IN THE FIRST-TIER TRIBUNAL **Appeal No: EA/2013/0258**
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50490148
Dated: 12 November 2013

Appellant:	**John Illingworth**
Respondent:	**The Information Commissioner**
Date of hearing:	**23 April 2014**
Venue:	**Magistrates Court, Leeds**
Representation:	**Appellant in person** **Respondent unrepresented**

Before

HH Judge Shanks

Judge

and

Michael Hake and **Paul Taylor**

Tribunal Members

Date of Decision: **29 April 2014**

Subject matter:

Freedom of Information Act 2000

s.12	Cost of compliance and appropriate limit

Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (SI 2004/3244) regulations 4 and 5.

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal allows Mr Illingworth's appeal and substitutes the following decision notice in place of the Commissioner's decision notice dated 12 November 2013.

SUBSTITUTED DECISION NOTICE

Public Authority: NHS Commissioning Board

Complainant: John Illingworth

The Substituted Decision

For the reasons set out below, the Tribunal finds that the Complainant's requests for information A2-4 and A6-10 and B1-6 as set out in the Annex to the Commissioner's decision notice dated 12 November 2013 were not dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000.

Action required

In so far as the information covered by those requests has not already been supplied to the Complainant the Public Authority must by 16.00 on 30 May 2014 supply such information or serve a suitable notice under section 17(1) of the Act in respect of any information not supplied.

HH Judge Shanks
29 April 2014

REASONS FOR DECISION

Factual background

1. In May 2008 the NHS started a national review of paediatric cardiac surgery provision called the "Safe and Sustainable" review. The review was carried out by a Joint Committee of Primary Care Trusts (JCPCT), which included representatives from all the English Strategic Health Authorities, and was managed by the NHS Specialised Commissioning Team (NSCT), who were "hosted" by NHS London. On 4 July 2012 the JCPCT decided that paediatric cardiac surgery should be concentrated onto fewer sites and that an existing unit in Leeds (among others) should be closed. For various reasons, that closure was not put into effect and the review was abandoned in June 2013. Following a major NHS reorganisation the JCPCT, the NSCT and NHS London ceased to exist at the end of April 2013; at least so far as this matter is concerned, the NHS Commissioning Board (or NHS England) have in effect succeeded to the responsibilities of the NSCT and NHS London.

2. The Appellant, John Illingworth, is a long standing Leeds City councillor. He is the chairman of the Joint Health Overview and Scrutiny Committee for Yorkshire and Humberside (JHOSC), a body established in 2011 under the Health and Social Care Act 2001 in reponse to the review to scrutinise NHS policy in relation to paediatric cardiac surgery in the region. It is clear that he is highly critical of the JCPCT's decision to close the Leeds site and the process by which it was reached and it is his view that there was inadequate public scrutiny of that process. He fears that the underlying assumptions on which the members of the JCPCT and officials were working will continue to influence NHS policy in future and he therefore continues to want to know more about how their decisions were reached.

3. In his capacity as chairman of the JHOSC Mr Illingworth had regular exchanges with and sought information from those responsible for the review, as he was entitled to do

under the relevant regulations (now regs 26 and 27 of the Local Authority (Public Health, Health and Wellbeing Boards and Health Scrutiny) Regulations 2013 (SI 2013/218). It seems that he was increasingly unhappy with the responses he received from officials and, rather than seeking to enforce the JHOSC's rights under the regulations through expensive and difficult judicial review proceedings, he resorted to seeking information in a personal capacity through the rights given to all citizens under the Freedom of Information Act 2000.

4. Following a request under the FOIA, on 21 December 2012 Mr Illingworth was sent a large bundle of hard copy documents weighing 18 kg under cover of a letter from the Chief Executive of NHS London, Dame Ruth Carnall. We accept his evidence that he had requested that this material should be supplied to him in electronic form. The material supplied gave rise to a large amount of comment and further questions by Mr Illingworth which were set out in a 14 page letter dated 17 January 2013.

5. This appeal is concerned with a series of requests for information contained in that letter and a series of emails from Mr Illingworth to officials in the NSCT sent between 21 January and 15 March 2013. There were also two further requests for information made by other councillors dated 8 and 21 February 2013 respectively (requests A5 and A11) which are relevant.

