Appeal.

In relation to Part 11: "Any correspondence between HSE, the MP, Sefton Council officers and the developers of this site", Ms. Cloherty located further information as a result of further searches conducted. This information was not identified as held at the time of the Request. Ms. Cloherty dealt with the information as follows:

d. Email to HSE from ASSET Ltd, a third party engaged by the duty-holder to undertake sampling of material at the Site, dated 24.3.2020, forwarding the Sample Report on the presence of asbestos – withheld as falls outside the scope of the Appellant's request as it is correspondence with a third party that is not an MP, Sefton Council or the developer/Duty holder of the Site. Further, Ms. Cloherty believed that Regulation 12(5)(b) and 13 would apply in any event.
e. An 6-13.2.20 email exchange starting with an exchange between the Duty holder and Sefton Council, then Sefton Council and HSE, then

internally within HSE between the original investigating Inspector, and the investigating Inspector who replaced the original Inspector – Ms. Cloherty decided to withhold the remainder of the email exchange from disclosure, relying on regulation 12(5)(b) and 13. Further, internal communications between the Second Respondent's personnel falls outside the scope of Part 11 of the Appellant's request. The email communications were partially disclosed to the Appellant to promote transparency.

f. Attached to the 6-13.2.20 email exchange, a risk assessment for operations tasks, dated 10.2.20 completed by the Duty holder and an asbestos removal method produced for the Duty holder – disclosed to the Appellant.

[43] Ms. Cloherty reiterated that additional requests by the Appellant are not of the Request in this case and are outside of the scope of her Request and this Appeal. She gave evidence in support of her witness statement at length during the oral hearing and was cross examined by the Appellant at length. During the course of the luncheon break she instigated further inquiries through her office in relation to further searches which proved to be exhaustive and forthcoming.

Second Respondent's Closing Submissions:

[44] The Second Respondent outlined that the following exceptions are applicable in this instance:

1. *Information that is personal data of which the applicant is not the data subject: regs 12(3) and 13;*
2. *Information that is not held by the authority: reg 12(4)(a);*
3. *Information that is a manifestly unreasonable request: reg 12(4)(b);*
4. *Information public disclosure of which would adversely affect 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: reg 12(5)(b).*

[45] The Second Respondent referred to *R (Evans) v AG* [2015] AC 1787, for the purposes of identifying the approach to be taken when considering the public interest balancing test. Further, concerning regulation 12(5)(a) EIR, the Second Respondent relied upon *Bromley v IC and Environment Agency* EA/2006/0072 to explain the searches which must be carried out before regulation 12(4)(a) can be relied upon if the authority does not hold the information. In addition the second respondent considered regulation 12(5)(b) and the 4-stage approach outlined in *Archer v IC and Salisbury DC* EA/2006/0037.

[46] In relation to regulation 13 EIR, the Second Respondent highlighted that regulation 13(1) EIR states, to the extent that the information requested includes personal data of which the applicant is not the data subject, a public authority must not disclose the personal data if at least one of three conditions is satisfied. In relation to the second and third, the public interest test additionally applies and must weigh in favour of non- disclosure for the prohibition in disclosure of the personal data to apply: reg 13(1)(b). In this case, only the first and third conditions (reg 13(2A) and (3A)) are relevant.

[47] The Second Respondent invited the Tribunal to find, applying the approach provided in *Bromley*, that the ultimate extent of the search was exhaustive and properly directed, and, on the balance of probabilities, nothing further is held that falls within scope of the Request. Measure of the breadth of the search parameters is Mrs O'Hanlon's response in relation to some of the further disclosure that it fell outside scope of what she was seeking.

[48] The Second Respondent submitted that the quality of public authority record keeping, and internal administration is not the concern of the FTT. If material is not held, then it cannot be disclosed, nor its disclosure ordered. Nonetheless, issues have arisen in these proceedings as to the quality of HSE's record keeping, in particular that its COIN records begin only with the date on which a Duty holder's name is identified and the absence of deletion record in respect to the original inspector's notebook.

[49] The Second Respondent contended that there were two jurisdictional obstacles to Part 1 of the appeal. Firstly, that the refusal was made on 6.5.2020. No further request for later material was made, only the request and requests for response to the request on 6.7.2020 and 29.7.2020. Further, the redacted COIN information postdates that Refusal. The date within the redacted information is long after the request, and the preceding redacted prosecution-related information is contemporaneous which postdates a review dated to 21 and 22.5.2020, which is after the request. Secondly, the Second Respondent provided a further response to the DN on 29.10.2021 disclosing a redacted version of the COIN record. In addition, further disclosure was made during the course of the proceedings. Therefore, the Tribunal does not have the jurisdiction to determine matters that were not subject of complainant to the Commissioner.

