IN THE FIRST-TIER TRIBUNAL **EA/2011/0053**
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]

ON APPEAL FROM:

Information Commissioner's Decision Notice: FS50316218
Dated: 1 February 2011

Appellant: DAVID BAKER

Respondent: THE INFORMATION COMMISSIONER

Second Respondent: HM REVENUE AND CUSTOMS

Date of hearing: 14 July 2011

Date of Decision: 5 September 2011

Before

Annabel Pilling (Judge)
Paul Taylor
Ivan Wilson

Subject matter:

FOIA - Whether information held s.1
FOIA - Cost of compliance and appropriate limit s.12

Cases:
Bromley v Information Commissioner and the Environment Agency (EA/2006/0072)
Urmenyi v Information Commissioner and London Borough of Sutton (EA/2006/0093)
Roberts v Information Commissioner (EA/2008/0050)

Representation:

For the Appellant:	David Baker
For the Respondent:	Edward Capewell, Michelle Voznick
For the Second Respondent:	David Blundell, Amanda Bowring

Decision

For the reasons given below, the Tribunal allows Ground 1 of the appeal, dismisses Ground 2 of the appeal and substitutes the following for the decision notice dated 1 February 2010.

SUBSTITUTED DECISION NOTICE

Dated 16 August 2011

Public Authority:	HM Revenue and Customs
Address:	100 Parliament Street London SW1A 2BQ
Complainant:	Mr David Baker

The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is that HM Revenue and Customs did not deal with the complainant's first request in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 and was not entitled to state that it did not hold the requested information at the time the request was made.

HM Revenue and Customs was entitled to rely on section 12(1) of the Freedom of Information Act 2000 in respect of the complainant's second request as the cost of complying would exceed the appropriate limit.

Action to be taken

HM Revenue and Customs is required to deal with the complainant's first request in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 as a request for both advice and guidance in relation to managerial responsibility towards staff that are considered being at suicidal risk due to work related stress/depression.

Dated 5 September 2011

Annabel Pilling (Tribunal Judge)

Reasons for Decision

Introduction

1. This is an Appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 1 February 2011.

2. The Decision Notice relates to two requests made by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to HM Revenue and Customs ('HMRC') for information relating to managerial responsibility towards the welfare of staff. In respect of the first request, the Commissioner concluded that, on the balance of probabilities, HMRC did not hold the information requested. In respect of the second request, the Commissioner concluded that HMRC interpreted the request too narrowly but that the cost of compliance would exceed the appropriate limit for the purposes of section 12(1) of FOIA.

3. The Appellant had been employed by HMRC and, from some time before making the requests for information, was off work. While it is not necessary to rehearse the background in any detail, it is pertinent to note that during the relevant period there was a course of correspondence between the Appellant and managerial staff at HMRC about a number of matters, including a change of manager and various complaints about other staff.

The request for information

4. On 3 December 2009, the Appellant wrote to a Senior Business Manager at HMRC. This letter dealt with various matters about which the Appellant sought answers from HMRC, the majority of which are not relevant to this appeal. In that letter, the Appellant made the following request for information:

> *"Let me have copies of HMRC guidance/advice in relation to managerial responsibility towards staff that are considered being at suicidal risk due to work related stress/depression."*

5. The Business Manager did not treat this as a request for information under FOIA. He regarded the letter as part of the chain of correspondence concerning various matters arising from the Appellant's employment at HMRC. The Business Manager responded by letter on 4 December 2009 reiterating what had been said in earlier correspondence that, due to certain concerns for the Appellant, he did not intend entering into further discussions on the matters raised whilst the Appellant was off work.

6. The Appellant wrote again on 6 December 2009 to ask The Business Manager to ask for urgent reconsideration *"and immediately fully answer the questions sought of you…"*

7. The Business Manager responded to this letter on 10 December 2009 and indicated that he had sought and received advice from the Employment Law Office, HR and Capita over the matters raised and had been advised that he should not enter into discussions over these matters until the Appellant returned to work.

8. The Appellant replied on 17 December 2009, stating that not providing full responses to the *"questions/material sought"* was having a detrimental effect on him and *"as a matter of urgency I look forward to full responses and material."* This was reiterated in a letter dated 22 December 2009.

9. The Business Manager continued to regard this as part of the chain of correspondence and failed to treat this as a request for information under FOIA.

10. On 29 December 2009, the Appellant wrote to his new manager within HMRC. He repeated his request of 3 December 2009 and asked for an explanation in respect of why the request did not fall under FOIA.

11. A response was sent from HMRC on 6 January 2010, enclosing a schedule of information and various print outs, although this was not a response to the request under FOIA.

12. On 20 January 2010, the Appellant wrote a four page letter to HMRC repeating his requests of 3 December 2009, raising various other grievances and making a further request for information under FOIA as follows:

> *"In addition please provide, under the Freedom of Information Act, copies of all HMRC guidance/advice in relation to management and staff responsibilities to staff who are disabled in general and specifically those with Mental Health problems. Please bear in mind that I currently do not have access to HMRC Internal guidance/advice."*

13. The substantive response to this request was a letter dated 28 January 2010 but still not a formal notice under FOIA. The HMRC official replying explained that

> *"I am advised by Mobile HR that the Department does not have a specific policy on potential suicide cases. The Department's duty of care is discharged through managers on an individual basis with the support of HR, Business and People Support, Capita etc. I do enclose however some key guidance on work related stress and managing sickness."*
>
> The following Guidance documents were enclosed:
>
> - Health and Safety: Stress Management
> - Conduct and Discipline: Resolving Issues in HMRC
> - Bullying and Harassment
> - Diversity and Equality: Disability
> - Occupational Health
> - Managing Sickness

14. The remainder of the letter dealt with responding to the various other matters raised by the Appellant.

15. The Appellant replied on 3 February 2010 expressing dissatisfaction with the entirety of the response and asking, in particular, for his request for guidance/advice to be referred to the Freedom of Information Unit. This resulted in the matter being referred to the Freedom of Information Act team who wrote to the Appellant on 5 February 2010 informing him that the request would be dealt with.

