



FIRST-TIER TRIBUNAL

GENERAL REGULATORY CHAMBER

Appeal No. EA/2011/0298

BETWEEN:

VIVIENNE EDWARDS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

MINISTRY OF JUSTICE

Second Respondent

Held on the papers on: 22 June 2012

Before: C Taylor, R Enderby, N Makanji

Subject Matter

Freedom of Information Act 2000 ('FOIA'): s.12

DECISION

For the reasons given below, the Tribunal allows the appeal and issues a Substituted Decision Notice.

Substituted Decision Notice

Dated: 16 October 2012

Public Authority:

Ministry of Justice

Address:

102 Petty France
London SW1H 9AJ

For the reasons set out below, the Ministry of Justice is to investigate whether any of the requested information is held electronically within 31 calendar days as an alternative approach to searching for the information in the archives. Whilst the Ministry of Justice will know best how its material is organised, their alternative searches should include those listed in paragraph 36 of this decision. We do not anticipate such searches will take more than a couple of hours and therefore should be within the cost limit. However, if the MoJ concludes that even if it were to limit its search to these alternative approaches, this would nonetheless exceed the appropriate limit under section 12 FOIA, it is required to contact the Appellant within 31 calendar days to advise her as to how to refine her list - that is categorised into more than one policy area - so as to bring it within the cost limit in accordance with s16 FOIA (*see paragraph 23*).

Reasons For The Decision

Background

1. Under changes to the Machinery of Government announced in 2007, sections of the Home Office were merged with what was then the Department for Constitutional Affairs, to create the Ministry of Justice ('MoJ').
2. The new department took on responsibility for archived records that related to the services transferred to it and any relevant freedom of information ('FOI') requests.

The Request for Information

3. On 21 January 2011, the Appellant sent an FOI request to the MoJ, stating:

"I produced the Report of the Advisory Council on Openness in the Public Sector. The Report and all the Advisory Council papers were published on the website, but have now probably been archived.

- *A copy of the Advisory Council's report to the Home Secretary which was completed in December 1999*
- *A copy of the submission to Jack Straw, then Home Secretary, submitting the report to him*
- *A copy of the letter Jack Straw sent to public authorities about the report*

4. I would also like to know if any review or evaluation of the Freedom Information Act or progress towards increasing openness in the public sector, is underway or planned, apart that is from the annual reports published on the website.

Witnesses

5. I was head of the team dealing with witnesses from 2001 to 2003. There is information on the internet about the joint cjs project "No Witness, No Justice" which was started in 2004, but I cannot find anything about the earlier work done in the Home Office (and which would now be within the scope of the Ministry of Justice) to review services for witnesses or the report of that work which was called "No Witness - No Justice", and which in fact introduced that term.

6. I would like copies of:

A copy of the submission to Lord Falconer in spring/summer 2002 recommending that a working group be established to review the services for witnesses in the light of the IPPR Report "Reluctant Witness" and other information

A copy of the IPPR Report "Reluctant Witness" which had been sent to the Home Office and which helped trigger the review

A copy of the report of May 2003 of the inter-agency working group on witnesses entitled "No Witness - No Justice: Towards a national strategy for witnesses". This was published on the cjs website at the time, but is no longer available.

A copy of the submission to Lord Falconer submitting the report to him

7. I would also like information about how the report was followed up and how it was incorporated into the cjs project "No Witness, No Justice", with copies of any key documents.

The Probation Service

8. When I was in the Probation Unit from 1993 to 1997 I was in the lead in changing the arrangements for the recruitment and training of probation officers. I would like copies of the following documents. I can't recall the dates of all of them, but they were very significant developments in that area of work and it should be possible to identify them.

The judgment in the 1995 judicial review NAPO (the National Association of Probation Officers) versus the Home Office – this was a legal challenge against the break with the Diploma in Social Work as a mandatory qualification for probation officers.

The Efficiency Report by [XX] on the sponsorship scheme for probation trainees. I think this was completed in late summer 1994.

The consultation document issued to the Probation Service on proposed changes to the arrangements for training of probation officers following [XX]'s report and my subsequent note summarising the responses received.

Key documents in the breach of contract case brought by the National Union of Probation Officers in respect of a year's intake of sponsored students. From what I recall the work on this was done over the winter 1993/94. There will be a note by me setting out the position when the summonses for breach of contract were received, submissions to Ministers, legal advice from Counsel, and a letter from me to the students informing them of the decision to refund them.

The new recruitment publication issued in 19945 called "Facing up to Crime, the submission I put to Lady Blatch seeking her agreement to its publication, and the letter to the probation service informing them of its availability. I don't think the publication is now available elsewhere.