[50] The Second Respondent made the following submissions in relation to COIN:

> *"First, the effect claimed by HSE, as set out when disclosing the redacted COIN file to Mrs. O'Hanlon on 29.10.2021, is an adverse one; namely that if its decision-making process was made public, it could be used by unscrupulous Duty holder(s) to circumvent health and safety legislation thereby avoiding enforcement action. This recalls the tribunal's finding in Archer at paragraph 56, that disclosure of the report would have disclosed the council's strategy in dealing with breaches, its view of the strength and weakness of its position, with the adverse effect on the ability of the council to conduct an inquiry of a criminal nature.*
>
> *Secondly, in light of the extent of disclosure of COIN already made and precision of the limited redactions maintained, disclosure of the remaining withheld information would be to the extent necessary to avoid that adverse effect.*
>
> *Thirdly, that disclosure would, on the balance of probabilities, have the adverse effect claimed. This manifest on the face of and given the nature of the material redacted on reg 12(5)(b) grounds, namely HSE decision-making in relation to whether to proceed to prosecutions*
>
> *Fourthly, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information. On the*

disclosure side, the general interest in transparency and the particular interest in transparency on matters of public health and safety."

[51] The Second Respondent's submissions in response to the assertion that complaints from members of the public, councilors and the MP were received between 30th January and 7th February 2020 are as follows:

"First, it held a concern received from a member of the public dated 30.1.2020. HSE withheld this in reliance on regs 12(5)(b) and 13. As to reg 13, Mrs. O'Hanlon has confirmed that she does not seek any content that is personal data. This remains the case other than for the inspectors.

Second, it held a complaint from Lydiate Residents, including Mrs. O'Hanlon, dated 5.2.2020 HSE withheld this on grounds of regulation 12(4)(b) (manifest unreasonableness – because already held by Mrs. O'Hanlon).

Third, it held email communication between Mrs. O'Hanlon and HSE between 5-17.3.2020. As the Commissioner observes, save for the first two days, 2c largely fell outside scope of the Request so need not have been identified as a document in scope of Request 2. HSE also withheld this on grounds of regulation 12(4)(b).

Fourth, a complaint from Mrs. O'Hanlon via HSE's Concerns and Advice Team (CAT), to HSE's Chief Executive and informally, directly to the Inspectors. This is a complaint by Mrs O'Hanlon, such that reg 12(4)(b) applies. If she does not have a record of that complaint and desires one, she may request the same by way of subject access request. The Commissioner's Guide to the EIR195 states on p 9: "The [EIR] don't provide a right of access to a person's own information. If someone makes a request for their own personal information, you should deal with it as a data protection 'subject access request". This reflects reg 5(3) EIR.

Fifth, three complaints received via CAT from members of the public, dated 2, 4 and 7.2.2020. Thirdly, two complaints received via CAT from the MP's office, dated 6 and 7.2.2020.

[52] The Second Respondent argued that Mrs. O'Hanlon's replies to the Second Respondents' responses to her appear on Part 5 are criticism of the absence of consignment notes, which does give the FTT grounds under a 58(1) FOIA to interfere

with the DN. Further, the Second Respondent contended that they will only hold an F10 notification where it has been provided by a duty holder. This was disclosed to the Appellant in Excel format.

[53] As to reg 13, as stated above, the Second Respondent stated that the Appellant does not seek personal data other than inspector names.

[54] As to reg 12(5)(b), on which the Second Respondent relies in respect to all withheld correspondence, the four-fold approach from *Archer* applies as follows:

> *"First, the explanatory and empirical evidence given by Jane Cloherty describes an adverse effect, in summary: prejudice to HSE ability to carry out future investigations successfully, the preference for and quality of voluntarily disclosed evidence, the risk of deterring cooperation amongst the investigated, an example of a previous significant impact caused by HSE disclosure of correspondence voluntarily disclosed to HSE, and the importance of HSE having a safe space in which operate during live investigations. Information that reveals an authority's strategy for dealing with regulatory breaches, including assessment of the merits of its position and strength of evidence, may have the adverse effect on the protected interest: Archer, §56.*
>
> *Secondly, no more than is necessary has been withheld. The exception has only been relied on to the extent necessary. The nature of the adverse impact is such that it is not ameliorated through redaction and partial disclosure.*
>
> *Thirdly, as to whether the adverse effect 'would' occur, rather than mere risk, as with the Part 2 complaints, the written evidence of Mrs Cloherty is lucid, cogent and detailed, and backed up by oral evidence which the FTT is invited to find was frank and helpful to the FTT's queries, owning limitations of her knowledge such that proper enquiries could be made to answer the FTT's queries. Relevant to this third probability question within her evidence is the example given is the specific example given of an incident where information was disclosed in response to FOIA request and led to a cessation in voluntary supply of information by regulates.*
>
> *This breadth of impact on: "efficacy": is analogous with PI reasons given by DN and HSE, in particular the "efficacy" of the whistleblowing on which HSE*

