Neutral Citation Number: [2025] UKUT 066 (AAC) **Appeal No. UA-2023-000436-GIA**

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Between:

Patricia O'Hanlon

Appellant

- v -

Information Commissioner

First Respondent

and

Health and Safety Executive

Second Respondent

Before: Upper Tribunal Judge Citron
Hearing date: 14 January 2025
Hearing venue: Manchester CJC

Representation:
Appellant: by herself
1st Respondent: by their solicitor (but not represented at the hearing)
2nd Respondent: by Tom Tabori of counsel, instructed by Government Legal Department

On appeal from:
Tribunal: First-tier Tribunal (General Regulatory Chamber) (Information Rights)

Tribunal Case No: EA/2021/0317
Hearing date: 21 April 2022
Decision Date: 3 February 2023

SUMMARY OF DECISION

ENVIRONMENTAL INFORMATION - GENERAL (93.7)

Environmental Information Regulations 2004 – appellant's information request was in form of "any documents or correspondence held by [the public authority] in relation to" a particular site where demolition works had taken place, followed by 11 particular documents (or categories of documents) of which the appellant was aware at the time – the Upper Tribunal holds that the information request was not restricted to the 11 items, as their presence in the request did not restrict the plain meaning of the opening words of the request – the FTT erred in law in holding otherwise – however, the error was not material in relation to some of the information requested, because, in respect of these, the FTT would have been bound to conclude that disclosure was not required, even if it had not erred, due to the availability of other exceptions to the requirement to disclose – this was due, in the case of some information, to substantial similarity with other parts of the FTT's reasoning, regarding regulation 12(5)(b) (exception where disclosure would adversely affect ability to conduct inquiry); and in the case of some other information, it was because the information was publicly available in another format (regulation 6(1)(b)). However, in the case of one piece of information, which was not held at the time of the request (exception in regulation 12(4)(a)), but came to be held before the public authority's reconsideration decision under regulation 11, the FTT had not turned its mind to the public interest balancing test as regards that exception (as was required by regulation 12(1)(b)). The Upper Tribunal holds that the FTT would not have been bound to resolve the competing public interests in favour of maintain the exception for documents not held at the time of the request, and so the FTT's error, in treating that particular information as outwith the information request, was material. Appeal allowed to that extent and the matter remitted to a fresh panel of the FTT for determination.

DECISION

The appeal is **allowed in part**.

The decision of the First-tier Tribunal involved the making of an error in point of law in relation to one piece of information, notification of contravention letters served against Amark.

Under section 12(2)(a) and (b)(i) of the Tribunals, Courts and Enforcement Act 2007 I set the First-tier Tribunal's decision aside as respects the matter in which it erred and remit the case to the First-tier Tribunal (General Regulatory Chamber) to reconsider in accordance with the following directions.

Directions

1. This case is remitted to a freshly constituted panel of the First-tier Tribunal for reconsideration at an oral hearing.

2. The matter to be considered is Mrs O'Hanlon's appeal, so far as it relates to the notification of contravention letters served against Amark. In considering this matter, the First-tier Tribunal shall reflect, so far as relevant, the reasoning and conclusions in this decision of the Upper Tribunal, and in particular shall proceed on the basis that

    a. the notification of contravention letters served against Amark were information within the scope of Mrs O'Hanlon's information request,

    b. Mrs O'Hanlon's information request was received on 27 April 2020,

    c. HSE did not hold the notification of contravention letters served against Amark when the request was received, but

    d. subsequently, on 15 May 2020 and 26 August 2020, HSE came to hold the notification of contravention letters served against Amark; and

    e. HSE made a "reconsideration" decision in August 2021 by which it refused disclosure of the notification of contravention letters served against Amark.

3. The First-tier Tribunal will determine the appeal, so far as it relates to the notification of contravention letters served against Amark, in accordance with section 58 of the Freedom of Information Act 2000, as read with regulation 18 of the Environmental Information Regulations 2004.

4. The First-tier Tribunal shall otherwise approach the remitted case (and any evidence it hears in respect of it) afresh. It is not bound by the reasoning, evaluation of evidence or conclusions of the First-tier Tribunal whose decision has been set aside in respect of the remitted matter.

5. The First-tier Tribunal shall, as soon as reasonably possible, make directions enabling the parties to adduce evidence, and make written submissions, in relation to the remitted case, in a fair, just, orderly and efficient manner.

6. A copy of this decision shall be added to the bundle to be placed before the panel of the First-tier Tribunal hearing the remitted appeal.

