



NCN: [2024] UKFTT 27 (GRC)
Case Reference: EA/2023/0037

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard: By CVP
Heard on: 12 December 2023
Decision given on: 15 January 2024

Before

TRIBUNAL JUDGE SOPHIE BUCKLEY
TRIBUNAL MEMBER PAUL TAYLOR
TRIBUNAL MEMBER SUSAN WOLF

Between

RHONDDA CYNON TAFF COUNTY BOROUGH COUNCIL

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: Mr. Davies (counsel)

For the Respondent: Mr. Gillow (counsel)

Decision:

1. The appeal is dismissed.

2. Rhondda Cynon Taff County Borough Council must comply with the terms of the Commissioner's decision notice C-159368-P0Y2 of 19 December 2022 and disclose the withheld information within 35 calendar days of the date of promulgation of this decision.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-159368-P0Y2 of 19 December 2022 which held that Rhondda Cynon Taff County Borough Council ('the Council') was not entitled to rely on regulation 12(5)(e) of the Environmental Information Regulations 2004 (EIR).
2. The Commissioner required the Council to disclose the withheld information.
3. This appeal concerns information about the location of disused coal tips within Rhondda Cynon Taff. There are a number of different datasets which contain or will contain this information. The tribunal uses the following terminology when referring to the different datasets:
 - 3.1. 'The Council dataset' or 'The Council data'. This refers to the information generated by and held by the Council that was not sent to it by the Welsh Government. This is the information that the Council was using in its tip management at the relevant date.
 - 3.2. The 'Welsh Government dataset' or the 'Welsh Government maps'. This includes both:
 - 3.2.1. the interim dataset that was created by the Coal Authority on behalf of the Welsh Government and shared with the Council in October 2021. This is a national dataset (the 'October 2021 national dataset') but the Council downloaded the section related to Rhondda Cynon Taff ('the October 2021 dataset'), and
 - 3.2.2. the data published in November 2023 by the Welsh Government ('the November 2023 dataset'). This is an updated version of part of the October 2021 national dataset.

Factual background to the appeal

4. A coal tip is a pile of waste material removed from the ground during coal mining. There are almost 2,500 disused coal tips in Wales; 326 of which are within the boundaries of Rhondda Cynon Taf.

5. The safety of disused coal tips is currently regulated by Part II (Prevention of Public Danger from Disused Tips) of the Mines and Quarries (Tips) Act 1969 (“the 1969 Act”) which was enacted in response to the Aberfan disaster in South Wales in October 1966, when a coal tip slide engulfed a row of houses and a school, killing 28 adults and 116 children.
6. According to the Law Commission, Part II of the 1969 Act “no longer provides an effective management framework for disused coal tips in the twenty-first century. In Wales today almost all coal tips are disused.... About 65% of these are in private ownership, owned by landowners with, generally, no connection with the mining industry, no vested or economic interest in the maintenance of tips, and no skill or knowledge concerning their care. In addition, rainfall has increased significantly due to climate change. This increases the risk of instability, particularly if drainage issues affecting a tip are not addressed.” (p 85 and 88 OB).
7. On 16 February 2020, following extreme rainfall caused by Storm Dennis, a landslip of an estimated 60,000 tonnes of coal tip waste was caused at a disused coal tip in Tylorstown, Rhondda Cynon Taf. Fortunately, nobody was injured because the tip was on the opposite side of the Rhondda Fach river from the village.
8. Shortly after the landslip in Tylorstown, the First Minister of Wales established a Coal Tip Safety Task Force (“the Task Force”) which is led by the Welsh Government, working with the Coal Authority, Natural Resources Wales (“NRW”) and local authorities. The purpose of the Task Force is to deliver an urgent programme of work to ensure that coal tips across Wales are being managed safely and effectively.
9. Urgent safety work included data gathering on all tips, including location, risk category and ownership type, and walkover inspections of all higher risk tips. The inspections identified the maintenance and remediation work needed, with recommended timescales for completion.
10. As part of this process, the Welsh Government began assessing the effectiveness of the existing legislative framework for coal tip safety under the 1969 Act. In October 2020, the Welsh Ministers invited the Law Commission to review the legislative framework.
11. The Law Commission consulted on potential legislative changes between 9 June 2021 and 10 September 2021. Its report was published to the Senedd on 23 March 2022.
12. The Law Commission’s report included a recommendation that there would be a newly created supervisory authority which would compile “a statutory register of coal tips, which in practice will be based on the inventory of tips compiled by the Task Force [*see below*].” (p89 OB at 1.22) The Law Commission stated, “The tip safety

regime needs to be founded on a single source of uniform, coherent and reliable data.” (p 120 OB at 3.19).

13. The Law Commission said the following in relation to its proposal to make the register public:

“3.7 We recognised that one of the overarching principles in Welsh legislation was the need to act collaboratively, including ensuring public involvement and participation. But there was a risk that the information contained in the register could detrimentally affect property prices and the cost of insurance. While this was an important factor for consideration, the purpose of our provisional proposals was to minimise risk through detailed prescription of inspection, maintenance and remediation requirements.

3.8 We thought that the fact that risks were being addressed should mitigate any deterrent effect of a property being publicly identified as containing a coal tip. We also thought it preferable that those considering dealing with a property should be able to discover the position from a public register. On balance, we thought that the information on the tip register should be public, subject to the exclusion of any information which needs to remain confidential in order to comply with data protection law. We asked for views on the issue.” (p 118 OB)

14. Following the Law Commission’s report, the Welsh Government issued a White Paper on 12 May 2022 titled “Coal Tip Safety (Wales) White Paper”, which was intended to build on the Law Commission’s findings and recommendations and propose a new legislative framework.

15. The White Paper proposes to establish a new supervisory authority to oversee the regulation of disused coal tips and the development of a new National Asset Register ‘comprised of uniform, coherent, reliable and up to date data, which is critical for the introduction of a consistent, comprehensive and effective management regime for disused coal tips’. The minimum content of the Asset Register is proposed to include (among other things) the name, location and risk-based categorisation of each coal tip. In the White Paper the Welsh Government states:

“3.2 We believe a centralised national asset register comprised of uniform, coherent and reliable and up to date data is critical for the introduction of a consistent, comprehensive, and effective management regime for disused coal tips.” (p 344 OB)

16. The Welsh Government’s consultation in relation to the White Paper closed on 4 August 2022 and the responses were published on 9 November 2022. The consultation addressed, among other things, the specific information that should be required to be disclosed on the Asset Register.

17. The Welsh Government published its interim response to the Law Commission's review in September 2022 and its detailed response in March 2023.
18. The Welsh Government stated in its White Paper in July 2022 that it intended to introduce legislation during 'the current Senned term'. The Welsh Government has now stated that it intends to introduce a Disused Tips Safety Bill establishing the new regulatory regime, including the Asset Register and supervisory authority during the third year of the legislative programme.
19. Concurrently with the development of the new regulatory regime, on behalf of the Task Force, the Coal Authority has been gathering and collating data in relation to disused coal tips. This data will form the basis of the information to be disclosed on the Asset Register.
20. The Council, along with other local authorities and NRW, were asked to provide data to the Coal Authority in March 2020 as part of this process.
21. The Law Commission consultation document¹ provides the following useful information on the process:

'8.4 ...The Coal Authority found a wide range of approaches to record-keeping, with variations in the types of information recorded, and with some local authorities not keeping detailed records or plans of tips. There was also no single system in place across all the local authorities for assessing and categorising risk. Systems used included ABCD, DCBA, ABC, CBA, 123, 321, high-medium-low and red-amber-green. The criteria applied to determine the risk rating also varied widely...

8.5 By the summer of 2020, the total number of tips identified was around 2,000. This involved checking numerous data sources: Ordnance Survey maps, British Geological Society data, historical tip maps, LIDAR, and aerial imagery. It was recognised that a data cleanse was then needed to ensure accuracy and to remove any double-counting.

