First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2018/0109

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Paul Taylor
and
Gareth Jones

Heard at Riverside House, Edinburgh on 15 January 2020

Between

Margaret Vesco

Appellant

and

The Information Commissioner

and

Government Legal Department

Respondents

The Appellant represented herself

The Commissioner was not represented

The Government Legal Department was represented by Ms Jennifer Thelen

DECISION AND REASONS

1. This is an appeal that has previously been heard by the first tier tribunal (FTT) and the appeal dismissed: the FTT found that the request for information was 'manifestly unreasonable' for the purposes of the EIR. However, the Appellant successfully appealed that decision to the Upper Tribunal where Upper Tribunal Judge Poole QC decided that the FTT had failed to apply the correct legal tests in reaching its decision. The FTT's decision was set aside and the appeal was remitted to a freshly constituted FTT to rehear the appeal. This is the decision of that new FTT.

Background

2. It is appropriate to set out the summary of the appeal and proceedings which appears in the UT decision. Thus at paragraph 1 the UT said:-

> 1. This is an appeal about rights to obtain environmental information. Ms Margaret Vesco…is concerned about emissions from flue pipes. She sought information from the Government Legal Department ("**GLD**"), a non-ministerial department and the government's principal legal advisors, by a request dated 22 October 2016. The request referred to the Gas Safety (Installation and Use) Regulations 1998 No. 2451 and said:
>
> > "1. Please give the name of the public authority responsible for enforcing the above statutory Regulation.
> > 2. Are British Standards: BS 5440 (flue emissions) enforceable when indicated within Regulations?"
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> The request was refused by GLD on 12 April 2017 on the ground that the request for information was manifestly unreasonable under Regulation 12(4)(b) of the Environmental Information Regulations 2004/3391 (the "**EIRs**"). The Information Commissioner (the "**Commissioner**"), in a decision dated 3 May 2018, decided that GLD's reliance on Regulation 12(4)(b) was correct. The Commissioner's decision was in turn upheld by the the First-tier Tribunal (General Regulatory Chamber) (Information Rights)… in a decision dated 19

October 2018 and promulgated on 29 October 2018…

3. The UT explained the background to the appeal as follows:-

> 2. [The Appellant's] concerns about flue emissions are long standing. It appears she initially raised her concerns about a neighbour's flue with Midlothian Council in about 1998. She then made requests for information to the Health and Safety Executive ("**HSE**") on various occasions. After some correspondence, the HSE declined to communicate substantively with the Requester any further. The Commissioner decided to uphold HSE's reliance on Regulation 12(4)(b) of the EIRs to justify its refusal. That decision was upheld by a earlier First-tier Tribunal on 3 October 2014. The decision of 3 October 2014 is not under appeal to the Upper Tribunal but forms part of the background.

4. We should say a little more about this background. The Appellant wrote to the HSE as long ago as 26 August 2011 to ask 'which authority is responsible' for enforcing regulations about the installation of flues. She also wrote the HSE on 10 October 2011 raising concerns that HSE was not enforcing the law. On 2 December 2011, HSE explained that it did not have the resources to investigate or enforce 'all issues of non-compliance that the law had uncovered' and therefore prioritised its resources to cases where people are 'exposed to the greatest risks to their health and safety', and the HSE had chosen not to investigate the Appellant's complaint further given the available evidence on scale and potential harm.

5. Since 2011, the Appellant continued to write to HSE, arguing about the need to enforce the regulations. Essentially, she does not accept that the HSE has the discretion it has claimed, and feels that all breaches of the law (or at least the breach she says she has identified in her case), must be investigated and the law enforced.

6. On 23 May 2011 the Appellant requested information from HSE, asking a series of questions in relation to HSE's enforcement powers and how they operated. HSE decided that, in the light of the Appellant's previous

correspondence, the requests were 'manifestly unreasonable'. This was upheld by the Commissioner and then by a FTT in a decision dated 3 October 2014 in case number EA/2014/0065. The FTT described the Appellant's correspondence with HSE as 'of a somewhat incessant nature, and disproportionate given that HSE have made clear their limits', and HSE had spent some time informing the Appellant that although it was the enforcing authority with respect to the regulations, it could not always carry out enforcement action and the Appellant had been referred to the HSE's policy on enforcement practices.

