Neutral Citation Number: [2024] EWHC 1643 (Ch)

Case Nos: BL-2019-002362, BL-2020-001318,
BL-2020-000937, BL-2021-000056,
BL-2021-000491

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

BUSINESS LIST (ChD)

7 Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 28 June 2024

Before :

THE HONOURABLE MR JUSTICE RICHARD SMITH

- -

Between:-

(1) SURREY SEARCHES LIMITED AND OTHERS
(2) PSG CLIENT SERVICES LIMITED AND 1 OTHER
(3) SEARCHFLOW LIMITED (IN ITS OWN RIGHT, AS ASSIGNEE OF WATERVALE LIMITED AND AS ASSIGNEE OF RICHARDS GRAY LIMITED AND OTHERS)
(4) P&S GRADWELL LIMITED AND OTHERS
(5) DYE AND DURHAM (UK) LIMITED AND OTHERS

Claimants

- and -

(1) NORTHUMBRIAN WATER LIMITED
(2) UNITED UTILITIES WATER LIMITED
(3) YORKSHIRE WATER SERVICES LIMITED
(4) SEVERN TRENT WATER LIMITED
(5) ~~DŴR CYMRU CYFYNGEDIG~~
(6) ANGLIAN WATER SERVICES LIMITED
(7) SOUTH WEST WATER LIMITED

(8) WESSEX WATER SERVICES LIMITED
(9) THAMES WATER UTILITIES LIMITED
(10) SOUTHERN WATER SERVICES
(11) SEVERN TRENT PROPERTY SOLUTIONS LIMITED (t/a SEVERN TRENT SEARCHES)
(12) WESSEX WATER ENTERPRISES LIMITED (t/a WESSEX SEARCHES)

Defendants

- -
- -

Gerry Facenna KC, Jenn Lawrence and Narinder Jhittay (instructed by **Fladgate LLP**) for the **Claimants**
Edmund Nourse KC, Timothy Pitt-Payne KC, James Nadin, Hannah Ready and Jade Fowler (instructed by **Eversheds Sutherland LLP**) for **Defendants 1-3, 7-10 and 12**
Monica Carss-Frisk KC and Jason Pobjoy (instructed by **Herbert Smith Freehills LLP**) for **Defendants 4 and 11**
Jason Coppel KC (instructed by **Addleshaw Goddard LLP**) for **Defendant 6**

Hearing dates: 15 November 2023 - 19 December 2023
Draft judgment circulated: 21 June 2024
- -
APPROVED JUDGMENT

Mr Justice Richard Smith:

A. INTRODUCTION

1. This judgment follows the 'stage 1' trial of certain issues arising in these proceedings.

The Parties

2. The Claimants are personal search companies (**PSCs**) or their assignees who undertake different types of searches for use in real property sale and purchase transactions, both residential and commercial. Using different sources of information available to them, they compile personal search reports (**PSRs**) (commonly known as 'regulated' reports) for sale to their clients, many of which are solicitors' firms acting for property purchasers and/ or their mortgagees. For information concerning water and drainage, the Claimants have sought information from the water and sewerage company (**WASC**) for the area in which the relevant property is located.

3. For the purpose of this stage 1 trial, a number of 'lead' Claimants have been identified, comprising (i) P & S Gradwell Limited (formerly trading as PSG Gateshead) (ii) Whitefield Legal Services Limited (iii) Property Information Exchange Limited (trading as PIE, PIEX, poweredbypie, Brighter Law, and Homeinfo UK) (iv) Simon Gill & (B) Uzma Bozai (trading as PSG Cornwall) (v) Searchflow Limited (vi) Scrutinor Limited (in its own right and as assignee of Corner House Legal Services Limited) (vii) NSS Franchising Limited (trading as National Search Service) (viii) Michael and Jayne Chetwynd (as assignees of Libmos Limited (formerly trading as PSG Chesterfield)) (ix) TM Property Search Limited (x) Conveyancing Data Services Limited (xi) Dye & Durham (UK) Limited (as assignee of Index Property Searches (East Central) Limited (trading as Index Property Information and Index East Central)), Index Property Information Limited and Stanley Davis Group Limited (trading as Stanley Davis Group Limited and York Place) (xii) Index East Anglia Limited (trading as Index Property Information) (xiii) Index West Midlands Limited (trading as Index Property Information and Index West Midlands Limited) and (xiv) Index Property Information Lincolnshire Limited (trading as Index Property Information).

4. In this judgment, I refer to the First to Third, Seventh to Tenth and Twelfth Defendants collectively as the "**Eversheds Defendants**". The Sixth Defendant was separately represented as were (together) the Fourth and Eleventh Defendants. I refer to the Defendants individually either numerically or by the abbreviations in the table below. So, for example, the Third Defendant, Yorkshire Water Services Limited, is referred to in this judgment as D3 or YW.

Def. No.	**Defendant**	
D1	Northumbrian Water Limited	**NW**
D2	United Utilities Water Limited	**UU**
D3	Yorkshire Water Services Limited	**YW**
D4	Severn Trent Water Limited	**STW**[1]
D6	Anglian Water Services Limited	**AW**
D7	South West Water Limited	**SWW**
D8	Wessex Water Services Limited	**WW**

[1] Also used herein as the abbreviation for sewage treatment works.

D9	Thames Water Utilities Limited	**TW**
D10	Southern Water Services Limited	**SW**
D11	Severn Trent Property Solutions Limited	**STPS**
D12	Wessex Water Enterprises Limited	**WWE**

5. D1-D4 and D6-10 are the nine English WASCs, licensed to provide water and sewerage services as statutory undertakers under the Water Industry Act 1991 (**WIA**). They are subject to various statutory obligations, some identified below, and are subject to regulatory oversight, including by the Office of Water Services (**Ofwat**).

6. D5 is no longer a Defendant, the claim against that WASC having settled before trial.

7. D11 and D12 are not WASCs but are commercial providers of so-called 'official' water and drainage information search reports known as a CON29DW Drainage and Water Enquiry (**CON29DW**) for residential property transactions and a Commercial Drainage and Water Enquiry (**CommercialDW**) for commercial property transactions. They are associated with, respectively, D4 and D8. Whenever the CON29DW shorthand is used in this judgment in a general sense, it should be considered to encompass Commercial DWs unless otherwise indicated. In addition to their activities as statutory water and sewerage undertakers, the WASC Defendants (save for D4 and D8) also sold CON29DWs and Commercial DWs on a commercial basis.

8. Although closely aligned in their defences, the Defendants' positions did differ somewhat on certain aspects of the argument and evidence.

The claim in overview

9. These proceedings concern sums paid by the Claimants to the Defendants for the purchase of CON29DWs and CommercialDWs. The relevant period of the claim is 18 December 2013 to date, during which there have been thousands of such transactions.

10. The Claimants allege that all the information responsive to a CON29DW is "environmental information" (**EI**) within the meaning of the Environmental Information Regulations 2004 (**EIR**). Following the European Court of Justice **(CJEU)** decision in *Fish Legal* v *Information Commissioner* (Case C-279/12) [2014] QB 521, and applying the tests it laid down, the Upper Tribunal (Administrative Appeals Chamber) (**UT**) determined that the Defendants were 'public authorities' within the meaning of the EIR *(Fish Legal* v *Information Commissioner* [2015] UKUT 0052 (AAC)). As such, the Defendants were obliged to make EI available for free or for no more than a reasonable charge.

11. The Claimants claim in restitution, asserting that the charges levied by the Defendants were unlawful and/ or paid under a mistake of law and that the Defendants have been unjustly enriched to the extent of those charges, less such sum as the Court may determine the Defendants could lawfully charge had they made the information available in compliance with the EIR. The Defendants deny liability, including on the basis that the information responsive to a CON29DW was not EI, that the information was not 'held' by them at the time the relevant request was made or that they were otherwise entitled under the EIR to refuse its disclosure.

Background to the stage 1 trial

12. The Defendants' liability (or otherwise) in unjust enrichment formed no part of the issues to be decided at the stage 1 trial. Nor was there any consideration of quantum issues. Rather, the six overarching issues falling for my determination were set out in an agreed List of Issues (**LOI**), all concerned with the interpretation and/ or application of the EIR (**EIR Issues**).

13. The scope of the stage 1 trial had its origins at the first case management conference on 25 March 2021 (**CMC1**). Given the scale of the proceedings, the parties were agreed that it was not feasible to resolve them completely within a single trial. The Court therefore directed this 'stage 1' trial, involving a number of lead Claimants, to determine the EIR Issues (then expressed in more general terms) and made directions for the identification of sub-issues and criteria for lead Claimants, it being anticipated that the determination of the EIR Issues for a small number of lead cases at stage 1 could be extrapolated to the remainder.

14. Having made good progress between themselves, the parties agreed an order at CMC2 on 22 September 2021, including directions for the more detailed LOI to replace the general issues identified at CMC1, now setting out the sub-issues, fact patterns and assumed or agreed facts in relation to the EIR Issues and providing for some to be tested by reference to sample transactions, as well as directions to facilitate the selection of lead Claimants.

15. A further set of directions was agreed ahead of CMC3 on 10 February 2022, including for the agreement of a list of sample transactions for some of the EIR Issues.

16. By the time of CMC4, the parties had agreed lists of sample transactions and the Defendants had proposed a revised LOI, removing some of their original arguments. The sequencing of service of factual evidence was ordered to take place in three rounds, with the evidence addressed to **Issue 3.1** to be served sequentially, the Claimants going first.

The EIR issues

17. The final iteration of the EIR Issues reflects revisions agreed by the parties in light of amendments proposed by the Defendants in September 2023 to their respective defences. The final form of LOI, reflecting those amendments, was approved by me following the PTR on 3 October 2023 and is annexed to the PTR order but, for present purposes, the 'overarching' EIR Issues can be summarised as follows (with specific Regulations within the EIR henceforth identified as, for example, **Reg 2**):-

    (i) **Issue 1**: are the various items of information in a CON29DW "environmental information" within the meaning of Reg 2(1)?

    (ii) **Issue 2**: did the Defendants "hold" the information, within the meaning of Reg 3(2), at the time that a CON29DW was requested?

    (iii) **Issue 3**: was any of the information covered by Regs 6(1), 12 or 13, so that the Defendants were not obliged to disclose it? More specifically, was the information responsive to a CON29DW:-

(a) publicly available in the same or different format and easily accessible for the purpose of Reg 6(1)? (**Issue 3.1**)

(b) personal data? (**Issue 3.8**)

(iv) **Issue 4**: could any of the requests for a CON29DW be refused under the EIR as being manifestly unreasonable within the meaning of Reg 12(4)(b)?

(v) **Issue 5**: did any services provided by the Defendants in respect of the information in a CON29DW mean that the charging regime in Reg 8 did not apply?

(vi) **Issue 6**: in the light of the answers to **Issues 1-5**, is a CON29DW subject to the charging regime in Reg 8(3), in whole or in part?

18. Accordingly, the 'stage 1' trial was a trial of issues, not of test cases, with the 14 lead Claimants above having been identified for that purpose. The EIR Issues were developed to include a number of sub-issues. For some issues, the parties identified certain fact patterns, assumed or agreed facts and sample transactions.

The so-called 'reverse ferret'

19. In their skeleton argument for trial, the Claimants argued that it is not appropriate or necessary to determine **Issue 3.1**, the engagement (or otherwise) of Reg 6(1)(b) being a fact sensitive enquiry. Moreover, they also said that **Issues 4-6** do not reflect issues that arise on their case in any event, including on the basis that their restitution claim does not rest on any suggestion that their past orders for CON29DWs were, or should be treated as, requests under the EIR. The Claimants therefore questioned the utility of the court determining these issues at this stage 1 trial as well. It is fair to say that this triggered considerable consternation on the Defendants' part, including their filing shortly before trial of a joint supplementary skeleton in which they explained why it had always been part of the Claimants' case that the CON29DWs were to be treated as EIR requests. The Claimants, in turn, argued that this mischaracterised matters, explaining in opening by reference to the Particulars of Claim (**PoC**) how their claim was not that the Defendants' charges were unlawful because the CON29DWs had been requested under the EIR. Rather, instead of complying with the statutory regime governing public access to EI, the Defendants restricted such access and operated a separate commercial regime making EI available only to those ordering CON29DWs. The EIR Issues reflect points advanced by the Defendants in their respective defences, not by the Claimants. The Defendants responded by taking me to how they say the EIR Issues came to be formulated and directed and how, based on what the Claimants had told the Court earlier in that context, they clearly were (or at least had been) contending for the treatment of the CON29DWs as requests under the EIR.

20. It is not necessary for me to recount that history here. Suffice to say that I am unable to accept that the Defendants have mischaracterised the Claimants' case. **First**, it seems clear to me that the Claimants were contending (PoC at [23.1]) that the charges for CON29DWs were unlawfully demanded because the Defendants had charged the Claimants more than a reasonable amount permitted by Reg 8(3). Since the Defendants' ability to make such a charge depends on there being a request for EI under Regulation 5(1), I am satisfied that the Claimants were contending that the CON29DWs were to be treated as EIR requests.

21. **Second**, the matter is, in my view, put beyond doubt by the Claimants' written and oral submissions at CMC1 at which they sought to have determined that unlawful demand case (under PoC [at 23.1]) in addition to the related issues contended for by the Defendants, albeit not at this first stage their alternative cases (under PoC [22] and [23.2]).

22. **Third**, even though the Claimants did not persuade the Court at CMC1 to order the determination of this element of their unlawful demand case, the Claimants positively agreed to the determination of the related issues contended for by the Defendants, including as recently as the PTR on 3 October 2023 before me when these were revised, again by agreement.

23. **Fourth**, that the Claimants were contending that the CON29DWs were to be treated as requests under the EIR is consistent with the agreed framing in the LOI of the EIR Issues and of their related fact patterns and sample requests.

24. **Fifth**, the Claimants' suggestion that they did not apply to amend the LOI because they thought that this would not realistically be re-visited by a different judge following CMC1 was unconvincing, not least given that the LOI did continue to be discussed and developed right up to this stage 1 trial.

25. **Sixth**, even if that had been the Claimants' view, I am satisfied that they would have made clear much earlier their view as to the (lack of) utility in the determination of these issues. They did not do so until their skeleton argument for trial.

26. **Seventh**, the Claimants' reliance on the Request For Further Information dated 23 December 2020[2] as indicative of the Defendants' suggested understanding of the Claimants' case was unconvincing. That request concerned but one aspect of that case.

27. Drawing these threads together, in my view, it is not credible that the Claimants would, as they did, agree that the EIR Issues should be decided first and undertake the necessary preparations, only then to suggest on the eve of this stage 1 trial that some of them might not be relevant to their case after all. To the contrary, for whatever reason, the Claimants have had a very late change of heart about the formulation of aspects of their case.

The way forward

28. As both parties realistically accepted, the question then arose in light of the Claimants' stance whether I should proceed nonetheless to decide all the EIR Issues. I have come to the view that I should. Not only did the Claimants positively agree to them all being decided at this 'stage 1' trial, including as recently as the PTR, all parties have undertaken significant preparations to that end, including extensive disclosure and witness evidence. More importantly, however, there is, in my view, substantive utility to deciding the EIR Issues at this stage, including in relation to:-

    (i) **Issue 3.1**, public availability and ease of accessibility of EI also being relevant on the Claimant's case to whether (a) the Defendants did restrict the Claimants' access to EI and (b) the Claimants had no choice than to buy CON29DWs;

[2] Request no. 56.

(ii) **Issue 4**, the Claimants' case envisaging that the Defendants should have made available EI free of charge and/ or for a reasonable amount, presumably in response to requests for EI. Even though such requests may not have taken the form of CON29DWs, it will potentially be open to the Defendants to argue that multiple EI requests from the Claimants would have been manifestly unreasonable;

(iii) **Issue 5**, the additional services or benefits the Defendants provided by way of CON29DWs being potentially relevant to the Claimants' reason(s) for purchasing these products and whether, in fact, they had no choice in the matter; and

(iv) **Issue 6**, as potentially reflecting the effect of my findings on **Issues 1-5**.

29. Despite the Claimants' reservations, and recognising at the outset that my findings on some issues may well affect how I might decide to proceed (if at all) for others, I am therefore presently of the view that it is desirable to determine all the EIR Issues. I am, however, conscious that it is no part of my role to decide or express views on the Claimants' restitution claim, the hypothetical scenarios it envisages or (to the extent such an argument is open to the Defendants in light of *Vodafone Ltd* v *Office of Communications* [2020] EWCA Civ 183 as will apparently be relied on by the Claimants) how the parties might have acted in those scenarios. In this regard, some of the arguments advanced by the parties at the stage 1 trial did appear to trespass on territory that does not arise for my determination. However, I have confined myself to the EIR Issues, leaving it for others to decide if my related findings do indeed inform and, if so to what extent, matters arising for later determination.

The evidence

30. The body of witness evidence was extensive, with the Claimants serving, by my calculation, 34 witness statements from 17 witnesses, 14 of whom also gave oral evidence. The evidence from the Defendants was even more extensive, serving 67 statements from 59 witnesses, 22 of whom gave oral evidence (one by videolink from India, another by the same method from within the UK).

31. It is fair to say that there was some criticism by both sides of the approach to the evidence taken by the other. In terms of the witnesses themselves, as in most cases, little, if anything, will turn on demeanour. However, given how the parties put matters, particularly in closing argument, it is only appropriate to make some headline observations at the outset. In general terms, I found that some of the Claimants' witnesses expressed themselves in somewhat vague terms, their statements concerned matters not arising at this stage 1 trial or they somewhat overreached themselves. Understandably, most did not have extensive knowledge of the Defendants' internal processes but this did not stop some from engaging in argument, even speculation, including about the Defendants' suggested motives, or to comment on matters beyond their purview.

32. Perhaps unsurprisingly given that they did have such knowledge, the Defendants' evidence was generally very detailed. In closing argument, the Claimants argued that the Defendants' statements had been over-engineered and that some did not comply with CPR, Part 57, PD AC. I have considered those criticisms carefully and I found the vast majority of them to be unwarranted. Taking Ms Tonia Reeve of NW merely as an example, she was criticised for explaining an aspect of her early employment history, her approach to her business development and operations roles, the performance of NW's statutory role under the New

Road and Street Works Act 1991 (**NRSWA**), her current team's customer service approach, the different resourcing of NW's EIR and CON29DW functions, her role when incorrect information is provided in a CON29DW report and NW's response to the increased demand for the e-mail map request service during the Covid pandemic. Pausing there, I am unable to say that any of this should be criticised as not being "restricted to evidence as to matters of fact that need to be proved at trial". It was either useful context for her evidence or it was, in itself, relevant evidence.

33. Ms Reeve was also criticised for addressing "matters of fact of which the witness has no personal knowledge relevant to the case", in this case on the basis that she did not have "day-to-day experience of using the PC view to carry out searches". However, Ms Reeve's witness statement did not suggest otherwise. Nevertheless, as the person supervising the team responsible for the booking system for NW's public access computer (**PAC**), she was able to give relevant evidence, including even about her own interactions with individual PSC agents. In this regard, I found somewhat unrealistic the Claimants' broader point that, because some of the WASC witnesses had a senior role, they lacked the requisite knowledge, particularly of the so-called 'PAC issues' encountered by PSC agents as were relied on by the Claimants under **Issue 3.1**. In performing their supervisory roles, the witnesses concerned did have relevant knowledge of how these issues affected PAC demand, operation, use and content. Ms Reeve was also said to have argued the case or engaged in speculation. However, the criticised evidence was, again, largely directed to her and her team's approach in performing their roles and, again, relevant, Ms Reeve making clear where she had made certain related assumptions.

34. Ms Reeve was also criticised for taking the Court through documents in the case. However, I was unable to discern this approach from the matters relied on. Rather, she provided an explanation of NW's approach in light of the content of a particular compliance note, code of conduct and marketing document and certain interactions with Mr Peter Gradwell. As to the suggestion that she referred to documents she neither created nor saw while the events were fresh in her mind, in one case, Ms Reeve was not speaking to the content of the document but to the reason it did not show something. For another, Ms Reeve was explaining how the approach indicated in a communication from Mr Andrew Cowan when he was employed by NW differed from her own. For others, she explained by reference to certain written requests for information her understanding of NW's typical approach. Again, she did have knowledge and relevant evidence to impart about these matters. In this regard, I also found misplaced the broader criticism that a number of WASC witnesses had given evidence about sample CON29DW transactions in which they themselves had not been involved, their related evidence directed to explaining the process undertaken by the relevant WASC in producing the report of which, again, they did have relevant knowledge.

35. The utility of some of the more marginal matters described to the overall resolution of the issues falling for my determination could perhaps be questioned. To the same end, some of the witness statements could perhaps have been streamlined. However, the same could be said of the Claimants' witnesses. Just as Ms Reeve considered it important to explain NW's customer orientated approach, Mr Gradwell and Mr Cowan considered it important to explain their perception of NW's hostility to PSCs. Likewise, although Mr Owen Davies (for STW) sought to be a helpful witness, I agree that his evidence attempted to carry too much weight on a number of matters of which his direct knowledge was limited. However, the same can be said of Messrs Albone and Dyoss for the Claimants. On any view, the Claimants' concerted attack in closing was overly forensic and not warranted. Moreover,

the suggested concerns were advanced late in the day for the Court meaningfully to address them. They should have been raised at the Pre-Trial Review at the latest, not in closing after the witnesses concerned had given evidence. Given these matters, the approach I have adopted is simply to address in this judgment where they arise any issues potentially affecting my assessment of the evidence presented by a particular witness.

36. Finally, the Claimants did not cross-examine a number of the Defendants' witnesses. It is, of course, generally a matter for the parties as to the particular course they may wish to take in the evidence and the Court does not condone repetitive questioning of multiple witnesses on the same point if it can fairly and effectively be addressed through one witness. However, the explanation proffered for this approach, ostensibly the limited time available and need for proportionality, was not compelling in circumstances in which much of the cross-examination of the Defendants' witnesses was taken up having them re-confirm aspects of their written evidence. This was not of much assistance to the Court. That was all the more marked when the Claimants made submissions in closing about shortcomings in some of the factual evidence even though they did not cross-examine some of the impugned witnesses about it, including on matters material to findings they invited the Court to make.

B. SOURCE/ INTERPRETATION OF THE EIR

Background to the EIR

37. The EIR gave domestic effect to EU Directive 2003/4/EC on public access to environmental information of 28 January 2003 (**Directive**), itself giving EU-wide effect to the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998 (**Convention**), to which the UK and the EU are signatories. The EIR replaced earlier 1992 Regulations which gave effect to an earlier 1990 EU Directive. Regulations affording a statutory right of access to EI held by public authorities have therefore existed at EU and UK level for over 30 years, with the EIR continuing to have domestic effect as retained EU law within the meaning of s.6(7) of the European (Withdrawal) Act 2018.

38. The Preamble to the Convention states as to the purpose for granting public access to EI:-

> "Recognizing also that every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations,
>
> Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights,
>
> Recognizing that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns,

> Aiming thereby to further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment."

39. To the same end, Recital 1 to the Directive states:-

> "Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment."

40. As explored further below, these indicate important context against which the EIR, including the definition of EI in Reg 2(1), falls to be construed.

The proper approach to interpretation of the EIR

41. In *DBEIS* v *Information Commissioner & Henney* [2017] EWCA Civ 844, the Court of Appeal summarised (at [14]-[15]) the guidance provided by EU and UK caselaw to the approach to interpretation of the EIR:-

> "14. The starting point is that the EIR must be interpreted, as far as possible, in the light of the wording and the purpose of the Directive, which itself gives effect to international obligations arising under the Aarhus Convention. In *Fish Legal* v *Information Comr* (Case C-297/12) [2014] QB 521, the CJEU stated:-
>
> > "35. First of all, it should be recalled that, by becoming a party to the Aarhus Convention, the European Union undertook to ensure, within the scope of EU law, a general principle of access to environmental information held by or for public authorities: see *Ville de Lyon* v *Caisse des dépôts et consignations* (Case C-524/09) [2010] ECR I-14115, para 36 and *Flachglas Torgau GmbH* v *Federal Republic of Germany* (Case C-204/09) [2013] QB 212, para 30.
> >
> > 36. As recital (5) in the Preamble to Directive 2003/4 confirms, in adopting that Directive the EU legislature intended to ensure the consistency of EU law with the Aarhus Convention with a view to its conclusion by the Community, by providing for a general scheme to ensure that any natural or legal person in a member state has a right of access to environmental information held by or on behalf of public authorities, without that person having to state an interest: see the *Flachglas Torgau* case, para 31.
> >
> > 37. It follows that, for the purposes of interpreting Directive 2003/4, account is to be taken of the wording and aim of the Aarhus Convention, which that Directive is designed to implement in EU law: see the *Flachglas Torgau* case, para 40."

42. Accordingly, the EIR falls to be interpreted in accordance with the language and objectives of the Directive and the Directive, in turn, with those of the Convention. For the purpose of interpreting the latter, *Fish Legal* also indicates (at [38]) that the Convention Implementation Guide "may also be regarded as an explanatory document, capable of being taken into consideration, if appropriate, among other relevant material … ", albeit "the observations in the guide have no binding force and do not have the normative effect of" the Convention. The Guide states in relation to the Preamble (at [p.18]) that:-

> "The preamble to the Aarhus Convention sets out the aspirations and goals that show its origins as well as guiding its future path. In particular the preamble emphasizes two main concepts: environmental rights as human rights; and the importance of access to information, public participation and access to justice to sustainable and environmentally sound development.
>
> **Making the connection to human rights**
>
> The preamble connects the concept that adequate protection of the environment is essential to the enjoyment of basic human rights with the concept that every person has the right to live in a healthy environment and the obligation to protect the environment. It then concludes that to assert this right and meet this obligation, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters.
>
> **Promoting sustainable and environmentally sound development**
>
> The preamble recognizes that sustainable and environmentally sound development depends on effective governmental decision-making that contains both environmental considerations and input from members of the public. When governments make environmental information publicly accessible and enable the public to participate in decision-making, they help meet society's goal of sustainable and environmentally sound development."

43. The Guide states (at [p.19]) in relation to access to information:-

> "Access to information stands as the first of the pillars. It is fitting that it comes first in the Convention, since effective public participation in decision-making depends on full, accurate, up-to-date information. However, it is equally important in its own right, in the sense that the public may seek access to information for any number of purposes, not just to participate.''

44. The Claimants also relied to the same end on orthodox principles of statutory interpretation and, as relevant background material at least, the comments of the relevant Minister as recorded in Hansard upon the introduction of the EIR in the House of Lords. The Defendants took exception to the admissibility of the latter but did not consider that much turned upon it. Given that the Minister's comments are a synopsis of the aims of the Convention, and it does not appear to be in dispute that these inform the interpretation of the EIR, I agree.

45. The Secretary of State has published a statutory Code of Practice (**Code**) pursuant to Reg 16. Although it does not have the status of legislation, public authorities are expected to adhere to it unless there are good reasons, capable of justification to the Information Commissioner (**IC**), why it would be inappropriate to do so.

46. In addition, the Information Commissioner's Office (**ICO**) has issued guidance on the EIR, including (i) the ICO Guide to the EIR (ii) Guidance on the Code and (iii) guidance on specific aspects of the EIR. In its guidance concerning "What are the Environmental Information Regulations?", the ICO gives its own synopsis of their underpinning:-

> "The principle behind the law is that giving the public access to environmental information will encourage greater awareness of issues that affect the environment. Greater awareness helps increase public participation in decision-making; it makes public bodies more accountable and transparent and it builds public confidence and trust in them."

47. Finally, I was shown a number of decisions of the First-tier (General Regulatory) (Information Rights) Tribunal (**Tribunal**) and the IC. Although they do not have the precedential status of Court of Appeal and UT authority, both parties relied on aspects of those decisions as instructive of how the EIR are applied in practice.

C. THE CONTENT OF THE EIR

48. The EIR came into force in the UK on 1 January 2005.

The meaning of "environmental information" - Reg 2(1)

49. Reg 2(1) (under "**Interpretation**") defines EI as " … any information in written, visual, aural, electronic or any other material form on:-

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);"

50. As Reg 2(1) itself notes, this definition replicates that contained in the Directive. It also corresponds broadly to that in the Convention.

51. The Claimants rely in particular on Reg 2(1)(a), (b), (c) and (f) for the purpose of **Issue 1**.

52. Reg 3(1) provides that, with certain exceptions, the EIR apply to "public authorities" (as that term is defined in Reg 2(2)). In light of the CJEU's decision in *Fish Legal*, there is no dispute that D1-D4 and D6-10 are public authorities for the purpose of the EIR. Although this is disputed with respect to D11 and D12, the 'stage 1' trial proceeded on the assumption that they too are public authorities for that purpose.

Duty to disseminate EI (Reg 4)

53. Reg 4 imposes on public authorities the following duty:-

"**Dissemination of environmental information**

(1) Subject to paragraph (3), a public authority shall in respect of environmental information that it holds:-

(a) progressively make the information available to the public by electronic means which are easily accessible; and

(b) take reasonable steps to organize the information relevant to its functions with a view to the active and systematic dissemination to the public of the information.

(2) For the purposes of paragraph (1) the use of electronic means to make information available or to organize information shall not be required in relation to information collected before 1st January 2005 in non-electronic form.

(3) Paragraph (1) shall not extend to making available or disseminating information which a public authority would be entitled to refuse to disclose under regulation 12.

(4) The information under paragraph (1) shall include at least—

(a) the information referred to in Article 7(2) of the Directive; and

(b) facts and analyses of facts which the public authority considers relevant and important in framing major environmental policy proposals.''

54. Article 7(2) of the Directive requires information to be made available and disseminated to include at a minimum (a) texts of international treaties, conventions or agreements, and of Community, national, regional or local legislation, on the environment or relating to it (b) policies, plans and programmes relating to the environment (c) progress reports on the implementation of the items referred to in (a) and (b) when prepared or held in electronic form by public authorities (d) national and, where appropriate, regional or local reports on the state of the environment as published at least every four years (e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment (f) authorisations with a significant impact on the environment and environmental agreements (or a reference to the place where such information can be requested or found within the framework of Article 3) and (g) environmental impact studies and risk assessments concerning the environmental elements referred to in Article 2(1)(a) (or similar place reference).

55. The ICO has issued specific guidance on "[p]roactive dissemination: routinely publishing environmental information (regulation 4)." In addition, the Code provides (at [II(4)-(7)]) that public authorities should give consideration to making web sites accessible to all and simple to use, so that information can be readily found, for example by enabling search functions and having an alphabetical directory as well as tree structures. Information should not be 'buried' on a site. In addition, public authorities should consider how to publicise applicants' rights to information, for example as part of general information on services provided by the authority. Finally, when public authorities are considering what information to disseminate proactively, they should not restrict themselves to the minimum requirements as listed in the Directive. For example, consideration should be given to disseminating frequently requested information, which will reduce individual requests for such information in the future.

56. As explained later in this judgment, the Claimants rely on the duty to disseminate information under Reg 4(1) as relevant to the approach to some of the issues in this case.

Duty to make EI available on request (Reg 5)

57. Reg 5 imposes on public authorities the following duty to make EI available on request to an "applicant":-

> **"Duty to make available environmental information on request**
>
> (1) Subject to paragraph (3) and in accordance with paragraphs (2), (4), (5) and (6) and the remaining provisions of this Part and Part 3 of these Regulations, a public authority that holds environmental information shall make it available on request.
>
> (2) Information shall be made available under paragraph (1) as soon as possible and no later than 20 working days after the date of receipt of the request.
>
> (3) To the extent that the information requested includes personal data of which the applicant is the data subject, paragraph (1) shall not apply to those personal data.
>
> (4) For the purposes of paragraph (1), where the information made available is compiled by or on behalf of the public authority it shall be up to date, accurate and comparable, so far as the public authority reasonably believes.
>
> ….."

58. Reg 7(1) permits the public authority to extend the time referred to in Reg 5(2) to 40 working days if it reasonably believes that the complexity and volume of the EI requested means that it is impracticable to comply within 20.

59. The ICO Guide to the EIR (at [p.20]) and ICO Guidance to the Code (at [17]) points out that, unlike the FOIA regime, there is no need for a request for EI to be made in writing. Oral requests are sufficient.

60. The Claimants also emphasise that requests made under the EIR are 'motive-blind' in the sense that the motives or interests of the EI applicant are not relevant. This is confirmed by Article 3(1) of the Directive and Article 4(1) of the Convention. The ICO Guide to the EIR

(at [p.7]) also emphasises that an applicant does not have to give a reason for wanting the EI. Rather, it is for the public authority to justify any refusal and all requests should be treated equally.

61. Article 2(4) of the Convention and Article 2(6) of the Directive provide that applicants for EI may be natural or legal persons.

Duty to provide advice and assistance (Reg 9)

62. Reg 9(1) requires a public authority to "provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants." Reg 9(2) also requires a public authority to seek more particulars in relation to the request and to assist the applicant in providing these where the former decides that the latter has "*formulated a request in too general a manner*".

63. The Code indicates (at [10]-[11]) that appropriate assistance might include (i) "providing access to detailed catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the public authority" and/ or (ii) "advising the person that another person… may be able to assist them with the application or make the application on their behalf". Public authorities "should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant". The ICO's detailed guidance on Reg 9 explains that giving advice and assistance "is a wide-ranging duty. Often, it may be relevant to most, if not all, stages of the request process."

64. Again, the Claimants rely on Reg 9(1) as informing the proper approach to the issues in this case.

EI "held" by a public authority (Reg 3(2))

65. Reg 3(2) explains that EI is "held by a public authority" for the purposes of the EIR (including Regs 4 and 5) "if the information:-

    (a) is in the authority's possession and has been produced or received by the authority; or

    (b) is held by another person on behalf of the authority."

66. Reg 3(2) is central to **Issue 2**.

Transfer of a request for EI not held (Reg 10)

67. Where a public authority receives a request for EI that it does not hold, but believes that another public authority does, the former shall either transfer the request to the latter or supply the applicant with the name of the latter and inform the applicant accordingly with the refusal of the information under Reg 14(1).

Charging for EI (Reg 8)

68. Reg 8(1) provides that a public authority may charge for making EI available in accordance with Reg 5(1), albeit Reg 8(2) precludes a charge "for allowing the applicant:-

    (a) to access any public registers or lists of environmental information held by the public authority; or

    (b) to examine the information requested at the place which the public authority makes available for that examination."

69. Moreover, any charge under paragraph 8(1) must not exceed an amount that the public authority is satisfied is a "reasonable amount" (Reg 8(3)).

Requesting EI in a particular form or format (Reg 6(1))

70. Where a person requests EI in a particular form or format, Reg 6(1) provides that "a public authority shall make it so available unless:-

    (a) it is reasonable for it to make the information available in another form or format; or

    (b) the information is already publicly available and easily accessible to the applicant in another form or format."

71. Reg 6(1)(b) is central to **Issue 3.1**.

Exceptions to the duty to disclose EI

72. Reg 12 admits of exceptions to the duty to disclose EI where Reg 12(4) or (5) is engaged and the public interest in maintaining the exception outweighs the public interest in its disclosure.

73. Reg 12(4) provides that the public authority may refuse to disclose EI to the extent:-

    (a) it does not hold that EI when an applicant's request is received;

    (b) the request for EI is manifestly unreasonable;

    (c) the request for EI is formulated in too general a manner and the public authority has complied with Reg 9;

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

    (e) the request involves the disclosure of internal communications.

74. Reg 12(4)(a) is again central to **Issue 2**. Reg 12(4)(b) is central to **Issue 4**. Further exceptions are provided by Reg 12(5) (e.g. where national security, the course of justice, intellectual property rights or commercial confidentiality would be adversely affected), albeit none is said to be relevant here.

75. The Claimants also emphasise that, these exceptions notwithstanding, Reg 12(2) requires the public authority to apply a presumption in favour of disclosure. To the same end, the

ICO Guide to the EIR states (at [p.7]) that "everybody has a right to access environmental information. Disclosure of information should be the default - in other words, information should be kept private only when there is a good reason and the Regulations allow it".

76. The Claimants also emphasise that, consistent with the general EU law principle that exceptions should be construed restrictively, the UT has held in the EIR context that "… the grounds for refusal under the EIRs should be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure" (*Vesco* v *Information Commissioner* [2019] UKUT 247 (AAC) at [16]).

77. The Defendants emphasise that the above presumption arises in the context of excepted matters and should not be read across the EIR more broadly.

Personal data (Reg 13)

78. In relation to personal data, Reg 12(3) provides that to the extent that the information requested includes such data of which the applicant is not the data subject, it shall not be disclosed otherwise than in accordance with Reg 13. The personal data exception does not therefore require a balancing of the relevant public interests. Rather, Reg 13(1) provides that personal data shall not be disclosed where one of the three stipulated conditions is satisfied.

79. Reg 13 is central to **Issue 3.8**, for that purpose the key issues being whether the relevant categories of CON29DW data identified by the Defendants comprise personal data and, if so, whether disclosure thereof to a member of the public would contravene any of the data protection principles (**DPP**).

The FOIA regime

80. It is also helpful briefly to consider the Freedom of Information Act 2000 (**FOIA**). Unlike the EIR, FOIA is a purely domestic regime which does not give effect to any international or EU obligations. FOIA applies to all kinds of information held by public authorities, not just EI. Moreover, although both FOIA and the EIR apply to public authorities, the term is defined differently for each, with none of the Defendants being public authorities for FOIA purposes. Disclosure under both FOIA and the EIR in response to a request for information is often said to be to the 'world at large'.

81. In *Henney*, Beatson LJ highlighted certain differences between the two regimes, observing (at [4]) that the obligations of public authorities to disclose (EI) under the EIR are generally broader than under FOIA to disclose (non-EI) information. For example, apart from the exception for personal data, all EIR exceptions are subject to the public interest balancing test, whereas a number of FOIA exemptions are absolute. Moreover, FOIA does not contain the presumption in favour of disclosure under Reg 12(2). Perhaps most important for present purposes is the difference explained by Beatson LJ (at [37]) between the definition of "information" in s.1 of FOIA and of EI in Reg 2(1)(c), the focus of the former being on the information, the latter focusing additionally on the relevant *measure*.

82. Despite these differences, there is an interrelationship and overlap between the two regimes, with the courts seeking to give similar legislative provisions a consistent interpretation such that FOIA case law is often relevant to the interpretation of the EIR. The two regimes also

share (with some differences) the same enforcement and appeals provisions in Part IV and V of FOIA, enabling dissatisfied requesters of information to complain to the IC, with a right of appeal to the Tribunal.

D. THE DEFENDANTS' STATUTORY RESPONSIBILITIES

83. The main duties and powers of the Defendants as statutory water and sewerage undertakers are set out in the WIA. The Claimants rely on a number of them for the purpose of identifying the relevant 'measures' or 'activities' within the meaning of Reg 2(1)(c) which the information responsive to the CON29DW questions is said to be 'on', those measures or activities said to have potential for huge environmental impacts. Although extensive, it is convenient to summarise them here since they inform the argument under **Issue 1**.

The WIA regime

84. Part I of the WIA sets out the powers of Ofwat and identifies one of its duties as the furtherance of the "resilience objective", namely to secure the long-term resilience of water undertakers' supply systems and sewerage undertakers' sewerage systems as regards environmental pressures, population growth and changes in consumer behaviour (s.2(2A)(e) and s.2(2DA)(a)).

85. Part I also imposes "[g]eneral environmental and recreational duties", including in the exercise by the WASCs of any of their powers conferred with respect to proposals relating to any of their functions to comply with requirements imposed, including "to further the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest and, in the case of the exercise of such a power by a company holding an appointment as a relevant undertaker, as to further water conservation" (s.3(1)-(2)).

86. S.4(3) contains consultation obligations in connection with works that may be carried out at sites of special scientific interest.

87. S.5 makes provision for the Secretary of State to issues codes of practice with respect to environmental and recreational duties, including to give practical guidance and promote desirable practices. The Water and Sewerage (Conservation, Access and Recreation) (Code of Practice) Order of 2000 gave effect to such a code.

88. That code provides advice and guidance on the exercise of undertakers' duties, including the general approach to matters such as seeking to contribute to the overarching objective of sustainable development and having special regard to the requirements of statutory protection afforded to areas, species or habitats afforded landscape or conservation designations (both on land they own and on which they exercise their functions).

89. The code also provides advice and guidance on more specific matters such as water resources management, pipe laying and sewerage, sewage disposal and pollution control. So, for example, in relation to sewerage connections, the code provides (at [3.17]) that:-

> "When considering whether its further duty under section 101A of the Water Industry Act to provide sewers applies, a sewerage undertaker must have regard, inter alia, to the nature and extent of any adverse effects on the environment as a result of the premises not being connected to a public sewer ..."

90. Moreover, in relation to pipe laying, when laying new trunk sewers and trunk mains or replacing existing pipelines, "the undertakers should seek to adjust routes to minimise damage to the landscape and important habitats, to by-pass sites of importance for conservation and to avoid damage to features of archaeological or historical interest." The use of the "trenchless method" should be considered to "minimise environmental damage" ([3.18]).

91. Part II of the WIA concerns the appointment and regulation of water and sewerage undertakers by Ofwat.

92. Part IIA of the WIA concerns the regulation of provision of infrastructure for the use of the water and sewerage undertakers, including as to its design, construction, ownership and operation.

Water supply – powers and duties (WIA, Part III)

93. Part III of the WIA concerns the main powers and duties of water undertakers, including (at s.37) the general duty to " ... develop and maintain an efficient and economical system of water supply within its area and to ensure that all such arrangements have been made:-

    (a) for providing supplies of water to premises in that area and for making such supplies available to persons who demand them; and

    (b) for maintaining, improving and extending the water undertaker's water mains and other pipes,

    as are necessary for securing that the undertaker is and continues to be able to meet its obligations under this Part."

94. Other powers and duties under Part III concerning water supply include:-

    (i) the undertaker's obligation (with required consultation with stipulated public bodies) to prepare, publish, maintain, review and revise a water resources management plan to show how it will manage and develop water resources to meet its Part III obligations (s.37A(1));

    (ii) the Secretary of State's power to make regulations to determine the extent to which breaches of the provisions in Part III are to constitute breaches of the duty imposed by s.37, to supplement that duty by the establishment of overall performance standards in the provision of supplies of water and to require the undertaker to pay compensation for failure to meet prescribed standards (s.38);

    (iii) Ofwat's obligation to collect from the undertaker, and the undertaker's obligation to provide to Ofwat, information concerning water supply standards performance levels achieved and compensation paid (s.38A);

(iv) the undertaker's obligation to provide, as directed by Ofwat, customers with information concerning water supply standards performance levels achieved (s.39A);

(v) the undertaker's obligation to prepare, publish and maintain a drought plan (s.39B);

(vi) the undertaker's obligation, subject to specified conditions, to provide in response to a requisition a water main in a particular locality in its area to provide sufficient water supplies for domestic purposes (s.41);

(vii) the undertaker's obligation to make a connection where the owner or occupier of premises consisting in the whole or part of a building (or proposed building) serves notice requiring the connection for domestic water supply purposes of a service pipe to those premises with the undertaker's water mains (s.45);

(viii) the undertaker's obligation to carry out ancillary works in pursuance of any such connection requisition (s.46);

(ix) the undertaker's power to require compliance with certain conditions following service of a connection requisition, including as to permitted security for discharge of the undertaker's connection obligation, the payment of outstanding water supply and disconnection charges and the installation of a water meter (s.47);

(x) the undertaker's power to agree with any person constructing any water main or service pipe (or proposing to do so) to declare it vested in the relevant undertaker upon completion of the work or at some future date if constructed in accordance with the terms of the agreement (s.51A);

(xi) the undertaker's obligation (or domestic supply duty) to provide premises (until specified interruption) with a sufficient supply of water for domestic water purposes and to maintain the connection between the mains and service pipe serving those premises (s.52);

(xii) the power of the Secretary of State to make regulations that water supplied to any premises is or is not to be regarded as wholesome if it satisfies prescribed requirements, including authorisation of relaxation of, or departures from, those prescribed requirements (s.67);

(xiii) the undertaker's obligation to ensure that water supplied to any premises for domestic or food production purposes is wholesome at the time of supply and to ensure as far as reasonably practicable no deterioration in the quality of the water from the relevant source (s.68); and

(xiv) the undertaker's power, in certain circumstances, to disconnect service pipes or otherwise cut off the supply of water to premises, or require customers to take steps to ensure that damage to persons or property, water contamination or waste, misuse or undue consumption of water does not occur (s.75).

95. Part IIIA of the WIA provides that:-

    (i) every water undertaker shall promote the efficient use of water by customers (s.93A);

    (ii) Ofwat may impose requirements on water undertakers to take such action or achieve such overall performance standards as it may specify in the performance of their water efficiency duty under s.93A (s.93B); and

    (iii) Ofwat may arrange for such requirements and the related performance levels of the water undertakers to be publicised, including by requiring them to inform their customers of the same (s.93C-s.93D).

Sewerage services – powers and duties (WIA, Part IV)

96. Part IV of the WIA concerns the main powers and duties of sewerage undertakers, including the general duty (s.94) to:-

    "(a) provide, improve and extend such a system of public sewers (whether inside its area or elsewhere) and so to cleanse and maintain those sewers and any lateral drains which belong to or vest in the undertaker as to ensure that that area is and continues to be effectually drained; and

    (b) to make provision for the emptying of those sewers and such further provision (whether inside its area or elsewhere) as is necessary from time to time for effectually dealing, by means of sewage disposal works or otherwise, with the contents of those sewers."

97. Other powers and duties under Part IV include:-

    (i) the Secretary of State's power to make regulations to determine the extent to which breaches of the provisions in Part IV are to constitute breaches of the duty imposed by s.94, to supplement that duty by the establishment of overall performance standards in the provision of sewerage services and to require the undertaker to pay compensation for failure to meet prescribed standards (s.95);

    (ii) Ofwat's obligation to collect from the undertaker, and the undertaker's obligation to provide to Ofwat, information concerning sewerage services performance levels achieved and compensation paid (s.95A);

    (iii) the undertaker's obligation to provide, as directed by Ofwat, customers with information concerning sewerage service standards performance levels achieved (s.96A);

    (iv) the undertaker's obligation, subject to specified conditions, to provide in response to a requisition a public sewer in a particular locality in its area for drainage for domestic purposes, or to provide a lateral drain to communicate with a public sewer (s.98);

(v) the undertaker's obligation, subject to specified conditions, to provide a public sewer in a particular locality in its area for drainage for domestic purposes where there are buildings on the premises, the drains or sewers used for drainage for domestic sewerage purposes do not connect with a public sewer and the drainage of any premises gives rise to such adverse effects to the environment or amenity that it is appropriate to provide a public sewer (s.101A);

(vi) the undertaker's power to declare vested in it any existing sewer in its area or which serves the whole or any part of that area, any such lateral drain which communicates, or is to communicate with, a public sewer, or any such sewage disposal works (s.102);

(vii) the undertaker's power to agree with any person constructing any sewer, drain intended to communicate with a public sewer vested in that undertaker or sewage disposal works to declare it vested in the undertaker upon completion of the work or at some future date if constructed in accordance with the terms of the agreement (s.104);

(viii) the undertaker's obligation to allow communication with a public sewer where the owner or occupier of premises or the owner of any private sewer draining premises gives notice of his proposal for such communication (s.106);

(ix) the undertaker's power to alter the existing drainage system by closing an existing drain or sewer or filling up a cesspool where that system of drainage, although sufficient for the effectual drainage of the premises, is not adapted to the general sewerage system in the area or is otherwise considered objectionable, subject to the undertaker first providing an equally effectual drain or sewer which communicates with a public sewer (s.113);

(x) the undertaker's power to examine and test the condition of a drain or sewer where it appears that any drain connecting with a public sewer, or any private sewer so connecting, is in such condition to be likely to be injurious or to cause injury to health or as to be a nuisance or is so defective as to admit subsoil water (s.114);

(xi) the undertaker's power to consent to the occupier of trade premises discharging trade effluent into the public sewers (s.118); and

(xii) the undertaker's duty to produce annual reports in relation to storm overflows (s.141C).

98. Since it is relevant to the information responsive to a number of the CON29DW questions, I note here that, as explained by the Defendants' witnesses, with effect from 1 October 2011, the bulk of private drains for existing terraced and semi-detached houses became vested in the WASCs by reason of The Water Industry (Schemes for Adoption of Private Sewers) Regulations 2011.

Water and sewerage charges (WIA, Part V)

99. Part V of the WIA confers power on water and sewerage undertakers to fix and recover charges for their services (s.142(1)). An undertaker also has the power to make a charges

scheme (s.143), as to which, Ofwat may issue rules (s.143B) in accordance with the guidance issued by the Minister (s.144ZE). The charging guidance lists four overriding objectives of equal weight to be reflected in Ofwat's charging rules, including environmental protection. The guidance indicates:-

(i) that "[c]harging can play a key role in securing the economically and environmentally efficient use of resources; encouraging innovation and ensuring that environmental goods are costed appropriately" ([2.8]);

(ii) "the important role to be played by promoting a more efficient use of scarce water resources in securing the long-term health and resilience of the water environment" and the role played by metered charges, the Government's policy being to encourage undertakers to do more to promote metering for those who would benefit ([4.6]);

(iii) the Government's expectation that sustainable drainage schemes will form part of the undertakers' networks, the construction, maintenance and operation of which by the undertakers in fulfilment of their statutory duty will relieve the public sewer, and can be financed through the undertakers' ordinary charges scheme, with maintenance costs funded through the surface water element of sewerage bills ([4.9]-[4.10]); and

(iv) the customers' ability to reduce their sewerage charges by constructing soakaways which do not drain into the public network, entitling them to a surface water rebate, and reducing pressure on drainage systems and reducing the need for additional investment in new sewers (at [4.11]).

100. Part VI of the WIA confers powers on undertakers, including to:-

(i) compulsorily purchase land required (s.155(1));

(ii) make byelaws with respect to waterways and land (s.157);

(iii) lay pipes in streets and other land (ss.158-159);

(iv) carry out works for sewerage purposes (s.160), securing that the water in any relevant waterworks is not polluted (s.161), installing, connecting and maintaining water meters (s.162) and fitting stopcocks to any service pipe supplying water (s.163);

(v) make agreements with respect to the carrying out of works to drain land or more effectively collect, convey or preserve the purity of water the undertaker is permitted to take (s.164);

(vi) discharge water for works purposes (s.165); and

(vii) carry out works under compulsory works orders (s.167).

101. Part VI of the WIA also confers upon water undertakers certain statutory rights of entry onto land, including for works, surveys and water searches, disconnection, water quality monitoring, sewerage and metering purposes (ss.168-172).

Information provision (WIA, Part VII)

102. Part VII of the WIA imposes duties on undertakers with respect to the provision of information, including to:-

(i) maintain trade effluent records (consents, directions, agreements and notices) and make them available for public inspection free of charge or provide copies for a reasonable sum (s.196);

(ii) keep a register of persons and premises for the purposes of works discharges (s.197); and

(iii) keep records of the location of their waterworks and sewerage assets publicly inspectable, at all reasonable times, free of charge in map form at their offices (ss.198(1) and 199(1)).

103. Asset location records are required to comprise:-

(i) for waterworks, every resource main, water main or discharge pipe and any other underground works, other than a service pipe, for the time being vested in that undertaker, together with every water main in relation to which a declaration of vesting, or agreement for such, has been made.

(ii) for sewerage, every public sewer, lateral drain or disposal main vested in the undertaker, together with every sewer or lateral drain in relation to which a declaration of vesting, or agreement for such, has been made.

104. Sewerage undertakers are also required to provide local authorities with copies of the same sewerage records as are required to be kept under s.199 (and modifications thereto), with a corresponding duty of inspection on the local authority (s.200).

105. The water and sewerage undertakers are also obliged to provide the Secretary of State with all such information concerning the actual or proposed performance of their functions as he or she may require (s.202).

New Roads and Street Works Act 1991

106. Finally on the subject of information provision, the Claimants referred me to the NRSWA, setting out requirements to which water and sewerage undertakers must adhere when installing, renewing, maintaining or inspecting underground apparatus in the street, including as to the recording of the location of every item of apparatus as soon as reasonably practicable after placing or locating it in the street, such records to be kept up to date, in the prescribed form and available for inspection at all reasonable hours and free of charge by any person authorised to have authority to execute works in the street or otherwise appearing to the undertaker to have a sufficient interest (s.79).

107. The evidence of a number of the Defendants' witnesses was to the effect that they produced their waterworks and sewerage asset maps to comply with their WIA and NRSWA information provision obligations. The public availability of, and ease of access to, those maps falls to be considered under **Issue 3.1**.

Regulations made under the WIA

108. Before leaving the WIA, I should also add that regulations have been made thereunder encompassing water quality, including relevantly to one of the previous CON29DW questions, The Water Supply (Water Quality) Regulations 2000, as well as customer service, complaints and compensation, interruption of supply, water pressure and sewer flooding (The Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008).

WISER

109. Finally, the Claimants also relied on the Water Industry Strategic Environmental Requirements (**WISER**), produced by the Environment Agency and Natural England, setting out "the statutory and non-statutory expectations of water companies for price review 2024 and expected practice", organised under three overarching objectives, being (i) a thriving natural environment; (ii) resilience for the environment and customers and (iii) expected performance and compliance. The intention of the WISER document is expressed as a "strategic steer" to companies on improving the environment, resilience for the environment and customers, flood risk and relevant legal requirements "designed to help water companies understand their environmental obligations and the regulators' expectations of them."

110. The document identifies the current environmental challenges, including the lack of significant improvement in the ecological status of England's waters, climate change and biodiversity loss and growing demands on the environment. The Government's priorities for the relevant period are stated to include action to enhance water quality and delivery of a resilient and sustainable water supply, specifically (i) significantly reducing the frequency and volume of sewage discharges from storm overflows so they operate infrequently and only in cases of unusually heavy rainfall (ii) achieving zero serious pollution incidents and significantly reducing all pollution incidents (iii) reducing nutrient pollution from wastewater treatment works and (iv) maintaining, restoring and enhancing protected sites and priority habitats such as chalk streams.

111. The Government's environmental ambitions are stated to include water quality, the Environment Act 2021 imposing binding targets, including in the priority area of water, as well as new biodiversity duties for water companies and making statutory the requirement for drainage and sewerage management plans. Other expectations and legal obligations are identified, including for the three overarching objectives in this document (and in the more detailed accompanying technical document), in the areas of bathing water, drinking water, protected habitats, biodiversity, net zero, water quality, drainage resilience and flood risk.

E. THE FORM CON29DW

Background

112. The local authority property search form, CON29R or, with optional enquiries, form CON29O, requested information from local authorities about a property. It was usually used when the property was being bought and sold. Prior to 2002, it included two drainage

and water questions. In 2002, the Law Society developed the CON29DW to provide purchasers (and lenders) with more drainage and water information.