These directions may be supplemented by later directions by a tribunal judge, registrar or caseworker in the General Regulatory Chamber of the First-tier Tribunal.

REASONS FOR DECISION

1. References in what follows to

    a. "**sections**" or "**s**" are to sections of the Freedom of Information Act 2000 ("**FOIA**")

    b. "**regulations**" are to the Environmental Information Regulations 2004

    c. the "**FTT**" are to the First-tier Tribunal

    d. "**HSE**" are to the second respondent

    e. "**IC**" are to the first respondent.

2. References to numbers in square brackets are (unless the context indicates otherwise) to paragraphs of the FTT's decision.

The decision of the FTT

3. The decision of the FTT in question allowed (in part) Mrs O'Hanlon's appeal under s57 against a decision notice of IC dated 28 September 2021.

4. At [2], the FTT stated that full details of the background to the appeal, Mrs O'Hanlon's request for information, and IC's decision were set out in IC's decision notice – and were not repeated in the FTT decision. For the sake of introducing the background, I note the following from IC's decision notice:

    a. Mrs O'Hanlon had requested information about demolition work at a particular site

    b. HSE is the statutory body responsible for the regulation and enforcement of workplace health, safety and welfare within the UK. Its statutory powers and responsibilities provide HSE's inspectors with powers of entry to workplaces, powers to investigate incidents and powers to take enforcement action, including prosecution, against those responsible for offences under the relevant health and safety legislation

    c. At the time of Mrs O'Hanlon's request, HSE was investigating a concern that had been raised by a member of the public regarding demolition work at the site in question, and the removal of asbestos.

5. [3] set out a chronology, as follows:

    a. 27 April 2020: Mrs. O'Hanlon wrote to 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."

(I note that the numbers in square brackets in the foregoing were not in Mrs O'Hanlon's original request, although they do appear in the version of that request set out in IC's decision notice.)

b. 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.

c. 15 May 2020: Mrs O'Hanlon requested an internal review. Mrs. O'Hanlon did not receive a review despite IC instructing HSE to provide the same on 30 November 2020.

d. 5 August 2021: Following correspondence with IC, 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 FOIA and that the correct legislation was the regulations.

e. 22 August 2021: Mrs O'Hanlon reverted to IC; IC understood Mrs O'Hanlon to be challenging HSE's position in relation to requests one, two, five, seven and eleven.

f. 28 September 2021: IC's decision notice 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 favoured maintaining this exception."

g. 24 October 2021: Mrs O'Hanlon filed her notice of appeal.

6. At [2], the FTT stated that the appeal concerned Mrs O'Hanlon's contention that

   a. HSE held further information within scope of her request; and

   b. the information withheld under regulation 12(5)(b) should be disclosed.

7. (By way of background: regulation 12(5)(b) is an exception to disclosure, permitting a public authority to refuse to disclose environmental information, where disclosure would adversely affect (amongst other things) "the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature". Regulation 12(1)(b) imposes an additional requirement: that, in all the circumstances, the public interest in maintaining the exception outweighs the public interest in disclosing the information).

8. At [7], the FTT decision recorded that IC's decision notice had found that, at the time of Mrs O'Hanlon's request, HSE's investigation into the "incident in question" was still live; that IC 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; it would also potentially make the public and involved parties less likely to volunteer information to HSE in its investigations of future incidents. IC also considered that disclosing the requested information would frustrate HSE's efficient investigation of the incident; this was because, given the circumstances, and the interests of different parties in the incident, IC considered that disclosure could have generated further correspondence and queries to HSE, distracting it from its investigation.

9. At [8], it was recorded that IC considered that disclosing the requested information at the time of the request would have prejudiced HSE's ability to carry out its investigation.

10. At [9], under the heading "Appellant's Grounds of Appeal", the FTT recorded that Mrs O'Hanlon "stated that [IC] 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."

11. At [13] there is reference to Mrs O'Hanlon seeing herself as seeking justice for the residents; and as saying that HSE knowingly allowed unlawful demolition on a contaminated site.

12. [14-35] consists of the FTT recording arguments made by the parties in their responses and replies to the appeal.

13. At [36-43], the FTT summarised the witness evidence of Jane Cloherty, HSE's disclosure manager. The decision records that Ms Cloherty gave evidence at the FTT hearing "at length" and was cross examined by Mrs O'Hanlon "at length".

14. [44-55] consists of the FTT recording the parties' closing submissions.