8.6 By early 2021, a provisional total number of tips had been recorded as 2,144. The risk classifications are as follows:

Category A = 647
Category B = 389
Category C = 216
Category D = 78
Category R (Fully restored): 150
NR (Risk category not yet assigned): 664

¹ <https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2021/06/Regulating-Coal-Tip-Safety-in-Wales-A-Consultation-Paper.pdf>

8.7 The criteria adopted to date by the Coal Authority team to provide a risk rating are based on the likelihood and consequences of tip failure. This is not the final approach, which will be decided by the Welsh Government, but is the approach which has guided the inspections completed in the first phases of the work in order to provide tip numbers. The team adopted the DCBA approach used by Rhondda Cynon Taf.

(1) Category D: There is potential to cause risk to life or property. Site has known history of (on-going) movement / signs of instability

(2) Category C: There is potential to cause risk to life or property. No known history of movement / signs of instability

(3) Category B: Tip is unlikely to cause risk to life or property due to size or location. No known history of movement / signs of instability

(4) Category A: Tip is unlikely to cause risk to life or property due to size or location. No known history of movement / signs of instability. May be impossible to detect when walking over – usually covering large area without height and vegetated – often grazed

(5) Category R: Tip fully restored/reclaimed but kept in database as a record. Nothing to inspect.

(6) Category NR: Tip identified – no records exist – requires assessment

...

8.14 As explained above, data-gathering was a first step toward building a central database of tips. The next step was to apply a standardised approach to the mapping of tips, with supporting data. In many cases the local authorities had recorded the presence of a tip on a map with a point of reference; the team looked at historical plans to map the boundaries of the tip, in what is referred to as a polygon. Initial maps were compiled of tips in Wales, to assist in their identification and location. This data is currently [*in June 2021*] being cleansed and quality assured with a view to the production of more accurate maps in the future.

8.15 The Coal Authority team have applied a provisional standardised approach to the collection of tip data. The starting point they adopted is that each tip should have its own specific reference. In the past, groups of tips may have been counted as one; this occurred when the method of tipping produced tip complexes.”

22. The Welsh Government funded the Coal Authority to carry out walk over inspections of all tips with an interim rating of category C or D. Further inspections were to be conducted of all tips where a risk category had not yet been assigned. In June 2021 final figures incorporating these categorisations were expected to be ready by the autumn of 2021.

23. On 26 October 2021, the Welsh Government published interim data which shows how many disused coal tips within each interim category are located in each local

authority area. The interim data did not, however, include the full dataset; for example, the names and specific locations of the coal tips were not included.

24. Also in October 2021 the Welsh Government shared with local authorities, including the Council, a dataset showing the location and interim risk category of approximately 2500 coal tips. The Council downloaded all of the data relevant to Rhondda Cynon Taf ('the October 2021 dataset').

25. The national dataset is described as follows (p 53 OB):

"It has been amalgamated by the Coal Authority, on behalf of the Welsh Government, using records provided by the local authorities on the Welsh coalfield, Natural Resources Wales (NRW) and the Coal Authority (CA). The CA then extended the original data by including additional tips which were identified using open data sources such as historical maps, current and historical aerial imagery and LiDAR data (detailed terrain data). Much of the data originally provided to the Coal Authority has since been changed in some way, so this now constitutes a different dataset to that which may have been originally provided by local authorities.

The Coal Authority have collaborated with the relevant local authorities to cleanse this data, and have applied an interim risk categorisation to each coal tip."

26. In that letter the Welsh Government referred to the possibility of FOIA/EIR requests and stated that the Government would deal with any request for the national dataset. It continued (p 54 OB):

"It is for local authorities to determine how they wish to respond to any requests relating to tips within their ownership, and whether they wish to provide information on tips in their complete ownership."

27. In a letter to local authorities dated 17 November 2021 the Welsh Government set out its position on the release of tip locations:

As discussed, this is the Welsh Government's position on the release of tip locations:

- It is vital the data provided to the public is robust. Further quality assurance work and processes are therefore ongoing to ensure the accuracy of the data and to address any data protection issues, before we can release the precise locations of tips publicly.
- We hope to publish the data in the first half of next year.

- We are sharing the data with local authorities and local resilience forums to support emergency preparedness.
28. The White Paper, issued in May 2022, included a breakdown by local authority of the 2,456 disused coal tips identified as at August 2021. This included the interim category risk rating. This data was said to be ‘a live data set and subject to change’ and the White Paper stated ‘While every effort has been made to identify all tips, the date remains subject to ongoing review and totals should not be considered definitive and will be subject to change.’ (p 332 OB).
29. The White Paper proposes that, before the Asset Register goes live, a new categorisation system will be introduced which categorises all disused coal tips into one of five new categories (Category 1 to Category 5), based on a hazard assessment. This will replace the Coal Authority’s interim system of categorisation (which uses Categories A to D, and R). The White Paper states at paragraph 5.3:
- “The interim categorisation approach provided the necessary consistency in the preliminary phases of the tips data capture process. It is, however, recognised that this approach is not suitable for a robust, future-proof categorisation systems that is to align with the policy ambitions of Welsh Government and meets the requirements identified by stakeholders.”
30. The Welsh Government published the location and boundaries of all disused category C and D coal tips in Wales in November 2023.² The website containing the data notes that ‘Figures are subject to change as a result of ongoing inspections and assessment’.
31. The categories used on the website are described by the Welsh Government as ‘interim categories’. The Welsh Government defines category C coal tips as ‘A tip with the potential to impact public safety, to be inspected at least once a year’ and category D as ‘A tip with the potential to impact public safety, to be inspected at least twice a year’. The website gives the following further information on categories:
- “Disused coal tips are being given interim categories. The categories reflect which tips may need more frequent inspections to assess drainage and stability.
Categorisation considers many different factors which are assessed by technical experts. Factors considered include:
Size and geometry
Potential hazards
Potential receptors
Site history
Any associated infrastructure
Inspection and monitoring requirements”

² <https://www.gov.wales/coal-tip-safety#72283>

32. The information published in November 2023 (the November 2023 dataset) in relation to the tips within Rhondda Cynon Taff differs to some extent from the information published in October 2021. For example, in 2021 there were 23 tips identified as being in category D compared to 29 in 2023 and in category C there were 52 in 2021 and 50 in 2023.
33. In the FAQs accompanying the publication in November 2023, the Welsh Government explains why they are only publishing the data in relation to category C and D tips:

“We have prioritised the category C and D disused coal tips as their rating means they need to be inspected more often, so we can identify and carry out any maintenance when needed.

Work is on-going to quality assure the category A, B and R disused coal tips.

We will not seek to publish information on these tips until they have undergone the same level of quality assurance as the Category C and D coal tips.”

Requests and response

34. This appeal concerns a request made by Mr. Elwyn Thomas on 21 November 2021 for the following information:
- A) The list of all coal tips within the boundary of Rhondda Cynon Taf?
 - B) The name and locations of the 23 coal tips with category D within the boundary of RCT?
 - C) The name and locations of the 52 coal tips with category C within the boundary of RCT?
 - D) The name and locations of the 95 coal tips with category B within the boundary of RCT?
 - E) The name and locations of the 89 coal tips with category A within the boundary of RCT?
 - F) The name and locations of the 44 coal tips with category R* within the boundary of RCT?
 - G) How many coal tips is RCTC responsible for the name and locations and what category risk status are they?
 - H) How many coal tips are in private ownership the name and locations and what category risk status are they?

- I) How many coal tips are The Coal Authority responsible for the name and locations and what category risk status are they?
 - J) How regular are coal tips monitored and inspected, coal tips category D, category C, category B, category A and category R*?
 - K) How many surveyors and engineers are employed to monitor and inspect coal tips for any movement or activity in the 303 coal tips?
35. The Council replied on 21 December 2021. The Council refused to provide the information requested in parts A-H under regulation 12(4)(d) EIR on the basis that it was information in the course of completion. The Council redirected Mr. Thomas to the Coal Authority in relation to part I and provided information in response to parts J and K.
36. Mr. Thomas applied for an internal review. On 31 January 2022 the Council upheld its decision.

