IN THE FIRST-TIER TRIBUNAL Case No. EA/2011/0116
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS UNDER SECTION 57 OF FREEDOM OF INFORMATION ACT 2000

ON APPEAL FROM:

The Information Commissioner's

Decision Notice No: FS50290504

Dated: 31 March 2011

Determined on the papers alone

Decision promulgated: 27 October 2011

Date of decision: 27 October 2011

Before

David Marks QC
Judge

and

Michael Hake
Narendra Makanji

BETWEEN:

DR C POUNDER

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

MINISTRY OF JUSTICE

Second Respondent

DECISION

The Tribunal varies the determination of the Information Commissioner (the Commissioner) in the Decision Notice dated 31 March 2011 Reference No FS50290504 by directing that one of the items constituting the information requested more particularly set out in the Decision herein be disclosed subject to the specific directions and redactions referred to further in this Decision.

REASONS FOR DECISION

1. This case involves a consideration of the scope of the request which is the subject matter of this appeal and the question of which part, if any, of the requested information properly falls within the said scope.

The background

2. The Appellant made a request for the Ministry of Justice (MoJ) from 1 October 2009 in the following terms, namely:

> "(i) A list of which Article(s) Directive 95/46/EC (The Data Protection Directive) the European Commission has alleged have not been implemented properly by the UK Government.
>
> (ii) In relation to each Article, summary information as to why the European Commission has made this claim.
>
> (iii) In relation to each Article, summary information as to why the UK Government thinks that the European Commission is wrong in this claim.
>
> (iv) Summary information as to whether or not any differences in opinion about implementation have now been resolved."

3. On 3 February 2010, i.e. after some delay the MoJ provided a substantive response. The MoJ confirmed that it did hold the

information requested but relied principally on the exemption in section 27(1)(c) of the Freedom of Information Act 2000 (FOIA) which exemption deals with prejudice of the UK's interests abroad.

4. There was an immediate response by the Appellant who asked for an internal review. On 25 August 2010, i.e. after another but perhaps less serious delay the MoJ responded with the outcome of this internal review. It upheld its earlier reliance on section 27(1)(c). In addition section 27(2) dealing with confidential information obtained from a State other than the UK etc. was also relied upon.

5. It will be noted that the last three requests which have been set out above sought various items of "summary information". The Commissioner's subsequent Decision Notice quite correctly pointed out section 11(1)(c) of FOIA provides that where a complainant specifies a preference for the material to be produced in the form of a summary or similar précis, the public authority should give effect to that request and preference where reasonably practical to do so. It could perhaps be said that even request (i) was in essence made solely to seek some form of summary but it is not an issue which is presently before the Tribunal. As the Decision Notice noted as at the date of the Notice, i.e. 31 March 2011, the Commissioner at least was not aware that the MoJ had collated the information to any form of the type requested by the complainant, nor did the Commissioner know whether it was considered reasonably practicable to do so.

6. It appears that after the intervention of the Commission, i.e. after the internal review, the MoJ provided the Commissioner with the complete information rather than any form of list. In the Decision Notice the Commissioner concluded at paragraph 16 that whereas section 11(1)(c) provides that a public authority should give effect to the preference of a requester as to the means by which the requester might wish to have the information to be communicated, this did not mean the exemption cited should relate to anything other than the recorded information held by the public authority. Although as will be

seen, this issue does not form part of the reasoning which underlies this decision, the Tribunal respectfully agrees with that approach.

7. The Tribunal has been given a closed bundle and considered the same, the said bundle containing the full range of the information requested. It is plain that the two exemptions cited by the MoJ can properly be said to relate to that material in the sense that the exemptions or at least one of them apply or applies to the totality of information which might otherwise have been the subject of a summary or some form of digest.

8. As indicated above, the MoJ has placed reliance on various provisions in section 27 of FOIA. There is no need in the Tribunal's view to set out the whole of section 27 for present purposes. It is enough to paraphrase the Commissioner's relevant Guidance on section 27 which is referred to in paragraph 19 of the Decision Notice. The exemption is addressed to information likely to prejudice the interests of the UK abroad and will include information held by a public authority which, if disclosed, would harm UK interests in relation to an international arrangement or in relation to the UK's dealings with another State or non-UK organisation.

9. In its further exchanges with the Commissioner, the MoJ pointed to the possibility of likely prejudice that would ensue through disclosure. The particular impacts which were alleged to be potentially or actually damaging were first, as they related to the reputation of the UK, for ensuring the confidentiality of information and second, the effect of what is called the infraction process since confidentiality would allow all parties to that process to retain maximum flexibility.

