



**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL  
(INFORMATION RIGHTS)  
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

**EA/2010/0122**

**BETWEEN:**

**DR DECLAN QUIGLEY**

**Appellant**

**And**

**THE INFORMATION COMMISSIONER**

**Respondent**

---

**DECISION ON APPLICATION TO STRIKE OUT**

---

Introduction

1. The Appellant made a request for information to the Ministry of Justice (the 'MOJ') on 23 March 2010 as follows:

*"In the Edinburgh Employment Tribunals,*

- 1) *How many employment tribunals did Mr Mark Sischy chair between 1 May 2004 and 31 July 2006?*
- 2) *On what dates did Mr Mark Sischy preside as Chairman over employment tribunals between 1 May 2004 and 31 July 2006?*
- 3) *How many judgments did Mr Mark Sischy make between 1 May 2004 and 31 July 2006?*
- 4) *What are the names of the claimants and respondent in the case which Mr Sischy chaired between 1 May 2004 and 31 July 2006?"*

2. The request was dealt with by the Tribunals Service, an executive agency of the MOJ. The Tribunals Service issued a refusal notice on 20 April 2010 stating that in order to provide the requested information,

it would have to compile the data manually by examining the Public Register of Judgments (the 'Register') in Glasgow and collating the data. It estimated that it would take in excess of 3 ½ working days to locate, retrieve and extract the information. Although it did not refer to section 12(1) of FOIA, which renders inapplicable the general obligation to provide information contained in section 1(1) of FOIA where the cost of complying with the request would exceed the appropriate limit, it is clear that it was refusing the request on the basis of this section. The Tribunals Service advised Dr Quigley that he was at liberty to inspect the Register himself. It also directed him to the website of the Employment Appeal Tribunal, which publishes judgments it issues in response to appeals against Employment Tribunal rulings and advised Dr Quigley that it was possible to search those judgments such that he might find some of the information he was seeking.

3. The Tribunals Service also explained that it was possible that it no longer held some of the information as Employment Tribunal casework records are routinely destroyed twelve months after the date of any judgment, except where that decision is being appealed.
4. Dr Quigley requested an internal review of this refusal. He stated his belief that a personal file on Mr Sischy must exist and which must contain the information he sought.
5. The Tribunals Service upheld its original decision explaining that it was not possible to search the Register by either the name of a judge or by date of the judgement. It stated that it was "highly unlikely" that any casework records dating back to 2004-2006 were still held. It also stated that it did not hold any files which contained details of the cases that had been heard or dealt with by individual judges.
6. Dr Quigley complained to the Information Commissioner (the 'Commissioner') on 14 May 2010. He reiterated his belief that the

information he requested must exist and be held separately from the Register.

7. The Commissioner conducted an investigation, requesting further information from the MOJ about the time calculations it had provided and asking a number of questions about where the information requested might be found. He asked whether an individual file was held in respect of Mr Sischy and, if so, for a description of the information it contained. He also asked for a copy of any guidance or policy document or deletion schedule in respect of the stated policy of destroying case files after twelve months.
8. The MOJ responded and provided a copy of the Employment Tribunals' procedures regarding the retention and disposal of files. It also explained that the Register only contained judgments in respect of cases where one had been issued; if Mr Sischy had presided over cases which did not result in a judgment being issued (for example, where a case was settled, withdrawn or disposed of in a different way) no records would be contained in the Register. Information about those cases would be contained in the casework files and it is this information which the Tribunals Service suggested may no longer be held. Any search of the electronic casework management system to identify cases where Mr Sischy was the presiding judge would have to be undertaken manually and the time it would take to do so would considerably exceed the appropriate limit.
9. The MOJ confirmed that it held a personnel file in respect of Mr Sischy; this contained five pieces of routine paperwork concerning his retirement. It did not contain any records of an investigative or disciplinary nature.

