



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2020/0237V

Before

Judge Stephen Cragg Q.C.

and Tribunal Members

Ms Naomi Matthews
Mr Alf Murphy

Heard via the Cloud Video Platform on 4 June 2021

Between

GEORGE GREENWOOD

Appellant

and

(1) INFORMATION COMMISSIONER

(2) CABINET OFFICE

Respondents

The Appellant represented himself (assisted as McKenzie friend by Mr Maurice Frankel)

The Commissioner was not represented

The Cabinet office was represented by Ms Cecilia Ivimy

DECISION AND REASONS

DECISION

1. The appeal is dismissed.

MODE OF HEARING

2. The proceedings were held via the Cloud Video Platform. All parties represented joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
3. The Tribunal considered an agreed open bundle of evidence comprising 132 pages, a skeleton argument from the Cabinet Office, and an authorities bundle.

BACKGROUND

4. The Appellant submitted the following request to the Cabinet Office on 27 August 2018:

Please provide a copy of all documents prepared between 1st January 2010 and 12th May 2010 to be provided to Gordon Brown in the eventuality that he was re-elected Prime Minister at the 2010 general election.

Please send me this information by e-mail to [email address provided], in a machine readable format such as .csv or .xlsx where appropriate.

If you have any queries about this request, please contact me on [telephone number provided].

If you are encountering practical difficulties complying with this request, please contact me so that we can discuss the matter and if necessary, I can modify the request.

5. We were told that this information was known as 'Day One' information and was prepared for every potential prime minister at a general election. The Cabinet Office provided its response to his request on 27 September 2018 and sought to rely on section 36(2)(b)(i) and (ii) FOIA as its basis for refusing to provide the requested information. The Appellant requested an internal review on 28 September 2018. The

Cabinet Office did not respond to the request for an internal review, and the Appellant referred the matter to the Commissioner.

THE LAW

6. Section 36(2)FOIA provides, materially, that:-

Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –

(b) would, or would be likely to, inhibit –

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation...

7. Section 36 FOIA can only be engaged if, in the reasonable opinion of the qualified person, disclosure would result in any of the effects set out in s36(2) FOIA.

8. As well as s36 FOIA, s50(4)FOIA and s12 FOIA are relevant in this case.

9. Section 50(4) FOIA provides: -

Where the Commissioner decides that a public authority –

(a) has failed to communicate information ... in a case where it is required to do so by section 1(1), ...

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.

10. Although the wording of s50(4) FOIA contains the word ‘must’ on two occasions, it is established that s50(4) FOIA does not always require the Commissioner to specify steps but, instead, confers a discretion on her to do so. In *Information Commissioner v HMRC and Gaskell* [2011] UKUT 296 the Upper Tribunal recognised that there may be exceptional cases where a public authority should have communicated information at the time it was requested, but by the time of the Commissioner’s consideration, circumstances have materially changed such that disclosure has

become unlawful, impossible or wholly impractical. The UT described this as the “retrospectivity difficulty”. One such “retrospectivity difficulty” identified in *Gaskell* was where the relevant information has been destroyed. The UT held:-

24... Parliament can be presumed not to have intended that the Commissioner might have to impose an obligation on a public authority to take the “step” of communicating certain information where that step would, in the circumstances, be e.g. unlawful, impossible or wholly impractical. In other words, Parliament can be presumed to have intended that the Retrospectivity Difficulty would not arise in the FOIA scheme.

11. Section 12(1) FOIA provides:-

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.

12. The limit referred to in s12 FOIA is set by regulation 3 of the Freedom of Information and Data Protection (Appropriate Limits and Fees) Regulations 2004 (the Fees Regulations). The Cabinet Office is a public authority listed in Part 1 of Schedule 1 to FOIA and the appropriate limit is therefore £600. Pursuant to Regulation 4(4) of the Fees Regulations, costs are calculated on the basis of a cost of £25 per person per hour. The limit of £600 therefore represents the estimated cost of one person carrying out 25 hours work.

13. The Fees Regulations provide at regulation 4(3) that a public authority may take only certain costs into account, namely those relating to:-

- (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.