10. In the result, and as also expressed in the Decision Notice, the Commissioner found that section 27(1)(c) could not be relied on with regard to request (i). In other words, the exemption was not engaged. The Commissioner, however, did find the exemption to be engaged with regard to the remaining three requests. However, when weighing

the competing public interests, the Commissioner found with regard to request (ii) that the public interest militated in favour of disclosure. On the other hand, with regard to requests (iii) and (iv), the Commissioner found that the public interest in maintaining the exemption did outweigh the public interest in disclosure. The Commissioner also found that section 27(2) was engaged with regard to request (i). However, the public interest in favour of maintaining that exemption did not outweigh the public interest in disclosure. In the result, this Tribunal is only concerned with the determination regarding requests (iii) and (iv).

The Appeal

11. The Notice of Appeal is dated 31 March 2011. In it, the Appellant refers to the fact that he had previously made a request which he called a "broader request relating to this matter" which had been dealt with by the Commissioner in Decision Notice dated October 2006 bearing reference no. FS50110720. That Decision Notice, it seems found that the requested information was exempt under section 27(1)(b) and (c). It appears that the Appellant did not appeal that decision.

12. The Appellant then referred to the fact that in the request which forms the basis of the present appeal, he "adopted a different approach in order to avoid this exemption". In other words, instead of asking for the full exchanges between the MoJ and the European Commission, he asked for "summary information" on a number of key points. He went on to say that by asking for this he had it in mind that the MoJ would provide an indication of the arguments involved "written in such a way as to exclude the exempt information". He then took issue with the fact that he regarded the Commissioner as having, wrongly in his submission, regarded his request as a request for the full information. This led him to set out the following, namely:

"The only plausible rationale for my seeking summary information, given the earlier refusal, is that this will allow an abbreviated, non-

exempt account of the key issues to be disclosed. If there was any doubt as to my purpose in referring to "summary information" this should have been clarified in accordance with section 1(3) … I accept that there may be cases (e.g. where vast quantities of raw technical data are involved) where the full information is likely to be so complex that the summary is positively desirable as the only way of rendering it intelligible **but this is clearly not such a case."** (emphasis in the original).

The Responses

13. Both the Commissioner and the MoJ submitted written responses with regard to the original Notice of Appeal and, in particular, with regard to requests (iii) and (iv). The Tribunal intends no discourtesy to the careful way in which each of these responses is drafted by only describing their content in brief. The Commissioner's response focussed on the Appellant's first principal contention that, in effect, a public authority could in effect "create" (the Commissioner's term) information whether by means of a summary synthesis or distillation in response to a request in a manner which was intended to, or which did in fact constitute non-exempt information. The second principal contention made by the Appellant was to a similar effect, namely that section 11(c) of FOIA gives the requester the right to have all the information on a given topic "summarised" to meet the requested specified preference. Thirdly, and again in a similar vein, section 16 of FOIA also points to or sets out an obligation in effect on a public authority to determine whether a requester is entitled to any information.

14. In answer to the above points, the Commissioner contended first that the correct approach as illustrated by the Decision Notice was to consider the application of any exemption to the information as a whole which might be held and not for information it might otherwise create. Second, reliance placed upon not only section 11 and 16, but also on sections 1(3) and 8 of FOIA was consequently misplaced.

15. A short response by the MoJ, to all intents and purpose, endorsed the Commissioner's response. At paragraph 12, the MoJ claimed that with regard to requests (iii) and (iv), if there were elements of information relevant to the two requests, that information could have been redacted or disclosed in summary form and then the Commissioner would have come to a different conclusion. In short, the Commissioner decided that no exempt summary could be produced.

Evidence

16. The only formal evidence the Tribunal has received is a short open witness statement by Kevin John Fraser, Head of MoJ's European and International Data Protection policy team. He counters the specific allegation which had been made by the Appellant in the latter's lengthy request to the MoJ's initial request to the effect that the requested information, being about 15 words of summary detail about each Article of the relevant Directive subject to possible infraction proceedings, was likely to exist already as a summary, or could be extracted from existing information held by MoJ.

17. Mr Fraser states that at the time of the Appellant's request, namely 1 October 2009, the MoJ had not yet received what was called a "Reasoned Opinion" from the European Commission setting out those Articles that the Commissioner at the time intended to pursue in infraction proceedings. That document, as described by Mr Fraser is dated 24 June 2010.