## The Commissioner's Decision Notice

10. The Commissioner issued a Decision Notice on 5 May 2011. The Commissioner concluded that the MOJ was entitled to refuse the request on the basis that the cost of complying with the request would exceed the appropriate limit set by section 12(1) of FOIA.
11. The Commissioner also found that the MOJ had breached section 17(5) of FOIA as it had failed to state in its refusal notice that it could not confirm whether it held information about cases which did not result in a judgment being issued in its case management system without exceeding the appropriate limit.

## The Appeal

12. Dr Quigley remains dissatisfied and appealed to the Tribunal on 23 May 2011, pursuing one ground of appeal:
  - i) that the Register and the casework management system were not the only possible locations from which any of the requested information might be obtained.
13. Dr Quigley submits that there are "*at least two individuals who can provide the requested information, and no doubt others in both the Employment Tribunals and the Employment Appeals Tribunal.*" He argues that it must be possible to provide the information he seeks about Mr Sischy's work at the Scottish Employment Tribunal in the relevant period. He suggests that the President of the Employment Tribunals in Scotland and other judges must have been aware of Mr Sischy's absence from work and the reason behind that absence, and that it "*beggars belief that the entire staff at the Edinburgh ET offices was not aware of the situation*".

## The Application to strike out

14. The Commissioner, in his Response to the Appellant's Notice of Appeal, indicated that he resists the Appeal in its entirety and invited

the Tribunal to strike out the appeal under Rule 8(3)(c) of The Tribunal Procedure (First-tier) Tribunal (General Regulatory Chamber) Rules 2009 (the 'Rules') on the grounds that it has no reasonable prospect of succeeding.

15. Rule 8(3)(c) provides as follows:

*8. (3) The Tribunal may strike out the whole or part of the proceedings if-*

*(a) .....*

*(b) .....*

*(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.*

16. In *Southworth v Information Commissioner*<sup>1</sup>, I considered that the tests developed by the Tribunal under the previous set of rules applicable prior to 18 January 2010, that is The Information Tribunal (Enforcement Appeals) Rules 2005, to be a useful starting point. Under Rule 9 of those Rules, an application for an appeal to be struck out could be made by the Commissioner on the basis that the notice of appeal disclosed no reasonable grounds of appeal. A reasonable ground of appeal has been defined as one that is readily identifiable from the Notice of Appeal, relates to an issue the Tribunal has jurisdiction to decide and is realistic not fanciful: *Bennett v IC*<sup>2</sup>.

17. Under Rule 10 of those Rules, an appeal could be disposed of summarily. The test used by the Tribunal to decide whether an appeal should be dismissed summarily is akin to that found in Part 24 of the Civil Procedure Rules; it must be decided whether there is a "realistic" as opposed to "fanciful" prospect of success: *Tanner v ICO and HMRC*<sup>3</sup>. In that case, the Appellant did not challenge the substance of

---

<sup>1</sup> (EA/2010/0050)

<sup>2</sup> (EA/2008/0033)

<sup>3</sup> (EA/2007/0106)

the Commissioner's Decision Notice but effectively asked the Tribunal to review all the administrative acts by various public bodies about which he complained.

18. Under Rule 8(4) of the Rules, the Tribunal may not strike out the whole or part of the proceedings under Rule 8 (3)(c) without first giving the Appellant an opportunity to make representations in relation to the proposed striking out.

19. Dr Quigley was therefore directed to provide written representations to the Tribunal and the Commissioner by 22 July 2011.

20. The Commissioner was directed to serve a response to those representations by 5 August 2011.

21. Dr Quigley responded on 6 July 2011. The Commissioner responded on 29 July 2011.

### The Legal Framework

22. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.

23. The section 1(1)(b) duty of the public authority to provide the information requested will not apply where the information is exempt by virtue of any provision of Part II of FOIA. The exemptions provided for under Part II fall into two classes: absolute exemptions and qualified exemptions. Where the information is subject to a qualified exemption, it will only be exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (section 2(2)(b)).

24. Section 12(1) of FOIA does not provide an exemption as such; the effect is to render inapplicable the general obligation to provide information contained in section 1(1) of FOIA where the cost of complying with the request would exceed the appropriate limit.