16. Although the request was immediately dealt with by the FOIA team and a draft response prepared on 9 February 2010, due to an oversight this response was not sent until after the Appellant wrote on 3 March 2010 asking for a review of HMRC's handling of his requests. On 8 March 2010, HMRC issued its response that should have been sent earlier. In response to the first request, HMRC reiterated that there is no central HMRC policy on managerial responsibility towards staff that are considered to be at suicidal risk. In respect of the second request, HMRC enclosed information that it considered satisfied the request.

17. The Appellant's letter of 3 March 2010 was also treated as a request for an internal review of how his requests for information were handled. The outcome of that internal review to the Appellant in a letter dated 24 May 2010. The review concluded that although the requests had not been handled initially under FOIA, the Appellant had not been disadvantaged as a result. An apology was offered for the delays in the handling of the requests and it was accepted that HMRC had not adhered to the time-frame set out in FOIA, but considered that it had provided the information it held.

18. The Appellant remained dissatisfied with the internal review, in particular he was not satisfied that all information had been sent to him

as, for example, Hotseat[1] Disability questions and answers had not been sent to him.

The complaint to the Information Commissioner

19. The Appellant complained to the Commissioner on 2 June 2010

20. The Commissioner commenced an investigation, requiring HMRC to provide information about the searches that it had undertaken. He also received further correspondence from the Appellant.

21. The Commissioner wrote to HMRC on 23 September 2010, summarising the Appellant's arguments and requesting clarification of various matters. He stated that information contained on Hotseat would appear to fall within the scope of the original requests, particularly the second request.

22. HMRC provided a detailed explanation of the steps it had taken to locate information relevant to the requests. With respect to the second request, HMRC stated that it had not considered that Hotseat information would fall within the scope of the request but accepted that it should have sought clarification from the Appellant about the specific information being sought. In the event that a broader reading of the request was accepted, HMRC stated that section 12(1) of FOIA would apply as the cost of complying with the request would exceed the appropriate limit, and section 21(1) of FOIA would also apply as the information was reasonably accessible to the Appellant.

23. The Appellant provided the Commissioner with further suggestions about where further information falling within the scope of his request might be held by HMRC. The Commissioner asked HMRC for a more detailed explanation in relation to its position in respect of both

[1] "Hotseat" is an internal HMRC facility which provides staff with the opportunity to send questions to senior managers, the answers to which are posted on HMRC's intranet. Questions can be on any subject and may focus on an individual's particular issue or could be something of wider concern across the department.

requests for information. HMRC confirmed that it did not seek to rely on section 21(1) of FOIA but considered that it had complied with the first request as it did not hold the information sought and that section 12 (1) of FOIA applied to the second request.

24. A Decision Notice was issued on 1 February 2011. In summary, the Commissioner concluded that, in respect of the first request, on the balance of probabilities, HMRC did not hold the requested information and, in respect of the second request, HMRC was entitled to rely on section 12 (1) of FOIA. The Commissioner also found that, in respect of the first request HMRC had breached section 10(1) of FOIA by its failure to respond within the statutory time limit and, in respect of the second request, it had breached (i) section 17(5) of FOIA by failing to issue a refusal notice and (ii) section 16(1) of FOIA by its failure to provide advice and assistance as part of its handling of the request.

25. The Commissioner required HMRC to confer with the Appellant in respect of the second request in accordance with its responsibilities under section 16(1) of FOIA to enable him to submit a revised or refined request for information, to which HMRC may be able to respond within the appropriate limit.

26. In fact, HMRC wrote to the Appellant on 17 February 2011 asking him to refine his request and offering advice and assistance so that the cost limit would not be exceeded. The Appellant did not respond to that letter[2].

The Appeal to the Tribunal

27. By Notice of Appeal dated 24 February 2011, the Appellant appeals against the Commissioner's decision.

28. The Tribunal joined HMRC, on its application, as Second Respondent.

[2] During the course of the appeal, the Appellant submits that he does not believe he needs to refine the search as HMRC ought to have been able to do what it needed to do within section 12 of FOIA.

29. The Appellant is not represented in these proceedings and has submitted detailed submissions supported by other material which he considers the Tribunal should take into account when deciding this Appeal. Some of the submissions amount to allegations against HMRC and individudals employed by HMRC, for example, suggestions that HMRC *"has demonstrated over many years that it is fundamentally and institutionally corrupt, dishonest, lacking integrity"* and complicit in wrongdoing, that individuals have expressed *"biased, bigoted, prejudicial and offensive remarks about [him]"*. These allegations are denied by HMRC but, in any event, go beyond the issues this Tribunal has jurisdiction to decide.