113. The introduction of Home Information Packs (**HIPs**) was announced in the 2003 Queen's Speech, followed by the introduction of the Home Information Pack Regulations 2007, Regulation 9(m) requiring HIPs to contain "a search report which complies with Parts 1 and 2 of Schedule 7 and with Schedule 9 (drainage and water enquiries)." Schedule 9 listed the matters that such a search report had to cover, comprising essentially the information in a CON29DW. HIPs were compulsory for property purchases, CON29DWs becoming known as 'official' searches.

114. The HIP regime endured for three years or so. During that period, PSRs were not permitted for use in property sales. PSCs that wished to provide a customer with water and drainage information therefore had to buy and re-sell CON29DWs. From May 2010, HIPs ceased to be compulsory, albeit 'official' searches remain a common feature of property sales, the Drainage and Water Search Network (**DWSN**), an industry body, describing the CON29DW as:-

> "An essential part of the conveyancing process, the CON29DW products provide key information regarding water and sewerage services or assets for prospective property owners, protecting buyers and their advisers from unnecessary risk, complementing their own due diligence."

The CON29DW versions

115. Two versions of the residential CON29DW fall to be considered, version 1 (*v*1) and version 2 (*v*2). Since it will be necessary to consider these in some detail, I reproduce below the iteration taken from the LOI combining *v*1 and *v*2. Category A questions do not have a CON29DW version (*v*) reference as the relevant questions appear in both CON29DW *v*1 and *v*2. Category B questions have a CON29DW *v*2 reference (*v*2/[**x**]). Category C questions have a CON29DW *v*1 reference (*v*1/[**x**]). The CommercialDW contains a number of questions common to the CON29DW. Questions specific to the CommercialDW are not reproduced immediately below but are addressed later in this judgment where they arise.

Q.	Con29DW (residential) questions
Category A1 - December 2013 to date	
1.1	Where relevant, please include a copy of an extract from the public sewer map.
1.2	Where relevant, please include a copy of an extract from the map of waterworks.
2.1	Does foul water from the property drain to a public sewer?
2.2	Does surface water from the property drain to a public sewer?
2.3	Is a surface water drainage charge payable?
2.4	Does the public sewer map indicate any public sewer, disposal main or lateral drain within the boundaries of the property?
2.5	Does the public sewer map indicate any public sewer within 30.48 metres (100 feet) of any buildings within the property?
2.6	Are any sewers or lateral drains serving or which are proposed to serve the property the subject of an existing adoption agreement or an application for such an agreement?
2.7	Has a sewerage undertaker approved or been consulted about any plans to erect a building or extension on the property over or in the vicinity of a public sewer, disposal main or drain?
2.9	Please state the distance from the property to the nearest boundary of the nearest sewage treatment works.
3.1	Is the property connected to mains water supply?
3.2	Are there any water mains, resource mains or discharge pipes within the boundaries of the Property?
3.3	Is any water main or service pipe serving or which is proposed to serve the property the subject of an existing adoption agreement or an application for such an agreement?
3.4	Is this property at risk of receiving low water pressure or flow?
4.2	Who bills the property for sewerage services?
4.3	Who bills the property for water services?
4.4	What is the current basis for charging for sewerage [and/or] [and] water services at the property?
4.5	Will the basis for charging for sewerage and water services at the property change as a consequence of a change of occupation?
Category B - only from 4 July 2016 to date	
*v*2/**2.4.1**	Does the public sewer map indicate any public pumping station or ancillary apparatus within the boundaries of the property?
*v*2/**2.5.1**	Does the public sewer map indicate any public pumping station or any other ancillary apparatus within 50 metres of any buildings within the property?
*v*2/**2.8**	Is [the] [any] [normally occupied] [building] [dwelling house] which [is or] [forms part of the] property, [or any part of the property] at risk of internal [foul] flooding due to overloaded public sewers?
*v*2/**3.5**	What is the classification of the water supply for the property?
*v*2/**3.6**	Please include details of the location of any water meter serving the property.
*v*2/**4.1.1**	Who is responsible for providing the sewerage services for the property?
*v*2/**4.1.2**	Who is responsible for providing the water services for the property?
Category C1 - December 2013 – 3 July 2016 only	
*v*1/**2.8**	Is [any] [the] [normally occupied] building] [the dwelling house] [which is or forms part of] the property, [or any part of the property] at risk of internal flooding due to overloaded public sewers?
*v*1/**3.5**	Please include details of a water quality analysis made by the water undertaker for the water supply zone in respect of the most recent calendar year.
*v*1/**3.6**	Please include details of any departures, authorised by the Secretary of State under Part 6 of the 2000 Regulations from the provisions of Part 3 of those Regulations.
*v*1/**3.7**	Please include details of the location of any water meter serving the property.
*v*1/**4.1**	Who are the sewerage and water undertakers for the area?

Local authority property searches

116. Finally, it is appropriate to note that searches undertaken by local authorities (in the form of the CON29R or CON29O) are subject to their own statutory regime under the Local Authorities (England) (Charges for Property Searches) Regulations 2008 (**CPSR**), made under s.150 of the Local Government and Housing Act 1989. The CPSR permit local authorities to charge for answering enquiries about a property, albeit as the related ICO Guidance makes clear, that power is constrained for EI provided in response to a "personal search" to which the charging provisions in the EIR do apply. By contrast, since an "official search" requires the local authority to guarantee the information, and therefore goes beyond the right of access under the EIR, the authority can charge under the CPSR. Although not subject to their own specific statutory regime, the Defendants say that their drainage and water searches too go beyond the mere provision of information they hold but also encompass additional services such that the EIR charging regime in Reg 8 does not apply to them. I re-visit that question under **Issue 5** but consider first the prior question of whether the CON29DW information was, in fact, EI at all (**Issue 1**).

F. ISSUE 1 – ENVIRONMENTAL INFORMATION

Introduction

117. The Claimants assert that all information responsive to the CON29DW (and CommercialDW) questions is EI within the meaning of Reg 2(1). The Defendants deny this, albeit AW's response is a mixture of denial and non-admission.

118. The LOI asks under **Issue 1** whether the "various items of information in a CON29DW" are EI within the meaning of Reg 2(1) and, under Issue 1.1 (relating to *v.*1 and *v.*2 of the CON29DW and the common questions from the CommercialDW), whether for each of the questions identified therein, the "information responsive to that question" is EI.

119. Issue 1.2 is no longer live, D5 no longer being a Defendant.

120. The fact patterns and agreed or assumed facts for **Issue 1** concern the versions of CON29DW or CommercialDW used, their periods of use and the provision of information responsive thereto.

Preliminary point

121. A preliminary point arises as to whether the relevant information for the purpose of this stage 1 trial was (i) the direct answer to the relevant question or request (without regard to additional information the Defendants chose to provide) or (ii) the information actually provided by the Defendants in response to CON29DWs and CommercialDWs. The Claimants contend for (i), albeit they were content for the Court to make findings with respect to both. The Defendants contend for (ii). Although the answers to the CON29DW provided by the Defendants do contain variations, including additional information beyond that strictly required, the Reg 5 duty is to make available information *on request*. Since it is the request for the information that frames what the public authority is required to make available, and having regard to my views as to the ongoing utility of deciding the EIR Issues, it seems to me that these are most appropriately considered by reference to the information actually called for by the question without supplementation, save for **Issue 5** for which the

additional information provided by the Defendants is relied upon as a particular feature of the CON29DW said to take it outside the EIR charging regime.

The meaning of EI – UK caselaw

122. As noted, EI is defined in Reg 2(1). The parties referred me in this regard to the Court of Appeal decisions in *Henney* and *Department of Transport* v (1) *Information Commissioner and (2) Hastings* [2019] EWCA Civ 2241 and the UT decision in *DfT, DVSA and Porsche Cars GB Ltd* v *Information Commissioner and John Cieslik* [2018] UKUT 127 (AAC), as summarised below.

Henney

123. *Henney* concerned a FOIA request to the (then) Department for Energy and Climate Change for information about an independent project assessment review of the communications and data component (**PRA**) of the UK Government's Smart Meter Programme (**SMP**) introduced under a 2009 Council Directive. The programme sought to provide sophisticated information about energy usage to consumers, suppliers and network operators to facilitate better control of energy usage and improve grid efficiency. After receiving a heavily redacted copy of the report representing the culmination of the review (and some further information after re-evaluation of the request), Mr Henney complained to the IC, saying that his request should have been dealt with under the EIR since it was a request for EI within the meaning of Reg 2(1), in particular Reg 2(1)(c), for "any information ... on ... measures ... affecting or likely to affect" the state of the elements of the environment or factors affecting those elements. The UT agreed with the Tribunal that the information was 'on' a relevant measure, namely the SMP, as to which, it was common ground that the programme as a whole was a measure under Reg 2(1)(c) likely to affect the relevant elements and factors within the meaning of Reg 2(1)(a) and (b) respectively. The UT did not decide whether the communications and data component was itself a measure, considering it permissible to look beyond the precise issue with which the disputed information was concerned and to have regard to what it described as the "*bigger picture*".

124. In considering the UT's approach in *Henney*, Beatson LJ in the Court of Appeal identified the (uncontroversial) principles gleaned from CJEU and UK court decisions. The starting point is that the EIR must be interpreted, as far as possible, in light of the wording and purpose of the Directive and the Convention, both stressing the importance of access to, and dissemination of, EI (at [14]-[15]) (citing *Fish Legal* at ([35]-[37]). The term "environmental information" was to be given a broad meaning to avoid " … the effect of excluding from the scope of the directive any of the activities engaged in by the public authorities" (at [16]) (referring to *Glawischnig* v *Bundesminister für soziale Sicherheit und Generationen* (Case C-316/01) EU:C:2003:343 (at [24])). However, there are limits to that broad approach (at [17]): the fact that the Directive is to be given a broad meaning does not mean that it intended "to give a general and unlimited right of access to all information held by public authorities which has a connection, however, minimal with one of the environmental factors mentioned. … To be covered by the right of access it establishes, such information must fall within one or more of the … categories set out in that provision" (*Glawischnig* at [25]). In *Glawischnig*, the CJEU had concluded (at [35]) that certain information relating to administrative measures monitoring products manufactured from genetically modified soya and maize did not constitute EI within the meaning of the predecessor to the Directive.

125. Beatson LJ considered unhelpful the UT's "bigger picture" terminology, a phrase apt to lose sight of relevant context, "deflect attention" from the statutory definition in Reg 2(1)(c) and lead to an approach that assesses whether information is 'on' a measure by reference to whether it relates to, or has a connection with, one of the environmental factors mentioned, however minimal. Nevertheless, he concluded (at [35]-[36]) that the UT had not fallen into error in applying Reg 2(1). In reaching that view, Beatson LJ noted, as the UT had done, that it was first necessary to identify the measure that the disputed information was 'on', information being 'on' a measure if it is about, relates to or concerns the measure in question ([37]). The language of Reg 2(1)(c) did not require the measure to be that which the information is "primarily" on. The UT's finding that it was permissible to look beyond the precise issue did not amount to a finding that it was permissible to look at issues with which the information was not concerned or was merely connected. It simply meant that the tribunal was not restricted by what the information is specifically, directly or immediately about ([39]). Moreover, information may be about a specific measure, about more than one measure, or about both a measure which is a sub-component of a broader measure and the broader measure as a whole ([42]).

126. Identifying the measure that the disputed information is 'on' may require consideration of the wider context. That wider context may include the purpose for which the information was produced, how important the information was to that purpose, how it is to be used and whether access to it would enable the public to be better informed about, or to participate in, decision-making in a better way. None of these matters may be apparent on the face of the information itself. When identifying a measure, a tribunal should apply the definition in the EIR purposively, bearing in mind the modern approach to statutory interpretation, particularly to international and EU measures such as the Convention and Directive. Having taken these steps, it is then necessary to decide whether the measure so identified has the requisite environmental impact for Reg 2(1) purposes ([43]).

127. Simply because a project had some environmental impact did not mean that all information concerned with the project was EI but nor, given that the Directive is to be given a broad meaning, need the information itself be intrinsically environmental ([45]). The line between information that qualifies and that which does not will be drawn by reference to the general principle that the EIR, Directive and Convention are to be construed purposively. Determining on which side of the line information falls will be fact and context specific [(47]). The recitals to the Convention and the Directive, referring to the requirement for citizens to have access to information to enable them to participate in environmental decision-making more effectively, and the contribution of greater access to a greater awareness of environmental matters and, eventually, a better environment, give an indication of how the broad language of the text may have to be assessed and provide a framework for determining whether information can properly be described as 'on' a given measure ([48]). The purposive approach (including enabling public participation in environmental decision-making) may yet narrow an otherwise over-broad definition, in effect 'reading down' the provision by legislative purpose ([50]).

128. I address a number of these points in greater detail below under the parties' respective arguments on **Issue 1**. However, applying them to the case before him, Beatson LJ concluded that the PRA was 'on' the SMP for the purposes of Reg 2(1)(c). Although focused on the communications and data component, it could nonetheless be described as being about the wider SMP, that component being integral to the programme as a whole.

Hastings

129. The approach in *Henney* was summarised and applied by the Court of Appeal in *Hastings* (at [28]-[31]), that case being concerned with a journalist's request to two UK Government departments relating to a meeting between the (then) Prince of Wales and departmental ministers. The Department for Transport (**DfT**) declined the request, principally on the basis of the FOIA exemption for communications with the heir to the throne. The journalist complained to the IC that the DfT should have considered the request under the EIR. The DfT then disclosed the name of the minister attending the meeting but refused disclosure of the rest of the information sought, it not being considered to be EI. The IC upheld the complaint, taking the view that most of the disputed information was "environmental". The DfT appealed, albeit conceding before the matter reached the Tribunal that substantial parts of the information (concerned with the Government's activities in the environmental field) were EI. However, the IC maintained that the (undisclosed) remainder of the information (including briefing material in connection with the meeting) fell to be treated in the same way.

130. The case therefore concerned information of potentially "mixed" character, with some undoubtedly EI, but with some the DfT contended was not such that the FOIA regime was engaged instead (with its absolute exemption for communications with the heir to the throne). After considering (at [28]-[31]) the overriding principles indicated by *Henney*, McCombe LJ stated (at [32]) that:-

> "In seeking to provide "guidance" for the general run of cases where "mixed" information is in issue, it seems to me that one will rarely need to do more than apply these principles to the information as a whole, in order to see whether (in the context of the whole and applying a broad and holistic view) the disputed elements of the information are "on" the "measure" in question. I would not wish to expand on those principles in the present case."

131. It was common ground in *Hastings* that the "measure" in question for Reg 2(1)(c) purposes was Government housing policy. McCombe LJ considered that the released information contained the material elements 'on' that measure but that the framework for the meeting discussions in the undisclosed material did not help better to understand it. Reference to "context" added nothing. Since it said nothing about the policy itself, the undisclosed material was not information 'on' that 'measure', the Court concluding that it was not EI.

Cieslik

132. The Defendants also referred me to the UT decision in *Cieslik*. In that case, the issue was whether information in the form of a vehicle safety test received by the DVSA (which test drove the vehicle but had no remit to consider its environmental impacts or manufacturer environmental compliance) fell within Reg 2(1), the Tribunal having found it did because (i) to carry out the safety test, it was necessary to run the vehicle's engine, causing emissions (ii) those emissions affected the air and (iii) the test was therefore a measure likely to affect the elements (air) within Reg 2(1)(c). The UT rejected (at [31]-[34]) both aspects of this reasoning as constituting an unduly broad approach, holding (at [35]) that the Tribunal had failed to address the considerations identified in *Henney*:-

> "Although the FTT used some of the language of purpose and context, it did not address whether and in what way knowledge of the disputed information, which concerned the safety of the Porsche Cayman, could contribute to the Directive's purpose. The FTT did not give any consideration to whether access to the information would contribute to greater awareness of, free exchange of views about or more effective participation in environmental decision-making, or to a better environment. The FTT did not address any considerations such as those listed by the Court of Appeal at paragraph 43. Nor did the FTT reflect on whether its literal approach to the definition of environmental information led to an impermissibly broad reading that included information which could not reasonably be said to fall within the regulation. The FTT's reasoning, set out above, demonstrates a fundamentally flawed approach which is inconsistent with the approach established by European case law and confirmed by the Court of Appeal in *Henney*."

Aarhus Implementation Guide on the meaning of EI

133. In the context of the proper meaning of EI, the Claimants also referred me to the Convention Implementation Guide which states (at [p.50]) that:-

> "[t]he clear intention of the drafters, however, was to craft a definition that would be as broad in scope as possible, a fact that should be taken into account in its interpretation."

134. And later (at [p.53]) that:-

> "Most importantly, the activities or measures do not need to be a part of some category of decision-making labelled "environmental". The test is whether the activities or measures may have an effect on the environment."

ICO Guidance on the meaning of EI

135. Similarly, the ICO guidance on Reg 2(1) states (at [p.3] under "[w]hat is "any information on?") that:-

> "You should interpret "any information on" broadly. Information that would inform the public about matters affecting the environment or enable them to participate in decision-making is likely to be environmental information, even if the information does not directly mention the environment.
>
> You should apply the test about whether the information is on or about something falling within the definitions in regulations 2(1)(a)-(f), and not whether the information directly mentions the environment or any environmental matter."

136. And (at [p.17] under "[w]hat about documents containing both environmental and non-environmental information?"):-

> "You should avoid analysing the information in isolation and instead take the holistic approach recommended in the Court of Appeal decision in [*Henney*].
>
> As a starting point you should consider the information in its entirety to establish if the information - on the whole - can be said to be information 'on' one or more of the definitions in regulation 2(1)(a)-(f)."

ICO/ Tribunal decisions on the meaning of EI

137. The Claimants also relied on a broad range of cases in which the ICO and Tribunal have found the information held by the relevant public body to be EI, including in the case of the latter:-

(i) information on proposals to introduce tolling on an existing and a new bridge across the River Mersey (*Mersey Tunnel Users Association (MTUA)* v *Information Commissioner and Halton Borough Council* [EA/2009/0001, 24 June 2009]);

(ii) information on the Environment Agency's procedures and policies with respect to watercourse flood risks (*Walker & Walker* v *Information Commissioner* [EA/2011/0096, 21 October 2011]), albeit it seems that there was no dispute that the information sought was EI;

(iii) the names of the network operators on a mobile phone base station database (*The Office of Communications* v *Information Commissioner and T-Mobile (UK) Limited* [EA/2006/0078, 4 September 2007]);

(iv) the financial viability assessment supporting a planning application for the development of a council housing estate (*London Borough of Southwark* v *Information Commissioner, Lend Lease (Elephant and Castle) Limited and Glasspool* [EA/2013/0162, 9 May 2014]);

(v) income and expenditure information concerning an abortive land development proposal (*Hall* v *Information Commissioner and Therfield Regulation Trust* [EA/2019/0125, 9 January 2020], albeit this does not appear to have been disputed (on the IC's interpretation of the information request at least);

(vi) legal advice sought by Thanet District Council concerning the implications of proposed night-time flights at Manston Airport on an existing development agreement with the airport operator (*Kirkaldie* v *Information Commissioner and Thanet District Council* [EA/2006/0001, 4 July 2006]); and

(vii) further examples given in Coppel, *Information Rights* (at [17-018] and the ICO decisions relied on by the Claimants under **Issue 1** for the specific CON29DW questions).

138. The Defendants say that the Claimants' reliance on these ICO and Tribunal decisions is inapposite, not being authoritative and, at best, merely illustrative of certain factual situations and how they were dealt with. For some, the particular point relied on in the case was not contested. In others, the information went much wider than about a single property. The Defendants also rejected the Claimants' reliance for some of the CON29DW information on cases from other EU states. These are considered below where they arise on the Claimants' analysis but the Defendants say that they do not assist the Court, arising as they do from how the Directive has been implemented in those EU states.

139. A number of the decisions relied upon by the Claimants concern planning manners, as to which, they also referred me to *Venn* v *Secretary of State for Communities and Local Government* [2014] EWCA Civ 1539 in which the Secretary of State accepted (at [11]) that EI "is given a broad definition in article 2(3), and … that since administrative matters likely to affect "the state of the land" are classed as "environmental" under Aarhus the definition of "environmental" in the Convention is arguably broad enough to catch most, if not all, planning matters." In a not unrelated vein, the Claimants also referred me to the Tribunal's treatment of the information required to respond to local authority search enquiries relating to the sale and purchase of property in the form of the CON29R (*East Riding of Yorks* v *Information Commissioner and Stanley Davis Group Ltd* [EA/2009/0069, 15 March 2010]; *Kirklees Council* v *Information Commissioner and PALI* [2011] UKUT 104 (AAC) at [37]-[40]). In these two Tribunal cases, it appears to have been accepted by the parties that the information sought was EI. The ICO guidance on EI also states (at [p.17]) that "[t]he majority of the information that is used to answer questions in a property search form is likely to be environmental information. This is because it affects or is likely to affect the use and therefore the state of the land (regulation 2(1)(c))." The specific ICO guidance on property searches and the EIR adds "[h]owever, with some of the enquiries the situation may be less clear so you need to consider this on a case by case basis." The Defendants say that the position of planning information and local authority search reports under the EIR sheds little or no light on what the Court has to decide in this case, being concerned with different public bodies dealing with different information from that featuring in this case.

140. Finally, in the context of the breadth of the meaning of EI, the Claimants referred me to the ICO Guidance on Reg 2(1) (at [p.5]) identifying "water" (as one of the elements of the environment listed in Reg 2(1)(a)) as existing " … in various forms at different temperatures and in different conditions, and the definition covers all of them. The location of the water is immaterial - underground, on the surface, or in natural settings."

Issue 1 – the parties' arguments

141. The Claimants contend that the CON29DW information, viewed as a whole, is EI within the meaning of Reg 2(1). In general terms, the information it provides is on water, and on the water, drainage and sewerage infrastructure, and connections on, under and around a property or plot of land, including any arrangements for removal or treatment of surface and foul water, and related information affecting or that may affect the property, those services and/ or the water in question. Considered through the prism of the definition of EI in Reg 2(1), which *Henney* requires to be applied broadly and holistically, the Claimants say that information in the CON29DW is 'on':-

    (i) the state of water, soil and land and/ or the interaction among these elements (**Reg 2(1)(a)**), including the state of water in all its forms within the clean water and sewerage network, as well as information on the state of the soil or land insofar as it relates to, for example, pipes in the soil or the surface drainage situation;

    (ii) factors such as substances, waste and discharges affecting or likely to affect water, soil or land (**Reg 2(1)(b)**), including most obviously foul water and surface water and related connections into and around a property;

    (iii) plans, programmes and activities affecting or likely to affect those elements and factors (including the state of the water and land in question) as well as measures or

activities designed to protect those elements (**Reg 2(1)(c)**), encompassing the Defendants' provision of clean water and sewerage services to properties in their area in their role as statutory undertakers as well as other activities, measures or components thereof; and

(iv) built structures inasmuch as they are or may be affected by the state of water or land or, through an interaction with water, by the matters referred to in Reg 2(1)(b) and (c) (**Reg 2(1)(f)**), including the information about distances from, and pipes going into and out of, buildings as well as the infrastructure and other man-made elements of the sewerage and mains water infrastructure itself.

142. Despite the Defendants minimising the CON29DW information as relevant only to private or commercial interests, and not concerned with access to information for wider public benefit and environmental good, the Claimants point to the Defendants holding this information to facilitate the discharge of their duties as statutory water and sewerage undertakers, as to which, the Claimants relied extensively on the related matters admitted by the Defendants in response to the Claimants' Requests for Information. Those duties include the obligation to collect, maintain and make available the information itself, including on their water and sewerage assets (such as public water and sewer maps), trade effluent consents and new road and street works and to provide to the Secretary of State, Ofwat or their customers with performance standards information on water quality, sewer flood risk and water pressure.

143. The CON29DW information, including at individual property level, is also relevant to enable those interested in that property and its vicinity, to understand the Defendants' compliance with their public duties and responsibilities under the WIA. This encompasses their general duties to maintain and develop the water supply system and to provide clean water, the corresponding general duties in relation to the public sewer system, and the overriding statutory obligation to further water conservation and promote efficient water use by customers, including water metering. The CON29DW also informs many more specific WIA duties and powers, including to provide and maintain mains water connections and clean water supply to individual properties (ss.41, 45 and 52), to provide a public sewer at, and to maintain sewerage connections to, those premises (ss.98, 101A and 106), to disconnect pipes (e.g. to prevent water wastage) (s.75) and to grant individual trade effluent consents (s.118), as well as the water pressure and flood risk performance standards for premises in their area and related compensation obligations if not met. Accordingly, the information is not limited to the state of the water, soil or land at a particular property (or factors affecting the state of those elements), albeit this would still be sufficient for Reg 2(1)(a) and (b) purposes, but it is also 'on' the Defendants' measures or activities, as statutory water and sewerage undertakers, of providing clean water and sewerage services to properties in their area which, whether viewed regionally, locally or at individual property level, are ultimately driven by environmental considerations.

144. Indeed, that statutory scheme seeks to ensure that the public has access to clean water, the collective water resource is used efficiently and the whole system of water distribution and waste water and sewage collection is operated in a manner that promotes environmental protection. This reflects the essential environmental consideration that all uses of water, from whatever source, are inextricably connected, the action of removing water from rivers or the ground for irrigation or trade reducing the supply of drinking water, the action of removing and treating sewage or effluent creating the potential to pollute those water

sources. For these reasons, the WIA (and related Regulations), code of practice and WISER guidance all recognise that, simply by their nature, the Defendants are engaged in functions and activities with the potential for huge impacts on the environment, particularly water resources.

145. The Defendants' critical responsibilities in relation to the environment extend to the land on which their infrastructure is based, where they lay their pipes and undertake works and where sewage, surface water and clean water is stored, transported and treated and returned to the environment. The Defendants' measures and activities so identified therefore clearly have the requisite environmental impact for Reg 2(1) purposes. Accordingly, the Defendants' framing of the case as being only about individual pipes serving an individual property, and the suggested insignificance of that information to the public, is misconceived. A similar argument could easily be made about any planning application or permitting matter concerning only a single property despite the relevant proposal having potentially significant environmental impacts. As such, a purposive approach to the CON29DW information also supports it falling on the EI 'side of the line'.

146. The Defendants deny that any of the information responsive to a CON29DW is EI (save that AW's position is part non-admission), emphasising that the starting point for the analysis is to focus on the *particular* information provided to the Claimants in the CON29DW reports. The Defendants agree that the definition of EIR must be construed in a purposive way, having regard to their role as the implementing Regulations for the Directive and the Directive, in turn, the Convention, including by reference to the principles already outlined. In relation to the specific definition of EI in Reg 2(1), the Defendants say that the UK caselaw summarised above helpfully cautions against too wide an approach to Reg 2(1). Although the authorities emphasise that each case is highly fact-specific, they also make clear that the underlying purpose(s) for which the right of access to EI is conferred will be crucial when determining the proper scope of that right.

147. In particular, *Henney* shows that the word 'on' bears considerable weight in determining whether the information concerned is 'on' one or more of the six limbs of Reg 2(1). On one view, it could be said that any item of information will be 'on' one or more of those limbs. To that end, the Defendants say that the Claimants could have taken a very simplistic approach, looking at this case as concerning information all about water. However, the caselaw shows that the definition is not to be applied mechanistically, looking for any connection, however remote, between the information and the Reg 2(1)(a)-(f) matters. That would be tantamount to the approach in *Cieslik* in which the Tribunal considered it sufficient for an engine to be turned on to safety test a car to mean that the state of the air is being altered such that Reg 2(1) is engaged, an approach rejected by the UT. Likewise, characterisation of the information as being 'on' the general measure or activity of the supply of water or sewerage services (under Reg 2(1)(c)) would suffer from the same mechanistic shortcoming.

148. For these reasons the Defendants say, the Claimants construct a more complex case to argue, in particular, that the information is on various measures and activities, reflecting WIA powers and duties relating to the environment such that it falls within Reg 2(1)(c). So, for example, the Claimants say that the answer to the question whether a property is connected to the water mains is 'on' the high level duties to maintain a water supply (s.37) or to comply with a water main requisition (s.45). To the same end, the Claimants rely on the Defendants' power to charge for their services (s.142) to say that information about how a particular

property is billed is information 'on' the exercise of that power. Although the approach to charging generally might, in some circumstances, constitute EI, the question of whether a particular property is charged in a particular way, by reference to a water meter or rateable value for example, says nothing bearing on the considerations arising under the Convention. The same is true of the other measures and activities undertaken by the WASCs relied on by the Claimants in this context.

149. Moreover, there is nothing in the WIA about the provision of CON29DW reports. Those reports and their pricing are not regulated in any way, unlike local authority search reports under the CPSR. The WASCs hold information, some of which may be used in a CON29DW, for various purposes. However, even if it was originally obtained or held pursuant to their WIA obligations, it does not follow that the subsequent provision of a very small part of it in a CON29DW is governed by the same statute. The purpose of the Defendants providing information in that way is to fulfil CON29DW orders for individual properties, not to discharge their WIA obligations. More specifically, the fact that some of the information used to answer a CON29DW may be drawn from the records required to be held by the Defendants under Part VII of the WIA does not mean that the information is 'on' that Part itself. The CON29DW information tells the customer nothing about how the Defendants' records are collated, stored or maintained. The CON29DW is provided to prospective purchasers or their funders or, as here, to PSCs, who then sell it to prospective purchasers. The information it contains is on a specific individual property and/ or the respective rights and obligations of the relevant undertaker and water customer as they pertain to that property. The Defendants were not providing different information about the state of their water and sewerage infrastructure, their billing policies or their water and sewerage activities more generally.

The wider context of the CON29DW/ purposive approach

150. The Claimants say that it is not necessary to consider the wider factual context or purposive approach, this not being a difficult case. It is clear from the face of the CON29DW that the information it contains is 'on' the Defendants' statutory activities as water and sewerage undertakers, themselves affecting or likely to affect the elements and factors in Reg 2(1)(a)-(b). Since Reg 2(1)(c) is obviously engaged, there is no need to search for a 'wider' measure as the Court did in *Henney* and, therefore, no need to explore the broader context. Even from the narrow description on the CON29DW website of the form as comprising "information on water and sewerage assets in, around and under a residential or commercial property or plot of land", it is still clear that the information must (at least) be 'on' the provision of water and sewerage services to that property or plot of land. However, even if necessary to consider the wider context or purpose, this too supports the Claimants' case that the CON29DW information is EI:-

(i) The CON29DW is water industry and Law Society endorsed standardised drainage and water information for prospective property purchasers, reflecting mandatory information previously required under the HIPs regime, its purpose being to allow the public to find out, and make informed choices, about the Reg 2(1) matters;

(ii) The information is produced and held by the Defendants for the purpose of providing public water and sewerage services in accordance with their obligations under the WIA which have, at their core, water, the state of the water, soil, land, landscape and natural sites, including wetlands, coastal and marine areas, and the

interaction among these elements (as referred to in Reg 2(1)(a)), as well as the treatment of waste and factors or activities affecting such matters (as referred to in Reg 2(1)(b) and (c));

(iii) Each Defendant is required to operate and maintain a vast infrastructure of underground water, drainage and sewage pipes to permit the flow of clean, drinkable water and potentially harmful sewage to and from properties in its area through that infrastructure and back into the environment. That activity is at the heart of the regulatory regime;

(iv) To the extent that the information concerns a statutory undertaker's activities at one particular property, that is simply a snapshot of the Defendants' wider activities;

(v) The Defendants' stance that the drainage and water information they hold is not EI, or is too remote from the matters identified in Reg 2(1), is contrary to the broad, purposive and holistic approach laid down by caselaw;

(vi) The Defendants' stance is also inconsistent with them arguing for CON29DWs as a mandatory element of HIPs and marketing them as essential to understanding the effect of water and sewerage infrastructure on land, including risks that might negatively impact prospective purchases, as highlighted in the Defendants' related marketing and lobbying materials;

(vii) Four Defendants[3] have accepted in recent ICO decisions the environmental nature of the information they hold (including about local sewer and water connections and/ or sewage treatment works (**STWs**) and, D2 in particular, the public interest in having access to it;

(viii) Over time, some Defendants have also accepted that some CON29DW information comprises EI, with D6 even justifying charging for certain information (flooding and low pressure) by reference to the EIR charging regime; and

(ix) The Claimants' motives in seeking the information are irrelevant to whether it falls within the statutory definition, Reg 2(1) being concerned first with the relevant measure and then what the information is 'on'. An EIR request is not disqualified because it is motivated by the PSCs' commercial interest.

151. The Defendants place particular emphasis on the need for a purposive rather than mechanistic approach, *Henney* also recognising that considerations of purpose can be used to restrict the scope of the broad definition under Reg 2(1) (at [43], with emphasis **supplied**):-

> "It follows that identifying the measure that the disputed information is "on" may require consideration of the wider context, and is not strictly limited to the precise issue with which the information is concerned, here the communications and data component, or the document containing the information, here the Project Assessment Review. It may be relevant to consider the **purpose for which the information was produced, how important the information is to that purpose, how it is to be used, and whether**

[3] D2, D4, D10 and former D5.

> **access to it would enable the public to be informed about, or to participate in, decision-making in a better way**. None of these matters may be apparent on the face of the information itself. It was not in dispute that, when identifying the measure, a tribunal should apply the definition in the EIR purposively, bearing in mind the modern approach to the interpretation of legislation, and particularly to international and European measures such as the Aarhus Convention and the Directive. It is then necessary to consider whether the measure so identified has the requisite environmental impact for the purposes of regulation 2(1)."

152. The Defendants say that these considerations are relevant not merely when there are two candidates in the frame for the relevant 'measure' the information is said to be 'on' for the purpose of Reg 2(1)(c), one narrow, one wide, as in *Henney* itself. Rather, these considerations arise whenever the question is asked whether particular information is 'on' a particular measure or other Reg 2(1) matter(s). In this case, the information was produced to answer a particular order for a CON29DW for use by PSCs by way of re-sale for profit as part of their business to customers who will decide whether they wish to purchase, or lend money against, the particular property with which it is concerned. Although very important for that purpose, it does not illuminate any wider one.

153. Further still the Defendants say, it is not merely the environmental impact of the relevant measure with which the purposive approach is concerned. Just because a project has some environmental impact, it does not mean that all information 'on' it must be EI. As *Henney* held (at [45]):-

> "A literal reading of regulation 2(1)(c) would mean that any information about a relevant "measure" would be environmental information, even if the information itself could not be characterised as having, even potentially, an environmental impact as defined. However, as recognised by the Judge (at §91), "simply because a project has some environmental impact", it does not follow that "all information concerned with that project must necessarily be environmental information". Interpreting the provision in that way would be inconsistent with the decision in *Glawischnig's* case discussed at [16] and [17] above. Since that case also stated that the Directive is to be given a broad meaning, I have concluded that the statutory definition in regulation 2(1)(c) does not mean that the information itself must be intrinsically environmental."

154. Beatson LJ then went on to explain (at [47]) how the line will be drawn, namely:-

> " …. By reference to the general principle that the regulations, the Directive, and the Aarhus Convention are to be construed purposively. Determining on which side of the line information falls will be fact and context-specific. But it is possible to provide some general guidance as to the circumstances in which information relating to a project will not be information "on" the project for the purposes of section 2(1)(c) because it is not consistent with or does not advance the purpose of those instruments."

155. His starting point for drawing that line was the Recitals to the Convention and Directive and, specifically (at [48]), the "requirement that citizens have access to information to enable them to participate in environmental decision-making more effectively, and the contribution of access to a greater awareness of environmental matters, and eventually, to a better environment" which "give an indication of how the very broad language of the text of the provisions may have to be assessed and provide a framework for determining the

question of whether in a particular case information can properly be described as 'on' a given measure."

156. Finally, the Defendants point to Beatson LJ's reference (at [49]-[50]) to the CJEU decision in *European Commission v Stichting Greenpeace Nederland* (Case C-673/13 P) in which it held that the General Court had erred in giving a broad and purposive interpretation to Article 6(1) of Regulation 1367/2006 such that any link between the information and emissions into the environment sufficed to fall within its scope. Although this decision did not assist his task given the different legislative context, he nevertheless went on to say (at [50]) that:-

> "But the decision does show that a purposive approach can be used to interpret a provision more narrowly than its very broad literal meaning. At §80, the CJEU relied on the purpose of enabling public participation in environmental decision-making to narrow the otherwise over-broad definition in Article 6(1) of regulation 1367/2006. It in effect "read down" the provision by reference to the legislative purpose."

157. The Defendants say that the same warnings about an overbroad interpretation detached from the purposes of the relevant legislation are to be found in *Glawischnig* and *Cieslik*. So, for example, it does not further the Convention's objectives to know that a particular property is connected to the mains supply or that the water meter is located in the hall cupboard.

'Salami slicing' the CON29DW

158. The Claimants also say that placing undue focus on *Glawischnig* and Beatson LJ's caveat in *Henney* (at [17]), the Defendants' approach is to 'salami slice' the CON29DW into its individual questions and to consider them in isolation rather than as a coherent body of property-specific information. In this way, the Defendants argue that the information only has a remote connection with the Reg 2(1) matter but this approach falls foul of:-

    (i) The purpose of the Convention and the EIR and the broad definition of EI;

    (ii) The holistic approach mandated by *Henney* and *Hastings* militating against drawing inappropriate distinctions between information on a component of a broader measure (e.g billing for water services) and the broader measure as a whole (the provision of those water services); and

    (iii) The approach indicated in some of the Tribunal cases that it is inappropriate to separate out (as 'non-environmental' information) details such as operator names (*T-Mobile*) and tolling arrangements (*MTUA*) which are an integral part of a broader category of information falling within the EIR.

159. The Claimants also say that this approach is intentionally not seeing the woods for the trees and is premised on a false view of *their* position, it being no part of the Claimants' case that the correct approach is to ask about the relationship between the information and the Reg 2(1) environmental factors (as *Henney* held (at [35]) was inapt). Rather, the Claimants' focus is what the information is 'on' as the (broad) definition of EI in Reg 2(1) *does* require. In line with the guidance in *Hastings*, the Court should look at the information as a whole and, applying the broad and holistic approach in *Henney*, ask whether the information is 'on' a relevant measure. The multitude of question-specific findings sought by the

Defendants is not required. All that said, even if viewed in that "unnecessarily narrow and artificial" way (as that phrase was used in *Henney* (at [53])), the Claimants say that the information responsive to each CON29DW question would still satisfy the definition of EI for the multiplicity of reasons set out in the detailed schedule to the Claimants' skeleton argument, including, for Reg 2(1)(c) purposes, by reference to the Defendant's relevant powers and duties embodied in the statutory scheme governing their activities.

160. The Defendants deny that their approach of looking at the information responsive to each of the CON29DW questions is 'salami-slicing'. That was, in fact, the very approach agreed in the LOI which asks under Issue 1.1 (with emphasis **supplied**):-

"**1.1** In relation to –

A,

(i) **each of the questions** in the standard version of the CON29DW that was generally …. in use between 1st December 2013 and 3rd July 2016 ("**CON29DW version 1**") and

(ii) **each of the questions** in the standard version of the CON29DW that was generally …. in use from 4th July 2016 onwards ("**CON29DW version 2**"), and/or

B, **each of the common questions**, in the versions of the CommercialDW products offered by the Defendants, that were generally …. in use from 1 December 2013

does the information responsive to that question constitute "environmental information" within the meaning of regulation 2(1) of the EIR, …."

161. Accordingly, the LOI, to which the Claimants themselves signed up, itself recognises that **Issue 1** is to be approached by reference to each individual question and the information responsive thereto. The Defendants also say that the agreed approach reflects the right approach given the need to focus closely on the *particular* information in issue for the purpose of Reg 2(1). More substantively, the Defendants say that each of the CON29DW questions has been carefully drafted, addresses a different issue and targets different information from different sources. Accordingly, were a CON29DW to be viewed hypothetically as an EIR request, each question is, in reality, a separate request. The Claimants' so-called holistic approach would have surprising consequences since the addition to a CON29DW of something obviously not EI would allow that outlier item to be considered in the round with everything else.

162. Properly understood, neither *Henney* nor *Hastings* assists the Claimants on this point. The high-water mark of the Claimants' case appears to be the latter (at [32]) concerning the general run of cases where 'mixed' information was in issue. *Hastings* was concerned with a short document, the majority of which had already been disclosed under the EIR, with an even smaller part still disputed. With the small amount of material McCombe LJ had before him, and without much theorising, he found it straightforward to consider that disputed element in the context of the whole to find that the former was not EI. He did so based on the characterisation of the information that remained disputed. However, he was reluctant (at [41]) to give more guidance "which might turn out to be less useful in a more complex case." That context was very different from the present case in which the Defendants say

that the Court need do no more than take the common sense approach of looking at 25 questions on different subject matters one by one.

G. ISSUE 1 – ENVIRONMENTAL INFORMATION – ANALYSIS

163. In relation to whether the Court should consider the information responsive to CON29DWs as a single property-specific set of questions or on a question by question basis for the purpose of determining whether that information is EI, it seems clear from the way in which the LOI has been framed by reference to "**each of** the questions" (emphasis **supplied**) that the parties had originally agreed the latter. Nevertheless, the parties' agreement is not necessarily determinative of the proper approach the Court should take.

164. As noted, the Claimants placed some store by McCombe LJ's observation in *Hastings* (at [32]) to the effect that the Court will rarely need to do more than apply the principles indicated in *Henney* "**to the information as a whole**" to see whether, "**in the context of the whole** and applying a broad and holistic view" (emphasis **supplied**), the disputed elements of the information are 'on' the "measure" in question. The Defendants, however, contend that this "guidance" for the general run of the cases where "mixed" information is in issue is inapposite here. *Hastings* was concerned with information of potentially "mixed" character. Some material was undoubtedly EI but this was disputed for the smaller balance, all of it concerned with aspects of a meeting between the (then) Prince of Wales and certain ministers about the UK Government's housing policy. In the context of a dispute about whether a subset of material about the same meeting was also 'on' the measure in question, it is hardly surprising that the Court considered the whole body of material to see if it informed that question. This case, however, is different.

165. First, there is no consensus here on the suggested 'measure' in question or other Reg 2(1) matter(s). The Claimants say that this is clear but the Defendants dispute this for the entirety of the CON29DW information.

166. Second, although the CON29DW questions are all concerned with aspects of the drainage and water arrangements at a particular property, they cover a range of different topics. Information about the distance of a particular property from an STW is unlikely meaningfully to inform whether information about the location of a water meter in that property is 'on' a measure (or other Reg 2(1) matter(s)).

167. Third, to the contrary, if anything, such an approach risks misidentifying information as EI when it is not, and vice versa.

168. Fourth, these points were rather reinforced by the overarching 'measure' said by the Claimants to be in issue in this case, namely the Defendants' statutory activities as water and sewerage undertakers of providing clean water and sewerage services in their area, a somewhat broad formulation.

169. Accordingly, I am satisfied that it would be wrong to approach the CON29DW as a single composite body of information. That said, the matter is not as binary as the parties' arguments appeared to assume. Unlike the STW/ water meter location example, other CON29DW questions do traverse subjects much more closely related. For those, it seems appropriate to consider together, rather than in isolation, the responsive information even

if, ultimately, the analysis under **Issue 1** may yield different answers for those related questions.

Discussion – the wider context

170. As noted, the Claimants suggest that considerations of wider context and purpose do not arise where, as here, the relevant measure is clear. In my view, that qualification is not supported by *Henney* and would fall foul of the principles of construction that determine meaning in light of context. Although it may turn out (as in *Hastings*) that the wider context does not meaningfully advance matters, it may yet do so. As also noted, there is no consensus here on the suggested 'measure' in question or other Reg 2(1) matter(s).

171. The Claimants also say that the information responsive to the CON29DW questions for any particular property is drawn from a much larger universe of information produced by the Defendants, including in furtherance of their activities as statutory water undertakers and related duties under the WIA. Although the purpose for which the latter was produced and used is potentially relevant to the general context against which the former falls to be considered, I was not persuaded that this point held quite the significance that the Claimants attached to it, the environmental importance of many of those activities and duties notwithstanding. In my view, of greater significance is the purpose for which the particular CON29DW information in issue here was obtained and used.

172. In this regard, I did not consider compelling the Defendants' emphasis on the private and commercial interests of the PSCs in acquiring, and re-selling for a profit, that information. The PSCs' role and interest in that process, effectively as intermediaries, seemed to add little, the more important focus being the purpose for which the ultimate recipients obtained and used the information in the CON29DWs. As to that, the Claimants correctly point out that the CON29DW is in a standard form devised by the Law Society in conjunction with the WASCs to elicit important drainage and water information about individual properties, its prior use being mandatory under the former HIPs regime. As such, it was, and continues to be, used as part of the due diligence process in the purchase of residential and commercial property alongside other enquiries made by the purchasers and/ or their mortgagees. I agree that the information it supplies is very important for these purposes as they are elaborated upon under the individual questions in a helpful question-by-question STPS CON29DW 'explainer' relied upon extensively by the Claimants in their skeleton argument concerning whether the responsive information is EI.

173. The Claimants say that this information enabled the public to find out, and therefore to make more informed decisions, about the Reg 2(1) matters, including the state of water and land, activities and measures affecting or likely to affect water, soil or land, built structures that may be affected by such matters and associated risks or mitigations at a particular property or plot of land. In this regard, I did not find persuasive the Claimants' reliance on certain ICO decisions and responses to EIR requests from which it appears that the Defendants may once have accepted some of the CON29DW information as EI. Whether certain information is EI does not fall to be considered by reference to positions once assumed by the relevant WASCs differently from how they may now articulate them, rather than by way of objective assessment, guided by the principles indicated in *Henney*, of whether this information is 'on' a Reg 2(1) matter. The Claimants also point to the Defendants' stance that the CON29DW information is not 'environmental' or is too remote from any Reg 2(1) matters but say that this is inconsistent with them pressing for the inclusion of CON29DWs as a

mandatory element of HIPs. However, the historical actions of the Defendants with respect to the HIPs regime again seemed to add little, as did the suggested inconsistency with the Defendants' own marketing materials. Although those materials, including the STPS 'explainer', emphasised how important the CON29DW is properly to understand the water and drainage infrastructure at a particular property, including the associated risks, liabilities and restrictions, it does not follow that the information is EI. That will depend upon the particular information provided and the wider context.

Analysis – the CON29DW information as EI (or not)

174. Consistent with the less binary approach indicated above, I have organised below the CON29DW information under (i) 'sewer map, assets and connections' (ii) 'sewer and water adoptions' (iii) 'water map, assets and connections' and (iv) 'undertaker and billing' and, within those headings, grouped, and considered together, those questions more closely related in subject matter by reference to parties' related arguments. I was reinforced in this approach by how the parties had themselves cross-referenced a number of their related arguments between the different questions. Other questions concerning matters of a more discrete nature are addressed on an individual basis. I should add, however, that after undertaking this exercise, I have stood back from the questions and, without conflating the different types of information in issue, re-visited and cross-checked the analysis to ensure consistency of approach.

175. As to the parties' respective approaches to the CON29DW information generally, the Claimants focused on what they say was the relevant 'measure' (or other Reg 2(1) matter(s)) in question, with the Defendants focusing more closely on the degree of connection between the relevant information and its (suggested minimal) environmental significance. There were difficulties with both approaches. Although the first step in the analysis is to identify the 'measure' or other relevant Reg 2(1) matter that the disputed information is 'on' (*Henney* at [37]), in my view, the Claimants often placed insufficient focus on the nature and quality of the information itself in the CON29DW. Since it was canvassed in submission, I make clear that, merely because the information concerned individual properties, or some questions only called for brief or "yes" or "no" answers, or others were more often answered in the negative, it does not follow that the responsive information was not, or could not be, EI. That said, the nature of the information actually imparted by the CON29DW often did not bear the weight of the Reg 2(1) matters ascribed to it by the Claimants. Any case will, of course, turn on its own facts and relevant context but the quality of the disputed information featuring in the various authorities relied on by the Claimants rather emphasised the limits of the information in issue here. Although *Henney* is clear that the relevant enquiry is not limited to those 'measures' which the information is specifically, directly, immediately, let alone primarily, 'on' (at [39]), and that there may be multiple measures and components in play (at [42]), the information in *Henney* was squarely concerned with the PRA, the PRA being an integral element of the broader measure comprising the SMP, without which, there would have been no SMP. In this case, it is far less clear that the CON29DW information is, in fact, about, concerned with or relates to the measures identified by the Claimants even on the broad view mandated by *Henney*. I was again reinforced in my view by the at times rather general way in which the Claimants expressed some of those measures and their suggested interrelationship.

176. By contrast, the Defendants' emphasis on the limits to the breadth of the EI definition, and the suggested minimal connection between the information in this case and its

environmental significance, tended to deflect focus from the relevant Reg 2(1) matter in question. It is perhaps unsurprising that the Defendants were reluctant or unable to anticipate how the Claimants might frame their case in this regard, at least to the level of detail indicated in the schedule to the Claimants' skeleton argument, or to canvass potential Reg 2(1) candidates of their own, if only to knock them down. Nevertheless, this different focus also led to a somewhat imbalanced approach. In light of these matters, some re-calibration was required, as explained further below.

Sewer map, assets and connections

177. I consider together first those CON29DW questions that seek to elicit information on the public sewer assets within the vicinity of a particular property.

Sewer map

178. **Question 1.1** says: **where relevant, please include a copy of an extract from the public sewer map**. Question 1.1 of the CommercialDW is in the same terms.

179. At the risk of stating the obvious, a map contains, and imparts visually, information, including possibly EI within the meaning of Reg 2(1). Indeed, as the ICO's specific guidance on EI indicates, "[a] map showing the location of mountain ranges, urban areas and woodland is information on the state of the land as an element of the environment" under Reg 2(1)(a). The guidance does not mention the sewer map but the Claimants say generally about this that it delineates infrastructure for centralised wastewater disposal, which has a direct impact on water, soil and land. To that end, they rely on a decision of Netherlands' highest general administrative court in *Inspector General of Mines & Vermilion Energy Netherlands BV*, 201905560/1/A3 (Council of State 6 October 2021, ECLI:NL:RVS:2021:2224) that a works programme describing the method of repairing an inner pipe to a well was EI, being on a measure or activity to protect the soil even though only one component concerned the prevention of seepage. However, *Vermilion* adds little to the analysis for **Question 1.1**. Although the WASCs will undertake repairs, maintenance and/ or improvements to their sewer network to comply with their statutory duties as sewerage undertakers, unlike the works programme in *Vermilion*, the public sewer map does not say anything about such activities.

180. Rather, as the HM Land Registry water and drainage residential reports 'explainer' says (as also relied on by the Claimants), the sewer map is concerned with the location of sewer assets within the geographical area covered by the map. The importance of that information for prospective homeowners is explained in the following terms:-

> "Our homes and the land they are built upon have water, drain and sewers passing beneath them. Knowing the route of the water, drain and sewer pipes and where they can be accessed via manholes and inspection chambers can be very helpful, particularly when you are considering the erection of another property on your land, or when you believe you have a water or sewerage leak. Sometimes, you just need to know the position of the nearest water access point in the road outside of your house. The map and reports deal with water, sewers and drains located at your property and within 200 metres of it."

181. The Claimants also rely on the STPS 'explainer' which states in relation to both map questions that:-

> "This is one of the most important sections of the CON29DW. Of primary interest to homebuyers is the location of the nearest sewer and water mains to the property, including any within the boundary itself. The location of either a public sewer or water main within a boundary can have an impact on the property. Both are protected, and water companies will be consulted about any proposed development over or near their assets as part of a planning application. Building over sewers is not normally permitted, and companies will normally advise how they need their assets diverting or protecting. There is an outright ban on building over water mains, as much to protect properties as the pipes themselves. Water companies also have statutory rights to enter private land to maintain and repair their assets."

182. Accordingly, the public sewer map is concerned with the location of nearby sewerage assets, its utility for the users of the CON29DW lying principally in potential obstacles to development and in access rights by WASCs for asset maintenance and repair purposes.

183. The Claimants also rely on two cases of the Danish Environment and Food Board of Appeal in which the Board held that the following were EI: (i) all correspondence, supplementary information and drawings between the client, consultant and contractor regarding a sewer separation project (Case 18/07397 of 21 February 2019) and (ii) legal correspondence between landowners' lawyers and the client sewerage network owner/ operator (or its lawyers) concerning the response to claims for repayment of connection fees and an account of whether local landowners had historically been connected to the Egelev public sewer system (Case 19/05392 of October 2019). In the former, the Board emphasised the broad definition of EI as not being limited to those matters with direct environmental impact, concluding that "the information in question concerns and may influence the execution of a sewer separation project, which shall be considered a measure that affects or may affect the individual environmental elements as mentioned in Section 3(1) and (2) of the Danish Environmental Information Act …" (those sections appearing to mirror Reg 2(1)(a) and (b)). In the latter, the Board decided that connection to waste water systems and collection of connection fees constituted measures or activities that affect or may affect those same individual environmental elements such that the related legal correspondence was found to be EI. However, since the related lawyer's fee invoice only contained information about the cost of legal assistance and a brief list of the lawyer's services performed for the sewer operator, neither directly or indirectly affecting those elements, this was not. I found neither Board decision particularly illuminating in the present context, not only because of the limited facts and reasoning they disclose, but because again of the qualitatively different information with which those cases were concerned.

184. Nor did I consider of assistance the various ICO decision notices in respect of which the Claimants say the Defendants "have not disputed the point" that the relevant information under discussion was EI. Their precedential status apart, as already noted, whether or not the Defendants have previously taken points now asserted does not advance the analysis. In any event, most of those decision notices again concern qualitatively different information from that contained in the CON29DW, namely (i) the location of all STWs in SW's area, including addresses and grid references [FER0631104] (ii) a sewer connection application made to UU in relation to a housing development [IC-127338-N0F2] (iii) an environmental permit granted by D4 for a particular STW and certain discharge data [IC-

163737-D3Q3] (iv) certain capacity, operational and trade effluent permit data concerning a particular STW in the STW area [IC-218612-B1J7] and (v) a copy of the combined sewer system/ road drainage hydraulic modelling for a specific location sought from Northern Ireland Water [IC-224320-F4P8].

185. By contrast, the ICO decision against Welsh Water did appear to concern information more akin to that contained in the CON29DW, namely the plans for the entire sewer and mains water system for a particular street [IC-46917-Z1Y4], the issue in that case being whether the charges levied were reasonable within the meaning of Reg 8(3). Although apparently not disputed, the ICO considered (at [7]-[9]) whether the information was EI, construing the term "information on" widely, usually including "information that would inform the public about the element, measure, etc under consideration and would therefore facilitate effective participation by the public in environmental decision making … ." The ICO found the information requested to be EI under Reg 2(1)(c), albeit the decision does not identify the particular measure concerned and does not appear to have considered it EI under Reg 2(1)(a) or (b). The ICO also considered (at [24]), apparently in the context of the reasonableness of the proposed charges, that "[t]he subject matter of this request - a map of the water assets in a particular street - does not suggest that the information will have any wider public value beyond the complainant's own immediate interest".