depends and the cooperation on which it would rather depend. This is particularly relevant in a complaint suffused with criticism of HSE's regulatory performance, the implication of which is desire that HSE be an effective regulator.

Fourthly, as to the public interest test, HSE repeats its submission on the test as made in respect to Part 1 and 2. HSE's investigative function is as dependent on the confidentiality of the HSE-duty holder correspondence requested under Part 11 as it is dependent on the confidentiality of the complaints requested under Part 2. They respectively comprise the key stages of HSE's regulatory operation, completed by the prosecutorial information requested under Part 1. It is impossible to see that the adverse effect on these functions as less great than the general public interest in transparency and the particular public interest in disclosure of this information to better inform Mrs O'Hanlon and the public about the action of the Duty holder and HSE's investigation. that would result from the disclosure of this correspondence".

Appellant's Closing Submissions:

[55] The Appellant provided a chronology of events which outlined the alleged asbestos incident and the effect that this has had on the residents. The Appellant referred to stages of this appeal in which she was not satisfied with the response received. The Appellant proffered arguments that both the Commissioner the Second Respondent erred in their handling of the request and their interpretation of the law some of these contentions are not material to the case at hand. Further, the Appellant highlighted the inaccuracies in which she believed appeared in the witness statement of the Second Respondent's witness.

Conclusions:

[56] Both the Appellant and the Second Respondent had initially approached this exercise – including the request and the original response – on the basis that the applicable statutory regime was FOIA. It was submitted by the Second Respondent at the hearing, and, indeed, in written submissions beforehand, that the correct basis for considering this matter was with respect to EIR. The Appellant did not disagree

with those submissions. It is therefore common ground, and a position that we agree with, that the position is one for which EIR applies.

Part 1: "copies of their reports and any other reports relating to HSE Inspectors' visits at this site"

[57] Our attention was drawn to the submissions as to the COIN Report. It was notable that, despite previous statements that no more information was found by the Second Respondent within the confines of the request, in fact more information was then found during the course of the hearing day. On that basis, we can only conclude that there was more information that should have been identified and provided to the Appellant earlier and we deal with those matters and the necessary substitute Decision Notice further below.

[58] The further information falling within this broad heading, and our decision in respect of them, is as follows:

a. "Information about an employee's actions or decisions in carrying out their job is still their personal data"

We accept and adopt the written submissions made on behalf of the Second Respondent in this respect: *"O'Hanlon did not request disclosure of the unredacted copies of the internal emails. In her reply to HSE, she stated that they lacked the information she sought."*

b. "Inspectors' notebooks"

Again, we accept and adopt the written submissions made on behalf of the Second Respondent: "In her reply to the Commissioner, Mrs O'Hanlon did not request the notebooks. This underlines the breadth of HSE's search. It has ultimately interpreted her Request so broadly that Mrs O'Hanlon considers it broader than what she was requesting". [We accept that the notebook entries can be withheld under reg 12(5)(b).]

Part 2: "complaints from members of the public, councillors and the MP were received between 30th January and 7th February 2020"

[59] We accept and adopt the written submissions made on behalf of the Second Respondent in this respect:

"99. First, it held a concern received from a member of the public dated 30.1.2020. HSE withheld this in reliance on regs 12(5)(b) and 13. As to reg 13, Mrs O'Hanlon has confirmed that she does not seek any content that is personal data.That remains the case other than for the inspectors. As to reg 12(5)(b):

a. Disclosure would have clear adverse effect on HSE's ability to conduct investigations into possible regulatory breach or take enforcement action if unable to provide notifiers with a confidential environment in which to report, a dissuasion risk not removed by anonymisation. The particular nature of this public interest has been explained in detail by HSE in its IR Response of 9.8.2021 and its basis further explained in the statement of Jane Cloherty at §§70-75 and 126. In her oral evidence, Mrs Cloherty said that when individuals submit a complaint, they are asked whether they wish to provide their name; 68% indicated that they do not want their name to be passed to the dutyholder in question; 8% don't want to give name at all to HSE; there are 20,000 complaints per year; and, as to the reason for the anonymity, "without it, people would not come forward to HSE". HSE notify whistleblowers that any information given to HSE will remain confidential.188 In the DN, the Commissioner accepted that HSE was entitled to rely on reg 12(5)(b) in order to withhold 2a and that the public interest favoured maintaining this exception. Its unimpeachable reasons are at §§35-38 and 45-50 of the DN.

