IN THE FIRST-TIER TRIBUNAL **Case No. EA/2015/0048**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:
Information Commissioner's
Decision Notice No: FS50550640
Dated: 17 February 2015

Appellant: **REUBEN KIRKHAM**

Respondent: **INFORMATION COMMISSIONER**

Heard at: Newcastle Magistrates Court

Date of hearing: 8 July and 8 December 2015

Date of decision:

Before
CHRIS RYAN
(Judge)
and
PIETER DE WAAL
DAVE SIVERS

Attendances:

The Appellant appeared in person
The Respondent did not appear and was not represented.

Subject matter: Cost of compliance and appropriate limit s.12

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2015/0048**
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

Introduction

1. The full background to the appeal is set out in the Preliminary Decision in this appeal which we promulgated on 26 August 2015. Abbreviations adopted in the Preliminary Decision apply here also.

2. The Preliminary Decision disposed of all the Appellant's grounds of appeal apart from his challenge to the reasonableness of the cost estimate on which the University relied for the purpose of FOIA section 12. On that issue we rejected part of the University's justification for its estimate – its suggestion that a search would be carried out through the personal notebooks of individuals who contributed to the funding proposals submitted to the EPSRC (paragraph 40(a) of the Preliminary Decision) – and we required it to provide more information (paragraph 40(b)) on the electronic searches the University had carried out as part of a sampling process in support of its costs estimate. We annexed to the Preliminary Decision the list of questions we asked the Information Commissioner to investigate with the University.

3. The Information Commissioner filed written submissions on the University's responses but did not attend the resumed hearing. The Appellant did attend and presented his arguments with the help of hard copy PowerPoint slides, which served as a very effective skeleton argument and assisted our understanding of the case he presented.

4. We will come back to those arguments after dealing with a number of procedural issues that arose.

Procedural Issues

5. The Appellant had applied to the Tribunal, in advance of the hearing, for an order that his appeal should be determined by a judge, sitting alone, and that he, the Appellant, be granted access to the electronic mailboxes and/or desktop computer of one of the University's Principal Investigators to enable him to run his own searches. By a ruling dated 7 October 2015 the Tribunal rejected both applications. As to the first part of the application, it ruled that the same panel that prepared the

Preliminary Decision should complete the determination of the appeal. As to the second part, the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules provide powers to order the production of electronic materials and their subjection to examination and/or testing, but it would not be proportionate to make the order sought. No appeal was made against those rulings.

6. The Appellant sought permission to record the hearing. A similar request had been refused at an earlier hearing before the Upper Tribunal of the Appellant's appeal on two procedural applications he had made within the scope of this Appeal. Part of the reasoning for the refusal was the availability of an official recording made by the Court. As recording facilities were not available within the room allocated for the hearing before us we allowed a recording to be made by the Appellant on the terms, as with the previous hearing, that the Appellant used it only for the purpose of this Appeal and related tribunal or court applications.

7. Finally, during the course of the hearing the Appellant invited us to "set aside" the Preliminary Decision, which he said would enable the Upper Tribunal to rule on the arguments arising from the Equality Act which had not found favour with the Tribunal when it issued the Preliminary Decision. His application was said to result from his having "*arrived at the conclusion that both the training and allocation generally* [of panel members] *is inadequate, both in the FTT and the UT"* for handling Equality Act issues. The consequence, he said, was that his appeal could not properly be determined without the appointment of an expert assessor, in the form of an Employment Appeal Tribunal judge, to make the final determination. The Appellant was not able to base his application on any particular statutory provision, procedural rule or general principle. It is, of course, the case that his right to appeal the Preliminary Decision remains open until the time for lodging an appeal against this decision expires (see paragraph 44 of the Preliminary Decision) and he therefore has an opportunity to apply for permission to take his Equality Act issues on appeal to the Upper Tribunal if that is his wish. On that basis we rejected the application.

<u>The arguments presented to us</u>

8. The Appellant's challenge to the University's cost estimate was based on the following explanation of the technical background, which he provided and we accept:
    a. All materials stored on electronic media (including e-mail messages and electronic images, such as a Portable Document Format (pdf.) file) consist of, or may be reduced to, a body of text;
    b. That text may be subjected to a word search to establish whether or not it includes a particular word or combination of words;

c. Word searches may be used to filter out from a body of electronic documents those that appear not to be relevant to a particular investigation; and
d. A search by a public authority for materials that fall, or are likely to fall, within the scope of a particular information request may be undertaken by conducting an electronic search by reference to a word or combination of words designed for the purpose. At an early stage in his communications with the University the Appellant provided the following example of a set of search terms that he thought would be appropriate on the facts of this Appeal:

> [[EPSRC] OR [DTC] OR [Doctoral] OR ["TITLE OF PROPOSAL"] OR [POSTGRADUATE]] AND [[EQUALITY] OR [DIVERSITY] OR ["keywords summarising each protected characteristic e.g. gender, disability, ethnicity …"]].