186. Finally, the Claimants say that "[a]ll Ds accept that the key purposes for which the maps were produced or obtained include to enable Ds to comply with their statutory duties". Although the Claimants' argument potentially informs the wider context, as I have already noted, in my view, the purpose(s) for which the CON29DW information was sought and used by the ultimate recipients, including as indicated in the HMLR and STPS 'explainers' relied on by the Claimants, is of greater significance. More specifically, although Part VII of the WIA requires the WASCs to make the sewer map publicly available, I agree with the Defendants that the information sought through the CON29DW is not 'on' that Part, the information saying nothing about how the relevant Defendants' records are collated, stored or maintained.

187. The Defendants rely for **Question 1.1** on their general arguments summarised above.

Sewer assets

188. **Question 6.2** (CommercialDW) says: **on the copy extract from the public sewer map, please show manhole cover, depth and invert levels where the information is available**.

189. For **Question 6.2** (CommercialDW), the Claimants rely on the points advanced with respect to the public sewer map (**Question 1.1** (above)), stating additionally that "[a]ll Ds accept that, if the responsive information is 'held' by a WASC, the key purposes for which it was produced or obtained include so that it knows where pipes and other assets can be accessed from and at what depth, including for inspection and maintenance purposes, and is able to maintain those manholes for which it is responsible, and to help assess the impact and risks to its sewerage infrastructure from any proposed nearby development on which it is consulted or in respect of which its approval or agreement is requested and to aid decision making in respect of the same."

190. The Defendants say that the responsive information has no, or very remote or tangential, connection with any of the elements of the environment in Reg 2(1)(a). Information of this nature about a specific property, for example as to the depth of a particular manhole, would not contribute in any way to meeting the objectives properly of relevance in the EIR context.

191. Given their similarity of subject matter, it is convenient to address together **Question 2.4** and **Question 2.5**. **Question 2.4** asks: **does the public sewer map indicate any public sewer, disposal main or lateral drain within the boundaries of the property**? Question 2.4 from the CommercialDW is in the same terms. **Question 2.5** asks: **does the public sewer map indicate any public sewer within 30.48 metres (100 feet) of any buildings within the property**? Question 2.5 from the CommercialDW is in the same terms.

192. The Claimants refer by way of explanation of **Question 2.4** to the London Drainage Facilities website which states that:-

> "A sewer is an underground network of pipes that carry sewage, such as waste water and excrement, waste water and surface water run-off from drains to treatment facilities or disposal points."

193. And:-

> "A lateral drainage system is a series of pipes which connects the main sewage system or public sewer network together. A lateral drain can usually be found outside your property boundary, often beneath a pavement or public road."

194. The Claimants also rely on the points advanced with respect to the public sewer map question (**Question 1.1** (above)), stating additionally by reference to the STPS 'explainer' for **Question 2.4** that " … public sewer infrastructure within property boundaries will affect potential development and use of the land, including by virtue of statutory rights of entry, easements, need to inspect and repair etc. and rights to veto development." Indeed, the 'explainer' identifies the two reasons why prospective homeowners might be concerned about the presence of public sewers within their property boundaries, namely (i) concern around development, WASCs having legal rights to protect their assets, including possible veto of nearby development where, for example, it makes access to the relevant asset difficult and/ or might cause sewer burst or collapse and (ii) relatedly, WASCs' statutory access rights to private land to maintain their assets, for example, to replace or repair sewers or other assets with the risk of excavation causing damage to properties. The Claimants say that this " … may present a risk of flooding, overflowing, collapse, with consequential environmental risks and risks to human health." The explainer goes on to note that, although these matters may sound alarming, sewers through boundaries are very common, particularly since the 2011 private sewer transfer and, more often than not, cause minimal issues for the owner.

195. For **Question 2.5**, the Claimants rely additionally on the rationale for its inclusion in the CON29DW as also indicated in the STPS 'explainer', namely:-

> "There's a dual reason for this question appearing in the search. The first, and historically the most important reason is to enable the buyer to determine the length of existing private drain/ sewer they are responsible for. If the nearest sewer was a considerable distance from a connected property, the owner could face a substantial

repair bill (as well as issues accessing a pipe located under public land) should something go wrong."

196. As to the second reason:-

> "The other reason for its inclusion - as well as the seemingly arbitrary figure of 30.48 metres (which equates to 100 feet) - applies to unconnected properties.
>
> If a property drains to a septic tank, the local authority has powers to force owners to connect to the public sewerage network if the current arrangements pose an environmental hazard, and there is a public sewer located within 30.48 metres. This will usually be at the owner's expense, and costs can be considerable. Any new pipes laid as part of this process would not automatically be adopted by the water company, and would therefore be the property owner's responsibility to maintain. This can be both difficult and costly if the pipe runs through land outside the property boundary, even more so if it passes under a public highway.
>
> If the nearest public sewer is over 30.48 metres, the local authority cannot insist a connection is made, unless they agree to fund any further length of pipe themselves. …….
>
> Something else for the owners of unconnected properties to consider - many septic tanks discharge a small amount of sewage into the environment. Under the government's new general binding rules (introduced in 2015), new discharges from a septic tank are not permitted if the tank is located near a public sewer."

197. Finally, the Claimants again rely on the acceptance by all Defendants that the key purpose for which the information was produced or obtained includes compliance with their statutory duties, the various sections of the WIA and related legislation all said to form part of the same 'measure', with the state of water and the environment at its core.

198. The Defendants say that information is of relevance only to the respective legal obligations of the WASC and owner/ occupier of the property, the latter wanting to know whether they are able to engage in building works without having to pay to divert the sewerage pipe or whether the local authority might be able to compel a property to be connected to the sewer main in certain circumstances in the future. From an environmental perspective, whether a public sewer crosses the corner of one particular property, whether it is just outside or whether it is within 30.48m of a particular building, is neither here nor there. Furthermore, because of the transfer of sewers in 2011, there are a number of public sewers not shown on the Defendants' maps. Accordingly, even if the presence or absence of a public sewer within specific property boundaries or within a certain distance of buildings is properly considered EI, the responsive information does not give a definitive answer. Additionally, whether a sewer is public or private does not in itself have any environmental significance and (in many cases) will depend upon the terms of the 2011 transfer. For example, the drains in a row of terraced houses may be public in respect of some but not in respect of others depending on their precise position but, from an environmental point of view, any such distinction is arbitrary and insignificant.

199. Finally, in relation to **Question 2.5**, the Defendants say that some of them (NW, UU and YW) will (in certain circumstances) express a professional opinion as to the presence of a

public sewer within 30.48 metres even though not shown on the map. This is not factual information, let alone EI, being a matter of expert judgment.

200. Given the similarity of their subject matter, it is also convenient to address together the two pumping station questions. **Question 2.4.1** asks: **does the public sewer map indicate any public pumping station or ancillary apparatus within the boundaries of the property**? Question 2.4.1 from the CommercialDW is in the same terms. **Question 2.5.1** asks: **does the public sewer map indicate any public pumping station or any other ancillary apparatus within 50 metres of any buildings within the property**? Question 2.5.1 from the CommercialDW is in the same terms.

201. The Claimants rely for both questions on the points made under **Question 2.4** (above). They also rely on the STPS 'explainer' which addresses **Question 2.4.1** and **Question 2.5.1** together, explaining that they were added to the CON29DW in 2016 on account of the then transfer of most private pumping stations to the WASCs. As to the reasons for their inclusion, the 'explainer' notes that:-

> "Once sewers are in place, they will generally work perfectly for many years with little or no human intervention.
>
> Pumping stations on the other hand, are more complex. Most sewers are known as 'gravity sewers', and, as the name suggests, work through gravity, allowing sewage to flow downhill until it reaches its destination. Pumping stations are used to pump sewage under pressure when using gravity isn't possible.
>
> Pumping stations require regular inspection and maintenance in order to ensure they remain in good working order. Where a pumping station was originally privately owned – as with those included in the recent transfer - this is even more important as they will not usually have been constructed to the standards required by water companies.
>
> This maintenance can sometimes be disruptive to homeowners and nearby residents. Water companies will need access to them, and have statutory rights to enter private land to access their assets. Less important, but worth noting is that pumping stations can be noisy and, if above ground can be unsightly.
>
> There's also another important reason why we include this information. The sewers leading from pumping stations pump sewage under pressure. Although a leak in a gravity sewer can be serious, a leak in a pressurised sewer can have serious consequences (they pump sewage under pressure, we'll let you work out the details). Because water companies understandably want to protect these sewers, they are subject to stricter restrictions regarding development in their vicinity than gravity sewers. This can have implications should a property owner wish to carry out any development work.
>
> A pumping station within or close to your property will rarely present major problems, but, should the CON29DW highlight one, we would always recommend that a prospective buyer should be aware of [sic] prior to purchase."

202. The Claimants rely on these potential effects on land use and amenity from maintenance as well as the other possible risks indicated to say that the related information was EI. In addition, they refer again to the two ICO decision notices against D4 referred to above ([IC-163737-D3Q3] and [IC-218612-B1J7]) in which the ICO and D4 are said to have implicitly accepted as EI information relating to (i) an environmental permit granted by D4 for a particular STW and certain discharge data and (ii) certain capacity, operational and trade effluent permit data concerning another specific STW. Again, these decisions do not meaningfully advance the analysis, such STW data being qualitatively different from that responsive to both these questions.

203. Finally, the Claimants again rely on the acceptance by all Defendants that the key purpose for which the information was produced or obtained includes compliance with their statutory duties, the various sections of the WIA and related legislation all said to form part of the same 'measure', with the state of water and the environment at its core.

204. In relation to these questions, the Defendants make essentially the same points as for **Question 2.4** and **Question 2.5** (above), it making no difference whether, for example, a pumping station is within one or other of two adjacent properties, just outside the boundaries of both properties or within a certain distance of them. Moreover, in the vast majority of cases, the answer to this question is "no", disclosing nothing of significance as regards the property purchase, let alone in relation to the wider environment.

Sewer connections

205. It is also convenient to address together both sewer connection questions. **Question 2.1** asks: **does foul water from the property drain to a public sewer**? Question 2.1 from the CommercialDW is in the same terms.

206. Relying upon ICO guidance, the Claimants say that foul water is 'water' within the meaning of the EIR. Since wastewater discharge into the public sewer has an impact on the water composition of the sewer system (ie: the state of water), information about it is EI.

207. Moreover, according to another less detailed STPS 'explainer', the owners of unconnected properties are responsible for "all costs of operation and maintaining private treatment processes, as well as any possible future costs due to rising environmental standards or the need to connect to a public sewer." The more detailed STPS 'explainer' for **Question 2.1** also relied on by the Claimants states:-

> "Properties that do not discharge to the public sewerage system are usually responsible for their own drainage. This can be via a private sewer network and treatment works, or a septic tank, cess pit or other method. These have to be fitted and maintained to certain standards, enforced by the Environment Agency, which the owners will be responsible for ensuring are met. They'll also have to arrange for them to be regularly emptied. All of this can be expensive, not to mention inconvenient."

208. The Claimants rely on the ICO decision notice against SWW [IC-246925-B5D5] in which a request for the start and finish time regarding a discharge from a particular combined sewer outflow on a specific date (and any other sewage spills at that time in the Exmouth area) was considered to be a request for EI, being information relating to the management of wastewater and, as such, on factors affecting the elements of the environment

(presumably within Reg 2(1)(b)). Again, this decision did not advance the analysis, the relevant data there being qualitatively different from the information responsive to this question.

209. Perhaps of more relevance to this case was the decision of the Scottish ICO [048/2020] in which Scottish Water accepted that information concerning the existence or otherwise of water connections for a built structure was EI. The Scottish ICO agreed, considering the information to fall under Reg 2(1)(a) and (c), albeit on what basis was not explained. In that case, however, the request was extensive, seeking information on the precise route and locations of the mains drain into which the solum of the particular premises drained.

210. The Defendants say that, although water is one of the elements of the environment referred to Reg 2(1)(a), knowing whether foul water from a specific individual property drains to a sewer tells you little or nothing about the state of that element of the environment, the connection with the elements referred to Reg 2(1)(a) being incidental and tangential. Moreover, from an environmental point of view, it makes no difference whether the foul water from an individual property drains into a public sewer as opposed to a private one. Although this is relevant as regards the respective legal rights of the owner or occupier and the sewerage undertaker, it does not in itself have any real environmental significance.

211. Finally, where the report relates to a plot of land or new development, one possible answer by a number of the WASCs to this question was that the situation should be checked with the developer. The Defendants say that this answer had no environmental significance.

212. As to the surface water sewer connection question, **Question 2.2** asks: **does surface water from the property drain to a public sewer**? Question 2.2 of the CommercialDW is in the same terms.

213. The Claimants say that surface water also constitutes 'water' within the meaning of the EIR. Since the discharge of surface water into the public sewer system has an impact on the water composition of the sewer system (i.e. on the state of water), information about it is again EI.

214. Likewise, if surface water does not drain to the public sewer, it will drain into the environment. In this regard, the Claimants again rely on both STPS 'explainers' to the effect that:-

> "Properties not connected will usually drain via methods such as soakaways or draining to watercourses. These properties will receive reduced water bills but may experience problems with drainage."

215. And at more length in the more detailed 'explainer' for this question (and **Question 2.3**):-

> " …. Surface water is primarily rainwater which falls on the property and has to be removed. Unlike foul water, this doesn't require treatment and is therefore usually directed into nearby watercourses.
>
> The traditional method for disposing of surface water is via a surface water sewer. These are maintained by the local water company, and a charge is payable for this service

(comprising approximately 36% of the water bill). If any portion of a property drains to a public sewer, surface water charges are payable.

……..

Water from some properties drains directly into a watercourse or into the ground. Soakaways, which assist water draining into the ground are another common artificial method of disposal. These are the responsibility of the homeowner and, although an effective method under normal circumstances, they can struggle to cope with heavy rainfall.

An increasingly common method of surface water disposal is via Sustainable Drainage Systems, commonly known as SuDS. These are found in many modern developments, and drain water through methods such as balancing ponds and permeable paving, avoiding the need for public sewers.

SuDS are generally maintained initially by the developer, and then by the local authority. As they're not the responsibility of water companies, the CON29DW doesn't always contain information about them. Question 3.3 of the local authority's CON29 may contain further information regarding SuDS.

It is more common for properties not to be connected to surface water sewers than foul, but nonetheless, it is still something that any new homeowner needs to be aware of. Inadequate drainage can cause serious problems for a property, and we would therefore always recommend checking how surface water is disposed of."

216. The Defendants rely on their arguments under **Question 2.1**, adding that, since surface water (rainwater run-off) is less environmentally significant than sewage, their case is even stronger.

Sewer map, assets and connections – discussion

217. Applying the broad definition of EI, the information responsive to these questions could be said to be about, relate to or concern, and therefore be 'on', the state of the water (Reg 2(1)(a)), and factors such as substances, waste, discharges and releases affecting the state of the water (Reg 2(1)(b)), it being obvious from the presence, location of and/ or connection to, a public sewer (or other sewer assets) that water is likely present within, near or travelling through them and, given its source, likely content and mixture with other such water as it travels to the local STW, that one element at least will be 'foul'. However, the responsive information says little more than those obvious facts, its focus being on the location of assets relative to a property, and potential connection thereto, not their function, content or operation.

218. That position remains if the responsive information indicates the lack of public sewer assets or connection thereto. The Claimants say that this might suggest the presence of private sewer assets such as septic tanks or cesspits but that is not indicated by the information, at least as called for by the questions themselves, and is therefore surmise. Nor, even if private sewer assets were indicated, would such information be likely to say more about the related discharges or the state of the water itself beyond, again, the rather obvious.

219. The same is true of the surface water questions. The fact that surface water, principally rainfall, may drain from the rainwater goods on a particular property directly into the public sewer, says little, if anything, about the effect of that release into the sewer system or the state of that water, other than indicating its entry into either a combined sewer to join with foul water and travel to an STW or into a (separate) surface water sewer that might, albeit this is again surmise, travel instead for discharge into a watercourse.

220. The Claimants also say that the absence of a surface water connection might suggest alternative forms of surface water drainage, with consequential impacts in terms of contaminants affecting the state of the water, interaction with the soil as the medium for the particular drainage system concerned and/ or excess surface water potentially affecting the state of the soil or land. However, the CON29DW questions again do not call for this information. What surface water drainage infrastructure might be in place, if there is no connection to a public sewer would again be surmise as would the consequences in that event for the state of the surface water and its interaction with other elements of the environment.

221. The Claimants also suggest that the responsive information is 'on' the soil, land, landscape and natural sites on which the infrastructure is located. However, beyond the map showing the location of certain assets (and, for some assets, their depth), information about their location relative to the boundary of a particular property and the obvious point that the sewers, pipes, manholes and pumping stations will be located in, under and/ or on the soil and/ or land, the responsive information again says little, if anything, about the state of those elements, let alone of any landscape or natural sites.

222. The Claimants also point to the limitations and risks associated with the presence of such assets on private land, including potential restrictions on development, damage to those assets if works are undertaken nearby without adequate protection, consequential environmental and human health risks (eg flooding, bursting or overflowing), and some assets (e.g. pumping stations) being potentially noisy or unsightly and others (e.g. pressurised sewers) presenting greater risks. However, the information responsive to these questions again does not illuminate these matters.

223. The Claimants also rely for these questions on an array of measures or activities, some general, some specific, which they suggest the information is 'on'. As a preliminary matter, the suggested measure of "duties and obligations under the WIA" for (**Question 1.1**) (public sewer map) is, in my view, too vague to be meaningful.

224. The Claimants also suggest for foul water connection (**Question 2.1**) that the information is 'on' the duty of the relevant sewerage undertaker to comply with requisitions for the provision of a public sewer for domestic purposes of premises in a particular locality (s.98(1)) and related communications to it by way of lateral drain (s.98(1A)) and to provide a public sewer if the existing drainage of any relevant premises gives rise to such adverse environmental effects as to make its provision appropriate (s.101A) and other unspecified parts of Part IV of the WIA ('Sewerage Services') relating to sewers and lateral drains. However, the information responsive to these questions says nothing about how any such public sewer or connections to it came about. That is obviously also the case where no public sewer assets are indicated.

225. As to surface water connection (**Question 2.2**), the Claimants suggest that the information is 'on' the duty of the relevant sewerage undertaker to allow communication of the public sewers with drains or private sewers upon the owner or occupier of the relevant premises giving notice of his proposals (s.106), including communication with a compliant SuDs drainage system (s.106A), the power of sewerage undertakers themselves to construct drainage systems for the purpose of reducing the volume of surface water entering the public sewers at the rate it does (s.114A) and other unspecified aspects of Parts IV of the WIA ('Sewerage Services') relating to provision of sewers, including discharge of surface water and (presumably under Part V ('Financial Provisions')) surface water charges. However, the responsive information says nothing about how the property was connected to the public surface water sewer or what alternative surface water drainage systems, if any, might be present.

226. Although the relevant Defendant may well require access to the particular property to inspect, maintain, repair and improve its sewer assets, exercising its powers under Part VI of the WIA ('Undertakers' Powers and Works') for that purpose, these questions do not call for any information about those powers or their exercise and, again, the CON29DW does not provide any.

227. Nor, as already noted, is the CON29DW information (including for these questions) 'on' the WASCs' information provision duties under Part VII of the WIA ('Information Provisions'), including to make available the sewer map for public inspection. These questions do not call for information about how the WASCs collect, store and make publicly available, their own information, and the CON29DW does not provide any.

228. At its highest, it could be said (as the Claimants do) that information indicating the presence and location of public sewer assets within and around a particular property or the connection of that property to those assets is about, relates to or concerns, and is therefore 'on', the relevant WASC's provision of sewerage services and its operation and management of the sewer network, at least in the vicinity of that property. However, beyond the presence of, and a particular property's connection to, certain individual assets, the information says little, if anything, about the function or operation of the local sewerage system, let alone about the WASC's duty to provide, improve and extend a system of public sewers inside its area of responsibility, the cleansing and maintaining of those sewers to ensure the effective drainage of that area (s.94(1)(a)) or the provision for their emptying or effectual dealing with their contents (s.94(1)(b)).

229. Finally, the Claimants say that the responsive information is 'on' the state of built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in Reg 2(1)(a) or, through those elements, by any of the matters referred to in Reg 2(1)(b) and (c), the term 'built structures' said to encompass not only the property with which the prospective purchaser is interested, but also the sewers, lateral drains, pipes, infrastructure and other man-made elements of the network itself. However, even on that expansive view of the term, the responsive information says nothing about the state of those built structures, let alone how they might be affected by the state of the elements in Reg 2(1)(a) or, through them, by any of the matters in Reg 2(1)(b) and (c).

230. I therefore find that the information responsive to these CON29DW questions is not EI. I do so conscious of, but notwithstanding, the breadth of the definition of EI indicated by cases such as *Henney*, including how the proper approach is not restricted by what the information is specifically, directly, immediately, let alone primarily, "on" (*Henney* at [39]). I also keep well in mind the obvious need for, and environmental implications of, an effective sewerage system, not least ensuring effective sewage treatment and water conservation, as both are important aspects of the legislative and regulatory regime described above. Despite these matters, the paucity and limited scope of the information responsive to these questions, concerned as it principally is with the locational relationship of specific sewer assets with a particular property, are such that any connection with the matters identified in Reg 2(1)(a) is minimal.

231. I am reinforced in these findings by both the wider context of the information, including the purpose for which it has been produced to the ultimate recipients of the CON29DW and the objectives of the EIR. As to the former, there is good reason for the focus of these questions on the location of the relevant sewer assets relative to a particular property. As the STPS 'explainer' makes clear for a number of them, their purpose is to elicit information which might implicate the rights and liabilities of the prospective property owner, whether in terms of having to afford access to the undertaker to maintain its assets, restricting the ability to build over or near to those assets, identifying where responsibility might lie for asset repair or whether the local authority can compel connection of the property to a public sewer and cause the landowner thereby to incur related cost. The purpose of the questions is not to enquire as to the content, condition, function, operation or potential risks of the assets, their effect on the water, soil or land, the related activities of the undertaker in their deployment and operation, or the environmental protections that any related restrictions on land use or development, for example, might afford.

232. Relatedly, nor can it be said that the information responsive to these questions, directed as it is to those purposes, meaningfully advances the objectives of the EIR. Without more, access to information about the presence (or otherwise) of sewer assets and their connection or location relative to an individual property does not advance public debate on, or better decision-making in, environmental matters (*Henney* at [54]). The Claimants' general argument is that such information facilitates better understanding of the Defendants' compliance (or otherwise) with their public duties and responsibilities under the WIA. Although such an objective would accord with the purpose of the EIR, it is not one indicated by the answers to these questions at least.

233. Accordingly, I find that the information responsive to these questions is not EI.

Discrete sewerage related questions

234. I now turn to certain further sewerage related questions which, given their more discrete subject matter, are appropriately considered individually.

Build over agreements/ consultation

235. **Question 2.7** asks: **has a sewerage undertaker approved or been consulted about any plans to erect a building or extension on the property over or in the vicinity of a public sewer, disposal main or drain**? Question 2.7 from the CommercialDW is in the same terms.

236. The Claimants again rely on the STPS 'explainer' for this question. This explains that local planning and building control authorities routinely consult WASCs about any proposed application affecting the immediate vicinity of one of their assets and that developments not requiring planning permission will still need to be approved by WASCs if they are likely to impact on their assets. The 'explainer' identifies the reasons for this as follows:-

> "The public water and sewer networks are vital, and it's important that water companies can access their assets at any time, and that these assets are not obstructed or damaged by building work. And whilst they're not as strict with restrictions around sewers as they are around water mains (where building over/ close to is outright forbidden) they will use their statutory powers to protect their assets.
>
> It's not just to protect the sewers however. Building too close to a pipe could have a negative effect on your property. Although uncommon, a damaged sewer near a property can lead to flooding or, in extreme cases, parts of a building collapsing.
>
> ……
>
> If a sewer has been built over or near-to without the water company's permission, the company has full legal powers to take whatever steps it considers necessary to protect their assets. This can be anything from an on-site inspection, to making the owner pay to divert the sewer or in extreme cases, removing the building built over their asset.
>
> It's primarily for this reason that the information's included in the CON29DW. Water companies will hold the current owner of a property responsible for unapproved developments, regardless of whether they were the owner at the time. It's best to check prior to purchasing a property whether all development work was approved, including around sewers, so it doesn't cause any issues down the line."

237. In this regard, the Claimants rely on the Secretary of State's concession in *Venn* that the definition of "environmental" in the Convention is arguably broad enough to catch most, if not all, planning matters. In that case, the issue arising was whether, in allowing an appeal against the local authority's refusal of planning permission for a single story courtyard dwelling in the garden of a Lewisham property, the planning inspector had failed to have regard to the local plan policy (itself said to be supported by other national and London planning policies and guidance). To the same end, the Claimants rely on the long list of planning matters identified as EI in Coppel, *Information Rights* (6th ed.) (at [17-018]), including financial viability assessments and legal advice on agreements to redevelop.

238. Finally, the Claimants say that all Defendants accept that, if and to the extent that the responsive information is 'held' by a Defendant, the key purpose for which it was produced or obtained is to (i) determine the impact of any such approval, keep informed and, if necessary, object, in relation to any such plans to build or extend, so as to ensure that it can continue to exercise its rights of access to carry out maintenance work and, if necessary, take steps towards preventing its assets from being obstructed or damaged by building work and (ii) be able to identify whether building works which pose a risk to or have already damaged its assets were approved or consulted upon and, if not, take appropriate action.

239. The Defendants say that the information responsive to this question relates to a landowner's right to build on its own land and the legal rights of landowner and undertaker in respect of any building. The relevant information has only a remote or tangential connection with any of the elements of the environment listed in Reg 2(1)(a). The connection with any environmental matters is still more remote where there has merely been consultation but, as yet, no approval. The same points apply with more force to the majority of cases where the answer is "no".

Build over agreements/ consultation – discussion

240. The Claimants say that the information responsive to **Question 2.7** is 'on' the state of the elements of the environment, including water (in the sewer or drain), soil, land, landscape and the interaction among these elements (Reg 2(1)(a)). However, the information says nothing about the state of the water, its focus being on approvals for construction work over, or in the vicinity of, those assets, not their content.

241. Although the question does not call for information about the subject matter of the agreement or consultations or what proposed work might be undertaken if approval is given, I am satisfied that information confirming the existence (or otherwise) of plans for the development of land (even if not yet consummated) relates to the state of that land, the soil and, potentially, the landscape, within the meaning of Reg 2(1)(a).

242. That said, I do not accept that the information responsive to this question is 'on' factors such as waste (in the sewer or drain) affecting or likely to affect the state of the elements of the environment (Reg 2(1)(b)). Beyond the premise of the question being construction over or, in the vicinity of, a sewer, disposal main or drain (into which waste may well discharge), the information elicited says nothing about waste, let alone its impact on the state of the elements referred to in Reg 2(1)(a).

243. Nor is the information 'on' the state of built structures inasmuch as they are or may be affected by the state of those elements or, through those elements, by any of the matters referred to in Reg 2(1)(b) and (c) (Reg 2(1)(f)). To the extent the Claimants are referring here again to the sewer and drainage infrastructure as being built structures, the responsive information says nothing about their state, let alone how they might be affected by the state, or through the elements of, the environment. The same is true if the Claimants are, in fact, referring to any construction, including any risk of flooding or building collapse associated with unauthorised works.

244. Finally, the Claimants say that the information is 'on' measures, plans, programmes, environmental agreements and activities (e.g. the activity of the relevant WASC agreeing to a building permit or planning application) affecting or likely to affect the elements and factors referred to in Reg 2(1)(a) and (b) as well as measures or activities designed to protect those elements (Reg 2(1)(c)). I agree that the exercise of a WASC's power to approve (or otherwise) a plan to erect a building or extension is a measure or activity that would affect, or be likely to affect, as well as being designed to protect, the soil, land and, potentially, the landscape within the meaning of Reg 2(1)(c).

245. As to the broader context, the Defendants are correct to say that the responsive information concerns the landowner's rights (or otherwise) to build on his own land and the undertaker's related rights in relation to any nearby sewer assets. However, the connection between the responsive matters and the Reg 2(1) matters identified above is more than merely tangential here. Nor did I find persuasive the Defendants' argument that the position would be different where the relevant proposal was merely under consultation or there had been no approval or consultation at all. The prospective exercise of an approval power would still engage those matters, as would its non-exercise. I am also satisfied that this information would be of broader public environmental interest than the narrower interests of landowner and sewerage undertaker, access to information about potential or actual local land development advancing public debate on, and better decision-making in, environmental matters.

246. Accordingly, I find that the information responsive to this question is EI.

Internal flood risk

247. **Question 2.8** asks: **is [any] [the] [normally occupied] [building] [the dwelling house] [which is or forms part of] the property, [or any part of the property] at risk of internal flooding due to overloaded public sewers**? **Question 2.8** and Question 2.8 from the CommercialDW are in very similar terms.

248. The Claimants rely on the STPS 'explainer' for this question which states that, although the areas of the CON29DW that tend to concern most people are around connections and public assets within property boundaries, the area of sewer flooding is also of concern as having the potential for serious household disruption, as to which:-

> "Water companies keep records of public sewers and properties which have suffered sewer flooding incidents, or are at risk of doing so.
>
> Sewers are recorded on a register if the flow from a storm is unable to pass through the sewer due to a permanent problem, such as the sewer being too small, or at the wrong gradient. They're not placed on the register if the problem is temporary, like a blockage or a collapsed sewer. This register changes regularly as water companies work constantly to upgrade inadequate sewers. Likewise, sewers are regularly added to the register as new properties connect to the network, increasing demand on the system.
>
> With buildings, water companies classify them as at risk from internal flooding if water from an overloaded sewer enters them (or passes beneath if the floor is suspended) either once or twice within a ten-year period. Flooding from extreme events, such as a one in 100-year storms is not included, as water companies don't class these events as likely to reoccur."

249. The Claimants also rely on the acceptance by all Defendants that if and to the extent that the responsive information was 'held' by a Defendant, the key purposes for which it was produced or obtained included to monitor flood risk and take steps towards preventing the building from flooding or flooding again in the future, to address ongoing flooding incidents, to comply with its duty pursuant to s.94 of the WIA to ensure that the area it serves is, and continues to be, effectually drained and to comply with a regulatory requirement to report to Ofwat, the various sections of the WIA and related legislation/

regulatory framework all said to form part of the same 'measure', with the state of water and the environment at its core.

250. The Claimants also say that the Tribunal in *Walker* v *IC* [EA/2011/0096, 21 October 2011] held that information related to flood risks from a watercourse was EI. However, apart from the somewhat different context of the question here, it appears that the Tribunal and the parties proceeded in that case on the basis the information sought was EI such that the point was not argued, the main issue being whether the relevant request for information was 'manifestly unreasonable' within the meaning of Reg 12(4)(b). The two ICO decision notices relied upon by the Claimants issued against, respectively, NW [FER0588641] and YW [FER0590277] also appear to have proceeded on the same basis. Moreover, the requests for information in those cases concerned the relevant undertaker's (DG5) flood risk database, not merely the flood risk record for a particular property. As such, the utility of these decisions is limited.

251. The Defendants say that, although there is some connection with Reg 2(1)(a) (water being one of the elements of the environment), the risk of flooding as regards a specific, individual property is not sufficiently closely connected with the matters in Reg 2(1), or about which the EIR is or ought to be concerned, for it to constitute EI. The fact that it may be of real interest or concern to a house-purchaser to know whether their specific property might be affected is a separate and distinct matter. The same points apply with even more force to the great majority of cases where the answer to question 2.8 is "no".

Internal flood risk – discussion

252. The information responsive to **Question 2.8** (and CommercialDW equivalents) is EI. First, at its most basic level, the information is "on" the (overflowing and foul) state of the water at risk of leaving the sewer system and entering the dwelling or building concerned. Unlike the questions directed to the location of, and connection to, sewer assets, the information responsive to this question *is* concerned with the state of the water, being a particularly unpleasant feature of internal flooding from sewers. However, I do not agree with the Claimants that the information is also concerned with the state of the land, and the interaction of water and land, the question here being directed to *internal* flooding.

253. Second, and to a similar end, the information is 'on' factors, including substances, waste, discharges and releases into the sewer system affecting or, likely to affect, the (overflowing and foul) state of the water at risk of leaving the sewer system and entering the dwelling or building concerned.

254. Third, and more pointedly, the information is 'on' measures affecting or likely to affect the elements (water) and factors (substances, waste, discharges and releases in the sewer system), those measures including the requirement for effluent from a sewer not to enter a customer's building (see Regulation 11(1) of the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008), representing a component of the service standards laid down by regulation for compliance (or otherwise) with the broader measure at s.94 of the WIA, including the duty to empty sewers and make further provision to deal effectually with their contents (s.94(1)(b)). Again, unlike the questions directed to the location of, and connection to, sewer assets, this question *does* concern the content, function and operation of the sewerage system, thereby, implicating the general duty to provide

sewerage services, albeit not, as the Claimants suggest, the WASCs' record-keeping or compensation obligations with which the responsive information is not concerned.

255. Fourth, and also more pointedly, the information is also 'on' the state of built structures (i.e. the flooded building or dwellinghouse) as they may be affected by the (overflowing and foul) state of the water, alternatively as such built structures may be affected through water by substances, waste, discharges and releases in the sewer system (Reg 2(1)(f)).

256. In this regard, I am unable to accept the Defendants' argument that the risk of flooding of an individual property is not sufficiently closely connected with the elements of the environment in Reg 2(1)(a). The environmental and sanitary risks posed by internal property flooding, even at individual property level, mean that such connection is more than minimal. Moreover, given those risks, and the implications for the local sewerage infrastructure, including the potential need for improvement, access to such information, again even at individual property level, advances public debate, and better decision-making, in environmental matters.

257. Finally, the fact that the majority of these CON29DW enquiries may elicit a "no" answer does not alter the analysis. Information that a property is not at risk of internal flooding is still EI.

258. Accordingly, I find that the information responsive to this question is EI.

Proximity of STWs

259. **Question 2.9** says: **please state the distance from the property to the nearest boundary of the nearest sewage treatment works**. Question 2.9 from the CommercialDW is in the same terms.

260. The Claimants again rely on the STPS 'explainer' for this question. This states:-

> " ….. This question is designed to inform the public about an unpleasant but necessary part of the sewage treatment process.
>
> Foul sewers, which take all waste water from inside a property, feed into treatment works (as opposed to surface water sewers, which remove rain water and return it back into the environment). This water is then treated to remove contaminants before being discharged, and the waste products safely disposed of.
>
> Unfortunately, this process can be disruptive, not to mention unpleasant for nearby properties, and it is for this reason that their location is included in the CON29DW.
>
> Firstly, and most obviously, the presence of a treatment works can cause unpleasant odours. Although most are located away from residential areas (primarily for this reason) the odour can occasionally be noticeable from some distance, especially in certain wind conditions.
>
> A treatment works can also be disruptive. The heavy machinery used can sometimes be noisy, and tanker trucks often visit sites, especially with larger works. Whilst the noise should be minimal from nearby properties (unless they are in immediate proximity to

works, which is unlikely), trucks visiting sites will pass along access roads to treatment works.

Flies are another unpleasant side effect of treatments works. The processes used to treat sewage are designed to mimic the ecology of marshland, which in turn attracts flies. Whilst these will be concentrated around the works themselves, they have on occasion been known to swarm, which can affect nearby properties."

261. The Claimants also rely on the ICO decision notice against STW [IC-163737-D3Q3] (also relied on under **Question 2.4.1**) in which the ICO and STW are said to have implicitly accepted as EI information relating to an environmental permit granted by D4 for a particular STW and certain discharge data. However, even though both are concerned with STWs, the information the subject matter of the ICO decision was, again, qualitatively different from that responsive to this question.

262. Finally, the Claimants say that most of the Defendants accept that, if the responsive information is 'held' by a Defendant, the key purposes for which it was produced or obtained included to comply with their statutory duties, the various sections of the WIA and related legislation all said to form part of the same 'measure', with the state of water and the environment at its core.

263. The Defendants say that the location of the STW may be EI (for example, as being information on factors falling within Reg 2(1)(b)). However, the distance of the works from a specific property does not in itself tell you anything that would contribute to meeting the objectives of the EIR. Indeed, if this information did constitute EI, the consequences would be wide-ranging and surprising, potentially requiring, for example, a public authority holding information about an environmentally relevant site or feature to measure the distance between that site or feature and any other location and to disclose the resulting measurement.

Proximity of STWs – discussion

264. The information responsive to **Question 2.9** is EI. First, although not specifically identified in the CON29DW itself, the question is clearly concerned with the 'hazards' of living in the vicinity of an STW, principally the smell of sewage treated at the STW. As such, it is 'on' the state of the elements of the environment, including air, atmosphere and (foul) water at the STW (Reg 2(1)(a)). Again, unlike the questions directed to the location of, and connection to, sewer assets, the information responsive to this question *is* concerned with the state of these elements albeit, with its focus on the *proximity* of the STW, not the landscape about which it says nothing.

265. Second, the information is also 'on' factors such as substances, waste, discharges and releases (as treated at the STW) affecting or likely to affect the state of the above elements of the environment (Reg 2(1)(b)).

266. Third, the information is 'on' the 'measure' or activity identified at s.94(1)(b) of the WIA of " … dealing, by means of sewage disposal works or otherwise, with the contents of [ ] sewers", such measure or activity likely to affect the elements and factors identified above, as well as being designed to protect the water through its treatment (Reg 2(1)(c)). Again, unlike the questions directed to the location of, and connection to, sewer assets, the

information responsive to this question *is* concerned with the function and operation of the relevant undertaker with respect to the content of the sewers.

267. I was not persuaded, however, that the responsive information is 'on' the state of built structures inasmuch as they are or may be affected by the state of the elements of the environment or, through those elements, by the factors or measures identified above (Reg 2(1)(f)). Although, no doubt, the use and enjoyment of a property would be affected by a nearby STW, particular in terms of air quality and odour, this does not impact the *state* of the relevant built structure as such.

268. Finally, I did not find compelling the Defendants' suggestion that knowing the distance of an STW from a specific property does not say anything that contributes to meeting the objectives of the EIR. To the contrary, even if that information is couched in that manner, access to information about local sites such as STWs, with the environmental effects described, is consistent with those objectives and advances public debate on, and better decision-making in, environmental matters.

269. Nor was my view affected by the suggested surprising outcome that a public authority would be required to measure the distance between any environmentally relevant site and any other location. As the Defendants recognise, this assumes that the information is "held" by the public authority in the first place. Moreover, even if the information is held by the relevant WASC, the point seems more properly one of burden rather than whether, as a matter of principle, the information is EI.

270. Accordingly, I find that the information responsive to this question is EI.

Trade effluent consents

271. **Question 5.1** (CommercialDW) asks: **is there Consent, on this property, to discharge Trade Effluent under s.118 of the Water Industry Act (1991) into the public sewerage system**?

272. S.141(1) of the WIA defines trade effluent as "any liquid, either with or without particles of matter in suspension in the liquid, which is wholly or partly produced in the course of any trade or industry carried on at trade premises".

273. The Claimants rely for this question on STW's website which states that:-

> "Trade effluent can damage our sewers, sewage treatment processes and the water courses that we discharge to.
>
> It can also affect the health and safety of anyone working in or around our sewerage network.
>
> We need to ensure that our infrastructure and treatment processes work effectively, so that we can return your treated waste water safely back into the environment."

274. The Claimants again rely for this question on the two ICO decision notices against D4 concerning, respectively, (i) an environmental permit granted by D4 for a particular STW and certain discharge data [IC-163737-D3Q3] and (ii) certain capacity, operational and trade effluent permit data concerning a particular STW in D4's area [IC-218612-B1J7] in which the ICO and D4 both implicitly accepted that the information sought was EI. However, with perhaps the exception in the latter of the list of companies holding trade effluent consents, the information the subject matter of those notices, was, again, qualitatively different from the information in issue for this question. As such, they added little to the analysis even if the point had been argued (which it was not).

275. Finally, the Claimants say that all Defendants accept that, if and to the extent that the responsive information was 'held' by a Defendant, the key purposes for which it was produced or obtained include to comply with its duties regarding trade effluent registers pursuant to s.196 of the WIA, the various sections of the WIA and related legislation all said to form part of the same 'measure', with the state of water and the environment at its core.

276. The Defendants rely on their general arguments summarised above.

Trade effluent consents – discussion

277. The information responsive to **Question 5.1** (CommercialDW) is EI. First, unlike the questions directed to the location of, and connection to, sewer assets, the responsive information *is* 'on' the state of the water (i.e. as mixed with trade effluent) within the sewers (Reg 2(1)(a)). However, contrary to the Claimants' suggestion, it is not 'on' the state of the soil, land, landscape and natural sites on which the sewer infrastructure is located, or the interaction of these elements. The information says nothing about those matters.

278. Second, similarly, the information is 'on' factors such as substances, waste, emissions, discharges and other releases (i.e. trade effluent) affecting or likely to affect the state of the water (Reg 2(1)(b)).

279. Third, the information is 'on' the 'measure' or activity of the sewerage undertaker in giving consent for the discharge of trade effluent pursuant to s.118 of the WIA, being likely to affect the elements and factors identified above, as well as a measure or activity designed to protect those elements, including, for example, through the imposition of conditions to any consent pursuant to s.121 (Reg 2(1)(c)).

280. Fourth, although D4's website explains the damaging effect of trade effluent on sewers, I was not persuaded by the Claimants' suggestion that the responsive information is also 'on' the state of built structures inasmuch as they are or may be affected by the state of the water or, through the water, by any of the factors or measures identified above. The responsive information says nothing about this.

281. Finally, even if the person commissioning the CommercialDW may be more concerned to know the implications of the responsive information for the operation of his business than for its environmental impact, access to information about trade effluent, even as permitted to be discharged from a single property, will advance public debate on, and better decision-making in, environmental matters.

282. Accordingly, I find that the information responsive to this question is EI.

Adoption agreements/ applications

283. It is convenient to consider together the sewer and water mains adoption questions, engaging as they do similar considerations. In relation to sewer adoption, **Question 2.6** asks: **are any sewers or lateral drains serving or which are proposed to serve the property the subject of an existing adoption agreement or an application for such an agreement**? Question 2.6 from the CommercialDW is in the same terms. In relation to water mains adoption, **Question 3.3** asks: **is any water main or service pipe serving or which is proposed to serve the property the subject of an existing adoption agreement or an application for such an agreement**?

Sewer adoptions

284. The Claimants rely on the STPS 'explainer' for **Question 2.6** which, after explaining that ownership of most newly laid sewers vests in the person who laid them, states:-

> "Usually, the owner of these sewers will want to transfer them to the relevant water company. Not only does this mean the owner is no longer responsible for their upkeep, it also means they're in the hands of a company that has the legal powers, financial resources and expertise to maintain them.
>
> With larger developments (typically ten houses or more), the normal method by which this transfer is achieved is via section 104 of the Water Industry Act (1991), commonly referred to as a Section 104 Agreement (or S104 agreement for short).
>
> This is an agreement between the developer and water company that specifies the criteria of adoption. In short, the developer agrees to build the sewers to an agreed standard, and maintain them for a certain amount of time after the development is occupied, usually a few years. After this period, providing there are no significant problems, ownership will be transferred to the water company, who will then be responsible for the sewers going forward.
>
> ……..
>
> Should your search highlight the sewers are under an adoption agreement, you need to be aware that they're not currently owned by the water company and that, if things go wrong, it's not the water company who will be responsible for repairing them. There's also the possibility that the developer will be unable/ unwilling to repair sewers, or, should they cease trading, the homeowners could ultimately find themselves responsible for the sewers. We'd always advise checking who the developer is, whether there are any likely complications, and the probable timescale of adoption."

285. The Claimants say that sewer adoption agreements regulate the transfer of private sewerage infrastructure into public ownership and comprise part of the statutory regime under s.102 (onwards) of the WIA. Moreover, all Defendants accept that, if and to the extent that the responsive information was 'held' by a Defendant, the key purpose for which it was produced or obtained was to (i) identify which foul, surface and combined sewers it is or will be responsible for maintaining and (ii) decide what action (if any) should be taken in

respect of any such application for an adoption agreement, the various sections of the WIA and related legislation all said to form part of the same 'measure', with the state of water and the environment at its core.

286. Finally, the Claimants rely on the decision of the Stuttgart Administrative Court in *Verwaltungsgericht Stuttgart*, Judgment of 13 November 2014 [4 K 5228/13] holding again, consistent with the broad definition, that the "cross-border leasing contracts" in that case were EI. The decisive matter in that case appeared to be that the main lease, leaseback and framework agreements all contained provisions concerning the obligations of the operator in relation to the operation of the sewer system, the non-performance of which potentially affected both the environmental elements of water and, at least indirectly, of the soil, a particular concern in that case because the investor potentially became responsible for sewage disposal after the leaseback period ended. All the contracts (including those dealing only with financing or tax issues) were therefore considered to contain EI. However, the information in that case was again qualitatively different from the information responsive to this question.

287. The Defendants say that the information responsive to this question has no, or at most a remote or tangential, connection with the elements of the environment in Reg 2(1)(a). An adoption agreement concerns the division of responsibility between developer and WASC, the latter only assuming responsibility upon adoption. It has no effect on the environment but concerns against whom the householder will have legal rights during the period before or after adoption. Any link with the elements of the environment is still more remote where there is no adoption agreement yet in place but merely an application for such an agreement. Finally, the Eversheds Defendants say that they also provide information as to whether the maintenance period has started or whether the adoption agreement is supported by a bond, such information relating to the respective legal and financial liabilities of the sewerage undertakers and developers, not to any environmental matters

Water mains adoption

288. The Claimants rely for **Question 3.3** on their arguments under **Question 2.6** (sewer adoptions) as well as the STPS 'explainer' for the former which states that:-

> "As with sewers, prior to adoption, responsibility for the main lies with the developer. This means for homeowners, should any problems occur, it will be them, not the water company who are responsible for resolving them. The danger here is that, should anything happen to the developer (such as them going bankrupt), or they choose not to resolve the problem, homeowners could be left in limbo, with no company taking responsible for the mains.
>
> With sewers, an adoption agreement is standard practice for laying new mains. With water however, it is currently extremely rare, with mains generally being laid either by the water company or an approved contractor (what is known as a 'self-lay' option). This ensures mains are laid correctly, and are the responsibility of the water company immediately."

289. Finally, the Claimants say that adoption agreements regulate the transfer of private waterworks infrastructure into public ownership, and comprise a part of the statutory regime (ss.51A-51E of the WIA). Most of the Defendants accept that, if and to the extent that the responsive information was 'held' by a Defendant, the key purpose for which it was produced or obtained was to (i) identify which water mains and service pipes it is or will be responsible for maintaining and (ii) decide what action (if any) should be taken in respect of any such application for an adoption agreement, the various sections of the WIA and related legislation all forming part of the same 'measure', with the state of water and the environment at its core.

290. The Defendants too rely for **Question 3.3** on the points made under **Question 2.6**, also noting that the answer to the former in the vast majority of cases is "no" such that it therefore has no environmental significance even to the property purchaser.

Adoption agreements/ applications – discussion

291. Considering sewer adoption first, the information responsive to **Question 2.6** could be said to be 'on' the state of the water (Reg 2(1)(a)) and factors such as substances, waste, discharges and releases affecting the state of the water (Reg 2(1)(b)), it being obvious that foul water at least will likely be present within, near or travelling through the relevant sewer the subject of the agreement. However, as with the sewer map, assets and connection questions, the responsive information says little more than that obvious fact, the focus being on the existence of an agreement, or of an application for an agreement, to adopt a sewer, not the content, function or operation of that asset, whether existing or yet to be built.

292. It could perhaps also be suggested, although the Claimants did not appear to do so, that the information is 'on' the state of the soil or land (Reg 2(1)(a)), it likely being a condition of any adoption agreement that the relevant sewer must be constructed using a particular method and to a certain standard before it can vest in the undertaker. However, the responsive information again says nothing about any such requirements.

293. The Claimants also rely for these questions on the 'measures' or activities constituted by s.102 (and following) of the WIA to say that Reg 2(1)(c) is engaged. Although the agreement to adopt existing sewers or those yet to be built under, respectively, ss.102 and 104 of the WIA are 'measures' within the meaning of Reg 2(1)(c), and the responsive information is 'on' them, the proposed or agreed change of ownership of the relevant sewer or lateral drains would not affect or be likely to affect, the water, land or factors identified above. Regardless of any agreement to adopt (or related application), the sewer would still be present or built and the foul and/ or surface water would still flow into it.

294. Consistent with *Henney*, it could be said that s.102 (and following) of the WIA is part of a broader measure, for example, with respect to the general duty to provide a sewerage system to ensure the effectual drainage of the area concerned. In one sense, the adoption of sewers, and their potential absorption into the public system, reflects the provision and extension of that system (s.94(1)(a) of the WIA), with the WASC having to operate, maintain and cleanse them post-adoption. However, information concerning the existence of an adoption agreement does not meaningfully inform that broader measure. In *Henney*, the data communication component was critical to the success, and an integral part, of the SMP. In this case, whether or not the relevant undertaker agrees to adopt a sewer in a particular

locality, it would still carry on the provision of the sewer system in the area in accordance with s.94(1).

295. Finally, the Claimants say that the responsive information is 'on' the state of built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in Reg 2(1)(a) or, through those elements, by any of the matters referred to in Reg 2(1)(b) and (c). However, even on the expansive view of that term as encompassing man-made elements of the sewer network, the responsive information again says nothing about the state of those built structures, or any properties they might serve, let alone how they might be affected by the state of, or through, water for example.

296. The position is the same for water mains adoption and for much the same reasons. Although there obviously is, or will be, water travelling through any water main or pipes proposed to be adopted, the information responsive to **Question 3.3** says nothing about its state or that of the other elements in Reg 2(1)(a), or their interaction.

297. Likewise, although the responsive information is 'on' the 'measures' or activities reflected in ss.51A-51E of the WIA, the existence of an adoption agreement for a water main (or application therefor), does not affect, and is not likely to affect, the water supplied to the new property (Reg 2(1)(c)). Nor can it again meaningfully be said in this context either that these specific measures on water main adoption are a sub-component of the general duty to "develop and maintain an efficient and economical system of water supply within its area" (s.37(1)).

298. Nor does the information concern the state of built structures, whether of the man-made elements of the network through which the water travels or of the property to which that network may be connected, let alone how they might be affected by the state of, or through, water (Reg 2(1)(f)).

299. Again, I am reinforced in these findings by both the wider context of the information, including the purpose for which it has been produced to the ultimate recipients of the CON29DW and the objectives of the EIR. The STPS 'explainer' makes clear for both questions that their importance lies in who has legal responsibility for a particular asset and the related financial risk to a house buyer pending adoption, neither of which advances public debate on, or better decision-making in, environmental matters or otherwise advances the purpose of the EIR. In my view, such information has minimal connection with the elements of the environment indicated in Reg 2(1)(a).

300. Accordingly, I find that the information responsive to these questions is not EI.

Wayleaves/ easements

301. Finally, before moving to the water questions proper, it is appropriate to consider here a question unique to the CommercialDW form. **Question 6.1** (CommercialDW), asks: **is there a wayleave/ easement agreement giving the Water and/ or Sewerage Undertaker the right to lay or maintain assets or right of access to pass through private land in order to reach the Company's assets**?

302. The Claimants say that the existence of a wayleave or easement conferring a right to install or maintain assets or a right of access to pass through private land will affect potential development and use of the land.

303. They also say that the Defendants must know whether they have a right to install or maintain assets or a right of access to pass through private land to reach their assets to comply with their general duty to provide a sewerage system under s.94 WIA. All the Defendants accept that, if and to the extent that the responsive information was 'held' by a Defendant, the key purpose for which it was produced or obtained was to know what rights it has over the property in question and is able to act within them, the various sections of the WIA and related legislation all said to form part of the same 'measure', with the state of water and the environment at its core.

304. The Defendants say that the information responsive to this question has no connection, or at very most a remote and tangential connection, with any of the elements of the environment in Reg 2(1)(a), concerning private arrangements or agreements between a WASC and property owner in relation to access to private land at a specific individual property. This information is of obvious relevance to a prospective purchaser but of no wider or more significant relevance, being about the respective legal rights and obligations of the WASC and the property owner or occupier and whether, for example, there can be access to a particular property without trespass.

Wayleaves/ easements – discussion

305. The Claimants say that the information responsive to this question is EI essentially for the reasons indicated under a number of the sewer and water map, assets and connection questions. I reject the Claimants' arguments for essentially the reasons stated there (above and below). The Claimants' emphasise the potential effect of such wayleaves and/ or easements on the development and use of the land. Although entering onto land to lay or maintain, and possibly even to reach, assets might conceivably have some impact on the soil or land, the responsive information says nothing meaningful about such matters, the focus of the question being on the encumbrance created by the right of access to land, not on the consequences of its actual exercise.

306. As such, I consider that the information has minimal connection with the elements of the environment indicated in Reg 2(1)(a). This is to be contrasted, for example, with the information responsive to **Question 2.7**. That question concerns actual plans for the erection of a building or extension. As such, its focus *is* on the development and use of land and, for the reasons given, the responsive information is EI.

307. Accordingly, I find that the information responsive to **Question 6.1** (CommercialDW) is not EI.

Water map, connections and assets

308. I also consider together the water map, connections and asset questions, albeit I can do so more briefly since they are fewer than, and their pattern (and the parties' related arguments) are not dissimilar to, those for the corresponding sewer questions.

Water map

309. **Question 1.2** says: **where relevant, please include a copy of an extract from the map of waterworks**. Question 1.2 of the CommercialDW is in the same terms.

310. The Claimants rely on their arguments for **Question 1.1** (above), stating additionally that all Defendants accept that the key purposes for which the maps were produced or obtained include to enable the Defendants to comply with their statutory duties, the WIA and related legislation, all said to form part of the same 'measure' which has at its core the state of water and the environment.

311. In relation to the water map specifically, the STPS 'explainer' states that:-

> " ….. There is an outright ban on building over water mains, as much to protect properties as the pipes themselves. Water companies also have statutory rights to enter private land to maintain and repair their assets.
>
> ……..
>
> Water plans show a variety of types of public mains, such as distribution and trunk mains. The main difference between these is their capacity. The larger the main, the more the water company will restrict development in its vicinity, meaning the larger the main, the larger the protective strip surrounding it."