b. This effect arises from disclosure of any complaints: it is class based and it cannot be removed through redaction or partial disclosure. None of the documents over which it is claimed falls outside that class.

c. As to probability, Mrs Cloherty's evidence is unchallenged and incontestable as to the impact, to which the FTT is referred.

d. The extent of information already disclosed means that limited weight can be attached to the public interest in disclosure of the complaints to HSE. By contrast, protecting the confidentiality of complainants is integral to HSE's regulatory function and at the core of the interest protected by reg 12(5)(b). The balance is clearly set in favour of non-disclosure.

100. Second, it held a complaint from Lydiate Residents, including Mrs O'Hanlon, dated 5.2.2020. HSE withheld this on grounds of reg 12(4)(b) ('manifest unreasonableness' – because already held by Mrs O'Hanlon).

101. Third, it held email communication between Mrs O'Hanlon and HSE between 5-17.3.2020. As the Commissioner observes, save for the first two days, 2c largely fell outside scope of the Request so need not have been identified as a document in scope of Request 2. HSE also withheld this on grounds of reg 12(4)(b).

102. On 23.8.2021, pursuant to its investigation of the complaint, the Commissioner notified the HSE that Mrs O'Hanlon had acknowledged that she already held the second and third communication items.

103. Pursuant to HSE's further searches in response to the appeal identified further information falling within scope of Part 2 of the Request but not identified as held at the time of the Request and the IR.

104. Fourth, a complaint from Mrs O'Hanlon via HSE's Concerns and Advice Team ("CAT"), to HSE's Chief Executive and informally, directly to the Inspectors. This is a complaint by Mrs O'Hanlon, such that reg 12(4)(b) applies. If she does not have a record of that complaint and desires one, she may request the same by way of subject access request. The Commissioner's Guide to the EIR195 states on p 9: "The [EIR] don't provide a right of access to a person's own information. If someone makes a request for their own personal information, you should deal with it as a data protection 'subject access request". This reflects reg 5(3) EIR.

105. Fifth, three complaints received via CAT from members of the public, dated 2, 4 and 7.2.2020. Thirdly, two complaints received via CAT from the MP's office, dated 6 and 7.2.2020.

106. In relation to the fourth and fifth, reg 12(5)(b) applies as submitted above in relation to the first. Further, HSE would reiterate its statements as to the purpose and importance of affording anonymity to the members of the public, trade union representatives and employees who use HSE's CAT service."

Part 5: "Consignment notes for waste and hazardous waste removed from site"

[60] We accept and adopt the written submissions of the Second Respondent in this respect:

"107. Within scope of this part of the Request, the HSE identified that it held: a bulk identification certificate and job completion note.199 It disclosed them, redacting only information engaging reg 13.200 Mrs O'Hanlon has notified that she does not seek personal data. The DN accepted the HSE's position that nothing more was held within scope of this part of the Request. The Commissioner's Response states: "Mrs O'Hanlon's arguments on appeal do not go to disturb that conclusion".

...

110. Mrs O'Hanlon's replies to the Respondents' responses to her appeal on Part 5 are criticism of the absence of consignment notes, which does give the FTT grounds under s 58(1) FOIA to interfere with the DN."

Part 7: "copies of: … F10 Notification"

[61] We accept and adopt the written submissions of the Second Respondent in this respect:

"113. Whilst the F10 notification was outside the scope of the Request as it was received after 27.4.2020, again adopting a broad interpretation of the scope of the Request, HSE nevertheless decided to disclose to Mrs O'Hanlon the F10 notification information that it held as part of its 9.8.2021 IR.

…

116. Nonetheless, Mrs O'Hanlon's Reply to HSE's Response to her appeal stated that "This was not what I had asked for. I am asking once again for the F10 form relating to the start of development on this site which is a statutory requirement.". As to Mrs O'Hanlon's reference to the "statutory requirement", insofar as Mrs O'Hanlon refers to the reg 6 CDM Regs duty set out above, she is correct. It does not follow that HSE in fact holds a pre-construction F10 notification. HSE will only hold an F10 notification where this has been provided by a dutyholder. The F10 notification information disclosed to Mrs O'Hanlon (in Excel format) is all the F10 notification information that HSE hold in relation to the Site (this being all that has been notified by the dutyholder to HSE)."

