



EA/2014/0217

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

EA/2014/0217

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice dated 9 July 2014
FS50527402**

Appellant: Mr H M

First Respondent: Information Commissioner

Second Respondent: Warwickshire County Council

Paper hearing

Before

John Angel

(Judge)

and

Rosalind Tatam and Narendra Makanji

Subject: section 12(1)-(5) FOIA (cost compliance exceeds appropriate limit), regulation 5 Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulation 2004 and section 16 FOIA (duty to provide advice and assistance)

Decision

The Tribunal dismisses the appeal.

Reasons for Decision

Background

1. In 2013 Warwickshire County Council (WCC) decided to remodel its Integrated Disability Service (IDS), short breaks and social care services to meet recommendations set out in the Children and Families Bill 2013 and to make essential savings from the service budget. WCC decided it had to reduce its budget by nearly £70 million by 2014/15. Its proposed savings target for the IDS was set at £1.7m which would reduce the service's total budget to £7.1m for the next financial year.
2. The reduction in budget would mainly affect the services provided to disabled children. Not surprisingly this caused great concern in the local community particularly for those parents, carers and professionals who would be affected. Some of parents and carers formed a group called Family Voice Warwickshire (FVW) to press their concerns with WCC about the changes but also with other objectives such as "to provide education, training, information and advice to parents and carers to empower them to advance their children in life and assist with their development".
3. Some members of FVW requested information from WCC about the cuts. Also it was reported that the organisation had threatened legal action by way of Judicial Review against WCC.
4. In May 2013 WCC started a public consultation inviting people to have a say about redesign proposals for children's disability services in Warwickshire. It would appear that FVW was invited to take part. The consultation ended in July 2013.
5. On 12 September 2013 the WCC Cabinet decided to confirm the decision to decommission short break services and to dispose of associated capital assets.

The Request

6. On 15 October 2013 Mr H M made a request in 13 parts to the WCC (Request). It is set out in paragraph 4 of the Decision Notice dated 9 July 2014 (DN). The actual Request starts "can clarification please be provided on a reply to a previous request submitted by myself/Ruth Walwyn, answer provide by Jessica Nash (12 April 2013)".
7. Mr H M met with the Leader of WCC on 10 November 2013, presumably to discuss matters raised in his Request.
8. WCC responded on 12 November 2013 and, after aggregating the Request with other FOIA requests (from 11 parents) received after 15 October 2013 it says from members of FVW, the WCC responding to the

Request claimed that it would exceed the appropriate limit and applied section 12(1) FOIA in order to refuse the Request (the Refusal Notice). Mr H M asked for an internal review. On 23 December 2013 WCC upheld the Refusal Notice.

Relevant Legal Framework

9. Section 1 FOIA states in relevant part:

“(1) Any person making a request for information to a public authority is entitled to-

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

(2) Subsection (1) has effect subject to the following provision of this section and to the provisions of sections 2, 9, 12 and 14.”

10. Section 12 provides in relevant part:

“(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.

..

(3) In subsections (1) and (2) “the appropriate limit” means such circumstances 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.”

11. The ‘appropriate limit’ referred to in section 12 FOIA is set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations). The Fees Regulations state that the appropriate limit for organisations such as the Council is £450. When calculating the cost estimate the Fees Regulations state that the cost of a request must be calculated at the rate of £25 per hour and they also state what activities may and may not be included in the calculation (regulation 4). If the Council estimates it will take more than 18 hours’ work to comply with the request, it may refuse a request under section 12.

12. In certain circumstances, it is possible to aggregate the costs for complying with two or more requests. Regulation 5 of the Fees Regulations states:

“(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.

(3) In this regulation, “working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.”

(Underlining added as emphasis)

13. Section 16 FOIA, which is also relevant to this matter, states:

“(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 [FOIA] is to be taken to comply with the duty imposed by subsection (1) in relation to that case.”

14. Paragraph 14 of the code of practice issued under section 45 FOIA, states:

“Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the “appropriate limit” (i.e. cost threshold) the authority 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.”