15. The "conclusions" section of the FTT's decision ([56-62]) contains the following:

    a. as regards part 1 (inspectors' reports) of Mrs O'Hanlon's request: [58] states that internal emails, and inspectors' notebooks, were not part of the information requested by Mrs O'Hanlon; it also states, in square brackets, that "we accept that the notebook entries can be withheld under regulation 12(5)(b)";

    b. as regards part 2 (complaints received from public etc) of Mrs O'Hanlon's request: regulation 12(5)(b) applied to complaints/concerns received from third parties; it was said at [59] that "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 reasoning relies on the written and oral evidence of Ms Cloherty;

c. as regards part 5 (consignment notes for waste removed) of Mrs O'Hanlon's request: [60] cites submissions of the parties but does not appear to state a conclusion;

d. as regards part 7 (F10 notification) of Mrs O'Hanlon's request: [61] concludes that the F10 notification information disclosed to Mrs O'Hanlon (in Excel format) is all the F10 notification information that HSE holds in relation to the site (this being all that has been notified by the "duty-holder" to HSE);

e. as regards part 11 (correspondence between HSE, MP, council, and site developers) of Mrs O'Hanlon's request: [62] applies the "four-fold approach from *Archer*" (*Archer v IC and Salisbury DC* EA/2006/0037, a decision of the FTT referred to at [45]). (I note that *Archer* says this at [50-51]:

> 50. Under regulation 12(5)(b), a public authority can refuse to disclose information to the extent that its disclosure 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".
>
> 51. There are several points to note here. First, it is not enough that disclosure should simply affect the matters set out in paragraph 50 above; the effect must be "adverse". Second, refusal to disclose is only permitted to the extent of that adverse effect. Third, it is necessary to show that disclosure "would" have an adverse effect - not that it could or might have such effect. Fourth, even if there would be an adverse effect, the information must still be disclosed unless "in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosing the information". All these issues must be assessed having regard to the overriding presumption in favour of disclosure. The result, in short, is that the threshold to justify non-disclosure is a high one.)

f. The FTT reasons at [62] as follows:

i. Ms Cloherty's evidence described an adverse effect:

1. prejudice to HSE's ability to carry out future investigations successfully;

2. the preference for, and quality of, voluntarily disclosed evidence;

3. the risk of deterring cooperation amongst the investigated;

4. an example of a previous significant impact caused by HSE disclosing correspondence that had been voluntarily disclosed to HSE;

5. importance of HSE having a safe space in which operate during live investigations;

6. 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* at [56];

ii. no more than is necessary has been withheld;

iii. adverse effect 'would' occur (rather than mere risk), based on Ms Cloherty's evidence (which is described as lucid, cogent and detailed (written evidence) and frank and helpful (oral evidence));

iv. public interest test: HSE's investigative function is as dependent on the confidentiality of HSE's correspondence with the "duty-holder" (i.e. the site developer) (part 11 of the request) as it is dependent on the confidentiality of complaints received by HSE (part 2 of the request); it is impossible to see 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.

16. [64] (in the immediately following section of the FTT's decision, headed "Result") states that the FTT was not persuaded on the balance of probabilities that there was any further information (in addition to that made available up to and including the date of the hearing) within the scope of the request held by HSE. At [63], the FTT states that HSE's provision of "further" information (up to and including the date of the hearing) had been through the "sincere endeavours" of Ms Cloherty; and that the FTT found Ms Cloherty to be "honest, forthcoming and co-operative throughout."

17. At [65], the FTT stated that it was issuing a "substituted decision" whereby it found that there was information within the scope of Mrs O'Hanlon's request held (by HSE) and not disclosed at the time of IC's decision notice, which had subsequently (i.e. by the time the FTT's decision was promulgated) been disclosed. However, the FTT was not persuaded that was any further material (that fell to be disclosed) and made no further direction to HSE in that regard.

18. At [67], the FTT directed that, "if there is further information sought, which may be held by [HSE]", the parties "serve the overriding objective in rule 2 [of the FTT's procedure rules] and seek a resolution by means of a consent order or other such effective and efficient means that will save the Tribunals' precious time and resources".

The grant of permission to appeal

19. In a decision issued by the Upper Tribunal on 22 November 2023, I gave permission to appeal on the ground that it was perverse of the FTT to find (or, in the alternative, its finding was inadequately explained) that HSE held no other information within the scope of Mrs O'Hanlon's information request, given

    a. the apparent breadth of that request ("any documents or correspondence held by [HSE] in relation to [the site in question] .."); and

    b. the evidence before the FTT that HSE held the following information but had not made it available:

        i. "notification of contravention" letters served against Amark, an asbestos removal company involved with the site

        ii. a "prohibition notice" served on the developer of the site, on 6 April 2020

iii. emails relating to the site between an asbestos surveyor ("**A Ltd**") and HSE, and Amark and HSE.