Independent Monitoring Boards (then Boards of Visitors)

9. I am interested in looking at some documents about Boards of Visitors, including some that should by now be in the National Archives having passed the 30 year rule, but have not been able to trace any. Perhaps the best way to deal with this would be for me to talk to someone in that area of work, if you can arrange that. I could then submit a more specific written request."¹

4. On 11 March, the MoJ refused the request. It explained that it had searched 109,644 files and that it estimated that extracting the information would exceed the appropriate limit for the cost of compliance set under s.12(1) Freedom of Information Act 2000 (FOIA). It did not provide an explanation as to how that cost estimation had been reached.
5. On 12 April, the Appellant requested the MoJ review its decision. The MoJ's internal review of 17 May confirmed its position but also stated that the initial search of files being manually reviewed had exceeded the guidance limit of three and a half days of staff hours. It gave no further detail on how the time had been spent. On 18 May, the department replied to a further letter from the Appellant, and confirmed that it held some of the information requested.
6. On 31 May 2011, the Appellant complained to the Commissioner about the handling of the request and the MoJ's management of its records. In its decision notice of 21 November 2011, the Commissioner concluded that the MoJ's cost estimate was reasonable based on its calculations of the time and effort and what the Commissioner considered to be the considerable scope of the request. However, it found that the MoJ breached s.16 FOIA by failing to advise and assist the Appellant as to how she might refine her request so as to bring it within the cost limit. We were told that the Commissioner '*dealt with*' the complaint about the MoJ's record management separately, but were given no further details.²

The Appeal

7. On 16 December 2011, the Appellant appealed to the Tribunal. She confirmed at the case management hearing that her grounds were:

"The Commissioner erred in concluding that compliance with the request would be properly estimated to exceed the 'appropriate limit' under [the FOIA], in part because of misconstruing the Appellant's request, and the structure of the groups of material requested."

¹ The text of the request has been reproduced in full because the Appellant considered that summaries made by the other parties could have distorted the meaning.

² As the parties are aware, the Commissioner has relevant powers under s51 FOIA to investigate matters such as whether a public authority conforms with the proposed practices set out in the relevant codes under s.s45 and 46 FOIA. However, whether he chooses to exercise them is not a matter that is reviewable by the Tribunal.

The Task of the Tribunal

8. The Tribunal's remit is governed by s.58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or whether he should have exercised any discretion he had differently.
9. This appeal focuses on the whether the costs exemption was properly relied upon. As was made clear to the Appellant at the preliminary hearing for case management of this appeal, our decision will not deal with arguments and evidence submitted that relates to matters beyond our remit, such as:
 - a. the suitability or quality of the MoJ's record management; or
 - b. the manner of the Commissioner's handling of the investigation. Whilst we do not have jurisdiction to do this, we may consider (and have considered) the matters afresh – we may receive evidence that was not before the Commissioner, and make different findings of fact from him.

The Law

10. A public authority is exempt from complying with an information request where it estimates that the cost of doing so would exceed the 'appropriate limit'. (See s.12(1) and (2) FOIA). The appropriate limit for a government department is equivalent to 24 hours of the public authority's time.³ In reaching its cost estimate,

*“(3) ... 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,*
 - and*
 - (d) extracting the information from a document containing it. (See regulation 4(3).)*
11. We therefore need to consider whether the authority's cost estimate is reasonable.
12. We agree with previous decisions of the First-tier Tribunal that the authority's estimate should be sensible, realistic and supported by cogent evidence. When estimating the cost (or time), it may not simply “go through the motions”, as this would not produce a bona fide estimate and so not justify the exemption. It should consider if there are alternative methods of complying with the request that would clearly bring it within the cost limit.⁴ As stated in *Roberts v Information Commissioner EA/2008/0050* para.s 12-13:

“Section 12 provides that the public authority may rely on its costs estimate to refuse a request ... the word “estimate” itself provides some guidance. It points to something more than a guess or an arbitrarily selected figure. It requires a process to be undertaken, which will involve

³ See regulations 3 and 4(4) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. Referred to here as 'the regulations' or individually as 'regulation'.

⁴ We refer to reasoning in *Randall v Information Commissioner EA/2007/0004*, *Gerald James and Cabinet Office and Government Departments EA/2006/003*, which we adopt here.

an investigation followed by an exercise of assessment and calculation. The investigation will need to cover matters such as the amount of information covered by the request, its location, and the hourly cost of those who will have the task of extracting it (in this case a rate imposed by the Regulations). The second stage will involve making an informed and intelligent assessment of how many hours the relevant staff members are likely to take to extract the information. Clearly the whole exercise must be undertaken in good faith and, as the Regulation provides, involve an element of reasonableness.

...We can envisage circumstances where it might be concluded that a public authority ought not to be permitted to rely on the reasonableness of its estimate if it had failed to give appropriate consideration to a cheaper available means for doing so. It does not follow from this that it only needs a person requesting information to suggest one alternative which the public authority had not considered for it to be prevented from relying on its estimate. It is only if an alternative exists that is so obvious to consider that disregarding it renders the estimate unreasonable that it might be open to attack. And in those circumstances it would not matter whether the public authority already knew of the alternative or had it drawn to its attention by the requestor or any other third party."

