



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

EA/2013/0282

ON APPEAL FROM:

**Information Commissioner's Decision Notice: FS50510686
Dated: 27 November 2013**

**Appellant: SRI RAMANATHAN
Respondent: THE INFORMATION COMMISSIONER**

**Heard at: Field House
Date of hearing: 14 May 2014**

Date of Decision: 19 May 2014

Before

**Annabel Pilling (Judge)
Henry Fitzhugh
Marion Saunders**

Subject matter:

FOIA – Cost of compliance exceeds the appropriate limit,s12

Representation:

For the Appellant: Sri Ramanathan
For the Respondent: Michelle Voznick

Decision

For the reasons given below, the Tribunal refuses the appeal and upholds the Decision Notice dated 27 November 2014.

Reasons for Decision

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 27 November 2014.
2. The Decision Notice relate to a request made by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to the Legal Ombudsman statistics for statistics for the number of cases in which the Legal Ombudsman agreed with the recommendation of its investigator and the number in which it disagreed.
3. The Legal Ombudsman applied section 12 FOIA to the request as the cost of complying would exceed the appropriate limit as defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2044 (the "Regulations").
4. The Commissioner agreed with the Legal Ombudsman and the Appellant appeals against his decision.

Background

5. The Legal Ombudsman was set up by the Office for Legal Complaints under the Legal Services Act 2007. It was established to simplify the system for dealing with complaints about the service provided by lawyers and to ensure that consumers had access to an independent expert to resolve those complaints. As with all Ombudsman schemes it is designed as an alternative to a court process, to be a quick and informal way of resolving disputes or complaints. The advantage to the consumer is said to be that the process is free and not binding if they do not agree with the final decision.

6. The Appellant complained to the Legal Ombudsman in respect of the services provided to him by a barrister under the Direct Access Scheme. The Investigator provided a recommendation that the service provided to the Appellant was reasonable. The Appellant rejected this recommendation and made further representations to the Legal Ombudsman. The Legal Ombudsman's final decision was that there had not been poor service which required a remedy.
7. The Appellant was dissatisfied with the decision of the Legal Ombudsman and is concerned that it was not an independent decision reached upon a full consideration of all the material provided but merely "rubber stamped" the recommendation of the Investigator.
8. On 5 June 2013 the Appellant expressed his dissatisfaction to the Legal Ombudsman and included the following request for information:

"...I would also appreciate if you could provide me with your statistics on Investigator/Ombudsman concurrence ratio; this is, how many decision of the investigator and the Ombudsman agreed with, and those rejected."
9. The Legal Ombudsman replied on 10 June 2013, applying section 12 FOIA to the request. It explained that there were 5810 cases falling within the scope of the Appellant's request and to establish in many of these cases if the Ombudsman agreed with the investigator's recommendation this was estimated to take a minimum of 15 minutes per file to retrieve the information.
10. The Appellant requested a review of that decision on 19 June 2013 and included the following: *"...if the costs limit is an issue, may I suggest*

obtaining the statistic on recent cases up to the limit allowed, for a start.”

11. There followed further correspondence between the Legal Ombudsman and the Appellant. The Legal Ombudsman drew the Appellant’s attention to the Commissioner’s Guidance in respect of section 12 of FOIA and in particular the third bullet point under paragraph 30; “A public authority is not obliged to search up to the appropriate limit.” The Legal Ombudsman suggested that the Appellant consider reframing his request so that it was smaller and manageable for them to consider, but pointed out that in limiting the request the Appellant may not receive the “full picture” he may wish. It was difficult to offer any suggestions on how to limit the search of 5810 files.
12. The Appellant indicated on 16 July 2013 that *“given the costs constraints, my request “as a whole” was limited up to what the costs would allow you to provide, not the entire statistic in question... In other words, the limited request is my entire request, at this stage.”*
13. The Legal Ombudsman did not consider that this was a reduced request as the limitation was to work until the £450 limit was reached and then cease and maintained that it had no duty to comply with the request on the ground of the cost of complying.

