



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]**

Case No. EA/2015/0272

ON APPEAL FROM:

**Information Commissioner's
Decision Notice No: FS50570535
Dated: 29 October 2015**

Appellant: Charity Commission for England and Wales

Respondent: The Information Commissioner

On the papers

**Date of decision: 9 August 2016
Re-Promulgated: 24 August 2016**

**Before
CHRIS RYAN
(Judge)
and
MICHAEL JONES
NARENDRA MAKANJI**

Subject matter: Duty to advise and assist s.16

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

Background

1. On 18 November 2014 the Charity Commission for England and Wales (“the CC”) received a request for information under the Freedom of Information Act 2000 (“FOIA”). The first part (which is the only part that is relevant to this Appeal) read:

“Please provide the current number of charities tagged with the ‘extremism and radicalisation’ issue code.”

2. On 22 December 2014 the CC wrote to the requestor explaining that this part of the request was based on a misunderstanding. It wrote:

“Let me start by correcting your suggestion that the Commission tags charities. This is not correct. You may have misunderstood the Commission’s use of the issue code system. Issue codes are purely administrative tools to help identify and classify the issues of concern under consideration in cases. There is no code or tag or label applied to a charity Cases are opened by the Commission, in accordance with the criteria in the published Risk Framework, based on what the regulatory issue is, the nature and level of the risk, how serious it is and the impact. We assign a code to each case (not to each charity as you suggest) simply to enable us to identify and quantify what regulatory issues arise in our work and report on case types and volumes each year in our Annual Report and in the more detailed report on our compliance work called Tackling Abuse and Mismanagement.”

3. On that basis the CC stated that most of the requested information was either not held or was covered by one or more of the exemptions provided under the FOIA. The requestor did not challenge that decision.

The request for information and the CC's response to it

4. On 23 December 2014 the requestor submitted a request for information ("the Request") that followed up on the Commission's explanation. It was in these terms:

"1. You have said that issue codes are not applied to charities but only to cases. Please clarify why you feel this distinction is important since the cases are connected to charities?

I should note that in a previous FOI from our organisation we asked 'Do any of the 55 charities know this code has been applied to them?

Your answer was:

'The application of issue codes is an aspect of internal case management and administration. The Commission has not made the 55 Charities aware that this issue case has been applied to them'

You did not make the distinction in your answer and crucially you confirmed that 55 charities were affected. Please explain?

2. The Chairman of the Commission in an interview with the Telegraph informed them 'The regulator has begun scrutinising 86 British charities which it believes could be at risk from extremism, including 37 working to help victims of the Syria crisis, according to new figures released today.'
<http://www.telegraph.co.uk/news/worldnew...>

At the time that article were those 86 charities connected with cases that have had the issue code 'radicalisation and extremism' applied?

3. Please provide the current number of cases that have had the issue code 'radicalisation and extremism' applied and clarify how many charities are connected with these cases?

4. How many charities have had allegations of 'extremism' upheld by the Commission? If it is not the Commission that determines the correctness of such allegations, please inform us which body is?"

5. On 23 January 2015 the CC responded to the Request. It refused to disclose any of the requested information on the basis that the cost of dealing with the Request would exceed the costs limit for handling an information request provided under FOIA section 12¹.
6. No attempt was made at that stage to estimate the cost of dealing with each of the four questions set out in the Request. The only information provided by CC was in the following terms:

¹ CC sought at the time to aggregate the Request with the earlier letter of 18 November 2014, a position which it subsequently abandoned. Nothing turns on this for the purposes of this Appeal.

"I see that we have already explained about the provisions of Section 12 but for the sake of clarity I would restate that this makes provision for public authorities to refuse requests for information where the cost of dealing with them would exceed the appropriate limit, which for central government is set at £600. This represents the estimated cost of one person spending 24 hours (or 3.5 working days) in determining whether CC holds the information and then locating, retrieving and extracting it."

7. It is common ground between the parties that no attempt was made by the CC at that stage to explain that the requestor might be able to avoid the ground for refusal by limiting the scope of the Request. However, on 6 March 2015 the CC wrote to the requestor again informing him that its original response had been subjected to an internal review. The letter set out estimates of the time it would take to deal with each of the four questions raised. The estimates for questions 1 and 3 produced relatively low cost figures. The estimate for question 2 was in these terms:

"In order to answer this question we would need to interrogate the commission's computer record for each of the 86 charities to determine whether there is an associated case which has been given the 'radicalisation and extremism' issue code. A conservative estimate would be 10 minutes per charity which would be a total of 14.333 hours or approximately 2 full days of work."