7. We would refer to a further round of correspondence which preceded the request to GLD which is currently under appeal. The Appellant had written to HSE on 26 September 2016 to point out that the siting of flues was subject to legal enforcement provisions exercisable by HSE. She pointed out that British Standard BS 5440 (which is the subject of the second part of her request in this case) also referred to enforcement.

8. HSE responded on 5 October 2016 to say that the provisions cited by the Appellant (regulation 27 of the Gas (Installation and Use) Regs 1998) related to the installation of flues and not to existing installations, and also referring the Appellant to the local authority. In relation to BS 5440, HSE stated that this was 'industry guidance and is not legally enforceable'.

9. The Appellant responded on 8 October 2016 to query whether installers could ignore requirements and then avoid prosecution because the HSE 'turns a blind eye', and repeated her assertion that HSE was responsible for enforcement. She asked for a reference to support HSE's comments about the enforceability of BS5440. On 21 October 2016 HSE responded to refer the Appellant to the British Standards Industry (*sic*) in relation to her query about BS5440 and said that HSE would no longer communicate with the Appellant.

10. The next day on 22 October 2016, the Appellant made her request to the GLD, as set out in the excerpt from the UT decision above.

The Commissioner's decision

11. The part of the Commissioner's decision dated 3 May 2018 which addressed whether that request was manifestly unreasonable is found at paragraphs 27 to 32 which state as follows:-

> 27. The Commissioner is of the view that the GLD correctly applied the exception to the complainant's request. In that she accepts that the complainant's request, when set against the context and history of the complainant's previous correspondence on this issue is manifestly unreasonable.
>
> 28. The Commissioner considers that the complainant is using the EIR to pursue a grievance she initially had with the HSE that the HSE has not dealt appropriately with her complaint about her neighbour's flue. The Commissioner's and Information Tribunal's subsequent decisions found that her requests were manifestly unreasonable.
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> 29. The Commissioner notes that the complainant's correspondence with GLD started on 22 October 2016 with a letter asking questions on the 1998 Regulations and related British Standards. This was followed with further letters dated 14 December 2016 and 10 January 2017, again on the 1998 Regulations, and also asking questions on the answers given by HSE to questions on the 1998 Regulations and British Standards.
>
> 30. The next letter on 7 February 2017 asking a series of questions on the 1998 Regulations and British Standards, this was in reply to GLD letter of 2 February saying that it would not be appropriate for GLD to correspond further with her on this matter. This was followed by a letter of 20 February addressed to "Complaints; the Litigation Group" The GLD replied on 8 March referring to the history and the fact that GLD's HSE clients were no longer prepared to correspondent on this subject.
>
> 31. In isolation the request is not without apparent merit. It appears to seek clarification and understanding of the enforcement of a regulation whose purpose is the safety of the public. In reality the complainant is pursuing and campaigning on an issue that (on an objective view) has been addressed by relevant bodies over a period of prolonged interaction between the HSE and the complainant. In this

sense, her request can be described as unreasonably persistent and vexatious.

32. For the reasons given above the Commissioner considers that the complainant's request for information is manifestly unreasonable when wider factors associated with the request, such as its background and history, are properly taken into account. The Commissioner therefore considers that regulation 12(4)(b) of the EIR has been correctly engaged

12. The Commissioner then went on to consider the application of the public interest test as follows:-

33. Regulation 12(4)(b), in keeping with all EIR Exceptions, is subject to the public interest test at regulation 12(1)(b) which states that information can only be withheld if in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.

34. The Commissioner has taken into account the presumption of disclosure under regulation 12(2) of the EIR.

35. The Commissioner has also taken into account the wider public interest in protecting the integrity of the EIR and ensuring that they are used responsibly. However, the request (given its history) is only of concern to the complainant and there is little wider public interest in the particular details.

36. Having considered the relevant factors in this matter, the Commissioner has concluded that maintaining the exception outweighs those in favour of complying with the request. In view of this, the Commissioner finds that the Council *(sic)* is entitled to rely on regulation 12(4)(b) on the basis that the request is manifestly unreasonable".

