**IN THE FIRST-TIER TRIBUNAL GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)**

**AND**

**IN THE MATTER OF AN APPEAL UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

**Appeal Nos. EA/2012/0205**
**EA/2012/0206**

**BETWEEN:**

**GEORGINA DOWNS**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**First Respondent**

**and**

**HEALTH AND SAFETY EXECUTIVE**

**Second Respondent**

**APPEAL CONSIDERED ON THE PAPERS ON 18 APRIL 2013**

**BEFORE**

**DAVID MARKS QC**
**Tribunal Judge**

**ANNE CHAFER**
**NARENDRA MAKANJI**

**Subject Matter:**

Environmental Information Regulations 2004: regulation 13: personal information; where the processing of information with regard to release of authors' names: Data Protection Act 1998, Schedule 2

**Cases and Authorities referred to:**

*Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47
*MoD v IC and Evans* (EA/2006/0027)
*Dun v IC and National Audit Office* (EA/2010/0060)

## Decision

The Tribunal dismisses the appeals of the Appellant against two Decision Notices issued by the Information Commissioner (the Commissioner) under the reference numbers FER0458662 (DN1) and FS50428730 (DN2) respectively, both of which are dated 28 August 2012 (the DNs) and therefore upholds the decisions of the Commissioner in both Notices.

## Reasons for Decision

Introduction

1. There are two appeals which are specific to this decision. Basic details of the relevant Decision Notices (DN1 and DN2) will be set out below. The appeals have been consolidated. They concern the same issue. The Appellant seeks disclosure of the names of those individuals who contributed and/or participated in the operation of certain specified activities, and in particular, the preparation of documentation for a working group set up by the Advisory Committee on Pesticides (ACP) and the Committee on Toxicity of Chemicals in Consumer Products and the Environment (COT).

2. The full title of the working group is the Bystander Risk Assessment Working Group (BRAWG). BRAWG was set up as a joint working group as a result of a ministerial request for review of the current approach to the assessment of risks to bystanders from pesticides. Administrative support for BRAWG was at all times provided by the Health and Safety Executive (HSE). HSE is one of the overriding public authorities and is the Second Respondent in both appeals. However, the Decision Notices both make it clear that COT and ACP are separate public authorities for the purposes of both the Freedom of Information Act 2000 (FOIA) and the related environmental regulations, namely the Environmental Information Regulations 2004 (EIR).

3. In particular, the Appellant seeks the author's name or authors' names with regard to certain documents. The appeals concern various exceptions set out in the EIR.

Background

4. In 2004 the Appellant instituted judicial review proceedings against the Government regarding the risk to the bystanders and residents with regard to the relevant procedures and processes in respect of pesticide approval. Her application was successful. It was however overturned on appeal. The Commissioner notes in his initial written response to the Notices of Appeal that at least as at the date of that response, namely October 2012, there was "a considerable amount of documentation" regarding the judicial review then before the European Court of Human Rights.

5. In the wake of the first instance decision in the High Court, there was a review of the relevant policy. That decision was made at ministerial level. It appears that that review was to be concerned with the findings of the court in the judicial review proceedings. A further ministerial decision was made to obtain initial advice from the two advisory bodies referred to above, namely the COT and ACP. This initial advice was intended to provide assistance with regard to taking forward the review of the policy in respect of pesticide approval.

6. In the wake of the Court of Appeal's overturning of the initial High Court decision, the remit of the review and the advice sought from both COT and ACP was, as it was put, refocused to look at the court proceedings which might have a wider impact on regulatory toxicology for plant protection products and other substances. Insofar as relevant to both appeals, the two committees were to consider toxicological aspects of the risk assessments for bystanders and neighbours relating to agricultural pesticides.

7. An immediate outcome was the decision to set up BRAWG as a joint working group.

8. On 27 January 2011, the Appellant wrote to the then Chair of BRAWG requesting certain information. This will be revisited in further detail below when the details of both Decision Notices are looked at. In particular, she sought disclosure of the papers which were used or considered by BRAWG, and on 4 March 2011 the Secretariat for BRAWG provided her with copies of the papers, albeit with some redactions.