20. This was the only ground on which permission to appeal was given.

21. My reasoning for giving permission to appeal on this ground was set out at [18-21] of the permission decision, as follows:

> 18. Mrs O'Hanlon argued that (contrary to the FTT's finding at [64]) HSE held information within the scope of her request that it had not made available.
>
> 19. This argument seems to me to identify a realistically arguable error of law in the FTT's decision, so far as it relates to information that was
>
> a. not within that specified at parts 1-11 of Mrs O'Hanlon's request (as, with regard to that, the FTT explained its decision adequately) but
>
> b. nevertheless, was arguably within the scope of her request by reason of the "catch all" wording at the start of it (as noted at [3], Mrs O'Hanlon's request started out by asking for "any documents or correspondence held by the HSE in relation to this site").
>
> 20. In other words, it seems to me realistically arguable that Mrs O'Hanlon's request was not restricted to parts 1-11 of her request. In the alternative, it is realistically arguable that the FTT's decision erred in not explaining adequately why it took the view that Mrs O'Hanlon's request was so restricted.
>
> 21. The information falling into this category (and not made available by HSE), as identified by Mrs O'Hanlon was:
>
> a. notification of contravention letters served against Amark, as referred to in Ms Cloherty's witness statement (dated 14 April 2022) at paragraph 22 (which also said that Amark "disappeared" and HSE was therefore unable to take its investigation any further);

b. email of 24 March 2020 to HSE from A Ltd, a third party engaged by the site developer to undertake sampling of material at the site, forwarding a sample report on the presence of asbestos (and referred to in Ms Cloherty's witness statement at paragraph 129a). I note that at paragraph 130 of Ms Cloherty's witness statement, Ms Cloherty gave her opinion as to why this email is outwith part 11 of Mrs O'Hanlon's information request, and in any case covered by regulations 12(5)(b) and 13; however, it is realistically arguable that the FTT's view of these matters (being questions of law or interpretation, rather than matters of fact) was not adequately explained;

c. prohibition notice served on the site developer on 6 April 2020 (and referred to at paragraph 18 of Ms Cloherty's witness statement). I note that the witness statement states Ms Cloherty's opinion that this notice was not part of Mrs O'Hanlon's request; however, it is again realistically arguable that the FTT's views on this (legal) matter were not adequately explained. Mr Tabori's post-hearing submissions assert that this prohibition notice was publicly available; however, it is odd that Ms Cloherty did not make this point in her witness statement; and, more fundamentally with regard to deciding if an arguable error of law is disclosed here, the FTT's decision does not appear to have made a finding of fact in the terms of Mr Tabori's assertion;

d. email from A Ltd to HSE of 17 March 2020 (Mrs O'Hanlon says this is one of the documents referred to at para 134 of Ms Cloherty's witness statement (email exchanges between A Ltd and HSE and Amark and HSE)). I note that the witness statement states Ms Cloherty's opinion that these were not within Mrs O'Hanlon's request; but it is again realistically arguable that the FTT's view of this (legal) matter was not adequately explained.

Responses to the grant of permission

22. In response to the grant of permission of appeal, IC concluded that it was of the view that the FTT should have adequately explained its position as to whether the four documents listed in the permission decision were within scope; and that

it erred in not doing so. IC did not, therefore, oppose the appeal. HSE did, however, oppose the appeal.

23. I am grateful to both Mrs O'Hanlon and Mr Tabori for their written and oral submissions. I will refer to them, only as far as necessary to explain my decision, as part of the following section of this decision.

The Upper Tribunal's analysis

24. My analysis, in overview, is that

    a. the FTT decision did err in law to find that HSE held no other information within the scope of Mrs O'Hanlon's information request, given that it held emails to HSE from A Ltd from March 2020, a prohibition notice served on the site developer, and notification of contravention letters served against Amark;

    b. that error was not material, in that it did not ultimately make a difference to the outcome of the appeal, in relation to the emails to HSE from A Ltd from March 2020 and the prohibition notice served on the site developer;

    c. the error was, however, material in relation to the contravention letters served against Amark.

