



Neutral citation number: [2023] UKFTT 00315 (GRC)

Case Reference: EA/2020/0347

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

Heard at: Field House, London

**Heard on: 19 October 2021
Decision given on: 27th March 2023**

Before

**TRIBUNAL JUDGE LYNN GRIFFIN
TRIBUNAL MEMBER KATE GRIMLEY-EVANS
TRIBUNAL MEMBER PIETER De WAAL**

Between

CHRIS SPIROPOULOS

Appellant

and

**1) INFORMATION COMMISSIONER
2) MINISTRY OF JUSTICE**

Respondents

Representation:

For the Appellant: in person

For the First Respondent: did not attend and was not represented

For the Second Respondent: Robert Cohen, counsel, instructed by the Government Legal Department

Decision: The appeal is dismissed.

Substituted Decision Notice: not applicable.

REASONS

The background to the appeal and the request for information

1. Mr Spiropoulos (“the appellant”) has made requests for information about faxes received by the County Court in central London using the GoldFax system that was in use by them in 2016. We understand that the appellant wishes to establish when a communication was received by the court in a civil case with which he was concerned.
2. On 23 August 2018 the appellant sent a request to the Ministry of Justice (“MOJ”). That request is not the request that concerns this Tribunal but it was in similar terms as follows,

“I would like to receive a copy of your GoldFax logs (08707394144) showing transmissions received for the following periods:

1. 12/7/16 between 22:00 and 23:00
2. 24/7/16 between 21:00 and 23:00
3. 30/10/16 between 13:00 and 14:00.”

3. On that occasion the MOJ said they did not hold information within the scope of the request. The appellant did not accept that response and made a complaint to the Information Commissioner who concluded that, on the balance of probabilities, the MOJ did not hold the information requested at the time of the request, in decision notice reference F850798333 which was issued on 14 March 2019. That is not the decision notice we are concerned with but it did concern an earlier composition of this Tribunal in appeal reference EA/2019/0102. That Tribunal concluded, on balance of probabilities, that the MOJ did not hold the information requested and dismissed the appeal. Permission to appeal to the Upper Tribunal was refused.
4. Three days after decision notice reference F850798333 was issued by the Information Commissioner the appellant wrote to the MOJ to request headed “Re. Freedom of Information Request” as follows

‘I would like to receive a copy of your GoldFax logs (08707394144) showing transmissions received for the following periods and relating to claim B30YP198. A copy of the actual document transmitted will do.

1. 12/7/16 between 22:00 and 23:00
2. 24/7/16 between 21:00 and 23:00
3. 30/10/16 between 13:00 and 14:00
4. 14/02/17 between 20:00 and 22:00
5. 04/12/17 between 24:00 and 01:00
6. 11/7/18 between 19:00 and 20:00
7. 22/8/18 between 22:00 and 23:00
8. 09/9/18 between 17:00 and 18:00’

This is the request for information which concerns this Tribunal.

5. On 4 May 2019 the MOJ responded to say that it did not hold the requested information, explaining that there was no legal or business requirement to do so and that FOIA does not oblige a public authority to create information to answer a request if the requested information is not held. The duty is to only provide the recorded information held.
6. The MOJ maintained this stance after conducting an internal review that was requested by the appellant. In the notification of that review dated 26 June 2019 the MOJ informed the appellant that

“As part of my review, I have looked at the search undertaken to see if any information is held. The search identified that the GoldFax service used cannot store sent and/or received faxes and is unable to restore faxes.”