9. Later correspondence informed the Appellant as to why the redactions had been made.

10. The Appellant then requested to be supplied with "all the redacted sections of the text disclosed to me under FOI/EIR" (emphasis in original). This was treated as a request for an internal review. The internal review upheld the original decision to withhold the redacted text with information being withheld under a number of the Regulations in the EIR, namely Regulations 12(4)(b), 12(4)(d), 124(4)(e), 12(5)(e) and 13.

11. There then followed a complaint by the Appellant to the Commissioner as to how her request had been handled. It was agreed between the parties that the investigation conducted by the Commissioner would consider whether the exceptions above referred to had been correctly applied to the following four issues, namely: first, identification of the author's name or authors' names in certain documents, second, details of the issues for consideration by BRAWG, third, the name of one company, two other names having been disclosed, referred to in the context of the approval of a particular pesticide, and fourth the name of an individual contained in the document concerning the approval of a particular pesticide.

12. In due course the third element which was the subject of disclosure, ie the name of one company, referred to in respect of the third issue, was duly disclosed. The second issue was also resolved.

The Decision Notices

13. DN1 and DN2 are in identical terms. The reasons for this are those indicated above, namely that there were two public authorities involved, namely COT and ACP.

14. At paragraph 15 and following of both Decision Notices, reference is made to Regulation 12(4)(e) which deals with internal communications. In brief, that exception provides that a public authority may refuse to disclose information to the extent that the request involves the disclosure of internal communications.

15. The Commissioner had taken the view that information communicated within a public authority would constitute an internal communication for the purposes of that exception. The Commissioner had also taken the view that internal communications would also include communications between central government departments and between the executive agencies. However,

according to the Commissioner at least, it was not to include communications between government departments and other public authorities.

16. The Commissioner duly found that Regulation 12(4)(e) did not apply to the present communications, being those between a government department or government departments on the one hand and separate independent public authorities on the other. He therefore decided that Regulation 12(4)(e) was not applicable.

17. It should perhaps be noted that in both Decision Notices it was expressly stated that the public authority in question had informed the Commissioner that the papers considered by BRAWG were "largely prepared" by members of the secretariat and Government departments in response to requests for information from both ACP and COT. Paragraph 17 of both Decision Notices went on to say that the details of what had been called "the issues for the committee" in the Appellant's requests were "usually added by the authors of the papers and drew the members specific attention to points of particular concern for discussion or consideration". These "issues for the committee" were stated by the Commissioner to have been the subject of a check by the secretariat to ensure that the questions asked were not "leading" in nature in order to ensure compliance with the relevant code of practice for scientific advisory committees".

18. At paragraph 20 and following of the Decision Notices, the Commissioner then turned to deal with the applicability of Regulation 12(5)(e) which deals with commercial confidentiality. Initially, the public authority, or more particularly the authorities, had refused to disclose the names of three companies under this sub-regulation. In due course, the public authorities consulted with the current owners of the companies and as has been indicated above, two company names were duly disclosed.

19. The Commissioner duly found that the exception set out in Regulation 12(5)(e) was not applicable primarily on the basis that the remaining company concerned had provided no information to the public authority which would support the application of the exception otherwise relied on.

20. The Commissioner then dealt with Regulation 13 which deals with personal information.

21. At paragraph 26 of both DNs, the Commissioner stated that the withheld information comprised "both the names of the authors of specific documents and the name of an individual who wrote a letter in 1989 related to an application for a licence for a particular pesticide". The same paragraph confirmed that all of the individuals concerned were officials working for the HSE at the time that the documents were created. It was also stated that all the documents were created as part of the HSE's role to provide administrative support to the members of BRAWG with the exception of the individual who wrote the letter dating from 1989. In the last case, reference to the individual concerned was contained within a document created as part of the licensing process for a particular pesticide.

22. The Commissioner determined in paragraph 27 of both DNs that the withheld names constituted "personal data" from which the data subjects would be identifiable. The Commissioner therefore went on to consider whether disclosure would breach any of the so-called data protection principles under the Data Protection Act 1998 (DPA).

23. In particular, the Commissioner considered whether the disclosure of the withheld information would be a breach of the first data protection principle under the DPA. That principle requires that any disclosure of information be fair and lawful and that at least one of the conditions set out in Schedule 2 to the 1998 Act be met. This in turn meant that the Commissioner had to consider whether disclosure would be fair. In so doing, three factors had to be addressed, namely first, the individual's or individuals' reasonable expectations of what would happen to their information, second, whether the disclosure would cause any unnecessary or unjustified damage or distress to the individuals and third, whether the legitimate interests of the public were sufficient to justify any negative impact to the rights and freedoms of the individuals in question.

