



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Information Rights**

Appeal Reference: EA/2016/0019

**Heard at Field House
On 28 June 2016**

Before

**JUDGE PETER LANE
ANNE CHAFER
SUZANNE COSGRAVE**

Between

ANDREW LOWNIE

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

THE FOREIGN AND COMMONWEALTH OFFICE

Second Respondent

Appearances:-

For the appellant: Mr G. Callus, Counsel
For the first respondent: No representation
For the second respondent: Mr R. Hopkins, Counsel, instructed by the Government
Legal Department

DECISION AND REASONS

A. Introduction

1. The appellant is an author and journalist. He has written "*Stalin's Englishman: The Lives of Guy Burgess*." Burgess was a British national who spied for the Soviet Union in the mid-twentieth century. In early 2015, the appellant was working on his *Burgess* book. Between 19 February and 2 March 2015, the appellant submitted 22 requests to the second respondent ("the FCO"). These followed twelve earlier requests of the FCO made in January and February 2015.
2. During March 2015, discussions took place between the appellant and the FCO, regarding his requests. Eventually, the FCO informed the appellant that it considered his 22 requests could be aggregated because they related to the same or similar information and that the FCO intended to refuse the requests because they exceeded the cost threshold prescribed by regulations made under section 12 of the Freedom of Information Act 2000 ("FOIA").
3. After further discussions, the FCO refused the appellant's requests by letter dated 30 March 2015. On 13 April 2015, the appellant made a written complaint about the way in which the FCO had handled his requests. The FCO treated this complaint as a request for an internal review. Having undertaken such a review, the FCO responded to the appellant by letter dated 29 April 2015, upholding its decision to refuse, explaining that the costs of responding to the requests would have exceeded the £600 limit for central government departments. In the same letter, the FCO stated that it considered it had offered appropriate advice and assistance to the appellant, pursuant to the FCO's obligation under section 16 of FOIA, by suggesting how the appellant might resubmit the requests so as to enable the FCO to provide him with responses.
4. On 12 May 2015, the appellant made a complaint to the first respondent ("the Commissioner") about the FCO's decisions. According to the Commissioner, subsequent correspondence between him and the appellant was confused, owing to the fact that the appellant had "five other appeals pending before the Information Commissioner" (response, paragraph 10).
5. In September 2015, the Commissioner concluded that 13 of the 22 requests in question could be aggregated, for the purposes of section 12 of FOIA, but that in the case of nine of the requests, the Commissioner considered it less clear that they related to Guy Burgess. The FCO was asked to explain why these requests were regarded as relating to the same overarching theme. The FCO replied on 3 November 2015, stating that the requests related to "individuals who may be linked to Guy Burgess either because of their links to the Security and Intelligence Services, or otherwise."

6. So far as costs were concerned, the FCO informed the Commissioner that, following agreement with the appellant, one of the requests had been re-submitted as a single request on 25 June 2015. It had taken the relevant FCO team six hours to check its records in order to respond to the request. Although accepting that other requests would not necessarily have taken so long, the FCO considered that they would at least have taken two hours each, giving a total time of 48 hours.
7. On 25 January 2016, the Commissioner issued a decision notice (FS 50589526), upholding the FCO's decision in relation to section 12 and finding that the FCO had not been in breach of its duty under section 16 to give advice and assistance to the appellant.

B. The appeal

8. The appellant appealed to the Tribunal. A hearing of the appeal took place at Field House on 28 June 2016. Mr Martin Tucker, Head of Archives in the FCO's Archive Management Team, had filed a witness statement dated 21 June 2016. He was available to give evidence but was not called, since Mr Callus stated that he had no cross-examination.
9. In reaching its unanimous decision in this appeal, the Tribunal has had regard to the oral and written submissions of the parties, together with the materials contained in the appeal bundle, which runs to 116 pages, and to the statement of Mr Tucker. The fact that this decision does not expressly refer to any item of evidence or element of the submissions is not to be taken as indicating that we have not had regard to the same.

C. Legislation

(a) FOIA

10. Section 12 of FOIA, so far as relevant, provides:-

“(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 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 taken to be the estimated total cost of complying with all of them.
- (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."