9. The Appellant acknowledged that a document search may not be perfect (any more, he said, than a perfect outcome could be guaranteed from an individual physically searching a large quantity of hard copy documents). Some relevant documents might be missed and some documents emerging from the search as a "hit" may turn out, on further investigation, to fall outside the scope of the information request.

10. One way to prevent relevant documents being missed, the Appellant said, would be to apply broad search terms. But this would be likely to generate an unmanageably large body of material that would then have to be physically inspected by an individual to locate those documents that fell within the scope of the information request. Conversely, a search string that was too highly developed might provide a suspiciously low number of "hits", suggesting that it had resulted in relevant material inadvertently being filtered out.

11. Any search strategy therefore required to reflect a balance between what the Appellant called "recall" (leading to the lowest possible number of relevant documents being missed) against what he termed "precision" (where the number of false positives would be as low as possible). So, for example, if the University's records were all reduced to a common searchable format and the search term was the single word "equality" he would expect 100% recall but the materials identified would then have to be subjected to a very extensive physical search (which would itself be subject to human error).

12. The Appellant suggested that the appropriate balance for a freedom of information search could be achieved by, first, developing an effective search format by a sampling process and then, once satisfied that it achieved the appropriate balance between recall and precision, apply it to the whole body of material to be searched. That having been done,

he suggested, the documents emerging from the search could be released without further human intervention.

13. It was suggested that these steps should be straightforward for a competent information officer employed by a responsible public authority which had equipped itself to handle freedom of information requests. It should not therefore give rise to difficulty or any significant cost which it would be appropriate to include in a section 12 calculation. He argued that the University, in particular, should be very well equipped to carry through these processes in light of the regular flow of requests which he assumed it received.

14. In response to a question from the panel on this point the Appellant did not think it appropriate to assess the reasonableness of a cost estimate on the basis that an information officer might not have significant expertise in data management but might have been selected for the role on the basis of other competences, such as specialist knowledge of compliance issues.

15. On the basis of these assumptions the Appellant proposed a specific costing model. Contrary to his earlier suggestion that a freedom of information search could be carried out without human intervention, his model did include a process in which an individual reviewed the outcome of an initial electronic search. He presented his model as representing the correct method for estimating the University's likely cost of complying with his information request.

16. We should say, first of all, that a cost estimate under FOIA section 12 does not fall to be rejected just because the party requesting information is able to devise an approach to the task of searching for information which might have been better than the one which the public authority proposed. No doubt a wholly inappropriate approach that leads to an unnecessarily expensive process may be exposed as such by demonstrating a significantly more straightforward method, but in most cases the requestor will not have sufficient information about the structure and content of a public authority's records management systems to enable him or her to expose anything less than the most extravagant of over estimates. And certainly the fact that an alternative approach might have led to a lower estimate does not establish that the method proposed by the public authority was unreasonable and should not have been relied on by the public authority.

17. Having said that, we did spend some time during the hearing exploring the Appellant's model. He explained that it would operate as follows:

    a. The mailbox of each individual likely to have had an involvement in the relevant part of each bid would be located and accessed. He assumed for this purpose that there would be 20 such mailboxes, one for each Principal Investigator plus another 7 for individuals providing specialist support in the field of equality

and diversity. He conceded in discussion with the panel that this would not capture email traffic between one core collaborator and another that was not copied to the relevant Principal Investigator. The Appellant also conceded that the University email system might have been configured so that each department had its own server, rather than having a university-wide system, but he did not think that this would increase the effort required by what he characterised as a competent information officer or, therefore, the notional cost of complying.

b. Each mailbox would be searched for attached documents containing relevant search terms and might be expected to contain something of the order of 8 relevant documents. That number was proposed as it matched the average number of documents disclosed by each of the other universities to whom the Appellant sent information requests.

c. It would be assumed that 75% of results generated by the electronic stage of the search would be false positives (i.e. four documents would be checked by a human selector for every one found to be within the scope of the information request).

d. A total of 2 hours 40 minutes would be allowed for the processes of converting mailbox content into word-searchable data and any refinement of the search parameters

e. On the basis of this model the time taken would be 13 hours and 20 minutes (2 hours 40 minutes to convert mailbox content to searchable data plus 640 minutes to search 20 mailboxes producing 8 documents reviewed at 4 minutes per document). That is a figure comfortably inside the 18 hours limit imposed by section 12 (as calculated in paragraphs 5 – 7 in the Preliminary Decision).

18. We also received written submissions from the Information Commissioner which warned of the danger of basing a challenge to the University's cost estimate on broad, hypothetical assumptions as to how the University held information or unsupported criticisms of its information officer. He also urged us to reject the Appellant's argument that a public authority, which could have organised its electronic documents more effectively but had not done so, should not be allowed to rely on section 12. He invited us to accept that he had tested the University's cost estimate with sufficient rigour during his investigation and that the conclusion he had reached in the Decision Notice did not contain any error.

Our decision

19. In paragraph 7 of the Preliminary Decision we pointed out that the Appellant was faced with the difficulty of having asked for specified

information on no less than 13 proposals which the University had submitted to EPSRC. With an 18 hour limit under the Fees Regulations this meant that the Appellant was faced with the daunting task of establishing that it was not reasonable to assume that more than 1.5 hours would be spent on carrying out the required search in respect of each proposal.

