IN THE UPPER TRIBUNAL **Case No. SGIA/44/2019**
ADMINISTRATIVE APPEALS CHAMBER

THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

Appellant:	**Ms Margaret Vesco**
First Respondent:	**The Information Commissioner**
Second Respondent:	**Government Legal Department**
Date of Decision:	**1 August 2019**

DECISION OF THE UPPER TRIBUNAL

A I POOLE QC
JUDGE OF THE UPPER TRIBUNAL

ON APPEAL FROM:

Tribunal:	**First-tier Tribunal (General Regulatory Chamber) (Information Rights)**
Tribunal Case No:	**EA/2018/0109**
Tribunal Venue:	**Edinburgh**
Hearing Date:	**24 September 2018**

THE UPPER TRIBUNAL

ADMINISTRATIVE APPEALS CHAMBER

DECISION OF THE UPPER TRIBUNAL JUDGE

The appeal is allowed. The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) given on 19 October 2018 and promulgated on 29 October 2018 is set aside. The case is referred to the First-tier Tribunal (General Regulatory Chamber) (Information Rights) for rehearing before a differently constituted tribunal.

REASONS FOR DECISION

The appeal

1. This is an appeal about rights to obtain environmental information. Ms Margaret Vesco (the "**Requester**") 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?"

   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) (the "**Tribunal**") in a decision dated 19 October 2018 and promulgated on 29 October 2018 (the "**Decision**"). I have decided, for reasons set out below, that the Tribunal's decision was in error of law and must be set aside.

Background

2. The Requester'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.

3. The Tribunal's reasons for the Decision under appeal in this case are as follows:

> "11. It is common case that there has been a very long and protracted correspondence between the Appellant and various public authorities on this subject, dating back to 1998. The Appellant herself details this previous correspondence, and sees it as a relevant consideration as it highlights the importance to her of the issues at hand.
>
> 12. Nevertheless, it is this long history of correspondence that has, in the view of this Tribunal, rendered her requests vexatious. She had already identified that the HSE was the body responsible for providing her with the information she sought, and this is and has been a clear attempt to circumvent the rulings of the Commissioner and the Tribunal in 2014. This appeal amounts in essence to being a repeat performance before a different Public Authority. While we are sympathetic with her plight in her difficulty in getting satisfaction or action about her concern, we accept, and adopt the Commissioner's reasoning that it is another vexatious request".

(I have taken the opportunity to correct a typographical error as to date in paragraph 12). These reasons followed earlier sections in the Decision setting out an introduction, the factual background with a chronology, the relevant legislation, text relating to the Commissioner's decision notice, the grounds of appeal, and the Commissioner's Response.

4. Paragraph 12 of the Tribunal's Decision incorporated the Commissioner's reasoning "that it is another vexatious request". The Commissioner's decision set out the law governing the manifestly unreasonable test, as the Commissioner understands it, between paragraphs 11 and 17. The part of the Commissioner's decision which addressed whether the request under consideration was manifestly unreasonable (or vexatious) is found at paragraphs 27 to 32 of the Commissioner's decision which provide 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.
> 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."

(Again, I have taken the opportunity to correct a typographical error as to date in paragraph 30).

5. For reasons set out below, I have not accepted that other parts of the Commissioner's decision were incorporated into the Tribunal's decision. Nevertheless I set the following paragraphs out because they are discussed below.

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 is entitled to rely on regulation 12(4)(b) on the basis that the request is manifestly unreasonable".

6. I granted permission to appeal after an oral hearing of the application on 26 March 2019, on the basis it was arguable that the Tribunal failed properly to apply the statutory

tests, provided inadequate reasons for its decision, and failed properly to exercise its statutory functions. Permission was refused on other grounds which had been advanced by the Requester. Written submissions on matters specified in Directions were subsequently received from the Commissioner, arguing that the Tribunal's decision does not reveal any error of law and should stand. Written submissions have also been received from the Requester. I have read both sets of written submissions carefully and have taken them into account, but as they are lengthy I have not reproduced them in this decision. GLD wrote to say that it had no further comments on the outcome of the appeal. Neither GLD nor the Commissioner requested an oral hearing, but the Requester at the end of her written submission said "It would be appreciated if a hearing could be held as written work is time consuming". As I am deciding the appeal in the Requester's favour, heard from her at an oral hearing for permission on 26 March 2019, and have extensive written submissions from her before me, I do not consider that an oral hearing would add anything of substance. I am satisfied I am able to decide the appeal fairly on the papers. Below I set out the governing legislative provisions, discuss the EIRs and Regulation 12, then set out the reasons why in my opinion the tribunal erred in law.

