



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Tribunal Reference: EA/2013/0005
Appellant: Mr Mark Snee
Respondent: The Information Commissioner
Second Respondent: Leeds City Council
Judge: NJ Warren
Member: J Nelson
Member: D Stephenson
Hearing Date: 22 November 2013
Decision Date: 17 December 2013

DECISION NOTICE

A. Introduction

1. Some years ago Mr Snee was engaged in Judicial Review proceedings with Leeds City Council (“Leeds”). One of the issues considered in the course of those proceedings was the propriety of Leeds’ system of delegation in 2003 and 2004. He still harbours a grievance about the manner in which Leeds disclosed to him their documents on this topic in the course of the litigation.
2. He has made several requests to Leeds under the Freedom of Information Act (FOIA).
3. As a result of one request, some 205 documents were supplied to Mr Snee on a CD. A search was then made of Leeds’ “Lotus Notes database”. Database is something of a misnomer. It is an infrastructure, no longer used by Leeds, housing numerous document libraries, collaboration spaces applications and intranet pages access to

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which is governed by a series of permissions. Another 1627 documents relating to 2003-2004 were supplied to Mr Snee from this source.

4. Another FOIA request asked for all information held by Leeds in relation to the conduct of the judicial review proceedings. This led to Mr Snee attending at one of Leeds' offices where he was given access to about 9000 pages of information.
5. One of the FOIA requests led to an investigation, at Mr Snee's request, by the Information Commissioner (ICO). The ICO dismissed the complaint, which related only to information held electronically for the years 2003-2004, on the ground that it would cost Leeds more than the statutory limit to supply it. The relevant limit is £450. See Section 12 FOIA and the Regulations made under it. In discussing alternative options, the ICO's decision referred to the possibility of Leeds providing Mr Snee with everything held on the Lotus Notes system, rather than trying to separate out the years 2003-2004. However, the ICO found that this too would breach the costs limit. Somewhat mysteriously, the decision notice stated that the ICO "notes that it is open to the complainant to request everything after considering this Notice". Some six months later Mr Snee took the hint.

B. The Request

6. On 8 March 2012 Mr Snee made another request under FOIA in the terms set out in the appendix. He wanted

"all the electronic information held by the council on its Lotus Notes Database(s) that comprised the council's intranet over a number of years and more, particularly including the years 2003 and 2004".

Leeds refused the request under both Section 12 FOIA and Section 14 FOIA which covers vexatious requests. Mr Snee complained to the ICO who upheld the Leeds decision. He now appeals to the Tribunal.

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7. We heard the appeal in Leeds on 22 November. Mr Snee was represented by Mr Greateorex. Leeds were represented by Ms Grey QC. We are grateful to both advocates for their assistance. The ICO did not trouble to attend.
8. Mr Greateorex put to us attractive and forceful submissions about cheaper and more straightforward responses which Leeds might be directed to make but he accepted that their success depended upon convincing us of a comparatively narrow interpretation of the request. Mr Greateorex submitted that properly understood, in the context of the previous ICO decision notice, Mr Snee's request covered only the information contained within Lotus Notes which was open to all of Leeds' employees; and did not extend to any of the information which was subject to a special permission to gain access. He added that Leeds had since supplied to Mr Snee a list of the 2300 databases contained within the system and that Mr Snee has identified just four in which he is interested. They contain more than 25,000 documents between them.
9. We agree that the request, like any other document, has to be construed in context. After carefully rereading it, however, we are unable to give it the meaning for which Mr Greateorex contends. In our judgement the request asks for all the information held within Lotus Notes – as the quotation in para 6 above suggests. There is no direct reference, nor can we imply any from the context, excluding any material access to which is governed by a permission. On this basis we turn to consider the application of Section 12 and Section 14 FOIA.
10. We pause first to remark that FOIA is a Statute concerning freedom of information; it is not a statute dealing with the discovery of documents. It may be that on a true analysis, Mr Snee's request did not conform with the statute in any event. It certainly described the ocean of documents which Mr Snee wished to explore. It is doubtful, however, whether it sufficiently described the information requested, as required by Section 8(1)(c) FOIA.

