IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)

BETWEEN:

DOROTHY COOKSEY **Appellant**

and

THE INFORMATION COMMISSIONER **Respondent**

and

CHIEF OFFICER OF GREATER MANCHESTER POLICE **Additional Party**

DECISION OF THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)

Oral Hearing by: **Alison McKenna, Tribunal Judge**
Nigel Watson, Tribunal Member
David Wilkinson, Tribunal Member

On: 9 November 2010

At: Tribunals Service (Immigration and Asylum)
Mosley Street
Manchester

Date of Decision: 26 November 2010

Subject Matter:

Freedom of Information Act 2000
Excessive cost of compliance- Section 12 FOIA
Duty to Give Advice and Assistance - Section 16 FOIA

Decision of the Tribunal

The Appeal is dismissed and the Information Commissioner's Decision Notice dated 20 May 2010 is upheld.

Reasons for Decision

Introduction

1. This is an appeal by Dorothy Cooksey ("the Appellant") against the Information Commissioner's Decision Notice FS50279125, dated 20 May 2010. The information request concerned documents relating to a murder investigation, undertaken between1992 and 1995. The public authority concerned, Greater Manchester Police ("The Additional Party") refused to provide the requested information on the basis that the costs of doing so would exceed the appropriate limit. The Information Commissioner ("the Respondent"), having conducted his own inquiries, upheld this decision and required no steps to be taken.

2. The Appellant acts in this matter on behalf of a group called "The Friends of Susan May". Mrs May was convicted of murder following the police investigation referred to above, served a custodial sentence and has now been released from prison. She is campaigning to have her conviction overturned, with the support of the group. Mrs May was represented by the Appellant at the Tribunal hearing, at which she gave evidence. The Additional Party was joined to these proceedings on 3 August 2010, and was represented by Russell Fortt of counsel at the hearing; the Information Commissioner was represented by Robin Hopkins of counsel.

The Information Request

3. On 18 April 2009, the Appellant requested the following information from the Additional Party:

> 1. *The sequence numbers of each police notebook used by [X] during the period March 1992 to March 1995, supplying the dates each notebook was issued and the dates notebooks were returned to the station;*
>
> *2. The dates [X] reported any lost/missing notebook(s);*
>
> *3. Copies and full disclosure of all letters, memos and records of telephone conversations concerning the investigation into trace samples JH1 and JH2;*
>
> *4. Copy of the instruction and authorisation to remove the samples JH1 and JH2 from Chorley FSS. Also copies of the records showing*

who collected the samples on 9/7/92 from Chorley and who received them at Oldham Police Station;

5. Copy of notes meeting between [Y] and scientist at which advice given to [Y] regarding storage of samples JH1 and JH 2 - presumably some time on or before 9/7/92;

6. Copy of [Y's] 2000 critique of the CCRC's statement of reasons (1999) with supporting notes of interviews and witness statements."

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4. There was a seventh item of requested information which was subsequently withdrawn and is not relevant to this appeal.

5. On 19 May 2009, the Additional Party responded to the Appellant, refusing to supply the requested information in reliance upon s.12 (1) of the Freedom of Information Act 2000 ("FOIA"). This was because, in the Additional Party's view, the cost of locating and retrieving the information would exceed the "appropriate level" of £450, which is set out in the Freedom of Information (Fees and Appropriate Limit) Regulations 2004 (see "The Law" below). On 26 May 2009 there was a telephone conversation between the Appellant and the Additional Party, following which a second response was issued, providing more detail and issuing a fees notice in accordance with s.13 of FOIA.

6. On 8 July 2009, the Appellant's Member of Parliament wrote to the Additional Party supporting her original information request. The Additional Party responded on 24 August 2009, stating that it was treating the MP's letter as a request for an internal review of its decision. On 21 December 2009, the Additional Party wrote to the MP confirming its earlier decision.