The appeal to this Tribunal

14. The Appellant appeals against the Commissioner’s decision under section 57 of FOIA. He requested the case to be considered on the

papers.

15. The Tribunal was provided in advance of the hearing with an agreed bundle of material from the parties.
16. Although we cannot refer to every document in this Decision, we have had regard to all the material before us.
17. This Tribunal is limited to considering whether the Commissioner's decision is in accordance with law. We do not have the jurisdiction to consider how the Legal Ombudsman conducts its investigations into complaints.
18. Although we had concerns that the Commissioner had failed to address the issue of whether the information requested was in fact held by the Legal Ombudsman for the purposes of FOIA, as opposed to creating new information, our jurisdiction is limited to a consideration of whether the Commissioner's decision in respect of the application of section 12 of FOIA was in accordance with the law.

The Relevant Legal Framework

19. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.
20. These two separate duties under section 1 of FOIA are not absolute.
21. Section 12(1) of FOIA provides for a limitation on these duties as follows:

Section 1(1) of FOIA 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.

22. The public authority is not obliged to comply with the section 1(1)(a)

duty to inform the requester whether it holds the information requested unless the estimated cost of complying with that alone would exceed the appropriate limit.

23. The relevant appropriate limit is set out in the Regulations. The appropriate limit for central government departments is £600 and £450 for all other public authorities. The relevant appropriate limit for the Legal Ombudsman is therefore £450. When calculating the cost estimate, the Regulations provide that the cost of a request must be calculated at the rate of £25 per hour of staff time and can include only the following activities:
- (i) determining whether the information is held;
 - (ii) locating the information, or a document which may contain the information;
 - (iii) retrieving the information, or a document which may contain the information; and
 - (iv) extracting the information from a document containing it.
24. Section 16 of FOIA imposes a duty on a public authority to provide advice and assistance to a person making a request for information. If the public authority conforms with the Code of Practice issued pursuant to section 45 of FOIA, it will be taken to have complied with that duty (section 16(2)).
25. Paragraph 16 of the Code of Practice relates to the cost of complying with a request and states that where a public authority is not obliged to comply with a request because it would exceed the appropriate limit to do so, then it should consider providing an indication of what, if any information could be provided within the cost ceiling.

Issues for the Tribunal

26. The Appellant has raised the following issues:

- 1) The basis of calculating the estimated cost of complying was flawed;
 - 2) The Legal Ombudsman was obliged to comply with the request for information up to the cost of £450 and the Commissioner's decision was perverse;
 - 3) Section 12 is not an absolute exemption from disclosure and therefore the public interest test applies.
27. The Legal Ombudsman was asked by the Commissioner during his investigation of the way in which it handled the Appellant's request for information to provide a detailed estimate of the time/cost taken to provide the information falling within the scope of the request. He reminded the Legal Ombudsman that a number of decisions of this Tribunal have made it clear that an estimate for the purposes of section 12 has to be "reasonable" which means that it is not sufficient for a public authority to simply assert that the appropriate limit has been met; rather the estimate should be realistic, sensible and supported by cogent evidence.
28. We have seen the letter from the Legal Ombudsman setting out the basis upon which it estimated that the cost of complying with the request would exceed the relevant limit. The Legal Ombudsman explained that the statistical information requested is not already available and would require compilation by manual interrogation of the electronically held case files.
29. The Legal Ombudsman consulted with its Management Information Team which is responsible for running management reports. It confirmed that no standard report could be run to compile the information sought by the Appellant.
30. The case files relate to the investigation of complaints about legal service providers and can often involve the examination of a lengthy history and a voluminous amount of documentation. There is an

inherent assumption in the request made by the Appellant that the Legal Ombudsman would agree or disagree with the whole of the Investigator's recommendation. Such is often unlikely to be the case. Considering whether the Ombudsman had agreed with the recommendation of an Investigator would not be a straightforward task; the Ombudsman may reach the same conclusion but based on different facts or factors. For example, it would not be uncommon for an Investigator and Ombudsman to conclude that there had been poor service from a lawyer but they may reach different conclusions in respect of what amounted to poor service, when it occurred and in respect of the type and amount of any remedy. The length of an Investigator's recommendation or Ombudsman's decision varies depending on the complexity of the case, the common length being between 5-20 pages of typed word. It would be these two documents which would have to be examined and which would require some sort of deconstruction and scoring to answer the Appellant's request.