Further and Final Submissions

18. There have been further written exchanges consisting largely of contentions between the parties since the original exchanges mentioned above. The Tribunal has not found that any of this additional material has in any relevant way added to the conclusion it has reached. It pauses here to note that it found in particular the submissions put in by the Appellant difficult to digest, quite apart from their relative length and apparently needless repetition of the basic

points which were outlined in the Notice of Appeal. The Tribunal fully understands that lay litigants are not to be expected to have the same conciseness of thought and expression as legal representatives, but nonetheless, it does not help an Appellant's case to repeat matters simply for the sake of emphasis. The net result is very often to deter the Tribunal in question from actually reading the material which is presented.

The Tribunal's Conclusions

19. The Tribunal begins with what it regards as a very simple proposition which does not appear to be challenged by either party. Indeed, the Tribunal cannot see how any challenge to its correctness could be maintained. The critical issue is whether within the closed material there is any information which sensibly answers and satisfies the terms of the requests, either request (iii) or request (iv). In practical terms, the question raises itself as to whether there is information, albeit in this case in documentary form, which can properly be regarded as a summary of the matters itemised in one or both of the said requests.

20. The Tribunal is of the view, as suggested by the Commissioner in his initial written response, that the relevant time at which the question of the applicability of an exemption to existing information should be addressed is at the date of the request or, arguably as a matter or logical extension "at least by the time of the compliance with ss.10 and 17 of FOIA" (see *DBERR v IC and Friends of the Earth* (EA/2007/0072) at para 1(10) but see and cf APPGER v Information Commissioner and Ministry of Defence [2011] UKUT 153(AAC) especially at par 9)). Although this Tribunal is not in any way bound by another First-Tier Tribunal's decision, this Tribunal sees no reason for departing from that general approach. On the facts of the instant case, the operation of section 17 would mean that the last relevant date was the date of the refusal, namely 3 February 2010. In those circumstances, the Tribunal would accept the thrust of Mr Fraser's evidence to the effect that a

document containing relevant information which post-dated that date could not be disclosable.

21. However, the Tribunal has carefully studied a document appearing in the closed bundle and dated only June 2009 which therefore would fall within the time limit addressed above. It is sent by MoJ to the European Commission. The Tribunal is firmly and unanimously of the view that the said document contains information which can fairly be characterised as a summary falling within the sense or import of request (iv). On the other hand, the Tribunal is deeply conscious of the fact that the finding of the Commissioner, as indicated above, endorsed the stance of the public authority to the effect that with regard to the last two requests, the public interest favoured the maintenance of the exemptions which were relied upon. For these reasons, redactions will have to be made in the way to be set out below. The Tribunal is not aware that the Appellant has appealed against the findings regarding the relative public interests. Even if it were wrong so to find, and that in essence the Appellant was complaining about the specific decision as the competing public interests by the Commissioner, to the effect the public interest with regard to requests (iii) and (iv) was incorrectly applied by the Commissioner, the Tribunal endorses the Commissioner's view and upholds his decision on the basis that it can detect in the reasoning of the Commissioner no error in law, nor can it perceive that he exercised his discretion inappropriately or wrongfully.

22. It follows that in the light of its primary finding, the Tribunal is content for that document to be disclosed, but that it must be subject to a degree of redaction. The redaction, in practical terms, is such that all that would be left would be the heading of the letter beneath the name of the addressee, and the underlined descriptions of each paragraph or section, the paragraphs being numbered, the said descriptions being in bold and dealing with specific subject matters attributable to various Articles of the appropriate Directive. It follows that the bulk of the letter should be redacted. On the other hand, the Tribunal sees no reason

as to why the name of the addressee or the name of the personal individual signing the letter should not remain on the face of the redacted document.

23. In conclusion, therefore, the Tribunal upholds the decision of the Information Commissioner but with the variations as set out in the preceding paragraphs.

David Marks QC
Tribunal Judge

27 October 2011

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GENERAL REGULATORY CHAMBER
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David Marks QC
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Michael Hake
Narendra Makanji

BETWEEN:

DR C POUNDER

Appellant

And

THE INFORMATION COMMISSIONER

First Respondent

And

Ministry of Justice

Second Respondent

Ruling on Tribunal application for permission to appeal to Upper Tribunal made by Appellant dated 23 November 2011

DECISION

The Tribunal Judge refuses to grant permission to appeal in respect of the above Decision promulgated on 27 October 2011 (Case No. EA/2011/0116) to the Upper Tribunal.

REASONS FOR RULING AND DECISION

An appeal to the Upper Tribunal lies only on a question of law. The arguments advanced in the application do not relate to appealable questions of law. The alleged grounds of appeal are said to consist of two errors in law coupled with a procedural error.

With regard to the first alleged error in law it is denied that the Tribunal committed any error in law with regard to its finding in paragraphs 5 and 6 of the Decision that the Information Commissioner's Decision Notice was correct.