312. The Defendants rely on their general arguments summarised above.

Water connections

313. **Question 3.1** asks: **is the property connected to mains water supply**? Question 3.1 from the CommercialDW is in the same terms.

314. The Claimants say that the mains water supply contains 'water' within the meaning of the EIR. Whether clean water in a public mains water supply is connected to a property has an impact on the state of the water in question.

315. The Claimants also rely on the STPS 'explainer' for this question which states:-

> "If a property isn't connected, it will often have a private supply. Most commonly, properties will get their supply from a natural source such as a well, borehole or spring.
>
> With wells and other underground supplies, water companies are not responsible for the amount or quality of water supplied. These are monitored by the local authority ….
>
> Should private water supplies for some reason become unusable (for example the supply becoming contaminated) the property owner will be responsible for rectifying the problem, which can be both time-consuming and costly. In some circumstances a connection to the public supply is necessary, which can be expensive if the property is not located close to a main.

> Question 3.1 is one of the most important in the CON29DW. The buyer of any unconnected property should be aware where it gets its water from and the potential implications of this."

316. The Claimants also rely on two opinions of the French Commission d'accès aux documents administratifs (**CADA**) in which it held that (i) a report containing information describing the infrastructure of a water supply network and operating advice for servicing and maintenance of that network [Opinion 20103226] and (ii) a municipality master plan for drinking water [Opinion 20175061] were EI. However, apart from the limited reasoning indicated by both decisions, the subject matter of the information sought was, again, qualitatively different information from that responsive to this question and, as such, did not advance the analysis.

317. Finally, the Claimants say that the Defendants must know which properties are connected to their mains water supplies to comply with their general duty to maintain a water supply system under s.37 of, and all related obligations under, the WIA, the various sections and related legislation all said to form part of the same 'measure', with the state of water and the environment at its core.

318. The Defendants rely on their arguments for **Question 2.1** (above), noting additionally that, in the case of a new development, all Eversheds Defendants (apart from SWW) may possibly answer the question by saying that the position with the developer should be checked, an answer with no environmental significance.

Water assets

319. **Question 3.2** asks: **are there any water mains, resource mains or discharge pipes within the boundaries of the Property**? Question 3.2 from the CommercialDW is in the same terms.

320. The Claimants rely on their arguments for **Question 1.1** and **Question 2.4** above.

321. In addition, they rely on the STPS 'explainer' for this question which explains that it is relatively rare for a water main to pass through private land because, unlike sewers, their location is not generally determined by the topography of the land, water mains being pressurised and capable of being laid where best suited. Moreover:-

> "Sewers within property boundaries also tend to be small, and generally only serve a few properties. Although water companies take steps to protect these, a collapse or burst tends to not be overly serious due to the small number of properties involved. Main sewers are - whenever possible located in public land. Water mains on the other hand, generally serve a substantial number of properties - in some cases thousands - and operate under pressure. A burst in one can therefore have catastrophic consequences.
>
> Because of this, water companies will in no circumstances allow them to be built over or near. How close you can build to a main will vary depending on its size and capacity.
>
> Should you wish to develop in a location where there is an existing main, this may be possible, but the main will need to be diverted. This is a specialist and expensive job, carried out by the water company, but done at the property owner's expense.

> Water mains also tend to require more maintenance than sewers. The companies have statutory rights of access to private land for the purposes of repair and maintenance of their assets. This includes being able to excavate in order to reach mains, and although they will always repair any damage done within reason, it can still be inconvenient for property owners.
>
> Fortunately though, as we stated earlier, water mains within property boundaries tend to be extremely rare. Should one be highlighted on a CON29DW, there can be serious ramifications - especially around development - and we would strongly recommend investigating any potential problems this may cause."

322. So, the Claimants say, water network infrastructure within property boundaries will affect potential development and use of land, including by virtue of statutory rights of entry, the need to inspect, repair and excavate and the right to veto development as well as presenting a risk of bursting or overflowing with consequential risks to the environment and human health.

323. Finally, the Claimants say that all Defendants accept that, if the responsive information is 'held' by a Defendant, the key purposes for which it was produced or obtained included to comply with their statutory duties, the various sections of the WIA and related legislation all said to form part of the same 'measure', with the state of water and the environment at its core.

324. The Defendants rely on their arguments for **Question 2.4** (above), noting additionally that, in the great majority of cases, the answer will be "no" because, wherever possible, the water mains are deliberately laid in the road, the question therefore generally being of no significance for a prospective house purchase, let alone the wider public and the environment.

Water map, connections and assets - discussion

325. The information responsive to these questions could, again, be said to be 'on' the state of the water (Reg 2(1)(a)), it being obvious from the presence and location of and/ or connection to, a water main or other mains and pipes that water is travelling through the network and, given its source, that it is clean and drinkable. However, the responsive information says little more than those obvious facts, its focus being on the connection to, and location of, water assets in the vicinity of a particular property, not the state of their contents.

326. That position remains if the responsive information indicates the lack of a water main or lack of connection thereto. The Claimants say that this might suggest the presence of private water sources such as wells, boreholes or springs but that is not indicated by the responsive information, at least as called for by the questions themselves, and is therefore surmise. Nor, even if such alternative private sources were indicated, would such information be likely to say more about the state of the water itself.

327. The Claimants also suggest that the responsive information is 'on' the soil, land and landscape (and the interaction of these elements and water). However, beyond the map showing the location of certain assets and the obvious point that these will be located in,

under and/ or on the soil and/ or land, the responsive information again says little, if anything, about the state of those elements, let alone about the landscape.

328. The Claimants also point to the limitations and risks associated with the presence of such assets on private land, including access rights, potential restrictions on development (significantly heightened in the case of building near a water main) and risk of mains or pipe burst or overflow. However, the information responsive to these questions again does not illuminate these matters.

329. The Claimants also say that the responsive information is on 'measures', plans and activities (e.g. the management, maintenance and development of the water supply network, including under s.37 of the WIA), the power under Part III of the WIA ('Water Supply') to disconnect pipes in certain emergency circumstances, Part VI ('Undertakers' Powers and Works') and Part VII ('Information Provisions'), likely to affect the elements and factors referred to in Reg 2(1)(a) and (b) as well as measures or activities designed to protect those elements (Reg 2(1)(c)).

330. Although the relevant undertaker may well require access to the particular property to inspect, maintain, repair and improve its water assets, exercising its powers under Part VI of the WIA ('Undertakers' Powers and Works') for that purpose, these questions do not call for any information about those powers or their exercise and, again, the CON29DW does not provide any. Nor does the information say anything about the undertaker's power under Part III of the WIA ('Water Supply') to disconnect pipes in certain emergency circumstances.

331. Nor, as already noted, is the CON29DW information (including for these questions) 'on' the Defendants' information provision duties under Part VII of the WIA ('Information Provisions'), including to make available the water map for public inspection. These questions do not call for information about how the undertakers collect, store and make publicly available, their own information, and the CON29DW does not provide any.

332. At its highest, it could be said (as the Claimants do) that information indicating the presence of a clean water supply in the vicinity of, or connected to, a particular property is 'on' the general duty of the relevant undertaker under s.37 of the WIA to maintain a water supply system. However, information about the clean water supply infrastructure in the vicinity of, or its connection to, a particular property says little, if anything, about the obligation to develop and maintain an efficient and economical system of water supply in the WASC's area, to ensure that all arrangements have been made to provide supplies of water in that area (s.37(1)(a) of the WIA) or to maintain, improve and extend its water mains and pipes (s.37(1)(b)).

333. Finally, the Claimants say that the responsive information is 'on' the state of built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in Reg 2(1)(a) or, through those elements, by any of the matters referred to in Reg 2(1)(b) and (c). However, even on the expansive view of the term as encompassing man-made elements of the water network, the responsive information says nothing about their state, or that of the particular property they may serve, let alone how they might be affected by the state of, or through, water.

334. Again, I am reinforced in these findings by both the wider context of the information, including the purpose for which it has been produced to the ultimate recipients of the CON29DW and the objectives of the EIR. There is good reason for the focus of these questions on the location of the relevant water assets relative to a particular property. As the STPS 'explainer' makes clear, their purpose is to elicit information which might implicate the rights and liabilities of the prospective property owner, whether in terms of having to afford access to the undertaker to maintain its assets or restricting the ability to build over or near to those assets, not to enquire as to the content, condition, function, operation of those assets or the related risks they may present. Without more, access to information about the presence (or otherwise) of water assets and their connection or location relative to a particular property does not advance public debate on, or better decision-making in, environmental matters or otherwise advance the purpose of the EIR. Indeed, it has minimal connection with the elements of the environment indicated in Reg 2(1)(a).

335. Accordingly, I find that the information responsive to these questions is not EI.

Discrete water related questions

336. Next, I turn to certain water related questions which, given their discrete subject matter, are, again, more appropriately considered individually.

Low water pressure

337. **Question 3.4** asks: **is this property at risk of receiving low water pressure or flow**? Question 3.4 from the CommercialDW is in the same terms.

338. The STPS 'explainer' for this question states that:-

> "As we're sure you're aware, water pressure relates to the force at which it comes through your taps and other appliances such as showers. If it's not delivered at sufficient pressure, it can be very inconvenient. Water comes out of taps slowly, toilets take longer to refill and showers have low pressure. Some modern heating appliances and showers also don't work correctly if water pressure is insufficient.
>
> Fortunately, this is something that only affects an increasingly small number of properties. In 1990-91, OFWAT - the water regulator - estimated there were 380,000 properties in the UK with low pressure (which they define as a flow of nine litres per minute at the external stop tap). By 2003 this had dropped to 15,000 and that number is still decreasing.
>
> All water companies keep a register of how many properties in their area have water below this level, and report this to OFWAT. If a property appears on this register, it will be shown in the CON29DW.
>
> A number of different problems can affect water pressure. The water main serving the property may be too small, or leaking. Water pumping facilities may be inadequate, or the property may be at a high altitude. All of these can cause a long-term problem with pressure, which would be recorded by the water company and appear in the CON29DW.

> The good news is that water companies are continually working to improve pressure in these areas. The CON29DW will contain a report detailing steps being taken in areas of low pressure."

339. The Claimants also refer to the two ICO decision notices (also relied on in the context of **Question 2.8**) against NW [FER0588641] and YW [FER0590277] in which it is said that the ICO and the relevant Defendants implicitly accepted that information concerning properties at risk of receiving low water pressure was EI. In fact, in the former, NW did not accept that the DG2 database of properties was EI, albeit the ICO decided otherwise on the basis that the information was on the state (in this case the pressure) of water, the definition of EI encompassing water in pipes. In the latter decision, YW initially denied that information in the DG2 database was EI but did not maintain that stance in light of the NW decision notice [FER0588641].

340. The Claimants also say that all Defendants accept that, if and to the extent that the responsive information was 'held' by a Defendant, the key purposes for which it was produced or obtained included to monitor water pressure and take steps towards preventing the property from receiving low water pressure or receiving low pressure again in the future, to address ongoing low pressure incidents and to comply with a regulatory requirement to report to Ofwat, the various sections of the WIA and the related legislation and regulatory framework all forming part of the same 'measure', with the state of water and the environment at its core.

341. The Defendants rely on the points made under **Question 2.8**, adding that, even from the point of view of the individual house owner, the significance of low water pressure affects matters such as the strength of a shower and nothing more. That is a matter of some interest to the individual purchasing the property, but is not related to the environment or relevant to it in the required sense. Moreover, in the vast number of cases, the answer to this question is also "no". It cannot be of any environmental significance to be informed that there is nothing significant about the water pressure of a particular house.

Low water pressure – discussion

342. The Claimants say that the information responsive to this question is 'on' the state of the water (Reg 2(1)(a)). Although I accept that, for EIR purposes, 'water' includes that within a communication pipe serving a property, I found somewhat artificial the use of the word "state" to describe how it might be affected by (insufficient) mains pressure, it appearing to me that the state of the water at the kitchen tap in the flats at the top of a block is likely to be the same as at ground floor level even if the flow is slower higher up the building. I am of that view notwithstanding the ICO decision that water pressure information (albeit as indicated by the undertaker's DG2 database for the properties in the entire area) was on the state of water [FER0588641].

343. Moreover, I do not accept the Claimants' suggestion that the responsive information is 'on' the state of the land about which it says nothing.

344. Nor is the responsive information on the state of built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c) (Reg 2(1)(f)). The

information says nothing about the state of the built structures rather than an aspect of the use and amenity of the properties served by the relevant water main.

345. Finally, the Claimants say that the information is on 'measures' affecting or likely to affect the elements and factors referred to in Reg 2(1)(a) and (b) as well as measures or activities designed to protect those elements (Reg 2(1)(c)). As a preliminary matter, I disagree with the Claimants' suggestion that the information is 'on' undertakers' record-keeping about incidents of low water pressure and their duties to compensate households suffering from low water pressure. The responsive information says nothing about these matters. However, the information here could be said to be 'on' the 'measure' in Regulation 10(1) of the Water Supply and Sewerage Services Regulations (Customer Services Standards) Regulations 2008, requiring an undertaker to maintain "in a communication pipe serving premises supplied with water, a minimum water pressure of seven metres static head." If the responsive information indicates the risk of low water pressure, this suggests that such duty may not be being performed. If no such risk is indicated, this suggests compliance.

346. Moreover, Regulation 10(1) represents one aspect of the service standards laid down by regulation for assessing the relevant undertaker's compliance (or otherwise) with its general duty to maintain a water supply system, including to ensure arrangements "for maintaining, improving and extending the water undertaker's mains and other pipes" (s.37(1)(b) of the WIA). As such, it could be said that the information is on that broader measure too.

347. Despite these matters, I am still unable to conclude that Reg 2(1)(c) is engaged here. I am doubtful whether it could meaningfully be said in this context that either 'measure' *affects*, or is likely to *affect*, let alone is designed to *protect*, water. Relatedly, and conclusively in my view, the purpose for which the information is obtained and used is to identify potential issues with water flow at a particular property. Although no doubt very inconvenient to live at a property where the bath fills slowly or the low water pressure is incompatible with the use of certain appliances, access to information about that state of affairs does not advance public debate on, or better decision-making in, environmental matters or otherwise advance the purpose of the EIR. In my view, such information has minimal connection with the elements of the environment indicated in Reg 2(1)(a).

348. Accordingly, I find that the information responsive to this question is not EI.

Water classification/ quality

349. The water classification and quality questions are most conveniently considered together. **Question 3.5** *v*2 asks: **what is the classification of the water supply for the property**? Question 3.5 from the CommercialDW is in the same terms. **Question 3.5** *v*1 was framed somewhat differently, asking: **please include details of a water quality analysis made by the water undertaker for the water supply zone in respect of the most recent calendar year**?

350. The Claimants rely on the STPS 'explainer' for **Question 3.5** *v*2 which states:-

> "Introduced in mid-2016, the question replaced a previous one which concerned water quality. While problems with quality are exceedingly rare, water hardness is something that affects a great many households, as it can have practical implications.

> While many homeowners will know the geological make up of the area in which they live, water companies regularly move water around their network, so geography alone may not be a reliable indicator that a property is in a hard water area.
>
> Fortunately, water companies regularly monitor the composition of water at various parts in their network, and keep detailed records. Besides it being available in the CON29DW, they also make this information freely available. For Severn Trent customers, this can be checked on Severn Trent Water's website. Water companies will give a classification for hardness, depending on the concentration of calcium carbonate (measured in parts per million).
>
> Although there is some evidence that it can aggravate eczema in certain individuals, it's not otherwise hazardous to human health. The main problem it causes for most homeowners is with domestic appliances.
>
> Hard water can cause a build-up of limescale around taps as well as in household appliances such as kettles, electric irons and washing machines. This can affect the look and performance of certain appliances, as well as making them less efficient and shorten their lifespan. The effects of water hardness can usually be counteracted by installing a water softener."

351. The Claimants also state that most of the Defendants accept that the key purposes for which the responsive information was produced or obtained included for each Defendant to be able to inform the registered customer or occupier of the property's water hardness and, if relevant, put them on notice of a risk of hard water related issues.

352. The Defendants say that the answer towhether a particular area has hard or soft water may arguably be EI, but the same is not true as regards a specific privately-held property. The fact that a particular property has hard or soft water will affect, for instance, whether scale forms in kettles, a matter which may be relevant to those living in a particular property but which has no environmental significance of the kind that the EIR are intended to capture.

353. **Question 3.6** *v*1 says: **please include details of any departures, authorised by the Secretary of State under Part 6 of the 2000 Regulations from the provisions of Part 3 of those Regulations**.

354. Part VI of the Water Supply (Water Quality) Regulations 2000 permitted the Secretary of State, upon the written application of the relevant water undertaker, to authorise (where necessary to maintain in the relevant zone a supply of water) a departure from the provisions of Part III of the Regulations concerning the wholesomeness of water supplied for certain domestic or food production purposes in respect of certain microbiological or chemical parameters.

355. In this regard, the Claimants say that most of the Defendants accept that the key purposes for which the responsive information was produced or obtained included for each Defendant to ensure that it was at all times aware of the extent of its obligations regarding the supply of "wholesome" water pursuant to Part 3 of the 2000 Regulations in relation to all relevant water supply zones and that they were met, the various sections of the WIA and related legislation all forming part of a singular statutory regime, with EI information (particularly concerning water) at its core.

356. The Eversheds Defendants say that, as far as they are aware, there have never been any authorised departures as regards any of them such that the answer to this question has always been "no", a negative answer being of no significance even as to the decision to purchase a property, let alone as regards the environment.

Water classification/ quality – discussion

357. The Claimants say that the information responsive to these questions is on the state of water (Reg 2(1)(a)). I agree, concerning at it does, the chemical and biological composition of the water and any departure from the prescribed wholesomeness standards.

358. Contrary to the Claimants' suggestion otherwise, the responsive information is not on the state of built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c) (Reg 2(1)(f)). Although the presence of hard water may cause limescale in appliances and pipes, and soft water accelerate pipe corrosion, I am unable to conclude that these matters affect the state of the built structure as opposed to its internal pipes and fittings or an aspect of its use or amenity.

359. To the extent that the responsive information concerns water quality or authorised departures (**Question 3.5** *v*1 and **Question 3.6** *v*1), I agree that this is on the 'measure' under the relevant water supply quality regulations (as applicable at the relevant time) to maintain certain standards of water quality affecting or likely to affect the elements and factors referred to in Reg 2(1)(a) and (b) as well as measures or activities designed to protect those elements (Reg 2(1)(c)), itself an element of the more general duty at s.68 of the WIA to ensure the wholesomeness of the mains water. There being no standards specified for hardness, I do not agree that the information responsive to **Question 3.5** *v*2 is on these measures. Although water companies monitor water composition, including calcium carbonate, and possibly soften the water supply, the responsive information says nothing about those activities.

360. Although the Defendants rely on the questions being concerned with an individual property, I remain satisfied that it is EI under Reg 2(1)(a). First, the water quality and classification information indicates the state of the water for the wider water supply zone (even if the supply itself originates from outside the geographical and geological area of the property).

361. Second, information about the quality of the drinking water, including its chemical and biological composition, has obvious human health implications. Consistent with the objectives of the EIR, access to such information advances public debate on, and better decision-making in, environmental matters.

362. Third, although the focus of the information responsive to the new classification question does not (with the possible exception of eczema) appear to give rise to human health considerations, water hardness has implications for matters such as the efficiency and longevity of domestic appliances and, as such, access to it does still advance public debate on, and better decision-making in, environmental matters.

363. Finally, even if the information responsive to **Question 3.6** *v*1 is invariably expressed in the negative, it is still EI.

364. Accordingly, I find that the information responsive to these questions is EI.

Water meters

365. **Question 3.6** *v*2 says: **please include details of the location of any water meter serving the property**. **Question 3.7** *v*1 and Question 3.7 from the CommercialDW are in the same terms. **Question 3.6** of the CommercialDW asks additionally: **is there a meter installed at the property**?

366. The Claimants rely on the STPS 'explainer' for **Question 3.6** *v*2 which states that:-

> "Unlike some questions in the search, the reason for the inclusion of this information is relatively obvious - property owners and meter readers will need to know the location of the meter in order to take readings, allowing the property to be billed correctly.
>
> ……..
>
> The most common abbreviation used for meter locations is 'BB' or 'Bbox' which stands for 'Boundary Box.' These are (as the name suggests) boxes located in the pavement at the boundary of the property. Readers can check the meter in a boundary box without the need to enter the property or disturb the residents. It's water companies' preferred location for new meters, and where they'll usually be located if possible.
>
> Meters can also be located indoors, which would of course mean meter readers have to enter the property in order to take a reading. As with all water company assets, there are statutory rights allowing representatives to access assets on private land. Indoor meters are usually located on the water pipe near to where it enters the property, often near the stop tap. The location of an internal meter is something homeowners will also need to be aware of when considering any development work.
>
> Besides meter readers visiting properties, Severn Trent Water also allows customers to submit their own readings via its website. Obviously, this requires the homeowner to know where the meter is located."

367. The Claimants also say that water meters comprise part of Ofwat's programme to conserve water and/ or promote the environmental awareness of consumers. Ofwat's 2019 Price Review Final Determinations state ([at p.12]) that:-

> "Reducing consumption of water: English companies are also set to take forward a range of measures to reduce overall use of water by customers. Companies plan to help their customers to use water more efficiently to reduce water consumption by 517 million litres per day over the 2020-25 period. This should further reduce the burden on water supplies. Companies also plan to invest £650 million, installing at least 2 million new water meters over the 2020-25 period to help customers reduce consumption. Smart meter installations should provide more insight into consumer demands and help identify leaks."

368. In addition, the Claimants rely on the WISER technical document expectations concerning resource planning and security of supply and, specifically, reducing demand and leakage. These state that:-

> "Water company business plans should include a long-term commitment to reduce demand. For instance, by considering the increase of meter installation. This would help reduce demand and leakage even where they are not used to set water bills. Water companies should also consider how to work with consumers to encourage them to purchase water saving technology and secure behaviour change to reduce unnecessary water use."

369. Finally, the Claimants say that most Defendants accept that the key purposes for which the responsive information was produced or obtained include to take readings, where needed, and ensure that the homeowner is billed accurately and maintain or replace any water meter. The Defendants also accept that the responsive information is held in part to roll out metering programmes and/ or meet performance commitments approved or decided by Ofwat in its Price Review 2019.

370. The Defendants say that whether the water supply to any specific property is metered is not EI. The same applies *a fortiori* to the location of any meter. The fact that any meter is under the kitchen sink or in the driveway on the left hand side makes no difference to the environment and is of no concern to the wider public.

Water meters – discussion

371. The Claimants say that the information responsive to these questions is 'on' measures, plans and activities etc. (e.g. metering programmes and meeting of performance commitments decided by Ofwat and the fixing and levying of charges under s.142(1) in accordance with ss.143B and 144ZE and other parts of Part V of the WIA ('Financial Provisions')) likely to affect the elements and factors referred to in Reg 2(1)(a) and (b), as well as measures or activities designed to protect those elements (Reg 2(1)(c)). I disagree.

372. That a meter is inside a property or at the roadside says nothing about the relevant undertaker's metering programmes, how that undertaker is seeking to meet Ofwat's related performance commitments, the charges scheme operated by that undertaker, Ofwat's related guidance or other aspects of the WIA charging regime. Water metering does, of course, have important environmental implications, particularly in relation to water conservation, and the related charging regime may well play an important part by shaping behaviours in water use. However, the information responsive to these questions, limited in the manner it is, does not inform any of these matters.

373. I am reinforced in my view by the purpose for which the information is obtained, namely to enable the meter to be read and accurate bills prepared, to know whether access might need to be afforded to the undertaker for that purpose and whether the location of the meter might impact on potential development. Access to the responsive information does not advance public debate on, or better decision-making in, environmental matters or otherwise advance the purpose of the EIR. In my view, such information has minimal connection with the elements of the environment indicated in Reg 2(1)(a).

374. Accordingly, I find that the information responsive to these questions is not EI.

Undertaker and billing

375. Finally, I consider together the undertaker and billing questions.

Undertaker

376. As to the former, **Question 4.1** asks: **who are the sewerage and water undertakers for the area**? The latest version splits out the different services, with **Question 4.1.1** and **Question 4.1.1** of the CommercialDW asking: **who is responsible for providing the sewerage services for the property**? **Question 4.1.2** and **Question 4.1.2** of the CommercialDW ask: **who is responsible for providing the water services for the property**?

377. For **Question 4.1.1** and **Question 4.1.2**, the STPS 'explainer' explains that:-

> "Question 4.1 of the CON29DW is split into two sections, 4.1.1, which asks "who is responsible for providing the sewerage services at the property?" and 4.1.2, which asks the same for water services.
>
> While it may seem obvious to assume that the same water company would be responsible for both services, in reality, this is not always the case.
>
> Throughout England and Wales there are ten water and waste water companies that supply both services. ……
>
> The boundaries of these companies are, for a variety of historical and logistical reasons, not identical for water and sewerage services, and so in areas where companies border each other, one may supply clean water, and another sewerage services. …….
>
> The company who is supplying water will generally bill householders for both services."

378. The Claimants say that the Defendants must know whether they are responsible for providing the sewerage services for any given property to comply with their general duties to provide a sewerage system under s.94 of the WIA and to maintain a water supply system under s.37 of the WIA (and other related WIA obligations). Moreover, most Defendants accept that the key purposes for which the responsive information was produced or obtained by a Defendant include so that it knows whether it is or ought to be providing the relevant service to the property in question, the various sections of the WIA and related legislation all said to form part of the same measure, with the state of water and the environment at its core.

379. The Defendants say that the question of who provides services to a specific property can have only a remote and tangential connection with any of the elements in Reg 2(1)(a). This is information about the entitlement to charge and/ or about the respective legal rights and duties of undertakers and owners/ occupiers, not about environmental matters.

Billing

380. As for the billing questions, **Question 4.2** asks: **who bills the property for sewerage services**? **Question 4.2** from the CommercialDW is in the same terms. **Question 4.3** asks: **who bills the property for water services**? Question 4.3 from the CommercialDW is in the same terms.

381. The Claimants rely on the STPS 'explainer' for **Question 4.2** and **Question 4.3** which explains that:-

> " ….. in many areas, water is provided by one company, and sewerage services by another.
>
> In these areas, properties will receive either one or two bills, depending on the arrangements between companies as well as other factors such as the presence of a water meter.
>
> For commercial properties in England, it is more complicated still. 2017 saw the government open up the water market for non-household customers. This meant that, although the provider of services did not change ….. customers were able to choose their retailer, the same as with other utilities such as gas and electricity.
>
> These retailers deal with all the commercial aspects of water supply. They issue bills to customers and collect charges and meter readings, work with customers to reduce usage and charges, and are able to compete against other retailers for business.
>
> As the billing company is not always straightforward, it is therefore important that purchasers know in advance who will be billing them. While commercial customers have the option to change their billing company in England, residential customers do not, and their arrangements will be the same as previously."

382. The Claimants say that the Defendants must know whether they are responsible for billing any given property for sewerage services in order to fulfil their general duties of operating and maintaining a sewer network and of developing and maintaining a system of water supply (as well as exercise their powers under s.142(1) WIA to fix and levy charges for any services provided in the course of carrying out their functions), the various sections of the WIA and related legislation all said to form part of the same measure, with the state of water and the environment at its core.

383. The Defendants rely on their arguments for **Question 4.1.1**, adding that the argument that this is not EI is even stronger since this is expressly billing-related. Moreover, the answer to this question depends entirely on the contractual and billing arrangements of the relevant sewerage services provider, which will vary between the Defendants. For example, where one undertaker provides sewerage services but another undertaker provides water services, in some cases the latter will bill for both water and sewerage. In some cases (for instance, for some blocks of flats) the property owner will not be billed for sewerage services directly since the bill will go to a third party such as a management company. Such variations to the billing arrangements are of no environmental significance whatsoever.

384. Although **Question 2.3** (and CommercialDW Question 2.3) are located with the sewer map, assets and connections questions, they are more conveniently addressed here. These ask: **is a surface water drainage charge payable**?

385. The Claimants rely on an Ofwat surface and highway drainage 'explainer' which states that:-

> "Most rainwater falling on properties drains into public sewers owned by the ten water and sewerage companies in England and Wales.
>
> These companies are responsible for removing and processing this rainwater. If rainwater drains from your property into a public sewer, you will be charged for surface water drainage through your sewerage bill. You will pay for surface water drainage in your bill in one of the following ways:
>
> • a fee in the standing charge
>
> • a volumetric charge based on the amount of water you use
>
> • a charge based on the rateable value of your property
>
> • through a charge related to the type of property you live in"

386. Relevant parts of the STPS 'explainer' for this question are also set out above under **Question 2.2**.

387. The Claimants rely on a decision of the High Administrative Court of Berlin-Brandenburg to the effect that information held by a German undertaker concerning the calculation of its fees and charges was EI (Oberverwaltungsgericht Berlin-Brandenburg, Judgment of 6 March 2014 – OVG 12 B 20.12). However, the information in that case was, again, qualitatively different from that in issue here. Although the decision is not the easiest to discern, the information sought was apparently costs and subsidies information concerning the erection of water supply and wastewater disposal facilities, the relevant 'measure' in that case apparently being their construction. Given the impact of that construction on water and, indirectly at least, the soil, the information was considered EI. That is very far removed from the question here.

388. The Claimants say that the information responsive to this question concerns whether fees are due for the service referred to in **Question 2.2** (surface water connection) and, in most cases, will reflect the answer given there. As I have found, the information responsive to **Question 2.2** is not EI. To the extent the answers to **Question 2.2** and **Question 2.3** do not match, this will include (most commonly) where sewers are subject to a s.104 adoption agreement, itself a further measure, plan or activity under Reg 2(1)(c). However, as I have found above, the information responsive to **Question 2.6** is not EI either.

389. The Claimants also say that the basis for calculating the amount of fees due constitutes EI concerning cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in Reg 2(1)(c) (Reg 2(1)(e)). The question whether a fee at all is due is also EI, being information on a 'measure' likely to affect the elements and factors referred to in Reg 2(1)(a) and (b), and designed to protect those elements (Reg 2(1)(c)). In this regard, the Claimants say that all Defendants accept that, to the extent the responsive information was 'held' by a Defendant, the key purpose for which it was produced or obtained was to charge the relevant customer for surface water drainage. Such charges would be pursuant to Part V of the WIA ('Financial Provisions'),

the various sections of the WIA and related legislation all said to form part of the same 'measure', with the state of water and the environment at its core.

390. The Defendants say that the responsive information concerns the basis on which the undertaker seeks payment in respect of the property, reflecting the respective legal and financial obligations of undertaker and customer as regards a specific property. Where the Defendant providing the CON29DW already holds this information, it does so to ensure its customers are correctly billed, not for any environmental purpose.

391. The connection to any of the elements in Reg 2(1)(a) is accordingly even more remote than for **Question 2.2**. Even if the answer to **Question 2.2** were to constitute EI (which it does not), the answer to **Question 2.3** would be otherwise, the only element of any potential environmental significance being what happens to the rainwater (as in the former), not whether the property is being billed for its drainage (as in the latter).

392. The default position is that properties are billed for surface water unless and until the owner proves that the surface water is not draining to the public sewers. This is a further reason why the responsive information has no real environmental significance.

393. For all Eversheds Defendants (SWW apart), one possible answer was that the situation needed to be checked with the developer (as under **Question 2.1**). Moreover, for all Eversheds Defendants (SWW, TW and SW apart) one possible answer was that a third party (such as a management company) was billed. Information of this kind about billing arrangements is clearly not environmental.

394. **Question 4.4** asks: **what is the current basis for charging for sewerage and water services at the property**?

395. The Claimants rely on the STPS 'explainer' for this question which explains that:-

> "What this means, simply, is whether a property is billed on what is known as a measured or unmeasured basis.
>
> The most common of these nowadays is a measured basis. This means that the property is fitted with a water meter, and the charges are based on the actual volume used at the property. All properties constructed since 1990 are fitted with a meter, as are all non-household properties.
>
> There are three components to a bill: clean water, used water and surface water. With metered properties, clean water (water supplied to the property) is based on the actual volumes used. Used water (i.e. anything that comes from inside the house, such as sinks, toilets, washing machine or dishwashers) is billed as a percentage of the fresh water used. Surface water - primarily rain water which runs off the property and into sewers - is billed dependent on property type and location. As not all properties discharge surface water to the public sewer, this element is not included on all bills.
>
> The other common method of charging is unmeasured, also known as rateable value. This is found in older properties, and is based on the size and value of the property. Both clean and fresh water are charged on this basis.
>
> ……..

> A final, less common way of billing properties, is by what is known as assessed charging. This occurs in situations where a meter would normally be fitted at a property (either when newly-built or at the owner's request) but the water company is unable to fit one. In these circumstances, the charges will be based on the average consumption in the area for similar type/sized properties.
>
> Why does this matter? To many people, whether a property has a water meter is one of the many water-related questions they have. For properties with only a few occupants, a water meter can represent a considerable saving. For large families (or families with young children), it can work out more expensive. A water leak within the property (on the private pipework) can also be costly for metered properties, with the owner being responsible for the wasted water.
>
> The presence [sic] of absence of a water meter can have significant cost implications for the property owners, and is often one of the most important questions on the CON29DW for homebuyers."

396. The Claimants say that public access to this information under the EIR is also in line with the spirit and purpose of the regime, encouraging members of the public to make informed decisions about water consumption.

397. Finally, the Claimants say that all Defendants accept that the key purposes for which the responsive information was produced or obtained include in order to ensure that it charges on the correct basis and, in the case of water services, that it knows whether to bill the property on a measured or unmeasured basis. This would be done in line with the Defendants' general duties to provide water and sewerage services to properties in the area and pursuant to Part V of the WIA ('Financial Provisions'), the various sections of the WIA and related legislation all said to form part of the same 'measure' which has at its core the state of water and the environment.

398. The Defendants say that there are a range of different potential answers for this question, albeit in each case, the basis for charging as regards a specific individual property is too remote from any environmental factors for it to constitute EI. The property might, for example, be metered. At an aggregate level (for example, knowing what proportion of the properties supplied by a particular water undertaker were metered), this might arguably constitute EI. However, knowing whether a particular individual property is metered contributes nothing to the objectives of the Convention, the Directive or the EIR. The same is true whether the property is charged on the basis of rateable value, or variations thereof (e.g. "residential assessed") or if "third party billing" is in operation (e.g. a management company being charged in respect of a block of flats, then on-charging to individual flat owners through a service charge). Although significant for a prospective purchaser, it has no broader environmental significance. Further still, the water company might be unable to say anything at all as to basis for charging, for example because the property has not yet been built. There is no environmental significance in this answer either.

399. Finally, **Question 4.5** asks: **will the basis for charging for sewerage and water services at the property change as a consequence of a change of occupation**?

400. The Claimants rely on their arguments under **Question 4.4** as well as the STPS 'explainer' for **Question 4.5** which explains that:-

> "As explained in our discussion of question 4.4, properties are usually billed on either a measured or unmeasured basis (i.e. with a water meter, or based on the property size & value). And while this basis of charging will usually remain consistent from one owner to the next, there are circumstances where it can change.
>
> The first of these is where a water meter is installed at the property, but not currently being used. Any property owner is entitled to have a meter fitted for free by their water company.
>
> After fitting, owners have the option of reverting back to an unmeasured basis should they change their mind. The most common reason for this is the measured supply working out more expensive than anticipated. ……. The meter will remain in place, but not be used for charging the property.
>
> This is relevant to question 4.5 because if a meter is fitted at a property, any new occupants will be charged on a measured basis, regardless of how the property was previously charged. This means that even though a property is billed as unmeasured for the current owners, upon a change of ownership, the new owners will pay for the property on a measured basis.
>
> Water companies are also entitled to fit a meter at a property when there is a change in occupation. …….. The government prefers properties to be fitted with a meter as it reduces wastage and allows customers to be charged more fairly, and they introduced legislation allowing water companies to fit meters upon change of occupation.
>
> While many regulated searches (and some solicitors) believe that a water bill is a reliable indicator of how the property will be billed in future, this is not always the case. Although a measured property will not switch to unmeasured upon change of occupancy, the opposite can be true. As the presence or absence of a water meter can make a substantial difference to a property's bills, we would always recommend confirming how a property will be charged.

401. The Claimants also say that all Defendants accept that the key purposes for which the responsive information was produced or obtained include to ensure that it charges on the correct basis and, in the case of water services, that it knows whether to bill the property on a measured or unmeasured basis. This would be done in line with the Defendants' general duties to provide water and sewerage services to properties in the area and pursuant to Part V of the WIA ('Financial Provisions'), the various sections of the WIA and related legislation all said to form part of the same measure, with the state of water and the environment at its core.

402. The Defendants too rely on the same considerations under **Question 4.4** and go on to say that the answer to this question is usually "no", meaning that the answer is usually even less informative from an environmental point of view than for **Question 4.4**. The most usual circumstance where this question is answered "yes" is where there is a "sleeping meter" (i.e. a meter has been installed but is not currently being used to calculate charges). Following a change of occupation, a new customer will be charged on a metered basis. Again, information of this nature in relation to a specific individual property simply has no environmental significance and does not contribute to meeting the objectives of the Convention, the Directive or the EIR.

Undertaker and billing – discussion

403. The Claimants say that the information responsive to these questions is on the state of the elements of the environment, including water travelling within the sewers or through the water supply network, water from natural sources such as wells, boreholes or springs, soil, land, landscape and natural sites on which the infrastructure is located, and the interaction among those elements (Reg 2(1)(a)). I disagree. In my view, information on the identity of the undertaker(s) providing services to a property and the entity billing for its services, whether a surface water charge applies, the basis for charges for its services and whether that basis will change with a new occupier say nothing about the state of water (or the other Reg 2(1)(a) elements).

404. For the same reasons, I disagree that the information is on factors such as substances, waste, discharges and other releases (e.g. foul water, surface water, sewage) affecting or likely to affect the state of the elements of the environment (Reg 2(1)(b)) or the state of built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c) (Reg 2(1)(f)).

405. It is more arguable that the information is 'on' certain measures, plans and activities likely to affect the elements and factors referred to in Reg 2(1)(a) and (b) as well as measures or activities designed to protect those elements (Reg 2(1)(c)). As a preliminary matter, however, I found too vague to be meaningful the assertion that the information responsive to **Question 4.1.1** was "on" "duties and obligations under the WIA."

406. That said, I am of the view that the information responsive to the sewerage and water undertaker questions (**Question 4.1**, **Question 4.1.1** and **Question 4.1.2**) are 'on', respectively, the operation and maintenance of the sewer network and provision of sewerage services to properties in the area pursuant to s.98 of the WIA, and the development and maintenance of a system of water supply and provision of water services to properties in the area pursuant to s.37 of the WIA. Although the information is brief and does not spell out those duties or provide information about their performance, it does, critically, identify the entity with responsibility for them in the area, their discharge having significant potential environmental implications, including for water conservation and sanitary health. As such, it does more than merely identify the likely charging entity and/ or the entity against which the relevant customer may seek recourse. Those are both matters of interest to a house buyer but access to this information, even at individual property level will, more broadly, facilitate public debate on, and better decision-making in environmental matters, including those aspects of the environment potentially affected by that undertaker's performance of its duties in the area.

407. Accordingly, I find that the information responsive to the undertaker questions is EI.

408. As for the billing questions, the Claimants say that, in addition to the general duties as water and sewerage undertakers under, respectively, ss.37 and 98 of the WIA, the responsive information is 'on' the fixing and levying of charges under s.142(1) in accordance with ss.143B and 144ZE of the WIA (and other sections of Part V relating to charging ('Financial Provisions')), the rolling out of metering programmes and meeting of performance commitments decided by Ofwat.

409. I am unable to accept that any of these questions are 'on' an undertaker's power to "fix" its charges (s.142(1)(a) of the WIA), Ofwat's power to make rules for charging schemes (s.143B) or the related guidance to Ofwat from the Minister (s.144ZE). The billing questions are not directed to, and do not impart any information 'on', how the charges at the individual property identified in the CON29DW are "fixed" or comprised. Rather, they identify the charging entity, whether a surface water charge is payable, whether a property is charged on a metered or rateable value (or, possibly, assessed) basis and whether that will change following a change of occupation. The questions do not engage issues of the undertaker's charging scheme, nor the underlying policy considerations that might inform that scheme, including, for example, important environmental matters such as water conservation.

410. Nor, even though the information might reveal a metered charging basis for a particular property, does the responsive information say anything about the undertaker's metering programmes or its satisfaction (or otherwise) of related commitments decided by Ofwat. The information is simply too narrow in compass to shed any light on these matters. At its highest, this information is 'on' the relevant undertaker's power to "demand and recover charges fixed under this section" (s.142(1)(b)), as to which, I am unable to conclude that it affects, or is likely to affect, the elements and factors in Reg 2(1)(a) and (b).

411. Finally, nor is the identity of the billing entity for the relevant water and sewerage services information 'on' the general duties under ss.37 and 98 of the WIA. **Question 4.2** and **Question 4.3** are not directed to the provision or provider of the services. That issue is already addressed by **Question 4.1.1** and **Question 4.1.2**. Although the identity of the billing entity may well be the same as the undertaker itself, the STPS 'explainer' and the uncontested evidence of many of the WASC witnesses explain that they may differ for various reasons. Hence, the need for separate questions.

412. I am reinforced in my view by the purpose for which this information is obtained, namely to inform the potential property purchaser of the billing entity and overall charging basis it can expect, not on the different considerations underlying how those charges are comprised. Moreover, knowing the billing entity for a particular property, that the property is billed on the basis of meter readings, that the billing basis will remain unchanged if I move into the property and that, if I do, my bill will include a surface water charge, does not advance public debate on, or better decision-making in, environmental matters or otherwise advance the purpose of the EIR. In my view, such information has minimal connection with the elements of the environment indicated in Reg 2(1)(a).

413. Accordingly, I find that, save only for **Question 4.1**, **Question 4.1.1** and **Question 4.1.2**, the information responsive to the undertaker and billing questions is not EI.

H. ISSUE 2 – DID THE WASCs "HOLD" THE EI?

Issue 2 – Introduction

414. Reg 12(4) allows a public authority to refuse to disclose information to the extent it does not hold it when an applicant's request is received. The overarching question under **Issue 2** is therefore whether the Defendants "held" the responsive information within the meaning

of Reg 3(2) at the time the CON29DW was requested. Reg 3(2) provides that EI is held by a public authority if the information is either:-

(a) in the authority's possession and has been produced or received by the authority; or

(b) held by another person on behalf of the authority.

415. **Issue 2** gives rise, in turn, to certain sub-issues which broadly break down as follows, namely whether the relevant information was not "held" because:-

(a) it was obtained from another water undertaker (**OWC**) where the Defendant to which the CON29DW request was made acted as sewerage undertaker but the OWC provided water services (**Issue 2.1(b)**, **cross-border issue**), itself breaking down into four scenarios, namely where:-

(i) the OWC provided water services and billed for those and the relevant Defendant's sewerage services (**CB1** scenario);

(ii) the OWC billed for its water services and the Defendant billed separately for its own sewerage services (**CB2** scenario);

(iii) WW provided sewerage services and Bristol Water provided water services (**CB3** scenario); and

(iv) the relevant Defendant obtained information for a CommercialDW from a water wholesaler (**CB4** scenario).

(b) the property in question was wholly outside the relevant Defendant's area of responsibility (**Issue 2.1(c)** (**OOA** scenario));

(c) in the case of D11 and D12, the information was obtained from an associated company, D4 and/or Severn Trent Data Portal Limited (**STDP**) for the former and D8 for the latter (**Issue 2.1(d)**);

(d) the relevant Defendant had to provide answers to the CON29DW by obtaining, deriving or creating the information by inference or interpretation (**Issue 2.3**, **skill and judgment issue**); and

(e) the Defendants provided no substantive answer to a CON29DW question (**Issue 2.5**).

416. The LOI indicates certain fact patterns intended to reflect some of the scenarios envisaged by the different sub-issues, to be considered by reference to sample requests.

Issue 2 – the parties' positions

417. As already noted, despite the Claimants' more recent views as to the utility of the LOI overall, they did agree that **Issue 2** should also be decided at this 'stage 1' trial.

418. It was common ground that the question of whether Reg 3(2) is engaged for any of the **Issue 2** sub-issues is a fact sensitive one, albeit for **Issue 2.1(d)** and **Issue 2.3** in particular, the parties directed me to relevant ICO guidance and related authorities.

419. As to the parties' areas (and limits) of agreement as they affect the information I have found to be EI, the Claimants accept that:-

    (a) in the OOA scenario, the Defendants did not hold the responsive information;[4]

    (b) for scenarios CB1 and CB2, the Defendants did not hold the information responsive to a number of the water questions, including **Question 3.5** and **Question 3.6**.[5] (The Claimants do not accept D1's position that it did not hold the information responsive to **Question 4.1.1** or **Question 4.1.2** in scenario CB1 nor D4/11's position that they did not hold the information responsive to **Question 4.1.2** in scenarios CB1 and CB2);[6]

    (c) in residential cross-border cases, where D8 provides the sewerage services and Bristol Water the water services (scenario CB3), the relevant water information obtained directly from Bristol Water (as opposed to through D8's billing joint venture) was not held by D12, including that responsive to **Question 3.5** and **Question 3.6**;[7]

    (d) in cross-border searches for CommercialDWs after 1 April 2017, where the relevant Defendant obtained the information responsive to the water questions from the water wholesaler (scenario CB4), including **Question 3.5** and **Question 3.6**, this was not held by that Defendant;[8] and

    (e) where the relevant Defendant did not provide information responsive to the relevant CON29DW question(s), it did not "hold" that information (**Issue 2.5**),[9] including for **Question 2.7** to the extent it relates to D6's *consultations on* any build over agreements for which it says it holds no records.[10]

420. In light of the concessions on both sides as to whether the Defendants 'held' certain information at the relevant time, the disputes on **Issue 2** concerning the information I have found to be EI therefore encompass the threshold issue for D11 and D12 of whether they obtained the information responsive to the CON29DWs from, respectively, D4/ STDP and D8, or whether the latter held that information "on behalf of" the former within the meaning of Reg 3(2)(b) (**Issue 2.1(d)**). Certain considerations of a more discrete and granular nature also fall for determination, albeit in light of my findings on **Issue 1**, of narrower compass than originally in play, namely whether:-

    (a) D11 did not hold information responsive to **Question 2.7** where billing records required manual inspection;

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4 Claimants' written closings (at [38(b)], [73]-[75]).
5 Claimants' written closings (at [56]-[57]).
6 Claimants' written closings (at [49(c)], [61]-[64]).
7 Claimants' written closings (at [38a]).
8 Claimants' written closings (at [38(a)]).
9 Claimants' written closings (at [38(e)]).
10 For D6's position, see D6's skeleton argument (at [Appendix, Q.2.7, "Held"]) and D6's written closing argument (at [44]). For Cs' related concession, see Cs' written closings (at [Annex A, Q.2.7, D6]).

(b) for all Eversheds Defendants and D11, the information responsive to **Question 2.8** was not held when the property was initially flagged as at risk for internal foul flooding, the Defendant then going on to consider whether or not to give a "yes" answer;

(c) D6 did not hold the information responsive to **Question 2.9** when derived through the exercise of skill and judgment in deciding where to measure the distance from;

(d) D1 held the information responsive to **Question 4.1.1** and **Question 4.1.2** in scenario CB1; and

(e) D11 held the information responsive to **Question 4.1.2** in scenarios CB1 and CB2.

421. These areas of agreement and disagreement, as they affect the CON29DW information found to be EI, are shown in the table below, "Y" connoting the relevant Defendant's acceptance that it did hold this information, "N" otherwise. The orange shaded text indicates the areas of disagreement.

Q. No	EI	D1 NW	D2 UU	D3 YW	D4/11 STW	D6 AW	D7 SWW	D8/12 WW	D9 TW	D10 SW
2.7	Build over agreements	Y	Y	Y	Y but not in some cases	Y but not in some cases	Y	Y	Y	Y
2.8	Internal flooding	Y but not in some cases	Y but not in some cases	Y but not in some cases	Y but not in some cases	Y	Y but not in some cases	Y but not in some cases	Y but not in some cases	Y but not in some cases
2.9	STW distance	Y	Y	Y	Y	Y but not in some cases	Y	Y	Y	Y
3.5 (*v*1)	Water quality	Y but not in CB 1&2	Y but not in CB 1&2	Y but not in CB 1&2	Y but not in CB 1&2	Y but not in CB 1&2	Y but not in CB 1&2	Y but not in CB 1&2	Y but not in CB 1&2	Y but not in CB 1&2
3.5 (*v*2)	Water hardness	Y but not in CB 1&2	Y but not in CB 1&2	Y but not in CB 1&2	Y but not in CB 1&2	Y but not in CB 1&2	Y but not in CB 1&2	Y but not in CB 1&2	Y but not in CB 1&2	Y but not in CB 1&2
3.6 (*v*1)	Authorised Departures	Y but not in CB 1&2	Y but not in CB 1&2	Y but not in CB 1&2	Y but not in CB 1&2	Y but not in CB 1&2	Y but not in CB 1&2	Y but not in CB 1&2	Y but not in CB 1&2	Y but not in CB 1&2
4.1.1	Sewerage undertaker[11]	Y but not in CB1	Y	Y	Y	Y	Y	Y	Y	Y
4.1.2	Water undertaker[12]	Y but not in CB1	Y	Y	Y but not in CB 1&2	Y	Y	Y	Y	Y
5.1	Trade effluent	Y	Y	Y	Y	Y	Y	Y	Y	Y

[11] Including **Question 4.1**.
[12] Including **Question 4.1**.

Issue 2 – D4/ STDP/ D11 and D8/ 12

422. In relation to **Issue 2.1(d)**, the Claimants say that the information responsive to the CON29DWs was 'held' by D11 and D12. Although they may not have had the information in their *possession* when the CON29DW was requested, and they obtained this from their respective associated companies, the latter held it on behalf of D11 and D12 at the relevant time. One of the Claimants' overarching submissions, expressed most strongly in relation to this sub-issue, was that the Court should take a 'common sense', rather than technical or overcomplicated, approach to whether the information was held by the WASCs, as such approach is indicated by a number of the authorities, including:-

    (a) *University of Newcastle upon Tyne* v *Information Commissioner and BUAV* [2011] UKUT 185 (AAC) in a FOIA context, the UT endorsing the approach of the Tribunal in considering the relevant factual matrix to determine whether the information was 'held' by the University, doing so by reference to its ordinary meaning, not to a statutory prohibition on disclosure found in other legislation ([41]-[44]).

    (b) *Department of Health* v. *Information Commissioner and another* [2017] 1 WLR 3330, also in a FOIA context, the Court of Appeal agreeing (at [54]) with the approach indicated in *BUAV* that "there must be an appropriate connection between the information and the department so that it can properly be said that the information is held by the department". In *BUAV*, the UT made clear (at [29]) that this formulation was not replacing the statutory language with a "nebulous test" rather than pointing to the need for 'hold' to be understood as conveying something more than simply the underlying physical concept.

    (c) *Graham* v. *Scottish Information Commissioner* [2020] SC 199, also in a (Scottish equivalent of) FOIA context, in which the Court of Session Inner House held that "the words and expressions used in the Act should, so far as possible, be given their ordinary and natural meaning" and that "[t]here should be no scope for the introduction of technicalities, unnecessary legal concepts calculated to over-complicate matters and, by so doing, to restrict the disclosure of relevant information" (at [15]).

    (d) *Holland* v *University of East Anglia* [EA/2-12/0098, 2 March 2012] (at [95]-[97]), in which it is said the Tribunal applied (in an EIR context) the same 'common sense' approach to the question of whether a person (in that case an *ad hoc* group undertaking an independent inquiry) held information "on behalf of" the relevant public authority (which set up and funded the inquiry).

423. On this last point, the ICO guidance entitled "[i]nformation you hold for the purposes of the EIR" states in relation to information "held on behalf" of a public authority that "the distinction will not always be clear cut" and that Reg 3(2)(b) is likely to be relevant where "[y]ou have outsourced some of your services to a private contractor or have other contractual arrangements in place with a third party". The guidance emphasises the need to consider "… all the facts relevant to the request and establish the degree of connection between the information and your functions as a public authority" and identifies agency

agreements with other bodies as a situation in which information might be held on behalf of a public authority.

424. The Defendants deny that the CON29DW information was held on behalf of D11 or D12, stating that this question depends on the legal relationship between the authority and the third party concerned, the various authorities cited (many at Tribunal or ICO decision notice level) indicating that the authority must be able to access the information as of right but, additionally, that the information must be under the control and held for the benefit of the authority. It is not necessary for me to cite those authorities here since, ultimately, both parties accept that they turned on their own facts.[13]

D4/ STDP/ D11

425. D4 is the statutory water and sewerage undertaker for the Severn Trent area, an indirect subsidiary of Severn Trent plc (**ST**). D4 does not produce CON29DW or CommercialDW reports. D11 is also an indirect subsidiary of ST which does provide a commercial service of preparing and selling such reports. For that purpose, D11 purchases property-specific information from STDP under a non-exclusive licence, with STDP collating and refining D4's raw data, also currently under a non-exclusive licence, before producing this through its data portal to D11. This arrangement involves three agreements which have undergone different iterations from time to time, comprising an agreement between:-

    (a) D4 and STDP, granting STDP the right to use and process D4's raw data for the purpose of providing refined data to third party licensees (**D4/ STDP Licence**);

    (b) D4 and D11, granting D11 the right to use D4's data, as refined and provided by STDP, for the purpose of preparing CON29DW and CommercialDW reports (**D4/11 Licence**); and

    (c) D11 and STDP, granting D11 access to D4's data (as refined) through STDP's data portal (**D11/ STDP Access Agreement**).

426. The D4/ STDP Licence (from 2021) confirmed that D4 owned the data held within the data portal (Recital A) and retained all intellectual property rights therein (clause 5.1), with STDP owning all intellectual property rights in the data portal itself (clause 7.1). The agreement ran on a continuous basis unless terminated in accordance with its terms, including on 6 months' prior notice (clause 2.1). D4 granted a revocable, non-assignable, non-exclusive, royalty free licence to STDP to use the data for the purpose of organising and partially refining this to provide it to third party licensees to access such data as required to provide CON29DW and CommercialDW reports (clause 3). D4 paid STDP for the provision of the data portal (clause 4.10), with STDP invoicing for, and collecting, D4's licence fees due from the third party licensees (clause 4.14). STDP also agreed to make available to D4 all data in connection with the D4/ STDP Licence (clause 4.6). STDP also acknowledged that D4 may be obliged to disclose information pursuant to the EIR (clause 16), with STDP undertaking to, amongst other things, provide details of EI it held on behalf of D4 (clause 16.2.1). Finally, the parties acknowledged that nothing in the D4/ STDP Licence was deemed to constitute a relationship between the parties of partnership, joint venture or principal and agent (clause 19.12).