6. The NSCT responded to these requests by refusing to supply the requested information in reliance on section 12 of the Freedom of Information Act 2000 ("Exemption where cost of compliance exceeds appropriate limit"). In a letter dated 22 February 2013 they stated that they estimated that handling the requests sent between 17 January and 8 February 2013 would take "**at least 15 full working days** (much more than the 18 hours prescribed under the Fees Regulations), and … involve multiple staff members"; and in a letter dated 28 March 2013 they stated that complying with the March requests alone would take a further 118 hours, which they said they were in any event entitled to aggregate with the time required to handle the earlier requests.

7. The issue on this appeal, as before the Information Commissioner, is whether in fact the NSCT were entitled to rely on section 12 to refuse to comply with Mr Illingworth's requests for information.

Applicable law

8. Section 12(1) of the Act provides that a public authority is not obliged to comply with a request for information under the Act if the authority estimates that the cost of complying with it would exceed the "appropriate limit".

9. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (SI 2004/3244) provide that the appropriate limit is £450 in relation to the a public authority like the NHS and that the time costs of staff are to be estimated at the rate of £25 per person per hour: hence the 18 hours referred to by the NSCT. The regulations also provide (so far as relevant) as follows:

> **4 … (3) … 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 ...**
>
> **(c) retrieving the information …**
>
> **(d) extracting the information from a document containing it.**
>
> **5(1) In circumstances in which this regulation applies, where two or more requests for information … are made to the public authority –**
>
> **(a) by one person, or**
>
> **(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,**
>
> **the estimated cost of complying with any of the requests is to be the total costs which may be taken into account by the authority … of complying with all of them.**
>
> **(2) This regulation applies in circumstances in which-**

(a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and

(b) those requests are received by the public authority within any period of sixty consecutive days.

10. We make the following points in relation to these provisions:

(1) The estimate is one that must be made by the public authority at the time it seeks to rely on the provision to refuse to supply the information requested and it must necessarily relate to the position as it is at that time;

(2) The estimate must relate to costs *reasonably* expected to be incurred: the Commissioner and the Tribunal are thus able to review the estimate and must do so as at the date of the refusal (ie March 2013 in this case);

(3) The costs of considering whether any other exemption might apply to the information requested or of redacting information to which such an exemption might apply *cannot* be included;

(4) Although the Commissioner is correct to point out in his decision notice (at para 21) the apparent tension between the 60 working day period referred to in regulation 5(2)(b) and the requirement that public authorities respond to requests under the Act within 20 working days, we do not see that there is any statutory justification for the approach in his guidance of allowing the "aggregation period" to run "forward" for only 20 days but "backwards" for 60 days; in other words, if a request on a certain date has not been complied with and a further request is made 59 working days later which would result in an overall estimate greater than the appropriate limit when the two are properly aggregated, it seems to us that there is nothing to stop the public authority then refusing to comply with either request;

(5) Under the regulations, requests which can be aggregated are those which "relate, to any extent, to the same or similar information". It seems clear that such requests do not have to be requests *for* the same or similar information (or the provision about the "same … information" would be otiose, since obtaining the same information would presumably add

nothing to the costs); however, we do not agree with the implied conclusion of the Commissioner in para 16 of his decision notice that it is necessarily sufficient that two requests are "on the same theme".

The application to the Commissioner and the appeal to the Tribunal

11. In due course Mr Illingworth complained to the Commissioner about the NSCT's response to his requests under section 50 of the FOIA. By letter dated 4 October 2013 NHS England provided the Commissioner with detailed representations, including a 23 page schedule setting out the relevant requests and their then estimate of time to respond to each: the totals were 138 hours in respect of the January and February requests and 96 hours in respect of the March requests. In his decision notice dated 12 November 2013 the Commissioner:

    (1) found that, with the exception of the request dated 21 February 2013 which was more than 20 working days after the first in the series, the NHS were entitled to aggregate the costs of dealing with the January and February requests and the March requests respectively, on the basis that they were all "on the same theme";

    (2) apparently accepted the NHS's position that the figures put forward were derived from prior experience or the best judgment of those responsible for the information in question and that the estimates represented the quickest method of gathering the information;

    (3) noted that part of the time estimated related to considering exemptions and to scanning documents which in his view would not come within the time permitted by the 2004 regulations;

    (4) took into account points made by Mr Illingworth (in particular that a number of the requests were not new requests but related to the handling of past requests, that much of the requested information was held electronically and it would therefore be simple to find and extract information, and that a limited pool of individuals would be responsible for holding the information in question);

(5) nevertheless reached the view, while having reservations about parts of the estimates, that, given the overall number of requests and the activities which were allowed to be included under the 2004 regulations and given that even if the estimates for the two groups of requests were halved or cut by two-thirds they would still exceed the permitted 18 hours, the NHS were entitled to rely on section 12 in respect of all the requests.