Evidence

13. The parties submitted witness evidence, submissions, previous cases and a considerable number of documents as supporting evidence. We have considered all of this, even if not specifically referred to below. *(We have added titles and emphasis to the evidence and submissions below purely for ease of reference.)*

Appellant Evidence

14. The Appellant submitted a lengthy witness statement, including that:

The Request

- a. Her request related to work she had been involved as a civil servant. The range of documents and information were from different stages of her career. They reflected significant developments either being ground breaking or high profile in some way, and were about issues that were still of current interest. They were from policy areas on Freedom of Information, Witnesses and Probation. The request grouped the documents under these headings.
- b. The request was made to the MoJ because the main bulk of the work requested would now be in the MoJ.

The Search - State of Records

- c. She had been told the refusal of the request was because it would exceed the cost limit. This was because they were in former Home Office files that were not listed in accordance with the MOJ records index and their normal electronic search methods could not be used.
- d. She had found it difficult to believe that the Home Office would expect a receiving department to work from just a list of file numbers with no way

of identifying the subject matter. However, the MoJ had sent her sample spreadsheets to verify this difficulty. She noted the spreadsheets seemed useless as a way of identifying files. She thought it could have implications for the effectiveness of normal Departmental business if staff could not identify or retrieve information from the official records, and could not establish if there were any difficulties for staff in their normal day to day work, or in developing and implementing policy and preparing advice to Ministers.

Alternative Searches to Mitigate Costs?

- e. She had asked the relevant MoJ official whether policy units who might be able to help trace the information had been involved. This had not been not fruitful.

15. Letter to Appellant from Gus O'Donnell of 12 September 2011, explaining:

- a. *“Many areas of government continue to rely upon the legacy of paper records and files before the onset of desktop computing. A number of shortcuts were taken in the 1990s that led to a large number of files being registered by number without further subject information. A large number of these files have subsequently been transferred to two other Departments, including the Ministry of Justice, in line with Machinery of Government changes. The lack of detailed subject information for a large number of files is of concern ... and [the Home Office and MoJ] are working to resolve this...the Home Office was put under special monitoring provisions at the end of last year because it was failing to respond to all FOI requests as quickly as required by the Act. Since then, however, the department has turned in an impressive improvement... In my view this demonstrates that the department does have systems in place to identify and retrieve information being requested.”¹⁵*

16. Sample of spreadsheet forwarded by MoJ to Appellant:

Prefix	Account Code	Item Code	Item Desc
PBR	36001	HOF000295906	PBR 00 0090/0001/001/
PBR	36001	HOF000295909	PBR 00 0090/0001/002/
PBR	36001	HOF000295912	PBR 00 0090/0001/003/
PBR	36001	HOF000295915	PBR 00 0090/0001/004/
PBR	36001	HOF000295918	PBR 00 0090/0001/005/
PBR	36001	HOF000295921	PBR 00 0090/0001/006/
PBR	36001	HOF000295924	PBR 00 0090/0001/007/
PBR	36001	HOF000295927	PBR 00 0090/0001/008/
PBR	36001	HOF000295994	PBR 00 0090/0001/009/
PBR	36001	HOF000295975	PBR 00 0090/0001/010/
PBR	36001	HOF000107596	PBR 00 0090/0001/011/
PBR	36001	HOF000295978	PBR 00 0090/0001/012/
PBR	36001	HOF000295981	PBR 00 0090/0002/001/
PBR	36001	HOF000295984	PBR 00 0090/0002/002/
PBR	36001	HOF000295987	PBR 00 0090/0002/003/
PBR	36001	HOF000295990	PBR 00 0090/0002/004/
PBR	36001	HOF000295991	PBR 00 0090/0002/005/
PBR	36001	HOF000295945	PBR 00 0090/0002/006/
PBR	36001	HOF000295992	PBR 00 0090/0002/007/
PBR	36001	HOF000295995	PBR 00 0090/0002/008/
PBR	36001	HOF000498435	PBR 00 0090/0002/009/
PBR	36001	HOF000498438	PBR 00 0090/0002/010/
PBR	36001	HOF000498441	PBR 00 0090/0002/011/

1. The witness later clarified that this work was considered important, and would be concluded as soon as possible.

2.

MoJ Evidence

17. MoJ letter to the Appellant of 11 March 2011:

- a. *"The Department has made reasonable enquiries to assist you with your request and I confirm that the Department holds substantial amount of information relating to the former Home Office...Our records management team have searched through records of 109,644 former Home Office files on a series of spreadsheets manually, looking for each topic in turn. So far, we have been able to locate four bulky files on topics "Facing Up to Crime-Update" and one file entitled "No Witness..." Regrettably we were unable to find any copies of documents in these files states in your letter. In order for us to extract the information in the form that you have requested it would require us to search through thousands of files individually since 1994. We estimate this task would exceed the appropriate limit set out in the Act..."*

18. On 18 May, the department replied to a further letter from the Appellant, and confirmed that it held some of the information requested.