[13] Claimants' written closing submissions (at [80(a)]); Eversheds Defendants' written closings (at [370]).

427. The D4/11 Licence (from 2021) again confirmed that D4 owned the data accessed through the portal operated by STDP (Recital 1) and retained all intellectual property rights therein (clause 5.1). The agreement ran for a period of a year and was automatically renewable unless terminated in accordance with its terms, including on 3 months' prior notice (clauses 2 and 9). D4 granted D11 a non-exclusive, revocable and non-assignable licence to use the data for the purpose only of providing CON29DW and CommercialDW reports (clause 3.2). In return, D11 paid a licence fee (payable to STDP) for each data packet requested from the data portal (clause 3.1 and 4.3). D11 also acknowledged that D4 might be required to disclose information pursuant to the EIR (clause 13.1), with D11 undertaking to, amongst other things, provide details of EI it held on behalf of D4 (clause 13.2.1). Finally, the parties acknowledged that nothing in the D4/11 Licence was deemed to constitute a relationship between the parties of partnership, joint venture or principal and agent (clause 15.12).

428. Under the STDP/ D11 Access Agreement (a schedule to the D4/ STDP Licence), STDP provided D11 with the licence and access rights to the STDP data portal (clause 2), expressed to be a personal, non-exclusive, non-transferable, revocable, restricted right (clause 3.1), limited to access to the data portal (clause 3.1), for the purpose set out in the D4/11 Licence (clause 3.1.3), terminable upon termination thereof (clause 7.2.2). Clause 4.1 confirmed that intellectual property rights in the data portal vested in STDP.

429. I should add that there was some controversy at trial as to the redaction of the amount of the fees from the agreements, albeit the Claimants not having applied for specific disclosure, and the parties' arrangements overall being clear, I was not persuaded that anything of significance turned upon it.

430. In terms of how the arrangements worked in practice, D4 provided raw data on billing, water pressure, water quality, flood risk and build over agreements as well as mapping data licensed from Ordnance Survey. STDP refined this raw data and made it accessible through the data portal, with STDP bearing the immediate processing and hosting costs, albeit D4 ultimately paid for this service. Some data was not transferred to STDP but was made accessible to STDP technicians on D4's own databases, including, for example, on adoption agreements.

431. As a preliminary matter, I was unable to accept D4/11's submission that this was a 'third party chain' arrangement of the nature indicated, for example, in the ICO decision notice concerning the Olympic Delivery Authority [FER0484371]. Although at the end of a contractual chain in the sense of receiving D4's data in refined form through STDP's data portal, it was not a sub-contracting arrangement but a tripartite one, D11 having a direct contractual relationship with D4 as, respectively, licensee and licensor.

432. It is common ground that D11 did not have in its *possession* the information responsive to the CON29DW request at the time it was made. As to whether D4 or STDP held the information subsequently provided to D11 through the data portal *on D11's behalf*, D11 did have a right to access the portal and to use the information. However, such right was, in terms, non-exclusive, non-transferable, revocable, restricted and subject to the payment of a licence fee for each data packet purchased. D11's request, collation and disclosure of data under the D4/11 Licence was "only for the provision of responses to valid Law Society

Con29DW searches received by it".[14] Moreover, "[a]ny Data retained by the Licensee must be for records and claims management purposes only and must not be used or otherwise processed by the Licensee at any time to respond to or fulfil any separate Data Request."[15]

433. By contrast, D4 owned the data (in raw and refined form), it held the related intellectual property rights and it did so for its own business purposes, unconstrained in its use by the arrangements with STDP and D11. The Claimants (correctly) say that D4 appointed STDP to host and process its data and to maintain a data portal through which D11 could access D4's information on a property by property basis to complete CON29DW reports. As such, they also say that STDP "holds and processes data on behalf of" D4.[16] I agree, in light of which, it is difficult to see how D4 or STDP could be said to hold the data on behalf of D11. On a common sense and non-technical approach (as urged by the Claimants), D4 was doing no more than licensing the right to use parts of its data to D11 so that D11 could perform that service.

434. The Claimants also rely on the references in the D4/11 Licence to D11 itself potentially being required to comply with a legal obligation (including under the EIR) to disclose the data (clause 7.2.2). Although the D4/11 Licence does contain this reference, as the Claimants also note, the more substantive EI provision is clause 13, under which the parties expressly acknowledged that D4 might be required to disclose information under the EIR, with D11 undertaking to provide details of EI it held on D4's behalf. Although the parties' views on the engagement (or otherwise) of the EIR are not particularly illuminating, that the parties expressly contemplated D11 holding any such information *on D4's behalf* (not the other way around) is more instructive.

435. Relatedly, I also found inapt the Claimants' reliance on the reference in the ICO guidance to outsourcing or other similar arrangements. If it was being suggested, by analogy with this case, that D11, as provider of the CON29DW service, effectively stood in the position of an outsourcing company, D11 undertook that service in its own right. In any event, in such situations, it is the outsourcing company that will ordinarily hold data *on behalf* of the relevant public authority, not as the Claimants argue in this case, the other way around.

436. The Claimants also suggest that D4 and D11 have sought to distinguish between the existence of an intragroup arrangement, by which D11 was afforded access to D4's information held and processed by STDP to produce property searches, and a "quasi-arm's length" commercial purchasing arrangement between STDP and D11. In my view, this was a false dichotomy, and not one introduced by D4 or D11 but by the Claimants, the tripartite arrangements in place perfectly capable of, and in fact, accommodating both.

437. To a similar end, I also found unavailing the Claimants' surmise that "[t]he agreement between STPS and STDP was effectively imposed on those two entities by D4 STW". The fact that D4 and D11 (and STDP) were subsidiaries of the same ultimate parent, or that STDP and D11 came about as a result of the division of Severn Trent's former property search business, does not warrant D11's treatment other than as a licensee and purchaser of certain data. Likewise, the evidence of Ms Cathy Hughes (STDP) and Mr Adam Carter (D11) that the two companies enjoyed a strong working relationship, had joint working arrangements or that they organised themselves to maximise efficiency was entirely

[14] Schedule 1 to the (2021) D4/11 Licence.
[15] *Ibid*.
[16] Cs' written closings (at [82(c)]).

unexceptional and said little, if anything, about the basis on which D4 held its information. Nor did the fact that D11 was the only licensee, that it paid a fee to STDP which accounted for this to D4 (minus its own costs and fees), or that D11 described D4 in the CON29DW as one of its "Partner Undertakers" advance the analysis.

438. Finally, I was unable to accept the proposition that the information said to be held on D11's behalf bears a close connection to D11's functions. Even if properly described as a *public* function, a matter not falling for determination at this stage, D11 merely supplied CON29DW information to its customers. Given the subject matter of that information, and the entity which created it (D4), it is self-evidently closely connected with D4's function as a public authority, not D11's.

439. In light of all these matters, I am therefore satisfied, and I find, that neither D4 nor STDP held the CON29DW and CommercialDW information *on behalf of* D11 and that D11 therefore did not hold this within the meaning of Reg 3(2)(a) or (b).

D8/ D12

440. D8 and D12 are sister companies, both being wholly owned by the same parent. D8 is the statutory water and sewerage undertaker for the Wessex region. D8 does not produce CON29DWs or CommercialDWs. Rather, D12 is the official producer of such searches in the region, trading as Wessex Searches. The most useful starting point is again the contract, being a supply of services agreement dated 17 January 2020 (**Wessex Agreement**). This provides that:-

(a) The agreement began on the effective date of 1 April 2019, for an initial term of 12 months, renewable for a further four periods of 12 months, subject to four months' prior notice of termination by either party during the initial or any renewal term (clause 2);

(b) D8's responsibilities included the use of reasonable endeavours to provide the services and the deliverables to D12, as identified in schedule 1 (clause 3.1);

(c) For that purpose, D12 was required to provide such information as D8 might reasonably require (clause 4.1(b));

(d) D12 was required to pay D8 charges for the former's services as also set out in schedule 1 (clause 6.1), albeit there were no charges for data access;

(e) As between D8 and D12, all intellectual property rights in D8's deliverables were owned by D8 (clause 7.1);

(f) Such intellectual property rights were licensed by D8 to D12 on a non-exclusive, worldwide basis to the extent necessary to enable D12 to make use of D8's services and deliverables (clause 7.1);

(g) Such licence was co-terminous with the Wessex Agreement itself (clause 7.1);

(h) The parties owed a mutual duty of confidentiality with respect to information concerning the other's business or products (clause 8.1);

(i) Each party was required to appoint a contract manager and service managers for the overall and day-to-day management of the Wessex Agreement (clause 10.1); and

(j) Nothing in the Wessex Agreement made either party the agent of the other (clause 22).

441. Schedule 1 to the Wessex Agreement explains:-

(a) the function of D12 as nationwide search provider and exclusive official provider of CON29DW and CommercialDW in D8's region;

(b) D12's investment in significant integrated electronic systems, staff training and procedures to access, analyse and interpret the required data from D8;

(c) D12's systems used to receive orders for, process requests for and deliver CON29DW and CommercialDW reports;

(d) D8's data accessed by D12 and the corresponding connection points, the former encompassing sewer and water supply maps, connection (billing) information, DG2 (low pressure), DG5 (internal sewer flooding), buildover/ connection information, s.104 agreements and 'free supply' information;

(e) D8's ownership of the data used to provide the reports; and

(f) D8's services to D12, encompassing access to data, access to maps, customer service billing record queries, sewer checking and validation and IS services.

442. Schedule 1 also sets out D12's obligations, including.

(a) to carry out and discharge any requests or obligations on D8 to produce, provide or compile CON29DW or CommercialDW drainage and water enquiries in D8's region;

(b) to market itself as the official producer of CON29DWs and CommercialDWs in D8's region;

(c) promptly to respond to and resolve any queries raised by clients in respect of CON29DW and CommercialDW drainage and water enquiries in D8's region;

(d) obtain £10m of professional indemnity insurance against errors in the data supplied in the CON29DW and CommercialDW; and

(e) provide updates and corrections on D8's maps and connections.

443. Mr Donald Sherratt (for D8) explained in his written evidence the manner in which the arrangement worked in practice, with D12's staff using the "Searches Admin System" to identify the relevant property boundary and address. The system then placed the request with D12's "Web Service" micro-application which automatically gathered the relevant information from multiple D8 records, including D8's maps, customer service records,

flood risk and low water pressure records and billing records, and which used and returned that data to pre-populate the CON29DW within the Searches Admin System. In addition, D12 could view (but not edit) D8's mapping data and customer service records.

444. Whether considered at the contractual level or the more functional level of how the arrangements operated as between D8 and D12, I am again satisfied that D12 did not hold the CON29DW information. At the time the CON29DW request was made, D12 did not have such information in its *possession*, having yet to obtain D8's related data. Nor did D8 hold that data *on behalf of* D12. Although D12 clearly enjoyed and exercised a right to access and use that data, that was for the limited purpose of allowing D12 to perform its own commercial function as exclusive provider of CON29DWs in D8's region. Again, on a common sense and non-technical view, D8 was doing no more than licensing the right to use parts of its data so that D12 could perform that function. D8 owned the information, it held the related intellectual property rights, it controlled its format and storage and it had unrestricted use of it for its own business purposes. By contrast, D12's right to use that information was non-exclusive, potentially terminable on notice and restricted in purpose.

445. Although para 5.2(1) of schedule 1 to the Wessex Agreement required D12 to carry out any requests or obligations on D8 to produce CON29DW enquiries in the Wessex region, there was no such obligation on D8. D12 was the regional supplier of CON29DWs and performed that commercial service in its own right. Moreover, even if D8 had been required to answer CON29DWs and D12 had discharged that obligation for or *on behalf of* D8, it does not follow that D8 held the information it supplied for that purpose on D12's behalf. Any outsourcing analogy would again be inapposite. Nor does the requirement for D12 to update and correct D8's maps and connections affect the analysis, D12 not having the right to change D8's information and ownership of that information remaining vested in D8 in any event.

446. To support their argument, the Claimants rely on Mr Sherratt's evidence that both companies are based in the same building and have a common IT function and group IT and data protection policies. They also rely on the development by D12 of its systems within the overall group IT function and the level of access to D8's systems afforded to D12's staff. To a similar end, the Claimants also rely on Ms Lucy Sherry's evidence (for D12) as to the close integration of those systems and D8's general level of responsiveness to D12's queries. However, the fact that D8 and D12 are part of the same group, with common policies and the benefit of shared group resources or the close co-operation of their respective systems or staff, does not alter the analysis. D8 and D12 operated as separate companies and, in accordance with the terms of the Wessex Agreement, doing so in a manner consistent with D8 holding its own data in its own right and for its own purposes, albeit affording D12 access to it for its own more limited commercial purpose.

447. In light of the above matters, I find, that D8 did not hold the CON29DW and CommercialDW information *on behalf of* D12 and that D12 too therefore did not hold this within the meaning of Reg 3(2)(a) or (b).

448. Contrary to the Claimants' suggestion otherwise, these findings on **Issue 2.1(d)** are not inconsistent with the underlying purpose of the EIR, it being open to any person to make a request for EI from the actual entity which did, in fact, hold it at all times – in this case, D4 for the Severn Trent region and D8 for the Wessex region. In my view, suggesting that the onus of answering EIR requests lay with D11 and D12 put matters 'back to front'.

449. Having determined that broader issue, I now turn to those more granular factual aspects of **Issue 2** which still arise for my determination in light of my findings on **Issue 1**.

Issue 2 – Skill and judgment

450. Some of those outstanding aspects engage the skill and judgment question (**Issue 2.3**) and whether the relevant Defendant provided CON29DW information by obtaining, deriving or creating this by inference or interpretation. As to that, the ICO guidance entitled "[d]etermining whether we hold [EI]" explains that the EIR only apply to information that a public authority already holds in recorded form at the time of the request. The parties point to various aspects of that guidance, including:-

(a) There being no requirement for the authority to create new information or seek it from a third party (unless held by that third party on the authority's behalf);

(b) Information may nevertheless be held even though it is not immediately to hand when the request is made;

(c) If the authority has the 'building blocks' to produce a particular type of information, it is likely to hold that information unless particular skill or expertise is required to put those building blocks together;

(d) If a requester wants a list, schedule or summary of documents (which does not exist) rather than the underlying documents themselves (which do), the authority would probably still hold the former if this could be compiled or extracted from raw data. Although possibly time consuming, the task is relatively simple;

(e) In *Michael Leo Johnson* v *Information Commissioner* [EA/2006/0085], the Tribunal found that the level of skill and judgment required to interpret terms used by Queen's Bench Masters when striking out claims was "minimal" such that the Ministry of Justice was required to disclose the number of such claims over a four year period despite the need to search through thousands of files;

(f) In *Higham* v *Information Commissioner* (unreported), the UT agreed with the Tribunal that, even though the combined costs of various projects were not available in a single document, the relevant Council held the aggregate information which could be produced by the simple addition of figures across the individual project costings;

(g) Likewise, if the request requires documents to be combined into a chronological schedule, accessible information retrieved through automated query or data to be anonymised or redacted, it is still likely to be 'held' by that authority (for the latter, see *Common Services Agency* v *Scottish Information Commissioner* [2008] UKHL 47 at [14]-[15]);

(h) The more it is necessary to manipulate the 'building blocks', and the more subjective the terms of the request, the more likely it is that the information is not held; and

(i) Information is held regardless of whether it is accurate, the right being to the information held, not to accurate information (see *Home Office* v *Information Commissioner* [EA/2008/0027] in a FOIA context).

451. I should add that the parties referred to further Tribunal and ICO decision notices in addition to those cited in the ICO guidance. Given the fact sensitive nature of my task, these were again of limited assistance. The difference between the parties lay principally in the level of skill, judgment and expertise (if any) said to be required, the Claimants saying that the processes identified by the Defendants for production of the CON29DW involved minimal skill such that the information was 'held' for EIR purposes. By contrast, the Defendants emphasised that their activities in answering the CON29DWs amounted to much more than the filtering, collation, distillation or re-presentation of existing information to present it in a new format, rather than its change, development or transformation to create new information.

452. Since the Claimants placed some emphasis on it, I should also add that I found potentially unhelpful the formulation in the ICO guidance that, if two people with similar skills could analyse the same raw data but reach different conclusions, it is likely that the public authority would not hold the information and that the more an individual has to exercise his own judgment, rather than follow a defined process, the less likely it is to be held. Although possibly only a matter of phraseology, this could be read to imply that information might be "held" if two people exercising skill and judgment would reach the same conclusion in analysing the same data. It could also suggest that adhering to a defined process and the exercise of skill and judgment were mutually exclusive. If so, neither proposition would, in my view, be correct, at least in those stark terms.

Issue 2 – Question 2.7 – build over agreements – D4/11

453. Subject to **Issue 2.1(d)**, and with the exception of D4/11 and D6, all Defendants accept that they held the information responsive to Question 2.7.[17] As already noted, the Claimants accept D6's position that it does not hold responsive information to the extent it concerns *consultation for* any build over agreements for which D6 says it holds no records.[18]

454. D4/11 say in the table in the Annex to their closing submissions that information responsive to **Question 2.7** was held if automatically generated but not when manual inspection of billing records was required. However, closer review of D4/11's skeleton argument and written closings indicates that the position is not, in fact, contentious, D4/D11 accepting that, even when a specialist technician performed a manual cross-check for **Question 2.7**, this involved no more than a database cross-check.[19] Even if a point were being taken by D4/11, it would be moot in any event given my finding on **Issue 2.1(d)**.

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[17] The Eversheds Defendants originally indicated in their skeleton argument (at [130, table]) that a point was taken in some cases for **Question 2.7** for YW (when answered manually) and for all other Eversheds Defendants (except for TW). The summary tables at Annex 1 to the written closings of the Eversheds Defendants (under **Question 2.7**) indicate that no point is now taken.

[18] D6's position is stated in D6's skeleton argument (at [Appendix, Q.2.7, "Held"]), with C's related concession in Cs' written closings (at [Annex A, Q.2.7, D6]).

[19] D4/11's skeleton argument (at [55.2] and [65]) and D4/11's written closings (at [67.1]). The Claimants also appear to have understood that this question was not contentious in respect of D4/11, Annex A to their closing submissions indicating for this question that "HSF Ds – D4/11 (NB. point not taken)".

Issue 2 – Question 2.8 (internal flooding) – Eversheds Defendants/ D11

455. The Eversheds Defendants say that information responsive to **Question 2.8** was not held when a CON29DW was ordered, the property initially flagged (either automatically or manually) as at risk for internal foul flooding, the staff investigated the nature of the underlying incidents, determined whether it was appropriate to state that the property was at risk and, if so, produced further details of that risk.[20]

456. To the same end, D11 says that it did not hold the information responsive to **Question 2.8** where the automatic system returned a "yes", the technician then reviewed the data and requested a report from D4's Waste Water Assurance team as to whether the building was at risk of internal flooding, the interpretation and compilation of information for that report involving technical knowledge and expertise.[21]

457. The Claimants say that an automatic 'check' of the Defendants' systems to see if a property is at risk required no skill or judgment to obtain the information from Ds' own records. Likewise, where the check was not automatic, the evidence indicates that this amounted to no more than looking at the Defendants' maps, again requiring minimal skill or judgment. Either way, such risk 'flags' were very rare. Furthermore, even if the initial check indicated that the property may have been at risk, any further checks were straightforward and the information easily extracted from the relevant department within the Defendant concerned.[22]

458. D6 accepts that it held the information responsive to this question.[23]

459. As noted, **Question 2.8** asks: **is [any] [the] [normally occupied] [building] [the dwelling house] [which is or forms part of] the property] [, or any part of the property] at risk of internal flooding due to overloaded public sewers**? Accordingly, the question is seeking to discern whether, as a matter of fact, the relevant premises are at risk of internal flooding and, if so, whether the reason for the existence of that risk is public sewer overload.

460. Turning to the evidence of the relevant Defendants as to how they went about answering this question:-

Question 2.8 – the evidence

D1 – NW

461. Ms Suzanne Jones is a supervisor in NW's Property Solutions Team that produces CON29DW and CommercialDW reports for its customers. She explained in her statement how NW's Con29 system used by the team searched the relevant property for a flooding incident record. If there was such a record, Con29 pre-populated the answer with "B. May be at risk (CHECK ANSWER)". The team then interrogated each incident to see whether it was internal and/ or due to overloaded sewers, editing the answer to confirm whether the property might be at risk and deleting any incidents that should not be included (for example, if historical or on a private part of the sewer network). The team then considered

[20] Eversheds Defendants written closings (at [355]).
[21] D4/11's written closings (at [67], [67.2], [71] and [80]).
[22] Claimants' written closings (at [Annex A, Question 2.8]).
[23] D6's skeleton argument (at [Appendix, Question 2.8]).

whether non-capacity related incidents should be included even though beyond what the question asked for.

462. Ms Jones described the process as one of making "judgement calls", the team guided not by written guidance, but by factors such as the age, type of incident and whether any mitigations had been put in place. As for the latter, this involved checking records for interactions with the property owner and operations records, including on legacy systems. The team also discussed and reviewed data used by the Network team and the Sewer Flooding team to see if the property was within the scope of planned remediation and the status of that remediation work. The nature of the mitigation could also affect the answer, whether, for example, the sewer capacity issue has been resolved or the mitigation was at property level only.

463. Ms Jones confirmed in her oral evidence that incidents of internal flooding due to sewer overload sewers were rare. Although taken through her written evidence on this issue in cross-examination, it was not challenged. I accept it.

D2 – UU

464. Ms Elizabeth Bywater is a Production Advisor in UU's Property Searches team. She explained in her statement how UU's mapping system indicated properties at risk of foul flooding. The team's system training manual provided instructions to Production Assistants on how to answer the question. If the map indicated a risk (with a red, yellow or blue cross), the Production Assistant would search over the property using the information tool in the mapping record, the foul flooding field indicating the nature of previous flooding incident(s). This information facilitated further investigation by Ms Bywater (or her fellow Production Advisor).

465. A yellow cross indicated a foul flooding incident with different risk levels. If the search indicated that the property had experienced foul flooding from a storm of a severity that had occurred once in 20 years and, as usual in such cases, no mitigation measures were also shown, with the incident resolved after a visit, the Production Advisor would return the report to be completed for this question as "No". For yellow cross incidents where mitigation measures had been installed, the Production Advisors would undertake further investigations of UU's foul flooding records. If there had been mitigation, they would usually answer the question "yes" unless the records were not clear, in which case, they would seek input from UU's Wastewater Technical Team.

466. A red cross indicated that a property had flooded due to internal hydraulic flooding. A blue cross indicated past flooding due to other causes such as bad weather. If either was shown, the question would again be escalated to the Production Advisors, they would check UU's internal records and, if the relevant property was not listed or no mitigation had been installed, the question would be answered "no". However, if the property was listed and shown as having had mitigation measures installed, the matter would be escalated further to UU's Wastewater Technical Team which might have more information. The question would then be answered based on that team's response.

467. Drawing these threads together, if the property was listed in UU's records and mitigation measures had been installed, the question was answered "yes". Based on the Production Advisors' investigation or the information received from UU's Wastewater Technical Team, an additional letter was provided with the search results, explaining the mitigation measures already taken and/ or any proposed action to reduce the risk of internal foul flooding.

468. In oral evidence, Ms Bywater confirmed that there were few properties in UU's area at risk of internal foul water flooding. Although taken through her written evidence on this issue in cross-examination, it was not challenged. I accept it.

D3 – YW

469. Mr Stephen Midgley is the Business Process Team Lender within YW's SafeMove business group, responsible for providing conveyancing services such as residential and commercial searches. He explained in his statement how YW answered this question by reference to its internal flooding records. That a property featured in YW's flood records was highlighted in its mapping system with a blue circle icon within the relevant property's boundary. If there was no icon, the question was answered "no". If the icon was located automatically by YW's system, the question was referred to a search advisor for consideration and further manual checks. An exception message would also be shown. Clicking on the icon brought up further information about the flooding incident and indicated whether it appeared within YW's flooding records.

470. The search advisor was trained to approach senior advisors to find out more about the nature of the flooding incident relevant to the property, those senior advisors having access to YW's flood records which they could filter to review the type and frequency of flooding incidents that had occurred. The senior advisor would then feed back to the search advisor whether the incident was relevant to this question or, for example, the internal flooding was not caused by sewer overload. If the incident was of the relevant type and frequency (at least one incident in 10 years), the search advisor would be prompted to contact another YW department dealing with internal sewer flooding to find out more information about the incident, specifically whether it was an incident of internal flooding due to sewer overload and any additional information. The other YW department would then provide this information by e-mail, including the date and nature of the flooding incident, whether it was resolved and any follow-up preventative action. Based on this information, the search advisor answered the question "yes" and inputted information about the incident which was captured in the search report. Additional information about the flood risk and mitigation steps was included separately.

471. In oral evidence, Mr Midgely confirmed that this question would be answered "no" for the vast majority of properties. Although taken through his written evidence on this issue in cross-examination, it was not challenged. I accept it.

D4/ D11 – STW

472. Ms Cathy Hughes is the Data Portal Lead at STDP. She explained in her statement how D4's Waste Water Assurance Team provided STDP on a monthly basis with a pre-defined report from its flood register which STDP would then 'cleanse', including by re-formatting, before placing it on its own Gemini Datasources database.

473. As for the process for answering this question, Ms Hughes explained that, if no address match was found for the property being searched within the flood data set, the system would answer the question "no". If the property was new build or did not have a billing account, the order was reviewed by an STDP technician and the question answered "no" manually. If, however, a match was found, the system answered the question "yes", causing a 'validation rule' to be raised as a 'flag'. The STDP technician would then review the order and raise an e-mail request for a flood report with D4's Waste Water Assurance Team. Once received, the report was attached to the order in the Gemini IT system and sent to D11.

474. Ms Hughes was not cross-examined on her written evidence on this issue. I accept it.

D7 – SWW

475. Mr Stephen Skinner is Searches Manager for SWW. His responsibilities include managing the searches team split between the onshore and offshore team based in India. He explained in his statement how flooding at a property was shown on SWW's GIS map with a green circle, its size indicating the number of flooding events that had occurred and, when clicked, providing the event details. When the offshore team saw a green circle, they escalated the search back to the onshore team who looked into the flooding and completed the CON29DW order. Information held in the mapping system about any mitigation measures relating to flood risk was provided in the answer to this question in the report.

476. In oral evidence, Mr Skinner confirmed that the search team's user guide showed how to answer this question. He also explained that, merely because a green circle was on the map, it did not necessarily mean that the answer to the question was "yes". The system would show all sewer events at the property (internal and external) and SWW would only answer it "yes" if there was an internal sewer event caused by overloaded sewers. The user guide confirmed that there were only a few hundred properties in the whole SWW region at risk of internal foul water flooding. Although taken through his written evidence on this issue in cross-examination, it was not challenged. I accept it.

D8/12 – WW

477. Ms Lucy Sherry is Systems and Processing Lead for D12. When the pre-populated answer in D12's system showed "yes" to this question, D12 contacted WW's DG5 team asking them to confirm whether the property was in their records as at risk of flooding or under investigation, whether improvement engineering works were planned, when the risk could be expected to be removed and whether mitigation measures were planned or in place. The mapping system could also be manually checked for indications of internal flood risk.

478. The question would be answered "yes" if the DG5 team informed D12 that the property was on its records as being at risk of flooding. D12 also entered any details about remedial works and statistics received from the DG5 team (for example as to flooding frequency). D12 also informed the homeowner that it would produce a document revealing the information. The CON29DW report was prepared using the information from the DG5 team, albeit in non-technical, user friendly language. The answer "under investigation" would be given where the DG5 team confirmed this status.

479. In oral evidence, Ms Sherry confirmed that D12 would conduct a manual check of the billing records even if the pre-populated answer was "no". She also confirmed that it was rare for a property to be listed as at risk. Although taken through her written evidence on this issue in cross-examination, it was not challenged. I accept it.

D9 – TW

480. Ms Renee Truter is Product Delivery Manager for TW. She explained in her statement that properties at risk of internal foul flooding had a flag logged against them by D9's Sewer Flooding team. To answer this question, TW's production system automatically looked for this flag. In most cases, none was detected and the question would be answered "[n]ot at risk". However, if the system found a flag, an exception was raised. The search team member or 'agent' would then manually check the relevant records to see what type of flooding had occurred at the property, looking particularly for records of actual internal flooding due to hydraulic failure or engineer assessments that the property was at risk. If a risk or potential risk was identified, the agent would compile a statement for inclusion in the search report covering key information from the relevant records. This included how often the property had flooded internally in the last 10 years or, if the property was identified as at risk of internal flooding following an engineer assessment, the proposed action to remove the risk. Training was provided by the Sewer Flooding team on how to read the records, that team also annually reviewing the guideline to ensure the process was correct.

481. In oral evidence, Ms Truter confirmed that, in most cases, no flag was logged against the property on TW's system such that the question was answered "no". Although taken through her written evidence on this issue in cross-examination, it was not challenged. I accept it.

D10 – SW

482. Mr Indranil Banerjee is employed by Tata Consultancy Services Limited (**TCS**) as a "subject matter expert". TCS provides services to SW in the preparation of CON29DW and CommercialDW reports. Mr Banerjee deals with difficult cases or 'exceptions' and customer queries referred to him. In his statement, he explained how the TCS team were required to follow an operating manual which he described as the "SOP".

483. For this question, the standard procedures involved clicking on a button called "[f]looding" in the LandSearch Database Application to see if the property had previously been listed as "at risk" of flooding. In addition, TCS also checked and reviewed SW's flooding records directly, searching for these in what is described in the SOP as the Sirf DG5 database to see if the property was "at risk" or "not at risk" and the type of flooding. TCS would only answer "at risk" if the property was recorded as being at risk of internal flooding. If "at risk" was selected, the automated answer generated provided information to the customer in the search report.

484. Although taken through his written evidence on this issue in cross-examination, it was not challenged. I accept it.

Question 2.8 - analysis

485. The starting point for the analysis is the question itself, which asks whether the property is *at risk* of flooding. Assessment of risk is a classic evaluation exercise, involving as it does an attempt to establish the likelihood of a particular (often harmful) event occurring. Such assessment involves consideration of the circumstances relevant to the materialisation of the risk, including here, past such events and any mitigations since adopted or planned to reduce or avoid recurrence. Additionally, the question has a particular focus on a specific type of flooding - internal - and a specific cause - overloaded public sewers. Given the nature of the risk, with serious implications for the property concerned, and for any person buying or selling it, the question is an important one even if the risk with which it is concerned is rare.

486. In the majority of cases, the initial check for this question (whether undertaken manually, automatically, or both) indicated no record of risk. However, in those few cases in which a risk was 'flagged', I am satisfied that each of D1-D3, D7 and D9-D10 went on to apply such skill and judgment that it cannot be said that they already 'held' the responsive information when the request was received. Indeed, as indicated in the evidence summarised above, to undertake their risk assessment, those WASC Defendants had to interpret their flood records. Those records were technical in nature, concerning different frequency, types and causes of flooding and different mitigation or remediation measures undertaken, planned or neither.

487. If anything, the rarity of these events rather underlined the skill involved in the interrogation of those records. The need for such skill is why, in a number of cases, the enquiry was referred to senior members of the relevant search team and/ or the technical team and/ or specialist training given. Such skill is also underlined by the often detailed additional information provided in response to this question, seeking to make user friendly the underlying technical engineering language in the records which were considered. The fact that the search agents or advisors may have followed set processes or guidance manuals on this question, used highly functional computerised systems or that two similarly trained advisors might reach the same conclusion for the same property does not, in my view, detract from the skill and judgment involved.

488. Accordingly, having considered the evidence separately for each Defendant, I find that where the initial check did indicate that the property was, or might be, at risk of internal flooding, each of D1-D3, D7 and D9-D10 did, in its own different way, go on to apply such skill and judgment in answering the question that it cannot be said that it already held the responsive information at the time of the CON29DW request. That is the case whether they then answered the question in the affirmative or the negative. Indeed, that they might yet answer "no" after a potential risk had been flagged rather reinforces my view. D11 and D12 did not exercise such skill and judgment but that is because their answer to **Question 2.8** depended on the provision of information by their associated companies, respectively, STDP and D8. As I have found under **Issue 2.1(d)**, D11 and D12 did not 'hold' such information. The same obtains in this context too.

Issue 2 – Question 2.9 – STW proximity – D6

489. **Question 2.9** says: **please state the distance from the property to the nearest boundary of the nearest sewage treatment works**. Question 2.9 from the CommercialDW is in the same terms.

490. Subject to **Issue 2.1(d)**, and with the exception of D6, all the Defendants accept that they held the information responsive to **Question 2.9**.[24]

491. D6 says that, although its mapping database has a measuring tool which generates measurements automatically, the use of that tool, and in particular the decision where to measure from (i.e. where is the closest boundary of a building within the property, or the closest point within the property, to the STW), often requires the exercise of skill and judgment by a D6 employee. D6 also says that the related evidence of Mr Nicholas Hill (for D6) was unchallenged on this point.[25] The Claimants, by contrast, say that (like the measurements for the questions at **Question 2.5** and **Question 2.5.1**), this is a simple task of looking at the map and using D6's measuring tool, with minimal skill or judgment required.[26]

Issue 2 - Question 2.9 - evidence

492. Mr Hill is Customer Services Team Manager at Tide Services Limited (**Tide**), part of the Anglian Water Group. Mr John Cooney is a Product Quality Assurance Technician at Tide. Mr Hill is his manager. Although Mr Hill provided a witness statement, he could not testify. Nevertheless, upon D6's application prior to trial, I gave permission for D6 to serve a statement from Mr Cooney which adopted in very large part Mr Hill's statement. Although tendered for cross-examination, the Claimants chose not to cross-examine Mr Cooney. I therefore accept his evidence, including the adopted parts of Mr Hill's statement.

493. Mr Hill explained in his statement (at [83]) that the answer to **Question 2.9** is automatically pre-populated using AW's asset data. By placing a marker on the relevant property on D6's GIS mapping system, the system will detect the location of the nearest STW and its distance from that property. When the marker is moved, it calculates the new distance which is then brought into the answer text for the question. However, D6 relies for **Question 2.9** on Mr Hill's evidence (at [61]-[62]) on the other measurement questions (**Question 2.5** and **Question 2.5.1**). Of most relevance, Mr Hill states (at [61]) that:-

> "The question is done spatially in GIS. We would move the marker … around in the boundary to see if there is a sewer within 30.48 metres of the property. You're looking for the nearest point from the building to the sewer. The system automatically calculates the distance between the marker and the nearest public sewer. The actual question is "any buildings within the property", so you're looking at all buildings where there could be a connection."

[24] Eversheds Defendants skeleton argument (at [130, table]); summary tables at Annex 1 to the written closings of the Eversheds Defendants (under Question 2.9); D4/11's written closing (at [Annex, under Question 2.9]).
[25] D6's skeleton argument (at [31] and Appendix, under Question 2.9); D6's written closings (at [42]).
[26] Claimants' written submissions (at [Annex A, Question 2.5, Question 2.5.1 and Question 2.9).

494. D6 also relies on what appears to be an internal D6 guide on when and how to answer **Question 2.5** in GIS. This states:-

> "Verifying the distance
>
> Fortunately, you don't need to grab your ruler and be a mathematical genius to work out the distance to the nearest sewer, this is done automatically by the system using the vicinity marker as the point of reference.
>
> Unfortunately, the question relates to any nearest building within the customer's area of interest, therefore, if the customer is purchasing a plot of land or a farm that contains multiple buildings, you'll need to check the distance from the nearest sewer for each of the buildings."

495. Although D6 obviously does not already have to hand when receiving a CON29DW request measurements between particular properties in D6's region and its nearest STW, I am unable to accept that the use of its measuring tool, in particular where to measure from, involves such skill and judgment that the information is not held by D6. First, neither Mr Hill nor Mr Cooney indicated in their evidence such skill being required for any of these questions. Second, the suggested complexity in answering **Question 2.5** and **Question 2.5.1** arises, in particular, from the potential presence of (often multiple) buildings within a property. However, **Question 2.9** is not concerned with measuring distance from buildings but from the property itself, a less complex exercise. Third, great *care* is no doubt needed to identify the building(s) or point on the property boundary from which to measure for the purpose of each of these three questions. However, on the basis of the evidence as to what the process entails, I cannot accept that this amounts to the application of such *skill* or *judgment* in putting together the necessary 'building blocks' within D6's GIS system to create new information as such.

496. Accordingly, I find that D6 held the information responsive to this question at the time the CON29DW request was made.

Issue 2 – Questions 4.1.1 and 4.1.2

497. **Question 4.1.1** and **Question 4.1.1** of the CommercialDW ask **who is responsible for providing the sewerage services for the property**? **Question 4.1.2** and **Question 4.1.2** of the CommercialDW ask **who is responsible for providing the water services for the property**?

D1 – CB1 – Question 4.1.1 and 4.1.2

498. NW says it did not hold the information responsive to **Question 4.1.1** and **Question 4.1.2** in scenario CB1. This is said to be because the potential answers NW gave to these questions were not limited to the names of the sewerage and water undertaker which NW knows.[27] For example, NW may answer "NWL Partial" for question 4.1.1 if a property is connected for sewerage but not surface water drainage. In a cross-border case, NW is dependent on billing data from the OWC to determine whether this answer may apply. The Claimants say that this 'technical' argument is without merit, the relevant issue being

[27] Eversheds Defendants' skeleton argument (at [110, fn.52]); Eversheds Defendants written closings (at [270]-[272]).

whether D1 'held' information within the scope of the questions, namely its own identity and that of the OWC billing for its services, which NW plainly did.[28]

499. Although I again accept Ms Jones' related evidence, I am in no doubt that NW held the information responsive to **Question 4.1.1** and **Question 4.1.2** in scenario CB1. The fact that NW may use different variations in its answers, and that OWC's billing data is required for NW to select between them, does not alter the position that D1 must have known and held information in material form confirming that it was the sewerage undertaker and that the relevant OWC was the water undertaker for the property concerned. As such, I find that D1 held the information responsive to both questions.

D4/11 – CB1/ CB2 – Question 4.1.2

500. D4/11 say that, in scenario CB1 and CB2, D11 did not hold the information responsive to a number of water questions, including **Question 4.1.2**, and that it was not available from STDP.[29] The Claimants take issue with this, saying that the point is nonsensical and unsupported by D4/11's own evidence.[30] I agree that, for this question at least, D4/11's position makes little sense. Although the OWC billed for water services in both scenarios, and D11 obtained from that OWC the information responsive to water questions (including **Question 4.1.2**), self-evidently, D11 must already have known, and held its own information in material form confirming, that OWC's identity. As such, I find that D11 held the information responsive to this question.

I. ISSUE 3.1 – PUBLICLY AVAILABLE AND EASILY ACCESSIBLE

501. **Issue 3** is framed in the following terms:-

> "Was any of the information covered by regulations 6(1), 12 or 13 of the EIR, so that the Ds were not obliged to disclose it?"

Issue 3.1 – introduction

502. A significant part of the time spent at trial on **Issue 3** related to **Issue 3.1** concerning the engagement (or otherwise) of Reg 6(1)(b). **Issue 3.1** asks whether the information responsive to a number of the CON29DW questions was:-

> "(a) publicly available in the same or a different format and easily accessible for the purpose of **regulation 6(1)**; and if so
>
> (b) was the Defendant therefore not obliged to disclose it?"

503. The LOI also reflects the parties' agreement that this sub-issue was to be tested by reference to a set of sample orders from the test Claimants.

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[28] Cs' written closings (at [62]-[64]).
[29] See D4/11's skeleton argument (at [52] *et seq*); D4/11's written closings (at [49.1] and [49.2, fn.73]).
[30] Cs' written closings (at [49(c)], [61]-[64]).

The parties' positions

504. The Claimants emphasise that Reg 6(1) is engaged upon a request that EI be made available in a particular form or format. It is not an exception to the Reg 5 duty rather than a possible permitted route for its discharge. As to this, the Defendants say that these proceedings concern requests for CON29DW searches. Those requests were fulfilled and the Claimants paid the relevant charges. To the extent that these are to be treated as requests for EI held by a Defendant, and therefore fall in principle within Reg 5(1), they were requests for information in a particular form or format (*viz* a search report).

505. Relatedly, the Claimants also argued that Reg 6(1)(b) is a fact sensitive provision, the question of whether that information is already publicly available and easily accessible to the applicant is dependent on what has been requested, by whom, in what form, and the extent to which the already publicly available information in a different form or format is equivalent to the information requested and easily accessible in practice to the individual requester. In light of this, the provision cannot be applied in a generalised way. However, as the LOI itself records, the Claimants contended that the relevant information was not "easily accessible" to them due to various suggested restrictions, including:-

> "a. the fact that the information was only available *in situ* on a public access computer ("PAC") during the relevant period;
>
> b. the terms on which access to the PAC was provided;
>
> c. the reliability and/ or availability of the PAC;
>
> d. the extent to which the information provided on the PAC was kept up to date;
>
> e. the format in which information was provided on the PAC, including the extent to which information on the PAC could be printed out, and the form in which the information was displayed;
>
> f. the fact that the information was different from the information available to and used by the Defendants to compile a CON29DW or a CommercialDW; and
>
> g. the advice or assistance provided by each Defendant (if any) in relation to information which is said to have been publicly accessible."

506. Given this level of detail articulated on the Claimants' side in the agreed LOI, taken to an even greater level of granularity in the related body of evidence served by them and the Defendants and in the related arguments advanced at trial by both sides, I am satisfied that meaningful conclusions can be reached under **Issue 3.1**. Indeed, as the Claimants themselves made clear in closing submission, based upon the related general evidence it has received, the Court can make findings in principle to be carried forward to the next stage.[31] That is so even if, as the Claimants also say, it is not possible to link every point to a specific sample transaction. Accordingly, although conscious of the Claimants' admonition as to the 'blanket' application of Reg 6(1)(b), the evidence and argument provided by both sides have equipped me to make a number of findings as to the public availability and ease of

[31] D.17/p.75/l.5-12.

accessibility to the Claimant PSCs of the different items of EI held by the different WASCs from the different sources identified.

507. The Claimants also suggested that there was an inconsistency on the part of the Defendants in arguing for the purposes of **Issue 2** that they did not 'hold' much of the information responsive to the CON29DW questions, at the same time arguing for the purpose of **Issue 3.1** that some of the same information was already publicly available. However, given the different and nuanced arguments around whether information was 'held' (as some are discussed above) and that **Issue 2** and **Issue 3.1** were argued in the alternative, little seemed to turn on this point.

508. As for the disputes arising under **Issue 3.1** with respect to the information I have found to be EI held by the Defendants, the matrix of the arguments for each of the Defendants is more complex still than that under **Issue 2**. The table below summarises the Defendants' position for each of the relevant questions as it stood after closing submissions, with "Y" connoting their assertion (for the majority of, and in the case of D6, all questions) that the responsive information for the relevant CON29DW question was publicly available and easily accessible and "N" their acceptance otherwise. Entering the trial, the Claimants already disputed the Defendants' position for a number of the questions, those disputes growing by the end of trial as the Claimants indicated the withdrawal of certain prior concessions.

Q.	**EI**	**D1 NW**	**D2 UU**	**D3 YW**	**D4/11 STW**	**D6 AW**	**D7 SWW**	**D8/12 WW**	**D9 TW**	**D10 SW**
2.7	Buildover agreements	N	N	N	N	Y[32]	N	N	N	Y[33]
2.8	Internal flooding	N	N	N	N	Y	N	N	N	N
2.9	STW distance	N	Y	Y	Y	Y	Y	Y	Y	Y
3.5 (*v*1)	Water quality	Y	Y	Y	Y	Y	Y	Y	Y	Y
3.5 (*v*2)	Water hardness	Y	Y	Y	Y	Y	Y	Y	Y	Y
3.6 (*v*1)	Authorised Departures	Y	Y	Y	Y	Y	Y	Y	Y	Y
4.1.1	Sewerage undertaker[34]	Y	Y	Y	Y	Y	Y	Y	Y	Y
4.1.2	Water undertaker[35]	Y	Y	Y	Y	Y	Y	Y	Y	Y
5.1	Trade effluent	Y	Y	Y	Y	Y	Y	Y	Y	Y

Reg 6(1)(b) – legislative scheme

509. Reg 6(1)(b) gives effect to Article 4(1)(b)(ii) of the Convention and Article 3(4)(a) of the Directive and provides that, where information is requested in a particular form or format, a public authority shall make it so available unless it is already publicly available and easily accessible to the applicant in another form or format. As Article 3(4)(a) of the Directive says, such pre-existing information in an alternative format includes in particular that made publicly available under Article 7 (and which is easily accessible), as reflected by the Reg 4(1) duty progressively to make EI publicly available. In this regard, the Defendants rely

[32] As noted under **Issue 2**, the Claimants accept that AW does not hold information relating to buildover *consultations* (as opposed to buildover agreements).
[33] D10 accepts that buildover *consultations* (as opposed to agreements) are not shown on the public sewer map.
[34] Including **Question 4.1**.
[35] Including **Question 4.1**.

on the rationale for Reg 6(1)(b) suggested by the ICO decision notice for NW [IC-120111-X0Q5]:-[36]

> "22. In the Commissioner's view, Regulation 6(1)(b) should be understood in the context of Regulation 4 of the EIR which places an obligation upon all public authorities to make progressively available as much of the environmental information they hold as possible.
>
> 23. The EIR place an obligation upon public authorities, but they also provide public authorities with some protection. Where environmental information has already been made available, public authorities can shield themselves from some of the burden of responding to requests - either because would-be requesters have already found the information for themselves or because the public authority can, when a request has been made, simply point to the information already available. Therefore Regulation 6(1)(b) exists in part to protect public authorities from having to re-provide the same information continually - it also acts as an extra incentive for public authorities to make the environmental information available in the first place.
>
> 24. Even if the Commissioner were to accept that the complainant's estimate of the time required to extract the information was accurate, it does not follow that the information is not easily accessible. The complainant can access the information by simply opening up each permit. The time required is not expended on accessing the information, but on choosing which information he wishes to access, extracting the particular piece of environmental information that is of interest to him and converting that information into a format that is convenient for him to re-use.
>
> 25. The EIR do not concern the right to re-use the environmental information or the ease with which that can be done. They only concern the right of access to the information in the first place."

510. I should add in this context that the Claimants relied at trial on Reg 4(1) as informing the approach the Court should adopt to a number of the issues, including **Issue 3.1**. However, I found the Claimants' related submission somewhat inchoate. This is perhaps unsurprising, Reg 4(1) forming no part of the underpinning for the LOI, let alone **Issue 3.1**. To the contrary, the pleaded shortcomings in the approach of the Defendants in withholding or restricting the availability of the information sought by the Claimants concentrate principally on problems said to have been encountered with the PAC operated by the different WASCs.[37] This position was also reflected in the Claimants' contentions in the LOI under the fact pattern for **Issue 3.1**. Although I sought to explore with the Claimants in submission how it was said that the WASCs fell short with respect to Reg 4(1), there was a distinct lack of clarity, let alone granularity, in this regard.

511. This too is perhaps unsurprising, the Reg 4(1) duty being framed in terms of (i) information being made *progressively* available by electronic means (ii) *reasonable steps* being taken as to the organisation of information with a view to its systematic dissemination and (iii) a *minimum* level of information to be disseminated, including (in addition to the matters identified in the Directive) "facts and analyses of facts which the public authority considers

[36] The ICO reflected similar considerations in the London Borough of Croydon decision notice [IC-143229-S3C3] at [13]-[15].

[37] PoC, Schedule 4.

relevant and important in framing major environmental policy proposals". As to the latter, although a 'floor' on the information to be made available and organised for dissemination, the minimum information indicated is qualitatively miles apart in terms of its policy importance compared to that with which this case is concerned. Given these matters, I was not persuaded that Reg 4(1) could or should meaningfully inform my analysis of **Issue 3.1**.

512. The PSC Claimants also relied on the duty of advice and assistance under Reg 9(1) as relevant to the Court's approach, albeit again to what specific end was far from clear, not least given the independence and experience of the Claimant PSCs in the conduct of their searches and the standardised questions comprising the CON29DW. In any event, to the extent that specific complaints about lack of assistance by the WASCs did arise under **Issue 3.1**, these are addressed below without the need for recourse to Reg 9(1).

Publicly available – the parties' contentions

513. As to the sufficiency or equivalence of the pre-existing publicly available information compared to that in the particular form or format requested, the Claimants point to the ICO guidance on Reg 6(1) which states that the relevant public authority " … must be able to direct the requester to where they can obtain all the information they have requested" (emphasis supplied) and that it cannot rely on Reg 6 where it is " … only directing the requester to something similar to the requested information or a part of it or a summary of it, rather than all of it." In addition, "another form" means that the available information is the functional equivalent of the form requested, not a summary; and that the information should be available in its entirety."

514. In this regard, the Claimants also pointed to certain ICO decision notices, including one involving a request for Trinity Housing Association to provide copy documentation relating to the agreed sale of a particular property [FER0497378]. In that case, the Association failed to satisfy the ICO that all the information within the relevant agreement was, in fact, publicly available from other public bodies such as HM Land Registry or the local Council. As such, it could not rely on Reg 6(1)(b). Nor, according to another decision notice, would the request for a map of the area of two public highways at a particular scale be "already publicly available" by means of a digitised map service (available for a fee or by visiting Hampshire County Council's records office) if only part of the responsive information had already been digitised [FER0810614]. Finally, the Tribunal considered that photographs and PDFs of photographs of certain land did not provide access to the same information given the differences in the structural properties, including resolution, of the two formats (*Reeves* v *ICO* [2023] UKFTT 882 (GRC)).

515. Although this guidance and these decisions provide a useful indication of how Reg 6(1)(b) is approached in practice, I did not discern from them that the information responsive to multiple requests for EI had to be publicly available in the aggregate before Reg 6(1)(b) could be engaged. If that were the case, it would lead to some arbitrary outcomes simply on the basis of requests for EI being made compendiously or separately or because they happened to include a single question capable only of answer by reference to the public authority's internal documents.

516. Moreover, although the scope of the Claimants' related submission was not entirely clear, I do not accept that Reg 5 (or Reg 6(1)(b)) requires the recipient to make available all the information it holds to answer a request. What information might be required depends on the nature of the request, in this case a series of individual CON29DW questions rather than for specific underlying data.

517. Finally in this regard, the Claimants also appeared to suggest that it would not be sufficient for Reg 6(1)(b) purposes to satisfy a request for information by its provision in combination with other publicly available material or tools. Although this would again depend on the facts of the case, it seems to me perfectly possible, in principle, for a request to be satisfied in this way. In this case, the issue perhaps arose most pointedly under **Question 2.9** (STWs). As the evidence indicated, a number of WASCs started to publish on their websites information about the STWs in their region, including co-ordinates. If so minded, the Claimant PSCs could use this information to calculate the distance from the property being searched to the nearest STW, and therefore answer **Question 2.9**, using simple online applications such as Google Maps. To suggest, as the Claimants appeared to do, that the WASCs additionally had to provide the measuring functionality or to do the actual calculation seemed to run counter to the Claimants' own Reg 4(1) arguments, the WASCs having actively disseminated STW location information electronically, with the Claimant PSCs at least perfectly capable of deploying the necessary online functionality to answer the question.

518. Relying on *S* v *IC and the General Register Office* [EA/2006/0030] (at [42]), the Claimants also say that, whether information is publicly available "is a matter of degree". However, *S* was concerned with whether confidence in certain information had been lost by the information being in the public *domain*. The concept of public *availability* is not the same. To the same end, the Claimants also rely on *Ofcom* v *ICO and T-Mobile* [EA/2007/0078] but it is clear (at [69]) that the Tribunal's decision in that case turned on the relevant website not being *easily accessible* (the requested format being relevant to that issue), not on its public availability.

519. The Defendants say that information they have made publicly available other than under the auspices of their Reg 4(1) duty and which is also easily accessible, such as that required to be made available by the WASCs under ss.196 and 198-199 of the WIA, also satisfies Reg 6(1)(b). I agree that such information is capable, again in principle, of meeting the requirements of Reg 6(1)(b) as, indeed, might information made publicly available by another public authority or by a person not subject to EIR duties.

520. I also accept that publicly available does not mean having completely unfettered public access and that information may qualify as such even if some registration process, permission or physical attendance for inspection purposes might be required. Moreover, information may be publicly available if it is available in hard copy, by e-mail request, on-line or on a computer terminal to be viewed *in situ*. In this regard, the Claimants suggested in relation to certain sources of responsive information relied on by the Defendants that, only being available *on request* from that source, the information was, 'by definition', not 'already' publicly available. I disagree. If, for example, a WASC can no longer allow in person access to its PAC because of Covid restrictions and provides a public map e-mail request service instead, or seeks to discharge its obligation to make available trade effluent consent information by providing copies of its electronic register in response to a phone call, e-mail or in-person request rather than through inspection of its former physical

hardcopy register or if it provides stand-alone services for the provision of individual elements of CON29DW information upon submission of an order form, there is no reason why this too is not publicly available. If such access carries with it restrictions or conditions too onerous for the requester, that may militate against it being publicly available. However, I reject the Claimants' related suggestion that information available 'on request' is 'by definition' not publicly available.

521. Finally, relying on the Convention Implementation Guide (at [81]), as endorsed by the related ICO guidance, the Claimants say that ""publicly" available assumes that the same reasonable cost standards are in place for that information as required under the Convention" and that "if you decide that you are going to point a member of the public to something which you say is already publicly available, it cannot be on the basis that the cost is going to be more than would be permissible under the regime itself".[38] The Defendants say that information is no less publicly available simply because it is available to anyone upon payment of a fee. Although they accept that it may not be easily accessible if the fee is excessive, they do not accept that the Reg 8(3) costs standards would apply, albeit they say it may make little difference in this case given that the question of fees under **Issue 3.1** only arises in relation to AW and, on any view, the charges concerned were reasonable.[39] As to these rival contentions, I accept that Reg 6(1)(b) can still be invoked where the alternative public source of the information requires a fee to be paid but it would, in my view, be a surprising proposition (and one potentially admitting of avoidance of the EIR regime) if the fee charged in that event could exceed that permitted under Reg 8(3).

Easily accessible – the parties' contentions

522. The Claimants referred to certain ICO guidance on information in the public domain to say that, for information to be already easily accessible, it should not require "unrealistic persistence or efforts nor any specialised knowledge". The guidance cites *Attorney-General* v *Greater Manchester Newspapers Ltd* [2001] EWHC QB 451 (at [32-33]) in which the Court held that certain information was not in the public domain despite it being available from (i) a public library and (ii) a government website. The information held by the former was detailed and complex, containing statistics not easy to digest by those not used to its format or with sufficient background information to know where to look for it. The information on the latter " .. would require some degree of background knowledge and persistence for it to become available to a member of the public and would not be widely recognised as available. .." Not being 'realistically accessible', the information was not in the public domain. However, as noted, whether information is in the public domain is a different enquiry.