Decision Notice

37. In a decision notice dated 19 December 2022 the Commissioner decided that the exemption was engaged but that the public interest favoured disclosure.
38. The Commissioner accepted that data surrounding the coal tips within its boundaries continues to be gathered and verified to feed into a document due to be released by the Welsh Government regarding all coal tips throughout the country. As such the Commissioner found that the exemption was engaged.
39. In relation to the public interest the Commissioner was not persuaded that the public interest arguments in favour of withholding the information were sufficiently compelling to outweigh the presumption in favour of disclosure. The subject is of great public interest given the history of dangerous incidents surrounding coal tips in Wales. The Commissioner considered that it was of greater interest to the public to be aware of where these potentially dangerous sites are located in order that the public can take appropriate measures to keep themselves safe, rather than to shield the Council from having to answer any queries which might arise from disclosure.

The grounds of appeal

40. The Council appealed the decision on the following grounds:

Ground 1 – public interest

41. The Commissioner erred in determining that the public interest favoured disclosure.

Ground 2 – personal data

42. The relevant data includes the personal data of third parties and its disclosure would not comply with data protection principles.

The Commissioner's response

Ground 1

43. In relation to the Council's arguments on the public interest the Commissioner submits as follows.

The information may not be accurate and requires standardisation prior to publication which would take place in due course

44. The Commissioner submits that the obligation under EIR is to provide information held not information held subject to being it accurate and complete. If it was sufficient that information is partial to justify non-disclosure, the exception in regulation 12(4)(d) would not have been made subject to a public interest balancing test.

It is in the public interest for the Council and the task force to have a safe space to collate, verify and categorise data prior to publication

45. The Commissioner submits that this is difficult to understand in the factual context of this case. There is no reason that an official would be inhibited from participating in the process of collation and verification of data by fear of disclosure of an incomplete data set.

It is in the public interest for the data to only be disclosed in the context of the Welsh Government's overall strategy accompanied by the new regulatory regime which provides the necessary context to the raw data/disclosure could mislead the public.

46. The Commissioner submits that insofar as the new regulatory regime gives 'necessary context' to the data, the details of that regime are already in the public domain and can inform public understanding of any data to the extent necessary.

47. To the extent that the Council considers that it is necessary for the data to be accompanied by a narrative to give context to the data, the Commissioner submits that it is free to provide that context alongside disclosure.

The categorisation currently utilised in the information is due to change and it will risk giving a false impression of the risk level associated with a coal tip and potentially confuse the public if two different categorisations relating to the same coal tips are in the public domain.

48. To the extent that the appellant is concerned about any public confusion it its submitted that it can provide context for the information it is releasing alongside disclosure. The fact of two separate systems is not a complex concept and is not likely to give rise to widespread confusion. The fact there are separate systems for initial determination of risk and final determination of risk militates against the Council's concerns because it would be possible to clearly differentiate between the two.
49. Set against the factors identified by the Council the Commissioner submits that the public interest in disclosure is plainly very weighty. There is clearly enormous public interest in the subject of coal tips in Wales particularly in the light of the history of dangerous coal tips causing harm to the public. This is further heightened in this specific geographic context by the landslip in Tylorstown in 2020. There is an extraordinarily weighty public interest in allowing the public to take measures to protect themselves against harm which is assisted by information, even interim information, on the location of coal tips and their interim dangerousness rating.

Ground 2

50. The Commissioner makes submissions in the response without having seen the withheld information. He submits as follows:
- 50.1. If he owner is a corporate body the exception cannot apply.
 - 50.2. The suggested mechanism for identification of individuals is unlikely to apply in all cases, because not all UK land is registered.
 - 50.3. To the extent necessary, personal data can be redacted.
51. The notice of appeal suggests that because information is due to be published at some point in the future it is not necessary for the data to be published on an interim basis such that there is no lawful basis for its disclosure. The Commissioner submits that such an approach is wrong. The legitimate interests identified in this case include the public interest in information that allows the public to take measures to protect themselves against harm. Contrary to the notice of appeal it is necessary to disclose the information to meet that interest. It is not sufficient that the information will be disclosed at an undefined point in the future.
52. It is submitted that fairness in the context of data protection principles means that processing should occur in ways that the person would reasonably expect and not in a way that has a non-justified adverse impact on them. In the context of this case the purpose for which the data would be disclosed is the same as the purpose for which it was collected. There is no unfairness in processing data for that purpose. Any expectation that personal data would not be disclosed would be an unreasonable expectation.
53. The tribunal should reject an argument that it would constitute a breach of the second and third data protection principles to disclose the data. The purpose limitation principle requires that personal data is collected for specific purposes. In

this case any data will be processed for the same purpose that it was collected. The data minimisation principle requires that personal data is adequate, relevant and limited to what is necessary. The disclosure of any data in this case would not increase the amount of personal data held and/or processed by the appellant nor would it entail the processing of irrelevant personal data.

The Council's reply

Ground 1

54. The Commissioner's analysis of the disclosure obligation under the EIR appears not to take account of the fact that the very purpose of regulation 12(4)(d) is to provide an exception to that obligation in relation to incomplete information.
55. It is in the public interest for that exception to be maintained in order to provide the Council and the wider Task Force with the time and space needed to complete their work verifying the information currently held, and appropriately categorising the identified coal tips according to risk, before that information is disclosed to the public in due course.
56. The work being undertaken by the Task Force to verify and categorise the coal tip data is an iterative process. The logical consequence of the Commissioner's position is that it would be in the public interest for each of the multiple public authorities involved in that process to be required to make disclosures on a rolling basis of each iteration of the information they hold. That analysis should be rejected. There is a strong public interest in one complete and accurate dataset being published centrally in due course pursuant to the new regulatory regime.
57. In relation to the need for a safe space, the Council submits that the work of the Task Force involves questions of policy and judgement (e.g. how the risk categories should be defined and which category each coal tip should fall within) not merely the processing of data. The Council's essential case is that the public interest requires the Council and the Task Force to be given time and space to complete the work that is in progress.
58. The tribunal should reject the Commissioner's contention that the public will not be misled because details of the regulatory regime are already in the public domain. At the time of the request the Welsh Government had not published its White Paper or launched its consultation. Although some information has since been published the regime remains under development. The Council understands that the legislative regime once in force will prescribe the criteria for the relevant risk categories and the legal consequences for coal tips in each such category. That legislation will provide necessary context to enable the public to understand the risk categories.

59. The examples given in the Commissioner's guidance in relation to the risk of disclosure misleading the public are directly applicable in the present case:

- 59.1. No final or corrected information yet exists.
- 59.2. The information was provided to the Council by the Welsh Government for the purposes of discussion. The Council understands that this data has changed since the time of the request and the Council is not able to independently verify the accuracy of the data.
- 59.3. The new regime for coal tip regulation is complex. Risk of misleading the public could not be avoided by simply providing a narrative explanation alongside the data. The interim risk categories vary between the datasets depending on assessments made by the Council itself and other bodies such as NRW and the Coal Authority. The Council is not in a position at this stage to provide a meaningful explanation of the basis on which the interim risk categories have been assigned.
- 59.4. Even if it were possible to provide a sufficient explanation that is likely to require significant additional work on the part of the Council and other members of this taskforce. This would require disproportionate effort and could hinder the completion of the unfinished work itself.

60. The Council agrees that there is a weighty public interest in ensuring the public are informed about the location of coal tips and their risk rating. It remains the Council's view that that interest will be served by the centralised publication in due course of verified information pursuant to the new regulatory regime. The publication of unfair, unverified and potentially inaccurate information on an ad hoc basis by numerous different public authorities would run counter to the objective of ensuring that the public is provided with clear information that can be relied upon.