- a. *"MoJ now has the most comprehensive version of the list of files it is possible to have but it is not possible to obtain all of the file details, without retrieving every single file from storage, and then entering their information upon the lists that MoJ now holds. This is therefore what the Records Management Services within MoJ is currently in the process of compiling, but as approximately a quarter of a million files were involved, and the ordinary, on-going work of RMS must continue unaffected, it is not possible to give a precise date by which this work will be completed."*
- b. It attached email correspondence between the MoJ and Home Office on efforts made to try to get more information than it had from the spreadsheets such as file titles. These pre-dated the request.

19. MoJ letter to the Commissioner of 8 September 2011:

- a. *"It has been estimated that without knowing which files to target it would require looking manually through all of the 219,363 files held. To establish whether the section 12 exemption applied, a search of 109,644 ex-Home Office files within scope of the request were manually reviewed. There were still 109,719 that had not been searched. It has been estimated it took in total 26 and a half hours to deal with a sample of the information requested."*
- b. *If, as estimated, it takes 26 and a half hours to identify and then search through 109,644 files out of a total of 219,363, leaving 109,719 files still to be searched, this means that it took 26 and half hours to do just under half of the work that would have been necessary to comply with the request. Therefore, the estimated total cost of work hours for one person to search all the relevant documents and comply with the request would be approximately £1325-00(twice as much), which is above the £600 cost limit imposed on Freedom of Information requests."*
- c. *As was explained to the requester in the section 12 refusal notice provided to her on the 11 March 2011, the former Home Office files are not listed in accordance with MoJ records index numbers therefore the*

normal electronic search methods to look for information could not be used. The problem is that the files belonged to the Home Office, and became the responsibility of MoJ upon its creation, but they were not listed in our records indexes. This meant that whilst the information is held electronically, the searching through lists would have to be conducted individually and would require the file lists being separately searched.

Calculation:

- d. *'From the sample determining whether it holds the information': 'It took an estimated 22 hours and 30 minutes to investigate which documents from the 219,363 might be of relevance.'*
 - e. *'...c. Retrieving the information, or a document containing it = 3 hours 45 minutes: As the information being requested is not held in a readily accessible format it would involve manually searching through the files to locate what information is held relevant to the request. The information requested is archived so it proved necessary to recall a sample of the files from storage to locate the relevant information. It took approximately three hours and forty-five minutes to complete these tasks on a sample of the documents.'*
 - f. *'d. Extracting the information from a document containing it =15 minutes. The information would have to be extracted from the document it is held in which depending on the file could take fifteen minutes. Please note that a more precise estimate is not possible due to lack of consistency in the size of the files, the time it would take to obtain the necessary information would be dependent upon each file. So while it may be possible to find some of the information relatively quickly for some, for others this could involve exhaustive checks which may well not yield the information required. It is not possible to select a typical file, or sample to run an estimate as no single file is typical...'*
20. Testimony of MoJ official working in records management and FOI requests, included:

Calculation

- a. It had taken 26.5 hours for her to identify and search through 109,644 files out of a total of 219,363 files. After searching through 109,644 files, she had been told to stop, as there had already been spent a total of slightly over the three and a half working days limit that is set for such work (albeit in parcels of between one and three hours, over a period of three weeks, rather than three and a half days of continuous work). This left 109,719 files still to be searched through, which meant that it took 26.5 hours to do just under half of the work that would have been necessary to complete the search. It would therefore have cost twice as much for the MoJ to search through all records necessary.
- b. She had calculated the 26.5 hours by going back through her calendar to see how many hours she and her colleague had spent *'searching the records held for the information necessary to be able to identify the files, within which would be held the information and/or copy documents ... requested'*.

- c. A colleague with knowledge of the lists of records transferred from the Home Office had assisted in 'populating' the lists of those records with the information needed to make those lists amenable to search tools, and was able to advise and assist in searching through those listings. He had spent time sending for the few files that she had been able to identify as being possible sources of the information sought.
- d. She had not conducted a search of any websites - neither MoJ's nor any external websites - because this did not fall within her remit, of searching records held by MoJ in order to provide a response to the access request.

Reason search took so long

- e. The records system that originally held the information the Appellant requested had belonged to the Home Office. The MoJ had been provided with copies of the lists held on the Home Office system relating to the records. The MoJ did not control the content of the list of files which were transferred from the Home Office, nor any control or even input into the policy, practices and procedures governing the content or records management practices to be applied to the lists' 'style' relating to the information with which MoJ was being provided. Neither did it have the authority to refuse to accept such transfer of records or lists of records, because of the way that the [Home Office] had listed those records.
- f. The files listed, had, in the vast majority of cases, only the individual file reference number listed in the relevant spreadsheets, and no information as to the title or subject matter of the content of those files. As the request referred specifically to the titles of the files within which were held the documents and/or information being sought, there was, and is, no way of knowing whether or not any given file numbers relate to one of the subjects of the request.
- g. This made the search far more time consuming job than it needed to be, because every individual page, on each section of each spreadsheet had to be checked separately for each separate item being sought, by individual searches being made using the standard search methods for such records since metadata searching was not an option. This was something over which the MoJ had no control.
- h. Initially they were not allowed to have access to the original Home Office computer system that housed the lists of these records. The Home Office did eventually allow MoJ staff to interrogate its system to decide which file lists needed to be transferred to MoJ. However, the system only held file titles for a very small proportion of the records listed, such that the MoJ was still faced with only having file numbers recorded. Unless the individual file reference numbers were known, the process of searching for specific or individual records was cumbersome.

