



Neutral citation number: [2024] UKFTT 834 (GRC)

Case Reference: EA/2024/0038

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Decided without a hearing

Decision given on: 18 September 2024

Before

**JUDGE HAZEL OLIVER
MEMBER DAVID COOK
MEMBER DAVE SIVERS**

Between

GEORGE GREENWOOD

Appellant

and

**(1) INFORMATION COMMISSIONER
(2) SERIOUS FRAUD OFFICE**

Respondents

Decision: The appeal is Allowed.

Substituted Decision Notice:

1. The Serious Fraud Office was not entitled to withhold the information requested by the Appellant under sections 31, 21 or 22 of the Freedom of Information Act 2000.
2. The Serious Fraud Office is to disclose the total cost of the investigation into Eurasian Natural Resources Corporation Ltd in accordance with the terms of the Appellant's request. The Serious Fraud Office is to do this within 42 days of the date this decision is sent to the parties.
3. Failure to comply may result in the Tribunal making written certification of this fact to the Upper Tribunal, in accordance with rule 7A of the First-tier Tribunal (General Regulatory Chamber) Rules, and may be dealt with as a contempt of court.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 15 January 2024 (IC-266373-H6Q9, the “Decision Notice”). The appeal relates to the application of the Freedom of Information Act 2000 (“FOIA”). It concerns information requested from the Serious Fraud Office (the “SFO”) about the cost of the investigation into Eurasian Natural Resources Corporation Ltd (“ENRC”).

2. The parties opted for paper determination of the appeal. The Tribunal is satisfied that it can properly determine the issues without a hearing within rule 32(1)(b) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (as amended).

3. On 29 August 2023, the Appellant wrote to the SFO and requested the following information (the “Request”):

“Please state the total cost to the Serious Fraud Office of the investigation into Eurasian Natural Resources Corporation Ltd (ENRC).

Please include the cost of the main investigation, and costs incurred by cases directly related to the conduct of the main case, such as ENRC claims for damages against the SFO on grounds of malfeasance in public office.”

4. The SFO responded on 26 September 2023 confirming it held the requested information. The SFO refused to disclose the information under section 31 FOIA (law enforcement) on the basis that such disclosure would be likely to prejudice the prevention or detection of crime, apprehension or prosecution of offenders, and the administration of justice. The SFO maintained its position following an internal review.

5. The Appellant complained to the Commissioner on 25 October 2023. The Commissioner decided that the SFO was entitled to rely on sections 31(1)(a), (b) and (c) of FOIA to refuse to disclose the withheld information.

a. The exemptions were engaged, taking into account the SFO’s core function to prosecute economic crime, the likely prejudice caused by the cumulative effect of disclosing information in response to a series of requests of a similar nature, and the possibility that a case can be re-opened in the future. He accepted that complying with one request can make it more difficult to refuse requests for similar information in the future. He was satisfied that: there was a causal link between the requested information and the applicable interests relied on; disclosure was capable of having a detrimental impact on law enforcement; and the lower-level test that prejudice “would be likely to occur” had been demonstrated.

b. In relation to the public interest, the Commissioner found that the public interest in avoiding prejudice to the SFO’s investigations outweighed the valid public interest in favour of disclosure of the requested information relating to the ENRC investigation.

The Appeal and Responses

6. The Appellant appealed on 16 January 2024. His grounds of appeal are:
- a. That section 31 has been misapplied as the SFO has failed to demonstrate that the harms would or would be likely to occur in this case.
 - The argument that disclosure would set a precedent for future cases is incorrect as decision notices do not set legal precedents. Each case must be decided on its own facts, and there could be public interest in disclosure in a specific case without disclosure automatically being required in all future cases.
 - The overall cost of a single case is not financial information that could be of practical use to a defendant or nefarious party.
 - The SFO has released equivalent information to him previously which was reported in The Times, and has provided no evidence that this led to harm.
 - The SFO already publishes details of its cases on its website, and disclosure of the costs of one case would not materially provide further information about prioritisation. A number of SFO cases are kept secret, so disclosure of information only about public cases will not give an indication of priority, capacity, caseload or focus. This is likely to be true even if information on the costs of all closed cases was provided.
 - The SFO argues that the case is still live, but the website clearly states it has been closed.
 - b. There is a very clear public interest in disclosure in this specific case. The corruption enquiry took 10 years before being dropped, the SFO has been widely criticised, and the costs of this failure to the taxpayer is important information for informing the current public debate about how economic crime is policed.
7. The Commissioner's response maintains that the Decision Notice was correct. He says that previous decision notices are persuasive when considering similar requests and arguments in the future, and in any event the disclosure of such figures would be likely to lead to the prejudices claimed. He also says that he remains satisfied with the SFO's submissions. Other disclosures are likely, given the nature of the SFO's work and small specialist caseload, and it was appropriate for the Commissioner to accept the SFO's submissions in light of its expertise and experience.
8. The Appellant submitted a reply to the Commissioner's response. He says that this case comes with a strong public interest, given how badly the ENRC case was handled by the SFO, and disclosure would not set a precedent as other disclosures could be refused where the public interest is weaker. Equivalent cost information has been released and reported on already, and the SFO has provided no evidence of material harm.
9. The SFO was joined as a party to the proceedings. The SFO's response maintains its position and relies on two additional exemptions for some of the information.
- a. In relation to section 31:

- Disclosure would create a precedent for future FOIA requests, leading to a situation where the SFO would be required to release the costs of other cases, or would at the very least be highly likely to be required to release the costs of other cases (“the precedent effect”).
 - The consequence of cumulative disclosures would be to enable individuals, including suspects and defendants in the SFO’s investigations and prosecutions, to construct detailed models of the SFO’s work and the level of resources which the SFO allocates to any given case or category of case, causing direct harm to the SFO’s ability to prosecute economic crime and protect the UK economy (“the mosaic effect”).
 - The effect of the disclosure, when analysed alongside the existing publicly available information published by the SFO, would also cause or be likely to cause prejudice (a further instance of the mosaic effect).
 - The prejudice is real. Release would allow criminals to understand how the SFO is likely to resource different cases and incentivise certain types of crime. Suspects and defendants could use such information tactically to derail SFO trials and related proceedings. Criminals could infer how an investigation is progressing and what investigative techniques are being used, and predict how an investigation is typically progressed. Release could also reveal the existence of covert cases.
 - The fact a case is “closed” at the time of a request does not diminish the prejudice, as the information could still be used to model the SFO’s work, and closed cases remain subject to being reopened.
 - Prejudice would occur (or at least would be likely to occur) – the SFO has received 12 FOIA requests for costs information in the period from January 2023, the corporations and individuals it investigates are highly sophisticated and well-resourced, and the Appellant himself relies on a previous disclosure.
 - The SFO publishes information to meet its transparency obligations. The public interest in avoiding prejudice to the SFO’s investigations is the weightier factor in this case notwithstanding the valid public interest in promoting transparency and accountability, including in the ENRC case. It is of paramount importance to the public interest that the SFO’s investigative and prosecutorial efficacy is maintained.
- b. In respect of the costs of two sets of ongoing civil proceedings related to the ENRC investigation, the SFO relies upon two additional exemptions.
- Section 21 FOIA (information accessible by other means) – as the costs information contained in costs budgets, security for costs applications and related orders can be obtained from the Court.
 - Section 22 FOIA (information intended for future publication) – as the civil costs will be published in the SFO’s annual report and accounts, and it is reasonable to withhold it until conclusion of the proceedings to avoid the same prejudice as above and to avoid misleading incomplete information being published.

10. The Appellant submitted a reply to the SFO's response. He maintains that serious failures by the SFO are likely to have prevented allegations of corruption from being heard before a court. He also maintains that there is no evidence of harm caused by the previous disclosure to him, and the precedent argument is incorrect.

Applicable law

11. The relevant provisions of FOIA are as follows.

1 General right of access to information held by public authorities.

- (1) *Any person making a request for information to a public authority is entitled—*
- (a) *to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
 - (b) *if that is the case, to have that information communicated to him.*

.....

2 Effect of the exemptions in Part II.

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- (2) *In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—*
- (a) *the information is exempt information by virtue of a provision conferring absolute exemption, or*
 - (b) *in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*

.....

21 Information accessible to applicant by other means.

- (1) *Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.*
- (2) *For the purposes of subsection (1) -*
- (a) *information may be reasonably accessible to the applicant even though it is accessible only on payment, and*
 - (b) *information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.*

.....

22 Information intended for future publication.

- (1) *Information is exempt information if—*
- (a) *the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),*
 - (b) *the information was already held with a view to such publication at the time when the request for information was made, and*
 - (c) *it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).*

.....

