



IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL (INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

EA/2014/0127

B E T W E E N :-

JOHN NORRINGTON

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

TRIBUNAL

**Brian Kennedy QC
Jacqueline Blake
Malcolm Clarke**

Hearing: 30 September 2014.

Location: Wrexworth Tribunal Office.

Date of Decision: 31 October 2014.

Date of Promulgation: 5 November 2014.

Decision: The Tribunal Refuse the Appeal.

Introduction

1. The Appellant appeals under section 57 of the Freedom of Information Act 2000 (“FOIA”) against the Commissioner’s Decision Notice (reference number FS50529055) dated 8 May 2014 (the “DN”).
2. We adopt the helpful Legal Framework and Background as set out by the Respondent in their Response to the Grounds of Appeal and repeated herein.

The Legal Framework

3. Section 12 FOIA provides:

“12. Exemption where cost of compliance exceeds appropriate limit.

- (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.*
- (4) *The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a 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 taken to be the estimated total cost of complying with all of them.”

Regulation 3 of the *Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 SI 2004 No 3244* (“the Fees Regulations”) provides that, for a government department such as the MoJ, the appropriate cost limit is £600, equating to 24 working hours.

4. Regulation 5 of the Fees Regulations provides that:

“Estimating the cost of complying with a request – aggregation of related requests

5.—(1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply, are made to a 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 taken to be the total costs which may be taken into account by the authority, under regulation 4, 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 working days.*

Background

5. Prior to the request that is the subject of this Appeal, the Appellant had made an earlier request for information to the Ministry of Justice (MoJ) on 5 September 2013. That request was as follows:

“My present focus is on the Small Claims Court. Could you tell me please how many such claims have been processed by the Court since 2010; in how many cases leave to appeal has been sought; whether leave has ever be granted [sic] and if so in how many cases the applicant has been successful on appeal?”

The MoJ refused that request on the basis that section 12 of FOIA applied.

6. The Appellant subsequently wrote to the MoJ on 29 November 2013 and requested information in the following terms:

“... You say at one point that HMCTS holds the information but you then go on to claim it is not held on a central data base. Is it held on local data bases? Could you send me please an example of what is held on the central data base in respect of appeals? As a bottom line could you provide the information I am seeking in respect of the County Court at Lincoln?”

7. The MoJ responded on 24 December 2013. It confirmed that it held the requested information in relation to the Lincoln County Court. However, it refused to disclose it, again citing section 12 of the FOIA.
8. The Appellant complained to the Commissioner who investigated in the usual fashion.

The Decision Notice

9. The Appellant contacted the Commissioner on 28 December 2013 and on 15 January 2014, complaining about the way his request for information had been handled.
10. The Commissioner considered the scope of his investigation to be the MoJ's application of section 12 to the information requested on 29 November 2013 concerning the number of small claims processed in Lincoln County Court since 2010 (DN § 11).
11. The Commissioner noted that, under Regulation 4(3) of the Fees Regulations, when estimating whether complying with a request would exceed the appropriate cost limit, a public authority can only take into account the costs it reasonably expects to incur in:
 - determining whether it holds the information;
 - locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.(DN § 15).
12. A public authority does not have to make a precise calculation of the costs of complying with a request: instead only an estimate is required. However, it must be a reasonable estimate (DN § 17).

13. The Commissioner noted that, although the MoJ explained in general terms why it considered that complying with the request would exceed the cost limit, it failed to provide the Appellant with an estimate of the actual work involved in complying with his request (DN § 19).
14. The Commissioner acknowledged that MoJ advised the Appellant that it would be required to manually search individual small claims track files over the specified period and that, in previous correspondence, the MoJ did provide the Appellant with an estimate of the number of files involved and the time it would take to examine them (DN §§ 20 - 21). However, from the evidence available to the Commissioner, the MoJ failed to provide similar details in respect of this particular request (DN § 22).
15. Whilst, it is agreed, there is no statutory requirement for a public authority to provide an estimate of the costs involved, or any other explanation of why the cost limit would be exceeded, in the Commissioner's view, it is beneficial to do so in order to allow a requestor to assess the reasonableness of the estimate (DN § 23). The Commissioner therefore found it understandable that the Appellant regarded the MoJ's response to him as unsatisfactory (DN § 24).
16. However, in the course of the Commissioner's investigation, the MoJ provided the arguments in support of its reliance on section 12 FOIA, saying that :

"To extract the data would require a manual check of all the court files over the four year period. The caseload through the Court over this period was 771¹ cases and based on 10 minutes to search each file, this equates to 128 hours or £3200, which exceeds the cost limit" (DN § 26 & **[HB 64]**).
17. The Commissioner noted his disappointment that the MoJ failed to provide further explanation or clarification to the Appellant (DN § 27). However, he was satisfied during his investigation that the MoJ provided an adequate explanation that it would exceed the appropriate limit to locate, retrieve and extract the requested information. Accordingly he concluded that Section 12(1) FOIA was engaged and the MoJ was not required to comply with the request (DN § 28).

