



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0027
Information Commissioner's Ref: FS50166599

Heard at Procession House, London, EC4
On 1 August 2008

Decision Promulgated
On 15 August 2008

BEFORE

CHAIRMAN

MURRAY SHANKS

and

LAY MEMBERS

TONY STOLLER AND ROGER CREEDON

Between

HOME OFFICE

Appellant

and

INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: James Strachan
For the Respondent: Ben Lask

Decision

The Tribunal dismisses the appeal in relation to the issue whether the Home Office holds the information requested and issues the following directions in relation to the question of whether the Home Office can rely on sections 41 and/or 43 of the Freedom of Information Act 2000:

1. The Home Office must by 4.00 pm on 12 September 2008 serve on the Information Commissioner and the Tribunal a notice stating whether and to what extent it intends to rely on either of those sections and indicating the grounds for such reliance and in general terms the evidence that will be relied on to support such grounds;
2. If the Home Office either fails to serve such notice or indicates that it will not rely on either section it must supply the information requested by 4.00 pm on 19 September 2008;
3. Otherwise the Chairman will issue further directions for the resolution of the appeal.

Dated this 15th day of August 2008

Signed

Murray Shanks
Deputy Chairman, Information Tribunal

Reasons for Decision

Introduction

1. By letter dated 19 March 2007 Ben Leapman of the Sunday Telegraph made a request under the Freedom of Information Act 2000 for the Home Office to inform him how many work permits were obtained in 2005 and 2006 respectively by nine named employers in the IT sector. The Home Office replied on 18 April 2007 to the effect that the information requested was “not held in the required format” and would have to be “created”, something which it was not obliged to do under the 2000 Act. This issue was decided against the Home office by the Information Commissioner in a decision notice dated 19 February 2008 and is the subject of this appeal by the Home Office to the Tribunal.

The facts

2. Unsurprisingly, the Home Office has a computer database (known as Globe) on which they record details of all applications for work permits, including the name of the applicant, the name of the employer and the outcome of the application. The database is administered by a small management information team based in Sheffield under the leadership of Anthony Venables, a Higher Executive Officer, who gave helpful evidence to the Tribunal. There is no reporting function within the database itself but Mr Venables and his team use “off the shelf” Crystal software to write “reports”, ie computer programmes which can be run in order to obtain particular information from the database. There is obviously a great deal of standard management information about work permit applications required by the Home Office on a daily, weekly or monthly basis for which there are standard reports already in existence, but Mr Venables’ team also receives up to 250 ad hoc requests for information from management each month; in such cases, they first check to see if there is an appropriate Crystal report already in existence; if there is, they run that report entering the necessary parameters (e.g. start and finish date); if not, they write a new one if they can and run it to produce the information requested. Any member of the team is potentially capable of writing a Crystal report in order to produce information from the Globe database.

3. There is no report currently in existence which will produce the information requested by Mr Leapman at the press of a few buttons but Mr Venables frankly accepted that it would be relatively straightforward for him or any of his team (bar one trainee) to write a report which would produce that information. It would also be possible to run an existing report which could produce figures for (say) the top 30 IT employers who had obtained work permits in 2005 and 2006, which would be very likely to disclose the figures for the nine employers specified by Mr Leapman (very likely because the nine he specified were the top nine for the period 2000 to 2004).
4. Mr Venables repeated, however, a concern raised by the Home Office about the accuracy of the information that might be produced from the database, since the details of employers are not always entered consistently by caseworkers. On closer examination, it seemed to us that this concern may have been somewhat exaggerated by the Home Office. It was clear from Mr Venables' evidence that this problem was greater in relation to the database that was in use before the Globe database was introduced in 1999. With the Globe database, when the caseworker inputting the data about a particular work permit application comes to enter the employer's name, he is given the opportunity of consulting a list of employers already on the system (each of which have unique numbers) and should simply click on the matching existing name: this seems to us to make it fairly unlikely that caseworkers would have been entering details of employers' names inconsistently in 2005 and 2006 with any frequency. In any event, Mr Venables' statement indicates that there is a way round the problem which is by carrying out what is called a "wild card" search; this would be likely to disclose any records where a variation on the name of a specified employer had been entered by a caseworker; it may also disclose records relating to unconnected employers with names coming within the "wild card" search, and the person preparing the information for disclosure would therefore need to check the information produced by the search to eliminate employers not within the scope of the request before adding up the remainder. No doubt even after a "wild card" search it could not be said with complete confidence that the figures that would be produced in response to Mr Leapman's request would be 100% accurate. The same must be true of information produced from any database (which is after all dependant on human beings to input

data) and Mr Venables accepted that he has produced information in the past in relation to which he has had to give a suitable caveat.