Grounds of appeal

15. Mr H M first asserts that the Commissioner was wrong to consider that his multi-part request was submitted as part of a campaign by FVW. Mr H M says 'when I am the only person to contact ICO, I am bemused as to how ICO can consider that my request was part of a campaign'.
16. The Commissioner considers Mr H M may have misunderstood some of the reasoning for the Commissioner's findings. The Commissioner argues that the relevant issue here is whether there are requests from different persons who appear to the public authority to be acting in concert or in pursuance of a campaign. The application of the Fees Regulations is not contingent on an appeal to the Commissioner under section 50 FOIA; it is of no relevance.
17. We agree with the Commissioner. It is of no relevance that no other requesters complained to the Commissioner. However what we need to consider is whether WCC was entitled to aggregate the requests.
18. Mr H M maintains that he is not linked (other than tangentially) to FVW.
19. The WCC aggregated what would appear to be 12 requests on the basis of information taken from the FVW website at the time referring to the 11 requests which presumably does not include the Request. The Commissioner found that there was evidence "that the complainant's request did not specifically form part of the organised campaign of the leadership of" FVW. Mr H M says that the first time he met any members of FVW was at a consultation meeting held by WCC on 24 October after the date of the Request and that his Request was not part of any campaign on the part of FVW.
20. Ruth Walwyn was the Chair of FVW. A letter from WCC dated 12 April 2013 was sent by Jessica Nash the Service Manager, Strategic Commissioning SEN on behalf of WCC to Ms Walwyn. Mr H M's Request appears to have been prompted to some extent by the information contained in that letter. Parts 1-4 of his Request, were prefaced with the phrase '... on a reply to a previous request submitted by myself/ Ruth Walwyn, answer provided by Jessica Nash (12 April 2013)'.
21. Mr H M is a parent of a child with autism and learning disability. He says he was never a member of FVW. However he admits that he knew about FVW and had had contact with the organisation because it was "the recognised body of parents and carers to liaise amongst themselves and with WCC". This is not surprising considering his personal circumstances

and the measures being taken by WCC in relation to services which would, no doubt, affect his child.

22. Taking into account these circumstances it seems reasonable for the WCC to have assumed that Mr H M is in some way linked to FVW, having named the Chair in his Request and having access to a document sent to Ms Walwyn.
23. Under Regulation 5(1)(b) of the Fees Regulations it is only necessary for WCC to be satisfied that “different persons...appear to the public authority to be acting in concert or in pursuance of a campaign” (our emphasis). From the evidence in this case we consider WCC formed a reasonable view that the different persons making requests within a short period of each other (received by the authority within a period of 60 consecutive days) were made in the circumstances set out in section 12(4)(b) FOIA. The Commissioner at §22 DN found “that it was reasonable for the council to consider that the complainant was acting in concert with the group, and that the request was part of a continuation of that campaign”.
24. Also we note that under Regulation 5 it is not just that the requests must be received within a period of 60 consecutive days but that the requests relate, to any extent, to the same or similar information. This is a wide requirement. As is explained later in the decision we find that this requirement is met.
25. On the evidence before us we agree with the Commissioner's findings in §22 DN “whilst the complainant's individual request may not have been known specifically by the leadership of Family Voice there was a campaign to obtain information by its membership and the complainant's request was for information on the same sorts of issues with the same overall purposes”. Under Regulation 5 of the Fees Regulations it is only necessary for it to “appear to the public authority” that Mr H M was acting in concert or in pursuance of a campaign. In our view WCC reasonably took the view it did. There was no need for it to have actual evidence say that he was a member of FVW. It was sufficient that WCC came to a reasonable conclusion based on the information available to it.
26. Mr H M also challenges the way that WCC concluded that the requests would exceed the appropriate limit. WCC categorised the 12 requests in the Refusal Notice in an interesting way. The Request itself makes 13 individual points. WCC categorised the information that was being requested as follows:
 - a. IDS budget – various questions
 - b. Staff structure and budget
 - c. Analysis of response to consultation

- d. Needs assessment matrix and information regarding number of individuals remaining under Children's Services under new system
- e. Grants received from central government and IDS budget
- f. Cost to Council regarding delay in the implementation of budget cuts
- g. Sitting service arrangement from ILEAP
- h. Contracts with external providers
- i. Calculations of packages and how been reviewed
- j. IDS fixed assets
- k. Correspondence between officers in connection with IDS cuts.

27. We have no evidence to explain how WCC arrived at these categories and it is difficult to map these categories above against the 13 parts of Mr H M's Request. Most of the categories seem unrelated, and his "legal" questions do not seem to form part of any category. It does not appear that the Commissioner made any enquiry as to the categorisation. Neither the Commissioner nor the Tribunal was provided with the substance of the other requests made. However we can identify at least 4 categories which are related to the Request and this is sufficient in our view to meet the requirement under Regulation 5(2)(a).

28. Mr H M is critical of the WCC's FOI practices particularly in relation to the 10 hours expended on dealing with his Request before the Refusal Notice was issued. WCC consider that Mr H M may have misunderstood its approach in this regard. WCC say its approach was based on guidance from the Commissioner, which essentially permits a public authority to carry out some searches for the requested information (if it so wishes) without an initial estimate and then to stop searching as soon as it realises that the appropriate limit will be exceeded. This is what WCC said it did and the Commissioner found that WCC had correctly applied the section 12 exclusion.

29. Mr H M is critical of the methodology applied by WCC to test whether the appropriate limit had been exceeded. WCC says it is based on the Commissioner's guidance. The guidance suggests taking a test sample or samples and if the limit is exceeded there is no need to continue with the exercise. The "random" category 11 taken by WCC to test whether section 12 would be met does not seem to us to cover any part of the Request. If another category of request had been considered first then it may have taken much less time and some information could have been provided within the appropriate limit if the requests had been narrowed.