30. The Grounds of Appeal have been identified as follows:

> **Ground 1** - The Commissioner erred in concluding, on the balance of probabilities, that HMRC carried out sufficient and/or appropriate searches for the material falling within the scope of the first request for information.
>
> **Ground 2** – The Commissioner wrongly upheld HMRC's application of section 12(1) of FOIA as he wrongly concluded that HMRC's estimate of the time that would be taken for compliance is reasonable or accurate in respect of the second request for information.

31. The Appellant addresses a number of other matters, such as HMRC's initial failure to deal with the requests for information in accordance with FOIA. The Commissioner has found that there were breaches of FOIA in these respects and there has been no appeal against that part of his decision. It is not necessary for us to consider this aspect of the case further, although we observe that it is understandable why the HMRC business manager did not treat the first request in the letter of 3 December 2009 as a request for information under FOIA but, as part of the on-going correspondence about a number of related matters. We consider that once the Appellant had alerted HMRC to his concern that

this part of his letter should have been treated as a request for information under FOIA, the request should then have been passed to the FOIA team on 29 December 2009.

32. The Appeal was determined at a hearing on the papers on 14 July 2011.

33. The Tribunal was provided in advance with an agreed Bundle of material and written submissions from the parties. Within the agreed Bundle of documents are two witness statements submitted by HMRC from (i) Teresa Chance, who carried out the internal review and corresponded with the Commissioner during his investigation, and (ii) Ann Thomas, Information/Data Manager in the Central Business Management/Security, Risk and Information team. Although we do not refer to every document, we have had regard to all the material before us.

The Powers of the Tribunal

34. The Tribunal's powers in relation to appeals are set out in section 58 of FOIA, as follows:

> *(1) If on an appeal under section 57 the Tribunal considers-*
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> *(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.

35. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether the applicable statutory framework has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, it will find that the Decision Notice was not in accordance with the law.

The Legal Framework

36. 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.

37. 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)).

38. Section 12(1) of FOIA does not provide an exemption as such; the effect is to render inapplicable the general obligation to provide

information in section 1(1) of FOIA where the cost of complying with the request would exceed the appropriate limit.

Submissions and Analysis

Ground 1 – The Commissioner erred in concluding, on the balance of probabilities, that HMRC carried out sufficient and/or appropriate searches for the material falling within the scope of the first request for information.

39. There is no dispute that the duty under section 1(1) of FOIA, to disclose information upon request, extends only to recorded information. It does not place an obligation on a public authority to answer questions generally or to create information that is not held in recorded form at the time of the request. There can never be certainty that a document might be undiscovered within the records held by a public authority. It is accepted by the parties that the standard of proof to be applied is the civil standard, that is the balance of probabilities. A differently constituted Panel of this Tribunal in *Bromley v IC and Environment Agency* [3] (*"Bromley"*) rejected arguments that certainty was the test to be applied in determining whether information was held for the purposes of FOIA and described the balance of probabilities as the "normal standard of proof." We are content that this is the correct standard of proof to be applied by this Tribunal.

40. In *Bromley* the Tribunal said that in reviewing the conclusion reached by the Commissioner as to whether the public authority, on the balance of probabilities, held the requested information, it was required

> "…*to consider a number of factors, including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence*

[3] (EA/2006/0072)

or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."

41. The first request was for "*copies of HMRC guidance/advice in relation to managerial responsibility towards staff that are considered being at suicidal risk due to work related stress/depression."*

42. The HMRC Senior Business Manager sought an answer from HR Mobile advisor, or "Mobile HR", in respect of whether such information was held and we have seen the following e-mail in response dated 25 January 2010:

"I have spoken to my manager who has confirmed that

- *the Dept does not have a specific policy to cover potential suicide cases.*
- *The Dept has a duty of care and this is discharged via managers. When managers are confronted with such issues support for them and the individual can be provided by BPSS..."*.

43. HMRC did provide the Appellant with some generic guidance which was found through the HMRC Intranet pages entitled *People Policies and Guidance*.

44. According to the witness statement of Ann Thomas, once the request was passed to the FOIA team to deal with, the request was interpreted in the same way, *"to mean generic, department-wide information which was current and produced by HMRC's People Function"*. She explained further that it was not considered that either case specific advice or guidance, given to a particular member of staff in a particular, relevant circumstance, fell within the scope of the request.

45. Teresa Chance, in her witness statement, explained that the Intranet is where all generic guidance is made available to staff and so it was reasonable to expect that all the current guidance would be found there. In respect of the Appellant's suggestion that Hotseat would be expected to contain relevant information falling within the scope of the request, she states that Hotseat did not constitute "departmental guidance" but that Hotseat questions may make reference to departmental guidance relevant to a particular issue raised.

46. The result of this narrow interpretation of the Appellant's request, was that apart from the targeted Intranet search carried out initially within the *People Policies and Guidance* pages, the results of which had been provided to the Appellant, no wider Intranet searches were carried out, including searching the Hotseat pages. Ms Thomas states that this *"was because it was believed that information held on the 'Hotseat' did not constitute advice/guidance within the scope of the request."*

47. The Appellant's submissions in respect of Ground 1 can be summarised as follows:

    i) HMRC did not search for "advice" as distinct from "guidance";

    ii) The search did not extend to the Hotseat facility;

    iii) Information is not kept indefinitely on the Intranet which may mean that information that was available at the time of the request is no longer available.