13. The Appellant appealed the Commissioner's decision and emphasised that it was not manifestly unreasonable to seek to protect the public from dangerous emissions or to expect public authorities to carry out their enforcement duties accordingly. She pointed out that she was seeking

information in relation to a single issue, and the importance of access to environmental information as highlighted in the Aarhus convention.

The hearing

14. We heard the appeal over half a day in Edinburgh. GLD was represented by Ms Jennifer Thelen of counsel. The Appellant attended in person, supported by her (adult) son. GLD had submitted a witness statement from a lawyer, Ms Wallwork, who is part of a team of 11 lawyers and two support staff providing legal advice to the HSE. Ms Wallwork was available to answer questions from the Appellant and the Tribunal by way of the telephone (as directed before the hearing by the Registrar)

15. In the hearing of this appeal, the Appellant went over some of the history of the matter, and explained to us that she did not think the HSE had answered her questions. She said that she thought she would try somewhere else to get an answer and as it was a legal issue she thought the GLD would be the appropriate body to try. Her hope was the GLD would put pressure on the HSE to enforce the regulations, because they were advisers to the HSE, and would encourage HSE to comply with the law.

16. Ms Wallwork told us that she has experience as a litigator with the GLD in advising on disclosure and freedom of information issues, and in overseeing searches for documents. She explained that no searches had been carried out to see if the GLD held information within the scope of the request. She was concerned about the breadth of the search that would have to be undertaken, and the burden on GLD in doing so, given that there were 1800 lawyers in the GLD, many of whom were embedded with other departments, using different computer systems which would make searching difficult. However, Ms Wallwork only gave one example of another departmental area which might have information within scope, and that was the area covered by the Department of Business, Innovation and Skills (DBIS).

17. The main thrust of Ms Wallwork's evidence other than that was that HSE had effectively answered the request made by the Appellant and that GLD was unlikely to have any additional information to that provided by HSE, especially as there had been no change in the statutory regime between the requests made to HSE and now GLD.

18. GLD's case was that HSE had done their best to answer the requests made by the Appellant, but there had been what Ms Thelen described as a 'disconnect' between what the Appellant had wanted to happen in terms of enforcement, and HSE's view that investigation and enforcement of its powers were necessarily discretionary functions, such that the Appellant was never likely to be satisfied with a response that did not contain confirmation that enforcement action would be taken.

19. Ms Wallwork relied upon the two responses from HSE that directly preceded the request to GLD (as described above) as indicating more recently that HSE had responded to the Appellant's requests. In relation to the current request, Ms Wallwork was of the view that, essentially, the Appellant was asking for advice, which the GLD could not provide to members of the public, and that any additional information GLD might hold would probably be covered by legal professional privilege in any event (although she accepted that as the information had not been looked for, she could not say that this was, in fact, the case).

The approach for the FTT to take

20. In remitting the case for reconsideration the UT has specifically directed the FTT to take into account particular paragraphs of the UT's judgment, namely 'the applicable legislative provisions in paragraphs 7 to 12..., the guidance on the law in paragraphs 13 to 20, and the discussion in paragraphs 21 to 25'. As that is the case, we will set out at least the majority of the contents of those paragraphs, so far as they appear directly relevant to our decision.

21. The **legislative provisions** as explained by the UT begin by setting out the genesis of the EIRs:-

> 7. The EIRs implement the UK's obligations under Council Directive 2003/4/EC on Public Access to Environmental Information (the "**Directive**"). Relevant extracts from the Directive are as follows:
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> > Recital (1) "Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment"
> > Recital (8) "It is necessary to ensure that any natural and legal person has a right of access to environmental information held by or for public authorities without his having to state an interest"
> > Recital (9) "It is also necessary that public authorities make available and disseminate environmental information to the general public to the widest extent possible, in particular by using information and communication technologies…"
> > Recital (16) "The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases. Grounds for refusal should be interpreted in a restrictive way, whereby the public interest served by disclosure should be weighed against the interest served by the refusal…"
> >
> > Article 1: "The objectives of this Directive are: (a) to guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise…"
> >
> > Article 3: "(1) Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest…
> > (5) For the purposes of this Article, Member States shall ensure that:
> > (a) officials are required to support the public in seeking access to information"
> >
> > Article 4:
> > "(1) Member States may provide for a request for environmental information to be refused if:..(b) the request is manifestly unreasonable…..