8. In respect of question 4 (or, more correctly, the first sentence of that question – the second sentence was not addressed) the review letter read:

"I have interpreted this to mean 'in how many cases has the Commission investigated allegations of extremism and found that those allegations had some merit?'² In order to find this information the Commission would have to identify all the cases which have been allocated the issue code 'radicalism and extremism' and then interrogate the case file to see if the allegations were about extremism and if so whether we found that the allegations had merit. In order to provide the information you request I would have to interrogate the computer records of at least 86 charities, read several documents to see whether the allegation was about extremism and if so more documents to see whether those allegations were found to have merit. From my knowledge of the Commission's systems I estimate that this would take a minimum 10 minutes per charity which should be a minimum of 14.33 hours in total."

² Neither the requestor nor the Information Commissioner challenged that interpretation.

Complaint to the Information Commissioner and his Decision Notice

9. By an email of 8 April 2015 the requestor notified the CC that he planned to challenge its review findings, in particular the estimate made in respect of question 2. As to question 4 the requestor wrote:

"You have said that a conservative estimate would be 10 minutes per case file thus totalling 14.33 hours. Even if this was accepted as correct then 3.5 days would allow for approximately 30 hours of work time.

I believe therefore that the section 12 exemption is invalid. In addition I would add that I would accept a partial answer to question 4. Meaning that if the commission was only able to cover a random sample of 50% of the relevant charities within the allotted time then I would accept this."

A copy of that letter was sent to the Information Commissioner with the requestor's complaint (also dated 8 April 2015) regarding the way in which his information request had been handled.

10. The CC did not reply to the requestor immediately, but on 22 May 2015 it sent the Information Commissioner a detailed justification for the stance it had adopted towards the Request. Its letter referred to a second letter which it had sent the requestor on the same day. That letter recorded that, following the complaint to the Information Commissioner, a further review had been undertaken because CC considered, having reviewed the matter again, that a more detailed explanation should have been given. The letter then set out the response which it considered should have been given to the Request at the outset. The relevant part read:

"The Commission notes that request number 4 does not have any parameters such as a specified time period. The Commission has therefore searched for all cases with the relevant issue codes. However, the Commission will hold information on other cases where allegations of extremism have been made which were considered prior to issue codes being created. To identify the relevant charities for this would be a massive task especially as the words 'extremism' may not have been used which makes searching for information in response to the specified request more difficult.

Allegations of extremism may be made at different stages in a case and also it may not be the only issue being considered so whether the allegation was substantiated or not may be resolved at different stages in a case. It is not therefore possible to only consider closed cases for example. This does mean that to identify the information requested accurately, every activity and

document on every relevant case would need to be opened and considered individually.

The Commission now considers that to identify the information for each charity would take between 36 mins and 3 hours 42 mins and given the number of potential cases falling within the request, this takes the request beyond the appropriate limit set out in the 2004 Regulations. The estimate of time is based on the Commission choosing 4 cases at random and identifying how many activities (activities may be emails, letters, telephone calls, meetings, etc.) were recorded on its case management system and how many documents were recorded on its document management system (which is integrated with the case management system). Although clearly the amount of information recorded in an activity or document will vary greatly, the Commission has estimated that it would take on average 2 minutes to select, open and consider an activity or document. Activities and documents ranged from a couple of lines to documents of 6 pages or more."

11. The section of the letter to the requestor dealing with FOIA section 12 concluded with this paragraph:

"If you wish to refine the scope of your request so that the time taken to process it would fall within the appropriate limits you should send a revised request, which will be treated as a new request for information. The Commission's response to you on 6 March 2015 provided you with what information regarding the requests that could be made within the appropriate limit. The clarification above, should also assist you in narrowing your request should you wish to do so."

12. The revised calculations were repeated in the letter to the Information Commissioner of the same date and it was pointed out to the Information Commissioner that:

"This takes the request way beyond the appropriate limit set out in the 2004 Regulations"

The letter went on to say:

"CC notes that request number 4 does not have any parameters such as a specified time period"

13. That criticism did not, of course, respond to the possible limitation on the scope of the Request, which the requestor had suggested in his letter of 8 April 2015.

14. On 29 October 2015 the Information Commissioner issued his Decision Notice recording the outcome of his investigation into the requestor's

complaint. He concluded that the cost of complying with question number 4 on its own would exceed the appropriate limit and that the Commission was therefore entitled to refuse all of the requestor's questions. He recorded that the difficulties the CC would have faced in responding to the Request would have been:

"... compounded by the fact that there is no timeframe to the complainant's fourth request and so it would need to search through all of its cases to identify what information it held."