523. For Reg 6(1)(b) to be engaged, the information has to be already easily accessible to the relevant applicant. Although Article 4(1)(b)(ii) of the Convention does not refer to ease of accessibility, Article 3(4)(a) of the Directive does. Moreover, the Convention Implementation Guide provides (at [81]) that "[t]o be effective, "publicly available" means that the information is easily accessible to the member of the public requesting the information. Accordingly, although a government published book may be publicly available in a library, "[i]nforming an applicant about the existence of a single copy of a book in a library 200 kilometres from his or her residence would probably not be a

[38] D.2/p.153/l.14-22

[39] D6 has charged for information concerning low water pressure and internal sewer flooding and, more recently, connection and billing.

satisfactory response". EI must be "effectively accessible", meaning that "the established information systems should go beyond simply making the information available to the public. Records, databases and documents may be considered effectively accessible when, for example, the public can easily search within them for specific pieces of information, or when the public has easy access through convenient office hours, locations, equipment such as copy machines, etc. …. As well as being physically accessible, "effectively accessible" requires that information should be available in a format, language and level of technical detail that the public can effectively access" (at [101]).

524. The Defendants referred to various Tribunal and ICO decisions in this context. So, for example, in the Cherwell District Council decision notice [FER0571475], the ICO decided that the Council was correct to refuse planning history information requested to be provided by e-mail when it was already available on its public access system. Taking into account the particular circumstances of the applicant, namely an employee of a property search company, the information was easily accessible even though a six hour round trip was involved. The outcome was the same on not dissimilar facts in the Wokingham Borough Council decision notice [FER0676534], involving a representative of the same search company and a substantial round trip, on that occasion for information about common land and/ or town or village green registration and related changes. The Tower Hamlets decision notice concerning a request by a commercial organisation for information on the adoption status of a road indicated a similar approach [FER0572743].

525. In this regard, the Claimants emphasised that the PSCs were a diverse group. Not all of them were national franchises. For some at least, travelling large distances to visit a PAC in a (generally) single location covering a large region meant that the information was not easily accessible. For example, although his business is incorporated, it was said that Mr Gradwell was effectively a sole trader who had to undertake a return journey of 70 miles each time he visited NW's PAC.[40] Although I recognise that ease of accessibility is to be considered by reference to the particular requester, I was satisfied on the evidence that, insofar as the Claimant PSCs were concerned, none of the WASCs fell foul of Reg 6(1)(b) as a result of the location of their PAC. As for Mr Gradwell, it was quite clear from his evidence that he had taken the conscious decision some 20 years ago to set himself up in a property search business, with travel being an integral part of his work, not limited to drainage and water searches at NW's offices, but also to local Council offices in the region he covers. Although he referred in parts of his evidence to the distance he travels, this did not indicate any issues in terms of ease of accessibility rather than annoyance at having travelled that distance if the NW computers were not working properly on a particular day or the potential for greater convenience to him if afforded more time to complete his searches at NW's offices. As to this, the Defendants say that easily accessible does not mean the most convenient or accessible means for the applicant, the Powys County Council decision notice [FER0526839], for example, upholding the Council's refusal to provide a plain paper colour copy of the definitive map for a particular area on the basis it was available for view at its offices even though it involved an 84 mile round trip for the applicant.

[40] Gradwell 1 at [61]; Gradwell 2 at [26]; D.6/p.19/l.2-13.

526. Indeed, the Defendants say that the easily accessible criteria will readily be met where the public authority relies upon examination of information *in situ* without charge "at the place which the authority makes available for that examination" under Reg 8(2)(b). To that end, they rely on the Kent County Council decision notice [IC-144241-S0K1][41] in which the ICO found that:-

> "22. The Commissioner's guidance on regulation 6 (and specifically the section on 'Inspection') explains that it is an expectation of the EIR that the public may inspect information at facilities "which the public authority makes available for that examination" (regulation 8(2)(b)).
>
> 23. The same guidance explains that the "establishment and maintenance" of such facilities is a specific requirement of Article 3(5)(c) of the European Council Directive 2003/4/EC, which the EIR implements in UK law.
>
> 24. Whilst the Commissioner recognises that the complainant will need to bear the cost of visiting the Centre, he is satisfied that the information is publicly available and easily accessible to the complainant by virtue of it being available for inspection at a facility established and maintained for the purpose (i.e. the local records office).
>
> 25. As the Commissioner is [sic] satisfised that the information is both publicly available and easily accessible to the complainant, he finds that regulation 6(1)(b) is engaged."

527. The Defendants also say that Tribunal and ICO decisions indicate that ease of accessibility is not concerned with the applicant's ability to 'harvest' or re-use the information concerned. So, the Tribunal in *Benson* v *Information Commissioner and the Governing Body of the University of Bristol* (EA/2011/0120) found (at [15]) in relation to a similar provision under the FOIA regime that the admitted absence of difficulty in finding the information on the relevant website meant the information was 'reasonably accessible' to him even though it was spread across a number of pages making difficult its 'harvesting' or re-use. That difficulty was not a relevant consideration. The Tribunal in *Hall* v *ICO* [2022] UKFTT 461 (GRC) (at [36]) decided to a similar end for the EIR regime, as did the ICO in the NW decision notice [IC-120111-X0Q5] at ([25]). In this context, the Defendants say that publicly available information is no less easily accessible merely because the Claimants may happen to have multiple water and drainage searches to undertake at any one time such that there is more limited time to complete each one. The Defendants also rely on the same NW decision notice (at [27]) to the effect that, just because information might be more easily accessible to the applicant from the public authority to which the request was made than from the different (publicly available) source, it does not mean that the information held by the latter is not easily accessible.

Reg 6(1)(b) applied – introduction

528. Although these decisions again provide a useful indication of how the Tribunal and the ICO might approach Reg 6(1)(b) in practice, whether the information in the CON29DW searches provided by the Defendants was already publicly available and easily accessible to the Claimants will turn upon the facts of the case. As for those in play here, I heard extensive evidence from representatives of the different PSCs and WASCs. That evidence (together

[41] Not the Croydon decision notice [IC-143229-S3C3] as stated in the Defendants' joint legal skeleton (at [99]).

with the approach of the witnesses concerned) is most conveniently considered for each WASC in turn by reference to the different questions for which I have found the responsive information to be EI held by that Defendant. Although some of the issues raised by the Claimants are common to more than one of those questions, particularly the so-called 'PAC issues', I address them where they first arise. I have also focused on those issues as pressed by the parties in closing submission. So, for example, in the context of the 'PAC issues' said to engage the ease of accessibility (or otherwise) of the information held by the WASCs on their PAC, some of the evidence refers to the local parking arrangements or set up and layout of the rooms in which the PAC could be viewed. Ultimately, very little, if anything, turned on these matters as the Claimants themselves appeared tacitly to acknowledge by their focus in submission on matters of potentially greater significance.

529. In this regard, a general observation is warranted at the outset, namely an air of unreality on the Claimants' part at times in their criticism of the arrangements that the WASCs had put in place to manage demand for, and for the operation of, their PAC, with seemingly none considered adequate. Standing back from the detail, their complaints were, generally, either of a relatively minor nature, not implicating ease of accessibility, or were really concerned with how they thought the WASCs should organise themselves better to enable the PSCs to harvest information in a manner more convenient and efficient for them. Although no doubt always keen to improve their turnaround times, the evidence of many of the PSC Claimants was to the effect that they were generally able to complete in relatively short order their outstanding 'regulated' searches. As such, whether or not the WASCs may have experienced the occasional IT outage or the PSCs might have preferred slightly longer time on the PAC to facilitate a further 20 searches on certain days, the evidence indicated their general ability to obtain in a timely fashion the information they required. Moreover, as to the information which did not feature in their 'regulated' searches but did feature in the CON29DW, a number of the Claimant PSCs ventured, initially at least, that this was not accessible through the PAC only to go on to accept that it was or might be but that they did not include this in their own reports.

J. ISSUE 3.1 – THE INDIVIDUAL DEFENDANTS

Issue 3.1 – D1 (NW)

530. NW accepts that the information responsive to **Question 2.7** and **Question 2.8** was not publicly available.

531. NW also accepts that information responsive to **Question 2.9** was not publicly available in most cases because, although STWs are shown on the public sewer map, this is not navigable by the user such that measurement of the distance to the nearest STW is not possible.

532. Based on the unchallenged witness statement of Mr Mark Charlton (of NW),[42] the Claimants accept that the information responsive to **Question 3.5** (water quality) and **Question 3.5** (water hardness) was publicly available and easily accessible for the relevant period on NW's website. I accept that evidence.

[42] Charlton 1 at [18]-[20].

533. The Claimants originally did not admit that the information responsive to **Question 3.6** *v*1 was publicly available and easily accessible on DWI's website. That position 'hardened' to denial in closing submissions on the basis that "D has not provided evidence that this source has stated the existence/ details of departures." In fact, Mr Owen Davies (STW) and Mr Kevin Brown (AW) did give evidence about this.[43] Although the source of Mr Davies' related evidence is unclear, Mr Brown explains in his statement that, having spoken to AW's Director of Quality and Environment, Mr Robin Price, any departures would have been published on the DWI website. Although second hand, I accept that evidence and that such publication would extend to all departures by any of the WASCSs, including NW. The paucity of documentary evidence is easily explained by the unsurprising rarity of such departures.

534. In any event, given the potential seriousness of such departures, including related health concerns, and the detailed process indicated by the Water Supply (Water Quality) Regulations 2000 (with which **Question 3.6** *v*1 was specifically concerned), including related publicity, reporting and record keeping requirements, I have also reached the view quite independently of this evidence that information about any such departures would have been published on the DWI website, the DWI being the agency responsible for exercising the Secretary of State's powers in the regulation of drinking water quality. That is in addition to the mandatory requirements imposed by those Regulations with respect to publicity by the WASCs of any such departure.[44] As such, I find that the information responsive to this question was already publicly available and easily accessible.

535. As for **Question 4.1.1** and **Question 4.1.2**, the Claimants admitted for the purposes of the trial that the responsive information was publicly available and easily accessible from, respectively, the Water UK website (from 23 April 2018) and from the Digdat Connect website (from 27 June 2016). The Defendants maintained that the latter was, in fact, publicly available from 17 March 2014. Other information sources were also identified by the various Defendants for these two questions (and for **Question 4.1**), albeit the Claimants say that, being map-based, they do not enable accurate supplier identification. In closing submission, the Claimants indicated that they were now withdrawing their prior admissions for these two questions.

Water UK website

536. The suggested basis for the withdrawal of the admission for **Question 4.1.1** in relation to the Water UK website was that (i) the "source was not reliable" and (ii) the "search results were not based on records for, or therefore tailored to, a particular property". As to the former, the written evidence of Ms Chloe Grice was that "I do not believe the Water UK website is detailed enough; for example, I believe that if the clean and waste water are provided by different suppliers this won't always show up."[45] Accordingly, when the Claimants made their admission in relation to the Water UK website, including in their **Issue 3.1** table attached to their skeleton argument, they already knew that Ms Grice questioned its reliability for properties near water region boundaries. When questioned at trial by counsel for D6, Ms Grice's oral evidence was along the same lines.[46]

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43 Davies 2 (ST) at [33]; Brown 2 (AW) at [57] and [exhibit 1, table].
44 See, for example, Regulation 23.
45 Grice 2 at [23].
46 D.8/p.2/l.24-p.4/l.4.

537. As to the basis for the proposed withdrawal of their prior admission, the Claimants rely on the cross-examination of Mr Kevin Brown (AW). It is appropriate to set out here (with emphasis **supplied**) the whole exchange:-[47]

Q. That website, the Water UK website that you tell us about, it [sic] let's you search by postcode?
A. That's correct.
Q. And it displays the name of the sewerage and water provider who operates in that postcode area?
A. That's correct from what I've seen on the website, yes.
Q. So the information is not tailored to a particular property?
A. It's tailored from what I can see to a postcode, correct. However, I'm a little bit confused with a reference here because this talks about drainage and Water.co.uk website and I do not believe that's necessarily the Water UK website.
Q. Yes, because that's water.org.uk, isn't it?
A. I believe, yes.
Q. You think that might be referring to something different?
A. It looks to me that it's referring to something different, that I am not familiar with.
Q. You do not think it's likely that, when it says water.co.uk showing it as Thames, that it's referring to the water.org.uk website?
A. I do not believe so. It says drainage and water.co.uk, so ...
MR COPPEL: I'm also confused because, if Mr Facenna is seeking to challenge the availability of information from the Water UK website, that's something which has been admitted by the claimants subject to dates.
MR FACENNA: I'm not seeking to challenge that. I'm just seeking to clarify exactly what the information is, my Lord. And if you don't know the answer to any of these questions, absolutely say –
A. I just don't feel that that was the correct website that you are referring to.
Q. I understand. You're quite right, that says water.co.uk, and I think you're correct, the correct address is water.org.uk. I won't ask you any more about that document. **But I think you just confirmed, the water.org.uk website lets you search by postcode?**
A. That's correct, yes.
Q. And then it displays the name of the sewerage and water provider for that postcode area?
A. That's correct.
Q. So it's not tailored to a specific property?
A. Not to a specific property, no, not that I can see.
Q. And that website, as far as you know, doesn't access records for any particular property?
A. Not that I'm aware of.
Q. So for some properties which are close to the boundaries between operating regions, it's possible that the information provided by that website may not be accurate to a property-specific level?
MR COPPEL: I'm sorry, my Lord, this has been admitted by the claimants. There has been no qualification in the extensive correspondence on the 3.1 overview table – there has been no qualification about properties on the boundary, about inaccurate information being provided. So it's not fair for Mr Brown to be cross-examined about something the claimants have admitted.

[47] D.15/p.82/l.22-p.85/l.8.

> **MR FACENNA: My Lord, I won't ask – as far as I was aware, there was an issue about properties on the boundary. I won't ask any further questions about it then.**

538. In my view, it could not be clearer from the exchanges between counsel during the evidence of both Mr Brown and Ms Grice that the Claimants were adhering to the admission in their skeleton argument relating to the Water UK website. It would be unfair for the Claimants to be permitted now to resile from that admission on the suggested basis of that very evidence. Furthermore, it was not until after all the evidence had concluded that the Claimants indicated in written closings that they sought its withdrawal. The Claimants' characterisation of the issue as a narrow one concerning the way postcode checkers work does not meet that unfairness. AW did touch on the issue with Ms Grice but barely so. Having reasonably proceeded (as I accept they did) on the basis that there was no need for them to do so, the Defendants as a whole have not had a proper opportunity to explore that issue with the witnesses. Nor does the Claimants' additional reliance on documentary evidence, said largely to comprise easily verifiable website screenshots, mitigate that unfairness. If anything, this rather highlighted and compounded it, the Defendants, not afforded the proper opportunity to investigate, let alone explore their content, with the witnesses. The Claimants may consider their content to be self-evident or uncontroversial but the Defendants did not share that view. Moreover, the suggested prejudice to the Claimants in not permitting the withdrawal of the admission is minimal, the controversy implicating search results for WASC border areas. Having regard to all the relevant circumstances, including the matters indicated at CPR, Part 14.5(a)-(g), I decline such permission.

Digdat Connect

539. In their skeleton argument, the Claimants also admitted that the information responsive to **Question 4.1.2** was publicly available and easily accessible from the Digdat Connect website from 27 June 2016, albeit the Defendants maintained that this was, in fact, available from 17 March 2014. The Claimants' position changed in written closing submissions, ostensibly on the basis of certain evidence from Mr Richard Barry (AW),[48] Mr Michael Lloyd[49] and Mr Greg McBride[50] as to search results not being tailored to a specific property. Again, I am satisfied that it would be unfair to permit the admission to be withdrawn. First, the point now made by the Claimants was apparent from Mr Barry's written evidence.[51] Second, Messrs Lloyd and McBride are the Claimants' witnesses and the point now made could have been elicited from either or both of them and advanced prior to trial. Third, although the point was touched on in oral evidence, I accept the Defendants' submission that it would have been explored much more fully had the public availability from the Digdat Connect website of the information responsive to this question been understood to be a 'live' issue. I accept that the Defendants reasonably proceeded on the basis that it was not. The issue arising in connection with WASC border areas, the prejudice to the Claimants in not permitting withdrawal of the admission is again minimal. In all the circumstances, and given the related unfairness to the Defendants, I also decline permission for the withdrawal of this admission.

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48 D.15/p.127/l.13-p.128/l.23.
49 D.8/p.51/l.7-23.
50 D.8/p.96/l.1-16.
51 Barry 1 at [50]-[52].

540. As to when the Digdat website was available, the Claimants' own witness, Mr McBride, accepted that he had used this facility from the commencement of his company's operations in around March 2015 to determine whether the property fell within WW's area or not.[52] However, the evidence of Mr Kevin Brown (AW) was that the service began a year earlier in March 2014.[53] That was based on both Mr Brown's own recollection of the launch year and the marketing communication information provided to him by his data support analyst colleague, Mr Aaron Hayward, indicating the launch to be on or just after 17 March 2014.[54] Although the Claimants say that such information pre-dates March 2014 and they point to a later internet archive from 27 June 2016,[55] based on the evidence as a whole, I am satisfied that the Digdat start date was, in fact, 17 March 2014.

PAC access

541. Finally, I should also say that, even if I had been minded to allow the withdrawal of these admissions (which I was not), I would have permitted the Defendants, as a matter of fairness, to rely on the evidence as to other sources of publicly available information. Indeed, in seeking to persuade me that I should allow the admissions to be withdrawn, the Claimants pointed to the acceptance by some of the witnesses that the responsive information was available from such sources, including the PAC, and that the Court was entitled to assume that, if other witnesses had been asked about this, they would say the same.[56] Ms Susan MacDonald testified, for example, that she could tell from the PAC whether a particular property was within YW's area.[57] Mr McBride too accepted that WW provided water or sewerage services for the property if the relevant assets were shown on its asset maps.[58] Accordingly, as he also testified, if the Digdat website gave two names for the sewerage or water supplier in a 'border area', he could still view the PAC and clarify the service providers for the property.[59] Mr Gradwell's evidence was to similar effect in relation to NW.[60]

NW's PAC – public availability

542. The Claimants do not appear to dispute that map-related information was already publicly available from NW's PAC save for the period 6 April to 2 August 2020 when PAC access was restricted due to Covid, with map screenshots being available on e-mail request instead. The Claimants say that there was no means of 'direct access' during that period and that information provided on request was, by definition, not 'already' publicly available. I disagree for the reason already explained above. NW set up a dedicated email address through which it continued to make available to the public access to its water and sewerage maps so that it could continue to comply with its statutory obligations under ss.198(1) and 199(1) of the WIA. The fact that the relevant map snapshot was provided following an e-mail request rather than through a visit to NW's offices to view the PAC or by remote access to NW's live mapping system simply means that it was already publicly available in a different way than on the PAC.

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52 McBride 2 at [10].
53 Brown 2 at [15], as confirmed in oral evidence at D.15/p.85/l.9-p.87/l.8.
54 F6/248; F6/250.
55 F1/125.
56 D.8/p.96/l.17-p.97/l.5.
57 D.6/p.99/l.19-p.100/l.10.
58 McBride 2 at [72], table.
59 D.8/p.96/l.21-p.97/l.5.
60 Gradwell 1 at [93], table; D.6/p.39/l.6-14.

NW's map request service - ease of accessibility

543. The Claimants' denial that NW's public maps were easily accessible was originally based on the so-called 'PAC issues'. In closing submission, the Claimants sought to extend this to NW's temporary e-mail map request service on the basis of suggested delays in satisfying requests during its period of operation as indicated in Ms Tonia Reeve's evidence.[61] However, since that evidence was already available to the Claimants when they submitted their original skeleton argument without that denial, the reason for this change of position is again unclear. In any event, I would not accept that these admitted delays in the turnaround of requests for e-mail maps meant that the information they contained was not easily accessible. The Covid pandemic was an extraordinary situation. Although visiting NW's PAC might have been more straightforward, public health restrictions meant that this was not possible. Ease of access falls to be considered in that light. Despite the longer hours worked by NW staff, there were inevitable delays in the processing of the map requests, as explained by Ms Reeve.[62] NW nevertheless adapted quickly to the circumstances and took steps to implement a different method of public access. The associated delays in turnaround, rising to 20 days at the height of the property market boom, no doubt caused issues for some PSCs in the provision of PSRs to their clients.[63] However, convenience for the PSCs in obtaining the information promptly should not be conflated with ease of access thereto. In the circumstances, I am satisfied that map-related information, including for present purposes that responsive to **Question 4.1.1** and **Question 4.1.2**, was easily accessible during the period 6 April and 2 August 2020.

NW's PAC - ease of accessibility

544. The Claimants also say that map-related information on the PAC was not easily accessible for the periods December 2013 to 5 April 2020 and 3 August 2020 onwards. This was based primarily on the evidence of Mr Gradwell, Mr Cowan and Ms Reeve (NW). Mr Gradwell was forceful in his complaints about the suggested limitations on access to NW's PAC. However, the vagueness of aspects of his oral evidence, his speculation about NW's motives for its suggested treatment of the PSCs and his less ambitious second statement in the face of NW's responsive evidence indicated that his complaints were exaggerated. I also found unpersuasive his suggestion that there was 'no point' in raising his complaints with NW before 2019. It was apparent to me that Mr Gradwell would not have hesitated to complain if he had thought there were grounds to do so. Indeed, he did complain in writing, including about relatively minor issues, when these proceedings were in prospect and underway. I am satisfied that their timing was no coincidence. Finally, he also downplayed significantly the support he received from NW when undertaking his searches.

545. I also found aspects of Mr Cowan's evidence to be vague and unspecific, including even as to the frequency of the personal searches undertaken by him at NW (as opposed to his mother). He also advanced further complaints against NW in his second witness statement. However, if there had been real substance to them, they would have featured earlier. In any event, I found unpersuasive his evidence on those further matters, including the IT issues said to have been encountered. Overall, I found that much of the evidence of both these witnesses was more directed to casting NW in a poor light than fairly presenting their actual

[61] Reeve 2 at [33].
[62] Reeve 2 at [33].
[63] Reeve 2 at [20].

experience. By contrast, I found Ms Reeve's evidence (for NW) to be straightforward, fair and balanced. She did not overreach herself and she made appropriate concessions.

546. As to the specific 'PAC issues' raised by the Claimants with respect to NW, it is common ground that there was a single PAC terminal based at the 'kiosk' at NW's offices at Northumbrian House, located in a small area adjacent to the entrance, with opening hours of 9am to 4.30pm pre-Covid and 9.15am to 4.30pm thereafter. As I have already explored above in the context of Mr Gradwell's journey distance to NW's offices, the mere fact that the PAC was in a single location some distance from where he or other PSCs may have been based in the large area covered by the NW region does not mean that it was not easily accessible. To the contrary, given the commercial nature of the PSCs' operations, providing dedicated property search services, that the PAC was the means by which NW sought to discharge its obligations under ss.198(1) and 199(1) of the WIA and that its location would be considered a place of *in situ* inspection for the purpose of Reg 8(2)(b), I am satisfied that NW did not fall foul of Reg 6(1)(b) on account of these arrangements, at least in relation to the Claimant PSCs.

NW's PAC - booking arrangements

547. One important aspect of the 'PAC issues' was the suggested high demand for the PAC, meaning that users could not secure access for the time and duration required, with a focus of the Claimants' complaints being the booking system operated by NW. Pre-Covid, this comprised a telephone or e-mail booking system for 30 minute time slots. Ms Reeve's evidence was that NW was not stringent as to the number of appointments that could be booked because the kiosk was not that busy. If required, multiple and back-to-back appointments could be booked, with no restriction on advance bookings.[64] Mr Gradwell's written evidence was that users were originally only allowed one appointment per week, later moving to two.[65] In cross-examination, he did not dispute Ms Reeve's related evidence which I accept.[66] I also accept that he was wrong to dispute her evidence on back-to-back and advance bookings.[67] From 11 August 2020, the system was replaced with online booking for 45 minute slots, NW allowing users two appointments per week, with the possibility of a third, subject to availability, bookable up to three weeks in advance.

548. The Claimants appeared to suggest that the need for, or use of, these booking arrangements indicated that it was not easily accessible. I disagree. For example, by taking the approach it did when PAC use resumed in August 2020, NW responded to PSC feedback, seeking to maximise fair and efficient PAC use and communicating the new arrangements to users.[68] Likewise, when users such as Mr Cowan booked, but did not use, a regular morning slot, the related complaints from other users did not mean that the PAC was not easily accessible. Rather, NW's monitoring of the position and intervention on such occasions again sought to ensure the fairer allocation of PAC resource.[69] As if any confirmation of the ease of accessibility of the NW PAC were required, Mr Gradwell confirmed in his evidence that he was generally able to secure the very busy 9.15 am slots on his preferred days, Tuesdays and Thursdays.[70] Moreover, when the system moved back to kiosk access in August 2020, Mr Gradwell was still able to clear his backlog of searches quickly albeit, as he says,

64 Reeve 2 at [27].
65 Gradwell 1 at [45]; Gradwell 2 at [25].
66 D.6/p.12/l.2-11.
67 Gradwell 2 at [25].
68 F2/78.
69 Reeve 2 at [27].
70 Day 6/p.18/l.2-11.

working long hours to do so.[71] Finally, if anything, Mr Cowan's evidence that users could sometimes secure last minute appointments or use the PAC without booking a slot rather underlined the flexibility of, and ease of accessibility to, NW's system.[72]

549. In my view, these matters show that the system worked well, even for its most regular users and at times when PSC and NW resource was most stretched. No doubt there was no single arrangement that suited all PSCs and some would have preferred greater flexibility still and more PAC terminals to be sure that they could comfortably complete all their searches in one hit. However, convenience to the PSCs and the demands of their workload from time to time, including the desire to process a certain number of search requests in a particular timeslot, should again not be conflated with ease of access to the actual information required for that purpose. I therefore reject the proposition that NW's PAC was not easily accessible on account of these booking arrangements.

NW's PAC – IT issues

550. The Claimants also say that their time for inspection and, therefore, predictability of access was further limited by IT issues affecting use of the PAC from time to time.[73] So, for example, Mr Gradwell referred to an instance in 2019 when NW's IT system (including the PAC) suffered outage problems lasting a few weeks, making searches almost unworkable. Ms Reeve explained in her evidence that there was a unique outage then and a major incident for NW's systems originating with BT. Despite this, Mr Gradwell still attended his PAC appointments.[74] The Claimants also relied on a later incident, apparently in 2020, when the PAC is said to have stopped working repeatedly for a number of weeks. If there had been such a serious outage, Mr Gradwell would have been able to provide more meaningful information about it and/ or would have made a complaint at the time. He did neither (even though he did complain about the earlier 2019 incident). Likewise, Ms Reeve would have remembered it. She did not.[75] NW did experience other IT problems for different reasons such as the stability of the Citrix platform used by NW, including some day long outages.[76] The position improved post-Covid in light of improvements in NW's systems, with further problems encountered of generally shorter duration save for certain isolated incidents. The Claimants also emphasised delays said to have been encountered when the computer was logged out after arrival at the kiosk and the limited assistance the NW IT department provided.

551. Given the evidence as to the nature of the issues experienced, the period of time they covered, the improvements introduced by NW over that period, the absence of any contemporaneous complaint from Mr Gradwell (before 2019 at least) and the actual support offered by NW when IT problems were encountered or assistance was required, including staff and IT help, legend clarifications, printouts, extra PAC time and PAC resets, I am satisfied that Mr Gradwell's related complaints were overstated. Mr Cowan too made certain related complaints in his second statement[77] but, as indicated, these were vague and, if they had been meaningful, they would have been mentioned in his first. Although there was some attempt by the Claimants to suggest that Ms Reeve was distant from the PAC IT issues, I am satisfied that she was well aware of any potentially significant IT problems as

71 Day 6/p.15/l.13-21.
72 Cowan 2 at [20].
73 Gradwell 1 at [57]-[63].
74 Reeve 2 at [76].
75 Reeve 2 at [75].
76 Reeve 2 at [73].
77 Cowan 2 at [23]-[25].

well as NW's related mitigations and workarounds. That insight extended to the level of the individual PSCs, Ms Reeve (and Mr Gradwell) both confirming, for example, that Mr Gradwell declined her offer to deliver printed plans to his hometown during the 2019 IT incident.[78]

552. Finally, there is surprisingly little concrete evidence from the Claimants of the suggested impact of these incidents. Even though the PSCs may have experienced some delays on occasion, and even though the PSCs might have preferred a more user friendly terminal and kiosk layout, the evidence indicates that Mr Gradwell and Mr Cowan (or his mother) appear to have navigated any related difficulties and managed to undertake their water and drainage searches. As for the complaints about lack of printing facilities and restrictions on PAC photography, these appeared to be directed to the re-use of the information sought, rather than ease of access thereto.

553. Having considered all the evidence, I am satisfied that map-related information, including for present purposes **Question 4.1**, **Question 4.1.1** and **Question 4.1.2**, was publicly available and easily accessible to the Claimant PSCs from NW throughout.

554. As for **Question 5.1**, the Claimants admit that NW (i) made available the responsive information on request and (ii) maintained a physical register to 2017, albeit denied that the former was publicly available and the latter easily accessible. As to the former, for the reasons given above, I disagree that information made available on request is not already publicly available. As to the latter, the Claimants 'hardened' their position in written closings, saying additionally that there was "no evidence as to method of organisation/ inspection process" for the physical register. However, the witness statement of Mr Peter Davies of NW does, in fact, explain its method of organisation, how he has never received a request from a member of the public to inspect it but how it could be viewed at NW's Leat House if such a request was ever to be received.[79] As such, there clearly *is* evidence of these matters. Such evidence is undisputed. If the Claimants had wanted to assert lack of ease of accessibility on the basis of its method of organisation and inspection, they should have done so earlier and asked Mr Davies to attend for cross-examination to put the point to him. They did neither. In any event, given its duties under s.196 of the WIA, I am satisfied that there was (and would still be) no difficulty obtaining from NW's physical register confirmation of the existence (or otherwise) of a (pre-2017) trade effluent consent for a particular property as **Question 5.1** asks.

555. As for the Claimants' other points, NW maintained the physical register at Leat House for the purpose of compliance with its obligations under s.196 of the WIA. This therefore served (and, if ever called upon to do so for pre-2017 consents, still serves) as a place of *in situ* inspection for the purpose of Reg 8(2)(b). As with NW's PAC, although only available from one location in the NW region, I am satisfied that the information for the period to 2017 was, and remains, easily accessible to the Claimant PSCs at least. I would have come to that view even if the existence of the physical register had not been publicised on NW's website. Whether something is publicly available does not depend on it being advertised as such. In any event, despite the Claimants' reliance on a later 'Wayback Machine'

[78] Reeve 2 at [78]; Gradwell 2 at [15].
[79] Peter Davies 1 at [11]-[13].

extract,[80] I also accept Mr Davies' evidence that the ability to inspect the trade effluent register has, in fact, been publicised on NW's website since at least 2010.[81]

556. Accordingly, I am satisfied that the information responsive to **Question 5.1** was publicly available and easily accessible to the Claimant PSCs.

Issue 3.1 – D2 (UU)

557. UU accepts that the information responsive to **Question 2.7** and **Question 2.8** was not publicly available.

558. Although the Claimants accept that map-related information on UU's PAC and remote access system was publicly available, they deny this with respect to **Question 2.9**, essentially on the basis that measuring the distance between the relevant property and the STW was difficult and time consuming on the PAC. I address this specific aspect further below.

UU's PAC – ease of accessibility generally

559. Based primarily on the evidence of Ms Emma Grindrod and Ms Karen McCormack (UU), the Claimants say that map-related information on UU's PAC, including that responsive to **Question 2.9**, was not easily accessible. Ms Grindrod only undertook searches at UU's offices from an unspecified point in 2018 to March 2020. As such, her evidence covers a limited period. Moreover, given the scope of her search activity, she was sometimes unable to shed much light on the relevant matter under discussion. Nevertheless, she was a straightforward witness who made appropriate concessions. Ms McCormack did not take up her role as UU's Property Searches Manager until around December 2016, albeit she spoke to her understanding of the earlier period. Although slightly nervous, she was a generally straightforward witness who made appropriate concessions and clarifications in her evidence.

560. As for UU's so-called 'PAC issues', it was common ground that, between December 2013 and 24 March 2020, PAC access was obtained at the security office at UU's Warrington premises, with opening hours of 9am to 5pm. The booking system was by telephone or email, with appointments of two hours duration, bookable up to four weeks in advance. The Claimants denied UU's contention that there were no restrictions on the number of appointments on the basis that that multiple slots were not practically possible due to demand.

561. As a preliminary matter, and for the same reasons indicated above with respect to NW, I am satisfied that UU did not fall foul of Reg 6(1)(b), at least in relation to the Claimant PSCs, on account of the UU PAC being located at a single site in a large geographical area.

562. From 26 March 2020, the PAC system was replaced with a remote online viewing service (accessed using log-in details). It was common ground that users could book two hour appointment slots up to four weeks in advance between Monday and Friday, 9am to 5pm.

[80] F2/202.
[81] Peter Davies 1 at [14].

The Claimants did not admit that appointments could finish up to 7pm but I accept Ms McCormack's evidence to that end.[82]

UU's PAC - booking arrangements

563. One important focus of the Claimants' complaints was again the suggested high demand for the PAC. With only two terminals at one location, there was greater demand for PAC access than the facilities allowed such that users could not secure access at the time and/ or for as long as required. This was said to be shown by UU adopting booking arrangements, including limits on appointment length to manage demand between users, the need to book a long time in advance to secure appointments and difficulty in practice in securing multiple appointments, with time and flexibility for inspection limited accordingly.

564. The booking arrangements were clearly designed to ensure a fair distribution of appointments and ease of access to all users. Ms Grindrod's evidence was that she was generally able to secure the two or three hour slots that suited her best if she booked them in advance and that, when she did so, she generally had enough time to complete her searches.[83] Given her evidence that multiple, back-to-back slots were possible,[84] which I accept, I reject the Claimants' related denial. Ms Grindrod did explain that it might be more difficult to obtain slots if she did not book in advance or if her PSC suddenly became busy and needed more appointments. However, her evidence also indicated that, even in those circumstances, she might not get the slot she *wanted* and/ or there were *fewer* slots to choose from, not that she could not get a slot *at all*.[85] It appears that difficulties in that regard also depended on Ms Grindrod's own availability.[86] Although she says that a third computer might have been warranted "at times", this was at the busiest times (particularly the mornings) when other users had turned up without an appointment.[87] For 30-40% of her PAC visits, the second computer was not occupied.[88]

565. In light of the above, the Claimants' so-called 'PAC issues' bore limited relation to Ms Grindrod's evidence. In any event, the Claimants' real complaint seemed to be one of access at a preferred time and/ or a desire for even greater flexibility. No doubt, the Claimant PSCs might have desired additional UU resource and different arrangements depending upon their workloads from time to time. However, that would again be to conflate convenience with ease of accessibility. Accordingly, I reject the proposition that map-related information on the PAC was not easily accessible on account of UU's booking arrangements.

UU's PAC – IT issues.

566. The Claimants also say that the time for inspection (and predictability of access) was limited by IT issues affecting PAC use. According to Ms Grindrod, this included crashes every two weeks, with issues usually lasting for a couple of days, albeit she corrected this in her second statement to explain that the issues were usually fixed during her appointment. Common issues included maps not loading.[89] When fixes were achieved, this usually took 10 minutes

82 McCormack 2 at [31].
83 Grindrod 1 at [19]-[20] and [23].
84 D.7/p.8/l.7-14; d.7/p.8/l.21-p.9/1.2.
85 Grindrod 1 at [20]-[21].
86 Grindrod 1 at [23].
87 D.7, p.9/l.8-p.10/l.10.
88 Grindrod 1 at [29].
89 Grindrod 2 at [13]; d.7/p.13/l.4-19.

but this was lost from her appointment time. If fixes were not achieved within 30 minutes, Ms Grindrod would usually leave (which she did about 3 or 4 times each year). This sometimes led to delays in completion of her outstanding workload, a knock-on effect on her other work and the need to make further bookings.[90] However, in cross-examination, Ms Grindrod confirmed that she was able to make further appointments. On another occasion, UU e-mailed her with the relevant searches. She did not complain to UU about computer crashes causing problems in completing reports.[91]

567. Although the Claimants sought to suggest that Ms McCormack was distant from the IT issues experienced by PAC users, I am satisfied that she would have been aware at the time of those issues (both ongoing and one-off) which were potentially meaningful to users. In this regard, Ms McCormack confirmed that UU did have issues with the Wyse terminals which experienced some outages or slowness, on occasion leading to some appointment cancellation, albeit replacement slots or free plans were offered.[92] The Wyse terminals were replaced with PCs in 2017. Ms McCormack exhibited two IT report logs. These did not appear to indicate an abnormal level of outage, albeit she confirmed that these did not reflect those more minor issues that were resolved quickly by re-booting the PAC.[93]

UU's remote access system – ease of accessibility

568. Ms Grindrod's evidence was that the new remote access system introduced during the Covid pandemic was a better system, albeit she found the log-in somewhat convoluted, sometimes taking five to ten minutes, again cutting into her appointment time, with unfinished work carried forward to her next one.[94] Ms McCormack confirmed that there were certain teething problems when the system was introduced, albeit the most common issue was with the Citrix platform on users' computers.[95] The Claimants also relied on certain e-mails indicating log-in issues (most not long after the introduction of remote access). However, it was not possible to discern from these the source of the relevant problem (whether user or UU) and/ or related impact, if any, on the user. In any event, the issues described in those e-mails were unexceptional and appeared capable of easy resolution. The Claimants also canvassed certain so-called 'SageDig' issues to suggest information was not displayed effectively or that the system did not remain available throughout the appointment. However, these were based on an even smaller handful of e-mails from which it was again not possible to discern the source of the problem and/ or related impact, if any. These issues too appeared unexceptional.

569. Having considered the evidence, I am satisfied that map-related information was already publicly available and easily accessible to the Claimant PSCs from UU's PAC and its remote access system. No doubt the IT issues encountered at UU caused users difficulty and delay on occasion but it was evident from Ms Grindrod's evidence that these were matters of temporary inconvenience and that she was still able to get her work done. As for the complaints about lack of printing facilities and restrictions on PAC photography and laptop use, these again appeared to be directed to the re-use of the information, rather than ease of access.

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90 Grindrod 1 at [36].
91 D.7/p.14/l.19-p.16/l.21.
92 McCormack 2 at [57]-[59]; d.9/p.113/l.12-20.
93 D.9/p.115/l.21-p.116/l.9.
94 Grindrod 1 at [41]; d.7/p.17/l.9-p.18/l.10.
95 McCormack 2 at [86].

UU PAC – Question 2.9

570. Turning specifically to **Question 2.9**, although the Claimants admit that users have, at all material times, been able to roam around the map, whether on the PAC or using the remote access facility, they deny that the information responsive to this question was publicly available from UU because of the difficulty and time taken in measuring the distance from the relevant property to the nearest STW.

571. In her evidence, Ms McCormack stated that STWs are shown on the map and a user can use the measuring tool to measure the distance to a boundary, albeit fairly noting that this may be difficult unless the STW is close to the relevant property.[96] Ms Grindrod's original evidence was that she would not be able to access the information because, even zooming out to look for an STW, she would not be able to measure the distance.[97] However, that evidence was based on Ms Grindrod's ignorance of the measuring tool on UU's system.[98] Notably, this particular question did not feature in her PSRs.[99] As she later fairly accepted in cross-examination, such measurement would have been possible.[100] In light of the evidence, I accept that the information responsive to this question was already publicly available and easily accessible. Although it may have taken a few minutes to locate the nearest STW by zooming out on the map, I am satisfied that the PSC Claimants at least were more than capable of performing that task.

572. I should add that, in closing submission, the Claimants raised the new point that there was no direct evidence that the scale and measuring tool was available throughout the relevant period. However, based on the matters now relied on by the Claimants, there was no reason why this point could not have been raised earlier than closing submission. In any event, this new submission was based partly on Ms Grindrod's lack of recall of the presence of the scale on the map, as to which, it is clear that she was out of her depth in her evidence when it came to this and the measuring tool.[101] By contrast, I accept that Ms McCormack would have been aware of the presence of both and I found compelling her evidence to that end.[102] I accept it.

573. Accordingly, I am satisfied that the information responsive to **Question 2.9** was, at all material times, already publicly available and easily accessible to the Claimant PSCs from UU's PAC and, later, UU's remote access system.

574. Based on the unchallenged witness statement of Mr Matthew Tasker of UU,[103] the Claimants again accept that the information responsive to **Question 3.5** (water quality) and **Question 3.5** (water hardness) was publicly available and easily accessible for the relevant period on UU's website. Again, I accept this.

575. The Claimants' position with respect to **Question 3.6** *v*1 for UU was essentially the same as that for NW. For the reasons given above, I am satisfied that the information responsive

96 McCormack 2 at [21, table]. In cross-examination Ms McCormack also acknowledged that this may not straightforward (d.9/p.97/l.11-19).
97 Grindrod 1 at [49, table].
98 Grindrod 2 at [19].
99 D.7/p.29/l.19-p.30/l.11
100 D.7/p.30/l.8-14.
101 D.7/p.23/l.12-25-p.24/l.1-20.
102 Day 9, p.92/l.22-25-p.96/l.1-2.
103 Tasker 1 at [16]-[22].

to this question was already publicly available and easily accessible from the DWI website for the UU area as well.

576. The Claimant' position with respect to **Question 4.1.1** and **Question 4.1.2** for UU was essentially the same as that for NW above. For the reasons given there, I am satisfied that the information responsive to these questions was already publicly available and easily accessible for the UU area from the Water UK and Digdat Connect websites for the periods asserted by the Defendants. Since I have rejected the Claimants' 'PAC issues', I also find that the information responsive to these questions (and **Question 4.1**) was publicly available and easily accessible from UU's PAC and, later, UU's remote access facility.

577. Finally, as for **Question 5.1**, Ms Victoria Ince (UU) explained how UU's trade effluent register was maintained. Since 2015, this has been made available through UU's website. Before then, the register was produced in hard copy form and the records stored in the public register room at UU's Thirlmere House. The register was stored in alphabetised cabinets with every active consent for trade effluent then discharging into the network. The register was open to the public to view by appointment and was available each day during normal business hours. Each record confirmed the name of the discharger, the address of the discharge site and the site of connection to the public sewer.

578. Although the Claimants accept that the register was publicly available, they deny that it was easily accessible on the basis that it was (i) only accessible at one location for the relevant geographical area and (ii) stored alphabetically in hard copy and therefore not easily searchable by property. As to the former, the same position obtains for UU as it does for NW above. As to the latter, the Claimants advanced no evidence of their own as to the searchability (or otherwise) of the register. Nor did they call Ms Ince to put to the point to her. Nor does alphabetical storage mean that the responsive information was not easily accessible. To the contrary, given its duty under s.196 of the WIA, I am satisfied that there would be no difficulty obtaining from UU confirmation of the existence (or otherwise) of a trade effluent consent for a particular property as **Question 5.1** asks. I therefore find that the responsive information was already publicly available and easily accessible to the Claimant PSCs.

Issue 3.1 – D3 (YW)

579. YW accepts that the information responsive to **Question 2.7** and **Question 2.8** was not publicly available.

YW's PAC/ e-mail map request service – public availability

580. The Claimants deny that the information responsive to **Question 2.9** was publicly available from YW, essentially on the basis that measuring the distance between the relevant property and the STW was difficult and time consuming on the PAC. I address this specific aspect below.

581. Although, more generally, the Claimants do not appear to dispute that map-related information was publicly available from YW's PAC, they say that this was not the case during the temporary period (due to Covid) when maps could be obtained from YW by e-mail request. There being no direct access and only being available on request, the

Claimants say that these were not publicly available. I disagree for the reasons already given for NW above.

582. To the same end, the Claimants also say that the default position for e-mail map requests was that the requesters would pay a fee unless they queried this on the basis that they would have ordinarily visited the YW PAC (for free). Although Mr Midgley confirmed that this was YW's approach, he also expressed his doubts that the PSCs would have been charged since users of YW's PAC were informed about this free service.[104] Consistent with that doubt, the Claimants do not suggest that the PSCs were charged for these maps, nor do their witnesses. Indeed, I am satisfied that, if they had there been an attempt to charge them, they would have been the first to have pushed back on this.

583. Finally, the Claimants also complain that they did not receive the correct maps back from YW when they used this service because a particular YW employee who answered about 50% of the requests from Ms Nicola Colborn got them wrong 75% of the time. This was said to have delayed her orders, some of which were three to four weeks behind at times.[105] Although Mr Midgley accepted that mistakes were made during that very busy period, including by that employee, he expressed scepticism in his evidence of the suggested error rate. Ms Colborn did not attend trial for cross-examination. However, whatever the rate, there is no basis for saying that the maps were not publicly available on this account. As Mr Midgley explained, such complaints would have been dealt with within 24 hours[106] and replacement maps provided. This slight delay does not mean that they were not publicly available.

584. Accordingly, I am satisfied that map-related information was already publicly available during the temporary period of YW's e-mail map request service.

YW's PAC – ease of accessibility generally

585. Based primarily on the evidence of Ms Colborn, Ms Susan MacDonald and Mr Midgley (YW), the Claimants also say that map-related information, including that responsive to **Question 2.9**, was not easily accessible from YW's PAC. As noted, Ms Colborn did not give oral evidence. Her statements were admitted under hearsay notice. She regularly attended in person at YW's offices from November 2019 to March 2020. Ms MacDonald attended YW's offices between 2018 and 2019. As such, the evidence of both witnesses did not cover the majority of the period in issue. Nevertheless, I found Ms MacDonald's evidence to be generally straightforward with appropriate concessions, albeit the scope of her search activity meant that she too was sometimes unable to shed much light on the relevant matter under discussion. Mr Midgley (YW) was a straightforward witness who made appropriate concessions, with occasional but warranted clarification. I should add that Mr Peter Garford attended at YW's offices from 2017 into 2018, albeit his evidence was not relied on in the Claimants' exposition of YW's suggested 'PAC issues'.[107]

586. As to those, it was common ground that PAC access was obtained through a single terminal at YW's Bradford offices (originally the Midway Building, from 2022, Western House). Opening hours were 9am to 12pm and 2pm to 3.30pm, extended to 4.30pm from 2017,

104 Midgley 2 at [74].
105 Colborn 1 at [36]-[37].
106 Midgley 2 at [79].
107 Garford 1 at [82]-[94].

reduced to 4pm from 2022. Booking was originally by telephone up to seven days in advance, moving online in 2020. Appointments were allocated on the basis of 30 minute or 1 hour slots, with an individual maximum booking of one hour per day. Subject to that daily maximum, there was no restriction on the number of appointments per PSC. Between March 2020 to September 2022, YW operated the temporary Covid arrangements already indicated, with no limit on the number of public map requests that could be made.

587. As a preliminary matter, and for the same reasons indicated for NW above, I am satisfied that YW did not fall foul of Reg 6(1)(b), at least in relation to the Claimant PSCs, on account of the YW PAC being located at a single site in a large geographical area. I come to that view notwithstanding Ms Colborn's complaints about traffic[108] and Ms MacDonald's about parking.[109]

YW's PAC – booking arrangements

588. One important focus of the Claimants' complaints was again the suggested high demand for the PAC. With only one terminal at one location, there was greater demand for PAC access than the facilities allowed such that users could not secure access at the time and/ or for as long as required. This was said to be shown by YW adopting booking arrangements, including limits on appointment length to manage demand between users, the need to book a long time in advance to secure appointments and difficulty in practice in securing multiple appointments, with time and flexibility for inspection limited accordingly.

589. As Mr Midgley explained in his evidence, the purpose of the booking system was to ensure a fair distribution of access between the many users who wanted to visit the PAC.[110] Far from impeding ease of access, I am satisfied that the arrangements were intended to facilitate it. Likewise, as Mr Midgley said, the new online booking system recognised the increasing demand for appointments and ensured greater efficiency for users by avoiding the need to call a single YW telephone line to book.[111] Neither indicates lack of ease of access rather than a response to user demand. Ms Colborn does say in her statement that it was necessary to telephone first thing in the morning to book an hour slot for the next available day the following week. However, there were only one or two occasions when she first started her job that she did not get a slot at all. Being diligent in her pre-booking, she would get a slot most days.[112] The real issue for Ms Colborn appears to have been her inability most of the time to get her first choice slot which would disrupt her day because she had other appointments at the offices of Bradford Council. Likewise, she complained about not being able to undertake urgent searches on less than a week's notice. However, the former appeared to be a matter of convenience and, in circumstances in which an appointment can be booked for every day, the latter a question of the allocation and prioritisation of her work. As Mr Midgley testified, approximately 80% of appointments were subscribed which, in his view, were unlikely to have been fully taken up even if appointment length was extended, there being more popular slots than others.[113] Ms MacDonald was not involved in booking appointments but 90% of the time she had her regular slot on Tuesdays at 1 or 2pm. There was some controversy about whether appointments could be started early, with Ms Colborn indicating that this was not possible,

108 Colborn 1 at [15].
109 MacDonald 1 at [11].
110 Midgley 2 at [56]; d.10/p.140/l.1-15.
111 Midgley 2 at [24].
112 Colborn 1 at [16].
113 Midgley 2 at [33]-[34]; d.10/p.145/l.15-p.146/l.6.

or had been curtailed, and Mr Midgley indicating otherwise.[114] Ultimately, however, the point goes nowhere. Having considered the evidence, I reject the proposition that map-related information on the PAC was not easily accessible on account of YW's booking arrangements.

YW's PAC – IT issues

590. The Claimants also say that their time for inspection (and predictability of access) was further limited by IT issues affecting use of the PAC from time to time. In particular, Ms Colborn highlighted the dull PAC screen, the slow zoom function, the slow PAC generally, the two occasions when the system was unavailable since 2019, certain internet or network errors which required a fix taking 5-10, possibly up to 20, minutes, cutting into her search time, and one or two crashes.[115] Despite this litany of complaints, her related evidence was not tested in cross-examination but, the two periods of unavailability apart, the difficulties encountered did not appear to be serious. Moreover, although fairly recognising that YW did experience some IT issues with the PAC, Mr Midgley explained in his evidence why he considered the Claimants' complaints to be exaggerated. In this regard, I considered unavailing the Claimants' efforts to downplay Mr Midgley's awareness of these issues. Given his areas of responsibility, I accept his evidence that he would have been notified of IT issues by his team.[116] Finally, it is notable that Ms MacDonald had no IT complaints with respect to YW's PAC. Although she did complain about glare on the PAC screen and the layout of, and noise in, the room, these were minor issues and did not prevent her completing her reports.[117] Mr Garford did say that Ms MacDonald had informed him about certain IT issues which meant she had been turned away from YW.[118] However, Ms MacDonald did not mention this in her evidence.

591. Having considered the evidence, I am satisfied that map-related information was already publicly available and easily accessible to the PSC Claimants from YW's PAC. No doubt the IT issues encountered at YW caused users difficulty and delay on occasion but, again, I am satisfied that these were matters of temporary inconvenience. As for the complaints about lack of printing facilities and restrictions on PAC photography, these again appeared to be directed to the re-use of the information, rather than ease of access.

YW PAC – Question 2.9

592. Turning specifically to **Question 2.9**, although the Claimants admit that users could roam around the map (save for the period of remote e-mail requests from March 2020 to September 2022), they deny that the information responsive to this question was publicly available, essentially because the measurement of distance from the relevant property to the nearest STW was again said to be difficult and time consuming. YW accepts that a user could not answer **Question 2.9** during the period of remote e-mail requests unless the nearest STW was shown on the fixed map extract provided but says that the responsive information was available at all other material times.

593. Mr Midgley's evidence was that users could answer **Question 2.9** using YW's PAC. That functionality comprised the user's ability to zoom in and out of and roam around the map,

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114 Colborn 1 at [23]; Colborn 2 at [20]-[23]; Midgley 2 at [57].
115 Colborn 1 at [31]-[34].
116 Day 10/p.146/l.19-25-p.147/l.1-7.
117 MacDonald 1 at [26]-[33]; d.6/p.102/l.12-25-p.103/l.1-15.
118 Garford 1 at [91].

to find the STW, with the distance to the relevant property being measured using the scale displayed with the mapping records.[119] Ms MacDonald indicated in her written evidence that she was not sure whether the responsive information was shown on the PAC[120] but, if it was available, it would only be seen if it was very close to the property, otherwise it would be off-map. In her oral evidence, however, she confirmed that it would, in fact, be possible to locate the STW using the zoom functionality, albeit it could take some time to do this and measure the distance between the two locations.[121]

594. In light of the evidence, I accept YW's submission that the information responsive to this question was already publicly available and easily accessible. Although it may have taken a few minutes to locate the nearest STW by zooming out on the map, and then measure the distance using the scale, I am again satisfied that the PSC Claimants at least were more than capable of performing that task. Ms MacDonald's initial hesitation was that this was a question she did not answer.[122] I am also satisfied that the responsive information was also already publicly available and easily accessible from other public sources, including STW locations from YW's own website (which the Claimants accept was available from 2017), with online tools such as Google Maps readily available to the PSC to calculate the distance between the two locations.

595. Accordingly, I am satisfied that the information responsive to **Question 2.9** was, save for the period of remote access, already publicly available and easily accessible to the Claimant PSCs from YW's PAC and, from 2017, its website.

596. Based on the unchallenged evidence of Mr Midgley of YW,[123] the Claimants again accept that the information responsive to **Question 3.5** (water quality) and **Question 3.5** (water hardness) was publicly available and easily accessible for the relevant period on YW's website. Again, I accept this.

597. The Claimants' position with respect to **Question 3.6** *v*1 for YW was the same as that for NW. For the reasons given above, I am satisfied that the information responsive to this question was already publicly available and easily accessible from the DWI website for the YW area as well.

598. The Claimant' position with respect to **Question 4.1.1** and **Question 4.1.2** for YW was essentially the same as that for NW. For the reasons given above, I am satisfied that the information responsive to these questions was already publicly available and easily accessible for the YW area from the Water UK and Digdat Connect websites for the periods asserted by the Defendants. Since I have rejected the Claimants' 'PAC issues', I also find that the information responsive to these questions (and **Question 4.1**) was publicly available and easily accessible from YW's PAC.