(2) The grounds for refusal …shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal".

22. The UT then sets out the relevant provisions of the EIRs, explaining as follows:-

> 8.….Regulation 2 contains the following definition of environmental information:
>
> "environmental information" has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on–
> (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)…." (there then follow further paragraphs).
>
> "Environmental information" is given a broad interpretation. It is not in dispute in this case that the request was for environmental information within the EIRs.
>
> 9. Regulation 5 of the EIRs obliges a public authority that holds environmental information to make it available on request, subject to other provisions of the EIRs.
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> 10. Regulation 12 of the EIRs provides, insofar as relevant:
>
> "(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–
….
(b) the request for information is manifestly unreasonable".

23. We do not set out the UT's comments about the regulatory system in Scotland as that does not apply in this case (as the request was made of the GLD based in England). We also do not set out regulation 12(9) EIR which refers to 'information on emissions' because, the UT explained, regulation 12(9) EIR is not relevant to this case, as none of the exemptions to which it relates are applicable in this case.

24. The UT also then sets out the statutory provisions which feature in the Appellant's request as she wished to know who was responsible for enforcing these Regulations because of the terms of Regulation 27 of Gas Safety (Installation and Use) Regulations 1998:-

27.— Flues
(1) No person shall install a gas appliance to any flue unless the flue is suitable and in a proper condition for the safe operation of the appliance.
(2) No person shall install a flue pipe so that it enters a brick or masonry chimney in such a way that the seal between the flue pipe and the chimney cannot be inspected.
(3) No person shall connect a gas appliance to a flue which is surrounded by an enclosure unless that enclosure is so sealed that any spillage of products of combustion cannot pass from the enclosure to any room or internal space other than the room or internal space in which the appliance is installed.
(4) No person shall install a power operated flue system for a gas appliance unless it safely prevents the operation of the appliance if the draught fails.
(5) No person shall install a flue other than in a safe position".

25. In relation to **the guidance on the law** set out in paragraphs 13-20 of the UT decision we note in paragraph 13 that the UT has underlined the importance

of access to environmental information to enable people to participate in decisions about the environment. The UT explains that:-

> 13… These public participation obligations arise under the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental matters ("**Aarhus**"), which led to adoption of the Directive. The EIRs are part of the UK's implementation of its obligations under the Directive. The EIRs fall to be interpreted purposively in accordance with the Directive (*Marleasing SA v La Comercial Internacional de Alimentacion SA* Case C-106/89 paragraph 8; *The A-G for the Prince of Wales v Information Commissioner and Mr Michael Bruton* [2016] UKUT 154 paragraph 15).
>
> 14. It is clear from the extracts from the Directive set out in the governing legislation section above that the purposes of the Directive include guaranteeing rights to access environmental information. Public authorities hold information on behalf of the public, and are to support and assist the public in seeking access to information. As the Court of Justice of the European Union ("**CJEU**") has said:
>
> > "The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information only in a few specific and clearly defined cases. The grounds for refusal should therefore be interpreted restrictively, in such a way that the public interest served by disclosure is weighed against the interest served by the refusal". (*Office for Communications v Information Commissioner* Case C-71/10 at paragraph 22).

26. At paragraph 16 of the UT decision it is explained that it is important that all of the tests in the EIRs are applied before a public authority decides to refuse to disclose information and that '[i]t is clear from the terms of the Directive and CJEU authority that grounds for refusal of requests for environmental information must be interpreted restrictively'. The UT then sets out the tests to be applied:-

> ….For public authorities to be entitled to refuse a request for environmental information on the basis that it is manifestly unreasonable, a three stage test applies, on the wording of Regulation 12:

Is the request manifestly unreasonable? (Regulation 12(1)(a))
If so, does the public interest in maintaining the exception outweigh the public interest in disclosing the information, in all the circumstances of the case? (Regulation 12(1)(b))
Does the presumption in favour of disclosure mean that the information should be disclosed? (Regulation 12(2))

