



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2016/0040

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50600569

Dated: 7 January 2016

Appellant: Mark Sandy

Respondent: Information Commissioner

Public Authority: University of the Arts London

Heard at: Fox Court London

Date of hearing: 14 June 2016

Date of decision: 20 June 2016

Date Promulgated: 21 June 2016

Before

Angus Hamilton DJ(MC)

Subject matter: s 12(1) Freedom of Information Act 2000 and the Freedom of Information & Data Protection (Appropriate Limit & Fees) Regulations 2004

Cases considered:

Roberts v Information Commissioner (EA/2008/0050)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal for the reasons given below and consequently substitutes the original Decision Notice with the Decision Notice set out below.

SUBSTITUTED DECISION NOTICE

Freedom of Information Act 2000 (FOIA)

Date: 21 June 2016

Public Authority: University of the Arts London
Address: 272 High Holborn, London WC1V 7EY

Complainant: Mark Sandy
Address:

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 7 January 2016.

Action Required

The University of the Arts London is to provide a copy of the information requested by the Mr Sandy in his communication of 15 June 2015.

The University of the Arts London must take this steps within 35 calendar days of the date of this substituted decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Dated this 21 day of June 2016

Signed

Angus Hamilton DJ(MC)
Tribunal Judge

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REASONS FOR DECISION

Introduction

1. Under section 1(1) of FOIA (the Act) a person who has made a request to a public authority for information is, subject to other provisions of FOIA:
 - (1) entitled to be informed in writing by the public authority whether it holds information of the description specified in the request (section 1(1)(a)); and
 - (2) if the public authority does hold the information, to have that information communicated to him (section 1(1)(b)).

2. Section 12 of FOIA provides, so far as material, 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.

3. The Secretary of State has made regulations which prescribe the appropriate limit for the purposes of section 12 of FOIA, namely the

Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations').

4. Regulation 3 of the Regulations prescribes that the appropriate limit for public authorities listed in Schedule 1 of the Regulations is £600 and for all other public authorities is £450. In this Appeal the appropriate limit is £450.
5. Regulation 4(3) of the Regulations provides that in estimating the cost of complying with a request to which section 1(1) of FOIA would otherwise apply, a public authority may "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."
6. Regulation 4(4) of the Regulations provides that where costs are attributable to the time that is expected to be taken by persons undertaking the activities specified in regulation 4(3), "those costs are to be estimated at a rate of £25 per person per hour". £450 is therefore the equivalent of 18 hours' work.

Request by the Appellant

- 7 The Information Commissioner in his Response to the Appeal dated 16 March 2016 has correctly set out the chronology of this matter and I

have adopted that chronology:

- 8 On 15 June 2015 the Appellant made the following request for information to the University:

The information I am requesting concerns all research grants received by the University of the Arts London and its predecessor institution the London Institute from the Arts and Humanities Research Council (AHRC) and its predecessor organisation the Arts and Humanities Research Board (AHRB) during the period from 1999 to 2014.

Please send me:

For each grant the relevant project code, project title and AHRC/AHRB grant reference.

For each grant the accounting ledger from the University's finance systems setting out financial transactions relating to each research project. I would expect each ledger to be annotated with the relevant project code and project title.

For each grant the final statement of expenditure submitted to and accepted by the AHRC or its predecessor the AHRB.

I would like the above information to be provided to me as paper or electronic copies.

- 9 The University responded on 24 July 2015. The University stated that it does not retain grant records for more than 6 years, and therefore would not hold the historic records requested. As to the more recent records, it stated that these were reasonably accessible to the public, being in the public domain and held by the research council (the

AHRC). The University provided links to two websites where it stated the records could be found.

- 10 The Appellant sought an internal review, explaining to the University that he had contacted AHRC regarding the requested accounting ledgers, and that AHRC had confirmed it did not hold this information.
- 11 On 5 August 2015 the University wrote to the Appellant with the outcome of its internal review. The University confirmed that it holds some of the requested information, but explained that the cost of complying with the request would exceed the appropriate limit established by s.12 FOIA and the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Fees Regulations'), as it would take more than 18 staff hours to assemble the requested information. Referring to its duty to advise and assist, the University provided a link to a website which it stated may provide some of the information sought, and invited the Appellant to consider narrowing the scope of the request if there were particular projects of interest to him.
- 12 The Appellant contacted the Commissioner to complain about the handling of his request and the Commissioner investigated the matter asking the University to provide a detailed estimate of the time and cost it would take to provide the withheld information.
- 13 The Commissioner's Response to Appeal records that:

'the University explained that the requested information covers a period of 15 years. It stated that the majority of the requested information which it holds is archived off-site, while older records had been destroyed. It explained that its Research Management and Administration team had checked the archiving records to establish an estimate of the work that

would be involved in responding to the request. It was estimated that responding to the request would involve retrieving around 12 boxes, each containing 5-6 lever arch files. It would be necessary to review each box to ascertain whether the requested information was held, which it estimated would take 2 hours per box; and it estimated that an additional 6 hours would then be required to locate and extract the precise information. The University explained that the task would be particularly time consuming as the University had changed its financial system in 2013, and current team members would have limited knowledge of the old system. On this basis, the University estimated that responding to the request would take at least 30 hours of work'. [Response to Appeal para 10]

- 14 By a Decision Notice dated 7 January 2016 served in accordance with s. 50 of the Act the Commissioner decided that the University had been correct to rely on s.12 FOIA to refuse to provide the information sought.

The Appeal to the Tribunal

- 15 On 15 February 2016 the Appellant submitted an appeal to the Tribunal (IRT).
- 16 The Commissioner has fairly summarised the Grounds of Appeal in his Response as follows:
 - (i) *in response to a previous information request the University had provided electronically the financial ledger for a specific research project, so it must be untrue that ledgers are held offsite, and/or that this would preclude disclosure;*

- (ii) *the previously provided ledger had been disclosed in 2015, after the University's change of financial systems in 2013, so it cannot be the case that the change of system precludes easy retrieval of the information;*
- (iii) *further information previously disclosed by the University regarding a research project included what appeared to be electronically generated financial information; and*
- (iv) *the AHRC had been able to comply with a similar request for information.*

[Response para 18]

17 The Commissioner has responded to these Grounds, quite fully, as follows:

- i. *The Appellant points to the fact that the University previously provided some of the information requested in relation to a specific research project. The Appellant points to the fact that this information was provided electronically. The Commissioner considers that it is not possible to extrapolate from the response to a much more limited request to determine what would be involved in responding to the Appellant's current, broad request. The request considered here covers a range of information over a 15-year period. While it may be the case that some of the information encompassed by the request could be provided within the cost limit, in electronic format, it does not follow that the entirety of the request could be complied with in this way. The Commissioner notes that the University invited the Appellant to consider narrowing the scope of his request following the internal review, but he has not done so. The University therefore estimated what would be required to*

comply with the request as a whole, and the Commissioner has no reason to doubt its explanation in that regard.

- ii. Second, the Appellant explains that in 2015 he was provided with a single accounts ledger, i.e. after the University's change of financial systems in 2013, and he submits that it therefore cannot be the case that the change of system precludes easy retrieval of the information. However, the University's position is not that the change of systems would make it impossible to comply with the request, only that it would make it a more time-consuming task. Again, in this case the University considered what would be necessary to respond to the Appellant's broad request for information, and the difficulties posed by the change in systems was a relevant factor in estimating the work and time required.*
- iii. Third, the Appellant refers to other information that has been provided electronically. It does not follow, however, that the information specifically requested by the Appellant in this case is held by the University electronically. The Commissioner has no reason to doubt the University's explanation as to what would be required to locate, retrieve and extract the entirety of the information falling within the scope of the current request.*
- iv. Finally, the Appellant submits that the AHRC had been able to comply with a similar request for information. The Commissioner considers that the ability of the AHRC to provide similar information does not indicate what might be required for another organisation such as the University. The University explained what complying with the Appellant's request would be likely to require, and provided a reasonable estimate as to the work and time involved.*

[Response paras 20-24]

The Questions for the Tribunal

- 18 This matter was considered on the papers only. The University was not joined as a party to the proceedings (despite being invited to do so and despite its participation being urged by the Commissioner) and made no formal representations to the Tribunal. Mr Sandy also made no further submissions after submitting his appeal.
- 19 I judged that the sole question for me was to consider whether the Mr Sandy was correct to claim that on the balance of probabilities that the work involved in answering his requests for information under FOIA would have involved 18 hours or less work.
- 20 I considered all the written material before me presented by both the Commissioner and the Appellant.
- 21 I also considered the decision of the IRT in *Roberts v Information Commissioner* (EA/2008/0050) in relation to the nature and quality of the evidence or information that should be provided by a public authority which is seeking to rely on s12 of the Act.
- 22 The Roberts case confirms that a public authority is not required to provide a precise calculation of costs, only an estimate:

That estimate, however, must be a reasonable one and may only be based on the activities covered by Regulation 4(3) It is not sufficient for a public authority simply to assert the appropriate limit has been exceeded. As was made clear in Randall (EA/2007/0004) and estimate has to be 'sensible, realistic and supported by cogent evidence'. The word estimate ... points to something more than a guess or an arbitrarily

selected figure. It requires a process to be undertaken which will involve an investigation followed by an exercise of assessment and calculation. The investigation will need to cover matters such as the amount of information covered by the request, its location ... The second stage will involve making an informed and intelligent assessment of how many hours the relevant staff members are likely to take to extract the information. Clearly the whole exercise must be undertaken in good faith and, as the Regulation provides, involve an element of reasonableness.