7. The appellant was not satisfied with the response from the MOJ and complained to the Information Commissioner on 5 July 2019 who noted that some of the information requested was the same as the earlier request and contacted the appellant in that regard. In subsequent correspondence, he confirmed that the dates specified in this request intentionally overlap those in another request he had previously made to the MoJ, and that the request in this case additionally includes a court case reference.
8. In a letter to the ICO the appellant said he would not agree to resolve the matter informally in the light of the other overlapping request stating *“They will have to provide the information requested, or I will see them in court!”*. He went on to explain why he considered that the MOJ holds the requested information, as follows

“GoldFax is a fax server application package that runs on a Windows server and enables the sending and receiving of faxes. It is one of several packages in the market and its operation is similar. Besides keeping a copy of the actual file transmitted, GoldFax also by default keeps track of all faxing activity including the date, and the time of incoming and outgoing fax transmissions, as well as the duration, the name of the file, the sending and receiving fax numbers (unless deliberately withheld), and most importantly, whether the fax transmission was successful, as verified by the receiving fax machine/server.”

9. In the decision notice reference FS50856055 issued on 2 November 2020 the Information Commissioner concluded that the MOJ had complied with its duty under s1(1) FOIA because on the balance of probabilities, the MoJ does not hold the requested information and thus the Information Commissioner required no steps to be taken. This is the decision from which the appellant appeals to this Tribunal. In the decision notices it was stated that

Having considered all the factors applicable to this case, the Commissioner is satisfied that the similarity between this case and F850798333 is such that she is able to reach the same decision, a decision confirmed by the Tribunal, without the need for further analysis.

The appeal

10. The appeal was received by the Tribunal on 29 November 2020. The grounds set out therein state that the appellant's challenge to the decision is on the basis that
 - a. FOIA is about information so his request should be considered as a request for information and not documents, he said (emphasis in the original)

"6. It should also be understood that although the request mentions 'copies of fax logs', the scope of the request is not about any specific documents described as 'fax logs'. The request is about the information to be found in the specific fax logs, amongst other places. The FOIA is not about documents. It is about information.

7. Specifically, fax logs contain information about the metadata of specific fax transmissions, like the date and time of receipt, the number of pages, etc. The request specifically states that information about 'transmissions received' at specific time periods is what it is sought. That information is available and can be retrieved from several other places in this case. The MOJ has admitted that faxes received are always transferred to their email system, as well as the information being recorded in the case management system (Caseman). And, of course, there is a case file where all case specific information is held."
 - b. he said that he provided the case file reference in the Request and the information requested should be in that file but that it was not about access to the case file as that was just one place where the information requested might be found. Others were the MOJ email system and the "Caseman" system. Thus he argues that it is irrelevant that the logs may have been destroyed.
 - c. the MOJ could have dealt with this request as a Subject Access Request, or simply as a customer request for information relating to his pending case before the court.
11. In responding to the appeal on 4 February 2021, the Information Commissioner relied upon her decision notice and the findings in her previous decision that was considered by the Tribunal in EA/2019/0102. She went on to agree with the assertion that FOIA provides a general right of access to information rather than documentation but went on to point out that the terms of a request are "fundamental" to how that request should be considered by a public authority. It was submitted that where a request is made for a specific document then the scope of the request is limited to that document and the public authority's only obligation is to consider the release of the recorded information in that document for release. It will not have to check whether it holds any other relevant information elsewhere in its records, and relied upon the guidance in her document "The right to recorded information and requests for documents".
12. The Information Commissioner submitted that the inclusion of the case reference number in the request does not have the effect for which the appellant argues because "whilst it is possible that the particular case file may include the information which the appellant appears to want to secure it does not follow that that is what he in fact requested." She argues that the Appellant has asked for a copy of 'GoldFax logs', specifically, those within a specific time period and relating to a particular court case.

This means that the Appellant is requesting the information within any GoldFax logs which meets those further criteria. In the Commissioner's submission, it does not mean that if the public authority holds any information which might have been within the GoldFax logs but held elsewhere that the public authority should search for such information and/ or that the Appellant is entitled to it if held (subject of course to any applicable exemptions).