Ground 2

61. The Council maintains that the requested information, insofar as it relates to privately (rather than publicly) owned coal tips is the personal data of the landowners and subject to an absolute exception from the disclosure obligation.

62. It is denied that the personal data exception would only apply where the direct owner of the relevant land is a natural (rather than corporate) person. Private land which is owned by a corporate entity must nonetheless have ultimate beneficial owners who are natural persons (i.e. the shareholders in the corporate entity). The requested information would enable such natural persons to be identified using publicly available information, including through the Land Registry, Companies House and/or other public resources. Accordingly, in the case of land owned by

corporate entities, the requested information is the personal data of the ultimate beneficial owners.

63. The significant majority of privately owned coal tips are on registered land. The Welsh Government estimated in footnote 31 to the White Paper that only 5% of coal tips in Wales are on unregistered land. Based on the data currently available, the Council estimates that around 8% of coal tips in its area are wholly or partly on unregistered land.
64. Redaction would not be a workable solution. If the names and locations of the coal tips were redacted there would be nothing left to disclose.
65. The Council submits that there is no lawful basis for disclosing the interim data. It is not necessary for the purposes of any person's legitimate interest to disclose their requested incomplete and unverified information in circumstances in which final verified information is intended to be published in the near future in accordance with a new regulatory regime.
66. The Council maintains that the purpose for which the data was collected was disclosure pursuant to the new regulatory regime following verification and accurate categorisation by risk. Processing the data otherwise would not be consistent with that purpose and would be contrary to the first, second and third data protection principles.
67. The Council further maintains that disclosure of the information in its current form prior to verification would be contrary to the 4th data protection principle (accuracy).

Legal framework

68. The EIR applies the provisions of Directive 2003/4/EC of the European Parliament and the Council on public access to environmental information to England and Wales. The relevant parts of reg. 12 and 13 are:

Exceptions to the duty to disclose environmental information

12. – (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 - [...]

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

Regulation 13 Personal data

(1) To the extent that the information requested includes personal data of which the applicant is not the data subject, a public authority must not disclose the personal data if –

(a) the first condition is satisfied, or

(b) the second or third condition is satisfied and, in all the circumstances of the case, the public interest in not disclosing the information outweighs the public interest in disclosing it.

(2A) The first condition is that the disclosure of the information to a member of the public otherwise than under these Regulations –

(a) would contravene any of the data protection principles, or...

69. There is a presumption in favour of disclosure under the EIR under reg. 12(2). The result is that the threshold to justify non-disclosure is a high one.

Personal data

70. Personal data is defined in s 3(2) of the Data Protection Act 2018 (DPA) as:

Any information relating to an identified or identifiable living individual

71. 'Identifiable' means a living individual who can be identified, directly or indirectly. It must be possible to identify an individual using all the information that is reasonably likely to be used, including information that would be sought out by a motivated inquirer. Identifying a pool that contains or may contain a person is insufficient. It is not sufficient to say that a person is reasonably likely to be covered by the data (**NHS Business Services Authority v Information Commissioner and Spivak** [2021] UKUT 192 (AAC)).

72. Article 5(1) UKGDPR provides that personal data shall be:

(a) processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency');

(b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes ('purpose limitation');

(c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation');

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay ('accuracy');

...

73. In order to be lawful, one of the lawful bases of processing in article 6(1) UKGDPR must apply. The only potentially relevant basis here is article 6(1)(f):

Processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which requires protection of personal data, in particular where the data subject is a child.

74. The case law on article 6(1)(f)'s predecessor established that it required three questions to be answered, which we consider are still appropriate if reworded as follows:

1. Is the data controller or a third party pursuing a legitimate interest or interests?
2. Is the processing involved necessary for the purposes of those interests?
3. Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?

Evidence

75. We read an open and a closed bundle and a small bundle of additional open documents. The closed bundle contained the withheld information.

76. We read a witness statement and heard oral evidence from Jacqueline Mynott, Head of Infrastructure Asset Management for the Council.

Issues

77. It is agreed that the information in the course of completion. The issue we have to determine under regulation 12(4)(d) is whether the public interest in maintaining the exception outweighs the public interest in disclosing the information.

78. The issues under regulation 13 are:

- 78.1. Is the information the personal data of a third party?
- 78.2. Would disclosure breach the purpose limitation principle?
- 78.3. Would disclosure breach the data minimisation principle?
- 78.4. Would disclosure breach the accuracy principle?
- 78.5. Would disclosing the information be lawful and fair?
- 78.6. Are the conditions in 6(1)(f) met i.e.

- 78.6.1. Is the data controller or the third party or parties to whom the data is disclosed pursuing a legitimate interest or interests?
- 78.6.2. Is the processing involved necessary for the purposes of those interests?
- 78.6.3. Are the above interests overridden by the interests or fundamental rights and freedoms of the data subject?

The role of the tribunal

79. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

Oral submissions/skeleton arguments

Submissions from Mr. Davies on behalf of the appellant

The public interest balance under regulation 12(4)(d)

80. Mr. Davies accepted that there was a general public interest and a presumption in favour of disclosure and that there was a strong specific public interest in the disclosure of accurate data relating to disused tips and their locations. He submitted that the disclosure of accurate data is a key part of the tip safety regime that is in the process of being introduced and as recommended by the Law Commission.
81. However it is the Council's case that the public interest is served by the publication of a single source of uniform, coherent and reliable data in relation to coal tips across Wales such as has now been published by the Welsh Government in relation to the higher risk tips, following the completion of verification and alongside information and support provided by the Welsh Government to assist members of the public in understanding what the data means. The Council's position is that the publication of unreliable, unverified data would not serve the public interest in the way that the Commissioner suggests.
82. Mr. Davies submitted that the reality is that the public can only be properly informed about the locations of coal tips and the risks associated with them at the end of the process of work that has been undertaken.
83. Mr. Davies submitted that the Commissioner's case seems to effectively be that in the absence of good data it is better to publish bad data than no data at all. The Council maintains that that is the incorrect approach and that it was the right

decision in the public interest for this data to be published following collation, quality assurance and verification.

84. The dataset in 2021 was only one iteration of a back and forth between local authority and the Coal Authority to produce its interim dataset which the Welsh Government then shared again with local authorities for further verification. There have since been material changes to the data - for example there are six more category D tips in the November 2023 dataset.
85. The correct approach to publication has been looked at in significant detail by the Law Commission who undertook a wide consultation and recommended a particular approach to the disclosure of this information in support of the new regime. Mr. Davies submitted that that is a relevant consideration when considering whether it is in the public interest to do something entirely different.
86. On the other side of the public interest balance, Mr. Davies submitted that publishing the information at the relevant time would have been misleading to the public. It may have caused unnecessary alarm and may have been adverse to the interest of landowners in the vicinity of identified coal tips.
87. Mr. Davies submitted that the Council was concerned that the release of the interim data would have led to significant volumes of queries that the Council would have needed to respond to. Local authorities are strained and under resourced to deal with the management of coal tips generally. Further the Council has not produced the classifications, or the dataset itself, so it was not in a position to fully explain why any particular tip had been given a particular category.
88. At the time of the response to the request the Council thought that the Welsh Government would be publishing the data in spring 2022. Mr. Davies submitted that at the time of the response the public interest favoured maintaining the exception and waiting for the data to be published centrally by the Welsh Government alongside the information campaign that was expected.
89. Mr. Davies pointed out that a significant number of different public authorities have been involved in this process. He argued that each of the local authorities and the Welsh Government and the Coal Authority were likely to have held several different sets of this data which have been refined over time. Mr. Davies submitted that the logical endpoint of the Commissioner's position was that it would be in the public interest that each of the many public authorities involved be required to disclose each iteration of that data in advance of the final version being published centrally.
90. As regards the Upper Tribunal decision in **Ofqual v Information Commissioner** [2023] UKUT 253 (AAC), Mr. Davies submitted that in relation to this particular exemption, the tribunal should be able to take account of the fact that the completed information was expected to be published imminently, because of the particular

interests that this exemption is directly designed to protect. Mr. Davies accepted that one of the dangers highlighted by Upper Tribunal Judge Jacobs of relying on information that was to be published imminently was that the information may not in fact be published imminently which is what has transpired in this case.