The Commissioner annexed to his decision notice a list of the requests whose numbering we have adopted.

12. Nothing daunted, on 29 November 2013 Mr Illingworth appealed against the decision notice to this Tribunal. The main points made in his notice of appeal were (1) that the NHS had hugely exaggerated the amount of time required to locate the information; (2) that the requests were for "highly disparate information" (and could not therefore be aggregated); and (3) that the NSCT had not assisted him but had in effect obstructed him. The notice of appeal included nearly 100 pages of annexed documents providing very full details of his position.

13. Both Mr Illingworth and the Commissioner (in his Response) invited the Tribunal to add the NHS as a Respondent to the appeal but in a case management note issued on 29 January 2014 the Tribunal's Registrar noted that the public authority would have been told about the appeal but had made no application to be joined and stated that in the circumstances to join them would be disproportionate.

14. Mr Illingworth renewed his application to join the NHS to the Chamber President but on 14 February 2014 Judge Warren stated that in his view the proportionate procedure was for Mr Illingworth to pose written questions to the NHS requiring answers within 14 days (and to include a copy of his case management note). Judge Warren also stated that if he remained dissatisfied it was open to Mr Illingworth to make a fresh application. On 26 February 2014 Mr Illingworth produced a detailed list of questions in accordance with Judge Warren's proposal which were sent to the NHS. They were not answered until 23 April 2014, the day of the hearing. The answer

attached a copy of the 23 page schedule to which we refer above which we will refer to as the NHS schedule.

15. In the meantime, on 9 April 2014 the Commissioner served his written submissions in accordance with the Registrar's case management note and on 11 April 2014 he notified the Tribunal that, while of course intending no disrespect, he would not be attending the hearing.

16. Mr Illingworth's written submissions were served on 14 April 2014, he having been allowed an extension in light of the failure of the NHS at that stage to answer his questions. They included a further application that NHS England should be made a party to the proceedings on the basis that he was challenging the evidence they had put before the Commissioner and, given that the Commissioner would not be at the hearing, he would be faced with the " … farcical position of making serious complaints but having nobody to complain to!". Although we felt some sympathy with his position as so expressed, we thought it unlikely that in fact Mr Illingworth would suffer any prejudice as a consequence of the NHS not being a party to the appeal and we therefore proceeded with the hearing without at that stage acceding to his application, while formally reserving the position.

17. The hearing therefore took place on 23 April 2014 over some three hours in Leeds with only Mr Illingworth and his supporters present apart from the Tribunal members and staff. We formed the view that Mr Illingworth knew what he was talking about and had some considerable (albeit he was modest about it) experience of websites and the electronic data held by public authorities and the way information can be extracted from them. He was able to make detailed, cogent and impressive submissions. On the other side we were necessarily entirely reliant on the written material put forward by the Commissioner and the NHS.

<u>The Tribunal's findings</u>

18. As we have already indicated, in our view there were two errors of law in the Commissioner's decision notice, one favouring Mr Illingworth and the other favouring the NHS, which would incline us to look again at his decision: (a) it was not necessarily sufficient that all the requests were "on the same theme" but (b) in our view there was no reason why all requests falling within a 60 working day period (as these did) should not be aggregated (assuming of course the other conditions in the 2004 regulations were fulfilled). Furthermore, it is in any event open to this Tribunal on an appeal to review any finding of fact by the Commissioner in the light of all the evidence now before it (see section 58(2) FOIA).