24. At paragraph 30, the Commissioner addressed the issue dealing with the reasonable expectation of the individuals in question.

25. These individuals were named as authors of some of the documents that were provided to the Appellant. These documents were minutes of BRAWG meetings, a summary research paper, a four-page history of ACP discussions on the assessment of risks to bystanders since 2001 and a record of the

issues to be considered by BRAWG. They are set out in more detail below. The name of an individual who had written the letter as part of the licensing process for a pesticide was also withheld.

26. The Appellant had argued that any official entering the civil service was supposed in principle to be serving the public. As will be seen, this is echoed in the further submissions made in the Grounds of Appeal by the Appellant. The Appellant had said that this principle was especially relevant and applicable in a case such as the present one where officials were involved in decisions relating to a serious public health issue of significant public importance.

27. The Commissioner also noted at paragraph 32 a further argument raised by the Appellant. She had claimed that if any of the civil servants' names that had been redacted related to civil servants who were of a high enough level to be representing the Government in relation to the judicial review proceedings mentioned above, and as it was put in the Decision Notice at paragraph 32, "it could not possibly be argued that the names of those officials should not be disclosed".

28. The Commissioner noted that the public authority had confirmed that none of the officials whose names had been withheld were at or occupied senior civil service grades. The authors' names, according to the Commissioner, recorded "junior officials carrying out administrative tasks" (see paragraph 33 of the DNs). Those tasks consisted of the typing of minutes of meetings, the recording of issues to be considered by the working group, the detailing of the history of the ACP's and/or COT's consideration of a related issues, summarising the research paper and the writing of the letter as part of the licensing process for a pesticide.

29. Although the Commissioner stated at paragraph 34 that he accepted that where there was information related to an employee of a public authority carrying out their professional duties, there was a "greater expectation" that such information will be disclosed than if it relates to their private life. He stated that the information sought to be disclosed and being withheld "clearly relates to the professional duties of the officials concerned".

30. The Commissioner noted however at paragraph 35 of the DNs that the tasks undertaken by those officials were "very much administrative in nature and were not public facing in the sense that there were not centred on engagement with the public". The Commissioner regarded that as being a proper reason for his finding that those individuals "would have had a reasonable expectations [sic] that their names would not be disclosed".

31. The Commissioner then turned to the consequences of disclosure being the second factor mentioned above in relation to the first data protection principle. The Commissioner recognised that disclosure would, in the present case, "be unlikely to cause significant distress or damage to the officials concerned". However, he also acknowledged that "the disclosure of their names in connection with BRAWG could result in increased communications directed to them from members of the public". The examples given by the Commissioner were where members of the public might otherwise seek to influence policy in the area concerned or seek to obtain more information about the issues under consideration.

32. With regard to the balancing of the rights and freedoms of the data subjects on the one hand as against the legitimate interests of the public on the other, the Commissioner noted that the working group, ie BRAWG, had only been set up following upon a request by Ministers as a result of the legal case that was taken against the Government on the issue of attendent risks with regard to the use of pesticides. As can perhaps be seen from what has been said already, the Appellant took the view that there was a significant public interest in knowing the identity of all those involved with the preparation of documentation.

33. However, the Commissioner took the view that given the fact that the duties involved were of "an administrative nature", he did not see "any significant public interest in the disclosure of those names sufficient to override the reasonable expectations of the officials concerned.

34. In the result, the Commissioner found and determined that it would not be fair to disclose the officials' names and that the public authority had correctly withheld their names under Regulation 13.

The Grounds of Appeal

35. The grounds of appeal as drafted by the Appellant are not excessively long, taking up only three and a half pages of typescript. Although it is true that the Appellant begins by making it clear that there is only one issue on the appeals (and for this purpose reference will be made to the appeal in the singular for the purposes of this judgment) a proper understanding of the precise grounds is not facilitated by an absence of numbered paragraphs and/or headings.

36. However, the Tribunal agrees with the Commissioner in the Commissioner's additional written response that there appear to be four main grounds.