Personal data

91. Mr. Davies submitted that the information was the personal data of the landowners. Location data can easily be combined with other publicly available information to identify the individual who owns the land.
92. Mr. Davies submitted that disclosure would be in breach of the 'purpose limitation' principle in article 5(1)(b) and the 'data minimisation' principle in article 5(1)(c) UKGDPR because the Welsh Government's purpose in collecting the data was publication, following verification, in a single source central register, and that has been made clear to the public. The Welsh Government made clear to the Council that the information was being shared with the Council for the purposes of approval and emergency preparedness. Mr Davies submitted that neither of those purposes were consistent with the ad hoc publication of interim data prior to verification by the Council.
93. Mr. Davies submitted that it would also be contrary to the accuracy principle in article 5(1)(d) UKGDPR to publish data that the Council knew was likely to be or was inaccurate.
94. Mr. Davies submitted that it would not be lawful, fair or transparent to disclose the information on an ad hoc basis, in circumstances where there was a clear intention by the Welsh Government for the data to be disclosed in a central register following verification. A landowner would not reasonably have expected the Council to publish unverified interim data prior to the process of verification being completed and central publication by the Welsh Government.
95. Mr. Davies submitted that the publication of inaccurate data could have led to unjustified treatment of landlords by the press and public, and may have affected property prices.
96. Mr. Davies submitted that even if the Requester and other members of the public had a legitimate interest in the publication of information about coal tips, the publication by the Council of its interim data could not have been said to be necessary for the purposes of that interest in circumstances in which verified and accurately categorised information was expected to be published centrally in due course.

Submissions of Mr. Gillow on behalf of the Commissioner

Public interest balance under regulation 12(4)(d)

97. Mr. Gillow made the overarching point that if there was even a small increase in public safety as a result of disclosure of this information, that would translate to a very strong public interest in disclosure.

Public interest in withholding the information

98. Mr. Gillow submitted that the data is not misleading in the sense that it would give a misleading picture to the public of where coal tips are or approximately how risky they are. Barring minor boundary changes the location of the coal tips remains consistent across the sets of data. There may be certain elements that have been improved on in subsequent iterations and some shifts in categorisation but the Commissioner submits that this is nevertheless a useful first instance of the data which can be used by any member of the public to check where the coal tips are and roughly how risky they might be.

99. At the relevant date no information about the location of coal tips had been put into the public domain by the Council. The Commissioner's case is not that local authorities would have to publish every iteration of the data, but where there is no existing data as to the location of coal tips there is a very compelling public interest in having that data published.

100. There is evidence that the interim publication in November 2023 did not lead to a huge number of queries. Further, the evidence was that at least the in-person public consultation following the November 2023 publication was not well attended. Taken together, Mr Gillow submits, this suggests that the volume of queries would in practice be manageable.

101. Mr. Gillow submitted that insofar as those queries are legitimate, such as when inspections were being conducted; whether or not the inspection schedule was being kept to; and whether there might be specific safety concerns about specific areas, then it is in the public interest to disclose the information because it is in the public interest to enable those questions to be asked. If the public does not know where the coal tips are to start with or the approximate categorisation of those coal tips the public is not in a position to ask the right questions.

102. The Council will be able to deal with any entirely irrational or vexatious or otherwise inappropriate comments or queries by refusing to answer or by referring to publicly available information.

103. In terms of potential alarm to the public, Mr. Gillow repeats his submission that there is a public interest in enabling queries to be answered. Alarm amongst the public may or may not be justified, but it will be eased by knowing where coal tips are, what the Council is doing to keep them safe and what the public can do, if anything, to keep themselves safe in the vicinity of the coal tips.

104. The Commissioner recognises the concerns in relation to the interests of landowners, but submits that there is an important countervailing consideration which is that the Law Commission and the Welsh Government have decided, despite concerns relating to property prices and insurance, that the central register should be public.
105. Mr. Gillow submits that whilst the interests of landowners are important, they cannot outweigh public safety. Further Mr. Gillow submits that insofar as there are coal tips on land that will affect land prices or insurance that is information that should be available to prospective buyers or prospective insurers.
106. Insofar as the harm to landowner's interests is said to flow from the information being misleading, the differences between the data published in 2021 and 2023 are minor and do not relate to the geographical locations of tips.
107. In terms of public confusion, the revised categorisation that will be put in place in future by the Welsh Government will use an entirely different system of numbers rather than letters. Mr. Gillow submits that the potential for real confusion is therefore limited.
108. Mr. Gillow submitted that the Council could explain relatively simply that the data was interim data and in the process of being verified and analysed further, that the categorisation used by the Council was slightly different to that used by the Welsh Government and that when later sources of data are released those later sources should be relied upon. In essence he submitted that it would be possible for the Council to provide a short explanation of the differences in the data without significantly undermining public understanding or its ability to carry out its other tasks.
109. Mr. Gillow acknowledged that having a single source of data is valuable but submitted that this does not mean that there is not a strong public interest in disclosure in circumstances where that single source of data is not available at the relevant time. Disclosure would not necessarily compromise the single source dataset because the Welsh Government can say that data published earlier in response to earlier requests or voluntarily has been superseded and that from now on reliance should be placed on the single and accurate source of data. The Council can say the same.
110. Mr Davies placed some reliance on the Welsh Government's assessment of the balance of public interest under the EIR. Mr. Gillow notes that this is not binding on the tribunal and the tribunal should come to its own conclusions on where the public interest lies.
111. In terms of the relevance of the Council's view, at the time, that the data would be published in its final form shortly afterwards, Mr. Gillow submitted as follows. First, **Ofqual** appears to bar consideration of impending disclosure in the public

interest balance. Mr. Gillow acknowledged that there was a question as to whether this would apply to this particular exception because it concerns incomplete data.

112. Mr Giles submitted that the tribunal could properly take account of whether disclosure had in fact been provided shortly afterwards. He admitted that in practice the public authority's assessment in this case was entirely wrong and disclosure did not happen for two years and was incomplete and interim. His submission was that the expectation that data was subsequently to be published was at best of very weak relevance in determining where the balance of public interest lies in this particular case.
113. When pushed to clarify his position Mr Gillow submitted that future publication would generally not be relevant unless there was quite compelling evidence that future publication was imminent. Mr. Gillow submitted it that it might change the outcome in terms of what the tribunal may order because there has been some publication of data that is likely to be more reliable and up-to-date than the data from 2021.

Public interest in disclosure

114. There is a presumption in favour of disclosure, but the Commissioner does not rely heavily on that because he submits that there is a compelling public interest in favour of disclosure.
115. Although Ms Mynott's witness statement appears to suggest that the information could not meaningfully increase public safety, Mr. Gillow highlighted the question from one of the panel members who had asked whether Ms Mynott had considered whether a person planning a Girl Guides or Scouts camping trip in the area might want to know if they were camping on a dangerous coal tip as part of due diligence. Mr. Gillow submitted that even if the categorisation was only interim, the data would still be useful because it would enable you to tell if you were camping on or underneath a coal tip. Mr. Gillow submits that there is a clear way in which disclosure would increase public safety on an individual level.
116. On a community level, whilst the mere knowledge that there is a tip above your property that has the potential to become dangerous does not necessarily mean that you can do anything about it, if they have the information individuals can ask the right questions of the responsible authorities and do their best to monitor that appropriate and timely steps are being taken to keep the coal tip safe. Further, individuals can make informed decisions about where to buy houses or send their children to school. The Council may be right that people may not be behaving rationally in making those decisions, but it is in the public interest to enable people to take those decisions themselves and seek any information they need from the Council.