THE DECISION NOTICE

14. The Commissioner's decision notice is dated 8 July 2020 (FS50831429). The Commissioner identified an immediate difficulty with the Cabinet Office's reliance on s36(2) FOIA. This was that the Cabinet Office had not obtained the necessary opinion of a Qualified Person (QP) as to the effect of making the disclosure. The Cabinet Office proposed to rely on a QP's opinion which related to a similar request in relation to Day One information prepared for David Cameron. The Commissioner said that she 'profoundly disagrees with this position', essentially on the basis that the same information may not be involved. As the QP's opinion had not been obtained then the Commissioner found that the Cabinet Office could not rely on the exemption in s36(2) FOIA.

15. The Commissioner then stated that the 'logical next step from this conclusion is that the Commissioner would order the disclosure of the information'. However, the Commissioner concluded that in the 'unique circumstances' of the case that could not be done. The Commissioner explained the situation as follows:-

21...the original handler of the request had left that department and... the Cabinet Office, was unable to find the hard copy of information that the original handler of the request had used when preparing their response...

22. The Cabinet Office then set out a litany of technical problems it would have in retrieving archived electronic versions of the documents in question including the prohibitive costs involved in doing so due to these problems. The Commissioner has not set out on the face of this notice what those problems are because they related to technical specifics. The Commissioner is prepared to accept that they apply in this case.

23. However, the Commissioner is extremely disappointed to learn of such records management problems in respect of this information....Although the problems described above are highly regrettable, the fact that the information still exists, albeit in electronic form, does not show evidence of deliberate destruction or loss of information.

16. The Commissioner then made a reference to s12 FOIA as follows:-

24. While she has considered whether she could substitute the application of section 12 for section 36, she notes that the Cabinet Office did not explicitly

choose to do so although it gave some information about the cost of compliance in this case since it had lost hard copies of the information in question. Had it done so, she would, with considerable regret given the circumstances and the Cabinet Office's own failures, have accepted an argument that the cost of complying with the request exceeds the appropriate limit for doing so set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

17. It has to be said that it is not immediately clear what decision the Commissioner has reached. However, the essence of it appears to be that, because of the technical issues raised by the Cabinet Office, although she has rejected the reliance on s36 FOIA, she will not order any steps to be taken for the information to be disclosed.
18. That the Commissioner is empowered to take this approach is to be found in s50(4) FOIA as interpreted by the case of *Gaskell* (see above). Thus, by finding that the exemption in s36 FOIA does not apply the Commissioner, effectively, decided that the Cabinet Office had failed to communicate information in a case where it is required to do so by section 1(1) FOIA. In usual circumstances, the decision notice should have specified the steps which must be taken by the Cabinet Office for complying with that disclosure requirement, and the period within which they must be taken. However, this was one of the exceptional circumstances as described in *Gaskell* and so it was not necessary to set out any steps.
19. The referral to, and relevance of, s12 FOIA to this decision is also not clear. As the Commissioner states, the Cabinet Office did not rely on s12 FOIA and the wording of s12 FOIA makes it clear that it is not compelled to do so. It seems to us that in paragraph 24 of the decision notice the Commissioner is not relying on s12 FOIA as an element in the decision-making process. All she is doing is making hypothetical remarks as to what would have been done if the Cabinet Office had relied on section 12 FOIA.
20. However, on the appeal, there was a question as to whether, in fact, the Commissioner was purporting to take s12 FOIA into account when exercising her discretion under s50(4) FOIA to which we will return later.

THE APPEAL

21. The Appellant's appeal is dated 15 July 2020. The Appellant maintains that the Commissioner exercised her discretion wrongly because:-

(1) The Cabinet Office did not rely on s. 12(1) FOIA.

(2) Section 12 FOIA was not available because it would involve the costs of carrying out an internal review, providing the information to the Commissioner, or complying with the Information Notice, not responding to the original request.

(3) The costs which the Cabinet Office would incur are the result of its failure to preserve the information it obtained when replying to the request.

22. The Appellant considers the reasons for the Commissioner not ordering the steps for disclosure and says:-

The precise reasons for this decision are not set out. From the context, the IC's position appears to be that the Cabinet Office could have refused the request on the grounds that the estimated costs of responding to it would have exceeded the appropriate limit under section 12 of FOIA.