Complaint to the Information Commissioner

7. The Appellant first contacted the Respondent on 11 November 2009. The Respondent contacted the Additional Party and encouraged it to complete the internal review, which was then outstanding. On 18 January 2010, the Respondent visited the offices of the Additional Party to look at its storage arrangements for the documents held in connection with the murder investigation. The Decision Notice was issued after the Respondent had made further enquiries of the Additional Party.

The Decision Notice

8. The Decision Notice contained certain findings of fact, as follows. There were 28 containers held by the Additional Party (comprising 26 boxes, one lever arch file and one briefcase), together containing the documents and other items relevant to the Appellant's request. It had taken two hours to transport them from the archive store to Oldham District Headquarters. The weight of each of the 26 boxes was ascertained and recorded. The Information Commissioner found that "*the boxes are not generally indexed either by time, date, or a*

description of contents". He also found that the order of the boxes[1] did not reflect the date that the information had been generated.

9. The Respondent's estimate of the time it would take to comply with the information request differed from the estimate given by the Additional Party. The Additional Party had estimated that it would take 28 hours, however after his own officer's inspection and inquiries, the Respondent concluded that a reasonable estimate would be 22 hours and 15 minutes, leading to a cost estimate of £556.25. The Respondent was, notwithstanding his different estimate, satisfied that the section 12 exemption applied n this case.

10. The Respondent was also satisfied that the requests should be aggregated for the purposes of the estimate, as permitted by the Freedom of Information (Fees and Appropriate Limit) Regulations 2004 (see "The Law" below). The Respondent was also satisfied that there were no obvious alternative ways of obtaining all of the requested information and that the only way to satisfy the aggregated request was for the Additional Party to search through all of the containers. The Respondent was also satisfied that it would not be possible to reduce the costs by, for example, allowing the Appellant to inspect the containers herself, because it was reasonable to conclude that they contained personal data. The Additional Party also indicated that some of the contents may be exempt from disclosure under section 30 FOIA.

11. The Decision Notice also considered the nature of the duty to give advice and assistance pursuant to section 16 FOIA. The Respondent considered whether it would have been possible for the Additional Party to have provided advice and assistance to enable the Appellant to have obtained the requested information without engaging the costs limit. The Additional Party informed the Respondent that it had been unable to suggest any ways in which the scope of the information request could have been narrowed so as to fall within the cost limit. It explained that there was no way of locating the requested information which did not require it to search all of the containers. The Respondent found that, in the circumstances of this case, there was no further advice or assistance that could reasonably have been given and that the duty had accordingly been complied with.

The Appeal to the Tribunal

12. The Appellant's Grounds of Appeal (in summary) were:

In relation to section 12:

(a) that the Respondent had not sought to establish whether there was an index to the containers;
(b) that it is reasonable to assume that such an index exists, especially given that the papers have been accessed already for the purposes of appeals and investigations;
(c) the Decision Notice implies that such an index (or a partial index) exists;

[1] The Tribunal heard that the boxes had been numbered for the first time when they were transported to the HQ building for the Information Commissioner's visit.

(d) the Additional Party's staff may have been familiar with the case and would have known where to locate particular documents from within the containers so that the time estimate could be reduced;
(e) the Decision Notice does not consider that a small time saving in searching the material (whether as a result of an index, partial index, or staff familiarity) could have brought the request within the appropriate limit.

In relation to section 16:

(a) that the Respondent should have found that the Additional Party could have given advice and assistance so as to facilitate the making of a request that fell within the appropriate limit and required further steps to be taken to achieve this;
(b) that the Respondent should have found the Additional Party to be in breach of its duty to advise and assist because it could have (i) instructed the Additional Party to search the majority of the containers so that the time it took fell within the appropriate limit; (ii) informed the Appellant that she could have asked for the remaining containers to be searched after a period of 60 days so as to de-aggregate the information requests.

