First-tier Tribunal
(General Regulatory Chamber)
Information Rights **Appeal Reference: EA/2017/0020**

Determined on written evidence
and submissions

Before

David Farrer Q.C.

Judge

Between

Des Moore ("DM")

Appellant

and

The Information Commissioner ("The ICO")

First Respondent

and

Parliamentary and Health Service Ombudsman ("the PHSO")

Second Respondent

The Tribunal dismisses this appeal. The PHSO is not required to take any action.

References in the form "s.12(4)" are to provisions of the Freedom of Information Act, 2000.
References in the form "Reg. 3(3)" are to provisions of the Information and Data Protection (Appropriate Limit and Fees) Regulations, 2004

Decision and Reasons

1. On 2nd. May, 2016, DM made two long and detailed requests for information to the PHSO. They are not repeated here but a copy of the original requests is annexed to this decision.

2. The first request consisted of fifteen "sub – requests" asking, in respect of the year 1st. April, 2015 to 31st. March, 2016, for the numbers of enquiries received by the PHSO, the number of individual complainants, how many complaints each made, how many assessments were made, how many investigations were undertaken/ completed and, where completed, the outcomes and the relationships between individual complainants and the numbers of assessments and investigations .

3. The second request contained four sub – requests, seeking information as at May, 2016, on the numbers and types of open complaints regarding the PHSO and how long they had remained open, whether held by the PHSO or after transfer to the Corporate Casework team.

4. The PHSO responded on 28th. May, 2016. It acknowledged that it held the requested information but refused both requests on the ground that the costs of compliance would exceed the appropriate limit so that the exemption provided

by FOIA s. 12 applied. Regulation 3(3) of the Information and Data Protection (Appropriate Limit and Fees) Regulations, 2004 provides that the limit applicable to the PHSO is £450, which currently represents the cost of eighteen hours' work. By letter of 25th. July, 2016 it maintained that refusal following an internal review. DM complained to the ICO on 2nd. August, 2016.

5. The DN was issued on 2nd. February, 2017. The ICO upheld the PHSO's refusal and its reliance on s.12. She found that it was entitled to aggregate the two requests and accepted evidence provided during her investigation that the estimated time required for compliance with the first request was twenty – three hours. This was said to be due to a case management system, since upgraded, which required manual checks as to how many individuals were involved in each complaint and whether an individual had made more than one complaint.

6. The DN also considered whether the PHSO had complied with the duty under s.16(1) to provide reasonable advice and assistance to DM as to how, if at all, his requests could be redrafted so as to enable the PHSO to provide information without incurring costs exceeding the Reg. 3(3) limit. The ICO concluded that it had done so but, later, in her Response to the Grounds of Appeal, she reversed this finding because the internal review gave DM *"little useful information about what he could do to refine his requests"*. She did not suggest, by reference to this case, what sort of information should have been provided. She then pointed out that such information had later been provided in the course of her investigation and in the DN, so that no order under s.16 was appropriate.

7. DM's complaint had not included any allegation of a breach of s.16, nor was such a claim included in the Grounds of Appeal.

8. DM submitted brief Grounds of Appeal on 5th. February, 2017. As to his first request, he contended that it sought important management information and that most, if not all, such information was easily obtainable within the cost limit because similar or identical information had been provided to another user of the *Whatdotheyknow* website. As to the second request, the estimate of seven hours' work was excessive because it had previously been provided in the form requested. He attached documents relating to four previous responses by the PHSO to similar requests for information from "J. Roberts".

9. The ICO in her Response simply restated her conclusions on s.12 and invited the Tribunal to join the PHSO as a party so that it could provide evidence as to the method of retrieving the requested information. The PHSO submitted a Response, which it later amended to take account of the evidence, which it adduced.

10. That evidence was a witness statement from Stephen Middleton, a Performance Manager at the PHSO in the Management Information Team, together with documents to which he referred. It made three important points –

    - A request identical to the first request, made by J. Roberts on 4th. April, 2016, had been refused, initially and following an internal review in reliance on s.12. Mr. Middleton's staff had estimated hat it would take two days, hence over eighteen hours to extract the requested information. J. Roberts made a second request at the same time, which was, for practical purposes, indistinguishable from DM's second request. This also had been refused by reference to s.12.
    - The main problem affecting the first request was that the case management system, "Visualfiles", captured the number of complaints but not the number of individuals behind those complaints nor

duplication resulting from one person making more than one complaint. This led to a manual check on each record to verify the number of individuals concerned and whether an individual had made another complaint.

- The increased estimate of time required to answer the first request (23 >> 34 hours) resulted from the return from leave of a highly experienced performance analyst who revealed that Visualfiles used unique complainant identity codes. This led her to establish that there were 24,575 records held on file relating to the period covered by the first request. However, even with such codes, the need for manual checking was not overcome because multiple individuals raising one complaint would be identified by a single code and an individual making multiple complaints would be identified by multiple codes. Mr. Middleton allowed five seconds for scrutiny of each record, producing an aggregate time commitment of just over thirty – four hours[1].