23. Essentially, the Appellant argued that, even if s12 FOIA was something that could be considered, then it should not apply to a situation where the Cabinet Office had already identified, located and retrieved the information, but then had to take further steps because the information had then been lost. In any event, costs incurred in such circumstances would not have been reasonably incurred for the purposes of regulation 4(3) of the Fees Regulations.

24. The Cabinet Office's response to the appeal can be summarised as follows:-

(a) The hard copy of the requested information has been lost or destroyed.

(b) The Cabinet Office had not been able to locate any possible digital copy at the time the Commissioner reached her decision.

- (c) Although at that time there remained open a theoretical further search which could be conducted to determine if the information existed in digital form, that search would have required very significant use of resources.
 - (d) The Commissioner did not err in exercising her discretion under s50(4) FOIA in those circumstances.
 - (e) The Commissioner was entitled to have regard to s12 FOIA and the Fees Regulations, and that further steps would exceed the costs limit.
 - (f) In any event, since the decision notice was issued, further digital and paper searches had been carried out, the information had not been found, and the Cabinet Office was now of the view that it no longer held the information, and so was unable to disclose it.
25. The Cabinet Office pointed out that the Commissioner had erroneously reported in the decision notice that the information did, in fact, exist, when the Cabinet Office had only referred to a possibility that this was the case.
26. The Commissioner's response to the appeal does little to elaborate on the reasoning in the decision notice, other than to explain the 'unusual circumstances' which led to the Commissioner not requiring the Cabinet Office to take any steps (in fact, the Commissioner used the word 'unique' in the decision notice):-

The 'unusual circumstances' were that the Second Respondent at the time of issuing of the DN, had not located the information requested and had indicated to the Commissioner that it existed, but in electronic form. The Second Respondent explained that, to comply with the request, would exceed the appropriate limit for doing so set in the Fees Regulations.

Nevertheless, the discretion argument and appeal has become irrelevant since the Second Respondent has confirmed the requested information is not held. The Commissioner regrets how this matter has played out but opines that an academic appeal such as this would be a waste of resources and would not further the Tribunal's overriding objective

THE HEARING

27. At the hearing the Tribunal heard evidence from Ms Eirian Walsh Atkins, who is the Deputy Director of FOI and Transparency at the Cabinet Office, and who had also provided a witness statement. In summary, Ms Walsh Atkins evidence, relevant for the Tribunal is as follows:-

- (a) The requested information may well not have been information which was retained because, as Gordon Brown did not become Prime Minister in 2010, it was information that was not required for any purpose by the Cabinet Office.
- (b) When the initial request from the Appellant was received, searches did not reveal the information.
- (c) However, there were two repositories being emptied out at that time and a partial version of the requested information was discovered in hard copy, and the request was dealt with on the basis of that document. Other officials had seen the document and told Ms Walsh Atkins that it was a partial copy.
- (d) The official who dealt with the request left his position and thereafter the hard copy could not be found. The official moved to another position in the civil service but an attempt to contact him by email had been unsuccessful and he has since left the civil service. His HR file had not been consulted to obtain contact details and Ms Walsh Atkins felt that would be intrusive and it would have been unlikely that he was still in possession of the document.
- (e) Colleagues and line-managers had been spoken to but were unable to throw light on the whereabouts of the hard copy.
- (f) In the circumstances, renewed efforts had been made to search for a digital copy. Relevant officials had been asked and relevant email records investigated. Although the Commissioner had been told that a digital system containing records relating to Gordon Brown could not be interrogated without large cost,

other methods had now been found to search the archive, but nothing had been found.

(g) There was a possibility (but nothing more) that the information could have been on the Apollo system which is a repository of unorganised documents. A search for Gordon Brown+2010+Advice had brought up 7,920 documents. The top twenty of these had been looked at and had brought up nothing like the information sought. An expert view had been formed that the search would not bring up the information.

(h) A view had been formed on the basis of this, that the information was, in fact, no longer held.

28. At the hearing Mr Greenwood made submissions based on his grounds of appeal, assisted by Mr Frankel, and Ms Ivimy made submissions on behalf of the Cabinet Office.

DISCUSSION

29. At the time of the Commissioner's decision we are satisfied that the position was as described to us by the Cabinet Office: that the original hard copy had been lost and that it had not been possible to locate a digital copy. At that time there was a theoretical, but expensive, search that could be undertaken but it was not the case, as the Commissioner incorrectly recorded, that it was known that a digital copy existed.