15. The Decision Notice went on to say that the Commission had not complied with its obligations under FOIA section 16 to provide the requestor with advice and assistance. The Information Commissioner conceded that the Commission's letter of 6 March 2015, reporting on the outcome of its internal review, had advised the requestor about the time needed to comply with each of the four requests and therefore that it was open to him to refine his request if he so wished. However, the Information Commissioner did not think that this was sufficient because it had not given any advice or assistance about how question number 4 could be refined to bring it within the appropriate limit. The Decision Notice concluded with these two paragraphs:

"The [Information Commissioner's] guidance suggests that the minimum a public authority should do in order to satisfy section 16 is:

- either indicate if it is not able to provide any information at all within the appropriate limit; or*
- provide an indication of what information could be provided within the appropriate limit; and*
- provide advice and assistance to enable the requestor to make a refined request.*

There is likely to be a breach of section 16 where a public authority has failed to indicate that it is unable to provide any information within the appropriate limit. This is based on a plain English interpretation of the phrase '...what, if any, information could be provided ...'. In this case the Charity Commissioner failed to inform the complainant that it was unable to provide any information within the cost limit or take any other steps to suggest how this particular request might be refined or reformatted. The [Information Commissioner] considers this is a breach of section 16 of FOIA"

Correspondence after the Decision Notice

16. On 24 November 2015 CC wrote to the requestor drawing attention to the Decision Notice and to its letter of 22 May 2015, which it said the Information Commissioner appeared to have overlooked. Its letter then contained this passage:

“However, having now had this further opportunity to clarify the above with you and consider matters again, following the [Decision Notice], the Commission believes that limiting your question to open or closed cases or to a timeframe may not be enough to take you within the cost limit. This is owing to practical difficulties in identifying the information sought. I hope that his clarified matters for you. If you have any questions we are happy to assist.”

The Appeal to this Tribunal

17. On 26 November 2015 the Commission launched an appeal to this Tribunal against the conclusion that it had breached FOIA section 16. That is the only issue to be determined – as the appeal came to us for determination there was no challenge to the finding that the cost estimate was not unreasonable for the purposes of section 12..
18. Both parties were happy for the Appeal to be determined on the basis of the papers and without a hearing. We agree that this was an appropriate process to adopt in the circumstances of this Appeal and we have reached our decision on the basis of an agreed bundle of papers, which included written submissions from the Information Commissioner and the Commission.

The Applicable Law

19. FOIA section 16 provides:

“Duty to provide advice and assistance.

(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 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

20. FOIA section 45 provides:

Issue of code of practice by Secretary of State.

(1) The Secretary of State shall issue, and may from time to time revise, a code of practice providing guidance to public authorities as to the practice which it would, in his opinion, be desirable for them to follow in connection with the discharge of the authorities' functions under Part I.

(2) The code of practice must, in particular, include provision relating to—

(a) the provision of advice and assistance by public authorities to persons who propose to make, or have made, requests for information to them ...

21. The full title of the code of practice referred to is "Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part 1 of the Freedom of Information Act 2000, Issued under section 45 of the Act". It provides, at paragraph 14:

"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."

The Parties' submissions

22. Both the CC and the Information Commissioner filed extensive written submissions. The process of doing so narrowed the areas of disagreement between them and, by the time the Appeal reached us for determination, it had been agreed that:
- a. The obligation imposed on a public authority under section 16 is to provide advice and assistance so far as it would be reasonable to expect it to do so.
 - b. A failure to meet the requirements of the Code of Practice will not inevitably lead to a breach of section 16.
 - c. However, compliance with the Code of Practice reduces the risk of such a breach.
 - d. The way in which the CC held information about charities against whom allegations of extremism had been made meant

that it could not readily identify which cases were likely to contain information that could easily be accessed, with the result that trying to advise the requestor on how question number 4 might be refined to bring it within the cost limit, without incurring the very level of cost that section 12 was intended to avoid, was problematic.

23. The Information Commissioner argued that, where a public authority relies on section 12, the minimum assistance it should provide (in the words of its written submissions) was to:

*“(i) either indicate if it is not able to provide any information at all within the appropriate limit; or
(ii) provide an indication of what information could be provided within the appropriate limit; and
(iii) provide advice and assistance to enable the requestor to make a refined request.”*

24. Applying those rules to the facts of the case, and in particular the problem identified in paragraph 22(d) above, the Information Commissioner submitted that the only advice and assistance which CC could reasonably offer would be to state that no information could be provided within the cost limit. It had failed to do so and remained in breach of section 16

25. The CC argued in its written submissions that the Information Commissioner had altered his position, having previously argued that the CC would remain in breach of section 16 until it committed itself either to (i) a statement to the effect that it would not be possible to obtain information within the cost ceiling, or, in the alternative (ii) guidance as to how it could be possible to obtain such information. However, CC was not content with the concession that it was not reasonable to expect it comply with alternative (ii) in that formulation of its obligations. It argued that the Information Commissioner's insistence that, in the circumstances of this case, the CC had no option but to state that it was not able to release any information within the cost limit represented an inflexible application of the guidance set out in the Code of Practice and undermined the discretion afforded to public authorities under section 16.