48. The Appellant submits that his request was clearly for both "guidance" and "advice" and that HMRC to this day has only ever searched for "guidance" not "advice"

49. HMRC accepts that it did not differentiate between "guidance" and "advice"*; "for the avoidance of doubt, HMRC has never drawn any distinction in the conduct of its searches between "guidance" and*

"advice" It has taken a broad approach and supplied [the Appellant] with a considerable quantity of information"".

50. The Commissioner agrees with HMRC that the phrase *"copies of HMRC guidance/advice"* is most naturally and reasonably understood in the employment context as referring to specific human resources policy documents concerning the welfare of staff, and that the Mobile HR was the obvious and most reasonable place to make a search for the information requested.

51. The Commissioner suggests that the Appellant now seeks to draw a distinction between "guidance" and "advice" and specifically raises the fact that HMRC should have undertaken a search of Hotseat for "advice" relating to request 1.

52. These submissions by HMRC and the Commissioner are disingenuous. In our opinion it is clear that, on a plain reading of the request, by asking for "*guidance/advice,*" the Appellant envisaged there being wider categories of information rather than only HMRC central or departmental policy, or generic guidance. There may well have been instances of advice being given to individual managers in relation to specific instances of concern in respect of an employee in the manager's department. The two types or categories of information are distinct.

53. We find that HMRC, and the Commissioner, considered the scope of request 1 too narrowly and should have seen the distinction between "guidance" and "advice". The quality of HMRC's initial assessment of the request was poor.

54. As HMRC concedes, it has never drawn a distinction between "guidance" and "advice" and has searched only for "guidance". We consider that it did not therefore carry out a reasonable search for the information requested.

55. In respect of the search it did carry out for “guidance”, the scope of the search was limited to the area that the initial HMRC respondent considered relevant, that is, “Mobile HR”, rather than a wider search across the whole of HMRC. Whilst its HR function was one logical place to search for “guidance”, we do not accept that “Mobile HR” was the only most obvious and reasonable place to search. HMRC may hold further “guidance” (as well as “advice” it has never looked for) in other locations including, but not limited to, its Intranet and Hotseat. It is fundamentally wrong for HMRC, and the Commissioner, to suggest that there was any onus on the Appellant to identify possible locations for the information he sought. Given the limited scope of the search and the fact it amounted to one request and one answer, we are not satisfied that this was a rigorous and efficient search, we are therefore not satisfied that a reasonable search for the information requested was carried out and we allow this ground of appeal.

56. There is no reference in the request to any specific department within HMRC, and consequently the request has to be interpreted as applying to the whole of HMRC. This may raise the possibility that the cost of complying with the request may exceed the appropriate limit such that section 12(1) of FOIA applies. HMRC has been reminded of its duty under section 16(1) of FOIA to advise and assist the Appellant.

57. We also observe that our decision to allow ground 1 of the appeal does not, and could not, amount to a decision that HMRC *does* in fact hold any information falling within the scope of the very specifically worded request for HMRC guidance/advice in relation to managerial responsibility towards staff that are considered being at suicidal risk due to work related stress/depression. For example, guidance in relation to managerial responsibility towards staff that are considered being at suicidal risk due to any other reason might be excluded as falling outside the scope of the request. Even if we were to conclude that HMRC *should* hold the information that the Appellant requested, it does not follow that HMRC does, in fact, hold that information. Our

task is to consider whether the Commissioner was correct to conclude on the balance of probabilities that the information requested was not held.

Ground 2 – The Commissioner wrongly upheld HMRC's application of section 12(1) of FOIA as he wrongly concluded that HMRC's estimate of the time that would be taken for compliance is reasonable or accurate in respect of the second request for information.

58. Section 12(1) of FOIA arises in respect of request 2 which was for "..*copies of all HMRC guidance/advice in relation to management and staff responsibilities to staff who are disabled in general and specifically those with Mental Health problems. Please bear in mind that I currently do not have access to HMRC Internal guidance/advice."*

59. 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).

60. 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.*

61. 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 HMRC 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.

62. 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.

63. 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*[4], the Tribunal held:

(i) 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;

(ii) the Commissioner and the Tribunal can enquire into the facts or assumptions underlying the estimate;

(iii) the Commissioner and the Tribunal can enquire whether the estimate was made on facts or assumptions which should not have been taken into account.

64. As to what is a reasonable estimate, in *Roberts v Information Commissioner*[5] the Tribunal held:

(i) only an estimate is required;

[4] (EA/2006/0093)
[5] (EA/2008/0050)

(ii) the costs estimate must be reasonable and only based on those activities described in Regulation 4(3);

(iii) the determination of a reasonable estimate can only be considered on a case-by-case basis;

(iv) any estimate should be sensible, realistic and supported by cogent evidence.

65. HMRC did not raise section 12 of FOIA as a basis for refusing to comply with the second request for information from the Appellant until the Commissioner's investigation into the way the request had been handled. In her witness statement, Ms Thomas concedes that HMRC had some difficulty defining the scope of the second request, evidenced by internal e-mail exchanges. She suggests that *"it was considered that seeking clarification might add further delay or appear obstructive to [the Appellant]"*. We do not find this an admission that reflects well on HMRC and its handling of the Appellant's requests for information, particularly as the FOIA team was not made aware of the requests until February 2010.

66. Ms Thomas explains that as the Appellant had referred to "HMRC guidance/advice", this was interpreted to mean generic, department-wide information which was current and produced by HMRC's People Function.