19. So far as the figures presented to the Commissioner by the NHS were concerned, there were a number of figures which in our view were obviously unsustainable:

    (1) On 21 January 2013 Mr Illingworth requested copies of the self-assessment documents produced by 11 hospitals which the Kennedy Panel were assessing (request A2). The NHS schedule estimates that this request would take 24-29 hours to respond to. Mr Illingworth says that these documents were "high profile electronic documents" and could have been located electronically and "dragged and dropped" within less than a minute each. The NHS say that some of them were supplied to them only in hard copy but, if that was so, we accept Mr Illingworth's point that they were of central importance in the review process and would nevertheless have been easily accessible in the NSCT records. It appears from the NHS schedule that the bulk of the 24-29 hours that they rely on would comprise time spent checking with the hospital trusts whether they were happy for the information to be released and reviewing the documents for "patient identifiable data". It is clear that those activities relate to the possible application of other exemptions and are not ones that can be taken into account under the 2004 regulations. We are therefore quite satisfied that the time that could be properly taken into account in respect of this request was indeed a matter of minutes and nothing like the 24-29 hours put forward by the NHS.

(2) On 5 February 2013 Mr Illingworth asked for electronic versions of the material which had been disclosed to him on 21 December 2012 (request A4). The NHS schedule estimates that this would take 24-32 hours to respond to. We accept Mr Illingworth's point that it was inappropriate to include this request since he had asked for this material in electronic form before 21 December 2012 but, in any event, the bulk of the time estimated by the NHS was the time it would take to scan the 18 kg of documents already supplied. Since, as we accept, these documents would undoubtedly have been held by the NHS in electronic form already the inclusion of the time it would take to scan hard copies is, in our view, clearly inappropriate.

(3) On 15 March 2013 Mr Ilingworth requested copies of all email correspondence between NSCT officials and members of the various committees and groups set up as part of the review process (request B6). The NHS schedule estimates that this would take 40 hours to respond to, since 11 mailboxes would "need to be checked against the names of all members of the groups (around 100 people)". We agree with Mr Illingworth that the NHS must have been able to carry out electronic searches, whether by means of "e-discovery" software and/or through the email server, which would have made the amount of work involved very much less than 40 hours. Further, the NHS schedule states in terms that the time estimate includes the time needed to "… ascertain whether any FOI exemptions apply…": again, it is clear that this is not time which can be legitimately included under the 2004 Regulations.

20. Given those points, we have felt it right to look more closely at all the figures put before the Commissioner by the NHS. In doing so we have taken into account (a) that the relevant time for considering the reasonableness of the estimates put forward was March 2013 (ie before the NHS re-organisation) (b) Mr Illingworth's evidence that a small group of very professional officials at NSCT was responsible for the Safe and Sustainable review and they would have had an intimate knowledge of relevant documents and information and (c) his general point that an organisation as sophisticated and large as the NHS could reasonably be expected to keep its data in an

organised, accessible and up-to-date way. In summary, our conclusions (by reference to the Commissioner's schedule of requests) are these:

Group A (January and February requests)

1. A large number of requests for information (or questions) contained in a long letter dated 17 January 2013 from Mr Illingworth to Dame Ruth Carnall, the Chief Executive of NHS London; the NHS schedule estimates over 30 hours to respond; Mr Illingworth's case is that this letter was not intended or initially treated as a request for information under the FOIA and that the only matters which can be considered as such requests are for a corrected copy of table 4.2 of the Health Impact Assessment and electronic versions of the material supplied on 21 December 2012, which were the subject of existing requests for information in any event, or (it seems) were the subject of other requests which are aggregated (requests A6-9); in the absence of oral representations the other way and having regard to the general tenor of the letter and the background we are inclined to accept Mr Illingworth's position on the letter dated 17 January 2013 and discount it for these purposes.

2. see above: para 19(1).

3. There is no estimate in the NHS schedule in relation to this "request"; in any event, when read in context it appears to be a follow up to an earlier request.

4. see above: para 19(2).

5 to 10. These requests were all made on 8 February 2013 and they all relate to documents on the "Safe and Sustainable" review website and in particular the terms of reference relating to panels or committees and who drafted them and approved them and the membership of the panels; the NHS schedule estimates that they would take about 45 hours in all to respond to. Mr Illingworth says, based on his own experience, that it would be easy to find the equivalent information in relation to Leeds City Council, "a morning's work at most." We find it difficult to reach any firm conclusion on this group of requests but, giving detailed consideration to some of the items, it is Mr Taylor's considered view, which the other members of the Tribunal endorse, that request A5(1) could be dealt with in 30 mins not 2 hours, request A5(7) could be dealt with in 15 mins not 1 hour and request A10 could be dealt with in 12 mins not 4 hours; taking those figures into account and having regard to the background of excessive estimates we have referred to, we are prepared to accept that

a true reasonable estimate would be much closer to Mr Illingworth's figure than the NHS's.

