



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

**Case No. EA/2013/0286**

**ON APPEAL FROM:**

The Information Commissioner's  
Decision Notice dated 2 December 2013  
FS50503796

**Appellant: Donnie MacKenzie**

**First Respondent: Information Commissioner**

**Second Respondent: Commissioner of the Metropolitan Police  
Service**

**Considered on the papers**

**Before**  
John Angel  
(Judge)  
and  
Jacqueline Blake and Pieter de Waal

**Decision**

**The appeal is allowed and the following decision notice is substituted:**

**Substituted Decision Notice**

**To the Metropolitan Police Service (MPS)**  
**New Scotland Yard**  
**Broadway**  
**London**  
**SW1H 0BG**

- 1. This decision notice is substituted for the Decision Notice dated 2 December 2013.**

2. **MPS is in breach of its obligation under section 16 FOIA for the reasons stated below.**
3. **MPS is therefore required to comply with its obligation under section 16 within 30 days of this notice.**

**Dated: 29th May 2014**

**Signed; John Angel  
Judge**

## **Reasons for Decision**

### Background

1. This appeal concerns a request made by Mr MacKenzie to the Metropolitan Police Service ("MPS") on 22 December 2012. The request was in the following terms:

*"Please could you tell me if the Metropolitan Police Service is involved in any joint agency operations which include surveillance?"*

*If so, could you please specify how many operations and how many staff are committed to these at date of writing?"*

*Could you also please specify the total number of people who are the target of these operations?"*

2. On 10 January 2013 the MPS requested an explanation of what was meant by "joint agency operations". Mr MacKenzie replied on 16 January 2013 that "Joint means with, as in to work with in any way. By agency I mean any force/organisation/company/ngo etc who are not Metropolitan Police Service [sic]". Later that day, following a further email from the MPS, Mr MacKenzie confirmed that his Request meant:

*"1) The number of ongoing joint agency operations which include surveillance as at 22/12/2012.*

*2) The number of MPS staff committed to question 1 as at 22/12/2012.*

*3) The total number of people who are the target of question 1 as at 22/12/2012."*

3. The MPS responded on 18 February 2013 claiming section 12(1) FOIA as an exception to disclosure. It noted as follows:

*"This email is to inform you that it will not be possible to respond to your request within the cost threshold. The MPS*

*has more than 32 Borough / Operational Command Units (B/OCUs). Police officers of various ranks are able to perform surveillance on subjects, for any number of reasons.*

*To establish if the information you require is held by the MPS can not be achieved within the time provided by [FOIA] as to do so will require the searching of many of the MPS's electronic systems, and paper based files located in all the B/OCUs."*

4. Pursuant to its duty to advise and assist under section 16 FOIA, the MPS considered whether Mr MacKenzie's request could be refined such that compliance with it would not exceed the costs limit. However, it informed Mr MacKenzie that it did not consider that there was "any practical way" in which the request could be so modified.

5. Mr MacKenzie requested an internal review on 8 March 2013. He said:

*"I believe it unlikely that there would not be some aggregated records of surveillance within areas and/or at a wider level which could be accessed simply.*

*There is increasing media coverage of reductions in budgets for public bodies and I think it is likely that there would be in depth and ongoing analysis of how funding is apportioned.*

*A good record keeping system is usually kept within organisations for a multitude of different purposes such as avoiding overlap of duties / conflicts of interest, accounting or uses of staff and assets and maintaining compliance with legislation.*

*I think that it is possible that if the request were to be refined appropriately the information could be successfully released within the time/expenditure limit, provided it is sought in a sensible way (ie emailing the specific individuals who would be in a position of surveillance oversight). If I were to refine the request I would do it based on organisation(s) involved in the joint effort".*

6. The MPS replied on 10 May 2013 maintaining that it had properly applied section 12 FOIA, but now relied on section 12 (2). It said as follows:

*“As mentioned in the original response ‘Police officers of various ranks are able to perform surveillance on subjects, for any number of reasons.’ Therefore, in order to establish if information is held, locate and extract the information will require a member of police staff contacting over 45 Borough and Operational Command Units (B/OCU) within the MPS. Within each of the B/OCU further contact would have to be made with thousands of officers and staff. Once this enquiry had established whether B/OCUs held this information on ‘joint agency operations’ additional work would then need to be undertaken to collate and extract the relevant information surrounding the number ‘of staff committed’ (question 2) and the ‘total number of people who are the target of these operations (question 3).*

*To provide you with a reasonable estimation even if the initial search for question 1 took just 1 minute, this would equate to over 33 hours for every 2000 officers who would need to be contacted. With over 32,000 police officers within the MPS, it is clear this aspect of your request will exceed the appropriate 18 hour limit set out under the FOIA legislation. This estimation does not include the time for the remainder of your request for questions 2 and 3”.*

7. The MPS also maintained that it had complied with its duty to advise and assist under section 16 FOIA.
8. Mr Mackenzie subsequently complained to the ICO. The Commissioner investigated in the usual way. The MPS responded to the Commissioner’s enquiries on 13 November 2013. Within that letter the MPS provided further details as to why it said that compliance with Mr Mackenzie’s request would exceed the costs limit.
9. The Commissioner found that compliance with Mr Mackenzie’s request would exceed the costs limit (detailed reasons are set out in §§21-34 DN) and therefore the MPS was not obliged to comply with it.
10. Also he found for the reasons given at §§35-38 DN that the MPS had complied with its duty under section 16 FOIA to advise and assist Mr Mackenzie.

### Legal Framework

11. Section 12 is one of the ‘procedural’ exemptions in FOIA. It provides a ‘cost-ceiling’ for compliance with a request for information. When the

estimated cost of compliance rises above the ceiling the public authority's section 1 obligations are dis-applied. Section 12 provides as follows:

(1) 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.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

(3) In subsections (1) and (2) "the appropriate limit" means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

...