37. The first appears at page 1 of the grounds. It alleges that the secretariat for BRAWG, namely the Chemicals Regulation Directorate (CRD), has in the past disclosed to the Appellant the names of any officials involved. The Appellant describes this as demonstrating "an inconsistency".

38. The second ground also appears on the first page of the grounds. The Appellant contends that every official who enters the civil service "is supposed to be, in principle, serving the public". This in turn means that in the interests of full transparency and accountability "the names of any officials involved should be disclosed" (emphasis in original). She also emphasises the point as noted in the DNs, namely that if any of the civil servants who are involved "were of a high enough level" to be representing the Government in the judicial proceedings "it cannot possibly be argued that the names of those officials must not be disclosed".

39. The third ground appears to be a revisiting by the Appellant of the basis on which BRAWG was set up, namely as she puts it "as a result of a request by Ministers for a review of the policy" regarding exposure to pesticides.

40. She also makes the comment that the description afforded by the Commissioner to the role or functions in fact carried out by the individuals concerned as being in effect administrative in nature "downplays" "what the authors of the particular papers that had been prepared have actually done".

41. Either coupled with this third ground, or indeed the second, or by way of separate argument, she also claims that in the light of the "amount of residents and other members of the public affected by this issue of spraying

pesticides in their localities" there is a "significant" public interest in knowing the information requested.

42. The fourth ground of appeal appears to rely on the fact that the names of several individuals appear on the BRAWG website and as such are publicly available. The Appellant adds that disclosure would cause no distress if there were disclosure.

The law and the Commissioner's Response

43. The full terms of Regulation 13 should be set out. Regulation 13 provides as follows, namely:

> "(1) To the extent that the information requested includes personal data on which the applicant is not the data subject and as respects which either the first or second condition below satisfied, a public authority shall not disclose the personal data.
>
> (2) The first condition is –
>
> (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under these Regulations will contravene –
>
> (i) any of the data protection principles …"

44. The first data protection principle in paragraph 1 of Schedule 1 to the 1998 Act, ie the DPA is that data shall be processed fairly and lawfully.

45. The Commissioner contended that there is no issue in the grounds of appeal even as summarised above as to whether the information is personal data. The Appellant does not dispute that.

46. The underlying issue in the appeal is that there would not be a breach of the first data protection principle if the information sought were disclosed. The Commissioner disagreed. He determined that there would be a breach of the first data protection principle. He did not then go on to consider whether any of the conditions in Schedule 2 of the DPA are met.

47. As to the first ground of appeal, the Commissioner observed that the charge of inconsistency did not constitute a proper ground of appeal. No specific finding or determination in the DNs was made as to that. As to the second ground, the Commissioner contended that the question was addressed in and dealt with by the DNs. In particular, paragraph 17 to 19, 33 and 35 summarised above in general terms showed that, in short, any need for transparency did not constitute a justification for disclosure with regard to junior members of staff dealing with administrative functions. The names of the members of BRAWG have been released so the transparency as to the membership of the working group has been satisfied. Again, the Commissioner contended that the second ground provided no basis for undermining the conclusions in the DNs. The Commissioner added that release of the information sought would go beyond the publication of names as mentioned on the website and would intrude upon the carrying out of the administrative roles by the authors concerned.

48. The above observations set out in the previous paragraph also constitute a response by the Commissioner to the third and fourth grounds.

49. The Commissioner added that disclosure could result in an increase in communications by the public which would divert staff from their normal duties. Any such increased contact could cause additional and unnecessary communications which could otherwise seek to influence policy.

<u>The HSE Response</u>

50. The HSE provided its own initial written response. This response pointed out that there had been withheld names contained in six documents. It is perhaps enough to refer to them in brief.

51. The first is identified as ACP8 with reference 332/2009. It is entitled “History of ACP discussion on bystanders from 2001”. It is a factual summary setting out what papers had been relevant to the ACP’s previous discussions on bystanders.

52. The second is ACP22 with reference 338/2009. This is entitled “Initial assessment of Costello et al 2009”. This document was said by the HSE to have been produced “as a matter of course for ACP.

53. The third is BRAWG1 (1/2010) entitled “Draft terms of reference and working practices”. The document is said to relate to the creation of BRAWG and proposes terms of reference, aims and methods of working.