Efforts to improve record system

- i. The MoJ had since taking over responsibility for the records in question (and all other 'legacy' records transferred records from the Home Office in relation to e.g. Prisons, Offender Management and the Probation Service, to be joined with what was then called the Department for Constitutional Affairs, so as to form the MoJ). It has been working to correct this

omission of information in the records with which it was provided, by virtue of having such records obtained from [storage], and their titles added on to the spreadsheets of lists.

Duty to Advise and Assist s. 16 FOIA

- j. When they were informed of the instruction to advise and assist [*we presume this was after the decision notice*], there was nothing they could suggest [*that would help bring the request within the cost limit*], because the Appellant had provided considerable information in respect of the records in which she was interested in her original request. It was the actual file reference numbers that were needed to shorten the time needed. The fault did not lie with the request, nor with the MoJ's records management systems, but with the format in which the records details had been held, before the MoJ inherited them.
 - k. They suggested the Appellant refine her request to ask for: "*only one of the records from those originally requested, then that might bring the request within the cost limit and MoJ will respond to the new request in compliance with the Freedom of Information Act.*" This she did. Unfortunately, it was still not possible to find the documents in which she was interested.
 - l. Despite the on-going work being conducted by the MoJ to correct the omission of necessary information in the lists, by obtaining records from store and adding their titles to the spreadsheets, the file the Appellant was interested in had been identified.
21. In response to further questions posed by the Tribunal and Appellant:

Search for Information Held Elsewhere

- a. By virtue of the medium in which the listings of these types of records were held, the only possibility of locating any information listed within these records, was by checking the listings of records still held in archive. There were no previous responses or provisions of information upon which the MoJ could rely, or of which MoJ could make use, to mitigate the costs of this search.

Tribunal Question: the Appellant said she had asked whether policy units who had dealt with the areas of policy the documents related might be able to help trace the information. Had they been asked?

Witness Response:

- b. The relevant official to whom the question had been addressed had told her these policy teams were not approached for help. The policy units could not have been in a position to suggest how to provide all the documents originally requested because any search for these documents would have had to include all information held both electronically and in the hardcopy manual files - because the request did not exclude hardcopy information.
- c. In relation to the hardcopy files, the record management unit are responsible for hardcopy files. They would have had to have been engaged by the policy units to locate these files and would not have been

able to assist records management in this extensive investigation to try to locate the files requested.

- d. If the request had been just for electronic information, then the policy units may have been able to offer some useful guidance in where to search and how to comply with that request, although section 12 may have still applied. However, because the scope of the request was much wider, because it asked for all information on several policy issues and there was no suggestion it did not include all the hardcopies files held, a wider search was called for. This is why the ICO accepted that MoJ could ask the requester to refine the scope of the request.

Tribunal Question: The MoJ letter to the Commissioner of 8 September 2011 indicates that the information was held electronically. If so, please explain why it would not have been possible to simply use a word search to find the information?

Witness Response:

- e. The information that was held electronically was not listed in the MoJ records indexes. This meant that whilst the information was held electronically, each individual list would have to be searched. The facility of a word search was used. The individual lists of files transferred from Home Office to MOJ were contained within individual spreadsheets. There were numerous individual lists, which had to be separately searched for each individual document and type of document and/or record on the list submitted by the Appellant.

Tribunal Question: The witness stated that the files listed, had, in the vast majority of cases, only the individual file reference number listed in the relevant spreadsheets, and no information as to the title or subject matter of the content of those files. Were the 'minority' of files with more than a reference number all checked?

Witness Response:

- f. Yes.

Tribunal Question: Relating to the inconsistency between witness testimony calculating time spent to have been 26.5 hours and that of the letter on 8 September which stated an estimate of 26 hours and implied this was not the time spent, but a forward looking estimate of time that could have been spent. Request for an explanation of this and how the estimate was reached in both cases; when the calendar was looked at to calculate time spent and whether there are print-offs of the calendar.