13. In addition the Information Commissioner

- a. invited the appellant to consider whether he should make a subject access request under data protection legislation which, it was suggested was a more appropriate mechanism for finding out whether the court file includes information that related to him
- b. pointed out that section 32 FOIA provides for an absolute exemption for certain court records in any event
- c. noted that section 40 FOIA (personal data) may also be applicable, such as to operate to prevent the MOJ disclosing the information the appellant wished to obtain.

14. The MOJ was joined as a party to the appeal by directions dated 10 February 2021. The MOJ's response to the appeal adopted much that had been submitted by the Information Commissioner and emphasised

- a. *"The request referred to 'GoldFax logs'. It was not a wider request for other information. It did not request, for instance, information as to the content of any files.*
- b. *In any event, and even if the Appellant had requested the content of files, it would have been refused under FOIA. The contents of the files would have been personal information. They would also have been available to the Appellant by other means."*

15. We note that in correspondence with the ICO the appellant had said

"I have made a request to the county court for the specific information. I'm not going to bother whether it is under the ?subject access? (sic) or the FOIA. They could have taken it under any of the above, or simply forget the legalities and simply provide the information requested without any fuss."

The hearing and the evidence

16. The hearing of this appeal took place at Field House in London. The appellant represented himself. The Information Commissioner was not represented and had indicated that she did not intend to participate and was content to rely on her written submissions. The MOJ was represented by counsel, Mr Cohen, who was delayed in his arrival for which he apologised. However that delay did not prejudice the Tribunal's ability to consider the matter fully given the time that had been set aside for the hearing.

17. At the start of the hearing the appellant made an application that the Tribunal should recuse itself. He submitted, in essence, that the Tribunal could not be impartial because the second respondent paid the fees/salary of the panel and would therefore be able to influence the outcome of the case. He said this offended the principle of impartiality and that no man should be a judge in his own cause. In response it was submitted that the appropriate test to be applied was whether the fair minded and informed observer would see a real possibility of bias as described in the case of Porter v Magill [2001] UKHL 67; [2002] 2 AC 357. It was submitted that the independence of judicial office holders was clear from the oath of office, and the lack of any managerial control by the Ministry of Justice there was no possibility or appearance of bias.
18. Having retired to consider the submissions the Tribunal declined to recuse ourselves. We agree that the test is that set out in Porter v Magill. We asked ourselves the following question; Would a fair minded and informed observer, having considered the facts, conclude that there was a real possibility of bias? That informed observer would know of the following facts
 - a. The words of the judicial oath of office taken by all judicial office holders whether legal or non legal to act without fear or favour, affection or ill will
 - b. Judicial office holders are not told what to do by the MOJ which has no management role which is undertaken by leadership judges who are in turn responsible to the Senior President of Tribunals and Lord Chief Justice
 - c. The independence of judiciary from executive influence is fundamental to the constitution as enshrined in the Constitutional Reform Act 2005
 - d. The MOJ has no influence on the outcome of any case, nor in this case beyond that of any party in Tribunal proceedings.

In the light of those facts we concluded that the fair minded and informed observer, having considered the facts, would not conclude that there was a real possibility of bias. We therefore refused the appellant's application and proceeded with the hearing.

19. I apologise to the parties for the time it has taken to reduce this decision to writing for it to be promulgated.
20. Before the hearing we had received a bundle of documents of 108 pages including index. We also received from the appellant a copy of the ICO Code of Practice on request handling and their guidance on the right to recorded information and requests for documents.
21. The bundle of documents contained 2 witness statements tendered on behalf of the second respondent from Ian Byfield and Michael Cranwell who both gave evidence to us.