(b) The Fees Regulations

11. By regulation 3(2) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations"), the "appropriate limit" in respect of FOIA requests to the FCO is £600.
12. Regulation 4 of the Fees Regulations, so far as relevant, provides as follows:
- "(1) This regulation has effect in any case in which a public authority proposes to estimate whether the cost of complying with a relevant request would exceed the appropriate limit.
 - (2) A relevant request is any request to the extent that it is a request -
...
 - (b) [for] information to which section 1(1) of [FOIA] would, apart from the appropriate limit, to any extent apply.
 - (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.

- (4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour."

13. Regulation 5 of the Fees Regulations, so far as relevant, provides as follows:-

"(1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of [FOIA] 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."

D. Evidence

14. It is necessary to address Mr Tucker's evidence in some detail. The Archive Management Team ("AMT") is part of the FCO's Knowledge Management Directive. Mr Tucker has been Head of the AMT since January 2010. In this role, he oversees the storage, near Milton Keynes, of approximately 1.2 million files (in paper and microform format).
15. Mr Tucker also oversees the work of the AMT Historical Freedom of Information Team, which responds to requests for information from historical records under FOIA. A "historical record," for these purposes, is one created in 1990 or earlier. The Historical FOI Team comprises 3.5 full-time equivalent staff. The team receives about one historical FOI request every working day. The team handles internal reviews arising out of historical FOI requests; responds to the Commissioner when a complaint has been made; and coordinates a review of FCO-related material which is held in closed form at the National Archives in Kew.

16. The FCO has a Central Freedom of Information and Data Protection Team ("the Central Team"), which coordinates and monitors all responses to FOI requests, across the FCO. Both the Historical FOI Team and Mr Tucker work closely with the Central Team. The sensitivity review of FCO records requested under FOIA is the responsibility of the FCO's sensitivity reviewers. There are 21.5 full-time equivalent such reviewers.
17. The subject matter and origin of FCO archive files is, according to Mr Tucker, very diverse. Besides the approximately 600,000 standard paper files produced annually by FCO departments, the FCO holds around an equal number of "non-standard" files, which tend to be of a more historical nature. The non-standard files were typically inherited by the FCO from its predecessor organisations, such as the Colonial Office, or else they are records created by organisations in which the Foreign Office (or FCO) was a participant. Often, material relevant to a given historical FOI request will be scattered across a number of different record series.
18. In searching for information requested under FOIA, the Historical FOI Team relies on its expert knowledge of the FCO filing plan, manual search aids such as subject and nominal indexes, registry file lists and a high-level electronic inventory of archive file holdings. The team also needs to be able to search *Discovery*, the National Archives online catalogue, in a high proportion of cases, in order to determine whether the FCO is holding any "retained" material. "Retained" material comprises records which have completed the review process under the Public Records Act 1958 but which are being retained in the FCO archive on grounds of sensitivity under section 3(4) of that Act.
19. In the course of considering an historical FOI request, external stakeholders may need to be consulted, given that FCO files contain a significant proportion of material created outside the FCO. There is also an approval chain for historical FOI replies within the FCO which, depending on the nature of the requests and any relevant exemptions, may include senior management and ministers. All of this is managed by the Historical FOI Team.
20. In his statement, Mr Tucker sets out some of the more pertinent communications between the appellant and the FCO. So far as the 22 FOI requests were concerned, the FCO's judgment was that these fell to be aggregated for the purposes of regulation 5 of the 2004 Regulations and section 12 of FOIA. Mr Tucker discussed with the Central FOI Team and with the Head of the Knowledge Management Department how the FCO might be able to advise the appellant on ways of bringing his 22 requests within the section 12 cost limits "in order to be as helpful as possible." The Head of Knowledge Management agreed with Mr Tucker that the appellant should be invited to withdraw and re-submit the 22 requests, one by one, each time the appellant received a response to an existing FOI request. That would enable the appellant to prioritise his requests.