Witness Response:

- g. The search undertaken referred to the search of the spreadsheets to identify files which might contain the information sought. The figures of 26 hours and 26½ hours were obtained from her looking at her calendar to see how much time she had blocked out having undertaken this work. When she was asked at a later date how much time she had spent, she had to list individual amounts of time for individual activities. This was when she realised she had missed something on the first occasion that

she was asked, and the time taken was actually 26½ hours. The figure of 26½ hours was not an estimate. It was a calculation of the time that was spent searching just under half of the spreadsheets for the records. The estimate was for how much time would be needed to complete all of the work therefore errs on the side of caution, rather than overstating the case. The estimate of 15 minutes related to how much time would be needed to conduct a search of any individual manual files which had been identified as potentially holding some of the information sought, and this was based upon how long the work took, in relation to the few files which my spreadsheet searches had identified.

- h. At the time that she was looking at her calendar to prepare these estimates, it would have been possible to print off its content. However, she said that she did not do this for two reasons: [a] she did not know at that time that the new computer system to be introduced would have the effect of preventing access to the archived portions of the calendar, thereby rendering copies necessary, if access were to be required at a later date; [b] the Information Commissioner's Office trusted the figures provided by her and did not demand proof by way of hardcopies.
 - i. The difference between the 26.5 hours of time she said she had spent searching and the MoJ's letter to the Commissioner that implies that at least 22.5 hours was spent this way could be explained by the fact that "searching" in the MoJ letter refers to actually searching the spreadsheets themselves. The 26.5 hours in her statement also accounted for peripheral tasks to facilitate those searches such as identifying which listings of former Home Office records had to be searched, obtaining information about storage of those records liaising with Data Access and Compliance Unit etc. However, for the avoidance of doubt, the majority of the 26.5 hours was spent actually searching the spreadsheets themselves.
 - j. However, her colleague assisted in searching through the lists and sending for a few files that I had identified as being possible sources of the information. From memory, this involvement amount to approximately one and a half hours and this time was included in the total number hours referred to, i.e., 26.5 hours. The time spent by Data Access and Compliance Unit searching files was not included in the 26.5 hours total time spent.
22. Tribunal Question: The Appellant asked (a) why the witness statement did not give any information about how they had identified the sample of files to recall from the archives; (b) how the statement that the official had spent 26.5 hours searching through 109,644 files could be correct as this would be mean 0.87 seconds for each file; and (c) whether she had actually carried out the work up to the limit imposed in the regulations particularly if the records were in the archives.

Witness Response:

- a. There were no 'sample' of files. All files which her searches of the spreadsheets identified as potentially containing items from the Appellant's list were obtained from storage and searched by the MoJ Data Access and Compliance Unit. She did not conduct a search of any manual files. She conducted a search of spreadsheets so as to identify the manual files to be retrieved from storage and searched.

- b. The search on the spreadsheets was conducted electronically. She would have thought the speed in which a computer carried out searches would be considerably less than 0.87 seconds per item. The 26½ hours of work she conducted was spent identifying the sources of information needed i.e. electronically searching the spreadsheets containing the lists of the records which could, potentially, hold the information requested. No manual files were searched by her, so the work of searching those files, by the MoJ Data Access and Compliance Unit would have to be added to the total of time spent by MoJ in responding to this request.
 - c. There was more than adequate proof of the seriousness of the efforts made by the MoJ, so as to provide the Appellant with the information sought, not least by the time spent in searching for it, as set out above.
23. As far as the MoJ's witness was aware, no one else has made a request from the MoJ for access in relation to Home Office records, such that this was the only refusal to have been made. However, the MoJ Data Access and Compliance Unit did not hold statistical information about requests.
24. Tribunal Question: what information and advice was provided to the Appellant?

Witness Response:

- a. Aside from that contained within the letter written to the Appellant, following on from the instruction received from the Information Commissioner, the Appellant was also provided with copies of e-mails exchanged between MoJ and the Home Office in relation to the difficulties which MoJ was experiencing in regards to: obtaining any listings of the records which had been transferred; and identifying the records which had been transferred, by virtue of the amount of information contained within the spreadsheets listing those records.
- b. The Appellant was also provided with numerous copies of the actual spreadsheets themselves, so as to give her first hand evidence of the problems that MoJ was experiencing in its efforts to supply her with the information sought.

Submissions

Appellant Submissions

25. The Appellant's submissions were lengthy and we cannot address every point. She asserted that the Decision Notice contained errors:
- a. in claiming that the refusal of her FOI request stemmed from the scope of the request: that the reason for the cost limit being exceeded was because of the scope of her FOI request and there was no need to look into any other issues; (*We note that this was not disputed by the other parties and do not take it further.*)
 - b. in accepting the explanations and cost estimates given by the MOJ without further investigation.
26. She also questioned the validity of the MoJ's witness evidence. (This included questions summarised in paragraph 21 above.) She remained concerned that

there might not have been any real commitment to providing the information requested.

Search for Information Held Elsewhere

27. She suggested that the MoJ could have asked the library if they had any of the documents or any other information that could help identify files and a web search.
28. She thought that many of the staff in the MoJ would have transferred from the Home Office and some that were involved in the initiatives covered in my FOI request are in the MoJ. She thought that it could have saved a lot of time if the policy units had been consulted when it became clear that the information could not be readily found from the files.