27. It is helpful to set out the guidance from the UT in full in relation to all three stages:-

> 17. The first stage. The decision maker must first decide if the request is manifestly unreasonable. Authorities on "vexatiousness" under Section 14 of FOIA and FOISA may be of assistance at this stage, because the tests for vexatiousness and manifest unreasonableness are similar (*Craven v Information Commissioner and Department for Energy and Climate Change* [2012] UKUT 442, and *Craven/Dransfield v Information Commissioner* [2015] 1 WLR 5316 at paragraph 78). The starting point is whether the request has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public, judged objectively (*Dransfield v Information Commissioner* [2015] 1 WLR 5316 at paragraph 68, *Beggs v Information Commissioner* 2019 SLT 173 paragraphs 26-29). The hurdle of satisfying the test is a high one. In considering manifest unreasonableness, it may be helpful to consider factors set out by the Upper Tribunal in *Dransfield v Information Commissioner and Devon County Council* [2012] UKUT 440 at paragraph 28. These are:
>
> (1) the burden (on the public authority and its staff), since one aim of the provision is to protect the resources of the public authority being squandered;
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> (2) the motive of the applicant - although no reason has to be given for the request, it has been found that motive may be relevant: for example a malicious motive may point to vexatiousness, but the absence of a malicious motive does not point to a request not being vexatious (*Beggs*, paragraph 33);
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> (3) the value or serious purpose of the request;
>
> (4) the harassment or distress of staff.
>
> This is not an exhaustive checklist, and other factors that are relevant in the present case are previous requests (including number, subject matter, breadth and pattern), whether they were to the same or a different body, the time lapse since the previous requests, and whether matters may have changed during that time. The Tribunal's fact

finding powers may be necessary when evaluating relevant factors; for example evidence might be led about why the information is sought, the amount of time likely to be required to comply with a request, the cost of doing so, and any prejudice on the public body's other duties if complying with the request. If, after applying the first stage of the test, the conclusion is that the request is not manifestly unreasonable, then the information requested should be disclosed (assuming no other exemptions apply).

18. The second stage. If it has been established that a request falling under the EIRs is manifestly unreasonable within Regulation 12(4)(b), that of itself is not a basis for refusing the request. The public authority must then go on to the second stage, and apply the public interest test in Regulation 12(1)(b). Application of this test may result in an obligation to disclose, even if a request is manifestly unreasonable. The public interest test requires the decision maker to analyse the public interest, which is a fact specific test turning on the particular circumstances of a case. The starting point is the content of the information in question, and it is relevant to consider what specific harm might result from the disclosure (*Export Credits Guarantee Department v Friends of the Earth* [2008] EWHC 638 paragraphs 26-28). The public interest (or various interests) in disclosing and in withholding the information should be identified; these are "the values, policies and so on that give the public interests their significance" (*O'Hanlon v Information Commissioner* [2019] UKUT 34 at paragraph 15). "Which factors are relevant to determining what is in the public interest in any given case are usually wide and various", and will be informed by the statutory context (*Willow v Information Commissioner and the Ministry of Justice* [2018] AACR 7 paragraph 48). Clearly the statutory context in this case includes the backdrop of the Directive and Aarhus discussed above, and the policy behind recovery of environmental information. Once the public interests in disclosing and withholding the information have been identified, then a balancing exercise must be carried out. If relevant factors are ignored, or irrelevant ones are wrongly taken into account, then the decision about where the balance lies may be open to challenge (*HM Treasury v Information Commissioner* [2010] QB 563). If the public interest in disclosing is stronger than the public interest in withholding the information, then the information should be disclosed.

19. The third stage. If application of the first two stages has not resulted in disclosure, a public authority should go on to consider the presumption in favour of disclosure under Regulation 12(2) of the EIRs. It was "common ground" in the case of *Export Credits Guarantee Department v Friends of the Earth* [2008] Env LR 40 at paragraph 24 that the presumption serves two purposes: (1) to provide the default

position in the event that the interests are equally balanced and (2) to inform any decision that may be taken under the regulations.