117. Mr. Gillow submits that even a small increase in public safety is a very valuable thing.

Personal data

118. In summary Mr. Gillow submits that the public interests highlighted above amount to a legitimate interest in disclosure.

119. The Commissioner submits that Mr. Davies has put forward too narrow a reading of the purpose limitation. Mr. Gillow submits that the primary purpose of the creation of a register is to allow public transparency and public information on the location and safety of the coal tips. Disclosure by the Council in respect of coal tips in its area is clearly compatible with that purpose. The fact that disclosure is not done via a single register does not mean that this is an inappropriate use of the data in line with the purpose for which it was collected. It must be the case that the Welsh Government would have the flexibility to, for example, decide to create a decentralised register so long as the use of the register is broadly in line with the original purposes.

120. Further, where a legal provision requires or allow processing in the public interest that is a sufficient lawful basis for disclosure. Therefore in circumstances where a freedom of information request requires disclosure of personal information and where disclosure of that personal information would be in the public interest that falls within that exemption to the purpose limitation.

121. In relation to the accuracy principle, Mr. Gillow submits that the personal data was only 'inaccurate' to the extent that the categorisation of the land might later change. That is not inaccuracy.

122. In relation to fairness, Mr. Gillow submits that where data has been collected for the purposes of creating a register and increasing public transparency if that data is disclosed for the purposes of increasing public transparency and increasing public safety it is difficult to see how it can be said that that disclosure can be unfair.

Discussion and conclusions

123. It is not in dispute that the EIR is the appropriate regime, and that would have been our conclusion in any event.

Section 12(4)(d)

124. It is accepted that the request relates to material in the course of completion.

Public interest balance

The relevance of information not yet in the public domain at the relevant date

125. In Montague v Information Commissioner [2022] UKUT 104 (AAC) (Montague) the Upper Tribunal held that the public interest under FOIA should be assessed at the date of the refusal of the request:

“86. ... The public authority is not to be judged on the balance of competing public interests on how matters stand other than at the time of the decision on the request which it has been obliged by Part I of FOIA to make.”

126. Although Montague was a FOIA appeal, all parties accepted and the tribunal agrees that it applies equally to EIR appeals.

127. In relation to information in the public domain, the Upper Tribunal said, at paragraphs 89:

“...The correct approach was for the FTT to ask, in respect of each piece of information separately, whether at the date of the 8 February 2018 refusal decision, the public interest in maintaining a given exemption outweighed that in favour of disclosure, taking account of anything that was already actually in the public domain as at 8 February 2018.”

128. In Ofqual v Information Commissioner [2023] UKUT 253(AAC) (Ofqual) the Upper Tribunal considered whether Montague established ‘a point of generally applicable principle’ with the effect that the First-tier Tribunal was bound to close its mind to information, which was known, as at the date of the refusal of the request, to be entering the public domain imminently.

129. Upper Tribunal Judge Jacobs rejected the argument that a public authority was entitled to take account of information that it is known will enter the public domain imminently, on the basis that he was bound by the decision in Montague, stating at paragraph 39, ‘There is no getting around the clarity of paragraph 86 of the panel’s reasons.’ He continued, at paragraph 40:

“40. Even if I were free to do so, I would not accept Mr Kosmin’s argument that a public authority can take account of information that is known will enter the public domain imminently. On his argument, this would include both information that would be published by the public authority itself and information that would be published by another public authority. This formulation raises vague questions. What is imminent? How certain must it be that specific information will be published? What happens if, in the event, no information or different information is published? How does the requester know at the time whether the public authority correctly assessed the balance of interests on account of information that is not yet available? Questions like this render the proposed test impracticable in application.”

130. Neither party referred to **Ofqual** in their submissions, but Judge Buckley raised it with both parties, given that Mr. Davies' submission that the public interest favoured maintaining the exception relied, in part, on the fact that at the time of the response to the request the Council thought that the Welsh Government would be publishing the data in spring 2022. In fact it has been published only in part and not until November 2023.
131. Although Judge Jacobs was explicitly considering whether **Montague** established 'a point of generally applicable principle', we do not think that either **Montague** or **Ofqual** require the tribunal to 'close its mind' to the fact that, at the relevant time, it was anticipated that the requested information itself would be published at a later date when considering the public interest under regulation 12(4)(d) or section 22(1) FOIA.
132. The equivalent, or at least broadly equivalent exemption in FOIA is section 22(1) FOIA which provides:
- "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)."
133. The fact that it was expected, at the relevant time, that the information would be published in future, the likelihood of that occurring and the date on which that was anticipated to happen, go directly to the interests which the exemption in section 22(1) FOIA and the exception in regulation 12(4)(d) EIR are designed to protect. These matters are highly relevant to the question of whether, *at the time of the refusal of the request*, it was in the public interest to disclose or withhold the information. Those matters would, in any event, have to be considered under section 22(1)(c). These exemptions/exceptions would be unworkable if the tribunal had to close its mind to the future publication of the information.
134. In the tribunal's view, as we are limiting ourselves to considering the public interest balance at the time of the refusal of the request, we are not prevented by **Montague** or **Ofqual** from taking account of these matters under regulation 12(4)(d).
135. We do accept that some of the problems identified by Upper Tribunal Judge Jacobs may also arise when considering the future publication of information under regulation 12(4)(d), and indeed one of them specifically arises in this

appeal, namely what happens if, in the event, no information or different information is published? In our view this does not mean that, in principle, the tribunal cannot take account of the anticipated future publication of the requested information under regulation 12(4)(d) EIR or indeed under section 22(1) FOIA. The certainty with which the date of future publication could be predicted at the time is something that the tribunal can factor into the public interest balance. It is not unusual in FOIA or EIR appeals for there to be evidence of unexpected developments occurring after the relevant date that would have altered the public interest balance. The tribunal knows that it cannot take those developments into account.

136. Applying these principles to this appeal, the tribunal notes that it was only a 'hope' that the interim location data would be published in the first half of 2022. In our view this could not be relied on by the Council as an indication that the data was *likely* to be published in the near future, and there was a clear chance that publication would be delayed for a significant period (as ultimately transpired).

The public interest balance under regulation 12(4)(d)

137. The date at which we are assessing the public interest balance is the date of the refusal of the request, i.e. December 2021.
138. We accept that the Law Commission had recommended and the Welsh Government intended that the public would obtain their information on the location of disused coal tips from a statutory register of coal tips. That register was intended to be a single source of uniform, coherent and reliable data.
139. It is apparent from the Law Commission Report and the White Paper that the primary rationale for establishing a single source of uniform, coherent and reliable data was that the register was to be the foundation of the new tip safety regime. In our view, the publication of the requested information at the relevant date would not have undermined the single source register as the underpinning of the new tip safety regime, neither of which had been introduced at the relevant date. There is, in our view, no risk that those operating the new tip safety regime would be confused by this earlier publication and therefore no risk of the new tip safety regime itself being undermined by this earlier publication.
140. We accept that the best way for the public to find out about the location, risk level and inspection frequency of disused coal tips would be from a single, coherent and reliable source of data. This was not available to the public at the relevant date. At the relevant date, other than local knowledge, there was very limited information in the public domain on the location of disused coal tips in the area.