Reasonably Expected Cost Estimate

29. She asserted that regulation 4(3) allowed a public authority to take into account the costs it “reasonably” expected to incur in determining whether it holds the information. She implied that the costs were unreasonable. She made the following points:
 - a. The regulations were unlikely to have envisaged the use of s.12 FOIA considering it ‘reasonable’ that a public authority would have to search through so many files to find information because there was no way of identifying the files to target.
 - b. This would in effect enable the interpretation of Section 12 and the subordinate legislation to override the recognised main aims of the primary legislation. This appeared to be an absurdity and not proper use of the regulations. She asserted that relying on the fee regulations to refuse requests when basic systems to support the FOIA were absent were an improper use of the regulations and undermined the effective operation of the FOIA. The importance of record management to FOI was summed up:

“Any freedom of information legislation is only as good as the quality of the records to which it provides access. Such rights are of little use if reliable records are not created in the first place, if they cannot be found when needed or if the arrangements for their eventual archiving or destruction are inadequate. Consequently, If public authorities are strongly encouraged to pay heed to the guidance in the Code⁶.”
 - c. Parliamentary papers indicated that on the question of fees, generally there was an assurance that they would not be set in a way that would act as a deterrent to the dissemination of information, which was the whole purpose of the FOIA. Using the costs ceiling in this way provided a cover for possible maladministration. This would allow a public authority to get round FOIA by not ensuring that a system is in place to access even its core records. To apply a cost limit in the circumstances of this case would result in an absurdity. She asserted that there was some discretion in Section 12 of the FOIA because the cost limit is not mandatory.

⁶ The Code of Practice under s.45 FOIA (‘the code’).

- d. She could not see what else she could have done to make the request more precise or clearer or to enable it to be met within the cost ceiling. She had been told by the MoJ that they would need a file number to search further. The Code of Practice under s.45 FOIA ('the code') stated that it was not reasonable to expect FOI applicants to possess identifiers like file reference numbers. (*See Para 11 of the code.*)

Record Management

By the Information Commissioner in guidance on record management:

“ 6. Can poor records management lead to a breach of the Act? Poor records management itself is not a breach of the FOIA. However, the FOIA sets out timetables for complying with a request, makes sure the costs of retrieving information are reasonable, and asserts that all recorded information held, wherever it is located within the public authority, can potentially be disclosed. If poor records management leads to the authority not meeting any of these requirements, it will constitute a breach of the FOIA and we will be able to consider using our enforcement powers.”

Duty to Advise and Assist:

- e. She agreed that providing advice and assistance under Section 16(1) of the FOIA would not have made any difference to the cost of complying with the request.

MoJ Submissions

30. The MoJ argued that:

- a. The only issue for determination was whether the limit of £600 was properly applied, given the nature of the request and the records to be searched.

Cost estimate

- b. The Second Respondent had carried out work up to the cost limit. This discharged the obligations upon it.

Search

- c. There could be no doubt as to the state of the records or extent (and therefore cost) of the searches that would be required to locate the information. The witness testimony made clear that even an apparently straightforward request, including with an identified title and date of a document, may not easily or speedily be fulfilled.
- d. The Second Respondent was only required to make a reasonable search. In determining what would be reasonable, the person making the request had to take the public authority as it finds it.⁷ If it was clear that on a reasonable search, that the cost limit would be exceeded, there was no basis for questioning reliance on those provisions by suggesting that some other method should have been used. The activities described by

⁷ As concluded in *Adlam v Information Commissioner EA/2006/0079*, para. 81.

the witness in the time spent on the request fell clearly within what could be taken into account in determining the cost of complying with a request under regulation 4(3). In particular, the time was spent largely in 'locating' the information.

- e. The Appellant appeared to be suggesting that because of the state of the records, the MoJ was not entitled to rely upon the cost limit in the regulations. She argued that the work required would not have been required if the Home Office and MoJ had not allegedly committed 'failings in record management'. The MoJ did not admit any failings, but in any event she had disclosed no error or law or wrongful exercise of discretion because the regulations did not provide that they should be disapplied or modulated to reflect the actual state of the records within which searches were being undertaken. Were this to happen, it would then always be open to a person requesting information to allege that the only reason the request could not be fulfilled was on account of the physical state of the records.

Commissioner Submissions

31. The representative for the Commissioner argued that:

- a. Based on the evidence and the MoJ's witness statement, the cost of compliance with the request would exceed the appropriate costs limit.
- b. That the records may be poorly managed or organised did not preclude an authority from relying on section 12 FOIA.⁸ He noted that paragraph 27 of the Commissioner's guidance⁹ stated

"...it is realistic to accept that it will take longer to find the requested information where the relevant records are poorly organised or filed".