The facts

22. Mr Cranwell's witness statement had been prepared for other proceedings but he confirmed to us that it was still true and correct. He is an Operational Support Officer in the South East Regional Support Unit of (what was at the time) Her Majesty's Courts and Tribunals Service ("HMCTS") a role he had held for over 7 years. He had handled the investigation into the appellant's original request for information (considered by the Tribunal in EA/2019/0102) and prepared the response to that request on behalf of the MOJ as well as providing the records that were created when handling the FOIA request to the person who conducted the Internal Review. He had also responded to the questions that were posed of the MOJ by the Tribunal in that earlier case, this was the purpose of his witness statement. He had not dealt with the request under FOIA with which this Tribunal is concerned. Mr Cranwell was cross examined by the appellant and asked questions by the Tribunal.
23. Mr Byfield is Operations Manager for the Central London County Court ("CLCC"). Mr Byfield had not been involved in taking the decision about how to respond to either of the appellant's requests for information. In his witness statement dated 6 April 2021 Mr Byfield said that the appellant could make a request to see the court file in the claim with which he is concerned, and provided the telephone number for him to request a supervised viewing. Mr Byfield was cross examined and asked questions by the Tribunal. During cross examination he tendered an apology to the appellant that the phone had not been answered when he had tried to call.
24. On the basis of all of the evidence we find the facts to be as follows
 - a. Atos IT Services UK ("Atos") is an information technology services company which was formally contracted to provide IT services to the MOJ. Atos arranged the provision of the GoldFax solution to the MOJ for use in the Courts.
 - b. GoldFax was set up for each court in 2010 and was in use in 2016. However GoldFax is no longer in use in the Courts, having been decommissioned in early 2019.
 - c. The GoldFax system operates such that faxes (facsimile transmissions) received were sent as emails to a specific email inbox, "the Enquiry email inbox".
 - d. The GoldFax solution had no general capability of storing sent or received faxes, this has been confirmed by Atos. GoldFax provided for the MOJ was configured to retain electronic data of faxes sent and received for a period of thirty days. There was no database in place, where copies of the content of faxes were stored.
 - e. There was no requirement for the storing of faxes on the GoldFax system. Reports of the records of faxes sent and received were saved and retained for a period of thirty days, after which these reports were deleted. In the case of Gold fax as provided to MOJ, the "GoldFax client" functionality, which could have given court staff access to the report, was not installed so the report for

the preceding thirty days would have been accessible by Atos administrative users only. This could have been provided at that time by Atos to court staff if requested.

- f. CLCC printed case-related documents which were matched with the file and stored according to file-retention policies for HMCTS.
- g. The CLCC delivery manager from HMCTS checked the court's management system called "Caseman". The application notice with which the appellant is concerned that was sent on 30 October 2016 was recorded on the Caseman system on 1 November 2016.
- h. Copies of documents received via GoldFax are placed in the case file. The delivery manager also checked the hard copy file and this only showed receipt of the application notice sent on 30 October 2016.
- i. The inbox for the CLCC is robustly managed to ensure it does not exceed its data capacity. Emails over a couple of months old are deleted to prevent it "crashing", there is no specific policy for the CLCC on that topic. CLCC deletes files after 2 months. CLCC applies HMCTS retention policies for digital files.
- j. Court files may be viewed under supervision, that is the procedure for all file views because in the past people have tried to take documents from court files or to add documents to the file. If a person wants a copy of data that relates to them they can make a subject access request to HMCTS.
- k. The Knowledge Information Liaison Officers ("KILO") make decisions about what documents can be released when a subject access request is made to HMCTS.
- l. The CLCC maintains hard copy files which are routinely destroyed in accordance with retention policies. For the types of files with which we are concerned if the matter is over 3 years old and there has been no action on the file in the past 12 months they are disposed of.

The Legal Framework

25. Section 1(1) FOIA states

"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."

26. In determining whether or not information is held by a public authority the Tribunal applies the balance of probabilities, asking itself is it more likely than not that the information is held. This is the civil standard of proof. It is not a question of certainty

especially in a large or complex organisation. As pointed out in the case of Linda Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072; 31 August 2007) there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records.

27. Thus the Tribunal approaches the issue by considering all of the circumstances. A number of factors will be relevant to the issue such as

- a. the quality of the public authority's initial analysis of the request,
- b. the scope of the search that it decided to make on the basis of that analysis,
- c. the rigour and efficiency with which the search was then conducted
- d. the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light.