141. Although it was not in the bundle, the tribunal notes that the location and inspection frequency of all disused coal tips managed by the Coal Authority was published on gov.uk on 24 January 2020.³ Six of these were in Rhondda Cynon Taff. Otherwise, the tribunal is not aware of any published list of the location of disused coal tips in Rhondda Cynon Taff at the relevant time.
142. At the relevant date there was no indication of when the statutory register would be published. At the relevant date the Welsh Government had indicated that it 'hoped' to publish data showing the location and risk rating of disused coal tips in the first half of 2022. There was therefore, at the date, no guarantee that location data would be published in the near future, simply a 'hope' that it would be.
143. We accept that the information held at the date of the request was still in the process of being verified and checked. However, the location data identified as the withheld data in the closed bundle accurately identifies the location of coal tips in Rhondda Cynon to the Council's knowledge at that time. The list in the closed bundle identifies the location of a tip using a grid reference (easting and northing). These were the locations used by the Council in their tip management at the time. There was a disused coal tip in those locations. The data was accurate and not misleading to that extent.
144. We accept Ms Mynott's evidence that 'in certain instances' the precise footprint identified in the interim data later released by the Welsh Government was different to the boundaries as understood by the Council at the time, because the Welsh Government had 'done a lot of work in reviewing the tips and boundaries of the tips'. As we understand it, the withheld information includes that contained in the closed bundle, which only gives grid references. We find it unlikely that any inconsistencies between the Council's understanding of the boundaries and the later dataset would be apparent from a comparison between grid references and a polygon map.
145. The information provided to the Council in October 2021 by the Welsh Government in the form of the polygon map was still in the process of being quality assured, verified and checked.
146. However by that stage the October 2021 dataset had been amalgamated by the Coal Authority using records provided by the local authorities, NRW and the Coal Authority. The Coal Authority had then extended the original data by including additional tips which were identified using open data sources such as historical maps, current and historical aerial imagery and LiDAR data (detailed terrain data). The Coal Authority had collaborated with the relevant local authorities to cleanse the data, and had already applied an interim risk categorisation to each coal tip. The location data including tip boundaries was

³ <https://www.gov.uk/government/publications/disused-collliery-tips-owned-and-inspected-by-the-coal-authority/disused-collliery-tips-managed-by-the-coal-authority-including-location-and-inspection-frequency--2>

therefore, while subject to ongoing verification and checking, likely to be broadly accurate. It was certainly accurate enough for the Welsh Government to have indicated that it could be used by local authorities and local resilience forums to assist with their emergency preparedness.

147. Due to the ongoing process and verification and checking, we accept that it is possible there may be some differences in the precise boundaries of tips between the interim polygon map shared with the Council by the Welsh Government in October 2021 and later polygon maps to be published centrally by the Welsh Government. We accept if no explanation was given that this could cause some future confusion if the difference in the boundary meant that a tip extended onto somebody's land in one case and not the other. We were not pointed to any examples of this happening, even though the Welsh Government location maps in relation to categories C and D have now been published. Overall we think that there is a small risk of confusion.
148. In our view, a simple explanation would be sufficient to avoid any possible confusion. For example, a few sentences along the lines of those used in the White Paper or the Law Commission's report would suffice, such as: 'This is a live data set and subject to change. Work on refining the dataset is ongoing and while efforts been made to accurately identify the boundaries of all tips, the date remains subject to ongoing review. The boundaries of tips should not be considered definitive and will be subject to change. The later maps produced by the Welsh Government will be more accurate and should be preferred in the case of any conflict.'
149. Even if any confusion could be avoided we accept that there remains a small risk of individuals being misled by the data. For example, there is a small risk that a particular landowner could be informed by the release of the October 2021 maps that the boundary of a tip extended on to their land, when after further checking, it transpired in later datasets that it did not.
150. We accept that there is also some variation between the Council data and the Welsh Government data because, for example, the Council sometimes classes eight 'lobes' as one tip, whereas the Welsh Government class this as eight separate tips. In our view this type of variation can be easily explained in a sentence or two and therefore is not likely to be misleading or confusing.
151. Further we accept that there is some variation in the risk categorisation of tips between the Council data and the October 2021 dataset and between the October 2021 and November 2023 datasets. The variation is likely to be fairly limited, because, as the Law Commission report notes, the Coal Authority team adopted the 'DCBA' approach used by Rhondda Cynon Taf.
152. However, there do remain variations. For example, the Council breaks the categories down further into, for example, D3, A2 etc. Also, individual tips have

sometimes been given a different categorisation by the Council to that given by the Welsh Government. There is also some recategorisation between the 2021 and the 2023 dataset. For example, there were 23 tips identified as being in category D compared to 29 in 2023 and in category C there were 52 in 2021 and 50 in 2023.

153. The information on risk categories contained in the Council dataset cannot in our view be described as inaccurate. It accurately records the risk category assigned by the Council and according to which, at the relevant time, it was operating its inspection regime. It is not misleading in that sense. It is still useful data. We accept that there is some potential for confusion because of the changes in categorisation, but in our view this can easily be explained in a couple of short sentences.
154. Finally we accept that there will be variation between the withheld information and the statutory register, when it is eventually published. Similarly, there will be variation between the interim data published by the Welsh Government in November 2023 and the statutory register. This is primarily because the intention is to adopt an entirely different risk classification scheme in the statutory register. As the risk classification scheme is entirely different, and given that it will be evident that the statutory register is the more reliable source, we do not anticipate that there will be any significant risk of confusion that cannot be dealt with by a short explanation accompanying the data.
155. In summary, in our view any potential for confusion arising from differences between datasets can be dealt with by way of a short explanation. The data is not, in general misleading. The Council data represented, at the time, the Council's present state of knowledge as to the location of tips in its area, and the risk category that it had assigned for the purposes of its inspection regime. That is not misleading data and is useful to the public.
156. The October 2021 dataset had been prepared on the basis of records provided by the local authorities, NRW and the Coal Authority and other open data sources. The Coal Authority had already collaborated with the relevant local authorities to cleanse the data, and had already applied an interim risk categorisation to each coal tip. The Welsh Government viewed the data as accurate enough to publish the list of the names of the tips and their risk categorisation, and accurate enough to be used by local authorities and local resilience forums to assist with their emergency preparedness. That data was not, in general, misleading data and is useful to the public.
157. Both these datasets would provide the public with useful information on (a) where disused coal tips were and (b) approximately how risky they had been assessed to be and the related inspection frequency. This was not as good as the information that would be provided in the future, but it was significantly better than the information that was already in the public domain at the relevant time.

158. In our view there is a very strong public interest in transparency in relation to the location of a disused coal tip and its safety categorisation. If the public know about the presence of disused coal tips above their children's schools or their houses or communities they can ask relevant questions of the Council or the Government about the condition and inspection regime of those tips. They can hold the Council to account via scrutiny and challenge in relation to the frequency and adequacy of inspections. They can report any potential safety issues that they may notice while carrying on their ordinary day to day business.
159. Ms Mynott's view was that it was not practical or rational to attempt to avoid disused coal tips in Rhonda Cynon Taff, because of the sheer number of tips. Her view was that it was irrational to attempt to avoid, for example, category D tips ('potential to cause risk to life or property, known history of movement/signs of instability') because the category relates to the level of monitoring required rather than the actual risk posed by the disused tip itself.
160. However, that does not mean that the public should be deprived of the opportunity to make their own informed decisions about where to buy houses or send their children to school or about where to camp with their scout group after a period of heavy rain.
161. We have accepted that the data could have been misleading in relation to the precise boundaries of the tips, which were still being verified. We accept that the withheld information might have shown a coal tip on an individual's land, which later turned out to have been inaccurate. Given the amount of checking that had already taken place by October 2021, and the sources of the data, we think that this is a small risk, but we accept that this does weigh in the public interest against disclosure.
162. We note that in any event, that location data was being used at the time as the basis for the inspection regime, and therefore we find that there was value in landowners being aware of the current view on the location of tips, even if that was to change in the future.
163. It may be adverse to the interest of landowners to own land on which there is a disused coal tip or which is in the vicinity of a disused coal tip, but their interests are affected primarily by the existence of the disused coal tips, rather than by public knowledge of those coal tips. We note that some landowners, many prospective purchasers or developers and some insurers would not have been aware at all of the presence or risk categorisation of disused coal tips on land in which they had an interest. In our view it is in the public interest for those individuals or bodies to have access to information about the location of disused coal tips as known at the time, even with the caveat that quality assurance was ongoing and that the precise boundaries might be subject to change.