31 Law enforcement.

- (1) *Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—*
- (a) *the prevention or detection of crime,*

- (b) *the apprehension or prosecution of offenders,*
- (c) *the administration of justice...*

12. **Section 31** is a qualified exemption, meaning that the information should only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

13. The approach to be taken when considering prejudice-based exemptions was set out in the First Tier Tribunal decision of *Hogan v Information Commissioner* [2011] 1 Info LR 588, as approved by the Court of Appeal in *Department for Work and Pensions v Information Commissioner* [2017] 1 WLR 1:

- a. Firstly the applicable interests within the relevant exemption must be identified.
- b. Secondly the nature of the prejudice being claimed must be considered. It is for the decision maker to show that there is some causal relationship between the potential disclosure and the prejudice, and that the prejudice is “real, actual or of substance”.
- c. Thirdly, the likelihood of occurrence of prejudice must be considered. Whether disclosure “would” cause prejudice is a question of whether this outcome is more likely than not. To meet the lower threshold of “would be likely to” cause prejudice, the degree of risk must be such that there is a “real and significant risk” of prejudice, or there “may very well” be prejudice, even if this falls short of being more probable than not.

Issues and evidence

14. The issues are:

- a. Is section 31 engaged?
- b. If so, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?
- c. Is section 21 engaged in relation to the costs of civil proceedings?
- d. Is section 22 engaged in relation to the costs of civil proceedings and, if so, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?

15. By way of evidence and submissions we had the following material, all of which we have taken into account in making our decision:

- a. An agreed bundle of open documents.
- b. Witness statements from Freya Grimwood and Raymond Emson on behalf of the SFO.
- c. A closed bundle of documents containing the withheld information and an unredacted version of Ms Grimwood’s witness statement.

16. The closed bundle is held under Rule 14(6) in accordance with the directions of Judge Cragg made on 16 July 2024. The redactions to Ms Grimwood’s witness statement relate to the withheld information, detail about SFO costs at particular stages of an investigation, and the current position in relation to ENRC.

Open Evidence

17. These are the key points from the witness statement from Freya Grimwood, Interim Chief Capability Officer at the Serious Fraud Office:

- a. The SFO is a unique law enforcement agency that investigates and prosecutes top tier fraud, corruption and bribery. It takes on a small number of investigations each year, approximately 35 criminal investigations at any one time. Typically, the SFO's caseload consists of cases that involve millions of pounds, hundreds or thousands of victims, and operate across multiple jurisdictions.
- b. The SFO is funded by public money and is required through legislation to present its Annual Report and Accounts to Parliament, which are then published. These set out the SFO's overall budget and how public money is being spent. Other costs are also proactively published on the SFO website, including details of procurement spending on items over £25,000.
- c. Ms Grimwood says that the disclosure of the requested costs would prejudice the SFO's functions in that it would create a *de facto* precedent for future FOIA requests, resulting in the expectation that the SFO would at the very least be highly likely to be required to routinely release the costs of its cases into the public domain. This would directly reveal how much public funding the SFO has chosen to allocate to each specific case. These cumulative disclosures as a result of multiple requests for costs information would cause prejudice engaging section 31 FOIA. It would be possible for individuals to re-create a complete picture of how the SFO conducts its operational work, or to infer, through comparison, how cases are being resourced. This would include suspects and defendants in SFO cases, which comprise individuals and companies operating at the highest and most complex levels of economic and financial criminality.
- d. Ms Grimwood also says that the disclosure of costs information could impact and incentivise certain types of crime. She gives a hypothetical example, saying it could be revealed, through multiple FOIA requests in relation to different types of fraud investigation, that the SFO invested significant resource into one type of fraud investigation compared to others. It could then be ascertained that the SFO had no or limited ability to investigate another type of fraud because they had only devoted limited or minimal resources to other fraud types. Criminals would consider diverting towards this latter type of fraud, to evade detection and/or being brought to justice. If it was made publicly available how much the SFO spends on a case (from pre-investigation to investigation through to prosecution), individuals (including suspects and defendants) could glean what types of cases they are likely to take on.
- e. Ms Grimwood says that these concerns also apply to closed cases. This is because costs information pertaining to closed cases could still allow criminals to create a picture of the SFO's work and the level of resources which the SFO allocates to any given case. Closed cases also remain subject to being reopened.
- f. Since January 2023, the SFO has received 12 FOIA requests for case costs information across seven cases. Ms Grimwood says that these demonstrate the significant interest in their case costs and, consequently, the extremely high likelihood that similar requests in relation to other cases will be made again in future.