30. Mr H M believed that the information he requested would have been collated by WCC as a Briefing Paper for the Leader, prior to the meeting he attended in November 2013, so it should have been easy to locate. However we have no evidence of this.
31. Moreover Mr H M's criticism of how WCC calculated the number of hours involved would seem to have merit. Regulation 4 of the Fees Regulations sets out the activities which can be taken into account in estimating costs. It does not state how a public authority should go about the estimation process. The Commissioner's letter to WCC during his investigation of the complaint dated 21 March 2014 stated that the estimate should be based on "the quickest method of gathering the information", which it seems to us was not necessarily the method chosen.
32. The Commissioner is critical of the process – see §27-29 DN but concluded that he was satisfied that the exercise was sufficient to establish that dealing with all 11 categories of requests would exceed the appropriate limit.
33. Despite the unsatisfactory nature of some aspects of the exercise, on the balance of probabilities, having considered the evidence before us, we would come to the same conclusion. The exercise undertaken was not necessarily the approach we would have taken but was certainly within the range of reasonable approaches that could have been taken. It is not for us to step into the shoes of WCC only to determine whether the approach taken by WCC in the circumstances of this case was reasonable.
34. Mr H M's next ground of appeal is that the Commissioner was wrong to find that WCC had offered advice and assistance to help him refine his Request for information, such that WCC had complied with its obligations under section 16 FOIA.
35. The Commissioner found that WCC's suggestion, that Mr H M liaise with other members of FVW about the requests for information they had made to WCC to see whether the requests could be narrowed or refined, to be a sensible one (§38 DN). However, we note that in the internal review letter dated 23 December 2013 WCC stated "...you were not provided with any specific suggestions on how to refine the requests..." .
36. Although Mr H M seemed to be adamant that he was not working in concert or as part of a campaign he did try to follow the advice by contacting the FVW bearing in mind he did not know who the other requesters were, but received no feedback. Mr H M could still have narrowed his Request but on the evidence before us he chose not to.
37. We have considered all the circumstances and on balance have decided that WCC did comply with its section 16 obligations although we do have some concerns which are expressed above. Having determined that Mr H

M's Request should be aggregated with the other requests, WCC's advise that he should liaise with the other requesters to narrow the scope of the requests in our view satisfied its obligation.

38. We note that it was WCC's intention to provide answers to questions on its web site and this may now have been done so that Mr H M has answers to some parts of his Request. If not he can always exercise his right to make another request particularly because the requests referred to in this case were made sometime ago. If he does so it may help if he bears in mind that he can only request information held by WCC and his request should be framed accordingly (as the Commissioner had set out in §§ 40 and 41 of the DN).
39. Mr H M also complains that it does not appear that the Commissioner took into account 'equality and diversity' issues behind his requests. The Commissioner understands Mr H M's argument to be that WCC is 'dealing with the parents/carers of children who have disabilities so profound that are in receipt of statutory service provision'.
40. The Commissioner was aware of the background to the requests for information. It is, however, an established principle that a request for information under FOIA received by a public authority should generally be considered as 'disclosure to the world'¹. In other words, in most cases, the identity of the person requesting information or the motive for the request(s) is not relevant to the public authority's statutory obligations.
41. This principle was recognised in the Upper Tribunal case of *Webber v Information Commissioner & Nottinghamshire Health Care NHS Trust* GIA/4090/2012, in which Ms Webber had sought information about her deceased son from the hospital trust which had been treating him shortly before his death (§ 37).
42. Accordingly, while recognising Mr H M's own desire to obtain as much information as possible about the IDS, the Commissioner was right to find that the WCC was not required to take into account Mr H M's reasons for the Request when considering its reliance on section 12 FOIA.
43. Mr H M seeks in his outcomes of the appeal that the Commissioner provides 'clarification ... as to how it applies equality and diversity considerations to its decision notice process'. It has chosen not to and this is a matter which the Tribunal does not have jurisdiction to consider (section 58(1)(a)).

¹ In certain instances the requester's identity is relevant to the public authority's consideration of the request (for instance, section 14 [vexatious or repeated request], section 21 [information reasonably available to the applicant] and section 40(1) [information which is the personal data of the requester]). Those situations are not relevant to this appeal.

44. Finally Mr H M complains that the Commissioner took a long time to consider his section 50 FOIA application and should have explained to him that he should have rephrased his questions so that they asked for recorded information, not questions which may have required the creation of new recorded information which was not held at the time of the Request.

45. Again this is not a matter that we can deal with because we have no jurisdiction under section 58 to consider matters which are unrelated to whether the DN is in accordance with the law.

46. We uphold the DN and dismiss the appeal.

Signed

Judge Angel

Dated: 27 January 2015