54. The fourth document is BRAWG3 (2/2010) entitled “Models for bystander and resident exposure from ground boom applications to field crops”. This is the document which acts as a factual document introducing the different methods of exposure.

55. The fifth BRAWG4 (2/2010) entitled “Local effects of pesticides: irritancy and sensitisation”, which contains a file note relating to the provisional approval for a certain pesticide and which refer to a letter sent by an official in May 1989 in the course of BRAWG’s day to day work.

56. The sixth and last document is BRAWG5 (2/2010) called “Implications relating to the code of practice for using plant protection products”. The title is perhaps self-explanatory.

57. The HSE confirmed that none of the names withheld in the six documents were, or are, of, members of the senior civil service: they were junior members of staff.

58. The HSE also points out that the production of the documents, and in the case of the fifth document, the production of the relevant letter, was not a function of the BRAWG secretariat. All such work products, and thus the authorising of such documents was part of the relevant officials’ work and was not a function of the BRAWG secretariat, or indeed that of the ACP.

59. In particular, ACP8 and ACP22 were intended initially to inform ACP. They were made available to BRAWG subsequently as being relevant to the latter’s purposes. Authors’ names were included to assist the BRAWG secretariat and members.

60. As for the charge of inconsistency, the HSE adopted the Commissioner’s Response, emphasising the fact that because HSE had released a particular sort of information in the past, no precedent was set.

61. As to the second ground of appeal addressed by the Commissioner, the HSE again repeated the Commissioner’s contentions.

62. The HSE then addressed the third ground of appeal identified by the Commissioner, coupled with the related argument put forward by the Appellant to the effect that the fact that an official whose name was related to and whose working formed the Government's position on exposure and risk assessment cannot be correctly described as performing tasks of an administrative nature.

63. The HSE responded by saying in effect, civil servants in the course of their work may fulfil more than one function. If such an official is doing day to day work such as research or analysing policy options, that individual would have a legitimate expectation that their identity remained out of the public domain.

64. He dealt with a further argument, advanced by the Appellant, which is also addressed by the HSE. The Appellant in effect argued that insofar as BRAWG was set up as a result of the judicial review proceedings which the Appellant herself had initiated, it was in some way unacceptable to have any author's name redacted: there was a significant public interest in question.

65. The HSE responded by saying that the fairness or otherwise of disclosing names had to be considered on the basis of the roles and functions in relation to the duties performed. The Commissioner's determination reflected a proper assessment of the relevant factors.

66. This contention by the HSE in effect was a response to the third ground of appeal previously addressed by the Commissioner.

67. The HSE claimed that it was wrong to assume that the names of the members of the secretariat are those of the authors of the six documents in question. Equally, it was wrong to assume that because it might be fair to disclose the name of a secretariat member in association with their secretariat function, it should also be fair to disclose the name of the same person carrying out another function.

68. The HSE ended its initial response by observing that the documents released to the Appellant did not, in themselves, disclose decisions or any influential judgement. They were merely factual or analylitical in nature. Release of the names in question would not only be unfair but would add nothing to the existing transparency provided by BRAWG.

The Appellant's Reply

69. The Appellant lodged sixteen pages of reply in response to the initial responses of the Commissioner and of HSE.

70. It is fair to say that her Reply revisits the various arguments addressed in response by the Commissioner and by the HSE as summarised above. Her Reply also contains additional factual material, eg as to the timing regarding which the six documents in question were issued or produced. Insofar as any further argument can be said to find expression in her Reply, the Tribunal is satisfied that any such further argument has been addressed in the further and final submissions put in by the Commissioner and the HSE in the period just prior to the paper hearing of the appeal.

71. The Tribunal would add that much of the Reply is taken up with a series of conjectures as to which person or persons are or were in fact the authors of the documents in question based in large part on the detailed analysis of each document and each such document's ramifications.

The law and the authorities

72. As indicated at the outset of this judgment, the only issue in the appeal is whether, and if so to what extent, the first data protection principle is engaged. In short, the question is really one of fairness.

73. It is well established that there is no presumption in favour of the release of personal data by virtue of the general principle set out in FOIA: see *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47, especially per Lord Hope. It was stated in that decision that the "guiding principle is the protection of the fundamental rights and freedoms of person, and in particular their right to privacy with respect to the processing of personal data" (see para 7). Any reference to the DPA within FOIA must be read in light of the legislative purpose of FOIA. The same approach, in the Tribunal's view, applies with regard to the interaction between the EIR and the DPA.