67. A member of the People Function Team carried out a search for information falling with the scope of the second request. He identified information on the HMRC Intranet pages entitled *People Policies and Guidance* (from which the Appellant had been supplied with some generic guidance in respect of his first request).

68. Searches of the *People Policies and Guidance* pages can be carried out using an A-Z search or by browsing through categories. Categories include Disability, Stress Management, Occupational Health Services and Reasonable Adjustments. Further links are available to the Diversity site and to the Health and Safety Site.

69. The People Function Team member confirmed to Teresa Chance that he and a colleague spent almost two days locating and extracting information which fell within the scope of request 2. Ms Chance explains that as they worked within the People Function Team they would be expected to know where to look for relevant information within scope, although Ms Thomas admits there may have been some duplication of searches carried out as they were not aware what information had already been provided in respect of the first request.

70. Ms Thomas explains that the fundamental difficulty with various searches by general keyword of part, or all, of the Intranet was that searches would find many records which were not relevant and not find all the records that were relevant; *"To fulfil our obligations under FOIA, we could not merely rely on simply reading the search screen results in deciding if the information found by this facility was in scope and relevant. Instead we considered that it would be necessary to open up and at least skim read the information identified."*

71. For example, HMRC searched its Intranet using its general search engine and 3323 documents were found using "*disabled*" and "*staff*" as a general keyword search of the Intranet. Ms Thomas, in her witness statement, explained that, the results of the search provided to the Appellant showed that the search of the intranet using the words "*disabled*" and "*staff*" was for "*all words*" which meant that the results would only identify content where both words were found. She emphasised that it was not a single word search such as the Commissioner indicated in his Decision Notice and Response, and as the Appellant alleges as a result. Having obtained the results of the search, Ms Thomas further explained that HMRC tried to refine those results by entering further keywords taken from the Appellant's request.

72. Ms Thomas, in her witness statement, explained that where a search returns a large number of documents, HMRC's Intranet would display only the first 200 most relevant results. However, further keywords can then be entered and the system searches not only the 200 most relevant but searches again through the whole list of hits, that is, the

whole 3323. For each additional keyword used to refine the original search, there could *"potentially be a further 200 hits which may be different from the original 200 results shown."*

73. Prior to 12 August 2010, there was not a specific search facility to enable Hotseat to be searched. The Archive section provides links to request in chronological order back to January 2007, while the pages for specific business allow searches by topic or year going back to 2006. The search function, introduced on 12 August 2010, now allows a focussed search to be carried out using keywords, however the search facility only works for the most recent past two years' questions and answers.

74. When HMRC carried out a search of Hotseat using a number of keywords, a large number of "hits" were found with results linking to multiple entries. A search for "*disability*" produced 129 hits, "*stress*" produced 134 hits, "*mental health*" produced 23 hits and "*disabled staff*" produced 109 hits. Teresa Chance explained to the Commissioner during his investigation that:

> *"Each [keyword] result consists of a batch of Hotseat questions and responses (typically between 5 and 10) but not all of those in the batch would be relevant to [the keyword]. The batch would typically consist of all the questions answered by a particular senior manager in a particular week. It is possible to highlight the search item within each batch, but it would still be necessary to read through the questions and responses to identify which information is actually within scope and extract it. In addition, some responses include links to generic HR guidance or other intranet information and it would be necessary to follow those links to determine whether the link contains additional information within scope.*
>
> *I estimate that it would take a minimum of 3 minutes to open each result, skim read it to find highlighted key words and open any links to further information in order to locate information in scope and then extract it. So, we estimate that to locate and extract information using the Hotseat keyword search function for the last two years' questions and answers would take:*
>
> | | |
> |---|---|
> | *Disability* | *129 x 3 minutes = 387 minutes (6 hours 27 minutes)* |
> | *Stress* | *134 x 3 minutes = 402 minutes (6 hours 42 minutes)* |

Mental Health *23 x 3 minutes = 69 minutes (1 hour 9 minutes)*

Disabled staff *109 x 3 minutes = 327 minutes (5 hours 27 minutes)*

Even if you only allowed 1 minute per result, the time resource would be over 6 hours. Given that we have already expended 20 hours of staff resource in providing the generic guidance, carrying out these searches would bring the request over the appropriate limit….In addition, they would not include a search of the 2000 or so Hotseat questions published per year for each of 2006, 2007 and 2008.

I described in my previous response to you how it is possible to search for categories and topics within Hotseat by date or theme. I estimate that to carry out such searches would exceed the additional 4 hours of staff resource [having already spent 20 hours] because the headings used are quite general and it would be difficult to know what headings could be omitted from the search. "

75. The Appellant does not accept HMRC's estimate of the time it would take to search as outlined above. He fears that HMRC has *"artificially inflated the work carried out and/or applied an incompetent process/incompetent staff"*. He particularly challenges the 20 hours already spent by HMRC in complying with request 2 and submits that work ought to have taken either around 2 hours or a *"reasonable estimate of 3 hours"*. The Appellant submits that he believes a reasonable estimate of the time it would take to comply with his request would fall within 9 to 12 hours. He has not provided any evidential basis to support either of these estimates. He draws support from the fact that HMRC has said that he was sent a bundle of information that was six inches thick when, in fact, it was only half an inch thick. This, he submits, is an example of HMRC exaggerating and inflating the work and the time taken to comply with his request.