Part 11: "Any correspondence between HSE, the MP, Sefton Council officers and the developers of this site"

[62] We accept and adopt the written submissions of the Second Respondent in this respect:

"122. As to reg 13, as stated above, Mrs O'Hanlon does not seek personal data other than inspector names.

123. As to reg 12(5)(b), on which HSE relies in respect to all withheld correspondence, the four-fold approach from Archer applies as follows.

124. First, the explanatory and empirical evidence given by Jane Cloherty at §§96-107 [OB/414-416] describes an adverse effect, in summary: prejudice to HSE ability to carry out future investigations successfully, the preference for and quality of voluntarily disclosed evidence, the risk of deterring cooperation amongst the investigated, an example of a previous significant impact caused by HSE disclosure of correspondence voluntarily disclosed to HSE, and the importance of HSE having a safe space in which operate during live investigations. Information that reveals an authority's strategy for dealing with regulatory breaches, including assessment of the merits of its position and strength of evidence, may have the adverse effect on the protected interest: Archer, §56.

125. Secondly, no more than is necessary has been withheld. The exception has been only been relied on to the extent necessary. The nature of the adverse impact is such that it is not ameliorated through redaction and partial disclosure.

126. Thirdly, as to whether the adverse effect 'would' occur, rather than mere risk, as with the Part 2 complaints, the written evidence of Mrs Cloherty is lucid, cogent and detailed, and backed up by oral evidence which the FTT is invited to find was frank and helpful to the FTT's queries, owning limitations of her knowledge such that proper enquiries could be made to answer the FTT's queries. Relevant to this third probability question within her evidence is the example given is the specific example given of an incident where information was disclosed in response to FOIA request and led to a cessation in voluntary supply of information by regulates. This breadth of impact: on "efficacy": is analogous with PI reasons given by DN and HSE, in particular the "efficacy" of the whistleblowing on which HSE depends and the cooperation on which it would rather depend. This is particularly relevant in a complaint suffused with criticism of HSE's regulatory performance, the implication of which is desire that HSE be an effective regulator.

127. Fourthly, as to the public interest test, HSE repeats its submission on the test as made in respect to Part 1 and 2. HSE's investigative function is as dependent on the confidentiality of the HSE-dutyholder correspondence requested under Part 11 as it is dependent on the confidentiality of the complaints requested under Part 2. They respectively comprise the key stages of HSE's regulatory operation, completed by the prosecutorial information requested under Part 1. It is impossible to see that the adverse effect on these functions as less great than the general public interest in transparency and the particular public interest in disclosure of this information to better inform Mrs O'Hanlon and the public about the action of the Dutyholder and HSE's investigation. that would result from the disclosure of this correspondence."

Result:

[63] This Tribunal has had regard to the evidence which demonstrated the Second Respondent did hold further information within the scope of the request. However, we accept this was produced through the sincere endeavours of Ms. Cloherty, their witness at, and during the hearing. The Tribunal found this witness to be honest,

forthcoming, and co-operative throughout and whilst there was a clear indication from her evidence that records, information, and the systems under which they were held, were far from satisfactory, they were as they were and remained in need of improvement. This is something the Tribunal are not empowered to assist with.

[64] The Tribunal have not been persuaded on the balance of probabilities that there is any further information within the scope of the request held by the Public Authority in this case. We welcome the supporting persuasive submissions, made by Counsel on behalf of the Second Respondent and as can be seen above we accept and adopt many of those submissions.

[65] Accordingly, we allow the appeal and issue a substituted decision whereby we find there was information within the scope of the request held and not disclosed at the time of the DN, which has now been disclosed. However, we have not been persuaded that there is any further material and make no further direction to the Second Respondent in that regard.

[66] We refer all parties to The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009:

> "Consolidated version – as in effect from 21 July 2021
>
> Overriding objective and parties' obligation to co-operate with the tribunal
>
> 2.— (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly. (2) Dealing with a case fairly and justly includes— (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs, and the resources of the parties; "

[67] If there is further information sought, which may be held by the Public Authority herein, then we direct the parties to serve the overriding objective in Rule 2 and seek a resolution by means of a consent order or such other effective and efficient means that will save the Tribunals' precious time and resources. My sincere apologises for the delay in promulgating this decision to all concerned.

Brian Kennedy KC 3 February 2023.

Promulgation Date : 3 February 2023