21. When Mr Tucker spoke with the appellant by telephone on 13 March 2015, setting out this proposal, Mr Tucker's understanding was that the appellant had agreed with it. Mr Tucker accordingly emailed the appellant on 16 March 2015, formally setting out the proposal. The appellant was asked to confirm in writing that he was withdrawing the 22 requests.
22. On 18 March, the appellant emailed Mr Tucker to say that he was happy for the requests to be aggregated but expressed concern that he might not receive responses in time for what he described as a "tight deadline." The appellant asked Mr Tucker what his options might be for gaining access to the material he had requested, such as viewing records on a confidential basis before their release and/or asking "other registered users of the national archives" to submit his requests.
23. On 24 March 2015, the Central FOI Team responded to the appellant's email of 18 March, stating that the appellant's 22 requests had been closed on the basis that the time it would take to answer the requests would breach section 12 limits. The email provided "updates" as the appellant had requested, on a number of his FOI requests, as well as answering several questions raised by the appellant in his email of 18 March.
24. On 25 March, the appellant emailed to say that his requests could not lawfully be limited to one at a time and that the FCO could not aggregate his recent requests because they covered a large number of individuals and did not all relate "to the same or similar information." The appellant required the FCO, pursuant to section 16 of FOIA, to resolve the section 12 objections, giving an estimate of likely costs, deciding whether some of the requested information could be provided and suggesting ways to refocus the requests so as to fall "within the £600." The appellant proposed a timetable for dealing with his 22 requests: "perhaps one request each working day." He also suggested combining some of the requests.
25. On 30 March 2015, the Central FOI Team wrote to the appellant to say that advice and assistance had already been provided to him (that is to say, the proposal that he could resubmit his requests one by one on receipt of a reply to an existing request). The Team said this would mean that in practice the FCO would still be handling at least ten of the appellant's FOI requests, concurrently.
26. A letter attached to the 30 March email explained that the 22 requests had been aggregated and that searches for these would cost more than £600, this figure representing the estimated cost of one or more person spending 3½ working days in determining whether the Department holds the information, and locating, retrieving and extracting it. The FCO now requested that the appellant allow a gap of 60 working days between each request, given that the appellant had not accepted the FCO's earlier suggestion on resubmission of requests.
27. The appellant, responding on 1 April 2015, requested the statutory basis upon which he was being told that he could only make one request every 60 working days. He

asked for the decision to be reviewed. The FCO interpreted this as a request for an internal review. The ensuing review was completed on 29 April 2015. It concluded that the decision to aggregate had been correct on the basis set out in the FCO's letter of 30 March. It also concluded that appropriate advice and assistance had been provided to the appellant.

28. Whilst the review was underway, the appellant wrote to the Permanent Under Secretary of the FCO on 13 April 2015. In this letter, the appellant expressed concerns about the FOI process and the handling of its requests. The letter to Sir Simon Fraser included the following:-

"I am sorry to bother you but I am having some problems with the Knowledge Management Department and would welcome your assistance. I am writing a scholarly biography of the former Foreign Office official Guy Burgess (1911-1963) and have put in several FOIA requests. Almost every request has been refused on the grounds of National Security (section 23) even though most files are more than sixty years old. I believe a public interest test has to be applied for records over twenty-eight years and I do not believe that has happened nor have these documents had the proper ministerial certificates. ...

Over the last three and a half months I have had only a dozen requests processed and I am finding the process very slow which is causing me problems as I am working to a tight publishing deadline. Between 19 February and the beginning of March I did put in twenty two requests, which in hindsight I realise was excessive, but, rather than try and agree a timetable, I was told I must cancel them all and I would only be allowed one request every sixty days which I do not believe is lawful. ...

I understand resources are limited and asked if the requests could be put through at an agreed number per week. There has been no response to my suggestions of a timetable and those requests from 19th February - all about different people - have been aggregated. The department have used section 12 saying the costs of researching my requests are too high but they have made no attempt, as required, to give an estimate of the likely costs, whether some of the information could be provided or suggest ways in which my requests could be focussed to fall within the £600 limit and perhaps settled in batches."

29. Mr Tucker states that he and relevant colleagues in the FCO formed a "strong impression" from this letter that the appellant's FOI requests were to do with his biography of Burgess. They judged that the requests were submitted by the appellant as part of his research into Burgess and either directly related to Burgess or else dealt with themes that featured prominently in the life and activities of Burgess, such as Communism, intelligence and espionage.
30. The FCO also gained the "firm impression at the time of aggregation that the appellant had made the 22 requests in order to collect information for a specific publication deadline." Apart from the above, Mr Tucker noted in this regard the appellant's email of 18 March 2015:-

“Many thanks for your letter of 16th March asking if I will withdraw all my remaining FOI requests and only put in one after a response on the previous submission. I understand time and resources are limited but I am on a tight deadline and hope we can find a way to avoid my doing so.”