Why the FTT erred in finding that HSE held no other information within scope of Mrs O'Hanlon's request

25. Mrs O'Hanlon plainly requested any documents, or correspondence, held by HSE in relation to a particular site (where demolition works had taken place) and in relation to which HSE was conducting an investigation: those were the first words of her request. The fact that the request then set out specific documents, or types of document, and that, in the course of her interaction with the public authority (HSE) and IC, numbers were assigned to those 11 items, and all the parties (including Mrs O'Hanlon) started to refer to them as the "parts" of her request, cannot, in my view, restrict the plain meaning of her request, as expressed in its opening words. Furthermore, the documents referred to in the permission decision were plainly information held by HSE "in relation to" the site in question (this latter aspect was not disputed, although there was a relevant point as to *when* HSE came to hold one of those documents, which will be discussed further below).

26. In reaching the view just set out, I have not accepted arguments made by HSE to the contrary:

    a. I do not accept the argument that Mrs O'Hanlon's first sentence was "introductory", and that the request was then, in Mr Tabori's words, "particularised". This argument might possibly have been persuasive had the request been drafted by a lawyer; but, clearly, it was not.

    b. I do not accept the argument that Mrs O'Hanlon's grounds of appeal to the FTT did not extend to an argument that IC's decision notice erred in failing to find that HSE held documents within the scope of her request (but not necessarily within one of the 11 enumerated "parts"). The first sentence of section 5a ("Grounds of appeal") of Mrs O'Hanlon's FTT appeal form reads: "I am appealing against this decision notice because it does not provide with the outcome I am seeking which is to obtain information from HSE which I originally requested on 27 April 2020 as detailed under." A little further down, she set out her information request, verbatim (though, "for ease of reference", she used the 11 "item numbers" introduced in IC's decision notice). Mrs O'Hanlon's FTT appeal form continues at some length (over four typed pages), recording in detail her interactions with HSE and IC and her disagreement with their views. None of this, however, amounts, in the hands of an inquisitorial and enabling tribunal, to a restriction of Mrs O'Halloran's clear (and simple) complaint before the FTT, that the IC decision notice was wrong not to find that her request (as I consider it correctly to be interpreted, as set out above) had not been complied with.

    c. Consistent with the point above, I do not accept the argument that Mrs O'Hanlon was changing or expanding the grounds of her FTT appeal when, in her 14 February 2022 "reply", she referred to the terms of her request (as set out in the opening sentence) not being restricted by the 11 itemised "parts". I note that, in that document, she says this immediately after stating that it was the first time HSE had "admitted" that certain documents were in its possession. This brings out an argument that Mrs O'Hanlon made at the hearing, and with which I agree: requests made under the regulations are requests for *information*, not for particular documents; there is plainly no requirement that the requestor specify all the documents within the purview of her request; and, furthermore, the fact that the requestor is able to identify some documents within the

purview of her request, and does so, does not mean, absent clear words, that the request is limited to those documents. I am satisfied in this case that neither in the original request, nor in the appeal to the FTT, did Mrs O'Hanlon restrict the scope of her request, or of her appeal, to the 11 items set out in her request, following the initial sentence, which expressed itself in terms not restricted to those items.

d. I do not accept the argument that, because IC's decision notice construed Mrs O'Hanlon's request as restricted to the 11 itemised documents, Mrs O'Hanlon could not argue otherwise on appeal to the FTT. In the words of the statute (s58 and s50), the FTT's task is to consider whether IC's decision notice is in accordance with the law; and the decision notice is IC's decision as to whether, in any specified respect, a request for information has been dealt with in accordance with (in this case, applying regulation 18) the relevant parts of the regulations. This plainly involves the IC decision notice taking a view on what the requested information is; and if it makes a legal error on that matter, that is plainly within the scope of the FTT's powers. In other words, construing correctly what information is requested is part of dealing correctly with the request under the regulations.

27. Mr Tabori cited two Upper Tribunal decisions (both concerning information requests under FOIA, rather than under the regulations) which, he submitted, suggested that the FTT was bound by the view taken of the scope of the information request in IC's decision notice; I do not read either case in that way:

a. In *Public Law Project v IC* [2024] UKUT 71 (AAC) (a decision of mine), the Upper Tribunal was dealing with a *further*, or additional, information request, made by the appellant to the public authority at the stage at which the public authority was reviewing its response to the initial, or principal, information request; and in that case, IC had overlooked to make a decision on the further information request. As was said at [65] of the decision in that case, IC failed to carry out their obligations under s50(3) in respect of that information request; there was *no decision* on it (and as a result, there was no decision notice in respect of that request).