¹ Although the Appellant states that he is uncertain whether 771 cases relates to the total number of cases in the Lincoln County Court, or just those in the Small Claims Track for the period in question, the figure is for the Small Claims Track alone. **[HB 64]**.

18. The Commissioner went on to note that Section 16 FOIA places a duty on a public authority to provide advice and assistance to a requestor with a view to assisting in refining a request so that it can be answered within the appropriate costs limit. In this case, the Commissioner found that the MoJ failed to provide adequate advice and assistance to the Appellant under section 16 FOIA (DN §§ 29 - 32).
19. This Tribunal have looked carefully at the documentation and the DN and we accept the conduct of the investigation and the conclusions reached by the Commissioner in the DN and adopt the reasons therein.
20. Again we find the helpful summary of the Grounds of Appeal and the Response to same by the Commissioner comprehensive and thorough in this case and for ease adopt the format thereof

The Appellant's Grounds of Appeal

21. The Appellant sets out his grounds of appeal (the "Grounds") in his letter to the Tribunal of 18 May 2014 [**HB 8**].
22. In his Grounds, the Appellant asserts that the reasons given by MoJ for refusing his request "*are not credible*".
23. Whilst acknowledging that a more detailed breakdown of the work involved in answering his request was provided during the course of the Commissioner's investigation, he complains that it is not clear to him whether the 771 cases referred to by MoJ (DN § 26) relates to all civil proceedings or just those in the Small Claims Track². He says: "*if the information relates to the Small Claims Court only, the MOJ needs to be asked why its analysis identifies numbers only and no other breakdown*".
24. The Appellant stated that: "*The Commissioner appears to have accepted the MOJ's section 12 exemption without questioning why it does not have a more up-to-date method of analysing the cases it deals with. If all Government departments claimed they could not answer specific information requests except*

² See footnote 1 above.

by using inefficient and labour intensive methods they would be able to apply a section 12 exemption in all but a few cases.”

25. The Appellant asserted that the MoJ *“does not have to spend 10 minutes examining each file”* to answer his request: he suggests that it would be sufficient for the MoJ to examine *“the daily listings of proceedings to extract only those that refer to appeals in the Small Claims Court over the period in question”*, i.e. the period between 2010 and September 2013. He states that *“there is no indication that the Information Commissioner has asked this question”*.
26. The Appellant concluded by asking whether or not, if he were to break down his one request and make a series of requests seeking the same information for nine-month intervals from 2010 to 2013, he would be entitled to receive the information he seeks. He suggested that if that were the case, the MoJ is just *“spinning out the whole process by the present attempt at evasion”*.

The Commissioner’s Response

27. This Tribunal accept that question for determination by us is whether or not the Commissioner was correct to conclude that the MoJ were entitled to refuse to respond to the Appellant’s information request, based upon the plain wording of that request, because to do so would exceed the appropriate costs limit under section 12 FOIA.
28. The Commissioner contends that his conclusion was correct and he relies upon, and repeats, those matters set out in his DN in support of his resistance to this appeal. He adds only the following:
29. Whilst the Commissioner noted in his DN that the MoJ had not dealt with the Appellants request as fully and proactively as might be hoped, he could find no reason, on the evidence before, him to reject the submissions put to him by the MoJ regarding the cost of compliance with the request. This Tribunal agree with this analysis and we too can find no evidence to persuade us that the Commissioner was wrong in his conclusions herein.
30. In the absence of any indication to the contrary, the Commissioner argues he is entitled to rely, in good faith, on the evidence tendered to him by a public au-

thority during the course of his investigation; it is proper for him to do so. In the present case, there is nothing, either in those submissions tendered by the MoJ, or in any of the matters advanced by the Appellant which casts doubt upon the veracity of the MoJ's analysis. Again we find nothing in the Appellants submissions that leads us to conclude the Commissioner was wrong in this regard and we accept his findings as reasonable.

31. The Appellant provides no support for this contention, other than bald assertion. Conversely, in the Commissioner's submission, the MoJ provided a cogent and reasonable analysis in support of its estimate that the appropriate cost limit would be exceeded if it was required to respond to the Appellant's requests. The Commissioner submits that the explanation provided by the MoJ in the course of his investigation, although belated, was sufficiently detailed to be credible. It was wholly proper for the Commissioner to rely upon them in reaching his conclusion. The Tribunal have not been persuaded by the Appellant that this response is wrong and we accept the submissions made by the Commissioner herein.
32. When dealing with a complaint to him under FOIA, it is not the Commissioner's role to make a ruling on how a public authority deploys its resources, on how it chooses to hold its information, or the strength of its business reasons for holding information in the way that it does as opposed to any other way. Rather, in a case such as this, the Commissioner's role is simply to decide whether or not the requested information can, or cannot, be provided to a requestor within the appropriate costs limit. This Tribunal is in a similar position and unless the Appellant can establish that the Public Authority have been non compliant with its obligations under the FOIA , and we find as a fact that he has failed to do so, then the Commissioner was correct in his conclusion herein.
33. The Commissioner argues that there is little weight in the Appellant's argument that public authorities could use section 12 FOIA to avoid answering requests by relying on "*inefficient and labour intensive methods*". This view, the Commissioner argues presupposes two things – first, that the public authority in question does not in fact have a compelling business need to arrange its information in as efficient a manner as possible and, second, that a public authority would choose to deliberately obfuscate its administrative processes with the express intention of withholding information from the general public, despite the clearly detrimental impact it would have on its own operations.