28. Paragraph 24 is where the UT sets out the ways in which the FTT failed to apply the first test correctly, and we set out the relevant comments here:-

> ….There is no proper consideration of whether the request had a reasonable foundation in that it would be of use to the Requester, judged objectively. In this regard, it appears relevant to me that GLD is a different public authority from HSE. HSE is only one of its clients. GLD has a remit potentially covering other public bodies with enforcement powers, and so there might have been legitimate reasons for asking GLD the same question that had been asked of HSE. But that was not apparently considered by either the Tribunal or the Commissioner. There is no consideration of the short and focused nature of the particular request, and what the actual burden on GLD would be of complying with it. Given the content of the information request, it appears unlikely that answering it would have been costly for GLD. There is inadequate consideration of the value or purpose of the request. On the wording of the request, it aims to find out from a government department who is responsible for enforcing gas safety in respect of flues and the relevance of a British Safety standard. Standing the background of Aarhus and the Directive, an explanation would be required if the Tribunal did not consider this to be a serious or valuable purpose. There is no consideration of whether there has been harassment or distress of staff. There is no consideration of the time lapse since earlier requests to HSE, and whether it was possible that enforcement and British Safety standards might have changed since then. There is no consideration given to whether the information request to GLD was in the same or different terms from earlier requests. There is no consideration given to whether, even though there had been a protracted history, the Requester had actually received an answer to her questions or not….

29. In relation to the public interest test, the UT made it clear that this should be considered separately from the 'manifestly unreasonable test'. The UT set out the factors that if thought the FTT had not considered as follows in paragraph 25:-

> No consideration is given to what harm could result from the disclosure, a factor likely to weigh in favour of disclosure. No consideration is given to the policy and values of protection of the

environment which underpin the EIRs, given the statutory context, another factor likely to weigh in favour of disclosure. No consideration is given to the value or otherwise of obtaining information about enforcement powers for gas flues, even though there are many such flues and this might be something in which the wider public has an interest. In this regard, there is no explanation why the Commissioner concluded the matter was only of concern to the Requester, when the request in its terms was not restricted only to her neighbour's flue.

30. In the same paragraph the UT also commented that '[t]here is also no reasoning explaining how the presumption of disclosure has been applied to the facts, only a bald statement that it has been taken into account'.

Discussion and decision

31. We bear in mind that the manifestly unreasonable test is a high one and must be interpreted restrictively.

32. However, in our view the request does not have a reasonable foundation in the sense that the information would be of use to the Appellant when viewed objectively. We accept Ms Thelen's submission that there is a 'disconnect' between what the Appellant wants in terms of establishing that HSE will carry out enforcement functions where it has the power to do so, and the explanation from HSE that it does not carry out investigation and enforcement in all cases, and has a discretion as to whether it does so or not. The Appellant is entitled to believe that all infractions of the regulations should be investigated and enforcement action taken, but this does not reflect what HSE does in practice.

33. We note here, as is well known, many regulators and enforcement agencies have to prioritise their resources when it comes to deciding which cases to investigate and then pursue. This includes bodies such as the police (who

do not investigate or prosecute every reported crime) and the various ombudsmen (who have to decide which cases to investigate).

34. Having got an answer from the HSE, in our view the Appellant has shown unreasonable persistence in pursuing this matter over the years. The correspondence shows that she has not accepted the HSE's views of its powers and has engaged in much correspondence with HSE making her disagreement known. A previous FTT in 2014 found that her persistence in relation to the HSE was manifestly unreasonable. The matter has become futile, because of the 'disconnect' between what the Appellant wants, and what the HSE is prepared to do in the exercise of its powers. The Appellant knows that the HSE is responsible for enforcement issues under the relevant regulations, and that the HSE can enforce issues under the regulations, but is not prepared to accept that it has a discretion not to carry out investigatory or enforcement functions if these do not come within their priorities in a particular case.

35. Undeterred, the Appellant has asked the GLD essentially the same questions, as she told us, in the hope that the GLD would advise the HSE differently about the enforcement issue. The decision not to take enforcement measure in the Appellant's case may be challengeable through other procedures, but asking different public authorities the same questions is very unlikely to progress matters in the way the Appellant would like.