5. The Home Office's position, confirmed by Mr Venables in evidence and accepted by the Tribunal, is that the information requested could be produced following the procedures described in paras 3 and 4 above which would take one of his team about 3 ½ hours, of which about a half would be spent writing the report (ie creating the software tool which would enable the information to be obtained from the database). Under the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the 2004 Regulations") the cost of that time would be estimated at a maximum of £87.50, which is nowhere near the limit provided for under section 12 of the 2000 Act. The Home Office's position is therefore necessarily not that the amount of work involved in answering Mr Leapman's request is excessive but that they do not "hold" the information he is requesting at all and would have to "create" it. We turn to the legal framework before considering the merits of that position.

The legal framework

6. It was agreed on all sides that the starting point is section 1(1) of the 2000 Act which provides:

Any person making a request for information to a public authority is entitled –

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

Section 1(4) makes clear that the information in respect of which an applicant is to be informed under section 1(1)(a), or which is to be communicated under section 1(1)(b), is "the information in question held at the time when the request is received." And section 84 defines "information" as "information recorded in any form".

7. Sections 11 and 12 of the Act also contain relevant provisions. Section 11(1) provides:

Where, on making his request for information the applicant expresses a preference for communication by ... the following means, namely-

...

(c) the provision to the applicant of a digest or summary of the information...

the public authority shall so far as reasonably practicable give effect to that preference.

Section 12(1) provides that section 1(1) "...does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit [currently £600]". Section 12(5) provides for the Secretary of State to make regulations in relation to estimating such costs. The 2004 Regulations have been made under that section; regulation 4(3) provides:

In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in-

(a) determining whether it holds the information,

(b) locating the information, or a document which may contain the information,

(c) retrieving the information, or a document which may contain the information, and

(d) extracting the information from a document containing it.

The word "document" is not defined for the purposes of the Act or the Regulations but Mr Lask for the Commissioner drew our attention to the definition of the word in the Civil Procedure Rules rule 31.4 as "anything in which information of any description is recorded..." and we see no reason to apply a different definition for the purposes of the 2004 Regulations.

8. As for relevant case law, our attention was drawn to the decision of the House of Lords in *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47 (which concerned the Freedom of Information (Scotland) Act 2002, whose provisions do not differ in any material respect from those in the 2000 Act with which we are concerned). We accept the submission of Mr Strachan for the Home Office that the House of Lords themselves in that case in effect accepted a submission that the obligations of public authorities are limited to information which is truly held by them and that they are not obliged by the legislation "...to conduct research or create new information on behalf of requesters". We note also that the

House went on to find that the process of “barnardising” information held by a public authority did not involve the creation of new information, but rather a change in the form in which the information might be provided (see opinion of Lord Hope at paras 14 and 15). We also note Lord Hope’s observation (also in para 15) that “[t]his part of the statutory regime should...be construed in as liberal a manner as possible”.

9. Our attention was also drawn to the helpful decision of a differently constituted Information Tribunal in *Johnson v Information Commissioner* (EA/2006/0085, 13.7.07). The information requested in that case was of a similar nature (ie numbers of transactions of a certain description in certain years: in that case claims struck out by individual Queen’s Bench Masters for each of the years 2001-4) and the Tribunal also had to consider whether it was held by the public authority in question, the Ministry of Justice. The Tribunal found that the information could not be obtained from the relevant database because “the relevant data [had] either not been input into the database, or it [had] not been input with the consistency necessary to obtain reliable results” (see para 44) but that the information was nevertheless “held” because it was available from the paper files kept in relation to each case from which the information requested could be extracted (see paras 45 to 50). On the facts of that case the Tribunal went on to find that the time which would be involved in extracting the information from the paper files was such that the appropriate limit for the purposes of section 12 of the 2000 Act was vastly exceeded and that the Ministry of Justice was not therefore obliged to supply the information requested.