599. Finally, as for **Question 5.1**, Mr Andrew Cottam (YW) gave evidence that YW has maintained since at least 1988 a physical register of all trade effluent consents at its Bradford head office. The public can view this by appointment although requests to do so are uncommon. Alternatively, the public can view YW's related internal electronic records,

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119 Midgley 2 at [14].
120 MacDonald 1 at [19, table].
121 Day 6/p.98/l.22-25-p.99/l.10.
122 Day 6/p.82/l.18-25; p.98/l.22-25-p.99/l.10.
123 Midgley 2 at [94].

available on request since December 2021.[124] The Claimants say that the latter would not, by definition, be already publicly available, only being available on request. I disagree for the reasons given above in relation to NW.

600. The Claimants also say that the information responsive to this question from the physical register is not easily accessible because it is (i) only available at only one location for the whole YW area and (ii) the inspection process is complex and time consuming. As to the former, the same position obtains for YW as it does for NW above. As to the latter, the Claimants advanced no evidence of their own as to the searchability (or otherwise) of the register. Nor did they call Mr Cottam to put to the point to him. Nor, in any event, did I discern from his evidence any particular complexity. To the contrary, given its duty under s.196 of the WIA, I am satisfied that there would be no difficulty obtaining from YW confirmation of the existence (or otherwise) of a trade effluent consent for a particular property as **Question 5.1** asks. I therefore find that the responsive information was already publicly available and easily accessible to the PSC Claimants.

Issue 3.1 – D4 (STW)

601. STW accepts that the information responsive to **Question 2.7** and **Question 2.8** was not publicly available.

STW's PAC – public availability

602. Although the Claimants accept that map-related information from STW's PAC (and temporary remote access facility on account of Covid) was publicly available, the Claimants deny this in relation to **Question 2.9**, essentially on the basis that measurement of distance was difficult and time consuming and there being, in any event, no direct evidence about this from the witnesses. I address this specific aspect further below.

STW's PAC – ease of accessibility generally

603. Based primarily on the evidence of Mr Stephen Allen (STW), Mr Ian Marriott, Mr Layton Mills and Ms MacDonald, the Claimants also say that map-related information was not easily accessible from STW, save for the temporary period of remote access on account of Covid between March 2020 and April 2022.

604. I found Mr Allen to be a confident, knowledgeable and straightforward witness whose elaborations in his evidence were generally warranted. Mr Marriott was a robust witness. On occasion, he was reluctant to make concessions where they would have been appropriate. Mr Mills did not give oral evidence, his statement having been admitted under hearsay notice. I have already commented on Ms MacDonald's approach to her evidence in the context of YW. Finally, Mr Owen Davies (STW) also gave evidence. Although a confident witness, as I have already noted, he had little direct knowledge of a number of the matters about which he testified.

605. As to the so-called STW 'PAC issues', I understood it to be common ground that STW provided two PAC terminals at the Severn Trent Centre in Coventry, with STW's sewer and water records also being made available from 2018 at the Wrexham offices of STW's

[124] Cottam 1 at [9]-[18].

Welsh subsidiary.[125] STW operated a telephonic booking system between 2013 and 2017, with PAC opening hours of 9am to 3.30pm Monday to Thursday and 9am to 3pm on Friday.[126]

606. According to Mr Allen, during that period (2013-2017), there were no restrictions on bookings, resulting in some PSCs making advance block bookings. This led to STW moving to a more formal booking system, with appointments running from 8.30am to 3.30pm, each lasting an hour, bookable by telephone up to a day in advance, with a maximum of one appointment for any PSC per day. This meant that there were 14 daily slots available in Coventry and a further 7 in Wrexham. Although disputed by the Claimants, Mr Allen says that the one appointment per day policy was not rigorously enforced such that a further appointment could be obtained on the day if there were available slots.[127] Between March 2020 and April 2022, the PAC was not available for physical inspection due to Covid restrictions, with remote access provided instead.[128] From April 2022, STW introduced an online appointment system, with the first appointment starting at 10am and the last at 3pm, with a 15 minute gap between slots and booking permissible up to 14 days in advance, with (although disputed) the continued flexibility of an extra slot permitted on the day, if available.[129]

607. As a preliminary matter, and for the same reasons indicated for NW, I am satisfied that STW did not fall foul of Reg 6(1)(b), at least in relation to the Claimant PSCs, on account of the STW PAC being located at a single site in Coventry until 2018 or, with the addition of Wrexham, two sites thereafter.

STW's PAC – booking arrangements

608. One important focus of the Claimants' complaints was again the suggested greater demand for PAC access than the facilities allowed, with users unable to secure access at the time and/ or for as long as was required. This was said to be shown by the fact that, during the period of remote access, some users exceeded 250 searches per day when, on Mr Allen's contemporaneous calculation, 250 searches was the maximum that could be carried out per week under the system of personal inspection using the PAC. I did not find this point compelling. Although it is clear from the document to which Mr Allen was taken that some users accessed STW's mapping records in this way during the period of remote access, that does not necessarily reflect demand for the information to produce personal searches. As Mr Allen explained in his evidence, he was also aware from other documents that at least one search company was trialling how to access STW's records in volume.[130] In any event, whatever the underlying reason for wanting the information at that scale, the argument again conflates ease of accessibility to the information in question (with which Reg 6(1)(b) is concerned) with the convenience to the user (with which it is not). Information inspected *in situ* can still be easily accessible even if accessible remotely in larger volume.

609. The Claimants also point to STW's need to adopt (and retain) booking arrangements, including limits on length and number of appointments to manage demand between users, as indicative of lack of ease of access. However, this again does not follow. It is clear from

125 Allen 2 at [7].
126 Allen 2 at [9].
127 Allen 2 at [35]-[41].
128 Allen 2 at [42].
129 Allen 2 at [43].
130 D.15/p.28/l.21-25-p.29/l.19

the related evidence of Mr Allen that the booking arrangements introduced in 2017 were intended to ensure fairness and ease of access for all users rather than favouring a few PSCs who were block booking in advance and not always turning up, thereby wasting slots that others could use.[131]

610. The Claimants also refer to the evidence of Ms MacDonald and Messrs Marriott and Mills to the effect that appointments needed to be booked as soon as they became available before they filled, as well as the general difficulty in securing appointments. However, it is quite clear from the evidence, including the documents, that there was capacity at the STW PAC for much of the time. As Mr Allen reported in mid-March 2018, "there has not been a single day when all the slots have been taken" since the end of 2017. Likewise, Mr Allen's analysis of the period 23 October 2019 to 19 March 2020 shows that, of the 102 days on which appointments had been available, only seven of those days were fully booked in Coventry and three in Wrexham.[132] As with the other WASCs, by far the greater proportion of users of the PAC were the PSCs. No doubt, there was significant competition between them to secure their preferred appointments and, therefore, to be first off the mark to book slots but, given the not insignificant capacity within the booking system, I am unable to conclude that the PAC was not easily accessible on that account. Indeed, it was because the PAC was not fully used that STW decided against acquiring a third terminal at Coventry.[133] In light of this, the fact that some PAC users may not have known about the ability to take a second slot on the same day does not meaningfully advance matters.

611. The overall position is perhaps most succinctly summarised in Mr Marriott's own evidence that "[a]t least 20% of the time we cannot get the slots we want."[134] In other words, 80% of the time Mr Marriott did get the slot he wanted. Although he may have experienced delays and potential backlogs the other 20% of the time, his complaint is not one of ease of access but, again of convenience in not losing 24 hours or so and then having to catch up on his searches. As to the length of appointments, as Mr Mills and Ms MacDonald confirmed, they were usually able to get their searches done within a day[135] even if the latter may have used creative means to do so. However, as she also said, the consequence of not getting all her searches done was delay to the customers in getting their PSR,[136] again resonant of convenience, not ease of access.

612. Having considered the evidence, I reject the proposition that map-related information on the PAC was not easily accessible on account of STW's booking arrangements.

STW's PAC – IT issues

613. The Claimants also say that their time for inspection (and predictability of access) was further limited by IT issues affecting PAC use from time to time. Ms MacDonald spoke, for example, of two occasions when STW advised her not to come to its office because the PAC was not working, other occasions on site when the computer was not working and Digdat called to assist, and two or three instances in the prior two years when the computers were not working,[137] albeit in the "vast majority" of her experience, the STW computers

131 Allen 2 at [37]; d.15/p.11/l.25-p.12/l.18.
132 Allen 2 at [53].
133 Allen 2 at [39]; [53].
134 Marriott 1 at [24]-[25].
135 Mills 1 at [33]; day 6/p.68/l.16-25-p.69/l.6.
136 D.6/p.69/l.22-25-p.70/l.1-3.
137 MacDonald 1 at [38].

were working.[138] Mr Mills did not seem to encounter any IT issues at STW.[139] By contrast, Mr Marriott spoke of the STW computers crashing quite frequently, the mapping system being painfully slow or computers being unusable for "days on end" as well as system access issues.[140]

614. Mr Allen explained in his evidence why an IT system might slow but did not recall regular or frequent complaints about the STW PAC operating too slowly.[141] Digdat is now responsible for dealing with issues affecting the PAC, with planned work generally undertaken outside working hours. As for unplanned availability, Digdat data indicates none between April 2019 and March 2020. From May 2020 to March 2021, there were four sessions of unplanned unavailability lasting, respectively, 14.5 hours and 20, 30 and 30 minutes. From June 2021 to March 2022, there were three sessions of unplanned availability, two lasting 12.5 hours in aggregate (outside working hours) and the third for one hour, albeit unclear whether this affected the PAC. Between April and December 2022, there were no unplanned outages. As Mr Allen fairly accepted in his evidence, the data appears not have captured a system outage in March 2020 affecting other WASCs such as SW. Moreover, I accept that the data may also not reflect those more minor issues which were fixed as they arose, including during PAC sessions. Although the Digdat data therefore may not necessarily reveal the complete picture, I am satisfied that it more closely reflects the true position than Mr Marriott's generalised complaints, notably not made contemporaneously.[142] Moreover, when the Digdat performance data was put to Mr Marriott, he indicated that "sometimes things don't get recorded if you switch on and off a machine",[143] rather suggesting that the issues were of a more minor nature. That data is also more closely aligned with the position indicated in the evidence of Ms MacDonald, Mr Mills and Mr Allen as to the rarity of unplanned outages. In this regard, I did not find persuasive the Claimants' efforts to downplay Mr Allen's involvement. Although he fairly accepted that he would not have been aware of each IT issue encountered, his team was responsible for ensuring the delivery of the service to PAC users and he continued to be involved on the technology side, including setting up the Digdat contract and monitoring the service it provided.[144]

615. Having considered the evidence, I am satisfied that map-related information was already publicly available and easily accessible to the Claimant PSCs from STW's PAC. No doubt, the IT issues encountered at STW caused users difficulty and delay on occasion but, again, I am satisfied that these were matters of temporary inconvenience. As for the complaints about lack of printing facilities and restrictions on PAC photography, these again appeared to be directed to the re-use of the information, rather than ease of access.

STW PAC – Question 2.9

616. Turning specifically to **Question 2.9**, although it does not appear to be disputed that the PAC had zoom and roaming capability and that they showed STWs, the Claimants deny that the information responsive to this question was publicly available, essentially because the measurement of distance from the relevant property to the nearest STW was again said to be difficult and time consuming.

138 Day 6/p.73/l.15-21.
139 Mills 1 at [40].
140 Marriott 1 at [31]-[33].
141 Allen 2 at [62].
142 Marriott 3 at [22].
143 D.7/p.40/l.13-19.
144 D.15/p.24/l.14-25-p.25/l.1-7.

617. In his written evidence, Mr Marriott stated that STW "do not provide us with the information necessary to answer this question"[145] but that appeared to suggest he had asked for it. As he confirmed in his oral evidence, he had not.[146] Although Mr Marriott went on in his third witness statement to suggest difficulties answering this question by reference to the PAC,[147] it became apparent that the real issue for him was one of time and impact on other searches rather than any particular difficulty.[148] As I have already noted in the context of YW, Ms MacDonald's initial hesitation was that she too did not answer this question but she went on to say that she could. Her evidence in relation to STW was to the same end.[149] Again, I accept that evidence and, more generally, that the information responsive to this question was already publicly available and easily accessible from STW's PAC. Although it may have taken a few minutes to locate the nearest STW by zooming out on the map, and then measuring the distance using the scale, I am again satisfied that the PSC Claimants at least were more than capable of performing that task.

618. I should also say that the responsive information was also already publicly available and easily accessible from other public sources, including from 2018 from STW's own website, with on-line tools such as Google Maps readily available to the PSC to calculate the distance between the two locations. Although Mr Marriott indicated that he was not aware of the website and spreadsheet of STWs in STW's area,[150] this is hardly surprising if he did not answer this question. Had he done so, he is likely to have been familiar with this source. Moreover, although he speculates that obtaining the information in this alternative way would also be time consuming,[151] the opposite seems true given that the identification of the relevant assets and measurement of distances would all be done online and without having to search the map.

619. Accordingly, I am satisfied that the information responsive to **Question 2.9** was already publicly available and easily accessible to the Claimant PSCs from STW's PAC (and remote access facility) and, from 2018, its website.

620. Based on the unchallenged evidence of Mr Davies of STW,[152] the Claimants again accept that the information responsive to **Question 3.5** (water quality) was publicly available and easily accessible for the relevant period on STW's website. Again, I accept this. Based on Mr Marriott's evidence, the Claimants did dispute the public availability of information responsive to **Question 3.5** (water hardness). However, having considered the contemporaneous internet archive record, I am satisfied that the responsive information was publicly available and easily accessible from STW's website from at least 2014. Although it is no longer possible to enter the relevant webpage postcode checker, the site states "Every day we work hard to make sure the quality of water you receive is the best possible standard. You can find out details about your water quality, including water hardness, by entering your postcode below." I am satisfied from this banner that, had any user entered their full postcode, the responsive information would have been provided. In his written and oral evidence, Mr Marriott indicated that the last time "we" looked at it, the information was

145 Marriott 1 at [52, table]; Marriott 3 at [37].
146 Day 7/p.56/l.16-25-p.57/l.14.
147 Marriott 3 at [37].
148 Day 7/p.57/l.15-25-p.58/l.1-15.
149 Day 6/p.82/l.18-25; p.98/l.22-25-p.99/l.10.
150 Marriott 3 at [38].
151 *Ibid*.
152 Midgley 2 at [94].

difficult to interpret.[153] However, in his oral evidence, he also confirmed that he was "unaware" of the possibility from 2014 of the STW website showing hardness information but that he did not dispute this.[154] In those circumstances, the Claimants' persistence with the point in closing submissions seemed strained to say the least.

621. The Claimants' position with respect to **Question 3.6** *v*1for STW was essentially the same as that for NW, with the added denial of Mr Davies' personal knowledge of the suggested sources of information. However, for the reasons given for NW above, I am satisfied that the information responsive to this question was already publicly available and easily accessible from the DWI website for the STW area as well.

622. The Claimant' position with respect to **Question 4.1.1** and **Question 4.1.2** for STW was essentially the same as that for NW. For the reasons given above, I am satisfied that the information responsive to these questions was already publicly available and easily accessible for the STW area from the Water UK and Digdat Connect websites for the periods asserted by the Defendants. Since I have rejected the Claimants' 'PAC issues', I also find that the information responsive to these questions (and **Question 4.1**) was publicly available and easily accessible from STW's PAC.

623. Finally, as for **Question 5.1**, Mr Davies (STW) gave evidence as to his understanding that STW maintained a register of all trade effluent consents at its offices in Derby.[155] The Claimants denied that source on the basis of Mr Davies' lack of personal knowledge. However, STW's website clearly shows that "[w]e are required to keep a register of trade effluent consents and associated documents, to which the public must be given access. The register is currently held at our offices in Raynesway, Derby DE21 7BE." Given that evidence, I consider the Claimants' stance unavailing.

624. The Claimants also deny that the information responsive to this question is easily accessible because (i) it is only available at one location for the whole STW area and (ii) there is no evidence as to its method or organisation. As to the former, notwithstanding the evidence of Mr Marriott and Mr Garford as to the distance that would have to be travelled,[156] the same position obtains for STW as it does for NW above. As to the latter, the Claimants advanced no evidence of their own as to the searchability (or otherwise) of the register but, given STW's duty under s.196 of the WIA (as acknowledged by STW on its website), I am again satisfied that there would be no difficulty obtaining from STW confirmation of the existence (or otherwise) of a trade effluent consent for a particular property as **Question 5.1** asks. I therefore find that the responsive information was already publicly available and easily accessible to the Claimant PSCs.

Issue 3.1 – D6 (AW)

625. AW says that all the information that I have found to be EI and held by AW is already publicly available and easily accessible within the meaning of Reg 6(1)(b).

153 Marriott 3 at [41]; d.7/p.62/l.4-10.
154 D.7/p.62/l.24-p.63/l.1-8.
155 Davies 2 at [38].
156 Marriott 3 at [45]; Garford 2 at [50].

AW's PAC – public availability

626. As to **Question 2.7**, AW says that the responsive information was publicly available and easily accessible on its PAC from June 2015 save for buildover *consultation* information. As noted, AW says that it does not hold records relating to such consultations as the Claimants have accepted for **Issue 2** purposes. As for information concerning buildover *agreements*, the Claimants deny that the information responsive to **Question 2.7** was publicly available due to certain evidential issues discussed further below.

627. Although, more generally, the Claimants do not appear to dispute that map-related information was publicly available from AW's PAC, they deny this for the period March to July 2020 when the PAC was not available due to Covid and AW allowed users to e-mail requests for map information instead. The Claimants say that there was no means of direct access and, by definition, maps provided on request were not publicly available. I disagree for the reasons already given for NW.

AW's PAC – ease of accessibility generally

628. AW's PAC arrangements over the relevant period were largely common ground. Until November 2016, AW made available a single PAC at the reception area of its offices in Huntingdon. This was available Monday to Friday from 9am to 5pm although, informally, users could on occasion access the PAC outside of these hours. There were no appointments or booking system, with access afforded on a first come first served basis. During busy times or when others were waiting, users were asked to limit their session to 15 minutes. AW says that there were no limits on how many times a day, week or month a person or PSC could use the PAC although the Claimants say that the PAC arrangements were such that there were practical limits. A second PAC was later introduced, with session time increased to 30 minutes. Mr Mills says that this was in approximately 2017, with the second for disabled users only.[157] Mr Kevin Brown and Mr Richard Barry (AW) say that two PACs were made available for all users, with a third for disabled users.[158] Given the contemporaneous documentation,[159] the unchallenged evidence of Messrs Brown and Barry,[160] and that Mr Mills was not cross-examined, I am satisfied that there were two PACs in operation for all users from November 2016. In July 2020, the PACs were moved to a different office in Huntingdon. During periods of Covid lockdown (in the timeframe March 2020 to April 2021), AW provided electronic copies of public maps on request via e-mail. As the contemporaneous documentation shows and Mr Garford accepted in his evidence, a third PAC was made available to all users on request from May 2021 provided it was not needed by a disabled user.[161] From May 2022, a fourth PAC was made available at AW's Hartlepool office. After the 30 minute session had expired, the PAC would be automatically logged out on the next action requiring server access, with the next user then logging in or the existing user able to log in again and continue if no-one was waiting.

629. As for AW's so-called 'PAC issues' generally, based primarily on the evidence of Ms Grice, Mr Mills and Mr Garford for the Claimants and Messrs Brown and Mr Barry for AW, the Claimants say that map-related information was not easily accessible from AW's PAC. I

157 Mills 1 at [20].
158 Brown 2 at [26]-[27]; Barry 1 at [11].
159 F6/71/1.
160 Mr Brown was asked about these PAC arrangements but his evidence was not challenged (d.15/p.87/l.12-22). Mr Barry was not asked about them
161 F6/199; d.7/p.72/l.16-25-p.73/l.1-10.

found Ms Grice to be a generally straightforward and fair witness who made appropriate concessions albeit, given the scope of her own search activity, I found her written evidence to be somewhat overstated. As noted, Mr Mills' written evidence was tendered under a hearsay notice and he was not cross-examined. Mr Garford was a careful and understated witness who made some concessions. However, he overreached himself in his written evidence. In oral evidence, he also qualified a number of his answers more than was warranted. Mr Brown was present throughout the trial and was interested in these proceedings beyond his former role at AW. Nevertheless, I found him to be a generally fair witness who made appropriate concessions and that his elaboration was usually warranted. Mr Barry was a knowledgeable and fair witness who made appropriate concessions and qualifications.

630. As a preliminary matter, and for the same reasons indicated for NW, I am satisfied that AW did not fall foul of Reg 6(1)(b), at least in relation to the Claimant PSCs, on account of the AW PAC being located at a single site in Huntingdon until 2022 or, with the addition of Hartlepool, two sites thereafter.

AW's PAC – viewing arrangements

631. One important focus of the Claimants' complaints was again the suggested greater demand for PAC access than the facilities allowed, with users unable to secure access at the time and/ or for as long as was required. That was said to arise from AW considering it necessary at all times to impose session limits on the PAC. However, as the Claimants themselves go on to say by reference to Mr Barry's evidence (and apparently accept), this was "to allow all users to get fair access to the PACs".[162] I agree that this was for the purpose of ensuring ease of accessibility to the PAC for all users. In this regard, I found compelling Mr Brown's evidence as to how AW had actively started monitoring PAC use in May 2015 to better understand the number of people waiting to view information at different times of day and to assist in understanding whether there were sufficient terminals to meet general demand.[163] Although the response rate was low, AW also surveyed users for their views.[164]

632. The written evidence of Ms Grice and Messrs Mills and Garford did indicate the frequent need to wait to use the PAC.[165] However, as Ms Grice herself confirmed, "[d]emand for the computers varies depending on the time and day, and depending on how busy the market is."[166] This was powerfully demonstrated by the log compiled by AW to monitor usage. Although there were clearly busy times of the day when the PAC was occupied and a number of users waiting, there were also periods when the PAC was free, with the afternoons often being less busy. As Mr Brown fairly accepted, the log did contain certain anomalies. Likewise, the Claimants pointed to contemporaneous complaints of multiple individuals having to wait for PAC access, some for over an hour, the potential for error in AW's manually compiled log and usage variability across the year. Despite these matters, the high water mark of the Claimants' case (as was again fairly accepted by Mr Brown) appeared to be that it was not unusual to have people waiting for the PAC.[167] As Ms Grice confirmed, the complaint was not that she could not get onto the PAC or not get her work done but that she had to spend longer at AW than she might like.[168] Mr Garford testified to

162 Barry 1 at [14].
163 Brown 2 at [29].
164 Brown 2 at [33].
165 Grice 1 at [28]-[30]; Mills 1 at [16], [18], [20], [23] and [30]; Garford 2 at [12] and [16].
166 Grice 1 at [30].
167 D.15/p.110/l.2-19.
168 D.8/p.8/l.15-20.

his preference to attend on a similar day each week, to take all searches by then accumulated and to measure turnaround times more easily.[169] In my view, these issues do not come close to saying that the information on AW's PAC was not easily accessible but concern the personal convenience and efficiency of the PSCs.

AW's PAC – IT issues

633. The Claimants also made certain complaints about IT issues said to affect AW's PAC. Ms Grice, for example, said that the PAC was slow, particularly zooming in and out, with the wi-fi sometimes being a "bit funny"[170] but she confirmed in her oral evidence that she had not encountered a serious IT problem.[171] Mr Mills complained about the tablet at Osprey House breaking down "quite frequently", with a 30 minute delay while being repaired, and resulting slowness. He said that AW had also carried out maintenance work 5 or 6 times between 2015 and 2018, resulting in the PAC being unavailable all day. According to him, the PAC was more reliable at Henderson House, breaking down twice a year, with a delay while this was repaired, meaning they had to wait a day or two to catch up on any searches not done.[172] Mr Barry's evidence included an IT ticket report indicating one or two issues a year not capable of immediate resolution without escalation to IT (apart from connectivity issues on the older PAC units).[173] Likewise, AW's records did not indicate any particular outage issues. There was again some suggestion that Mr Barry did not deal first hand with the IT issues encountered or that the logs might not reflect all the issues experienced. However, considering the evidence as a whole, the main issue appears to have been occasional slow running. Although no doubt inconvenient at the time, I cannot say that the information on AW's PAC was not easily accessible on this account. As for the complaint about lack of printing facilities, this again appeared to be directed to the re-use of the information, rather than ease of access.

634. Accordingly, I am satisfied that map-related information on AW's PAC was already publicly available and easily accessible to the Claimant PSCs.

AW PAC – Question 2.7

635. Turning specifically to **Question 2.7**, the Claimants' main point appears to be that their witnesses did not recall the information responsive to this question being available from AW's PAC.[174] However, this was hardly surprising in circumstances in which neither Ms Grice nor Mr Garford included this in their PSRs.[175] There was also some debate about Mr Mills' recorded use of the PAC buildover functionality. However, neither matter is of significance compared to Mr Barry's evidence that the responsive information had been available on the PAC from June 2015.[176] That evidence was compelling. It was not challenged in cross-examination. I accept it. As such, I find that the information responsive to **Question 2.7** was publicly available. Given my findings above on the so-called 'PAC issues', I also find that it was easily accessible to the Claimants PSCs from AW's PAC (and e-mail request service).

169 D.7/p.74/l.2-p.75/l.3.
170 Grice 1 at [34].
171 D.8/p.12/l.18-25.
172 Mills 1 at [35]-[39].
173 Barry 1 at [25].
174 Garford 1 at [110]; Garford 2 at [22]; Mills 1 at [55]; Mills 2 at [13]; Grice 2 at [17].
175 Day 8/p.22/l.23-25-p.23/l.1-2; day 7/p.110/l.25-p.112/l.1-5.
176 Barry 1 at [9]-[10] and [18].

636. As for **Question 2.8**, Mr Brown explained in his evidence how this was originally available on AW's PAC from April 2015 until the NW decision notice indicating that this information was protected by a personal data exemption [FER0588641]. The information was therefore removed from the PAC in February 2016 but the DG5 database (internal flooding) information then became available on request from AW for a small fee. For the earlier period, the Claimants' position appears to be that their witnesses were not aware that this information was available on the PAC. However, both Mr Brown and Mr Barry gave evidence that it was.[177] That evidence was again compelling. That evidence was again unchallenged. I accept it.

637. The Claimants appear to accept that AW made available for a fee the DG5 information available from February 2016, albeit they say again that, by definition, information made available on request is not already publicly available. If an applicant has to ask a public authority separately to release information, outside of the EIR regime at its discretion, it is not information that is "already publicly available to the applicant" at the time of the request within the meaning of Reg 6(1), still less if the applicant is required to pay non-EIR-compliant charges. As a preliminary point, for the reasons already given above, I accept that information made available on request is still publicly available even if (an EIR compliant) fee is levied. As to AW's suggested *discretion* in the provision of this information, this appeared to be based on the reference on AW's website to the "discretionary basis" for the provision of this information. However, Mr Brown's evidence (for AW) was to the effect that he understood that the information would be provided if requested. Moreover, Mr Robert Chapman (AW) gave written evidence about these separate information services provided by AW but was not cross-examined on them. If a point about discretion in the provision of this service was to be made, Mr Chapman should have been questioned about it. Accordingly, I consider that this point is not now open to the Claimants. As for the suggested charges being "non-EIR-compliant", notwithstanding AW's position that the EIR costs standards do not apply, the contemporaneous evidence indicates that the charges are, in fact, EIR compliant, including, for example, in the letters sent to PSCs in January 2016 informing them of the introduction of the service for low water pressure and internal flooding information and the basis for the related charge, namely that it was considered to be consistent with the staff time required to produce the report, in accordance with ICO guidance. In the absence of any evidence from the Claimants otherwise, I accept that the £5 charge is reasonable. As such, I accept that the information responsive to **Question 2.8** was publicly available and easily accessible, both from the PAC and subsequently on request.

638. As to **Question 2.9**, although it does not appear to be disputed that the PAC shows STWs and has zoom functionality and a scale, the Claimants again deny that the information responsive to this question was publicly available because, again, the measurement of distance from the relevant property to the nearest STW was essentially said to be difficult and time consuming. In his oral evidence, Mr Garford explained that he did not answer that question but accepted that he could do so by looking at the PAC.[178] I am again satisfied that the PSC Claimants at least were more than capable of performing that task. The fact that it would take time to answer does not mean that the responsive information is not publicly available from the PAC. In addition, the information was available from other public sources, including STW location information from 2018 from AW's own website, with online tools such as Google Maps readily available to the PSC to calculate the distance

177 Brown 2 at [68]-[70]; Barry 1 at [10].
178 Day 7/p.116/l.17-25.

between the two locations. Accordingly, I am satisfied that the information responsive to **Question 2.9** was already publicly available and easily accessible to the Claimant PSCs from AW's PAC and, from 2018, its website.

639. As for **Question 3.5** (water quality) and **Question 3.5** (water hardness), based on the evidence of Mr Brown[179] and the Claimants' related admission, I am satisfied that the responsive information was publicly available and easily accessible on AW's website from 2009.

640. The Claimants' position with respect to **Question 3.6** *v*1 for AW was essentially the same as that for NW. For the reasons given above, I am satisfied that the information responsive to this question was already publicly available and easily accessible from the DWI website for the AW area as well.

641. The Claimant' position with respect to **Question 4.1.1** and **Question 4.1.2** for AW was essentially the same as that for NW. For the reasons given above, I am satisfied that the information responsive to these questions was already publicly available and easily accessible for the AW area from the Water UK and Digdat Connect websites for the periods asserted by the Defendants. Since I have rejected the Claimants' 'PAC issues', I also find that the information responsive to these questions (and **Question 4.1**) was publicly available and easily accessible from AW's PAC.

642. Finally, as for **Question 5.1**, based on the evidence of Mr Brown and Mr Barry,[180] AW says that the responsive information was publicly available on request from AW throughout as well from AW's PAC since 2015. As to the former, the Claimants say that Mr Brown's evidence was not based on his personal experience of the source. However, he was not challenged about his understanding in cross-examination. Moreover, as Mr Brown said in his evidence, AW is required by s.196 of the WIA to keep a register of trade effluent consents and to make these available to the public on request. The Claimants also say that, only being available on request, it was not, by definition, already publicly available. I disagree for the reasons given above in relation to NW. As to the latter, the Claimants' denial again appears to be based on Ms Grice, Mr Mills and Mr Garford not recalling the availability of this information on the PAC. However, given that Ms Grice and Mr Garford did not include this information in their PSRs,[181] this is again unsurprising and takes matters nowhere. The evidence of Mr Brown and Mr Barry is clear that the responsive information has been available on the PAC from June 2015. That evidence was compelling. It was not challenged in cross-examination. I accept it. As such, I find that the information responsive to **Question 5.1** was publicly available and easily accessible to the Claimant PSCs from both sources.

Issue 3.1 – D7 (SWW)

643. SWW accepts that the information responsive to **Question 2.7** and **Question 2.8** was not publicly available.

644. Although not available on its PAC, SWW says that the information responsive to **Question 2.9** was publicly available on its website from 22 November 2017. The Claimants admit

179 Brown 2 at [54]-[56].
180 Brown 2 at [61]; Barry at [8]-[10] and [16]-[18].
181 Day 8/p.22/l.23-25-p.23/l.1-5; Day 7/p.135/l.11-15.

that the locations of SWW's STW's were shown on its website from that date but deny that the responsive information was publicly available on the basis of insufficient measuring functionality. I disagree. With online tools such as Google Maps readily available to the PSC to calculate the distance between the location of the relevant property and STW (as the latter is shown on SWW's website), I am satisfied that the information responsive to **Question 2.9** was publicly available and easily accessible from that date.

645. As for **Question 3.5** (water quality) and **Question 3.5** (water hardness), the Claimants do not dispute that the information responsive to the former was already publicly available from the DWI website. I accept this. As to the latter, the Claimants denied the public availability of the water hardness information from the different sources identified by SWW, including SWW's website (pre and post-2018) and on request from SWW. In this regard, there was some dispute as to when water hardness information could be obtained from SWW's website by postcode (having previously only been available online by reference to the local map). Based on information from Mr Richard Jenner (SWW), Mr Christopher Rockey (SWW) gave evidence that this was available from 18 September 2018.[182] The Claimants disputed this on the basis that Mr Jenner did not confirm this in his own evidence. However, Mr Jenner did.[183] In any event, Mr Rockey's evidence is also clear that the information responsive to this information has been made available by SWW on request since before 2011 (when water hardness information was placed online) and SWW continues to receive, and satisfy, such requests.[184] That evidence was compelling and was not challenged. I accept it. Although the Claimants again say that information provided on request is, by definition, not publicly available, I disagree for the reasons above. I am therefore satisfied, and I find, that the information responsive to both questions was publicly available and easily accessible.

646. The Claimants' position with respect to **Question 3.6** *v*1 for SWW was the same as that for NW. For the reasons given above, I am satisfied that the information responsive to this question was already publicly available and easily accessible from the DWI website for the SWW area as well.

647. The Claimants' position with respect to **Question 4.1.1** and **Question 4.1.2** (water undertaker) for SWW was essentially the same as that for NW. For the reasons given above, I am satisfied that the information responsive to these questions was already publicly available and easily accessible for the SWW area from the Water UK and Digdat Connect websites for the periods asserted by the Defendants.

SWW PAC – ease of accessibility generally

648. The Claimants accept that map-related information was publicly available from SWW's PAC and remote access portal. However, based primarily on the evidence of Mr Peter Johnson and Mr Stephen Skinner (SWW), the Claimants say that the information responsive to map-related information on SWW's PAC, including **Question 4.1**, **Question 4.1.1** and **Question 4.1.2**, was not easily accessible. Mr Johnson was a plain-speaking and straightforward witness. Mr Skinner was a straightforward witness who made appropriate concessions.

182 Rockey 1 at [9].
183 Jenner 1 at [10].
184 Rockey 1 at [11]-[12].

649. As to the 'PAC issues' raised by the Claimants with respect to SWW, it was common ground that PAC access was obtained through a single terminal at the reception area of its offices in Exeter. Opening hours were 8.30am to 5pm. There was no booking system, with access on a first come first served basis and no limit on the amount of time spent on the PAC per day or week. From March or April 2020, access was provided through a remote online portal with no limit on time spent using the remote system or on the number of searches that could be undertaken. The online portal continued post-Covid, with PAC access resumed from December 2021.

650. As a preliminary matter, and for the same reasons indicated for NW, I am satisfied that SWW did not fall foul of Reg 6(1)(b), at least in relation to the Claimant PSCs, on account of the SWW PAC being located at a single site in a large geographical area.

SWW's PAC – viewing arrangements

651. One important focus of the Claimants' complaints was again the suggested high demand for the PAC such that users could not necessarily secure access at the time and/ or for as long as was required. To that end, Mr Johnson gave evidence that, if other search agents were present when he arrived, he would have to wait his turn. On occasion, the search agents worked it out between themselves as to who would use the computer and for how long although not all agents participated. Sometimes he had a two to three hour wait to access the PAC but it could even be "locked up" for the whole day. Mr Johnson said that he initially tried to arrive first thing when the offices opened but he often did not get on the PAC so he moved his visit to around midday instead. Mornings were popular. He could not say that they were more popular than any other time but he could quite often get on in the afternoon. When he was self-employed (until 2016), he usually went to SWW's offices three times per week. When employed, his PSC would schedule his time which was a lot less flexible. He was allocated visits to local authorities, with visits to SWW in between (usually twice per week). However, his whole schedule was interrupted when he could not get on the PAC, requiring him either to cancel his local authority appointment or leave SWW without getting his searches done and try and come back the next day. According to Mr Johnson, a second PAC was justified. He had not complained about a lack of a booking system because the existing arrangements could work in his favour, not having to worry about securing a slot the next day.[185]

652. As Searches Manager for SWW, Mr Skinner is also responsible for ensuring the operational use of the PAC and assisting users. He gave evidence that there was no booking system in place because of lack of demand. There is a small pool of regular users who tend to come on the same day each week. Based on his discussions with users, they sometimes work out a schedule among themselves and SWW has previously received calls to check on the busyness of the PAC. He was not aware of significant wait times in terms of hours. Pre-Covid, the PAC was generally used once or twice a day. They did sometimes have multiple users although he would estimate that this occurred around three or four times in his nine years in the search team. A second PAC was not justified and had not previously been considered internally or, so far as he was aware, requested. Demand for the PAC had dropped even further with the introduction of remote access.[186]

185 Johnson 1 at [27]-[38]; Johnson 2 at [16]-[18]; d.8/p.116/l.10-25-p.122/l.1-8.
186 Skinner 2 at [20]-[25]; d.10/p.218/l.2-25-p.220/l.1-7.

653. Although Mr Johnson expressed forcefully his views about having sometimes to wait to use the PAC, he had his own routines and potential workarounds for dealing with times when it was busy, including communicating with other PSCs to maximise his ability to use the PAC at his convenience. Mr Johnson's imperative was to get as many of his searches completed as he could in one hit. His schedule became more constrained when his PSC allocated him particular slots to coincide with local authority visits. However, his inability to complete all his searches on occasion and the need to return to get these done does not mean the information was not easily accessible. Rather, it is again resonant of personal convenience. In this regard, I did not find persuasive the attempt to distance Mr Skinner from the 'PAC issues'. Not being based at the SWW reception desk, he did not have day to day oversight of PAC use but, given his role, I am satisfied that he did have a much better understanding than Mr Johnson of the position with respect to the use of the PAC overall. I also accept his evidence that another PAC was not required and that the PAC was generally not busy. Indeed, it is telling that Mr Johnson did not have an appreciation of PAC use at other times than he used it and that he was not in favour of a booking system, knowing that he did not have to vie to secure a slot if he needed to return the next day. Based on the evidence, I reject the proposition that the information held on the SWW PAC was not easily accessible on account of these viewing arrangements.

SWW's PAC – IT issues

654. The Claimants also say that their time for inspection (and predictability of access) was further limited by IT issues affecting use of the PAC from time to time. In his evidence, Mr Johnson said that these comprised log-in delays in the morning when the password was changed weekly, the mapping system commonly not working for an (unspecified) period in time, including map layers not loading, the system not properly working for two months three to four years ago (described in oral evidence as crashing or freezing and not continuous) and regular (unspecified) problems every couple of weeks or so around six to seven years ago. Following a system update four to five years ago, there were fewer crashes, albeit with a more restricted view when using the zoom function. When the PAC was down, Mr Johnson would sometimes (but not always) be allowed to use elsewhere in SWW's offices another computer that was working.[187]

655. Mr Skinner explained how the searches team is responsible for ensuring the PAC is working and how it would liaise with the IT department if it could not resolve an IT issue. The most significant outage that Mr Skinner recalled was in 2017 when the PAC was unusable for a week and needed rebuilding. Before this, it had not been performing as well as it should and fixes had been unsuccessful. While the PAC was unavailable, users were allowed access to desktop PCs or free printed plans. Most outages occurred prior to the system update in 2017 although some teething problems were experienced thereafter. Before Covid, SWW did experience issues with the PAC locking when users repeatedly entered incorrect passwords. This occurred around once a month and took about 20 minutes to fix. There have been two occasions during Mr Skinner's time at SWW when the mapping system has gone down, albeit fixed quickly, within a day. Mr Skinner was not aware of the incident said to have happened three to four years ago (although this could have been reference to the PAC not being available for a week). He does not believe the incident said to have happened six to seven years ago did occur, his search for related correspondence yielding no results. Prior to 2017, if the PAC was not working, users would be allowed to

187 Johnson 1 at [50-[59]; d.8/p.122/l.20-25-p.131/l.1.

use a search team computer. With GDPR requirements, this ceased, users being issued with free plans instead.[188]

656. Having considered the evidence, I found Mr Johnson's complaints to be somewhat unspecific and exaggerated. This was rather reinforced by his filling in the gaps in oral evidence which did not bring particular clarity. I am also satisfied that, as Mr Skinner testified, if there had been issues with the PAC, he would have been made aware of it by his team. As such, I am satisfied that the suggested serious problems from, respectively, three to four and six to seven years earlier did not occur as described. I do accept that there were some performance issues prior to the 2017 update, PAC unavailability during that update and certain log-in problems. There were also some limited outages but, when they occurred, SWW undertook the workarounds he described so that users still had the information requested.

657. I am therefore satisfied that map-related information, including the information responsive to **Question 4.1**, **Question 4.1.1** and **Question 4.1.2**, was already publicly available and easily accessible to the Claimant PSCs from SWW's PAC (and remote access system). No doubt the IT issues encountered at SWW caused users difficulty and delay on occasion but, again, I am satisfied that these were matters of temporary inconvenience. As for the complaints about lack of printing facilities, this again appeared to be directed to the re-use of the information, rather than ease of access.

658. Finally, as for **Question 5.1**, based on the evidence of Mr Steven Wallace (SWW), SWW says that the responsive information was publicly available from (i) the physical register maintained at SWW's premises up to September 2017 (ii) on request from SWW between September 2016 and 2017 and (iii) from SWW's website from September 2017.

659. To that end, Mr Wallace gave evidence that, based on his prior conversations with SWW's trade effluent scientists, the public could visit the SWW Countess Wear laboratory in Exeter to view the paper trade effluent consent documents, although he was not aware of the arrangements in place for their viewing. Mr Wallace also understood that the physical copies of the trade effluent register had now been destroyed following the move to making the relevant records available digitally. The online archive from April 2013 contains a contact number for trade effluent queries, including about existing consents, enabling requests for trade effluent information to be passed to the scientist team and, following its creation in September 2016, to Mr Wallace's Wholesale Account Management team. When the team received requests from September 2016, they extracted the relevant details from their records and provided these free of charge. Trade effluent consents were made available online on the SWW website in 2017.

660. The Claimants deny the existence of the physical register as a source of information responsive to this question because Mr Wallace's statement was not based on his personal knowledge rather than his conversations with colleagues. However, given his area of responsibility, I am satisfied that Mr Wallace would have needed to, and did, take steps to find out about the more historical position with the trade effluent register and I have no reason to doubt the accuracy of what he was told. In any event, he was not challenged about his understanding in cross-examination. Moreover, SWW was required by s.196 of the WIA to keep a register of trade effluent consents and to make these available to the public

[188] Skinner 2 at [28]-[37]; d.10/p.220/l.14-25-p.224/l.1-9.

on request. As such, I accept that there was a physical trade register located at the laboratory at which the public could inspect trade effluent consents.

661. The Claimants also deny that the information responsive to this question was easily accessible on the basis that (i) it was only available at one location for the whole SWW area (ii) there is no evidence as to its method or organisation and (iii) an e-mail from August 2017 suggests that the consents were not accessible at the time. As to (i), the same position obtains for SWW as it does for NW above. As to (ii), the Claimants advanced no evidence of their own as to the searchability (or otherwise) of the register but, given SWW's duty under s.196 of the WIA, I am again satisfied that there would be no difficulty obtaining from SWW confirmation of the existence (or otherwise) of a trade effluent consent for a particular property as **Question 5.1** asks. Indeed, the August 2017 e-mail relied upon by the Claimants indicates that there were only 400 then current trade effluent consents. Finally, as to that e-mail, the point in (iii) is not a good one. The fact that SWW state in the context of online publication that " … we now know these should be in the public domain, accessible by anyone" does not mean they were not hitherto publicly available and easily accessible by *in situ* inspection at SWW's premises. I am satisfied that they were.

662. The Claimants also say that the responsive information on request from SWW between September 2016 and 2017 was, by definition, not already publicly available. I disagree for the reasons given above for NW.

663. The Claimants also suggested that the information responsive to this question was not publicly available or easily accessible on SWW's website beyond 6 April 2023 due to the relevant webpage relied on no longer being obtainable. However, as SWW explained in pre-trial correspondence with the Claimants, the website is now accessed through a different URL to that cited in Mr Wallace's statement. I accept that the trade effluent information remains accessible through SWW's website.

664. I therefore find that the information responsive to **Question 5.1** was already publicly available and easily accessible to the PSC Claimants from the sources and for the periods indicated by SWW.

Issue 3.1 – D8 (WW).

665. WW accepts that the information responsive to **Question 2.7** and **Question 2.8** was not publicly available.

666. The Claimants deny that the information responsive to **Question 2.9** was publicly available from WW's public maps, essentially on the basis that measurement was difficult and time consuming. I address this specific aspect below.

WW's PAC – public availability

667. The Claimants do not appear to dispute that map-related information was publicly available on WW's PAC, save from November 2019 onwards in respect of the information provided through WW's map request service. The Claimants say that these were not already publicly available since, by definition, information available on request is not already publicly available. I disagree for the reasons given above for NW.

WW's PAC – ease of accessibility generally

668. Based primarily on the evidence of Mr Greg McBride and Mr Christopher Harrop (WW), the Claimants say that map-related information was not easily accessible from WW's PAC. Mr McBride attended WW's offices from 2015. He was a generally straightforward and succinct witness, albeit his written evidence was overstated in part. Mr Harrop was a careful witness who gave some long answers but these were generally warranted. In particular, I found authentic his insights into his dealings with the WW PAC users. He also made appropriate concessions.

669. As to the 'PAC issues' raised by the Claimants with respect to WW, it was common ground that PAC access was obtained from WW's Bath offices from 8am to 4/4.30pm Monday to Friday. WW says that there was no formal booking policy, albeit users could book by e-mail requesting an appointment, by notifying WW they would be attending their usual slot or by telephone, with no limit on how far to book in advance. The Claimants only admit these booking arrangements to the extent that appointments could be booked by e-mail. WW also says that there were no prescribed appointment slots but that these were generally four hours (being the morning or afternoon session). Finally, WW says that a "request a map" free service was available from November 2019, providing extracts of WW's maps without limit on the number requested. The Claimants only admit these arrangements to the extent that the service is free.

670. As a preliminary matter, and for the same reasons indicated for NW, I am satisfied that WW did not fall foul of Reg 6(1)(b), at least in relation to the Claimant PSCs, on account of the WW PAC being located at a single site in a large geographical area.

671. One important focus of the Claimants' complaints was again the suggested high demand for the WW PAC such that users could not necessarily secure access at the time and/ or for as long as was required. Mr McBride gave evidence that he secured PAC appointments by e-mail. He accepted that there were no limits on the number of appointments, subject to demand. Originally, he sought multiple slots but was often told that some requested were not available and was offered alternatives. Later, he moved to a single, weekly appointment, usually 2pm on a Friday, being most suitable for him. He e-mailed on Wednesday or Thursday to secure this. This lasted until 4pm, sometimes 4.30pm. On occasion, the Friday slot was not available. Although he e-mailed on a weekly basis to confirm his appointment, he did not dispute the absence of restriction on advance booking. Mr McBride's impression (not gleaned from WW) was that there were only two slots per day, one in the morning, one in the afternoon but, again, he did not take issue with Mr Harrop's evidence that there were no particular timeslots. There was an unspoken agreement between the search agents to book their own preferred appointments. If, for some reason, he could not get a slot, he took an alternative or carried his searches into the following week, causing some to be late. When he had a backlog, Mr McBride might occasionally take two appointments per week. As for IT issues, Mr McBride accepted that the PAC itself worked fine most of the time, but he could remember a few instances where there were problems, with Ms Johnson (WW) calling IT to re-boot it and, on another occasion, her telling him that his usual slot was not available because WW was doing IT work internally. He accepted that IT issues had very little impact on his PAC use. He did not dispute Mr Harrop's evidence that free map

printouts would be provided if there was a technical failure.[189] From 2017, the PAC was provided on a laptop.

672. Mr Harrop confirmed in his evidence that there were no time slots prescribed by any formal policy. Booking was by e-mail or, on shorter notice, by phone. There were no restrictions on the number of appointments or the time a user could book in advance. There were only a handful of PSCs visiting. They liked to have their regular weekly or fortnightly slots. Walk-in appointments were possible but that did not really happen. WW had perhaps five or six PAC visitors every week. There was never sufficient demand to justify a second PAC or changing booking arrangements.[190]

673. Having considered the evidence, it is clear that Mr McBride usually secured his regular Friday afternoon slot upon request made a day or two earlier. If this was not available or he needed more time, WW was flexible and accommodating and offered him another. The PAC was not busy most of the time. The facilities were adequate. The IT issues (such as they were) did not cause Mr McBride any difficulties. The request a map service was free and I accept that unlimited maps can be requested. As for the complaint about lack of printing facilities prior to the map request service, this again appeared to be directed to the re-use of the information, rather than ease of access. I am therefore satisfied that map-related information was already publicly available and easily accessible to the Claimant PSCs from WW's PAC.

WW PAC – Question 2.9

674. Turning specifically to **Question 2.9**, although it does not appear to be disputed that the PAC had zoom and roaming capability and that it showed STWs, the Claimants deny that the information responsive to this question was publicly available, essentially because the measurement of distance from the relevant property to the nearest STW was again said to be difficult and time consuming. Given Mr McBride's evidence that he could roam around the map, find the nearest STW, use the scale on the PAC and, 'in theory', calculate the distance from the relevant property to the STW, I am satisfied that the PSCs are more than capable of answering this question from the PAC even if it was not a question he answered and it might take a little time to do so.[191] This process would have been easier from January 2020 given the introduction of a measuring tool on the PAC. However, I accept (as does WW) that, when using WW's map request service, a user cannot answer this question unless the STW is shown in the fixed map extract provided. That said, from 23 April 2019, STW locations were also available from WW's website with, as Mr McBride accepted,[192] online tools such as Google Maps available to calculate the distance between the two locations. Accordingly, I am satisfied that the information responsive to **Question 2.9** was already publicly available and easily accessible to the PSC Claimants from WW's PAC and, from 2019, its website.

675. Based on the unchallenged evidence of Mr Clive Tugwell of WW,[193] the Claimants again accept that the information responsive to **Question 3.5** (water quality) and **Question 3.5** (water hardness) was publicly available and easily accessible for the relevant period on WW's website. Again, I accept this.

189 McBride 1 at [18]-[28]; [58]-[71]; d.8/p.82/l.13-25-p.95/l.1-6.
190 Harrop 1 at [11]-[42]; d.13/p.12/l.25-p.19/l.1-19.
191 D.8/p.105/l.20-25-p.107/l.1-3.
192 D.8/p.106/l.21-23.
193 Tugwell 1 at [31-[41].

676. The Claimants' position with respect to **Question 3.6** *v*1 for WW was essentially the same as that for NW. For the reasons given above, I am satisfied that the information responsive to this question was already publicly available and easily accessible from the DWI website for the WW area as well.

677. The Claimant' position with respect to **Question 4.1.1** and **Question 4.1.2** for WW was also essentially the same as that for NW. For the reasons given above, I am satisfied that the information responsive to these questions was already publicly available and easily accessible for the WW area from the Water UK and Digdat Connect websites for the periods asserted by the Defendants. Since I have rejected the Claimants' 'PAC issues', I also find that the information responsive to these questions (and **Question 4.1**) was publicly available and easily accessible from WW's PAC (and e-mail request service).

678. Finally, as for **Question 5.1**, Mr Tugwell gave evidence concerning WW's maintenance of a physical trade effluent register at certain WW premises in Bath and how that fact was advertised on its website, together with the ability over the period to request consents by e-mail and telephone.[194] The Claimants do not appear to dispute that the information responsive to this question was available from WW on request but they say that, by definition, records provided on request are not already publicly available. I disagree for the reasons already given above for NW. I therefore find that the information responsive to **Question 5.1** was already publicly available and easily accessible to the Claimant PSCs.

Issue 3.1 – D9 (TW).

679. TW accepts that the information responsive to **Question 2.7** and **Question 2.8** was not publicly available.

680. It is common ground that TW's STWs are not shown on its public maps such that information responsive to **Question 2.9** is not available from that source. However, TW says that the information was publicly available from other sources, including TW's website from 15 March 2018 at the latest. The Claimants say that TW only provided a spreadsheet of STW locations and that this did not enable an accurate measurement. However, online tools such as Google Maps were available and easily accessible to the public (including the Claimant PSCs) to calculate the distance between the location of the STW (as shown on TW's website) and the relevant property. As such, I am satisfied that the information responsive to **Question 2.9** was already publicly available to the Claimant PSCs from TW's website from that date.

681. Based on the unchallenged evidence of Mr Verma of TW,[195] the Claimants again accept that the information responsive to **Question 3.5** (water quality) and **Question 3.5** (water hardness) was publicly available and easily accessible for the relevant period on TW's website. Again, I accept this.

682. The Claimants' position with respect to **Question 3.6** *v*1 for TW was essentially the same as that for NW. For the reasons given above, I am satisfied that the information responsive to this question was already publicly available and easily accessible from the DWI website for the TW area as well.

194 Tugwell 1 at [42]-[50].
195 Verma 1 at [8]-[15].

683. The Claimants' position with respect to **Question 4.1.1** and **Question 4.1.2** for TW was also essentially the same as that for NW. For the reasons given above, I am satisfied that the information responsive to these questions was already publicly available and easily accessible for the TW area from the Water UK and Digdat Connect websites for the periods asserted by the Defendants.

TW's PAC – public availability

684. The Claimants do not appear to dispute that map-related information was already publicly available on TW's PAC, save for the period April 2020 to May 2023 when TW provided a map request service through which it received from users a list of property addresses by e-mail, produced the related map searches and sent them back to the user (also by e-mail). There being no direct access and only being available on request, the Claimants say that these were not already publicly available. I disagree for the reasons given above for NW.

TW's PAC – ease of accessibility generally

685. The Claimants say that map-related information was not easily accessible for the periods December 2013 to March 2020 and May 2023 onwards on account of TW's so-called 'PAC issues' based primarily on the evidence of Mr Michael Lloyd and Ms Helen Burton (TW). Mr Lloyd was somewhat prone to *ex temporising* in oral evidence, highlighting certain gaps and a lack of clarity in his written evidence. Ms Burton's evidence was fair. She made appropriate concessions. Her clarifications were, on occasion, lengthy but these were generally warranted where they arose.

686. It is common ground that TW operated the PAC service at its Clearwater Court office in Reading until September 2015 (8am to 6pm) before this moved to its Rose Kiln Court premises, also in Reading (initially 7am to 5.30pm, then 8am to 6pm from July 2016). The PAC operated until March 2020, ceasing from 6 April 2020 until May 2023 when the remote map e-mail service operated. From May 2023, TW operated both the PAC (now in tablet form, rather than PC) and remote e-mail services. The Claimants do not admit that the PAC operated between 8am and 6pm from May 2023.

687. As a preliminary matter, and for the same reasons indicated for NW, I am satisfied that TW did not fall foul of Reg 6(1)(b), at least in relation to the Claimant PSCs, on account of the TW PAC being located at a single site in a large geographical area.

TW's PAC – booking arrangements

688. As for TW's so-called 'PAC issues', one important focus by the Claimants was again the suggested high demand for the PAC, meaning that users could not secure access for the time and duration required, including as a result of TW's booking system. The following table summarises what TW says was the position from time to time, albeit not all aspects are admitted by the Claimants.