31. Mr Tucker’s statement demonstrates than ten of the 22 requests mentioned Guy Burgess by name. They related to individuals said by the appellant to have an association or some other form of connection with Burgess.
32. Four of the requests, whilst not mentioning Burgess, were regarded by the FCO as thematically linked in that they dealt with themes that featured prominently in the life and activities of Burgess; for example, investigations into Geoffrey Jackson for espionage; records on Milo Talbot, Barron Malahide, especially his time in Ankara, in the Security Department and the IRD (Information Research Department). One of the appellant’s other requests related to the “exact date of Burgess’ secondment to the Information Research Department” and material held on Alan Maclean (who was known by one of the FCO archive staff to have a connection with Burgess).
33. The Historical FOI Team carried out research into other of the appellant’s requests at the time of preparing the FCO’s response to the Commissioner. With the exception of a request relating to an individual called Wachenfeldt, the FCO considered it had established a thematic connection between the requests in terms of espionage, intelligence or Communism. Later, it was discovered that the Soviet agent Anthony Blunt was recorded in a published work as mentioning Wachenfeldt, as an agent “whom I control through Burgess”.
34. Mr Tucker’s statement contains evidence regarding the estimated search time for the 22 requests. In his letter to the Commissioner of 3 November 2015, Mr Tucker estimated that each of the 22 aggregated requests would require at least two hours’ search time. In so saying, Mr Tucker had taken account of the fact that one of the aggregated requests, resubmitted by the appellant by agreement, had taken six hours to complete. Thus, the actual research times might, according to Mr Tucker, have taken significantly longer than the FCO’s estimate.
35. That estimate was based on a consideration of each of the sources which would have been searched for all of the aggregated requests. The team used a template that is employed to scope historical FOI requests, in order to satisfy itself that the estimates were as accurate as possible.
36. The FCO was at the relevant time holding 254 files relating to Burgess and Maclean (another British KGB agent). They are described as follows in the National Archives catalogue:-

“This series consists of a collection of papers which focus on Guy Burgess and Donald Maclean, KGB spies who evaded capture and escaped to USSR. The papers include investigations into their disappearance, including assessments of their personalities; Melissa Maclean’s subsequent flight to Moscow, gives some details of their activities in

Moscow; and the measures the Foreign Office put in place as part of a wider government process of tightening personnel security.”

37. Although not all the files related specifically to Burgess and Maclean, Mr Tucker states that the FCO would have needed to search this collection in relation to most of the appellant’s FOI requests. The search would have begun with the FCO’s catalogue listing the files and, if any potentially relevant file titles were identified, then the files themselves would have been consulted. The catalogue listing only contains a high level description of the file, so it would have been likely in many cases that the search would have to have progressed to consultation of the files themselves. Furthermore, a number of other sources of information would have needed to be searched. These include (but are not limited to) the Diplomatic Service list, HM Diplomatic Service Overseas reference list, the National Archives online catalogue, the FCO electronic archive inventory, nominal indexes (1950-1995), subject/correspondence indexes (1920-1952) and the archive personnel store in the main FCO archive (if the subject of the request was a member of the FCO or one of its predecessors).

E. Discussion

38. The first of the appellant’s grounds challenges the FCO’s decision to aggregate the 22 requests. Both the Commissioner and the FCO stress the width of regulation 5(2)(a) of the 2004 Regulations, which permits aggregation if two or more requests “relate, to any extent, to the same or similar information.” The former Information Tribunal has, rightly in our view, read paragraph (a) as requiring “only a very loose connection” and as being “very wide” (Independent Police Complaints Commissioner v Information Commissioner (EA/2011/0222); Dedalus Limited v Information Commissioner (EA/2010/0001)).
39. It is quite apparent from the appellant’s letter of 13 April 2015 to Sir Simon Fraser that the appellant was giving the FCO to understand that the FOI requests were to do with the appellant’s biography of Guy Burgess, on which he was working “to a tight publishing deadline.” The reference to 22 requests occurs immediately after the appellant’s reference to that deadline.
40. The appellant has appealed against the Commissioner’s decision. The appellant therefore bears the burden of showing that the decision is wrong. Although the appellant appears subsequently to have suggested that some of the requests were unrelated to the Burgess project, he has not begun to make good that suggestion.
41. The Tribunal is unpersuaded by Mr Callus’ examples, in oral submissions, in which he attempted to challenge the FCO’s evidence (in the statement of Mr Tucker) regarding, in particular, “things which featured prominently in the life and activities of Burgess, such as Communism, intelligence and espionage.” Mr Callus sought to draw a parallel between that approach of the FCO and requests for information