Governing legislative provisions

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:

> 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".

8. Turning next to the terms of the EIRs, 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.

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".

I observe in passing that the EIRs do not apply to Scottish public authorities (Regulation 2(3)). Scottish public authorities are subject to the Environmental Information (Scotland) Regulations 2004 (the "**Scottish EIRs**"). However, Regulation 10 of the Scottish EIRs is in similar terms to Regulation 12 of the EIRs, in that it provides for exceptions from the duty to make environmental information available, and Regulation 10(4)(b) of the Scottish EIRs is in the same terms as Regulation 12(4)(b) of the EIRs (the manifestly unreasonable exception). Interestingly, there are differences between Regulation 10 of the Scottish EIRs and Regulation 12 of the EIRs, in that there is an additional provision in Regulation 10(2)(a) of the Scottish EIRs that Scottish public authorities must "interpret [the exceptions referred to in paragraphs 10(4) and 10(5)] in a restrictive way".

11. For completeness, since it has been referred to by the Requester, Regulation 12(9) of the EIRs provides that:

> "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)".

Regulation 12(9) in its terms only applies when an exception in Regulation 12(5)(d) to (g) is being relied on. None of the exceptions in Regulation 12(5)(d) to (g) are being relied on to justify withholding the information, and accordingly Regulation 12(9) is not relevant to this case.

12. The information request made by the Requester mentions the Gas Safety (Installation and Use) Regulations 1998. From the papers, it appears that the Requester wished to know who was responsible for enforcing these Regulations because of the terms of Regulation 27.

> **"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".

The EIRs and Regulation 12 exemptions

13. The EIRs (and the Scottish EIRs where Scottish public authorities are concerned) provide a legal basis for requesters to obtain environmental information from public authorities. The environment needs people to protect it and, if need be, challenge matters which may have an adverse impact on the environment. There has therefore been a move, internationally and nationally, to enable the public to participate in decisions about the environment in which they live. One aspect of public participation is that in environmental cases there are special provisions that proceedings should not be prohibitively expensive (*Edwards and Another (Appellant) v Environment Agency and Others* Case 260/11). Another aspect of public participation is that the public should have access to information, so they can be informed about matters relevant to the environment and be able to take decisions accordingly. 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). In turn, although not material to this particular case, account is taken of Aarhus when interpreting the Directive (*Fish Legal v Information Commissioner* C-279/12, paragraphs 35-38).

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).

15. This background is why the terms of the EIRs are different from other instruments governing recovery of information, such as the Freedom of Information Act 2000 ("**FOIA**") and the Freedom of Information (Scotland) Act 2002 ("**FOISA**"). There are various differences, listed at paragraph 9.45 of MacDonald on the *Law of Freedom of Information* (3rd Ed). For present purposes, the two most important differences are:
    a. No exemptions under the EIRs are absolute, in contrast to the regime under FOIA and FOISA, because Regulation 12(1)(b) of the EIRs subjects all exemptions to a public interest test.
    b. There is a presumption in favour of disclosure under the EIRs (Regulation 12(2)), which does not exist under FOIA and FOISA.

These differences are deliberate, and reflect the obligations the drafters of the EIRs considered to be necessary for the UK to comply with its obligations arising under the Directive.