Period	Booking/ viewing system
to 9/15	**Clearwater Court** Appointments booked in advance via e-mail. Appointment slots were released 2

	months in advance of the appointment month (i.e. appointments for December would be released at the beginning of October). Bookable appointment slots Mon to Fri, 9am to 4pm. Walk-in appointment slots (i.e. without a booking) Mon to Fri, 8am to 9am and 4pm to 6pm.[196] Max appointment slot of 2 hrs per day per individual.
9/15-6/16	**Rose Kiln Court** Appointments booked in advance via e-mail. Appointment slots were released just over 1 month in advance of the appointment month (i.e. appointments for December would be released on the final Monday of October). Bookable appointment slots Mon to Fri, 9am to 4pm. Walk-in appointment slots (i.e. without a booking) Mon to Fri, 7am to 9am and 4pm to 5.30pm. Max appointment slot of 2 hrs per day per individual.
7/16-3/20	**Rose Kiln Court** Appointments booked in advance via e-mail. Appointment slots were released just over 1 month in advance of the appointment month. Between July 2016 and June 2019, walk-in appointments (i.e. without a booking) available Mon to Fri, 4pm to 5.30pm. Max appointment slot of 1.5 hrs per day per individual and max of 6 hrs per week.
From 4/20	**Remote Service** Access provided via remote service. Users provide property addresses to be searched via e-mail and TW return PDF extracts of TW's public water and sewerage maps to the user. To use the remote service, users book "virtual appointments" by e-mail. Appointments bookable Mon to Fri, 8am to 6pm. Limited to maximum appointments of 1.5 hrs per day, 6 hrs per week and 24 hrs per month. For a 1.5 hr virtual appointment slot, users can submit up to 100 searches. For a 1 hr virtual appointment slot, users can submit up to 60 searches.
From 5/23	**Rose Kiln Court/ Remote Service** Appointments booked in advance via e-mail. Appointment slots are released just over 1 month in advance of the appointment month. 1.5 hr appointment slots. Max of one 1.5 hr appointment per day per individual. Max of 6 hrs a week or 24 hrs a month.

[196] TW says that, during walk-in hours, access was limited to users who had sought prior authorisation and been added to a list of authorised, out of core hours users. Any user could request authorisation via e-mail to TW's Technical Information team. Once a user had been added to the list of authorised users, they were able to continuously make use of walk-in hours without the need to seek further authorisation.

689. The Claimants suggest that the need for, or use of, these booking arrangements indicated that it was not easily accessible. I disagree. As Ms Burton testified, the main aim of the booking system was to allow access across the range of users that wanted to use TW's PAC.[197] Its purpose was to ensure ease of accessibility. It does not evidence the lack thereof. Moreover, the Claimants' criticisms of TW's booking system were generally not borne out by Mr Lloyd's evidence. In his first witness statement, he explained the need to book a month in advance, later six weeks, with available slots becoming limited quickly, Thursdays and Fridays being most popular. Mr Lloyd generally requested later time slots because he had to travel to TW by train. He complained that the maximum time slot (two hours) was not sufficient because he had to draw out the maps by hand (TW not permitting photography), with more limited access at Rose Kiln, meaning the PAC could not be used by him when other users had not turned up or when they had finished their slot.[198] That bugbear was repeated in his further statement in which Mr Lloyd also explained (surprisingly for the first time) how he and another PSC agent he had befriended would usually take the final 4pm-5.30pm 'walk-in' timeslot.[199]

690. I found Mr Lloyd's evidence to be vague and the substance of his complaints difficult to discern. His oral evidence also lacked clarity although it was evident that he seemed to have navigated TW's booking system successfully to secure his preferred slots and complete his searches while accommodating his other engagements (such as his university lectures when a self-employed agent). So, for example, Mr Lloyd said that when he was commission-based he would go to TW more often to see if he could get time on the PAC while fitting in with his other commitments. Later, things became more consistent when he would generally seek two slots per week. In this regard, looking at his correspondence with TW from late 2019 and early 2020 at least, the advance booking system (and the need to be quick off the mark when the next slots opened) did not seem to present him with any issues obtaining appointments (at that time, usually two per week for 1-1.5 hours). Sometimes, he needed more time in busier periods. Although additional slots were available, he might have to wait a week or ten days, especially to secure the correct time he needed, Mr Lloyd accepting that this was, partially at least, a matter of his own convenience.[200]

691. Given his testimony and his inability to specify any particular difficulties, nothing in his evidence leads me to conclude that the information on PAC was not easily accessible. His real complaint seems to be that, sometimes, he might have more work than usual or something unexpected might arise, and he could not guarantee getting this all done in one hit, requiring him to book another slot (in addition to those he had already secured). Equally, however, it seems from his second statement that he might sometimes have had too little work such that he would not attend some appointments. None of these matters suggests lack of ease of accessibility. To the contrary, I am satisfied that, throughout his time as a search agent, Mr Lloyd has been able to navigate the requirements of the TW booking system in a way that best suited his own needs, working practices and search requirements from time to time.

197 D.13/p.77/l.13-25-p.78/l.1-7.
198 Lloyd 1 at [32]-[42].
199 Lloyd 2 at [10]-[16].
200 D.8/p.30/l.22-p.35/l.2.

692. I should also add that the Claimants rely on certain contemporaneous e-mails containing various complaints about TW's PAC viewing arrangements. These comprise an array of communications concerning (i) a 2015 incident of double booking in which the need to book four to six weeks in advance is mentioned (ii) someone missing an appointment when the PC was down in 2017 and was not able to re-book for the following day (iii) a series of exchanges in 2018 with Mr Lloyd's former boss concerning PAC demand (apparently with Mr Lloyd's input), escalated to TW's lawyers but with no indication from the documents (or Mr Lloyd's evidence) as to how this was resolved (iv) an unexceptional reminder from TW in 2017 for users not to overbook and to cancel appointments no longer required given the high demand on the PAC (v) a response to a 2020 request from a member of the public for plans or drawings for a property, indicating a five week lead time for PAC access (vi) an internal TW e-mail from 2016 confirming the small number of PAC access requests from the public (as opposed to PSCs), how no member of the public had been turned away (and a time slot always reserved for emergencies) but that those who wanted two hour slots were hard to accommodate (as opposed to one hour) (vii) the related (busy) booking schedule (viii) PSC responses from TW's 2016 request for feedback in view of the PAC not being used to full capacity, some days lying idle for 2-3 hours a day, including suggestions (with various degrees of strength of feeling from different PSCs) for a second PAC and (ix) the response to that feedback, being an increase to the number of appointments and bookable hours each day, with the maximum bookable time being 1.5 hours per day, monitoring having indicated that the PAC was only being used 52% of the time and a second PAC therefore difficult to justify.

693. It is difficult to discern much meaningful from these communications beyond the fact that TW did monitor PAC usage (both by PSCs and the public) and seek PSC feedback and that, despite the high demand from PSCs for appointments and related PSC complaints and requests for a second terminal, the existing PAC was underutilised, in part at least as a result of PSCs making bookings but not them using them, some not even cancelling their appointments when it became apparent that these were not required. As Ms Burton testified,[201] that theme persisted into 2020 when another PSC complaint and request for a second PAC was received. That PSC was, in fact, allocated appointments for 15 of the 16 days requested but at a later time in the day than it wanted. TW's internal consideration of that complaint indicated that there had been 17 hours of missed PSC appointments per month with no record of cancellation, and some members of the public unable to get appointments. The complaining PSC appears to have accounted for at least two of the 'no-show' appointments, Mr Lloyd for two more. If anything, these documents rather underline Ms Burton's evidence, which I accept, that a second PAC was not, in fact, required at TW.[202]

TW's PAC – IT issues.

694. The Claimants also say that their time for inspection and, therefore, predictability of access was further limited by IT issues affecting use of the PAC from time to time. So, for example, Mr Lloyd explained in his evidence how the PC had some slowness. He also said that technical issues occurred once a month or once every two months. In that event, he was generally allowed to use another TW PC at Clearwater. The same facility was not provided at Rose Kiln but the problems would mostly be resolved in five to ten minutes, with Mr Lloyd being permitted to 'stretch' his appointment if possible or return at another

201 Burton 1 at [68].
202 Burton 1 at [65]; d.13/p.83/l.24-25-p.85/l.1-11.

time. Mr Lloyd has experienced five or six computer crashes since 2013.[203] There was some dispute as to the cause of slowness and whether this might be due to the old PC model which, as Ms Burton accepted in oral evidence, continued to be used for the PAC.[204] Ultimately, it is not necessary for me to resolve this. Based on the evidence, I am satisfied that the IT issues identified by Mr Lloyd were either so minor or so infrequent that they did not implicate ease of accessibility to the information on the PAC. At worst, they were a limited and temporary inconvenience. The additional matters relied on by the Claimants in written closings do not indicate otherwise.

TW's map request service - ease of accessibility

695. In closing submission, the Claimants sought to extend to TW's map request service their denial of ease of accessibility to map-related information. That was premised on (i) an appointment system suggested to be confusing to members of the public (ii) delays in securing appointments and (iii) backlogs in the provision of maps. I am again unable to accede to this eleventh hour change of request which appears to be based on 17 documents already available to the Claimants before trial only now relied on to make new points not previously advanced. In any event, having considered the documents concerned, although some (but by no means all) indicate some confusion by members of the public, none appears to concern access sought by PSCs who would, of course, be much more experienced and adept in making their appointments. Moreover, none suggests that the information was not easily accessible, merely that, on occasion, the requisite administrative steps to obtain it had to be explained more fully. The suggested delays in securing appointments again seems to be an issue principally with members of the public, with one PSC apparently having failed for some unknown reason to have obtained appointments for August 2020 but not for September. As for the suggested backlogs, although Ms Burton's evidence suggests some initial delay returning maps, that is hardly surprising given the exceptional circumstances in which these new arrangements were introduced. However, the same evidence also shows that, once those initial difficulties had been overcome, the turnaround time was quick, generally one day but with a service target of four days.[205] I accept that evidence. In this regard, there was some suggestion from Mr Lloyd that others were treated more favourably in the time taken to return his maps but he retreated from this in oral evidence,[206] rightly so in my view. I reject it without hesitation.

696. In light of the above matters, I am therefore satisfied that map-related information, including the information responsive to **Question 4.1**, **Question 4.1.1** and **Question 4.1.2**, was already publicly available and easily accessible to the Claimant PSCs from TW's PAC (and map request service). As for the complaints about lack of printing facilities and restrictions on PAC photography, these again appeared to be directed to the re-use of the information, rather than ease of access.

697. Finally, based on the evidence of Mr Daniel Bourne (TW),[207] the Claimants admit that the information responsive to **Question 5.1** was publicly available and easily accessible on TW's website throughout the relevant period. I accept that evidence.

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203 Lloyd 1 at [43]-[47]; d.8/p.45/l.22-25-p.47/l.1-19.
204 Day 13/p.87/l.25-p.88/l.1-16.
205 Burton 1 at [42-[44]; d.13/p.
206 Lloyd 1 at [50]; d.8/p.47/l.20-25-p.1-17.
207 Bourne 1 at [9]-[17].

Issue 3.1 – D10 (SW)

698. The Claimants originally denied that the information responsive to **Question 2.7** (buildover agreements) was already publicly available from SW's public map but only to the extent that the question concerned buildover *consultations*. In closing submission, the Claimants sought to extend its denial to buildover *agreements*. This was on the suggested basis that the public map was said not to be up to date regarding the existence of buildover agreements in light of the internal lag in updating mapping systems. However, it was quite clear before trial from the written evidence on both sides (as now relied on) that the argument was potentially open to the Claimants. Despite this, they chose expressly to limit their denial as they did. That written evidence appears anything but comprehensive on the point, it was canvassed briefly by the Claimants in cross-examination of SW's witnesses and SW did not itself cross-examine the Claimants' witnesses on it, SW reasonably proceeding on the basis of the limits of the existing denial. Apart from the difficulties in which the Court would now be placed attempting to decide the point, I am satisfied that there would be significant unfairness to SW were the Claimants permitted to change their position. By contrast, given that the issue is one of a suggested updating time lag relating to a discrete aspect of the CON29DW information, the prejudice to the Claimants would be minimal if, as I do, I decline to sanction the Claimants' proposed change of case.

Public availability – SW's PAC/ remote access maps

699. Although, more generally, the Claimants do not appear to dispute that map-related information was publicly available on SW's PAC, they deny this for the period 24 March 2020 to 3 May 2022 when SW provided PDF extracts of its public maps. Being available on request and there being no direct access, the Claimants say that these were not already publicly available. I disagree for the reasons given for NW.

SW's PAC – ease of accessibility generally

700. Based primarily on the evidence of Mr Paul Carragher, Ms Natalie Wensley and Ms Karen Roffey (SW), the Claimants also say that map-related information, including that responsive to **Question 2.7**, was not easily accessible from SW's PAC. Mr Carragher was a straightforward if somewhat nervous witness, with his oral evidence tending to reveal overstatement in parts of his written evidence. I also found Ms Wensley to be straightforward, albeit the scope of her search activity meant that she too was unable to illuminate certain issues arising. Ms Roffey was a fair witness who made appropriate concessions and whose limited clarification and elaboration was warranted.

701. As a preliminary matter, and for the same reasons indicated for NW, I am satisfied that SW did not fall foul of Reg 6(1)(b), at least in relation to the Claimant PSCs, on account of the SW PAC being located at a single site in a large geographical area.

702. As to the specific 'PAC issues' raised by the Claimants for SW, the viewing and booking arrangements for the single SW PAC (and remote access) varied over time. These arrangements (admitted by the Claimants save for limited aspects) are summarised below.

Period	Booking/ viewing system
to 12/19	**Chatham** **Opening hours** Dec 2013 - Dec 2014: Mon – Fri 9.30am – 3pm Dec 2014 - Feb 2015: Mon – Fri 9am – 3.30pm (1 hour per day non-bookable by PSCs) Feb 2015 - May 2017: Mon – Fri 9am – 4.30pm (1 hour per day non-bookable by PSCs) May 2017 - Dec 2019: Mon – Fri 8.30am -5pm (1 hour per day non-bookable by PSCs) **Booking system** E-mail booking system, with appointment booking opened in last week of the month for slots in the following month and an e-mail reminder sent monthly to regular users notifying them of appointment releases. Prior to Dec 2014, SW opened the diary on the first of each month to allow bookings for the following month (i.e. bookings for Dec appointments opened on 1 Nov. From Dec 2014, the appointment book opened on the last Mon of the month for the following month. From Dec 2014, SW opened the diary on the last Mon of the month for the following month. 1 hr appointment slots, with a max of 2 x 1 hour appointments per day (i.e. 2 hrs per day).
12/19-3/20	**Durrington** **Opening hours** Mon - Thu: 8.30am - 5pm Fri: 8.30am - 4pm **Booking system** E-mail booking system, with SW opening the diary on the last Mon of the month to take requests for the following month. 1 hr appointment slots, with a max of 2 x 1 hour appointments per day (i.e. 2 hrs per day).
4/20-5/22	**Covid temporary arrangements** Electronic copies of extracts of SW's maps provided on request via SW's website.
5/22-	**Durrington** **Opening hours** Mon - Thu: 8.30am - 5pm Fri: 8.30am - 4pm **Booking system** Online booking system, with slots bookable via SW's website up to 60 days in advance. 1 hr appointment slots, with a max of 2 x 1 hour appointments per day (i.e. 2 hrs per day).

703. The Claimants say that the adoption (and retention) of these booking arrangements, including limits on the length and number of appointments to manage demand between users, meant that the SW PAC was not easily accessible. I disagree. As Ms Roffey confirmed in her evidence, this was to ensure fair access to all users.[208]

[208] Roffey 2 at [14]; D.12/p.13/l.20-25-p.14/l.1-12.

704. The Claimants also say that time and flexibility of inspection was limited by the length and number of appointments permitted, relying to that end on Mr Carragher's evidence to the effect that he would always have a backlog. In written evidence, Mr Carragher said that he typically went to SW's offices twice a week and, a couple of times a month, equating to 25% of the time when he would not be able to complete his searches.[209] In oral evidence, Mr Carragher confirmed that he had no difficulty booking appointments (including obtaining the same preferred slots). However, it appears that, for whatever reason, he tended to stick to his usual two weekly appointments. As SW put to him, he could have booked more.[210] In this regard, I did not understand the Claimants' reference to SW's booking limits. As the Claimants have admitted, that was a *daily* limit. It seems that it was Mr Carragher, not SW, who limited his attendance to twice weekly for reasons of convenience.

705. The Claimants also point to Ms Wensley's evidence to the effect that, in the period 2012 to December 2019, she was sometimes kept waiting before being collected to visit the PAC, two or three times a week for 5-10 minutes, and twice over that period for more than half an hour.[211] Although no doubt very annoying at the time, particularly on the two longer occasions, this does not amount to a lack of ease of accessibility to the information on the PAC. It was an inconvenience.

706. The Claimants also rely on a document[212] which they suggest indicates the (prior) strict enforcement of finish times of appointments. Although Ms Roffey could not shed any light on it, the document did not, in my view, indicate a departure from existing practice, rather than a clarification that users were allowed to stay on beyond their appointment time in the circumstances indicated. Mr Carragher also suggested in his written evidence that he was never allowed to use the public computer before his slot had started.[213] In cross-examination, this was shown to be wrong.[214]

SW's PAC – IT issues

707. The Claimants also say that their time for inspection (and predictability of access) was further limited by IT issues affecting PAC use from time to time. In his written evidence, Mr Carragher said that the public computer would crash a lot, "almost every time I went there." With his appointments generally spanning the lunch hour, he could be sat there waiting for up to 10 minutes before staff came and logged him back in, meaning he would run out of time to complete his searches.[215] I found Mr Carragher's written evidence to be exaggerated. As he clarified, the problem he encountered appeared not to be an IT issue as such, rather than a timing out issue, requiring him to be logged back in. The suggestion that he waited 10 minutes was also exaggerated. The reality seemed to be that, if the staff were on the phone or one of them not in the office, it was possible that they would take a little longer to assist him. Ms Wensley said that she occasionally experienced issues with the public computer which could be down for a couple of days. When this occurred, she was no given extra appointments. This put her behind her targets and meant that her clients had

209 Carragher 1 at [36].
210 D.8/p.57/l.10-17; d.8/p.63/l.14-25-p.64/1-21.
211 Wensley 1 at [21]; Wensley 2 at [29]; D.9/p.41/l.20-25-p.43/l.1-9.
212 F10/157.
213 Carragher 2 at [30].
214 D.8/p.61/l.14-25-p.63/l.1-8.
215 Carragher 1 at [33]; Carragher 2 at [24]-[26]; d.8/p.69/l.11-25-p.71/l.1;

to wait a couple more days for their PSRs.[216] Although, again, no doubt, inconvenient to Ms Wensley at the time, her experience does not suggest a lack of ease of accessibility

708. There was, again, some attempt on the part of the Claimants to suggest that Ms Roffey was distant from the IT issues that might be experienced by users and that, therefore, her evidence does not reveal their full extent. As Ms Roffey fairly accepted, she would not necessarily be informed of IT issues at the time, but I accept that she would be made aware of significant issues affecting the PAC. Ms Roffey said that the longest period of unavailability of which she is aware was two days in November 2017 when the PAC was changed over to a new mapping system.[217] The Claimants relied on certain documents (both in cross-examination of Ms Roffey and in submission) to suggest that there had been longer outages, including a potentially week long outage in May 2018.[218] However, the documents are inconclusive as to the duration of the issues but they do show a recognition by SW of the criticality of the PAC, not least given SW's statutory duties to make its maps available for public inspection, an urgency in ensuring the problems were rectified quickly, the involvement of Ms Roffey and communication with affected PAC users to keep them apprised. Although, as Ms Roffey acknowledged in her evidence, the PAC was temporarily unavailable when outages did occur, I am satisfied that such occasions were few and of limited duration. The fact that SW, like many organisations, experienced such periods of temporary IT outage does not mean that the information on the PAC was not easily accessible.

709. In light of the above matters, I am therefore satisfied that map-related information, including (to the extent of buildover *agreements*) that responsive to **Question 2.7** was already publicly available and easily accessible to the Claimant PSCs from SW's PAC (and e-mail request service). As for the complaints about lack of printing facilities and restrictions on PAC photography and laptop use, these again appeared to be directed to the re-use of the information, rather than ease of access.

710. As for **Question 2.8**, SW accepts that this was not publicly available on its mapping system.

711. SW accepts that the information responsive to **Question 2.9** was not publicly available from 8 April 2020 to 2 May 2022 from the PAC when the remote service was provided but says it was otherwise publicly available and easily accessible therefrom. The Claimants deny that the information responsive to this question was publicly available, essentially based on measurement being difficult and time consuming.

712. In her written evidence, Ms Daniella Dobrijevic explained the information and functionality afforded by the MapGuide system as was used on the SW PAC until 2017. This included panning and zooming, STW locations and a measuring tool, albeit the latter only permitted measurement within the visible map window, with zooming in that window showing STWs on a scale of up to 1:1413.[219]

713. Mr Sam Greene of SW explained how he worked on the introduction of a new platform, with the PAC switching to MapInfo in around November 2017, replaced later by a new Digdat system from early 2020. Again, MapInfo could pan and zoom, the map had a scale

[216] Wensley 1 at [49]-[51]; d.9/p.50/l.14-25-p.51/l.1-10.
[217] Roffey 2 at [32]-[38].
[218] F10/109; F10/210; F10/211; d.12/p.17/l.9-25-p.21/l.1-14.
[219] Dobrijevic at 16 and [17(e)-(f)]; Greene 1 at [34(5)-(6)] and [36(5)-(6)].

and STW data and locations were shown. Distance to the nearest STWs (likely to be a few kilometres) could not be automatically measured but the ruler tool could be used at any zoom level, albeit more difficult to see the specific properties and assets when zoomed out.[220]

714. As for the Digdat information and functionality from early 2020, Mr Greene explained that users can scroll around the map and zoom, the map has a scale and STW locations are shown. Distances cannot be measured automatically but the scale provided on screen would need to be used, albeit difficult without existing knowledge of where the STW is located.[221]

715. Although the nearest STW could be identified on the PAC, measurement functionality did differ between the different systems. However, I am satisfied that, had the PSCs been interested in the distance of a particular property to the nearest STW (which it seems Mr Carragher and Ms Wensley were not[222]), even if this would have taken a little time, they would have been able to measure this using the measuring tool (MapGuide), ruler tool (MapInfo) or the scale on the map (Digdat). The only exception would be for MapGuide if the STW was not visible in a single window at or below the maximum scale. Despite this, during the currency of each of the systems in operation throughout the entire period, the STWs could be (and still are) easily located through the PAC and, from 30 November 2017, SW's website. As such, the distance could be measured easily using other publicly available tools such as Google Maps as, indeed, Ms Wensley says she had herself used when trying to measure distance.[223]

716. I am therefore satisfied that the information responsive to **Question 2.9** was already publicly available and easily accessible to the Claimant PSCs from SW's PAC and, from 2017, from SW's website.

717. Based on the unchallenged evidence of Mr Christopher Hazell of SW,[224] the Claimants again accept that the information responsive to **Question 3.5** (water quality) and **Question 3.5** (water hardness) was publicly available and easily accessible for the relevant period on SW's website. Again, I accept this.

718. The Claimants' position with respect to **Question 3.6** *v*1 for SW was essentially the same as that for NW. For the reasons given above, I am satisfied that the information responsive to this question was already publicly available and easily accessible from the DWI website for the SW area as well.

719. The Claimants' position with respect to **Question 4.1.1** and **Question 4.1.2** for SW was essentially the same as that for NW. For the reasons given above, I am satisfied that the information responsive to these questions was already publicly available and easily accessible for the SW area from the Water UK and Digdat Connect websites for the periods asserted by the Defendants. Since I have rejected the Claimants' 'PAC issues', I also find that the information responsive to these questions (and **Question 4.1**) was publicly available and easily accessible to the PSC Claimants from SW's PAC.

220 Greene 1 at [24], [29], [34(5)]-[35(6)].
221 Greene 1 at [36(1)(vii)], [36(6)]- [36(7)].
222 D.8/p.73/l.14-25-p.74/l.1-5; d.9/p.60/l.11-17.
223 Wensley 2 at [18].
224 Hazell 1 at [18]-[21].

720. Finally, as for **Question 5.1**, Ms Patricia Quintana of SW explains in her written evidence that prior to 2013 to 2017, SW's trade effluent register was available for inspection at SW's offices. Thereafter, requests for public register information were provided by e-mail for free.[225]

721. For the pre-2017 period, the Claimants accept that the responsive information was publicly available but deny that it was easily accessible on the basis of Ms Patrica Quintana's evidence that (i) the register could only be accessed at three locations for the relevant geographical area[226] and (ii) the default position was that customers were not advised of the option to inspect the register for free unless they were unhappy to pay for a copy of the relevant consents.[227] As to the former, the same position obtains for SW as it does for NW above. As to the latter, I accept Ms Quintana's evidence that the existence of the trade effluent register was publicised on SW's website.[228] Moreover, the right to inspect it is also clear from s.196 of the WIA. Finally, the Claimant PSCs do not suggest that they contacted SW and were not advised of the option to inspect. I am satisfied that, had they done so and it been suggested that they should pay a fee, the PSCs would not have hesitated to push back on this. None of the matters relied on by the Claimants impeded ease of accessibility.

722. As for the period post-2017, the Claimants say that the information responsive to **Question 5.1** was not already publicly available since, by definition, records provided on request are not publicly available. I disagree for the reasons already given for NW.

723. As such, I accept that the information responsive to **Question 5.1** was already publicly available and easily accessible to the Claimant PSCs.

K. ISSUE 3.8 – DATA PROTECTION

724. **Issue 3** also encompasses a different enquiry about data protection. Issue 3.8-3.10 (which I shall term **Issue 3.8**) essentially asks whether the information responsive to a number of the CON29DW questions (and, in the case of information relating to an unincorporated data subject, a number of the CommercialDW questions) was 'personal data' and, if so, whether the effect of Reg 13 was that the relevant Defendant was not obliged to disclose it. Given my findings under the other issues, **Issue 3.8** remains relevant to **Question 2.7** (buildover agreements) and **Question 2.8** (internal flooding) for most of (but not all) Defendants.

725. The latest iteration of Reg 13, reflecting the current UK data protection regime, provides relevantly for present purposes that:-

> "13. (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, …
>
> (b) ……

[225] Quintana 1 at [10]-[15].
[226] Quintana 1 at [10]-[12].
[227] Quintana 1 at [10].
[228] Quintana 1 at [16].

> (2A) The first condition is that the disclosure of the information to a member of the public otherwise than under these Regulations would contravene any of the data protection principles,
> …….. ."

726. Accordingly, Reg 13 operates as a prohibition on disclosure in the specified circumstances. Relevant to this case, these include where the information requested is 'personal data' and its disclosure (other than under the EIR) would contravene any of the DPP, the words in parenthesis necessary to prevent the potential circularity of the Reg 5(1) duty itself informing the analysis of DPP contravention. I should add that such analysis is potentially complicated by the three different data protection regimes in operation during the period with which this case is concerned, the original incarnation of the EIR being concerned with the Data Protection Act 1998 (**DPA 1998**). That was followed by Regulation (EU) 2016/679 (General Data Protection Regulation) (**GDPR**) (in conjunction with the Data Protection Act 2018 (**DPA 2018**)). The current version comprises the United Kingdom General Data Protection Regulation (**UK GDPR**) (also in conjunction with the DPA 2018). It appeared to be common ground that, for present purposes, nothing material turned on the differences between the different regimes.

Personal data

727. Under the DPA 1998, "personal data" was defined as follows:-

> ""personal data" means data which relate to a living individual who can be identified:-
>
> (a) from those data, or
>
> (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller."

728. Under article 4(1) of the UK GDPR (and corresponding provision of the GDPR and DPA 2018) "personal data" is defined as follows:-

> ""personal data" means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person."

729. Accordingly, a (living) individual must be identified or capable of identification from the data and the data must relate to that person. As to the former, the Defendants acknowledge that the CON29DW reports do not identify any specific individual. However, each such report relates to a specific property and identifies that property by address and postcode. As such, the Defendants say that the specific individuals identified from the data are the owners and occupiers of the relevant properties for which a CON29DW is prepared, identifiable from, for example, the electoral register, online sources and from the knowledge of those familiar with the property or the neighbourhood.

730. As to the latter, the Claimants rely on the Court of Appeal decision in *Durant* v *FSA* [2003] EWCA Civ 1746 and the two 'notions' indicated therein, namely whether the information (i) had the person in question as its focus or (ii) was biographically significant in relation to the person. However, according to the Defendants, the caselaw has moved on, later cases such as *Edem* v *The Information Commissioner* [2014] EWCA Civ 92 (at [17]) indicating that it may be wrong to have regard to such 'notions' where the information was plainly concerned with particular individuals. *Edem* also approved the (then) current ICO Guidance in the following terms:-

> "6. It is important to remember that it is not always necessary to consider 'biographical significance' to determine whether data is personal data. In many cases data may be personal data simply because its content is such that it is 'obviously about' an individual. Alternatively, data may be personal data because it is clearly 'linked to' an individual because it is about his activities and is processed for the purpose of determining or influencing the way in which that person is treated. You need to consider 'biographical significance' only where information is not 'obviously about' an individual or clearly 'linked to' him."

731. The Court in *Ittihadieh* v *5-11 Cheyne Gardens* [2017] EWCA Civ 121 discussed (at [63]-[66]) the approach of the Court in *Durant* and *Edem* (at [66]), explaining how, although not inconsistent, the different approaches indicated by those cases were necessarily shaped by the different contexts in which the different requests for information were made.

732. The Claimants also rely on the decision in *Aven and Others* v *Orbis Business Intelligence Limited* [2020] EWHC 1812 (QB) and the dicta of Warby J (as he then was) that:-

> "The cases relied on by Orbis - *Durant*, *Smith* v *Lloyds*, and *Ittihadieh* … are authority for the proposition that not all data that refer to an individual necessarily "relate to" him or her within the meaning of DPA s 1(1). In particular, whether information comprises personal data depends on where it falls in a continuum of relevance or proximity to the data subject; and for that purpose it is relevant to consider whether the information is biographical in a significant sense, whether it has the data subject as its focus, and whether it affects his privacy (whether in a personal, business or professional capacity). These propositions have been developed to guide those confronted with claims based on the notion that all information in any document that makes mention of an individual is that individual's personal data. …"

733. Finally, current ICO Guidance indicates the following, including usefully in the context of whether property data relates to an individual:-

> "There are many other examples of data which 'relate to' a particular individual because it is linked to that individual and informs or influences actions or decisions which affect an individual.
>
> For example, an individual's data about their phone or electricity account clearly determines what the individual will be charged. However, data about a house is not, by itself, personal data.

Context is important here. Information about a house is often linked to an owner or resident and consequently the data about the house will be personal data about that individual.

Example

Information about the market value of a particular house may be used for statistical purposes to identify trends in the house values in a geographical area. The house is not selected because the data controller wishes to know anything about the occupants, but because it is a four bedroom detached house in a medium-sized town. As soon as data about a house is either:

- linked to a particular individual, for example, to provide particular information about that individual (for example, his address); or

- used in deliberations and decisions concerning an individual (even without a link to the individual's name, for example, the amount of electricity used at the house is used to determine the bill the individual householder is required to pay),

then that data will be personal data."

734. The Claimants say that the focus of the information, and what it relates to, is a particular property and the relationship between the property and public water and sewerage infrastructure and is not biographical in respect any individual, let alone in a significant sense. The information is unlikely materially to implicate the privacy of any individual and there is no reason to believe that anyone would use the information to identify or make decisions about individuals, for example by combining it with Land Registry information. However, even if they did, the scope for interference with their private life seems remote, information about drainage and water connections at a property having no meaningful personal or biographical connotations for any individual.

Personal data – discussion

735. Some of the Defendants say that the information responsive to **Question 2.7** (buildover agreements) constitutes personal data about the owner and occupier of the property, including because it:-

(i) is about their domestic environment and living conditions (or working lives and conditions in the case of a Commercial DW);

(ii) is about the dealings that have taken place between the property's owner and sewerage undertaker and about the plans and intentions of the property owner;

(iii) would be used by WASCs and property developers to make decisions relating to them such as whether a proposed buildover could go ahead; and

(iv) the information could be used by third parties for decisions such as whether to insure the property and, if so, on what terms, whether to send direct marketing to the owner and/ or occupier and how to value the property (and, therefore, the assets of the owner).

736. I found these arguments unpersuasive. Although I accept for the purposes of **Issue 3.8** that the current owner or occupier of a property is, indirectly at least, identifiable from the address information provided in the CON29DW, I do not accept that the data relates to those individuals. First, the responsive information does not say anything meaningful about the domestic or working lives or conditions of the owner or occupier. Assuming a positive response to the question, the answer merely indicates that an approval has been given or that consultation has taken place, not any steps that have been or might be taken as a result, let alone how those steps might affect the living or working arrangements of the owner or occupier. As for the owner's plans and related dealings with the WASC, **Question 2.7** does not identify by whom any relevant approval has been sought or with whom the WASC has undertaken any relevant consultation. The Defendants say that this is likely to have been the current owner. Although that may be the case with many CON29DW reports, that is an assumption. Nor did it seem likely that the responsive information would be used by WASCs and property developers to make decisions relating to owners and occupiers of the properties such as whether a proposed buildover could go ahead. Rather, those decisions would be prompted by the plans put forward by the owners and related steps taken by them, if any, to seek any necessary approvals. Finally, I considered it unlikely that the information would be used by third parties for insurance, marketing or valuation decisions. Without more (for example, information as to an actual or potential breach of buildover requirements), the fact of such an approval or related consultation (or neither) seems unlikely materially to influence those matters. Accordingly, standing back from detail of these arguments, and returning to the ICO guidance approved in *Edem*, the information responsive to **Question 2.7** is not obviously about, or clearly linked to, the current owners or occupiers of a particular property and does not appear to contain anything biographically significant. As such, it is not personal data.

737. The Defendants also say that the information responsive to **Question 2.8** (internal flooding) constitutes personal data about the owner and occupier of the property, including because it:-

(i) is about their domestic circumstances and living conditions (or working lives and conditions in the case of a Commercial DW), internal flooding within their home being a highly personal and potentially distressing matter;

(ii) would be used by WASCs and property developers to make decisions relating to them, namely whether to take steps (and, if so, what steps), to mitigate the flooding risk;

(iii) could be used by third parties for making decisions such as whether to insure the property and, if so, on what terms, whether to send direct marketing to the owner and/ or occupier, whether to offer to buy the property and, if so, at what price, whether to lend money on the security of the property and, if so, on what terms and how to value the property (and, therefore, the assets of the owner); and

(iv) is information that the ICO itself has already accepted in its decision notices for NW [FER0588641] and YW [FER0588641] as constituting personal data.

738. Information about internal sewer flooding concerns an actual, current risk to a property. Given the particularly unpleasant nature and consequences of internal flooding, that risk has the potential seriously to impact the domestic or working lives and conditions of the current owners and occupiers. That risk also carries with it potentially serious financial

consequences. As such, it also affects the decisions made by others relating to those owners and occupiers, including with respect to the matters identified by the Defendants (mitigation measures, sale, value, security and insurance). Those owners and occupiers are again identifiable, at least indirectly, from the address information provided in the CON29DW. Given all these matters, I find that the information responsive to **Question 2.8** is clearly linked to the current owners or occupiers of a particular property and is, therefore, personal data.

DPP compliance

739. Being a form of 'processing', disclosure of personal data would not be lawful unless compliant with the DPP. As already noted, disclosure under the EIR (and FOIA) is often said to be to the world at large, with the Defendants pointing to three related features informing that view, namely (i) the inability of the public authority to impose conditions on disclosure (ii) the personal characteristics of the particular requester being generally considered irrelevant to whether disclosure should be given and (iii) in general, the inability of the public authority to choose to disclose under the EIR or FOIA to one requester over another. In this context, the Defendants emphasise the language of Reg 13(2A) (and its predecessor, Reg 13(2)(a)) concerning disclosure of the information to "a member of the public".

740. Considering the DPP in Schedule 1 to the DPA 1998, the first principle is relevant. This provides that:-

> "Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless:-
>
> (a) at least one of the conditions in Schedule 2 is met, and
>
> (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

741. Central to the requirement of fairness is whether the data has been processed in accordance with the reasonable expectations of the data subject, the word fairness suggesting a balancing of the interests of the data subject and data user and, possibly, any other data subject affected by the relevant operation (*Johnson* v *MDU* [2007] EWCA Civ 262 at [141]). The Defendants say that, consistent with their privacy policies (upon which there was extensive (unchallenged) written evidence), a customer would not expect a WASC to put his information into the public domain.

742. As to lawfulness, it was common ground that the conditions in DPA 1998, Schedule 3 are not relevant for present purposes and that the only relevant Schedule 2 condition is paragraph 6(1), concerning 'legitimate interests', that condition being satisfied if:-

> "The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

743. Although the legitimate interests condition is disapplied for public authorities under the UK GDPR, this is disregarded for EIR purposes (Reg 13(6)). The language of the exception to the current legitimate interests condition in Article 6(1)(f) of the UK GDPR is phrased differently from the DPA 1998 in terms of the legitimate interests of the controller or third party being "overridden" by the interests of fundamental rights and freedoms of the data subject which require protection of personal data. However, nothing material appeared to turn on that difference for present purposes either.

744. The 'legitimate interests' condition raises similar considerations to those for the fairness requirement with respect to the balancing of interests, as to which, the Defendants say:-

    (i) Reg 13(2A) is concerned with disclosure to "a member of the public" and governs the way that the legitimate interests condition is to be applied;

    (ii) As such, the specific interests of the particular requester (here, the Claimants) are not to be attributed to an ordinary member of the public;

    (iii) Such a member of the public would have no legitimate interest in the disclosure of information relating to a specific individual property;

    (iv) Even if the interests of the particular requester were said to be relevant, putting the information into the public domain would still go well beyond anything that is "necessary", that concept being concerned with pressing public need and proportionality to that need (*Driver* v *Crown Prosecution Service* [2022] EWHC 2500 at [112]-[114]); and

    (v) Any suggested interest in the disclosure of the information would also be "overridden" by the privacy interests of those whose personal data would be disclosed into the public domain.

745. The Defendants also say that the disclosure of information in response to an EIR request is entirely different from the provision of a CON29DW report. Those reports are for the benefit of specific individuals, namely purchasers of property and funders. The owners and occupiers would reasonably expect CON29DW information to be disclosed to those specific individuals. The sellers too have an interest in such disclosure to facilitate their sale. Unlike EIR disclosure, the reports can be protected against wider disclosure by means of confidentiality restriction.

746. The Claimants say that the specific interests of the PSCs *are* relevant for the purpose of disclosure in response to an EIR request. As to these, it is not suggested that the Defendants could be required to publish their entire customer databases. Rather, any disclosure of genuinely personal data would be limited on an address-specific basis. The PSCs have a legitimate interest in obtaining such data for their search businesses and providing it to their property purchasing customers. Moreover, those whose personal data might be disclosed would legitimately expect these types of searches to be conducted, including to answer CON29DW questions as part of the conveyancing process of which the seller will normally be aware. Indeed, the Defendants currently disclose that information to anyone who orders a CON29DW from them. From a data subject's perspective, there is no material difference in disclosing such data to a PSC under the EIR. Given the nature of the information and public expectations with respect to the availability of property drainage and water searches,

access to such information is necessary for the purpose of those legitimate interests, *South Lanarkshire Council* v *Scottish IC* [2013] UKSC 55 indicating (at [27]) that "necessary" means "reasonably" rather than absolutely or strictly necessary.

DPP compliance - discussion

747. The disclosure contemplated by Reg 13 is expressed to be "to a member of the public". The legitimate interests condition concerns processing necessary for the purposes of the legitimate interests pursued by the data controller or a third party to whom data is disclosed. I did not discern that the former sought to modify the particular interests with which the latter is concerned. In my view, Reg 13 does not bear such weight or effect. Although, in practice, disclosure under the EIR (or FOIA) may mean disclosure to the whole world, the relevance of that arises at the further stages of the analysis when the necessity and warrant of such disclosure fall to be considered. That view is consistent with the decisions in *Digby-Cameron* v *IC* (and others) (EA/2008/0023 and 0025) (at [16]) and the UT in *GR-N* v *IC (and others)* [2015] UKUT 0449 (AAC) (at [20]-[24]). As such, I accept that it is the legitimate interests of the PSCs, but more importantly of the property purchasing clients they represent, that are relevant, not those of the notional member of the public.

748. As a preliminary matter, I am satisfied that disclosure to the Claimant PSCs of the information responsive to **Question 2.8** under the auspices of the EIR would be fair. Such disclosure is consistent with the expectations of property owners that property information will be provided to their purchasers. I am also satisfied that there is a legitimate interest in disclosure to the purchasers who require the data to inform their decision about the proposed transaction. As to the potential prejudice to the interests of the data subject, it is clearly in the interests of the seller for this information to be disclosed to the purchaser to facilitate a possible sale, consistent with his expectations to that end. Such interest is aligned with that of the purchaser. However, that is not the seller's only interest. As I have found, the internal flood risk indicated by the information responsive to **Question 2.8** has the potential seriously to impact his domestic or working life and conditions. As such, I am satisfied that its disclosure will engage his privacy rights under Article 8 of the European Convention on Human Rights. Although disclosure to the purchaser might be thought to implicate those rights in a limited fashion, disclosure to the world (as envisaged by the EIR) would be more far reaching and potentially harmful to his interests (notwithstanding the data processing requirements to which any purchaser might himself be subject upon any proposed further disclosure by him). Although it can fairly be said that there is a public need for an efficient real property market and the free exchange of information to support that, I have come to the view that such disclosure under the EIR would not be reasonably necessary within the meaning of *South Lanarkshire*. It seems to me that disclosure to the world at large as envisaged by the EIR would not be a proportionate means to meet that public need, there being less intrusive methods of sharing this personal data which would enable its confidentiality to the outside world to be maintained, for example by contractual means through the use of the CON29DW. I should say that I reach the same outcome when considering the matter through the prism of the balancing exercise contemplated by the legitimate interests condition, it appearing to me that the legitimate interests of the purchaser could just as well be served by disclosure in the same (confidential) manner. Accordingly, I am satisfied that disclosure to the Claimant PSCs under the EIR of the information responsive to **Question 2.8** is prohibited by Reg 13(2A).

L. ISSUE 4 – MANIFESTLY UNREASONABLE REQUESTS

749. **Issue 4** asks whether any of the requests for a CON29DW could be refused under the EIR as being manifestly unreasonable within the meaning of Reg 12(4)(b) of the EIR. As noted, despite the so-called 'reverse ferret', I had originally considered there to be continuing utility in considering this issue (see [28(ii)] and [29] above). However, I am no longer so confident. There are a number of different considerations potentially informing the engagement (or otherwise) of the manifestly unreasonable exception under Reg 12(4)(b), including, for example, burden and impact on the recipient of the requests, the requester's motive and purpose in making them and the balance of the public interest. The findings I have made, particularly that some of the CON29DW information is not EI, complicates the matrix further. Since the parties have obviously not addressed me on those, I consider that it would not be appropriate to make findings on **Issue 4**. Nor, in light of the findings I have been able to make, do I consider it necessary to invite further submissions for that purpose. I make clear, however, that I express no view on the potential continuing relevance of this exception to the later stages of this case as it may continue to be deployed.

M. ISSUE 5 – CON29DW SERVICES/ ISSUE 6

750. I am, however, satisfied that it remains appropriate to consider **Issue 5** and **Issue 6**, at least to the extent indicated below, and that it is convenient to do so together. **Issue 5** asks whether any services provided by the Defendants in respect of the information in a CON29DW mean that the charging regime in regulation 8 EIR did not apply. In this regard, the Defendants' overarching point is that the service(s) provided in relation to a CON29DW went well beyond anything required under the EIR and was in itself sufficient to establish that the charging regime in Reg 8(3) did not apply to the CON29DW reports. They say that this is the case even if I had rejected their contentions under **Issues 1-4**.

751. **Issue 5** breaks down into certain sub-issues as to (i) the relevance of certain facts relied on by the Defendants as to the suggested services forming part of the provision of the CON29DW and (ii) the extent to which the answer to **Issue 5** may depend on whether the Claimants could choose to receive the CON29DW without those services. **Issue 6** asks whether, in the light of **Issues 1-5**, a CON29DW is subject to the charging regime in Reg 8(3) in whole or in part. The related sub-issues focus on the circumstances in which the entirety, or only a part of, the information responsive to the CON29DW questions might be subject to the Reg 8(3) charging regime and, if partially, the factors determining which part.

752. In closing submission, the Eversheds Defendants in particular asked me to make various detailed findings of fact under **Issue 5** as to the suggested difference and/ or superiority of the Defendants' CON29DW product in terms of its content and manner of provision compared to that which would be provided in response to a request for EI under the EIR. The Claimants sought to persuade me to adopt a 'proportionate' approach and not to make such detailed findings since these are not required for present purposes, they are better dealt with when causation and the value of those services is examined and the detailed evidence has not been explored orally. Given the Claimants' approach to the evidence already described, I was not persuaded by this last point. That said, although I have examined all the (largely) unchallenged witness evidence directed to this issue, I have come to the view that it is not necessary to make such detailed findings, let alone at the level of individual WASC since, for a number of different reasons, it is apparent that a request for a CON29DW report falls outside the EIR regime, including Reg 8(3).

753. First, the Claimants indicated in oral submission that **Issue 5** did not make much sense. Given the Claimants' longstanding agreement (including at the PTR) to **Issue 5** being determined and their detailed engagement with it in written submission, this head scratching seemed somewhat overstated. In this regard, the Claimants pointed to *East Sussex County Council* v *Information Commissioner (The Property Search Group and another, joint parties)* (Case C-71/14) in which the public authority supplied EI on request by a property search company but imposed several charges, including on the basis of an hourly rate for staff time spent on database maintenance. The CJEU held that this could not be taken into account for the purpose of the amount that could be properly charged for supplying the information responsive to the relevant request for EI. More pointedly still, in *Leeds City Council* v *the ICO and the Apps Claimants* [EA/2012/0020 and 0021], the Tribunal decided that the Council was not entitled under Reg 8(3) to levy a fee of £22.50 equivalent to that for completion of a full CON29R in circumstances in which the property search businesses had merely asked for the EI to enable it to complete the form itself. However, the facts of those cases are far removed from the situation that obtains here. In those cases, there was no order from the search companies for a CON29 product. In this case, the Claimants *did* order CON29DWs.

754. Second, the Claimants, in fact, repeatedly disavowed at the 'stage 1' trial that such orders were, or should be treated as, requests for EI under Reg 5(1). However, it is the Reg 5 request that engages the EIR charging regime under Reg 8. Accordingly, on the Claimants' own case, Article 8(3) cannot apply to their own orders. It makes no sense to foreclose a case under Reg 5(1) on the one hand and yet seek to maintain a case under Reg 8(3) on the other. The Claimants may say that restrictions imposed by the Defendants on access to EI meant that they had no choice other than to order a CON29DW but that issue goes to a different point concerning the recoverability (or otherwise) in unjust enrichment of those charges.

755. Third, even if the Claimants had taken the different stance indicated by their pleadings, earlier submissions and the LOI, I have already found that much of the information requested in a CON29DW report was not EI held by the WASCs in any event (**Issue 1** and **Issue 2**).

756. Fourth, as the ICO itself recognises in the context of local authority property searches, even if EI is requested, the EIR regime may yet not be engaged:-

> "When you are asked to only complete the CON29 form or provide access to the underlying environmental information so that the requester can complete the information themselves, the charging provisions in the EIR rather than the CPSR will apply.
>
> When you are asked to complete and guarantee the content of a CON29 form, this involves more than simply providing access to environmental information as required by the EIR. Therefore the charging provisions in the EIR do not apply and you can use the CPSR charging regime."

757. I agree with this guidance. Fifth, I also accept that when WASCs satisfy CON29DW orders, they were doing considerably more than meeting requests for (in this case, some) EI. The Eversheds Defendants summarise matters in these terms:-[229]

> "Reports are the provision of a commercial service, pursuant to contract, governed by terms and conditions controlling the rights and liabilities of the parties to that contract. The service provided is subject to the general rights and obligations of parties relating to the provision of services, such as implied terms. …."

758. I agree with that synopsis. Sixth, the Claimants do not dispute that the Defendants provided a commercial service or many of its essential components. Indeed, although they question the value of some elements, they accept "the basic facts that the defendants provide the product with a relatively short turnaround time, that they undertake checking and quality control internally, that certain guarantees are offered, albeit the liability is limited in various material ways, and …. that the defendants are in general willing to deal with follow-up queries and enquiries once someone has actually purchased a CON29DW." [230]

759. Seventh, looking by way of example only at some of those individual elements of the CON29DW service, some specific, some of more general application:-

(i) WASCs will obtain responsive information from OWCs and, in some cases, may buy from them a CON29DW and re-sell it to the requesting party. As already noted under **Issue 2**, some cross-border information is, in fact, held by WASCs. If it is EI, and a request for EI is made, this is discloseable under the EIR. Where the information is not held, there is also an obligation under Reg 10 to transfer any such request for EI to another public authority. However, procuring information from other WASCs in order to meet CON29DW orders goes well beyond what the EIR requires.

(ii) More generally, the Claimants accept the 'basic facts' with respect to the Defendants' contention as to the turnaround times for meeting CON29DW requests. Although the Claimants pointed to some evidence of suggested inconsistencies and delays in this regard, the body of evidence as a whole overwhelmingly confirmed the (largely) unchallenged position of all the Defendants that turnaround was generally very quick, a few days at most. Despite the requirement on public authorities to answer EI requests "as soon as possible and no later than 20 working days after the date of receipt of the request" (Reg 5(2)), the level of training, resource, infrastructure, quality control and customer service deployed to meet CON29DW orders to support these aggressive turnaround times for a narrow range of water and drainage information far exceeds that which could reasonably be expected of a WASC to meet requests for the information I have found to be EI, let alone in respect of the much broader range of EI it holds. Any suggested comparison with the EIR regime in this regard would, therefore, not be meaningful.

(iii) The Claimants again accept the 'basic facts' contended for by the Defendants as to the provision of guarantees or assurances as to the accuracy of the information provided in satisfaction of a CON29DW order. Although Reg 5(2) does require information provided pursuant to a request for EI to be "up to date, accurate and

[229] Eversheds Defendants' skeleton argument (at [409]).
[230] D.3/p.76/l.4-11; Claimants' written closing submissions (at [166]).

comparable, so far as the public authority reasonably believes", I am again satisfied that this falls far short of the protections afforded to someone ordering a CON29DW. First, the effect of Reg 18, in conjunction with section 56 of FOIA, is that a property purchaser to whom the WASC has provided inaccurate information in response to a request for EI does not have a right of action in civil proceedings in respect of any failure to comply with any duty under the EIR. Second, by marked contrast, the purchaser of a CON29DW does enjoy contractual rights and remedies in respect of inaccuracies in the CON29DW report. Third, the evidence of many WASCs, which I accept, is that their default position in the event of error in a CON29DW report is to provide redress, in some cases where there may be no legal liability, including by addressing the effects of an error at the property itself. The Claimants point to variations in the WASCs' contractual conditions from time to time in terms of limitation of liability and suggest that, in some cases, WASCs have taken a 'defensive' attitude to, and/ or denied, claims. However, the short point is that all purchasers of CON29DWs enjoy contractual rights and remedies for errors by WASCs, with any related limitation or exclusion clauses regulated by the general law. As such, I am again satisfied that these commercial benefits enjoyed by someone ordering a CON29DW far exceed what might be afforded to someone making a request for EI.

(iv) Relatedly, complaints against WASCs in respect of the provision of CON29DW reports may be referred to the Property Ombudsman (**TPO**), a scheme providing independent redress in relation to disputes between consumers and property agents. Being members of the DWSN, the WASCs are amenable to the TPO's processes. Although the Claimants point to evidence said to suggest the limited use of the TPO, it is nonetheless a meaningful dispute resolution service not available to those dissatisfied with the handling of EI requests.

760. Eighth, the Defendants pointed to a number of other elements of the CON29DW service to say that this surpassed anything that could be expected in response to a request for EI under the EIR. Those elements included trained staff undertaking the CON29DW service, a standardised form (including a summary and convenient format), the use of multiple sources to answer the CON29DW questions, the provision of additional information, the steps taken to verify or reconcile the responsive information (including even site visits) and responding to customer queries. Although, again, the Claimants did not dispute many of the 'basic facts', they did question the value of a number of these elements, the extent to which they were undertaken for the benefit of customers (as opposed to the WASCs themselves), the limits and qualifications to the information provided and whether they offered anything more than the Defendants were required to do in any event under the EIR (for example, under Regs 6(1) and 9(1)). Again, it is not necessary for me to consider the minutia of the various elements of the CON29DW service. Whether viewed as additional services in their own right or aspects of good customer service and quality control, these elements again emphasise that someone ordering a CON29DW report is seeking something very different from that sought under the EIR regime such that attempted parallels between the two are not meaningful.

761. Ninth, the Claimant PSCs also relied under **Issue 5** on various aspects of their own commercial 'regulated' report service said to rival the 'official' CON29DW, for example in terms of turnaround time, their own guarantee or insurance arrangements or the like amenability of some PSCs to the TPO regime. However, in my view, this rather reinforced

the fact that an order for a CON29DW is for a freestanding commercial service operating outside the EIR regime.

762. Given the above matters, I accept that the EIR regime does not govern orders for the CON29DW reports or the amount that can be charged for them. No question of severance or apportionment of charges arises because customers were paying for the commercial service encompassing and implicating all the information contained in the report, whether or not some of it also happened to be EI. In the absence of a CPSR equivalent regime for drainage and water searches, the level of charges levied for the CON29DWs is a matter entirely for the WASCs to decide.

763. At risk of trespassing on areas which properly fall for consideration at a later stage of these proceedings, in particular whether the Claimants did, in fact, have a choice other than to order CON29DWs, what they might have done differently if other options had been open to them and/ or the recoverability (or otherwise) in unjust enrichment of the sums paid for the reports, I do not consider that further or more detailed findings under **Issue 5** or, indeed, **Issue 6** are required or appropriate.

N. CONCLUSION

764. On a final note, it is striking that more than 10 years have passed since the first CON29DW in this case was purchased, more than four since the issue of the first claim form. Despite this, the Claimants' position indicated at the start of a month long trial was effectively that the Defendants had got the 'wrong end of the stick' and that many of the issues were not relevant to their case despite the parties working for years towards their determination.

765. Something has gone wrong here and I trust that all parties will reflect on my findings and give meaningful consideration to whether this dispute is now capable of resolution other than through the Court's process. In the meantime, I will hear further from the parties as to any matters consequential on my judgment that cannot be agreed between them. Any hearing required for that purpose can be arranged through my clerk and should take place in short order.