With regard to the second alleged error in law the same is said to relate to the question of whether when considering the application of the exemption the exemption applied to the body of the report in question or the requested management summary. It is denied that the Tribunal committed any error in law and reference should again be made to paragraph 6 of the First-Tier Tribunal's Decision in that regard. With regard to the alleged procedural error it is denied that the same constitutes any ground for properly appealing against the First-Tier Tribunal's Decision and/or constitutes an error of law such as to justify an appeal to the Upper Tribunal either as alleged or otherwise.

By way of addendum insofar as it is part of the application for permission to appeal that there be a remittance to the Information Commissioner the Tribunal accepts the submission made by the public authority that this will be inappropriate. As the public authority has recently maintained in its submissions to this Tribunal the Commissioner previously ordered disclosure of information requested under Parts (I) and (II) and the public authority, namely the MoJ complied with the same and duly supplied the information.

The First-Tier Tribunal has made its decision with regard to the Decision appealed against regarding the information requested under Parts (III) and (IV). The public authority being the MoJ has complied with the Tribunal's order for partial release of the information and has formally confirmed to the Tribunal that it does not intend to appeal that order or direction.

David Marks QC
Tribunal Judge

9 December 2011

IN THE UPPER TRIBUNAL
Administrative Appeals Chamber
Judge: P L Howell QC
29 February 2012

File No: GIA 109/12

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007
Tribunal Procedure (Upper Tribunal) Rules 2008 SI No 2698
FREEDOM OF INFORMATION ACT 2000

APPLICATION FOR PERMISSION TO APPEAL FROM DECISION OF FIRST-TIER TRIBUNAL

Applicant:	Chris Pounder
Respondents below:	(1) Information Commissioner (2) Ministry of Justice
First-tier Tribunal:	Information Rights
First-tier case ref:	EA/2011/0116
Decision dated:	27 October 2011

NOTICE OF DETERMINATION OF APPLICATION

I refuse permission to appeal.

REASONS

No sufficiently arguable and material error of law in the first-tier decision is identified, such as to warrant allowing a further appeal to proceed against it. It is clear from that decision that the first-tier tribunal was satisfied from the evidence before it as regards the information requests in issue ("(iii) In relation to each Article [of Directive 95/46/EC], summary information as to why the UK Government thinks that the European Commission is wrong ... (iv) Summary information as to whether or not any differences in opinion about implementation have now been resolved.") that:

(1) the whole of the information requested (in whatever form, even if only as a summary or digest) was within one or both of the exemptions in section 27(1)(c) or section 27(2) FOIA 2000 (paragraph 7 of the decision);
(2) the only existing recorded information held by the authority at the date of the request and/or response which could be characterised as a "summary" of the kind requested was the classified UK Government Note to the EU Commission dated June 2009 referring to various specific topics and Articles of the Directive (paragraphs 16, 19-22); and
(3) with the sole exception of the redacted version of that note which the tribunal itself directed, disclosure of any of the exempt information held on the topics identified in the request, or of summarised extracts from it, had been properly held to be against the balance of the public interest under section 2 FOIA so there was no duty to comply further with the request (paragraph 21).

As recorded in the tribunal's decision there had been no challenge to the Commissioner's finding on the public interest issue, and similarly the proposed grounds of appeal before me do not identify any arguable basis in law for challenging the tribunal's own endorsement of it subject to the one variation it directed. I am unable in those

circumstances to see that the grounds of this application provide any arguable basis for a further appeal that could have any material effect on the result. They pose three proposed "Questions in Law for the Upper Tribunal" on the meaning to be accorded to "summary information", but it is in my view sufficiently clear that the tribunal's findings apply equally whether that is to be taken as referring to a pre-existing summary already held in recorded form, or one that would only come into existence as a means of complying with the request.

(Signed)

P L Howell
Judge of the Upper Tribunal
29 February 2012

Under rule 22(3)-(5) of the Upper Tribunal Procedure Rules the applicant may apply for this decision to be reconsidered at an oral hearing but any such application must be made in writing and received by the Upper Tribunal within 14 days after the date on which this notice is sent to the applicant.

HM Courts & Tribunals Service

THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Information Note for appellants

Where permission to appeal has been refused without an oral hearing.

1. The decision of the Administrative Appeals Chamber of Upper Tribunal is attached.

2. You have been refused permission to appeal without an oral hearing.

3. You have a right to apply for the decision to be reconsidered at an oral hearing. If you wish to apply for reconsideration, you must do so in writing to this Office, within 14 days from the date of the letter sent with this Note, giving your reasons.

4. This time limit may be extended, but only if there are good reasons to do so.

5. Any hearing is likely to be in London or by video-link.

INVESTOR IN PEOPLE