13. The Respondent's Response was (in summary) that:

In relation to section 12:

(a) The Respondent had satisfied himself that there was no indexing system for the containers, having made relevant enquiries of the Additional Party. The costs estimate had to be a reasonable one only and it was not incumbent upon the Additional Party or the Respondent to have searched every container before making an estimate of cost. The Respondent had undertaken his own investigation as to the reasonableness of the estimate of compliance costs and had concluded on the basis of his own estimate that the costs would exceed the appropriate limit. This constituted a sensible and realistic estimate and was supported by cogent evidence (comprising the Respondent's own investigation, rather than that of the Additional Party);
(b) The Respondent had considered the issue of aggregation of the requests and was satisfied that it was appropriate in the circumstances;
(c) The Respondent had considered whether there were alternative means by which the request could have been complied with so that the appropriate limit would not be exceeded and concluded that there were not;
(d) He had also concluded that there were no obvious alternative ways that the Additional Party could have located the requested information without manually checking all the containers;

In relation to section 16:

(a) The Respondent had considered paragraph 14 of the Code of Practice (see "The Law" below), which states that a public authority should consider providing an indication of what, if any, information could be provided within the cost ceiling and should also consider advising the applicant that by re-forming or re-focussing their request the information could be supplied at a lower fee or at no fee;
(b) The Respondent had understood that the Appellant was reluctant to narrow her request but, in any event, the Respondent had concluded that it would have been necessary to search all the containers to obtain information to meet any one element of the aggregated request. It was not therefore possible to advise the Appellant to make the request in phases so as to de-aggregate it;
(c) There was no obligation on the Additional Party to have searched for information up to the costs limit because the effect of section 12, properly applied, is to remove the duty to comply with the information request all together.[2] It did not therefore appear to the Respondent that there was any further advice and assistance that could have been provided.

14. The Appellant submitted a Reply to the Respondent's Response, prepared with the assistance of the Campaign for Freedom of Information. In this document, it was submitted that the relatively modest differential between the cost estimate and the appropriate limit was decisive in relation to both elements of the appeal. In relation to section 12, the Reply took issue with the Respondent's methodology in making the cost estimate on which he relied. It continued to maintain that it was reasonable to assume that an index or partial index existed and argued that the Decision Notice took no account of this in considering whether the time taken to comply with the request could have been reduced so as to bring it within the cost limit. It further argued in relation to section 12 that the Additional Party should have advised the Appellant that it could have searched only 22 containers and that she could have submitted a subsequent information request for the information in the remaining containers. This was because it would have been reasonable in this case to take steps that it might not be reasonable to take in another case in view of the small margin between the cost estimate and the appropriate limit.

15. The Appellant's Reply also asserted that the information requested might reasonably have been located in other places than the boxes. It stated that the Appellant had already informed the Additional Party where to find some of the information requested, and it was not from the boxes. It argued that a search of the majority of the boxes, which may have been partially successful, would have been of assistance to the Appellant. The Reply referred to a number of previous decisions of the Information Commissioner and a number of first-instance decisions of this Tribunal and argued that the approach of the

[2] See *Randall v Information Commissioner& Medicines and Healthcare Products Regulatory Agency* EA/2007/0004.

Respondent and the Additional Party was, in this case, inconsistent with the approach in others.

16. The Additional Party also filed a Response to the Appeal, in which it adopted the Respondent's submissions. It additionally submitted that if the Tribunal were minded to allow the Appeal, it should take account of the fact that the Additional Party would want to consider whether s. 30 FOIA applied to the material prior to disclosure.[3]

17. Prior to the hearing, the Appellant submitted an "Additional Document" asking the Tribunal to take into account the following facts: (i) Mrs May's application to the CCRC had been refused; (ii) the Additional Party had not complied with the correct procedure with regard to the fees notice and it had already raised the issue of section 30 FOIA, so one might conclude that it has no intention of supplying the requested information; it is in the public interest for the information to be disclosed. In her pre-hearing submissions, the Appellant sent the Tribunal a copy of a letter concerning an investigation by the Office for the Supervision of Solicitors into complaints of negligence by Ms May's original trial solicitors.