That is not the situation here. There was, plainly, a decision by IC in respect of Mrs O'Hanlon's information request; and so, in the usual way, the FTT must decide whether that decision was in accordance with the law.

b. In *Montague v IC* [2022] UKUT 104 AAC, a decision of a three-judge panel of the Upper Tribunal, the FTT's decision had taken account of information which had come into the public domain well after the public authority had made its decision on the information request; the Upper Tribunal held that that the public interest balancing test fell to be judged as at the date of a public authority's decision on the request; this was because the function of IC on a complaint under s50 was determining whether the public authority had dealt with the request in accordance with the requirements of FOIA, as opposed to re-deciding the request as at the time of IC's decision; and, likewise, the FTT should have assessed the balance of the competing public interests on the basis of matters as they stood at the date of the public authority's refusal decision, as the role of the FTT under s58 was focused on the correctness of IC's decision.

(The Upper Tribunal's decision was reversed in part by the Court of Appeal (only as regards the separate issue of aggregation of exemptions) and an appeal against that decision is currently before the Supreme Court).

I am not persuaded that the Upper Tribunal three-judge panel's decision as summarised above – essentially related to the temporal circumstances to be taken into account when the FTT decides if IC's decision notice was accordance with the relevant law – requires the FTT to construe the scope of the information request in the same way as IC's decision notice did.

Whether the FTT's error was material

28. An "immaterial" error of law is one which would have made no difference to the outcome of the case, and such errors do not normally justify setting aside the decision. The hurdle (to show that a legal error is immaterial) is a relatively high one: an error is immaterial only if the tribunal "would have been *bound* to have reached the same conclusion, notwithstanding the error of law", given findings it had made which are not tainted with error (*Detamu v SSHD* [2006] EWCA Civ 604, at [14]).

29. I now explain why the error of law in the FTT's decision was in my view immaterial as regards some information (the emails to HSE from A Ltd from March 2020 and

the prohibition notice served on the site developer), but material as regards other information (the contravention letters served against Amark).

Email of 24 March 2020 from A Ltd to HSE

30. This was referred to at paragraph 129a of Ms Cloherty's witness statement. It appears that A Ltd was a third party surveyor engaged by the site developer to undertake sampling of material at the site; and this email forwarded a sample report on the presence of asbestos.

31. The email is also referred to, it would seem, at [29], in the section of the FTT's decision headed "Second Respondent's Response"; it appears in a list of further information identified by HSE as falling within part 11 of Mrs O'Hanlon's request (but not "identified" as held at the time of the request) – it is item "a" on the list. It is recorded there that "HSE withholds this email from disclosure in reliance on the exception in reg 12(5)(b) and 13". The section of the decision is not the FTT's own findings, but a recording of submissions received from the parties.

32. The question here is whether, had the FTT not erred – i.e. if it had recognised that this email was within the scope of Mrs O'Hanlon's information request – would the FTT have been bound to find that regulations 12(5)(b) and 12(1)(b) applied (as it found for information in other parts of Mrs O'Hanlon's request, such as part 2 (complaints from public/councillors/MP) and part 11 (HSE/MP/council/developer correspondence), such that HSE could refuse disclosure.

33. Mr Tabori's argument, which I essentially accept, is that the reasoning adopted by the FTT in considering information in parts 2 and 11 of Mrs O'Hanlon's information, is such that the FTT *would* be bound to come to the same conclusion as regards this email. This is because:

    a. much of the reasoning which the FTT applies to communication of the HSE with complainants (section 2) and with other third parties and the person being investigated by HSE (part 11) applies to A Ltd: in particular, the reasoning about the adverse effect on investigations (in the form of detriment to voluntary disclosure to, and cooperation with, HSE during investigations) if third parties' association with a party found in breach is disclosed; and

b. the FTT's evident high degree of confidence in Ms Cloherty's evidence, combined with the reasoning at paragraph 130 of her statement that is specifically directed to the adverse effect of disclosure of communications between HSE and A Ltd. The reasoning at paragraph 130 is that disclosure of information could be detrimental to the third party with which HSE was communicating (here, A Ltd), as it could link that third party to the health and safety failure associated with the "duty-holder" being investigated. The paragraph emphasised that, here, A Ltd was a third party, not itself being investigated for health and safety failings. Disclosure of such information would make third parties, like A Ltd, likely to be less cooperative regarding the provision of information; this would ultimately impact on HSE's ability to regulate and enforce health and safety legislation.

Email from A Ltd to HSE of 17 March 2020

34. For this same reasons as I have just given as regards the 24 March 2020 email between these parties, I conclude that the FTT's error of law with regard to this email is, also, immaterial.