20. Additionally, as we have indicated earlier in this decision, the fact that a costing model shows that a search might have been conducted at a lower cost than the estimate relied on by a public authority is not determinative. The estimate may still be a reasonable one for that public authority to have made, for the reasons we have given. However, in our view the Appellant's costing model did not, in any event, demonstrate that a less expensive method of complying with his information request could be devised. We say this for a number of reasons.

21. First, the Appellant's belief that the University's data could be manipulated and searched very easily and quickly was based on a number of assumptions he made about the ease and speed of various operations for locating information, which were not supported by any evidence available to him, or us. We also believe that procedures that seemed very straightforward to him would have created more difficulty, and have taken more time, if attempted by someone less skilled than a PhD student in computer science.

22. The second problem we perceived with the Appellant's calculations was that they were based solely on the search for documents found to have been attached to emails. He did not present any figures in respect of the search into the body of each email message. The costs model was clearly deficient in this respect and the Appellant accepted that the scope of his request was not limited to documents attached to emails and that the search would also have to include email content. Applying the same approach and assumptions as proposed by the Appellant in respect of the number of documents likely to emerge from the electronic search, the time it would take to search emails would again be an estimate of 13 hours 20 minutes.

23. Thirdly the Appellant's costs model similarly failed to take into account the need to search for documents stored electronically (even though some of them might duplicate those traced as attachments to emails). The University located a total of 159 documents saved by one of the Principal Investigators but the Appellant argued that this was too high a number and that a reasonable level of precision in the electronic search would be likely to generate just 4 or 5 documents per proposal requiring to be checked to see if they were drafts falling within the scope of the information request. If we adopt the Appellant's numbers and his estimate of just one minute being required per document to run a relevance check (against the higher number argued for by the

University) this part of the exercise would take 1 hour 40 minutes to complete a search for documents held by 20 persons.

24. Fourthly, even the model as presented seemed to us to be flawed. It was suggested to the Appellant during the hearing that, in respect of mailbox document searches, it would be more appropriate to run his calculation on the basis of the document numbers emanating from the University's own evidence, rather than the Appellant's estimate of the number of documents he would expect to see (based on the numbers he received from other organisations). The University's evidence was that one of the Principal Investigator's mailbox contained 270 potentially relevant documents (see paragraph 32 of the Preliminary Decision in which we explained how the assessment was made but erroneously recorded the number of apparently relevant documents as 370). The Appellant did not agree that it would be appropriate to run the costs model on the basis of those numbers and suggested that the number was closer to 8 (see paragraph 16.b above). As a generous compromise we proposed to assume a total of 90 documents per mailbox (i.e. 10% of the total number of emails which the University said had been found in the mailbox of one of the Principal Investigators). On that basis, the cost of this part of the search operation would be 60 hours (90 documents from 20 mailboxes at 4 minutes per document = 7200 minutes = 60 hours). However, to accommodate the Appellant we carried out the same calculation on the basis (which he was prepared to accept) of just 10 documents emerging from each mailbox at the end of the electronic search and requiring to be checked. On that basis the total time taken would be 16 hours (20x10x4 = 800 minutes = 13 hours 20 minutes plus 2 hours 40 minutes for the initial conversion into searchable format).

25. Accordingly, applying the Appellant's own cost model with the adjustments we consider to be reasonably required as mentioned in paragraphs 21, 22 and 23 above (none of which were challenged by the Appellant), would lead to a costs estimate of more than 30 hours, which significantly exceeds the 18 hour limit imposed under section 12.

26. Finally, the Appellant's figures did not, in our view, attribute appropriate additional time (and cost) likely to be incurred in the preliminary stage (exporting documents into a format in which they could be subjected to a common search tool and devising an appropriate string of search terms to apply) or in the subsequent stage of collating those documents that emerged from the process as falling within the scope of the information request. In this respect we expressly reject the argument put forward by the Appellant regarding the level of data management expertise that he believed an individual should possess in order to competently perform the role of information officer. Clearly, all public authorities are required to take their responsibilities under FOIA seriously, and that should lead to the appointment of sufficient employees, appropriately qualified, to enable them to handle a

reasonable flow of information requests. It should not be possible, as the Appellant argued, for a public authority to reduce its FOIA obligations by appointing someone incompetent to handle all requests. But it does not follow that an inflexible standard should be imposed on the precise qualifications and skill set of anyone performing the role. Although the Appellant was critical of the competence of the individual within the University who took responsibility for the information request in this case, he did not present any evidence to support his criticisms and the written communications from the individual, which were included in the hearing bundle, did not suggest to us that he was anything but diligent and competent in his performance of his role.

27. In light of the concerns we have expressed we do not believe that the Appellant has demonstrated that the University's cost estimate was unreasonable. The Information Commissioner was therefore correct to conclude in the Decision Notice that the University had been entitled to refuse the Appellant's information request. The Appeal should therefore be refused.

28. Our decision is unanimous

Chris Ryan

Judge
19th January 2016