74. In *MoD v IC and Evans* (EA/2006/0027), especially at paragraph 82, this Tribunal considered and accepted the fact that a line can properly and reasonably be drawn between senior civil servants and junior officials, at least

in relation to the disclosure of names. The critical question is whether, in any given case, the junior official would have a reasonable expectation that his or her name not be placed in the public domain, on the basis that it would be unfair to do so within the meaning and ambit of the first data protection principle.

75. The Tribunal fully recognises it will not always be unfair to disclose the names of junior officials. Everything turns on the role and responsibilities of the individual or individuals in question and on the nature of the information requested: cf *Dun v IC and National Audit Office* (EA/2010/0060), especially at paragraph 40.

76. One particular element which may be important and has already been referred to is the one emphasised by the HSE in its response, namely that an individual may occupy more than one role and may have more than one responsibility within a particular organisation.

77. The joint contentions of the Commissioner and of the HSE are to the effect that those individuals who prepare the information in the six documents referred to above were carrying out jobs and functions which were of an administrative nature. Unlike the typical case of a senior civil servant, it could not be said that the authors were responsible for decision-making or any other official action with regard to the work of BRAWG. The Tribunal has been shown the exchange between a member of the Commissioner's office and a member of HSE, a Steve Newman, which occurred on 26 April 2012 and which is in the open bundle before the Tribunal in which Mr Newman expressly confirmed that the authors' role was "an entirely administrative one – eg taking notes of what was said, tidying up the notes, etc. They were not involved in discussions or decision making".

78. The Appellant, in her various submissions, has laid stress on the fact that since the names of the BRAWG's secretariat appears on the BRAWG website, such names can be considered as being in the public domain. In addition, as has been seen, she claims that if a named individual is referred to as an author of the six documents and if or she could be said to have occupied a public facing profile in relation to the judicial review proceedings, there existed no basis for non-disclosure.

79. In the Tribunal's judgment, much depends on the precise role occupied by a person who might otherwise be described in generalised terms as occupying a public facing role, but with specific regard to the particular information which is being sought. The Tribunal does not regard the fact in the present case as analogous to a case where an official who deals with the media or otherwise represents the public authority in a formal setting can properly be referred to as having an expectation that his or her name will be disclosed. Again, in this respect, the Tribunal refers to exchanges between Mr Newman and the Commissioner's office: it has seen a redacted and unredacted copy of a further exchange between the Commissioner and Mr Newman in a letter dated 16 May 2012 from the Commissioner, as well as portions in a redacted version of a further exchange from Mr Newman to the Commissioner dated 25 May 2012 which, in its judgment, supports that analysis.

80. Application of the first data protection principle involves the consideration of three elements. The first consideration is whether the processing is fair. The second is whether it is lawful. The third is whether it meets at least one condition in Schedule 2 to the DPA. It is only fairness which is in issue in the present case. The relevant considerations for present purposes are therefore whether the data subject has given his or her consent, whether there would be distress and whether the processing is necessary for the purposes of legitimate interests pursued by the data controller, except where the processing is unwarranted in any particular case by reason of prejudice to the legitimate interests of the data subject. If the release is unfair, Regulation 13 will apply. If the release is regarded as unfair, then the question of consent must be considered. There is no evidence in this particular case that consent has been given. It therefore follows that if disclosure is otherwise treated as fair, the balancing test referred above will need to be addressed.

81. As has been seen, the Commissioner determined that disclosure would be unfair. It is well established that fairness, either under FOIA or under the EIR, entails the further consideration of three more specific factors. These have been mentioned briefly above, but need to be restated in perhaps rather more detail at this stage.

82. First, there has to be a consideration of the reasonable expectations of the individuals as to whether their names would be disclosed.

83. Second, there has to be a consideration of whether disclosure would cause any unnecessary or unjustified distress or damage. In this Tribunal's judgment, and as accepted by the public authority and the Commissioner, distress would not occur.

84. Third, and reflecting the relevant consideration in Schedule 2 in the DPA, there has to be a consideration of whether the legitimate interests of the public are sufficient to justify any negative impact on the rights and freedoms of the individuals in question.