18. The Tribunal is puzzled by the following sentence in paragraph 16 of Ms Grimwood's statement: "*The appellant has not only requested the case costs but has requested costs broken down by year covering investigation costs, trial costs, and appeal costs and other payments including SFO's own costs.*" The Appellant did not make this request. He simply asked for the "total cost" as at the date of the Request. Much of Ms Grimwood's statement appears to relate to a more detailed request, including information about investigation stages and tactics, spikes in spending caused by a Deferred Prosecution Agreement, and victim confidence. We have disregarded this evidence as it appears to relate to a request that the Appellant did not make.

19. These are the key points from the witness statement from Raymond Emson, Associate General Counsel at the Serious Fraud Office:

- a. His evidence relates to the civil claims brought against the Director of the SFO by ENRC, in two sets of proceedings (2019 and 2021). ENRC had engaged Dechert solicitors, led by partner Neil Gerrard, to undertake internal investigations for them. These investigations were into possible criminality and Dechert was to engage with the SFO on ENRC's behalf with a view to a possible self-report of criminality to the SFO. ENRC alleged that Mr Gerrard had made damaging disclosures during this process, including to the SFO. It brought proceedings against Dechert and Mr Gerrard. In relation to the proceedings against the SFO, ENRC alleged that certain SFO officials had, through acceptance of information provided to the SFO by Mr Gerrard before and during the self-report process, induced Dechert's breaches of its contract with ENRC.
- b. At a phase 1 trial in the 2019 proceedings, the judge found that the SFO was liable for the tort of inducing breach of contract, and determined the damages for which the SFO and Dechert were liable for the period to March 2013. The judge also held that the SFO wrongdoing had caused the investigation to open, meaning there would need to be a phase 2 trial to determine ENRC's recoverable losses for the period April 2013 to August 2023. The SFO is seeking permission to appeal.
- c. The SFO made a security for costs application in the 2019 proceedings and received a court order (made on 13 May 2020 and sealed on 2 June 2020). Mr Emson says that the court order is a public document, and the documents relied on in support of the application (including costs estimate and breakdown) are available with the court's permission.
- d. The SFO made a further security for costs application in the 2019 proceedings and received a court order (made on 5 March 2021 and sealed on 30 August 2022). Again, Mr Emson says that the court order is a public document, and the documents relied on in support of the application (including costs estimate and breakdown) are available with the court's permission.
- e. The SFO made a security for costs application in the 2021 proceedings. This did not go ahead, but the documents relied on were filed and are available with the court's permission. There is a consent order of 11 January 2023 which is a public document. The court also holds additional documents in relation to SFO's costs due to the costs budgeting process in these proceedings, and an approved costs budget formed part of an order sealed on 11 January 2023 which is a public document. There is also an amended order sealed on 30 November 2023.

- f. In both sets of proceedings, the SFO's expenditure has changed, and continues to change, on an ongoing basis. He says, "*The respective costs positions in the 2019 Proceedings and the 2021 Proceedings are in a state of flux. There will be no certainty about the final expenditure, or on a position on any questions related to the same (such as value for money), until the end of the proceedings when the final costs figure, and questions of liability and recoverability of costs, have been definitively settled.*"
- g. Mr Emson also says that the information is held with a view to its publication, and it is reasonable to withhold disclosure until it is published. He says he has obtained confirmation from the SFO's finance department that the final costs position in relation to the 2019 proceedings would be published at the end, and there is no reason why the position should be different for the 2021 proceedings. He says that information provided now would be nothing more than an incomplete "snapshot" of a continuously changing landscape without the context needed for an informed and sensible assessment or commentary. He also says that it would be an unwarranted distraction and inappropriate use of public money for SFO staff to have to continually address and comply with ongoing piecemeal requests for information.

Discussion and Conclusions

20. In accordance with section 58 of FOIA, our role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), we may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision. We deal in turn with the issues.

21. **Is section 31 engaged?** We need to decide whether disclosure under FOIA would, or would be likely to, prejudice the prevention or detection of crime, the apprehension or prosecution of offenders, and/or the administration of justice. We have considered the elements of the prejudice test in turn.

22. **What are the applicable interests within the relevant exemption?** The applicable interests are the ability of the SFO to effectively investigate and prosecute serious fraud cases. The SFO is a law enforcement agency which investigates and prosecutes top tier fraud, corruption and bribery. Prejudice to this function will engage all of the aspects of section 31 – the SFO's ability to prevent and detect crime, the SFO's ability to apprehend and prosecute offenders, and the administration of criminal justice.