11. These requests were made by another councillor and the NHS schedule does not provide any estimate in respect of them; in any event, request A11(2) appears to cover the same information as request A2 and similar arguments are likely to apply in relation to request A11(1).

Group B (March requests)

1. Requests for information about the assessment criteria used by the Kennedy panel; NHS estimate 8 hours to respond; Mr Illingworth was frank in stating that his belief was that KPMG wrote the assessment criteria without input from the panel and that highlighting this was the real purpose of his request; this is obviously a dangerous way to use the FOIA when it comes to consideration of the section 12 or 14 exemptions, but we accept his evidence that officials at the NSCT would have known the answer to the requests or where to look very quickly.

2. Request for copies of official correspondence about the review between NSCT officials and various named individuals and organisations; NHS estimate a total of 46 hours to respond; this request largely overlaps with request B6 and the points made about that request apply (see para 19(3) above); in relation to correspondence with "participating hospitals and NHS trusts" the NHS allowed 15 hours for reading all emails to establish relevance to the review: given the possibilities of electronic search methods we do not see why it would have been necessary to read each email in the way suggested to establish relevance.

3 & 4. Requests for information about meetings of the JCPCT (in particular copies of notices advertising them and details of attendance); the NHS estimate 4 hours total to respond; Mr Illingworth was frank in stating that his purpose in making these requests was to highlight his political point that only two such meetings were held in public; that is obviously a dangerous way to use the FOIA when it comes to consideration of the section 12 or 14 exemptions, but we accept his evidence that there were indeed only two relevant meetings and that the officials at NSCT would have been aware of that and we accept that any recorded information about these meetings ought to have been readily accessible to them.

5. Requests for information about payments to Graylings PR company; NHS estimate 8 hours; the Tribunal considers that it would have been possible to obtain the information by a creditor invoice search in a matter of minutes.

6. see above: para 19(3).

21. Having regard to those conclusions we do not think that it would have taken more than 18 hours (or effectively 2 ½ days) for a reasonably well-informed and conscientious official to locate, retrieve and/or extract the information which is the subject of both the Group A and Group B requests or that the NHS, properly applying its collective mind to the issue, should reasonably have so estimated. Thus, even aggregating the time for dealing with *all* the requests, it was not in our view open to the NHS to rely on section 12 of FOIA and we disagree with the Commissioner's decision to the contrary. In the circumstances it is unnecessary for us to consider Mr Illingworth's submission that the requests are for highly disparate information and that the time to deal with them cannot therefore be aggregated, although there may well be a good argument for saying that, for example, requests B2 and 6 and requests A5-10 respectively do not relate to the same or similar information.

22. There is also obviously no need for us to accede to Mr Illingworth's application to join the NHS to the appeal. We have, however, considered whether in fairness to the NHS we ought of our own motion to join them to the appeal and give them a further opportunity to make representations or present evidence. In the light of the procedural history which we recite at paras 11 to 17 above and in particular the fact that the NHS had a number of opportunities to apply to be joined which they did not take, we are satisfied that no injustice will have been done to them and that we have reached a fair and proper conclusion.

Disposal

23. For all those reasons we allow Mr Illingworth's appeal. By our substituted decision notice we require the NHS either to supply the information requested by Mr

Illingworth or, in so far as they seek to rely on any other exemption in the Act, to serve a suitable section 17 notice by the end of May 2014.

24. It is right to acknowledge that the job of complying with the requests may now, following the re-organisation, the abandonment of the review and the passage of another year, be somewhat more onerous than it would have been in March 2013, though Mr Illingworth indicated that some of the personel involved were the same and as we understand it some of the information has been supplied in the meantime. That is the unfortunate but inevitable result of the fact that the NHS decided (wrongly as we have concluded) to rely on section 12 at the time of the requests. We would suggest that the task may be made much easier if someone from NHS England with appropriate knowledge and expertise liaises closely with Mr Illingworth (he suggested that a morning's "face to face" meeting would be quite sufficient) to understand fully what he is "after" and how he suggests it can be obtained.

25. This decision is unanimous.

HH Judge Shanks
29 April 2014