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C. The Cost Limit

11. The cost limit rules are contained in Regs 3 and 4 Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. In particular, staff costs in retrieving information count for the purposes of the costs limit; but staff costs in considering whether any exemption should apply do not.
12. Leeds has produced an estimate of costs of meeting the information request by converting the physical Lotus Notes infrastructure into virtual; copying the virtual image onto independent hardware; and then configuring it to replicate the current network set up within which Lotus Notes exists. It is said that it would be necessary to purchase a new licence for Lotus Notes. Quite apart from staff time, it is said that this would involve the purchase of a new server at a cost of £2,000 and that the licence would cost an estimated £10,000. Mr Snee has some criticisms of the calculation and these may, to an extent, be justified. He points out that he has been able to buy a server for £80 wholesale – there may of course be a difference in the specification. He also states, and we accept, that he could install Windows 2003 and a newer version of Lotus Notes on the server in an hour and a half – rather than the ten hours estimated by Leeds. On the other hand, his proposed method of transfer of the data depends upon a narrowing of the request which we do not accept.
13. The estimate is not an easy exercise and is rendered even more speculative by suggestions that it is no longer possible to purchase the necessary licence. Bearing in mind that a public authority, dealing with an old information system has to proceed with some caution to ensure both that the proposal will succeed and that existing information will be accurately retained, we are satisfied that the likely costs of meeting the request exceed £450. In reaching this conclusion, we relied also on the expert advice obtained from the ICO about Leeds' proposals (see pages 84-87).

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D. Section 14 – Vexatious Requests

14. If we were wrong in affirming the ICO's decision on costs grounds, we would still uphold Leeds' original decision to refuse the information on the ground that the request was vexatious.
15. A request may be vexatious if it imposes a disproportionate burden on the public authority. Here, it is possible to take into consideration the burden of deciding whether information is exempt from disclosure under the Act.
16. There are some exemptions within FOIA which a public authority is practically duty bound to assert; for example, there may be a statutory bar on disclosure, liability for breach of confidence or a processing of data contrary to the data protection principles.
17. It is estimated that about two million documents are comprised in the request. It is obvious that to require Leeds to check through all of these to ensure, for example, that disclosure would not breach the data protection principles is to impose an intolerable burden. None of the other factors to be considered could possibly outweigh this. Mr Snee argues that there is a strong public interest in giving him an opportunity to uncover misconduct amounting to contempt of court, even though it would take him many months to go through the documents. We cannot accept that this possibility is sufficient to impose such an enormous obligation on a local authority, especially bearing in mind that any exemption applied by the authority would then be open to challenge before the ICO and the Tribunal.
18. We therefore conclude that the request is vexatious because of the burden it imposes on Leeds.

E. Advice and Assistance

19. It was submitted that Leeds had failed in their duty to provide advice and assistance under Section 16 FOIA.

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20. It is true that in the early days of the request Leeds, when judging it to be vexatious, did not consider it appropriate to offer advice and assistance to Mr Snee, perhaps by narrowing the request. That approach must be assessed in the context of the documents Leeds had already supplied to Mr Snee. The duty applies only “so far as it would be reasonable to expect the authority to do so”. Having regard to all the circumstances and in particular the enormous number of documents already provided we do not consider it appropriate to criticise Leeds on this ground.
21. In a written submission the ICO expresses the view that Leeds have made extensive unsuccessful attempts to resolve this dispute informally since the litigation began. We agree with that assessment.

F. Decision

22. For the reasons we have given, this appeal fails.

NJ Warren**Chamber President****Dated 17 December 2013**

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Annex A

From: Mark Snee [mark.snee@virgin.net]
Sent: 08 March 2012 21:20
To: cs.freedom.of.information@leeds.gov.uk
Subject: Request under the FoI Act

Dear Sir / Madam

I refer to the Information Commissioner's Case Reference Number FS50326588 (Decision Notice issued 12 September 2011).

At paragraph 72 of the Decision Notice, the Commissioner states that he "notes that it is open to the complainant to request everything after considering this Notice." The 'everything' refers to all the electronic information held by the Council on its Lotus Notes database(s) that comprised the Council's intranet over a number of years, and more particularly including the years 2003 and 2004.

Accordingly, having now considered the Notice, I now request 'everything' held by the council on its Lotus Notes system. I believe this request ought to be self-explanatory having regard to the discussion contained in the Decision Notice.

If the Council would like me to provide suitable media for the information to be copied onto, I should be perfectly willing to do that at my own cost and in such event would be pleased if you will let me know how much storage space the Lotus Notes database(s) will require and confirm what kind of connection would be suitable (e.g. USB, firewire, etc.).

Yours faithfully

Mark Snee
Croft House
Rods Mills Lane
Morley
Leeds
LS27 9BD

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