16. Where requests under the EIRs are being considered, it is important that all of the tests in the EIRs are applied before a public authority decides to refuse to disclose information. It is clear from the terms of the Directive and CJEU authority that grounds for refusal of requests for environmental information must be interpreted restrictively. I note that the EIRs do not contain an express obligation to interpret grounds for refusal in a restrictive way (in contrast to the Scottish EIRs, as discussed in paragraph 10 above). However, given the obligation to interpret the EIRs purposively in accordance with the Directive (paragraph 13 above), the overall result in practice ought to be the same: the grounds for refusal under the EIRs should be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. 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))

    This three stage approach is different from the approach that applies to vexatious or repeated requests under Sections 14 of FOIA and FOISA respectively. Under the EIRs, it is not merely a question of whether a request is manifestly unreasonable (or vexatious, in the language of FOIA and FOISA). A public authority withholding environmental information also has to have applied the public interest test, and the presumption in favour of disclosure. There are therefore more hurdles to jump before a public authority may legitimately refuse a request for environmental information.

17. <u>The first stage</u>. 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;
(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);
(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.

20. While this three stage process imposes a burden on decision makers, in my view it exists to ensure that the policy of the EIRs and the Directive is properly considered and implemented by public authorities. Aarhus and the Directive set up a permissive regime for recovery of environmental information. The EIRs exist to enable recovery of environmental information in appropriate cases. Any grounds for refusal to disclose are to be restrictively interpreted, taking into account for the particular case the public interest served by disclosure, and refusals to disclose information must be justified under the terms of the EIRs.

The Tribunal's errors in law

21. In the light of this discussion, in my opinion the decision making in relation to the request for environmental information in this case leaves much to be desired. Below I focus on the Tribunal's Decision, since my function under Sections 11 and 12 of the Tribunals, Courts and Enforcement Act 2007 is to decide whether the Tribunal's Decision involved the making of an error on a point of law.

22. As the Tribunal is aware, it is not there merely to rubber stamp decisions of the Commissioner. In any appeal against a decision of the Commissioner, the Tribunal must reach its own view on the matters before it, drawing where necessary on the expertise of its members. It is not restricted to a review function. In reaching its own decision, the Tribunal is entitled to give weight to the Commissioner's views as it thinks appropriate in the circumstances, but it is not bound by those findings. The Tribunal has its own powers to make findings in fact, and make judgments on questions of mixed law and fact (for example where the public interest lies). Where there is a discretion exercised by the Commissioner, the tribunal should form its own view on where the discretion lies. (*Guardian Newspapers Ltd and Heather Brooke v Information Commissioner* Appeal Nos EA/2006/0011 and EA/2006/0013, 8 January 2017 paragraph 14). The Tribunal must, among other things, apply the correct legal tests, take into account material considerations, and give proper and adequate reasons for the decision it reaches.

23. Looking first at the Tribunal's approach to the first stage, and whether the request for information was manifestly unreasonable within Regulation 12(4)(b), it is strange that there is no mention of "manifestly unreasonable" in the Tribunal's reasoning in paragraphs 11 and 12 of its Decision. The Tribunal uses the word "vexatious", which is terminology from FOIA and FOISA, not the EIRs. I notice that at page 4 of the Decision the full terms of Regulation 12 are set out, including the manifestly unreasonable test, and the courts have accepted that there is considerable crossover between the two concepts of vexatiousness and manifest unreasonableness (paragraph 17 above). On the basis that this was an expert Tribunal, I am prepared to find its use of the wrong terminology was not a material error of law. It is nevertheless unsatisfactory to use the wording of a different statutory regime; a person reading a decision is more likely to have confidence that the law has properly been applied if the correct statutory wording

is used. But there are more fundamental problems with the Tribunal's consideration of whether the request for information was manifestly unreasonable. In this case, in paragraph 12 of the Decision, the Tribunal expressly incorporates the Commissioner's reasoning that "it is another vexatious request". The reasoning about this particular request being vexatious (as distinct from paragraphs 11 to 17 which set out what the Commissioner considered to be the governing law) is to be found at paragraphs 27-32 of the Commissioner's decision set out in paragraph 4 above. In principle, where the Commissioner's views exactly reflect those of the Tribunal, then incorporation by reference might be an acceptable shorthand way of writing up a decision. But if taking this course, the Tribunal needs to bear in mind that it must reach its own view on the relevant tests, and must be independent and impartial between the parties. It must take care that the contents of its decision, together with any extracts from the Commissioner's decision which have been properly and expressly incorporated, have covered all relevant matters. That did not happen in this case.