Analysis and conclusions

10. The issue for this Tribunal is whether in the light of the facts and legal framework set out above the Commissioner made an error of law when concluding that the Home Office held the information requested by Mr Leapman.
11. Mr Strachan submitted forcefully that he did make such an error. He submitted (clearly rightly) that information coming within the disclosure obligation in section 1(1) of the 2000 Act had to be (a) of the description specified (b) held at the time the request was received and (c) recorded in some form. He submitted that the Commissioner had failed to distinguish properly in this case between information

held by a public authority at the time of the request on the one hand and “raw data” within the control of the public authority from which information requested could be “created” by manipulation or investigation of that data on the other. He argued that the former is within the scope of section 1 of the 2000 Act but the latter is not because it requires the authority to “create” the information requested. In this case neither the database itself nor the running of any existing report will expressly identify the figures which Mr Leapman wants and so they are neither “recorded” nor “held”. They can only be obtained by the use of considerable skill and judgment in writing a computer programme (ie a new report) to generate information for which the Home Office has no business requirement and which involves the creation of new information from the raw data. It cannot have been intended that the 2000 Act should require public authorities to undertake such an exercise in order to comply with a request for information under the Act.

12. It seems to the Tribunal that there is in reality no distinction between “information” held by a public authority and “raw data” held on a database which is itself held by the public authority, and the Tribunal considered that Mr Strachan was really forced to concede as much when he accepted that information which could be (but had not yet been) obtained by running an existing report but with different parameters was “held” by the Home Office. The suggestion that running an existing report to produce information would involve the “extraction” of existing information but that running a new report would involve “research” or the “creation” of new information was not one that the Tribunal could accept. In both cases information comes from the same database and no new information needs to be collected in order to obtain information by running a new report.

13. Since the Home Office’s database undoubtedly contains a record of each of the work permits granted to the named employers in the years in question, it seems to us that it must follow that the Home Office hold information as to how many such work permits were granted. It is quite clear (as Mr Lask submitted) from the whole scheme of the Act and section 11 in particular that the legislation is concerned with information as an abstract phenomenon (ie facts which are recorded) and not with documents or records as such. Thus the fact that the total number of permits is not recorded anywhere *as a number* is in our view irrelevant; the number is implicit in

the records of the relevant permits when put together and whether it comes in the form of a list of individual work permits or a total figure seems to us to be simply a matter of the form.

14. We accept that obtaining the information which Mr Leapman wants from the database will involve some skill and judgment on the part of Mr Venables and his team and that it is not information which the Home Office normally requires for its own business purposes but neither of these points seem to us to be of any relevance to the issue in question. As to the first, it is perfectly clear from section 12 of the Act and the 2004 Regulations that the legislation envisages that a public authority may be put to considerable work in complying with section 1 and there is no reason to suppose that it was not also envisaged that such work may involve skill and judgment. The exercise which Mr Venables and his team will have to go through seems to us to be covered precisely by the wording of regulation 4(3)(d) (“extracting the information from a document [which we accept can include a computer database] containing it”). If it would have involved a notional cost greater than £600 the Home Office would not have had to supply the information, but it is accepted that the cost of compliance in this case will come nowhere near that limit. The second point was put to us forcefully by the other witness for the Home Office, Mark Greenhorn, a Grade 6 within the Departments Science and Research Group but we cannot see that the Home Office’s normal business requirements have any relevance to the issue of whether they hold information or to their obligations under the Act. The Act was clearly designed to impose on public authorities obligations which may well go beyond those imposed by their normal business activities.
15. As to the concern mentioned in para 4 above about the accuracy of the information which will be disclosed we would make two brief remarks. First, on the facts we are satisfied that it will not be a problem to produce substantially reliable information. Second, if the records are faulty or inadequate and the information turns out therefore to be inaccurate that is irrelevant: the right under the Act is to information which is held, not information which is accurate.
16. We therefore conclude that the Home Office does hold the information requested in this case and that the Commissioner’s decision was correct. We are clear that to have reached the contrary conclusion would have involved a failure to construe this

part of the statutory regime “in as liberal a manner as possible”, as enjoined by Lord Hope.

17. The Home Office’s appeal must therefore be dismissed. Before the Commissioner and the Tribunal, the Home Office reserved its position in relation to whether they would seek to rely on sections 41 and/or 43 of the Act to exempt them from supplying the requested information. The Commissioner’s decision notice required the Home Office either to provide the requested information to Mr Leapman or to issue a refusal notice in accordance with section 17 of the Act (ie specifying the exemptions relied on). Given the additional delays that that procedure may now involve we consider that it is appropriate for this Tribunal to adjudicate on any exemptions relied on and to issue a substitute decision notice based on our conclusions on them, notwithstanding that we have dismissed the appeal (an approach contemplated we consider by the wording of section 58(1): “allow the appeal **or** substitute such other notice...”). We accordingly issue further directions as set out above which are consistent with discussions we held with counsel at the conclusion of the hearing.

18. Our decision is unanimous.

Signed

Murray Shanks

Deputy Chairman

Date: 15 August 2008