



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

Appeal Reference: EA/2016/0286

Decided at Field House Without a Hearing

Before

**THE HONOURABLE MR JUSTICE LANE
HENRY FITZHUGH
NARENDRA MAKANJI**

Between

**JOHN McGOLDRICK
(MERSEY TUNNELS USERS ASSOCIATION)**

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DECISION AND REASONS

1. The appellant requested information from HM Treasury about proposed Mersey Tunnel toll charges. His request was for the following:-
 - "1. A list of all recorded contacts, by the Government or Government officials with the Authority responsible for the Mersey Tunnels, after January 2015, which have included any mention or discussion of Mersey Tunnel tolls or tolling powers.
 2. A copy of any documents (including letters and emails) received or sent to the Government or Government officials and any agendas or minutes of any

meetings between the Government or Government officials and the Authority responsible for the Mersey Tunnels, after January 2015, which include any mention of tolls or tolling powers on the Mersey Tunnels or on the existing and new (Mersey Gateway) bridges between Runcorn and Widnes.

There may have been meetings internal to the Government or with someone other than those representing the Authority responsible for the Mersey Tunnels, but I am not at this stage asking for those documents. Note that the responsible authority for the Mersey Tunnels since April 2014 is the Liverpool City Region Combined Authority but that the people acting for the Authority may have used the "Merseytravel" name and email address.

If these documents contain information which is not related to tolls or tolling powers on the Mersey Tunnels or on the existing and new (Mersey Gateway) bridges between Runcorn and Widnes, then you may wish to exclude that part of the information which is outside this request."

3. On 18 February 2016, HM Treasury responded. It refused to provide the requested information, relying upon section 35 of the Freedom of Information Act 2000 (formulation of government policy, etc).
4. The appellant requested an internal review on 22 February 2016. In the course of producing this review, HM Treasury revised its position. It now said that it would refuse to supply the information by reason of section 12(1) of FOIA. This provision states that the general duty of disclosure in 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, as defined in section 12 (by reference to regulations).
5. There was an issue between the parties as to whether the request was properly within the ambit of the Freedom of Information Act 2000 or, instead, the Environmental Information Regulations 2004. The Tribunal agrees with the Information Commissioner that the appellant's request could cover both non-environment and environmental information, for the purposes of regulation 2(1)(c) but that it would defeat the purpose behind section 12 and regulation 12(4)(d) if a public authority were obliged to collate the requested information in order to ascertain what information fell under either FOIA or the EIR. We agree, therefore, that HM Treasury was correct to consider the request under section 12, even though it might include some environmental information. Separating out environmental information within the scope of the request would be unnecessary, given that information is exempt information for the purposes of FOIA if the authority is obliged to make the information available by reason of the EIR (section 39).
5. In the event, both parties have addressed the issue with reference to section 12. We approach the matter on that basis.

6. Both parties were content for the appeal to be determined without a hearing and, in all the circumstances, we consider that we could justly do so. In reaching our unanimous decision, we have had regard to the totality of the written materials and submissions provided by the parties.
7. The Information Commissioner's decision notice sets out, at paragraphs 16 to 31, why she agreed with HM Treasury that section 12 operated so as to entitle HM Treasury to refuse to supply the information requested by the appellant.
8. In essence, HM Treasury undertook a sample exercise, whereby one official undertook a key word search to decide what emails were held which would need to be considered. Five key terms used in the searches were "Mersey Tunnel", "toll", "Liverpool City region", "LCR" and "Merseytravel". The Information Commissioner considered that all the terms used were relevant to the request and that the dates searched were from 1 February to 31 December 2015.
9. The terms were searched separately in order to ensure that all relevant information falling within the scope of the request was identified. The Information Commissioner considers that it is for each public authority to determine the most appropriate sampling exercise based on a request for information and how that information may be held.
10. The decision notice then continues as follows:-
 - "21. The Commissioner considers it important to note that a search of "Mersey Tunnel" plus "toll" may have produced documentation falling within the scope of the request but may not have produced all relevant documentation within the scope. For example, it may not have produced documentation where the word "toll" was not mentioned but "levy" or "charge" was used instead.
 22. It is the Commissioner's view in this case that searching the terms separately would have ensured that all relevant information within scope was identified and would account for any ambiguity over wording.
 23. It is important that a public authority takes a broad approach where a request is itself broad, in order to identify all information within scope. This is an approach that the Commissioner actively encourages to ensure that all information within scope is captured by a search.
 24. The sample exercise produced a total of 2493 emails."
11. Given that the same search terms would need to be applied to a search of the Department's record management system, a sample exercise of this was undertaken, producing a result of 2450 documents. Accordingly, the entire sample exercise identified 4943 emails and documents which would need to be considered, although the actual number "would of course be higher".

12. Finally, dealing with section 16 (Duty to provide advice and assistance) the Information Commissioner noted that HM Treasury “has suggested to the complainant that he might like to consider refining his request by reducing the amount of information he is interested in and she considers that the Treasury has accordingly discharged its duty under FOIA section 16”.
13. In his reply of 21 May 2017, the appellant draws attention to a letter of 28 September 2016 from HM Treasury to the Information Commissioner. This makes plain the fact that, as we have just recorded, searches were done for the various terms as “separate” searches. This means, as the appellant points out, that “all the emails and records were searched for one term and then all the emails and records were searched again for the second term, and so on and the number of hits were added together”. Only 134 emails were identified for the period between 1 February and 31 December 2015, containing the word “toll”.
14. Overall, the appellant considers that HM Treasury was not being helpful in undertaking searches in the way that it did but that, on the contrary, the effect of the search methodology was “to produce such an exaggerated number of documents that they were then able to claim exemption”.

Discussion

15. In the light of the request made by the appellant, the nature of the search undertaken by HM Treasury was, we consider, the one most likely, as a matter of fact, to ensure that no information, falling within scope of the request, would fail to be disclosed, had the search been fully completed.
16. The Tribunal accordingly concludes that, on the particular facts, HM Treasury did not breach section 12 of FOIA.
17. We do, however, consider that the appellant has put forward a cogent case for saying that HM Treasury has not complied with the duty under section 16 of FOIA to give advice and assistance. Merely suggesting to the appellant that he might like to consider refining his request by reducing the amount of information requested does not, on the facts of this case, constitute adequate advice and assistance.
18. The maxim “the best is the enemy of the good” comes to mind. Given the widespread nature of computer-driven searches for information in connection with FOIA requests, it is, we consider, reasonable to expect large, sophisticated organisations, such as HM Treasury, to point out to requesters how the most thorough search is likely to exceed the relevant financial limit under the Regulations made by reference to section 12, and to suggest a reformulation of the request in terms specific to computerised searches. Accordingly, if HM Treasury had asked the appellant to reformulate his request by reference to emails and documents containing both the terms “Mersey tunnel” and “toll”, the appellant may well have

reformulated his request. If, on the other hand, the appellant had chosen not to do so, the authority could not be blamed for invoking section 12.

Decision

19. We accordingly allow the appeal to the following extent. The decision notice is not in accordance with the law. We re-make the notice by substituting a finding that HM Treasury was in breach of its duty under section 16 to provide advice and assistance to the appellant. It should do so, not later than 42 days from the date of this decision.

**Lane J
Chamber President**

**Date of Decision: 30 October 2017
Date of Promulgation: 30 October 2017**