23. **Is there some causal relationship between the potential disclosure and the prejudice, and is that prejudice "real, actual or of substance"?** We have considered the arguments and evidence from the SFO, and find that these elements of the test have been met. We make this finding based on the specific terms of the Request - a total cost figure for a case which was, at the time, shown on the SFO's systems as closed. As already noted, we have disregarded evidence which related to a more detailed request (which was not a request made by the Appellant). Nevertheless, we accept that disclosure of the requested information could potentially prejudice prevention and detection of crime by the SFO. This and similar costs information provided in response to FOIA requests could be used to build a picture of how cases are resourced and prioritised by the SFO. This information could also be combined with the information that the SFO already publishes. The SFO deals with criminal actors who tend to be well-resourced and sophisticated. We accept that repeated FOIA disclosures of costs information could guide criminals

towards certain activities and be used to analyse how the SFO tends to operate in practice. We also accept that this prejudice can be caused by costs information about a closed case. There is limited risk in a closed case of the costs information being of use to the defendant, but it can still be used to build up a picture of the SFO's resourcing of the type of case in question.

24. The Appellant has argued that the overall cost of a single case is not financial information that could be of practical use to a defendant or nefarious party. In isolation, it is correct that the requested information would provide little if any assistance to criminal actors. But, if costs information is routinely provided in response to FOIA requests, each disclosure will assist with building up this picture of the SFO's work and so add to the prejudice. The relationship between the potential disclosure and the prejudice is based on this "mosaic effect".

25. The SFO also relied on the "precedent effect", arguing that disclosure would create a precedent for future FOIA requests, leading to a situation where the SFO would be highly likely to be required to release the costs of other cases. The Appellant makes the point that decision notices do not set binding legal precedents, and each case must be decided on its own facts. We agree that a disclosure in one case does not necessarily set a precedent for future disclosures. Previous disclosures may make it more difficult for a public authority to argue that a later disclosure is likely to cause prejudice, particularly if there is no evidence of harm being caused in the past. However, we find the arguments about the mosaic effect are more compelling. It may be that initial disclosures did not cause actual prejudice, but the risks of prejudice may increase with more disclosures to the point where a public authority can then withhold the information.

26. **If the information is disclosed, would this cause the prejudice, meaning this is more likely than not? Alternatively, would it be likely to do so, meaning there is a "real and significant risk" of prejudice even if this falls short of being more probable than not?** Again, we have considered this based on the specific terms of the Request - a total cost figure for a case which was, at the time, shown on the SFO's systems as closed. We are not satisfied that the prejudice "would" be caused in this case (meaning it is more likely than not). However, we do find that the disclosure "would be likely" to cause the prejudice, as there is a real and significant risk that this would be the outcome. This is based on the arguments made by the SFO about the mosaic effect of disclosure, as explained above.

27. The Appellant says that there is no evidence of harm having been caused by a previous disclosure to him of similar costs information. The SFO has not provided any actual examples or evidence of the prejudice they are relying on. This is part of the reason why we are not satisfied that the prejudice "would" be caused. However, Ms Grimwood provided evidence of 12 similar FOIA requests that they had received since January 2023. The SFO has a relatively small caseload of around 35 cases at a time. We can see that this volume of requests increases the amount of costs information that is available about different types of case. Answering all of these requests would increase the risk of prejudice – particularly taking into account the resources and sophistication of the individuals and organisations that tend to be investigated by the SFO. All of these disclosures would be made to the world at large under FOIA. We therefore accept that there may very well be prejudice, even though it falls short of being more probable than not.

28. **If so, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?** We have considered the public interest for and against disclosure as follows.

29. The Appellant says that there is a particularly strong public interest in disclosure in this case. We agree. He says that the corruption enquiry by the SFO took 10 years before being dropped, the SFO has been widely criticised, and the costs of this failure to the taxpayer is important information for informing the current public debate about how economic crime is policed. We note that there was a lengthy investigation in this case which did not result in a prosecution. The SFO has since been involved in lengthy civil proceedings. These relate to a pre-investigation which took place before the SFO's formal criminal investigation, as explained in Mr Emson's witness statements. These proceedings are ongoing and there has been a finding that the SFO was liable for the tort of inducing breach of contract. Although the SFO says that these civil proceedings are not connected with the decision not to prosecute ENRC, they are still connected to the overall investigation into ENRC. This is clearly an unusual case. The public interest in the matter goes beyond the general interest in transparency as to how the SFO resources its cases. There is strong public interest in understanding the use of taxpayer money in such lengthy and complex proceedings, particularly where the SFP has been found liable in the civil case.