85. As to the question of reasonable expectations, the HSE contends that in writing their papers, the individuals, none of whom were in senior civil servant positions, did not occupy a public facing function. The Tribunal is entirely satisfied that on the evidence it has seen, none of the individuals were in the senior civil service: they each undertook functions and occupied roles which mean that they were accountable to more senior staff. The evidence also shows that their names on the documents (save as to one document, namely BRAWG4 (2/2010)) appeared in order to assist BRAWG (and the ACP where relevant) secretariat and members should that secretariat and the members seek to follow up on a particular document.

86. In addition, the documents which had been released to the Appellant do not disclose decisions or directly influence judgements. With respect to the Appellant, the Tribunal finds nothing submitted by her, in particular, nothing in her lengthy replies, including her later written Reply submissions which takes issue with that view. Even with regard to the second document of the six listed, the Appellant notes at paragraph 20 of her Reply (and in paragraph 9 of her later written Reply submissions) that the document "includes a scientific analysis (involving issues of epidemiology) of a very important and highly respected 2009 study" which she then names. It is true that the same document bears an author's name but, in the Tribunal's view, the purpose is not one in which any decision can be said to have been recorded or made. At its highest, the characterisation afforded by the Appellant to that document, as well as the first document of the six listed, is that the said documents are factual summaries or analyses. The Tribunal pauses here to note that the Appellant (who might otherwise have been a good position to do so) has not provided any evidence to justify a contention that the six documents directly

contributed to any particular decision reached by BRAWG or in some other way influenced such decisions.

87. As the HSE, also rightly in the Tribunal's view, points out in its earlier submission, the fact that the work reflected in one or more of the documents may have involved research or analysing policy options in order to inform further decisions to be taken by senior officials, either with or by BRAWG, ACP or by a Minister, does not convert the author into a policy-maker or a taker of decisions.

88. In the words of the HSE at paragraph 19 of its later submissions:

"[The work of the author] did not displace or usurp the responsibility placed on BRAWG members to consider all the evidence before them and reach their own conclusions for which they are accountable."

89. The Tribunal accepts that contention. It is entirely satisfied that in each of the six cases in question, the individual authors each had a legitimate expectation that their identity would not be put into the public domain: disclosure of their names would not, in the present circumstances, constitute fair processing of those individuals' personal data.

90. With regard to the question of distress or damage, the Tribunal would agree with the HSE that it is difficult to see how any significant distress would be caused to the individuals in question if their names were to be released. However, mention has already been made (rightly in the Tribunal's view) of the risk of an unjustified increase in communication with the authors were their names to be released such as to disrupt the work and manner in which BRAWG carried out its functions.

91. The open evidence considered by the Tribunal shows that the Appellant herself, on being acquainted with a person's name, made frequent contact with them, disrupting their roles, a fact endorsed by the email sent by Mr Newman to the Commissioner of 25 May 2012 appearing in the open bundle. It is fair to say however that the Appellant in large part disputes this. However, the Tribunal does not regard this factor in any way as decisive as to the main issues arising on the appeal.

92. As for the legitimate interests of the public, it is an understood fact that the work of BRAWG is of considerable importance and interest to the public. However, the Tribunal fails to see how disclosure of the names of the authors of the six documents in question can be said to further a legitimate public interest in that regard.

93. As indicated at the outset of this judgment, the activities of BRAWG are conducted by its members: it is those members who take all relevant decisions, including but not limited to, the content of the final BRAWG report.

94. The individual authors whose names are sought are not members of BRAWG. The Appellant claims, especially in her Reply, that the persons she claims to be authors, and indeed the authors themselves, in some way influence the decisions taken by the members of BRAWG.

95. As indicated above, none of the six documents in question can, in the Tribunal's judgment, legitimately be regarded as derating or persuading the members of BRAWG to adopt a particular conclusion, let alone to some degree of improper influence on such decision-making.

96. The fact remains that disclosure of the documents to the Appellant enables the Appellant herself to analyse the content and the analyses contained so as to be in a position to influence BRAWG herself directly.

Conclusion

97. For all the above reasons, the Tribunal dismisses the Appellant's appeals in both appeals and upholds the Decision Notices in both appeals as issued by the Commissioner.

Signed ……..
**(David Marks QC)**
**Tribunal Judge**

Dated: 1 May 2013