26. The CC argued that it might be possible for the requestor to reformulate his information request in a way that might be found, on investigation, to be capable of being responded to without excessive cost. But, because of the way in which the relevant information was

held, it was not possible for the CC to explore how this might be done, in advance, without incurring the very level of cost which section 12 was intended to avoid. In those circumstances, the CC argued, it would be misleading to say to the requestor, in effect, that there was no way in which the information request could be refined to enable it to be answered without exceeding the cost limit. It had done all it could reasonably be expected to have done in providing the information that it had regarding the way in which information was held to enable the requestor to decide whether or not he could refine his information request.

Our Decision

27. The first issue we have to address is the date at which the CC's conduct should be assessed for the purposes of section 16. Is it the date of the requestor's complaint to the Information Commissioner or some later date? And if a later date would it in any circumstances be appropriate to take into consideration any communication from the CC to the requestor after the date of the Decision Notice itself.
28. None of the parties addressed this issue in their written submissions, but the Information Commissioner appears to have proceeded on the basis that section 16 creates a continuing obligation, on which he had power to rule.
29. The statutory basis for the Information Commissioner's enforcement powers may be found in FOIA section 50(1), which reads, in material part:
- "Any person (in this section referred to as 'the complainant') may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I"*
30. Section 16 forms part of Part I and therefore clearly falls within the scope of the available appeal process. However, the phrase "*has been dealt with*" makes it clear that the Information Commissioner's jurisdiction is limited in this respect to considering the advice and assistance provided prior to the date of the complaint. For the purposes of this Appeal that means 8 April 2015, the date when, having received the CC's statement as to the outcome of its internal review (i.e. its letter of 6 March 2015) the requestor made the

complaint that led to the Decision Notice.³ The CC's communications that fell to be considered at that stage were its letter refusing the information request of 23 January 2014 and the letter of 6 March 2015 recording the outcome of its internal review. As the CC itself subsequently conceded (in its letter to the requestor of 22 May 2015), a more detailed explanation of the cost estimate should have been given. It is inherent in that concession, and apparent from our review of the correspondence read as a whole, that no other advice had been given at that date as to how the requestor might have been able to refine question number 4.

31. We are reinforced in our decision on the date at which a public authority's efforts to provide advice and assistance must be assessed by the fact that the Information Commissioner has no statutory power to direct compliance with section 16. Section 50(4) reads:

*"Where the Commissioner decides that a public authority –
(a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or
(b) has failed to comply with any of the requirements of sections 11 and 17, the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken."*

32. The absence of any reference in that subsection to section 16 is consistent with the conclusion we have reached, to the effect that the Information Commissioner's enforcement powers are limited to determining whether or not a public authority has complied with the section up to the date when complaint is made.

33. That is sufficient for the disposal of the Appeal. The CC, on its own admission, had not complied with section 16 at the date when complaint was made. The Information Commissioner, having investigated the complaint, was correct to conclude in his Decision Notice that this was the case.

³ The requestor first contacted the Information Commissioner on 6 February 2015 but accepted guidance that it was not appropriate to lodge a complaint until the Charity Commissioner's own complaints procedures had been exhausted. That stage was not reached until the requestor received the Charity Commission's letter of 6 March 2015. The Information Commissioner did not start his investigation until after that had been received and the requestor had indicated, in a letter dated 8 April 2015, that he did not accept its conclusions.

Postscript

34. We are conscious that our conclusion in this respect may be said to hamper the Information Commissioner's enforcement powers, but it is the inevitable consequence of the manner in which the FOIA has been drafted. Of course, this does not mean that the Information Commissioner may not start a new investigation (and if necessary issue a new decision notice), in the event that a public authority fails to take any steps to remedy a breach identified in a previous decision notice.
35. In case we were found to be wrong on this point, we should consider the impact of post-complaint communications. That would bring into play the letter of 22 May 2015 itself. In this context we bear in mind that by that date the requestor had stated, in his letter of 8 April 2015, that:
- "...if the commission was only able to cover a random sample of 50% of the relevant charities within the allotted time then I would accept this."*
36. Against that background, where the requestor is clearly aware of at least one way in which he could limit the scope of his request, we consider that the guidance set out in the CC's letter of 22 May 2015 would comply with section 16. It would certainly not be appropriate for the CC to have said, in those circumstances, that it was not able to provide any information within the cost limit. Nor would it be under an obligation to carry out an estimate of the likely cost of the limited search, which the requestor had mentioned, before that possible refinement had been converted into a specific request.
37. In these circumstances it is not necessary, or appropriate, to consider the possible impact of the CC's letter of 24 November 2015.
38. Our decision is unanimous

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Judge Chris Ryan
9 August 2016

Re-Promulgated 24 August 2016