36. The statutory regime has not changed over the years the Appellant has been pursuing this issue (or at least since 2011 when she first approached the HSE). To that extent in our view the Appellant is not going to get a different answer to her queries from the GLD, even though the GLD has other client departments other than HSE. The Appellant has been told HSE is responsible for enforcement and the BS guidance contains industry standards which are not legally enforceable. As Ms Wallwork states, what the Appellant is really seeking in the current request is advice about whether the HSE's view is correct or not.

37. As the UT indicated, there may be matters that can point the case away from a finding of manifest unreasonableness. We do not think that GLD has established that there would be an excessive burden in responding to this request. The request is for limited information, and GLD accepts that it has not yet sought the information, or carried out an analysis as to how wide the search should be, beyond a tentative conclusion that DBIS may have information. Therefore, if this were a case where it was claimed solely that the burden on the public authority made the request manifestly unreasonable, then we would have rejected the argument.

38. Although the Appellant's original concern was about a neighbour's flue, it is clear that she has developed something of a more general interest and concern about the enforcement of the relevant regulations. We are sure this happens in many cases where the EIR are engaged: an individual grievance arouses wider awareness of the environmental issues and procedures in play, and we are sure that this is something that the Aarhus Convention is designed to encourage.

39. Ms Thelen also submitted that, because any information held would likely to have been covered by legal professional privilege (and therefore potentially exempt from disclosure in any event), we should take into account the amount of time it would take to review and prepare the information prior to disclosure if it were to be disclosed. The Commissioner's guidance suggests that this is a factor if such preparation would impose 'a grossly oppressive burden' on the public authority, where the requester had asked for a 'substantial volume of information'. It seems to us that this is not a factor we should take into account where GLD have not actually identified the information to be disclosed, and it does not appear that the Appellant has requested a substantial volume of information.

40. But overall, we come back to what seems to us to be the futility of this request when seen within the context of the history of the case going back many years. Nothing that the GLD does, says or discloses will change the

fact that HSE is the enforcement agency, but that it has a discretion whether or not to carry out investigations and enforcement action. It is also very unlikely that anything the GLD does, says or discloses will change the Appellant's conviction that enforcement action should not have a discretionary element. On that basis we find that there is no reasonable foundation for the request and the information will not be of use to the Appellant when viewed objectively, and the request is manifestly unreasonable.

41. As the UT points out, that is not the end of the matter as we have to consider whether the public interest favours disclosure even in the case of a manifestly unreasonable request. The fact that HSE does exercise discretion not to investigate some complaints about alleged environmental pollution is capable of being of wider concern, and the disclosure of information about this is a matter of public interest, over and above the general public interest in transparency and openness in the activities of public bodies. However, these are facts already well known and well communicated to the Appellant and available to the wider public. As GLD states, this includes information on the HSE website which explains how enforcement action is targeted to meet the most serious risks.

42. As such we agree with the Commissioner's finding at paragraph 35 of the decision notice, given the history of the Appellant's requests and the information with which she has previously been provided (and the information already available), the current request is, in reality, only of concern to the complainant and there is little wider public interest in the disclosure of any further information (if any) held by the GLD about the enforcement powers in relation to gas flues.

43. Another issue raised by the UT is whether any 'harm' could result from disclosure. There would be some harm in our view in perpetuating a situation where information is disclosed even when a request is manifestly unreasonable: there is a wider public interest in protecting the integrity of

the EIR and ensuring that they are used responsibly. There is also the inevitable burden to be placed on the GLD in searching for information and responding to the request, and the public expense in doing so: we have found that as this should not be a factor which, itself, makes the request manifestly reasonable, but there is no reason why it cannot be a 'public interest' factor to take into account. Our conclusion is that the public interest factors come down heavily in favour of non-disclosure in relation to this manifestly unreasonable request.

44. Finally, we agree with the argument put forward by the GLD that applying the presumption in favour of disclosure does not advance the Appellant's case to the point where the information should be disclosed. Given our view on both the manifestly unreasonable nature of the request and the balance of the public interest in favour of non-disclosure, there is a positive case for withholding the information and preventing the EIRs being used where, having taken all factors into account, there is no reasonable purpose behind a request.

45. For the reasons set out above, the appeal is dismissed.

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 27 January 2020.