28. Section 16 FOIA states

“16 Duty to provide advice and assistance.

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.”

29. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

“If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law,
or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

Submissions

30. At the hearing the parties supplemented their written submissions in closing oral submissions.

31. The MOJ submissions included

- a. The request was clearly for a copy of GoldFax logs showing transmissions received during specified time periods and relating to claim B30YP198.
- b. The request in this case was essentially the same as that previously made and considered by the Tribunal in EA/2019/0102.
- c. The file had not been re-examined for the purposes of this request because the request does not say that the appellant wanted a copy of the application notice and proof of the time received. It was unlikely that the file would contain a documents not on the list within the civil procedure rules such as a list of faxes sent and/or received.

32. Mr Spiropoulos' submissions included

- a. The Tribunal should consider the terms of his request, he stated his request in plain English that he wanted the information on the case logs. By saying that a copy of the document would do he meant that a person should go into the file and find the information in the documents; he did not care about the document himself but the information would tell him when a document arrived, the number of pages that arrived and if they arrived correctly. Either that or he should have been provided with the meta data in the logs.
- b. If the information was not held they should have looked elsewhere for it.
- c. Information within the objective meaning of the request is within its scope.
- d. There should be a database of images of the faxes received as opposed to an SQL database, this was what he was asking for in his request.
- e. Everything sent to a court should be retained as it is required for business.
- f. It was not up to the requestor to define the relevant regulations under which to disclose the information it was up to the authority. He did not care what legislation was applied to allow him access to the information he was seeking.
- g. If the public authority was unclear about the scope of the request they could have sought clarification from him as they were obligated under s16 FOIA.

The issues

33. The Tribunal's role is to decide whether the Information Commissioner's decision notice was wrong in law or involved a wrongful exercise of her discretion. The Tribunal is entitled to review any finding of fact and will reach its own conclusions on the issues.
34. The central issue of fact for us is to determine whether at the date of the request it is more likely than not that the MOJ held the information requested.
35. The appellant raised an issue about the duty to provide advice and assistance at the hearing that did not form part of his grounds of appeal.

Analysis and conclusions

36. If a person wishes to obtain a piece of information from a person or organisation that holds it, there are different options open to them according to the nature of the information they wish to obtain. These include the following options relevant in this case, others may apply to information such as medical records
- a. If it is their own personal data (information that relates to them) they can make a subject access request to the data controller under the data protection legislation, to be sent a copy as the data subject (the person who the information is about).
 - b. If it is information in a court file they may choose to apply to the court under the principles of open justice for a copy of that document or the court may allow a party in a case to view the file under supervision.
 - c. If the information is held by a public authority then the person may choose to make a request under FOIA for disclosure, which is treated as to the world.
37. Each of the mechanisms to obtain information have their own legal framework attached to them.
38. The request with which this Tribunal is concerned was plainly made under the legislative scheme set out in FOIA. The request asked for copies of GoldFax logs which were not held for longer than 30 days.
39. In case EA/2019/0102 the Tribunal held at paragraph 28

28. In relation to the scope of the request and what searches should have been made for the information, we reject the Appellant's argument that the scope of the request would have required a search of his individual case file. His request for information specifically refers to 'GoldFax logs' from certain dates. The correct reading of the request, in our view, was that the Appellant was seeking all the logs from the periods referred to. There was nothing in the request that pointed the MOJ to a specific case or case file where a record of a fax transmission might be found, and the MOJ and the Commissioner were right not to assume that the Appellant wanted records relating to a particular case.