76. He suggests that HMRC has *"knowingly been dishonest by presenting 3323 hits inferring that all of these would have to be opened up and examined. They knew only the 200 most relevant are available for display. Thus the maximum number HMRC would need to open on*

any given search would be 200." He submits that the remaining 3123 hits would not be identified and their contents could not be searched.

77. The Appellant sets out the process that he considers would have been reasonable for HMRC to have followed and stresses the importance of using combinations of words or phrases using the Intranet search tool to limit the number of "hits" produced. He submits that by using the word "*disabled*" instead of "*disability*" HMRC has artificially increased the scope and number of hits. In his submission, the general search facility prior to August 2010 *"clearly did not meet the standards required by FOIA"*. He relies on the Lord Chancellor's Code of Practice on the management of records issued under section 46 of FOIA and submits that HMRC's management of records was not adequate to meet the needs of FOIA.

78. The Appellant considers that information falling within the scope of his request ought to have been found in the appropriate guidance/instruction sections such as People Policies, Health and Safety, Diversity and Equality, and Managers' role and responsibilities. He considers that Advice ought to have been found using the HMRC Intranet search tool or browsing through the Hotseat questions and answers. However, he submits that his request for searches is not limited to Hotseat. This was cited as an example of where relevant information might be held. Other possible locations may be *"memos, notes of meetings etc not consolidated into the main guidance/instruction, nor directly linked from the viewable guidance/instruction.."*

79. While we agree with the Appellant that the onus of identifying the possible locations for the information sought does not lie with the requestor, in this case he does not accept that HMRC has searched the relevant locations and he has provided some further examples of where, in his opinion, information might be held. If HMRC estimated that the cost of complying with the second request would exceed the appropriate limit when limited to a search of the Intranet and Hotseat, it is a clear inference that to search further avenues as suggested would

add further to those costs. In order for HMRC to be able to comply with the request within the time limit, it is necessary to try to refine the request rather than broaden it or add further potential avenues to search.

80. In relation to the time taken to open the various "hits", the Appellant submits that three minutes to open and skim read is excessive and that one to two minutes, on average, would be reasonable. He submits that the titles of the hits on Hotseat provide an accurate guide of the content of the question and answer. HMRC submits that it is necessary to open the document and skim read it to ascertain whether it fell within the scope of the request. We do not agree with the Appellant on this point and consider that each would need to be opened and the contents of those hits at least skim read to ensure a thorough search had been carried out. A cursory search by just the titles of "hits" following the search might result in relevant material being excluded. Even if the figure agreed was one minute, the time estimate would still exceed the appropriate limit.

81. The Appellant suggests other keyword search terms which in his submission *"ought to have been"* used in order to locate more information on Hotseat. He has provided the results of searches based on those keywords which he has undertaken himself at a time when he had access to Hotseat. He submits that in following the guidance provided on the "Intranet Help" section, *"There is no right or wrong way of searching, but just searching on one word will get you hundreds of hits. You should try to think about what combinations of words or phrases will narrow down the number of hits you get. This way you are more likely to find the exact bit of guidance or information you are looking for"*, that those carrying out the search should not have used just the one word they did, but have combined words to narrow down the number of hits.

82. While it might be the case that a different set of keywords or a combination of keywords might have produced different results, it does

not follow that all the relevant information held by HMRC falling within the scope of the second request would have been located this way. HMRC could have been criticised for using the "wrong" combinations of words or putting them in the "wrong" order. There is no right or wrong way of searching , nor is there only one method of searching that could be regarded as reasonable in any particular case. We are concerned with whether HMRC has provided a reasonable estimate of the time it would take to comply with the second request. The thrust of HMRC's submission is that the time that would be required to be spent in order to carry out a full and thorough search would far exceed the appropriate limit and thus section 12 (1) of FOIA is engaged.

83. The Commissioner submits that the estimate put forward by HMRC was reasonable; it was quite clearly based on cogent evidence and it was sensible and realistic in the circumstances.

84. The Commissioner submits that a public authority does not have to consider all possible methods of searching for or retrieving information. An estimate of the time taken for compliance would only be rendered unreasonable if the public authority has disregarded an alternative which is "so obvious" that it cannot be ignored (*Roberts v Information Commissioner, supra*). In the present case, the Commissioner submits that although there could be any number of permutations of keywords when using the search tool, HMRC chose a sensible and realistic number of terms framed in a perfectly reasonable way.

85. The Commissioner also submits that there is no evidential basis to conclude that if Hotseat had been searched using the terms suggested by the Appellant, the appropriate limit on the cost of complying would not have been reached. The Commissioner draws our attention specifically to the fact that HMRC had already spent over 20 hours searching other sources for the information requested.

86. Our task is to assess whether the cost estimate was reasonable. We accept the evidence of Ms Chance and Ms Thomas in respect of the

cost of complying with the request. The issue of whether HMRC's management of records is adequate or not is outside the scope of this appeal, although we are however surprised that an organisation such as HMRC does not appear to have a more satisfactory and simple system in place for searching for information on a particular topic. It may be, for example, that staff within HMRC's IT function would be better placed to carry out these sorts of wide searches across the whole organisation, for reasons of greater knowledge regarding search parameters and for their access to facilities not available to ordinary users, such as databases behind intranet sites and their network. One member of the Tribunal expressed concern that there was no evidence of any approach to the IT department or IT provider to explore whether any alternative search facilities could be considered. The fact that this was not done does not result in any search undertaken being unreasonable per se, but is relevant when considering whether any alternative methods of locating the information may have existed.