Prohibition notice served on the site developer on 6 April 2020

35. Mr Tabori pointed out that HSE's skeleton argument in the FTT proceedings had an appendix which stated that this document was available online (there was a footnote with a hyperlink); and the same information was contained in the 26 August 2020 notice of contravention. Mr Tabori submitted that requests for information that is publicly available are 'manifestly unreasonable' within the meaning of regulation 12(4)(b).

36. It seems to me that regulation 6(1)(b) is in point: where the information is requested in a particular form, a public authority must provide it in that form unless the information is already publicly available and easily accessible to the applicant in another form or format. It seems clear that this information was so available. It follows that, even if the FTT had not erred in finding that this prohibition notice was outwith Mrs Hanlon's request, the FTT would have been bound to conclude that HSE had complied with its regulation 5(1) obligations with respect to it (i.e. made it available, albeit in a different form or format).

37. At the hearing, Mrs O'Hanlon said that this document had in fact already been disclosed to her, in 2022, following the FTT hearing. This means that, even there

had been a material error here, it would not have been just for the Upper Tribunal to use its powers to set aside the FTT's decision on account of it (as that would be pointless, in the circumstances).

Notification of contravention letters served against Amark

38. These letters were referred to in Ms Cloherty's witness statement at paragraph 22. This said that Amark was the asbestos removal company engaged by the "duty-holder" (the site developer) to remove asbestos from the site. Ms Cloherty's evidence was that HSE commenced a separate investigation into Amark (because it was not registered as a licensed asbestos removal contractor) and served notification of contravention letters against Amark; however, Amark "disappeared" and HSE was not able to take its investigation further.

39. HSE's response to this appeal said as follows (paragraph 13):

> The Amark notices were dated 15.5.2020 and 26.8.2020. That postdates the date on which the Request was received on 27.4.2020. Therefore HSE was not obliged to consider it as held: reg 12(4)(a) EIR; *Coppell*, 20-011. Contrast the other Amark information disclosed to Ms O'Hanlon: "Amark Job Completion Form dated 6th April 2020" [OB/82]

40. Mr Tabori's skeleton argument was in similar terms, except that it cited *OGC v IC* [2010] QB 98, at [105-109], rather than referring to *Coppel on Information Rights* (the textbook).

41. Mrs O'Hanlon responded to this at the hearing by arguing that the date of her request was 12 October 2020 and not 27 April 2020. I do not accept this argument: the FTT decision found that the request was made on 27 April 2020; and the email of to 12 October 2020 to which Mrs O'Hanlon referred, which appeared more in the nature of a "chasing" email than a new request, did not persuade me of any legal error in that finding.

42. Whilst HSE, in its response to this appeal and skeleton argument, referred to regulation 12(4)(a) (which says that, for purposes of regulation 12(1)(a), a public authority may refuse to disclose information to the extent that it does not hold that information when an applicant's request is received), it did not expressly address regulation 12(1)(b) (the public interest in maintaining that exception, weighed against the public interest in disclosure) - which, along with regulation 12(1)(a), must be satisfied in order to permit the public authority to refuse disclosure. But

the section of *Coppel* to which HSE referred in its response (20-011) includes the following, which picks up on the need to satisfy regulation 12(1)(a):

> … In the case of a request under [FOIA], the public authority is not obliged when answering a request to consider information that is first held or recorded after the receipt of the request, even though this information answers the terms of the request. … In relation to a request under the regulations, where a public authority first holds information answering the terms of the request after the request is received, the public authority may refuse to disclose that information only if in all the circumstances of the case the public interest in refusing to do so outweighs the public interest in disclosing the information. …

43. A footnote (74) to the last sentence quoted above says this:

> This does not permit an applicant to make ongoing requests, but will cover the situation where the public authority has first held information after receipt of the request but before making its decision or decision on review. It would also appear to permit [IC] and the [FTT] to deal with information that Is first held by the public authority after it makes its decision.

44. There is, at first blush, a slight tension between the need to satisfy regulation 12(1)(a), as recognised in the *Coppel* extract above, and the wording of regulation 5(1) – that a public authority that *holds* environmental information shall make it available on request. The use of the word "holds" in the present tense suggests that the public authority's obligation depends on its holding the information *at the time of the request*. This, in essence, is what *OGC v IC* (at [108]) decided in relation to the FOIA regime, based on the wording of section 1. However, the critical difference (as against FOIA) would appear to be that regulation 5 is expressed to be "in accordance with" (amongst other provisions) regulation 12; and so I think *Coppel* is right to say that the regulations regime is different from the FOIA regime on this point, and that a public authority that acquires information after the date the request is received is only exempted from disclosure if the public interest balancing test resolves in favour of maintaining the exception for information not held at the date of the request. Given that HSE's response to the appeal expressly cited that section of *Coppel*, it seems fair to assume that HSE agrees with what is said there.