The Powers of the Tribunal

18. This appeal is brought under s.57 FOIA. The powers of the Tribunal in determining an appeal under s.57 are set out in s.58 of FOIA, as follows:

> *"If on an appeal under section 57 the Tribunal considers -*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
>
> *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*
>
> *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."*

19. As noted above, this appeal concerns the application of section 12 of FOIA, and the issue for the Tribunal is whether it was properly applied in this case. The Appellant's grounds of appeal also raise the issue of section 16 and the question for the Tribunal is whether the Additional Party could have been given additional advice and assistance in this matter so as to comply with that duty.

[3] Section 30 FOIA provides a qualified exemption from the duty to provide information that is held for the purposes of investigations and proceedings by public authorities.

The Law

20. Under s.1(1) of FOIA, a person making an information request to a public authority is entitled to be informed in writing whether the public authority holds the requested information and to have that information communicated to him, unless the information is exempt from disclosure as a matter of law. FOIA provides for a number of qualified and absolute exemptions to the duty of disclosure.

21. Section 12(1) and (2) of FOIA provide that a public authority is not required to comply with an information request if it estimates that the total cost of complying with it would exceed the "appropriate limit". The "appropriate limit" is set by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("The Regulations"), which provide that for non-Central Government public authorities such as the Additional Party, the appropriate limit is £450. This is to be calculated at a cost of £25 per hour so that the relevant amount of time is 18 hours. If a public authority reasonably estimates that the time which would be taken in complying with the information request would be over 18 hours, the request may lawfully be refused. A reasonable estimate in these circumstances has been held to be one that is sensible, realistic and supported by cogent evidence[4].

22. The Regulations also provide for the circumstances in which information requests can be "aggregated". Regulation 5 states that where two or more requests are made by one person, and the requests relate to similar information and are received within sixty consecutive days of each other, then the estimated cost is to be taken as the total cost of complying with all of the requests.

23. The Regulations provide that the estimate should be a reasonable one, taking into account the activities described in Regulation 4(3), which include determining whether it holds the information, locating it, retrieving it, and extracting it. It may not include time spent considering exemptions or redactions.

24. Section 16(1) of FOIA imposes a duty on the public authority to whom the information request is made to offer advice and assistance to the person making the request, so far as it would be reasonable to do so. Section 16(2) of FOIA provides that a public authority will be taken to have complied with its duty in this regard if it has complied with the Code of Practice, issued under paragraph 45 of FOIA[5]. Paragraph 14 of the Code of Practice is summarised at paragraph 13 above.

[4] See *Roberts v Information Commissioner* EA/2008/0050.
[5] Secretary of State for Constitutional Affairs' Code of practice on the discharge of public authorities' functions under part 1 of FOIA 2000.

The Hearing

25. The parties provided the Tribunal with skeleton arguments and a bundle of authorities for the oral hearing. The Tribunal also received three witness statements, from Mrs May, Mrs Elizabeth Hibbert, who is a personal assistant at the Oldham Division of Greater Manchester Police, and Miss Adrienne Walker, who is the Information Governance Manager at Greater Manchester Police[6].

26. The Tribunal heard oral evidence from Mrs May, who explained that her conviction had been re-considered by the Court of Appeal in 1997 and 2001. She told the Tribunal that her case had been considered by the Criminal Cases Review Commission in 1999 and that their investigation had led to the second appeal. She said that some papers had been obtained from the Additional Party for the purposes of these appeals but that she was seeking certain additional evidence as a basis for asking the CCRC to re-refer her case to the Court of Appeal. She confirmed that there were no legal proceedings currently pending. She was unsure whether a request had yet been made to the Additional Party under the provisions of the Data Protection Act, a course of action that had been suggested in the Decision Notice (at paragraph 87).