11. The PHSO argued that it was entitled to aggregate the two requests of 2nd. May, 2017, when assessing costs of compliance. On the evidence outlined above it revised the estimate of time needed to comply with the first request to about thirty – four hours, which was more than enough to justify a s.12 refusal. It stated that similar requests for this information had met the same response..

12. As to s.16, the PHSO observed, quite correctly, that there was no appeal against the ICO's decision. Had there been an appeal, there was no basis for suggesting that the PHSO could have provided further advice or assistance.

[1] The calculation is 24,575 / 720 (sets of 5 seconds in one hour) = 34.132

13. In final written submissions dated 20th. July, 2017, DM submitted that the PHSO had not invoked s.12 when responding to a very similar series of requests made by "J.Roberts" from the same website. They covered two years rather than one. This strongly suggested that the limits were not exceeded. If the PHSO could handle Roberts' requests within cost limits, why not those the subject of this appeal? The case was strengthened by the fact that the information for Roberts was marshalled in time to be provided to DM, where relevant.

The reasons for my decision

14. Three principles of law are relevant to this appeal -

- As with all appeals relating to s.12, the question is whether the public authority's estimate of time, hence cost, is reasonable and supported by cogent evidence – see *APPGER v Information Commissioner and Ministry of Defence [2011] UKUT 153 (AAC) at §46; Randall v Information Commissioner and MHPRA EA/2006/0004 at §12*
- The authority may aggregate the costs of complying with more than one request where the requirements of Reg. 5 of the 2004 regulations, foreshadowed in s.12(4), are met -

  5 —

  (1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act 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.

This appeal, for these purposes, involves two requests from one person (Reg. 5(1)(a)). The only issue is whether they refer to "the same or similar information" (Reg. 5(2)(a)).

- Section 12 relieves an authority of the duty to provide information imposed by s.1(2). It does not prohibit the provision of information at a cost exceeding the "appropriate limit".

15. It was not disputed that all the work, on which the estimate of thirty – four hours was based, fell within the four categories identified in Reg. 4(3).

16. The first and second requests plainly refer to similar information, namely the PHSO's handling of complaints relating to its decisions and services at closely linked dates. It was therefore entitled to aggregate the costs of complying with both.

17. I accept as truthful and accurate the evidence of Mr. Middleton. He demonstrates clearly how the final figure of thirty – four hours for the first request is calculated. It is a reasonable estimate based on a frugal allowance of time for checking.

18. DM, in his final submissions, suggests that there is a conflict of evidence between the acceptance by Mr. Middleton that some parts of the first request could be easily answered and the statement in the letter relating to the internal

review that *"there was not an obvious part that could be answered easily"*. This leads nowhere, as regards s.12, since the PHSO's later definitive response is the more favourable to DM's case.

19. My conclusions at §§15 and 16 make the question of time required for compliance with the second request immaterial. I understand that the requested information has now been provided anyway.

20. DM makes much of the fact that similar information, indeed, a wealth of apparently unrelated information, had been provided to J Roberts without reliance on s.12. I note that he does not acknowledge that J. Roberts' requests for the very same information that DM requested, met the same responses as give rise to this appeal.

21. He states that the PHSO was able to meet all these requests from J. Roberts within cost limits. Whether that is so, we do not know. As I observed in §14, s.12 does not prohibit the supply of information at a cost exceeding the appropriate limit. A public authority, when providing information, is entitled to exceed that limit in the interests of public relations but to say "enough is enough", if it considers that the exorbitant requests have continued for too long.

22. The information as to complaints provided to J.Roberts related to years 2013 – 4 and 2014 – 5. Its retrieval would have no apparent value to the task of retrieving 2015 – 6.

23. As to s.16, the duty to advise and assist, the ICO chose to make a finding as to compliance, despite the absence of any related complaint from DM. His Grounds of Appeal made no mention of s.16 and were never enlarged. However, the Tribunal's duty under s.58(1)(a) is to determine whether the DN

is *"in accordance with the law"*. So, if the ICO makes a finding as to compliance with the requirements of FOIA, even though it was, as regards the complaint, gratuitous, the Tribunal must consider whether it was correct. The fact that she made no consequent order, for the reasons that she gave in the DN, does not alter the position.

24. In my opinion, the ICO's original finding in the DN was correct and the reasons that the she gave in her Response for changing her view on s.16 were undeveloped and unconvincing. The internal review letter proposed a reduction in the number of requests. It is not obvious what more it could have usefully done, short of excluding all references to individuals (see §10), which would have undermined the apparent purpose of the series of requests. A public authority is not required to strain every sinew to modify a request so as to bring it within the limit. It must behave reasonably in providing advice and assistance. I find no breach of the s.16 duty owed by PHSO to DM.

25. For these reasons I dismiss this appeal.

David Farrer Q.C.,
Tribunal Judge,

29th. November, 2017