31. A random six cases were selected by the Legal Ombudsman and the requested information extracted. This was completed in one hour and thirty five minutes, an average of fifteen minutes per case to locate, retrieve and extract the information sought by the Appellant.
32. The Legal Ombudsman made a decision in 5810 cases in the last three financial years. It would therefore take an estimated 1452 hours to comply with the request. This far exceeds the appropriate limit, which would equate to 18 hours work.
33. The Appellant submits in his Notice of Appeal that the information he has requested should not involve so much time as asserted by the Legal Ombudsman. In his view, the information was already recorded prominently in the Decision and the Investigator's Recommendations documents and would not require the "lengthy investigation" suggested.
34. We are satisfied that the Legal Ombudsman has provided a reasonable

estimate of the cost of complying with the request. Establishing whether the Ombudsman agreed with the recommendation of the Investigator is not a simple task of looking at two ticked boxes for example, or a final summary paragraph; the reasoning by which the decision is reached is important for this purpose.

35. The estimate of fifteen minutes per file to locate, retrieve and extract the information sought by the Appellant is realistic, sensible and based on cogent evidence; we are satisfied that a sampling of six random cases is sufficient for the Legal Ombudsman to have undertaken in order to reach that conclusion.
36. The Appellant submits that the Legal Ombudsman should at least have provided the information requested in relation to those six cases, and that it should have continued the sampling until it had reached the cost limit. Despite advice that he narrow his request, the Appellant had not specified any more defined search parameters, for example, a smaller time frame. He appears to submit that it is “irrational” for the Commissioner to assert that it is contrary to good practice because it denies the requestor the right to express a preference.
37. While this raises logical argument, we disagree with the Appellant’s conclusions on this point. The Appellant was provided with sufficient information on 10 June 2013 in respect of how the information was held by the Legal Ombudsman and how the cost estimate was arrived at; he knew it would take an average of fifteen minutes per case to locate, retrieve and extract the information sought. The public authority cannot, and should not, make assumptions about what limits the requestor of the information would accept. For example, it cannot assume the requestor would want the information contained in the 72 most recent files, or the 36 files falling either side of the decision about which the Appellant is aggrieved. The Legal Ombudsman suggested that the Appellant narrow his request in order to bring the cost of complying within the appropriate limit; he did not do so, save to say on 16 July 2013 that “*given the costs constraints, my request “as a whole”*”

was limited up to what the costs would allow you to provide, not the entire statistic in question... In other words, the limited request is my entire request, at this stage.”

38. We agree with the Legal Ombudsman and the Commissioner that this is not required by the wording of section 12; the public authority is not obliged to comply with the duty to provide information if it estimates that the cost of complying with the request *would* exceed the relevant limit (our emphasis).
39. Finally, the Appellant submits that section 12 FOIA is not an absolute exemption from disclosure and therefore the public interest test applies. This is misconceived.
40. The section 1(1)(b) duty of the public authority to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions. Where the information is subject to a qualified exemption, it will only be exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b)). Section 12 is under Part 1 of FOIA and is not subject to the public interest test.

Conclusion

41. We are satisfied that the cost of complying with the request would exceed the appropriate limit under section 12(1) FOIA and there was no duty on the Legal Ombudsman to provide the information requested.
42. We therefore must refuse this appeal. Our decision is unanimous.

Annabel Pilling
Tribunal Judge

19 May 2014