regarding the “Palestinian Territories” (an analogy which also features in paragraph 16 of the appellant’s reply). Mr Callus contends that the approach taken by the FCO and the Commissioner would mean that a request for information regarding the Knesset’s attitude to the Golan Heights would be capable of being aggregated with a request for information regarding the soil acidity in the West Bank.

42. Such recourse to a *reductio ad absurdum* argument is, with respect, misconceived. There is a material difference between information sought regarding, on the one hand, the life and background of a particular individual and, on the other, political and scientific information that merely happens to have a partial geographic connection. In approving the Regulations, Parliament plainly had the intention of conferring a very wide power of aggregation. As with other such powers, regulation 5 must be operated in a rational manner. This means a common sense view must be taken, having regard to all the relevant circumstances. We find that this is precisely how regulation 5 was applied by the FCO in the present case.
43. In determining for the purposes of regulation 5(2)(a) whether the information requested is the same or similar, the circumstances surrounding the request may be relevant. It follows that we reject Mr Callus’s attempt to divorce the requests from the information. In the present case, the fact that the requests were made in connection with the appellant’s Burgess project was manifestly relevant in determining whether there was the necessary connection between the information sought.
44. The appellant contends that the FCO unlawfully required him to submit only one information request to it every 60 working days. That is a mischaracterisation of the FCO’s position. Even if the appellant might, at an earlier stage, have been under a misapprehension in this regard, any such misapprehension ought long to have been dispelled, upon reading the respective responses of the Commissioner and the FCO, along with the relevant emails and letters.
45. As can plainly be seen from the emails and the statement of Mr Tucker (who was not cross-examined and whose evidence we accept), the “60 day suggestion” emerged only after the appellant had (so far as Mr Tucker was concerned) resiled from his earlier apparent acceptance of the FCO’s proposal to receive a re-submitted request from the list of 22, each time a previous such request had been answered. That would have meant that the FCO would have been working on at least ten requests from the appellant, at any one time.
46. The FCO’s “60 working day” proposal clearly derives from regulation 5(2)(b). It should have been apparent to the appellant that what the FCO was proposing, at this point (in the light of the rejection of the earlier proposal), was a system that was guaranteed to avoid the future operation of regulation 5 in relation to the appellant’s requests. The Tribunal can find no indication in the materials to support the contention that the FCO was telling the appellant that he could only make one

request every 60 days, even if a future request, viewed with any other, did not meet the test of similarity set out in regulation 5(2)(a).

47. Mr Callus criticises the FCO's resort to evidence derived from its researchers into certain of the information requests made by the appellant. These are the requests relating to the individuals De Courcy, Pfeiffer, Ball, Zu Putlitz, Jackson, Norman, Von Wachenfeldt and Wilson. Mr Tucker's evidence describes the relevance of these to the appellant's Burgess project. The connection to Burgess came to light when the historical FOI Team carried out research at the time of preparing a response to the Commissioner. As we have noted, the Commissioner specifically asked the FCO about certain of the appellant's requests.
48. Mr Callus says that it is wrong for the FCO to rely on this "post-dated" evidence. According to Mr Callus, if the public authority were able to rely on later evidence to support its section 12 decisions, such decisions could be made entirely speculatively.
49. We are unpersuaded by this submission. It is trite law that evidence can be relied on in proceedings such as these, even though the evidence was not formed at the date of the public authority's refusal decision; provided that the evidence relates to the circumstances as they were at that date. Plainly, that is the case here.
50. We are also unpersuaded that public authorities would be likely to resort to speculative section 12 decisions, in the hope that they may later be able to find evidence to justify them. Mr Callus did not explain what advantage, in terms of overall effort saved, such a tactic might produce. We would also expect the Commissioner, in the discharge of his statutory responsibilities, to be alive to any such practice.
51. The appellant challenges the FCO's reliance upon regulation 3(2) of the 2004 Regulations. He disputes that the appropriate limits would be exceeded by the aggregated requests.
52. Regulation 4(4) states that the cost of time spent by persons undertaking any of the activities mentioned in regulation 4(3) is to be estimated at a rate of £25 per person per hour. As Mr Hopkins says, that is the rate and it matters not who undertakes the work.
53. The last part of Mr Tucker's statement shows plainly (and certainly on the balance of probabilities) that dealing with the aggregated requests would have exceeded the £600 limit. The work described by Mr Tucker as needing to be done falls within the ambit of regulation 4(3). We find that it was reasonable for Mr Tucker to have regard, amongst other things, to the amount of time that it had actually taken to deal with one of the appellant's requests. In the circumstances, we are satisfied on balance that dealing with each of the requests would have taken at least two hours of search time and that the £600 limit would have been breached by some margin.