30. At the time the case was considered by the Tribunal, the Cabinet Office's position had changed to say that it was of the view that it did not hold a digital copy of the information. This was because a way had been found of searching the Gordon Brown archive with no positive results. This, together with the searches that had been carried out on the Apollo system (where it was thought unlikely to find a copy of the information in any event), indicated that the information was not to be found.

31. In this case it seems to us that s12 FOIA is a red herring introduced unnecessarily and confusingly by the Commissioner in the decision. It was not relied upon by the

Cabinet Office at the time, and the Commissioner, in the decision notice, only makes reference to it to say what would have happened if it had been raised.

32. The real point of the decision notice is the acceptance by the Commissioner that there would be 'prohibitive costs' involved in trying to locate a digital copy of the information, in circumstances where the Cabinet Office's searches had not located one to date. It seems to us that that was an issue which could result in no steps being required pursuant to s50(4) FOIA on the basis that the steps would be 'wholly impractical' which is one of the categories identified by the UT in the *Gaskell* decision. No reference to s12 FOIA was required to reach that conclusion.
33. In our view, therefore, on the information available to the Commissioner at the time of the decision notice, the exercise of discretion by the Commissioner not to require steps is one with which we would not disagree in the circumstances of the case and therefore this appeal is dismissed. There was no reason why the Commissioner should not have reached the conclusion that further searches would have incurred 'prohibitive costs' on the evidence provided by the Cabinet Office.
34. It is worth noting that, even if we had disagreed with the Commissioner and allowed the appeal, the reality is that we would not have issued a substituted decision notice requiring the Cabinet Office to take any further steps. We accept the evidence of Ms Walsh Atkins that all reasonable searches for a digital copy of the information have been carried out, and that on the balance of probabilities the Cabinet Office does not hold the information.
35. There are, of course, always further searches that can be carried out, but on the basis of the evidence we have heard it is unlikely that they would yield anything further given the breadth of searches already carried out. It may have been a sensible step to have taken to have located the contact details of the official who dealt with the case, in order to ask him whether he had the document or knew what had happened to it. But on the evidence, we accept it is unlikely that he took it home, and much more likely that it was disposed of, accidentally, when he left the Cabinet Office.
36. For the purposes of the appeal, the Cabinet Office say that it does now rely on s12 FOIA if this is necessary. However, for the reasons set out above, the appeal can be dealt without recourse to s12 FOIA. We would note, however, the potential

difficulties in the application of s12 FOIA in circumstances where information has already been located, retrieved and extracted within the costs limit and is then lost.

37. As Mr Frankel asked, rhetorically, can it really be the case that a public authority can claim the benefit of s12 FOIA in such circumstances where the search for another copy of the information would take the public authority over the cost's threshold? On the other hand, as Ms Ivimy queried, is a public authority compelled to continue a never-ending search for another copy without the benefit of s12 FOIA? These may be difficult questions to resolve, and maybe they relate to a situation not envisaged by legislators when drafting s12 FOIA and the Fees Regulations. However, in our view it is not necessary for us to resolve the point to decide this appeal.
38. We would make comments about the role of both the Cabinet Office and the Commissioner in this case.
39. It is almost beyond belief that a public body such as the Cabinet Office can locate a document when a FOIA request is made, make decisions about disclosure, respond to the requester with the decision, but then simply lose the information. We accept that that is what happened in this case, but it is a hugely unsatisfactory situation. We were assured that steps have been taken to ensure that hard copy information which is subject to a FOIA request is now scanned as a matter of course.
40. The Commissioner's decision notice is confusing and confused. The Commissioner should have made it clear that she was considering the matter under s50(4) FOIA and deciding not to order any steps to be taken by the Cabinet Office. In addition, the Commissioner should have made it clear what role s12 FOIA played in her decision-making process. A long paragraph is devoted to it in the decision notice even though the Commissioner states that it has not been relied upon by the Cabinet Office. It is unfair to public authorities and, especially, requesters for the formal decision of the Commissioner to be opaque in this way and makes the job of the Tribunal also more difficult.
41. As set out in paragraph 33 above this appeal is dismissed.

STEPHEN CRAGG QC

Judge of the First-tier Tribunal

Date: 7 June 2021.

Date Promulgated: 8 June 2021