25. Section 12(1) provides as follows:

*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.*

26. The appropriate limit is set by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the 'Regulations'). The appropriate limit for a central government department such as the MOJ is £600. By Regulation 4(4) cost is to be calculated at a (nominal) rate of £25 per hour spent; this equates to a limit of 24 hours' work.

27. Regulation 4(3) sets out an exhaustive list of the factors that may be taken into account in arriving at a cost estimate:

*In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in –*

*(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,*

*extracting the information from a document containing it.*

28. Differently constituted Panels of this Tribunal have given guidance in relation to the application of section 12. In *Urmenyi v Information Commissioner and London Borough of Sutton*<sup>4</sup>, the Tribunal held:

---

<sup>4</sup> (EA/2006/0093)

1. that it was clear from the wording of section 12 that it was up to the public authority to estimate whether the appropriate limit would be exceeded in carrying out the activities described in Regulation 4;
2. the Commissioner and the Tribunal can enquire into the facts or assumptions underlying the estimate;
3. the Commissioner and the Tribunal can enquire whether the estimate was made on facts or assumptions which should not have been taken into account.

29. As to what is a reasonable estimate, in *Roberts v Information Commissioner*<sup>5</sup> the Tribunal held:

1. only an estimate is required;
2. the costs estimate must be reasonable and only based on those activities described in Regulation 4(3);
3. the determination of a reasonable estimate can only be considered on a case-by-case basis;
4. any estimate should be sensible, realistic and supported by cogent evidence.

#### The Issues for the Tribunal

30. Dr Quigley does not challenge the Commissioner's approach, reasoning or conclusions in respect of the estimate provided by the MOJ.

31. I agree with the Commissioner that Dr Quigley's principal point appears to be that one or more individuals within the Tribunals Service must know what Mr Sischy was doing in the period between 1 May 2004 and

---

<sup>5</sup> (EA/2008/0050)



31 July 2006, that the information could be obtained easily from them and therefore that the information could be provided without exceeding the appropriate costs limit.

32. Dr Quigley submits that it is very strange that the Employment Tribunals' computer system is not designed to search for the name of a particular judge. While he does not dispute that this is the case, he suggests that a new search term, at minimal cost, could be introduced.

33. Under FOIA, a person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him. Under section 84 of FOIA, "information" means "information recorded in any form". There is no requirement for a public authority to create new information to answer a request. There is no requirement for a public authority to create bespoke search programmes to locate, retrieve and extract information to answer a request.

34. While Dr Quigley may be correct in asserting that Mr Sischy's colleagues might be able to answer the question behind his request for information, that is, whether they recollect Mr Sischy's attendance at work between 1 May 2004 and 31 July 2006 and the nature of any work done, this information is not recorded nor is it held by the MOJ. Dr Quigley does not dispute that; he suggests how this particular information could be created. This Tribunal does not have power to direct a public authority to obtain information that is not currently held. In any event, this "*alternative, absurdly obvious and very inexpensive method*" of seeking information from Mr Sischy's colleagues does not amount to the information that would satisfy the request of 23 March 2010 (set out in paragraph 1 above) for the numbers of cases Mr Sischy chaired in the relevant period, the dates of those cases, the number of judgments issued and the names of the claimants and respondents in those cases.

## Conclusion

35. This Tribunal's jurisdiction is limited to a consideration of whether the Commissioner's Decision Notice is in accordance with the law. There is no challenge to the findings in respect of section 12(1) of FOIA; the sole ground of appeal is that Mr Sischy's colleagues and the Tribunal staff must be able easily to provide the information similar to the information requested on 23 March 2010 and for the reasons given above, I am satisfied that there is no reasonable prospect of the Appellant's case succeeding. I therefore strike out the appeal under Rule 8(3)(c).

36. I make no findings as to the reasonableness of the request itself and the underlying concerns raised by Dr Quigley as to Mr Sischy's work at the Employment Tribunals as these are matters outside the jurisdiction of this Tribunal.

**Annabel Pilling**  
**Tribunal Judge**

**4 August 2011**