24. Paragraph 17 above sets out the requirements of the manifestly unreasonable test. In my opinion, even when paragraphs 11 and 12 of the Tribunal's Decision are read as incorporating paragraphs 27 to 32 of the Commissioner's decision, the requirements of the manifestly unreasonable test have not properly been applied by the Tribunal. There is inadequate recognition that the manifestly unreasonable test is a high test, and must be interpreted restrictively. 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 focussed 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. In short, there appears to me to have been a one sided consideration, which was far from the objective approach required. The reasons given focus on the history and the fact that the Requester has made previous requests. These were undoubtedly relevant factors. But they were by no means the only factors bearing on whether this particular request was manifestly unreasonable. I find that the Tribunal erred in law by failing to apply the legal test properly, due to its failure to take into account the various material considerations I

have listed. Alternatively, I find that the Tribunal failed to provide proper and adequate reasons for its decision. The Tribunal's reasons do not adequately inform the Requester why she had lost, given that in principle there were a number of countervailing considerations not discussed by the Tribunal.

25. The Tribunal's Decision is also problematic because it does not demonstrate that the Tribunal properly considered the second and third stages of the test which had to be surmounted before a refusal to disclose could be justified. The Commissioner suggests that aspects of the Commissioner's decision mentioning public interest and the presumption against disclosure should be regarded as adopted by the Tribunal. I reject this submission. The Tribunal says that it adopts the Commissioner's reasoning that "it is another vexatious request". It is quite clear from the terms of the EIRs, and the different stages of consideration under Regulation 12, that manifest unreasonableness (and vexatiousness), is different from the public interest test, and has been treated as such in other cases before the General Regulatory Chamber (*Rattray v Information Commissioner* 2019 WL 03412307/ EA/2018/0219). Manifest unreasonableness (and vexatiousness) is also not the same test as the presumption of disclosure. If the Tribunal had meant to incorporate parts of the decision relating to these separate tests, it should have said so, but did not. I also do not accept that the passages of the Decision where the Tribunal set out the arguments of the parties made before it (for example paragraph 9 of the Decision), which appear before the heading "Tribunal Findings", were incorporated as part of the Tribunal's reasons. They are merely records of parties' submissions, not the Tribunal's reasons. Even if I were to be wrong about this, and further parts of the Commissioner's submissions and decision fall to be incorporated into the reasons for the Tribunal's Decision, I also find that the reasoning they contain on public interest and the presumption against disclosure would not have been sufficient to save the Tribunal's decision. The key matters referred to by the Commissioner in relation to public interest are the public interest in protecting the integrity of the EIRs and making sure they are used responsibly, a comment that the request (given the history) is only of concern to the claimant with little wider public interest in the particular details, and that HSE provided substantive answers to the Requester at some point in the past (presumably before 2014) (paragraph 9 of the Decision and paragraph 35 of the Commissioner's Decision). As set out in paragraph 18 above, there were many more factors potentially bearing on public interest. They do not appear to have been taken into account. 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. There 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. Accordingly, the Tribunal erred in law, either by failing properly to apply the public interest test because it did not take into account the relevant factors set out above, or it failed to give adequate reasons why it concluded the public interest in maintaining the

exception outweighed the public interest in disclosing the information, and how it applied the presumption in favour of disclosure.

26. Given these errors in law, the Tribunal's Decision must be set aside. I have considered remaking the decision, but on reflection I do not consider I am in a position properly to do so. The Tribunal has not carried out the necessary fact finding about a number of factors relevant particularly to the manifestly unreasonable test, and to an extent to public interest. Further evidence may be required on these matters. I am also mindful that the First-tier Tribunal (General Regulatory Chamber) (Information Rights) is an expert tribunal. It sits with members with expertise in information rights in practice, and properly directed it should be in a good position to identify all various factors bearing on manifest unreasonableness and the public interest, then weigh them appropriately. I therefore remit the case for reconsideration by a differently constituted First-tier Tribunal, directing it to take into account the applicable legislative provisions in paragraphs 7 to 12 above, the guidance on the law in paragraphs 13 to 20 above, and the discussion in paragraphs 21 to 25.

(Signed)
A I Poole QC
Judge of the Upper Tribunal
Date: 1 August 2019