- 23 Although the Roberts case was not binding on the Tribunal I accepted and adopted the comments in that case as being an eminently sensible approach to the requirement placed upon a public authority which seeks to rely on s.12 of the Act.
- 24 I have a number of issues with the decision of the Commissioner and the arguments presented to him by the public authority and I question whether they comply with the expectations as set out in *Roberts*.
- 25 In my view the Decision Notice uncritically embraces the estimate and brief supporting calculations from the University. This appears to be tacitly acknowledged by the Commissioner in his Response where it is stated:

The Commissioner reached the Decision on the basis of the information provided by the Appellant and the University during the course of his investigation. The Commissioner is not able to assist the Tribunal as to the factual matters at issue in this appeal – such as, in particular, how the information is held by the University, and what retrieving the information would entail – beyond his own understanding of the information provided by the University. Insofar as the Tribunal may wish to explore such questions further, the Commissioner therefore considers it

would assist the Tribunal for the University to be joined to this appeal.

[Response para 26]

- 26 This comment can very easily be read as ‘the Commissioner has not subjected the University’s assertions to detailed scrutiny but the Tribunal might wish to do so’.
- 27 In previous cases that I have dealt with where a public authority has sought to rely on s.12 FOIA the public authority has usually carried out a ‘test run’ of searching through a small part of their recorded information for the sought information and then extrapolated from the time that that exercise has taken to estimate the time for a full search. In this particular case an example of this would have been for the University to have provided the time it took to examine one box of lever arch files and then extrapolated from that. Clearly there is no statutory or regulatory requirement to approach the matter in such a fashion but it seems to me that without such an exercise the estimate provided by a public authority risks failing to comply with *Roberts* and risks appearing as ‘*an arbitrarily selected figure*’. In my view the ‘2 hours per box’ estimate that the University relies on has an unfortunate element of arbitrariness to it rather than being a figure derived from ‘*an exercise of assessment and calculation*’.
- 28 This point is of particular significance in the context of the University providing an overall time estimate (over 30 hours) which is not hugely in excess of the statutory limit (18 hours). A halving of the time per box estimate to one hour per box would bring the overall time spent within the statutory time limit.
- 29 The appellant makes the point (and provides evidence) that some of the sought information appears to be held in an electronic format.

From the limited information (and because of the lack of input from the University that information has been limited) provided to me it appears that such electronically held information dates back to 2007/8 – these dates appearing in the documents submitted by the appellants. This is a significant element of the period for which the appellants are seeking information (1999-2014). The appellants make the further reasonable point that electronically held information should be relatively easy to retrieve as compared to information stored in paper files. The University however does not address this point at all and does not explain what proportion of the information sought by the appellants is held in electronic format and what impact this would have on their estimates. Rather the University seeks to imply that all the information sought by the appellants is stored in paper format. Given the material provided by the appellants I do not find this to be a credible assertion in light of the material provided by the appellants.

- 30 The University asserts that their current staff have limited knowledge of their pre-2013 financial system and thus retrieving the sought information would take longer. I do not find this to be a persuasive argument. Public authorities are obliged to keep records for various reasons. Financial records, for example, may be subject to inspection by the tax authorities and their request for information may go back several years. If a public authority chooses to change its 'financial systems' then it seems to me that it is incumbent on the public authority, for the proper running of the organisation, to train their staff in both the old and the new systems so that information can be retrieved without great difficulty. HM Revenue & Customs would not accept an excuse that 'our current staff will struggle to obtain that financial information because they haven't been properly trained' and I do not think it's a valid excuse in the context of a FOIA request. To hold otherwise would risk a public authority nominating a completely inexperienced member of staff to carry out a FOIA response task and then contending that it will take them too long.

31 For all these reasons I find that I am not satisfied, on the balance of probabilities, that responding to the appellant's request would involve in excess of 18 hours work and thus I allow the appeal.

Signed:

Angus Hamilton DJ(MC)

Tribunal Judge

Date: 20 June 2016