54. Mr Callus's submissions regarding the grade of official that ought to be assigned to undertake the task go to the issue of whether the FCO's estimate under regulation 4 involved only costs that "it reasonably expects to incur" (regulation 4(3)). Since, as we have noted, the hourly rate is fixed at £25, the question is whether the person or persons assigned by the public authority to the tasks described in regulation 4(3)(a) to (d) are sufficiently trained and/or experienced as to be able satisfactorily to complete those tasks as quickly as possible. Again, we find that the appellant has failed to show any defect in the FCO's approach. We find nothing in Mr Tucker's evidence (or, indeed, any other of the evidence) to suggest that, whether through using different staff or otherwise, the FCO could handle the requests more efficiently and, thus, less expensively. On the contrary, Mr Tucker describes a system that we consider has been carefully crafted in order to meet the significant FOIA and other related duties which the FCO, as a public authority, must discharge.
55. Mr Callus submitted that, on the assumption that one was dealing with 48 hours worth of work in order to deal with the appellant's requests, that figure paled into insignificance in the light of what he estimated to be 5,600 "man" hours spent each year by the 3.5 equivalent full-time staff comprising the historical FOI Team.
56. There are serious difficulties with this submission. Even if it is factually correct, it does not take the appellant's case further, unless the assertion being made is that the FCO's decision to rely on the exemption in section 12 was irrational in public law terms. That is a high hurdle, which we find the appellant cannot surmount. The obvious problem with the submission is that any other requester could also make it. There is no suggestion that the Historical FOI Team is under-employed. Accordingly, time spent dealing with the appellant's 22 related requests would be likely to delay the resolution of requests made by others. Section 12 and regulations 3 to 5 have been crafted with a view to ensuring that requesters each get a "fair crack of the whip." In short, the Tribunal finds that the FCO was entitled to invoke section 12.
57. We find that there has been no breach by the FCO of its obligations under section 16 of FOIA. Although we accept that the appellant may genuinely feel otherwise, looking objectively at the exchanges between the appellant and the FCO, in its various manifestations, we consider that the FCO provided the requisite advice and assistance to the appellant. In particular, it remains unexplained why the appellant did not take up the offer of prioritising the 22 requests so as to re-submit one each time another was answered. As we have already found, the "60 day" statement was a reasonable way of dealing with the effect of regulation 5, once the FCO had decided that it should apply.
58. This finding means it is unnecessary to our decision to reach a conclusion on the issue of the interdependence of sections 12 and 16 of FOIA. Each is independently satisfied in the present case. Having said that, we consider the former Information Tribunal in Roberts v Information Commissioner (EA/2008/0050) was correct to hold that a public authority's ability to invoke section 12 is not dependant on its

having complied with its section 16 duties. As a matter of statutory interpretation, one would expect to see express provision in FOIA if section 12 were contingent on section 16.

59. Our findings on sections 12 and 16 mean that it is unnecessary for us to address the issue of whether the appellant's requests fall to be refused by reason of section 14. Whilst late reliance on such an exemption is not precluded, as a matter of law, we do not consider that, in all the circumstances of the present case, the overriding objective would be served by making any finding on this issue.

F. Decision

60. This appeal is dismissed.

Judge Peter Lane

11 August 2016

Promulgated 15 August 2016