87. Our task is not to insist that a public authority considers each and every reasonable method of locating and extracting information, and we agree with the Tribunal in the case of *Roberts*, that the reasonableness of the cost estimate is only undermined if an alternative method exists which is so obvious that disregarding it renders the estimate unreasonable. We do not consider that there is any such obvious alternative method for locating material that may fall within the scope of the second request.

88. In our opinion HMRC reached a reasonable estimate in respect of whether the cost limit would be exceeded in carrying out the relevant activities in Regulation 4 in relation to the second request. It has provided evidence of how the estimate was calculated and we see no basis to reject that evidence.

89. For these reasons we dismiss this ground of appeal.

<u>Possible additional ground of appeal</u>

90. The Appellant suggests that there is one further ground of appeal, namely that the Commissioner should have excluded or included certain details in the Decision Notice.

91. The scope of an appeal under section 57 of FOIA does not extend to a line-by-line or word-by-word examination of the detail and content of the Decision Notice. This ground of appeal is dismissed.

Conclusion and remedy

92. The initial failure to identify the first request correctly as a FOIA request has, in our opinion, led to it not being dealt with in as proper and timely a manner, in accordance with the requirements of FOIA, as it might have been if it had been passed to the FOI department immediately.

93. For the reasons set out in detail above, we have concluded that the Commissioner was wrong to conclude that, on the balance of probabilities, HMRC did not hold the information falling within the scope of the Appellant's first request. Accordingly, we allow Ground 1 of this appeal.

94. HMRC must now deal with the first request in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 as a request for both advice and guidance in relation to managerial responsibility towards staff that are considered being at suicidal risk due to work related stress/depression. We have indicated in the substituted Decision Notice that as there is no reference in the request to any specific department within HMRC, consequently the request has to be interpreted as applying to the whole of HMRC. This may raise the possibility that the cost of complying with the request may exceed the appropriate limit such that section 12(1) of FOIA applies.

95. In our opinion HMRC reached a reasonable estimate as to whether the cost of complying with the second request would exceed the appropriate limit and we dismiss Ground 2 of this appeal.

96. Our decision is unanimous

Annabel Pilling

Tribunal Judge

5 September 2011

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

EA/2011/0053

BETWEEN:

DAVID BAKER

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

And

HER MAJESTY'S REVENUE AND CUSTOMS

Second Respondent

DECISION ON APPLICATION FOR PERMISSION TO APPEAL

Introduction

1. The Appellant applies under Rule 42(1) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 for permission to appeal to the Upper Tribunal against a decision of this Tribunal, dated 2 September 2011, refusing, in part, his appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 1 February 2011.

Background to the Appeal to the Tribunal

1. The Appellant made two requests under the Freedom of Information Act 2000 (the 'FOIA') to HM Revenue and Customs ('HMRC') for information relating to managerial responsibility towards the welfare of staff. HMRC refused his requests and the Appellant complained to the Commissioner. In respect of the first request, the Commissioner concluded that, on the balance of probabilities, HMRC did not hold the information requested. In respect of the second request, the Commissioner concluded that HMRC interpreted the request too narrowly but that the cost of compliance would exceed the appropriate limit for the purposes of section 12(1) of FOIA[1].

2. The Appellant remained dissatisfied and appealed to the Tribunal on 24 February 2011. The Grounds of Appeal were:

   Ground 1 - The Commissioner erred in concluding, on the balance of probabilities, that HMRC carried out sufficient and/or appropriate searches for the material falling within the scope of the first request for information.

   Ground 2 – The Commissioner wrongly upheld HMRC's application of section 12(1) of FOIA as he wrongly concluded that HMRC's estimate of the time that would be taken for compliance is reasonable or accurate in respect of the second request for information.

3. The Appeal was determined at a hearing on the papers on 14 July 2011 and a Decision issued on 2 September 2011.

[1] The effect of section 12(1) of FOIA is to render inapplicable the general obligation to provide information in section 1(1) of FOIA where the cost of complying with the request 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'). The appropriate limit for a central government department such as HMRC 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. Regulation 4(3) sets out an exhaustive list of the factors that may be taken into account in arriving at a cost estimate.

4. The Tribunal allowed Ground 1 of the appeal; we found that HMRC, and the Commissioner, considered the scope of request 1 too narrowly and should have seen the distinction between "guidance" and "advice". The quality of HMRC's initial assessment of the request was poor. We concluded that HMRC did not deal with the complainant's first request in accordance with the requirements of Part 1 of FOIA and that it was not entitled to state that it did not hold the requested information at the time the request was made. We directed HMRC to deal with the complainant's first request in accordance with the requirements of Part 1 of FOIA as a request for *both* advice and guidance in relation to managerial responsibility towards staff that are considered being at suicidal risk due to work related stress/depression.

5. The Tribunal dismissed Ground 2 of the appeal; HMRC was entitled to rely on section 12(1) of FOIA in respect of the complainant's second request as the cost of complying would exceed the appropriate limit.