27. Mrs Hibbert told the Tribunal that she was the single point of contact for FOIA requests made to the Greater Manchester Police. She had no knowledge of Mrs May's case prior to being asked to locate the containers in 2009. She had found them in an archive store in a locked room and on inspection found that the boxes contained not only papers but also photographs, property bags and exhibits. She said the information had been "dumped" back into the boxes after previous examinations. She thought this was a historical problem and that the records would not have been left in this way under current procedures.

28. Miss Walker told the Tribunal that the officers who had made the original estimate of the time it would take to search the boxes were used to searching for information held by their employer. She thought that it was not unusual for historical files to be un-indexed but that this would not be the case now. She described the boxes as being "in a mixed-up state" and confirmed that her understanding was there were no indexes of the boxes' contents, although she thought some of the individual files had partial indexes. In response to a question from the Appellant she said that, in her view, to answer the information request you would have to go through all the papers. In response to a question from the Tribunal, she said that her colleagues might be able to find information faster than someone with no experience of such matters, but only where there was a filing system, and that these boxes were so dissimilar to anything else that an employee would have no "edge" when conducting the search.

[6] These witness statements were intended to stand as evidence in chief but none of them contained a statement of truth. The Tribunal dealt with this by asking the Additional Party to re-submit its witness statements containing an appropriate statement. The Tribunal asked Mrs May to conform the truth of her statement in her oral evidence.

29. Following the conclusion of the live evidence, the Appellant submitted that the requests had been made for a serious and important purpose and that the Additional Party had demonstrated a pattern of unhelpfulness. (The Tribunal reminded her that a public interest test was not applicable here). She submitted that any of the boxes might have contained some useful information and that the Additional Party should have advised her how to ask for a search up to the costs limit or over a longer period.

30. Counsel for the Respondent submitted that this was not a case where the requests could have been severed as it was necessary to go through all the boxes in order to search for any one of the items requested. In response to a question from the Tribunal, he accepted that the numbering of the boxes had altered the situation, but not, in his view, so as to affect the duties of the Additional Party. He submitted that the Respondent had taken reasonable steps to form his own estimate of cost and satisfy himself that section 12 was properly engaged in this matter and that the Tribunal should rely on this estimate. He referred the Tribunal to a number of first instance decisions of the Tribunal regarding the correct approach to the aggregation of information requests[7].

31. Counsel for the Additional Party had submitted his own skeleton argument prior to the hearing. He adopted the submissions made by counsel for the Respondent at the hearing. He argued additionally that the approach of a differently constituted panel of this Tribunal in *Brown*[8] was not the correct approach and that the approach taken by the Tribunal panel in *Randall*[9] was to be preferred (he accepted that these are first-instance decisions so that this Panel is not obliged to follow either decision in any event).

The Tribunal's Conclusions

32. The Tribunal has considered the evidence and arguments most carefully in this matter. Its decision was unanimous.

33. The Tribunal was frankly astonished that the Additional Party should keep important records in this disorganised manner. The records have been created (and frequently referred to) for the purposes of legal proceedings and yet as the Tribunal heard, they have been allowed to be returned to storage in a "mixed-up state". The Tribunal wonders how the Additional Party will be able to make an informed decision about their retention or destruction in accordance with its records management policy, without itself being aware what the containers hold.

34. The Tribunal notes that the Additional Party's estimate of the cost of complying with the information request was in fact reduced quite significantly by the Respondent's more considered approach to the process of estimation. It

[7] See, for example, *Fitzsimmons v IC and DCMS* EA/2007/0124
[8] *Brown v Information Commissioner* EA/2006/0088
[9] See footnote 2 above.

seems to the Tribunal that a reasonable estimate, within the meaning ascribed to that term by a differently constituted panel of this Tribunal in the *Randall* case, was achieved here not by the Additional Party's approach but by the Respondent's approach to the process of estimation. Nonetheless, the Tribunal was satisfied that the section 12 exemption was correctly engaged here for the following reasons:

(i) The Tribunal is satisfied that the Regulation 5 test for aggregation of the requests was met in this case. The requests made by the Appellant relate to "the same or similar information" because they relate to the set of records kept in connection with the murder investigation. Clearly the seven (subsequently six) requests were made at the same time by the Appellant;

(ii) The Tribunal is satisfied that the Respondent's estimate was a reasonable one. It took into account the activities permitted by the Regulations, and was sensible, realistic and supported by cogent evidence in the form of the investigation undertaken and described in the Decision Notice. The Respondent's submission that there were no relevant indexes was supported by the witness tendered by the Additional Party. She gave evidence that there were no indexes, from what she had personally seen. The Tribunal accepted this evidence.

(iii) The Tribunal was satisfied that the Respondent had properly considered whether there were alternative methods of complying with the information request, however the Tribunal agreed with the approach (taken by a differently constituted panel of this Tribunal) that "*it is only if an alternative exists that is so obvious that disregarding it renders the estimate unreasonable*".[10] The Appellant had suggested some alternative sources but there was no evidence to support these suggestions and the Tribunal concluded that as they were speculative, it could not accept that they were sufficiently "obvious" to render the estimate (based on the understanding that the containers had to be searched) unreasonable;

35. With regard to the duty to advise and assist, the Tribunal accepts the argument of the Respondent (supported by the Additional Party) that this was not a case in which the Appellant could reasonably have been advised to re-frame her request, to limit its scope or to make it in a way that would allow de-aggregation. This is because the Tribunal was satisfied on the basis of the evidence presented to it that the information is in so disorganised a state as to make it necessary for someone to search through all the containers in order to find any one part of it.

36. The Appellant argued that there could reasonably have been a search up to the costs limit and that any information found in relation to her original request, even if only partial, would be useful. The Tribunal sympathises with this sentiment, however it does not seem to the Tribunal that this is a correct approach to section 12 FOIA. If the costs limit is engaged, the Tribunal finds

[10] *Roberts v IC* - see footnote 4 above

that the effect of section 12 is to disapply the duty to comply with the information request. The Tribunal does not consider that the margin of difference between the compliance estimate and the costs limit is a relevant consideration in these circumstances.

Additional Matters

37 The Tribunal notes that the Respondent informed the Appellant in his Decision Notice that Mrs May (or someone acting on her behalf) could apply under section 7 of the Data Protection Act 1998 for information held about her by the Additional Party. The Tribunal asked questions about the progress of this application at the hearing but it did not appear that such a request had yet been submitted. The Tribunal would suggest that the Appellant or Mrs May now takes advice about this option.

38 The Tribunal also noted that the boxes were now distinguishable from each other as a result of having been allocated numbers for the purposes of transportation. The Tribunal considered that this development might allow the Appellant to make differently constituted information requests, relying on the box numbers. Once again, the Tribunal suggests that the Appellant take advice about this option.

39 The Tribunal was concerned that the Appellant and Mrs May found themselves in the position of making requests under FOIA for this information, which is obviously of such importance to Mrs May's campaign against her conviction. The Tribunal heard that she seeks the information in order to ask the Criminal Cases Review Commission to re-investigate her case. In view of the likelihood of further applications being made either under FOIA or as set out in paragraphs 37 and 38 above, the Additional Party gave the Tribunal an oral undertaking (which counsel said would also be sent in writing following the hearing) not to destroy the information in the containers for a period of at least two years from the date of the hearing. The Tribunal's understanding was that, even after the two year period, the documents and other information would be retained if the case was "active", under the additional party's records management policy, however there was some uncertainty as to the meaning of this term and the Tribunal expresses the hope that the Additional Party will make its longer-term policy in relation to the retention of these documents clear to the Appellant at the earliest opportunity.

Signed: Dated: 26 November 2010

Alison McKenna
Tribunal Judge