40. In this case that missing case file number was given by the appellant in his request and the hard copy file was checked by the delivery manager revealing only receipt of the application notice sent on 30 October 2016. Furthermore, the CLCC delivery manager also checked the court's management system called "Caseman". The application notice with which the appellant is concerned that was sent on 30 October 2016 was recorded on the Caseman system on 1 November 2016.
41. We note that in the decision refusing the appellant permission to appeal from the decision in EA/2019/0102 Upper Tribunal Judge Jacobs said

"The Tribunal [in EA/2019/0102] also rejected Mr Spiropoulos's argument that his request should have been interpreted to include his individual case file; he repeated this argument to me. The Tribunal's reasons are at paragraph 28. If that was what he had wanted, he could have easily have limited his request or added a specific reference to his case file. It may be

possible to speculate why he was asking for the information in the logs, but he chose to frame his request as he did. Once Mr Spiropoulos identified his case file, a search was made. He does not trust the answer he was given and told me that to him words did not mean anything. If that is his view he needs to try to obtain a copy of his file. The Tribunal told him (at paragraph 29) that he can ask the court administration for a copy of his file or make a subject access request under the Data Protection Act 2018. Either is a more appropriate approach than the Freedom of Information Act 2000."

42. Once again Mr Spiropoulos pursues an appeal because he does not trust that the answers he has been given are accurate. The system in connection with GoldFax has been explained and also how HMCTS dealt with the deletion of the GoldFax logs which is what he had requested.
43. We appreciate that he was attempting to establish whether certain communications from him to the CLCC in relation to the claim had been received via the GoldFax system in the time periods set out in his request but he has an answer to that, the file has been examined and the only communication present is that sent on 30 October 2016. If he wanted to look at the file for himself he could have tried to contact HMCTS on more than one occasion by phone or used another medium of communication.
44. On the basis of the facts as we find them to be the MOJ did hold the application sent by fax on 30 October 2016. However the request was clear, there is no ambiguity, the appellant was requesting information from within the logs about receipts that met his time criteria.
45. If it is clear that the scope of the request is limited to a specific document (or documents), then the authority's only obligation is to consider the release of the recorded information in that document (or documents) for release. It won't have to check whether it holds any other relevant information elsewhere in its records. See further, paragraphs 26 and 27 of "The right to recorded information and requests for documents Version: 1" to which the appellant drew our attention and itself draws on previous decisions of this tribunal.
46. The scope of the request was clear, being for a copy of the GoldFax logs to a certain number for specific time periods in relation to a specific claim. In the request the appellant said he would be satisfied with a copy of any document received in the specified period; it is clear to us that his initial intention was to extract the details of the time of receipt from any document received on the assumption that the document would be date and time stamped in the fax transmission process. The appellant stated as much to us in explaining that he was not interested in a copy of the document. What the appellant was requesting clearly was the log of time of receipt, that would not be achieved by providing him with a copy of the application. The appellant described it as asking for the "metadata" about when a fax was received, the name of the file and how many pages and how big the file was. Provision of a document will not answer that request as recognised by the appellant in his submission that he wanted information and not documents.

47. On the basis of the available evidence we are satisfied that, on the balance of probabilities, the MOJ does not hold information sought within the scope of the request.
48. As to the provision of advice and assistance, this was an issue that was raised by the appellant for the first time at the hearing on the premise that if the request was unclear the MOJ had a duty to clarify it with him pursuant to s.16 FOIA. The important aspect here is the clarity of the request and we have decided the request was clear. There was therefore no duty to clarify its contents.
49. Our function is not to determine whether the file should have been disclosed via another legal mechanism but we would observe that a request for information does not have to include the phrase 'subject access request', to be properly categorised as such. It just needs to be clear that the individual is asking for their own personal data. A request may be a valid subject access request even if it refers to other legislation, such as the Freedom of Information Act 2000 (FOIA). We agree that it is important to be rigorous in establishing the proper legal foundation for sharing of information given, inter alia, the fact that disclosure under FOIA is to the world. That is not pedantry but good practice in information management.
50. For these reasons we find that the Information Commissioner's decision notice FS50856055 did not contain an error of law, nor a wrongful exercise of discretion and we dismiss the appeal.

Signed

Judge Griffin

Date: 24 March 2023