Application for permission to appeal to the Upper Tribunal

6. On 2 October 2011 the Appellant made a written application to the Tribunal for permission to appeal to the Upper Tribunal against the decision of 5 September 2011 in respect of his second request:

> I wish permission to appeal against the First Tribunal decision dated 5 Sepotember 2011 (section
>
> 12, 2nd FOIA request) to the Upper Tribunal.
>
> The grounds of appeal is the Tribunal had no evidence, or not enough evidence, to
> support its decision - physical evidence (FOIA information sent to me in March 2010 by HMRC was
> only half an inch thick. The data exactly matching that described in HMRC's accompanying letter)
> represents 2-3 hours work. HMRC's own estimate of time needed to collate the balance ranged fro 6
> to 19 hours.
>
> In addition the tribunal failed to recognise [xx]'s ability to recognise a FOIA request
> - He is a senior manager, the position of which demands the ability to recognise and deal with a

> host of complex issues, one of which is ensuring staff under his wing are convesrsant with
> recognition and departmental procedure of FOIA request that do not state thaty they are FOIA
> requests. HMRC's first port of call is HMRC's FOIA unit, not a division of HMRC HR far removed from
> the FOIA processing function.

7. The right to appeal against a decision of the Tribunal is restricted to those cases which raise a point of law.

8. The Appellant appears to submit that he has identified 2 errors of law:

   i) the Tribunal had no evidence or not enough evidence to support its decision;

   ii) the Tribunal failed to recognise the Senior Business Manager's ability to recognise a FOIA request.

9. Each of these grounds of appeal is considered in turn below.

Ground i) the Tribunal had no evidence or not enough evidence to support its decision

10. The Appellant has repeated a submission he made before the Tribunal (referred to in paragraph 75 of our decision).

11. Within the agreed Bundle of documents we had been provided with two witness statements submitted by HMRC from (i) Teresa Chance, who carried out the internal review and corresponded with the Commissioner during his investigation, and (ii) Ann Thomas, Information/Data Manager in the Central Business Management/Security, Risk and Information team and we set out some of their evidence in our decision (at paragraphs 65-74).

12. We accepted the evidence of Ms Chance and Ms Thomas in respect of the cost of complying with the request. We did not consider that there

was any obvious alternative method for locating material that may fall within the scope of the second request than that outlined by these witnesses.

13. Our task was to assess whether the cost estimate was reasonable. In our opinion HMRC reached a reasonable estimate in respect of whether the cost limit would be exceeded in carrying out the relevant activities in relation to the second request. It provided evidence of how the estimate was calculated and we saw no basis to reject that evidence.

14. The Appellant continues to challenge this estimate. He has suggested that HMRC had inflated the estimate of the time (i) it had taken to comply with the second request so far, and (ii) it would take to comply with the remainder of the request. He provided his own estimate of the time he would consider reasonable, but he provided no evidential basis in support.

15. I am satisfied that the Tribunal was provided with sufficient evidence to reach a decision in respect of whether the cost estimate was reasonable and I do not consider that this ground amounts to identifying an error of law.

Ground ii) the Tribunal failed to recognise the Senior Business Manager's ability to recognise a FOIA request

16. This ground relates to the Appellant's complaint that his first request for information was not initially treated as a request under FOIA.

17. While it is not necessary to rehearse the background in any detail, it is necessary to set out the history of this complaint. The Appellant had been employed by HMRC and, from some time before making the requests for information, was off work. During the relevant period there was a course of correspondence between the Appellant and

managerial staff at HMRC about a number of matters, including a change of manager and various complaints about other staff.

18. On 3 December 2009, the Appellant wrote to the Senior Business Manager at HMRC. This letter dealt with various matters about which the Appellant sought answers from HMRC, the majority of which were not requests for information but continued previous correspondence. In that letter, the Appellant made the following request for information:

> *"Let me have copies of HMRC guidance/advice in relation to managerial responsibility towards staff that are considered being at suicidal risk due to work related stress/depression."*

19. The Senior Business Manager did not treat this as a request for information under FOIA. He regarded the letter as part of the chain of correspondence concerning various matters arising from the Appellant's employment at HMRC. He responded the following day, reiterating what had been said in earlier correspondence that, due to certain concerns for the Appellant, he did not intend entering into further discussions on the matters raised whilst the Appellant was off work.

20. In his complaint to the Commissioner and his lengthy Notice of Appeal document to the Tribunal, the Appellant addressed a number of matters that were not relevant to the Appeal, such as HMRC's initial failure to deal with the requests for information in accordance with FOIA. The Commissioner found that there were breaches of FOIA in some of these respects.

21. There was no appeal against that part of the Commissioner's decision. We did, however, observe in our decision that it is understandable why the HMRC Senior Business Manager did not treat the first request as a request for information under FOIA but, as part of the on-going correspondence about a number of related matters.

22. It was therefore not necessary for us to consider this aspect of the case further, and it had no bearing on the two agreed Grounds of Appeal. It is not relevant to the issue of either whether HMRC held information falling within the scope of the first request or the estimate of the cost of complying with the second request.

23. I do not consider that this ground amounts to an error of law.

Conclusion

24. Under Rule 43(1) of the Rules I am required to consider, taking into account the overriding objective in Rule 2, whether to review the decision in accordance with Rule 44. In this case, I am not of the opinion that I should review the decision of 2 September 2011 as I am not satisfied that there is any error of law.

25. As the application does not identify any ground that amounts to an error of law, I can not give leave to appeal and therefore permission to appeal is refused.

Annabel Pilling 6 October 2011
Tribunal Judge