34. This, the Commissioner argued is unpersuasive and he did not accept that either of these presuppositions is right. Rather, it appeared to the Commissioner that the MoJ simply does not perceive a business need to access, record or monitor the specific information requested by the Appellant. As such, that information does not fall to be easily provided. Here, the Commissioner noted that it was not denied by MoJ that the requested information *is* held – simply that it would exceed the appropriate costs limit to recover it and to do so would entail a manual search. The Commissioner accepted that explanation as plausible and reasonable. This Tribunal has not been persuaded by the Appellant that the Commissioner was wrong in coming to this conclusion either.
35. The Commissioner further noted that, whilst he accepted the MoJ’s time estimate of 10 minutes per file to locate, retrieve and extract the relevant information from each of the 771 files, were that estimate to be very significantly reduced – by even as much as two thirds – the amount of work required by the MoJ to respond to the request would still exceed the appropriate cost limit by a considerable margin. The Appellant does not suggest otherwise and this Tribunal therefore accept the Commissioners reasoning which we accept is relevant to the facts of this appeal.
36. The Appellant suggests that his request could have been addressed simply by the MoJ reviewing the “daily listings” for each day between May 2010 and September 2013, and extracting the relevant information. This Commissioner argues that is not correct.
37. The Commissioner pointed out that the Appellant’s request was for, in respect of the Lincoln County Court for the specified period:
- In how small claims track cases has leave to appeal been sought;
 - whether leave has ever been granted in any of those cases; and
 - if so, in how many cases was the appeal successful.
38. The Commissioner argued that whilst it is not clear that daily listings will have been retained for the period in question, no daily list of hearings would address the actual request which is the subject of this appeal. It is not, he argued, evident that a daily list would, on its face, record that a given case was an appeal from a Small Claims track determination. Nor would it reveal, he argued, whether leave had been granted, much less the outcome of the appeals proc-

ess itself in those individual appeals. Furthermore, the Commissioner argued, it appears unlikely to him that *all* appeals will actually reach a daily list in any event – a proportion of appeal applications are likely to have been dealt with and dismissed by a Judge sitting in Chambers. We accept that the Commissioner has given comprehensive consideration to the results of his investigation and has reached a reasonable and fair conclusion in the circumstances and on the facts in this case in this regard.

39. In relation to the Appellant's question as to whether making a series of requests would allow him to access the information he seeks, the Commissioner argues the answer is likely to be no. Regulation 5(2) of the Fees Regulations provide that such closely associated requests, made by the same individual closely proximate in time, will as a whole engage the appropriate costs limit at section 12 FOIA. This is a fair conclusion and the probable out come of the scenario raised by the Appellant on the facts of this case.
40. In the Commissioner's submission, in refusing this request, the MoJ is not attempting to evade the Appellant's request as he suggests – rather it is simply correctly applying the law, as enacted by Parliament, to the terms of his request. The Tribunal favour this interoperation of the facts as the more likely state of affairs than that suggested by the Appellant. There is no basis for the Commissioner or this tribunal to make a finding otherwise.
41. The Commissioner maintains he was correct to conclude in his DN that the Appellant's information request, on its plain wording, could not be answered without exceeding the appropriate limit and that consequently section 12 FOIA was properly engaged. This Tribunal finds on the facts of this appeal that that decision was right. The Appellant has failed tom persuade us otherwise on he evidence before us.
42. Accordingly the Tribunal dismiss the appeal for reasons referred to above. We do however wish to make some comments.
43. Section 16 FOIA is an important aspect of the legislation pertaining, in that public authorities should not only be aware of, but positively proactive in, putting into practice systems to facilitate requests for information. It is incumbent upon them to assist in identifying and facilitating wherever possible proper re-

quests for information. Unfortunately we find the Public Authority lacking in this regard on the facts of this case.

44. Whilst we accept that public authorities may not all have up to date methods of collating and analysing information, it is imperative that they adopt systems that will enable them to cope with reasonable requests. Otherwise the concern of the Appellant might come to fruition and some public bodies may employ inefficient methods in order to rely on Section 12. Where and when they cannot cope they should be able to demonstrate that there is a reason of this. We are satisfied on the facts of this case that the public authority herein was able to do so.

Brian Kennedy QC

Judge

31st October 2014.