30. The SFO says that there is clear public interest in avoiding harm to its ability to conduct investigations and prosecute economic crime effectively. We agree that the SFO carries out a very important role in policing economic crime and protecting the interests of the UK. Damage to its ability to carry out this role effectively is not in the public interest. We are mindful, however, that we have not found that the prejudice "would" be caused in this case. We have found that there is a real risk of prejudice. Any risk at all is not in the public interest. But, the public interest in avoiding this risk is less strong than if we had found the prejudice is more likely than not.

31. We have also considered whether the public interest in disclosure is partly met by the information that the SFO publishes or intends to publish. The Annual Report and Accounts show the SFO's overall budget. However, these do not show the costs of individual cases. The SFO has not said that it gives any breakdown of the cost of prosecuting cases. In relation to the costs of the civil proceedings involving ENRC, the SFO say that it will publish total costs at the end of these proceedings. This will only provide a partial answer to the Request, which asked for total costs. There is also likely to be a delay before these final costs are available, taking into account the complexity of the proceedings and possibility of an appeal.

32. Having taken all of these matters into account, we find that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information. Although there is clear public interest in not disclosing the information, this is insufficient to outweigh the particularly strong public interests in disclosure in this particular case. We emphasise that this is a finding on these facts in relation to the ENRC investigation and case costs, and the public interest balance may, and indeed is likely to, differ for other similar requests.

33. **Is section 21 engaged in relation to the costs of civil proceedings?** The SFO argue that the part of the Request which relates to the costs of civil proceedings is information that is accessible to the Appellant by other means, through court documents. These arguments are set out in Mr Emson's statement. We disagree for the following reasons:

- a. The court orders and consent orders for security for costs are public documents. However, they are unlikely to provide the information requested – the actual costs at the date of the Request in August 2023. The Tribunal understands that such orders would cover both existing and future costs as a single figure, and the SFO has not provided evidence showing otherwise. In addition, the timing of the security for costs applications

means that they would not provide the information the Appellant has asked for – the actual costs at the date of the Request in August 2023.

- b. Any supporting documents which break down the calculations into actual and future costs can only be obtained with leave of the court. The SFO say that the material was not subject to safeguards, and it could not realistically raise any objections. However, we find that this does not meet the test of being “reasonably accessible” under section 21. In particular, the court is not obliged to communicate it to members of the public upon request. It is necessary to make an application for access to documents filed with a court, and the court can refuse permission. The likelihood of a court granting such an application cannot be pre-determined in advance in this way and would necessarily be dependent on a whole host of factors. In addition, the timing of the security for costs applications means that the court would not provide the information the Appellant has asked for – the actual costs at the date of the Request in August 2023.
- c. The approved costs budgets referred to are public documents if attached to court orders. However, the SFO has not explained how these would break down existing and future costs. In addition, they are dated January and November 2023. They would not provide the information the Appellant has asked for – the actual costs at the date of the Request in August 2023.

34. **Is section 22 engaged in relation to the costs of civil proceedings and, if so, does the public interest in maintaining the exemption outweigh the public interest in disclosing the information?** The SFO also argue that the part of the Request which relates to the costs of civil proceedings is information that is intended for future publication, and it is reasonable in all the circumstances that the information should be withheld from disclosure until the date. These arguments are set out in Mr Emson’s statement. We disagree that section 22 is engaged. The information that will be published at the end of the civil proceedings is the total cost of these proceedings. The Appellant has not asked for this information. He has asked for total costs related to the ENRC investigation in August 2023, including the costs of the civil proceedings as of that date. In order to rely on this exemption, the information that the public authority intends to publish must be the specific information that an applicant has requested (see paragraph 10 of the Commissioner’s guidance on section 22). The costs information that will be published at the end of the proceedings will presumably include the costs up to August 2023, but the SFO has not said that it will be broken down in a way that shows this specific information.

35. **Appeal upheld.** We therefore find that the SFO was not entitled to withhold the requested information under section 31, 21 or 22 FOIA. We uphold the appeal and issue the Substituted Decision Notice set out at the start of this decision.

Signed Judge Hazel Oliver

Date: 13 September 2024