164. We accept that the publishing of the information might have led to some queries to the Council from the public and landowners. Some of those queries would be legitimate. In our view it is in the public interest for the public to be able to enquire about and challenge the Council in relation to the inspection regime for a disused coal tip on or near their property or community.
165. We reject the argument that publication at the time of the request would be likely to have given rise to unnecessary alarm amongst local communities learning that they were living on or underneath a disused coal tip rated as a risk. It was clear from Ms Mynott's moving evidence at the hearing that the Aberfan disaster (as discussed earlier) is still high in the consciousness of residents. Consequently, it is our view that residents are already, in general, aware of such risks. A short contextual paragraph explaining the categorisation would, in the tribunal's view, have been sufficient to avoid unnecessary alarm.
166. We accept that there may also have been some queries by landowners who had, perhaps incorrectly, been identified as having a disused coal tip on their land. We accept that the Council was not in a position to fully explain why any particular tip had been given a particular category by the Welsh Government, although that difficulty could be easily communicated either with the information when published or to any individual.
167. There is some evidence which suggests that the burden might not have been as great as the Council suspects. For example, an in person consultation event held after the release of information in November 2023 was attended by very few people and there has not been a significant rise in queries to the Council in the short period since its release. However, the tribunal recognises that the release of information in November 2023 was accompanied by a number of pages of contextual information and a set of 'FAQS' and it is possible that without this information there may have been more queries/attendees.
168. We accept that there is likely to have been some burden on the Council if the information was released in December 2021, either in terms of drafting some contextual information to accompany the release, or in responding to queries/liasing with landowners or both. We accept that the Council's resources are already thinly stretched. We do not accept that the burden would have been at such a level that it would have interfered significantly with the ongoing work on tip safety. Taking into account the matters considered above, we find that the burden would not have been disproportionate, but we accept that it does add to the public interest in withholding the information.
169. Taking all the above into account, and bearing in mind that there was no fixed future date for publication of the quality assured data, nor was there any more than a hope that it would be published at some point in the next six or seven months, we find that there was a very strong public interest in publishing the

interim data held by the Council at the relevant date. In our view this outweighs the public interest in withholding the information identified above.

170. We have not had to rely on the presumption in favour of disclosure.
171. Contrary to Mr. Davies' submissions, this does not mean that it would be in the public interest for each of the many public authorities involved to disclose each iteration of the data that they held in advance of the final version being published centrally. Each public authority has to consider any request on its merits, in the light of any information already in the public domain at that date.

Personal data

172. It is accepted by the Commissioner and we find that it is possible in most cases to identify the owner of land using publicly available information. Where that owner is a private individual we accept that the requested information is personal data.
173. It is unusual for public authorities in FOIA appeals to rely on any data protection processing principles other than the principle in article 5(1)(a) UKGDPR. In this appeal the Council relies on four separate data processing principles:
 - (a) Personal data must be processed lawfully, fairly and in a transparent manner in relation to the data subject;
 - (b) Personal data must be collected only for specified, explicit and legitimate purposes, and not further processed in a manner that is incompatible with those purposes.
 - (c) Personal data must be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed.
 - (d) Personal data processed must be accurate and, where necessary, kept up to date.
174. We agree with the following statement at p 32 of the Commissioner's guidance on Personal Information (section 40 and regulation 24):

"If disclosure of personal data under FOIA or the EIR would be lawful, fair and transparent then it does not contravene principle (a) of the UK GDPR.

This is the principle that public authorities most commonly consider when they receive a request for personal data of someone other than the requester.

The other data protection principles are unlikely to be relevant to an FOI or EIR request as they are concerned with either the purpose of the processing or the quality and storage of the data.

It is important to note that, in particular, principle (b) is not relevant to disclosure under FOIA or the EIR. This states that data should be processed for "specified, explicit and legitimate purposes" and should not be further processed in a manner that is incompatible with those purposes.

However disclosure under FOIA or the EIR is not in itself incompatible with the business purposes of a public authority. An FOI or EIR disclosure that complies with the UK GDPR and the DPA in other respects is therefore not likely to contravene principle (b)."

175. We do not accept that it is incompatible with the purposes for which the data was collected to release the information under EIR. As a matter of principle we consider that disclosure under EIR is not incompatible with the purposes for which a local authority holds data, whatever the specific purpose for which it was collected. For similar reasons we do not accept that disclosure would be in breach of principle (c).
176. In any event we are not satisfied that publication of the data relating to Rhonda Cynon Taff is *incompatible* with the purpose of publishing the data on a public register including the location of all the disused coal mines. We are not satisfied that the purpose was limited to publication on a single register, nor are we satisfied that the release under EIR would be incompatible with later publication on a single register.
177. Principle (d) concerns the accuracy of the data. The personal data was accurate to the best of the Welsh Government's and the Councils' knowledge at the relevant date. It was in the process of being quality assured and checked and the Council and the Welsh Government were taking reasonable steps to rectify it where they discovered any inaccuracies. We do not accept that disclosure would be in breach of principle (d).
178. In relation to principle (a) in our view disclosure would be fair and lawful. There is a clear legitimate interest in publication of the data, as set out under our consideration of the public interest balance above. It is necessary for the purposes of those legitimate interests for the location and risk category of the disused coal tips to be made public. In our view the legitimate interests are not overridden by the interests or fundamental rights and freedoms of the data subjects.
179. Landowners cannot, in our view, have had a reasonable expectation that the fact that there was a disused coal tip on their land and its risk categorisation would not be available to the public, given the potential impact on neighbouring landowners, local communities, developers of neighbouring land and prospective purchasers. The tribunal accepts that revealing to the public that there is a potentially dangerous tip on land may be adverse to the interests of that landowner, but only in the sense that it ensures that others with interests in

the land are fully informed. We have dealt under the public interest balance in more detail with the question of adverse impact on the interests of landowners and similar considerations apply here. In summary our view is that the legitimate interests are such that they are not outweighed by the interests or fundamental rights and freedoms of the data subjects.

180. For those reasons we find that the exception in regulation 13 does not apply.

Discretion not to order disclosure

181. We sought the parties' views on whether or not, if we dismissed the appeal, we should exercise our discretion under section 50(4) not to order the step of communicating the information given that a more up to date version of the location dataset had been released in November 2023 in relation to the tips categorised as C and D.

182. We have decided that it is not appropriate to exercise our discretion in this way for the following reasons.

183. First, in our view the discretion not to order disclosure of information that is not exempt should only be exercised in exceptional circumstances (see IC and HMRC v Gaskell [[2011] WL 12849924).

184. The type of exceptional circumstances in which it might be appropriate are illustrated by the examples identified in Gaskell, which include the factual matrix might shift, so that a pre-existing but previously inapplicable statutory prohibition might now apply; a new statutory bar on disclosure might be enacted by Parliament; and the requested information might have been inadvertently destroyed.

185. The discretion should not be exercised simply because matters have since taken place that may have altered the public interest balance. It should not be used to undermine the statutory requirement, as interpreted in Montague, to assess the public interest balance at the date of the refusal of the request.

186. Second we have already considered the possibility of a different or more up to date data set being published in the future in our consideration of the public interest balance above. We have decided that there is limited scope for confusion for the reasons set out above and it can be made clear by the Council on releasing the withheld information that this dataset has been superseded. There is therefore in our view no significant increase in the public interest in withholding the dataset now.

187. Third, we accept that the public interest in disclosure has been reduced, because the November 2023 dataset is now available. However there is still some value, in our view, in the public being aware of the Council's own categorisation of risk

and inspection regimes which are not apparent from the November 2023 dataset. Further no information has yet been released on the tips categorised as 'A' or 'B' and so the current data in the public domain is incomplete.

188. For all those reasons it is not appropriate for us to exercise our discretion not to order the step of communicating the withheld information.

Signed Sophie Buckley

Date: 11 January 2024

Judge of the First-tier Tribunal

Promulgated

Date: 15 January 2024