(5) The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated.

12. The regulations referred to in section 12 are the *Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004*. They prescribe the 'appropriate limit' for the purposes of section 12 as £450 for an authority such as the MPS (regulation 3). Applying the nominal hourly rate in regulation 4(4) means that £450 represents 18 hours of the public authority's time.

13. Regulation 4(3) provides an exhaustive list of the matters which a public authority may take into account in reaching its cost estimate. It provides as follows:

(3) 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.

14. The estimate made by the public authority must be "a reasonable one [which] may only be based on the activities covered by Regulation 4(3)" (*Roberts v Information Commissioner* EA/2008/0050). What is reasonable is something for the Commissioner and the tribunal to determine on a case-by-case basis (*ibid*). It does not require a precise calculation, but it must be "sensible, realistic, and supported by cogent evidence" (*Randall v*

*Information Commissioner EA/2007/0004*). Although we are not bound by these decisions they seem to us a suitable approach to take.

15. Section 16 FOIA provides that a public authority is under a duty to provide advice and assistance, so far as would be reasonable, to those who have or propose to make a request for information.
16. Paragraph 14 of the section 45 FOIA Code of Practice 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. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee.”*

17. Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the section 45 FOIA Code of Practice is to be taken to comply with its duty under section 16 FOIA.
18. Where a public authority is relying on section 12 FOIA to refuse a request, in order to comply with section 16 FOIA it should therefore either indicate if it is not able to provide any information at all within the appropriate limit; or provide an indication of what information could be provided within the appropriate limit and provide advice and assistance to enable the requestor to make a refined request.

### The Appeal

19. Mr Mackenzie sent a notice of appeal to the Tribunal dated 30 December 2013. There are two grounds of appeal.
20. First, Mr Mackenzie argues that the Commissioner was wrong to conclude that compliance with his request would exceed the costs limit. The Commissioner opposes this ground on the basis of the detailed reasons for his decision set out in §§21-34 DN. Mr Mackenzie asserts that it would be far simpler and less time consuming to respond to his request than suggested by the MPS. In addition to the reasons given in its refusal notice and internal review the MPS provided additional detailed reasons as to what work would need to be undertaken to comply with Mr Mackenzie's request in its letter to the Commissioner dated 13 November 2013. The Commissioner, in effect, accepted these reasons.
21. We consider that the Respondents have made a strong case that the cost limit would be exceeded but also consider they have taken a view of the request which makes it appear more complicated than perhaps it really is. However before considering the application of section 12 in this case we must consider the second ground of appeal.

22. Second, Mr Mackenzie contends that the MPS should have provided advice and assistance to enable him to refine his request so as to bring it within the costs limit.

23. What happened in this case? Following the request the MPS sought further information in order to identify and locate the information requested which it is entitled to do under section 1(3) FOIA. Mr MacKenzie obliged. By this stage the MPS were able to understand his request because it was able to produce a detailed refusal notice. In the refusal notice it referred to its section 16 obligations in that it “was unable to suggest any practical way in which your request may be modified in order to bring it within the 18 hours stipulated by the Regulations”.

24. During the course of the Commissioner’s investigation of the complaint Nigel Shankster MPS’s Senior Information Officer responded to a question from the Commissioner’s case officer relating to the section 16 obligation in a letter dated 13 November 2013. The exchange went as follows:

*“I note that the initial request and internal review state they are unable to reasonably offer any sort of advice that may see this request brought within cost.*

*I believe that the requestor will need to assess the way in which the questions are phrased. By withdrawing parts two and three of the request, as these are very likely to be of an indeterminate nature, and by being more specific about the area of business, may indeed enable searches to be undertaken and information retrieved. However, the MPS needs to stress that even if such information were obtained exemptions may well apply in regard to disclosure.”*

25. This would seem to us to provide the advice and guidance which the code of practice envisages in order to comply with section 16. Despite this the Commissioner found that the obligation had been complied with (see §§35-38 DN) and seems to have ignored the above exchange.

26. During the course of this appeal the Commissioner has recognised this difficulty with his DN.

27. MPS was subsequently joined as a party to the appeal.

28. The Commissioner in his response to the grounds of appeal invited the MPS to elaborate on the suggestion made in the MPS’s letter dated 13 November 2013 referred to in §24 above.

29. The MPS in its response to the appeal argues that if Mr Mackenzie was to take up Mr Shankster’s suggestion it would change the character of the request entirely and fall outside the MPS’s section 16 duty. It also suggests that that it could lead to multiple requests in respect of different

units which may well have led to aggregation or the application of section 14 (vexatious request).

30. We have difficulty in accepting these arguments. From the evidence before us we consider it is more probable than not that the first part of the request could be answered within the section 12 cost limit and that the MPS could have advised Mr MacKenzie of this when first responding to his request.

### Our Conclusion

31. We find that the MPS did not comply with its obligation under section 16 FOIA. We find that the MPS could have provided helpful advice to enable Mr MacKenzie to narrow his request so that it could be within the cost limit as was suggested in their letter of 13 November 2013 to the Commissioner. We cannot see how this would change the character of the request as suggested by the MPS particularly as the MPS is under an obligation to provide advice and guidance on how to narrow the request itself. Again we do not understand how it can be suggested that it would lead to a vexatious request particularly with its advice and guidance.

32. We therefore allow the appeal and substitute a new decision notice requiring the MPS to comply with its section 16 obligations. This will mean that following such advice Mr MacKenzie will have the opportunity to revise his request and the MPS will then need to deal with any such request under Part I of FOIA.

33. Having made this finding it is not appropriate for us to consider whether section 12 FOIA applies in this case.

Signed

John Angel  
Judge

29th May 2014