45. But there is still – as the footnote from *Coppel* quoted above addresses – the question of the date at which one considers the matters set out in regulation 12(1)(a) and (b). On the language of the regulation, that must be the date at which a decision as to disclosure is being made – I derive this from regulation 12(1), which is a right of the public authority to "refuse" disclosure. Here, the FTT decision found that HSE responded to Mrs O'Hanlon's request on 6 May 2020 (to the effect that the requested information was exempt under FOIA) but issued a reconsidered response on 5 August 2021. The reconsideration was pursuant to a process set out in regulation 11, whereby, if a requestor thinks that the public authority has failed to comply with a requirement of the regulations, they may make representations, which the public authority must consider – and then decide whether it has complied with the requirements (of the regulations). It seems to me that the regulation 11 decision is a decision as to whether to disclose information, and is therefore a decision to which regulation 12 – concerning a power to refuse disclosure – potentially applies. It therefore seems to me that 5 August 2021 (the date of the reconsideration decision) was the date at which HSE, as the public authority, needed to consider both the exception in regulation 12(4)(a) and weigh the public interests under regulation 12(1)(b).

46. Although the foregoing reasoning is, I believe, very much in line with the Upper Tribunal's decision in *Montague*, in that I am focusing on what the statutory regime requires of the public authority, and when, the conclusion I reach is seemingly different, in that I am deciding that the date for considering whether an exception applies, and for weighing the public interests, is not the date of the "first" decision (6 May 2020 – which was before the information in question was held by the public authority), but the date of the reconsideration decision (5 August 2021, by which time it did hold it). The reason for that is, of course, the difference between FOIA and the regulations on the matter of public authorities "reviewing" their own decisions: there is no statutory mechanism for it in FOIA (see [62-63] of the Upper Tribunal's decision in *Montague*), but under the regulations, there is regulation 11.

47. It follows that the FTT, having erred in not recognising that the Amark contravention letters were within the scope of Mr O'Hanlon's request, would only have been "bound" to find that this information was within the exception for information not held at the date of receipt of the request, if it was similarly bound to find that the public interest in maintaining that exception outweighed the public interest in disclosure. However, the FTT decision did not consider that latter point: it did, of course, turn its mind to the question of whether maintaining a *different*

exception, regulation 12(4)(b), outweighed the public interest in disclosure of *different information*; but little or nothing can be inferred from that reasoning (given the differences I have highlighted) as to what the FTT would have been bound to find as regards the exception for information not held at the date of receipt of the request. Indeed, HSE's response to this appeal, and skeleton argument, in pointing out that "other Amark information", pre-dating the date of Mrs O'Hanlon's request, had been disclosed, seemingly emphasise material differences between information relating to Amark, as against information in Mrs O'Hanlon's request relating to those who voluntarily engaged with HSE.

48. I do not therefore consider that the FTT, even if it had not erred in treating the Amark contravention letters as outwith Mrs O'Hanlon's request, would have been bound to apply the exception for information not held when the request was received, or any other exception to disclosure. It follows that the error was a material one; and for that reason it seems to me fair and just to set aside the FTT's decision, to the extent of that error.

Disposal

It will be evident from the analysis above that the key issue that now needs determining is whether, in relation to the Amark contravention letters, and as at the date of HSE's reconsideration decision in August 2021, the public interest in maintaining the exception for information not held at the date of receipt of the request outweighed the public interest in disclosure. I am not in a position to decide that matter, as I did not hear argument and evidence on the point. It seems to me the FTT is the better forum in which to determine this matter, as it is the fact-finding tribunal, and well accustomed to making determinations on the balance of competing public interests. As it has been nearly three years since the original FTT hearing, I see no particular efficiency in remitting this to the same panel (and it could well cause unnecessary delay); and a hearing before a fresh panel avoids any issue of appearance of bias. It also seems to me fair and just for the new FTT panel to consider the remitted matter entirely afresh, without having to try to make inferences from the original FTT decision as to what that that panel might have said about a matter to which they did not turn their mind. This explains my directions at the start of this decision.

Zachary Citron
Judge of the Upper Tribunal

Authorised by the Judge for issue on 13 February 2025