Our Findings

32. In summary, we accept that the MoJ reasonably expected to incur costs exceeding the appropriate limit in searching through the archived files. However, faced with a defunct system where it was clear from the outset that establishing the basics of whether the information was held would be likely to take an extraordinary long time, the MoJ should have considered whether they could first make a quicker search in an alternative location for at least part of the requested information, such as doing a word search of the electronic records. This would seem to us the most obvious step, and the Appellant had requested it. Nevertheless, we think it likely that an alternative search would not have produced all the requested information, given its age and origins not being in the MoJ. Therefore, ultimately the search would have had to be progressed to the archives, and then exceeded the cost limit. Under, s.16 FOIA, the MoJ should have advised the witness of how she might narrow her request to fall within the cost limit by, for example, excluding any search of hard copies. We set out below how we reached this position.

33. The following is not in dispute and in any way accept:

⁸ He gave the pertinent example of *Cooksey v Information Commissioner & Greater Manchester Police* EA/2010/0113.

⁹ See Guidance on the Commissioner's website on section 12 FOIA: "Requests where the cost of compliance with a request exceeds the appropriate limit."

- a. The relevant archived records comprise 219,363 files and are not organised or indexed to a usable extent.
 - b. The MoJ held spreadsheets which listed each file. However, in the vast majority of cases, the spreadsheets only contained the individual file reference number and gave no information as to the title, subject matter or contents of those files.
 - c. The legacy of paper records from the Home Office were such that a large number of files in the 1990s had been registered by number without further subject information.
34. The MoJ's approach to estimating the cost of compliance was to actually conduct a search. It looked through the spreadsheets and checked more fully the minority that listed more than a reference number. It would have been better if the MoJ had instead presented a more thorough and reasoned analysis of their cost estimate, as illustrated in other decisions, such as the *Roberts* case above. (Such an approach might involve taking one file and timing how long it took to search it and then multiplying it by a reasonable fraction of the total number of files.) We found the MoJ's evidence confusing and difficult to piece together. On the basis of that information, we have doubts as to the amount of time to the MoJ actually spent searching for the requested information. For instance:

MoJ Letter

- a. The MoJ letter of 8 September to the Commissioner stated that 26 hours had been spent manually reviewing *109,644 files*. It gave no proper detail of how the figure was reached or the time taken up. It reasoned it would take double as long to complete the search.
- b. Rather confusingly, the letter then presented calculations for complying with the request *would* require determining whether the information was held, retrieving and extracting it. Within this it stated that:
 - i. it *took* 22.5 hours to '*investigate which documents from the 219,363 might be of relevance*';
 - ii. it *took* three hours and 45 minutes to '*locate the relevant information*' from a sample of files obtained from storage;
 - iii. the information *would have to be* '*extracted from the document it is held in which depending on the file could take 15 minutes.*'

So, it seemed from this calculation that the MoJ were asserting they had spent 26.25 hours to date. Ignoring the slight inconsistency of 15 minutes, a) we were still no clearer as to how that time had been spent, and b) there seemed to be inconsistencies with the testimony from the witness.

Testimony

- c. The witness stated:
 - i. That it had taken *her* 26.5 hours over a period of weeks to identify and search through 109,644 files out of a total of 219,363 files.

She had calculated the 26.5 hours by going back through her calendar, but that it was no longer possible for her to provide that calendar. We would have thought the calendar details should have been provided to the Commissioner.

- ii. A colleague had assisted (for 1.5 hours included in the 26.5 hours) in searching through the lists and sending for the few files that she had been able to identify as being possible sources of the information sought.
- iii. In response to our further questions, that:
 - a) the 26.5 hours search referred to the search of the spreadsheets to identify files which might contain the information sought. This was later amended to 22.5 hours plus peripheral tasks.
 - b) there were no 'sample' of files as implied by the MoJ letter. All files which her searches of the spreadsheets identified as potentially containing items from the Appellant's list were obtained from storage and searched by the MoJ Data Access and Compliance Unit. She did not conduct a search of any manual files so the time spent by the MoJ Data Access and Compliance Unit would have to be added to the 26.5 hour total of time spent by MoJ in responding to this request.

Spreadsheets

- d. We find it hard to see how one could spend any significant time – whether 22.5 or 26.5 hours - searching through spreadsheets resembling what was submitted to us. (*See paragraph 16 above*). It is also hard to see how simply looking through them could take them any further in finding the requested material. The vast majority lacked any data to cross-refer to and as the witness stated, there was no way of knowing whether or not any given file numbers related to one of the subjects requested. We must presume what we have seen is representative of the majority since this is what we were presented with and the MoJ provided them to the Appellant to show the difficulty they were in.
35. Despite our doubts in the MoJ's approach to a cost estimate, we are satisfied that it would take an extremely long time to look through each archived paper file. Whilst it would not necessarily be the case that all of the files would have needed to be searched - depending on whether the information was found, say, in the middle or end of the search - it seems reasonable to conclude that searching a fraction of the extraordinary number of disordered files would go well beyond 24 hours. The Appellant seems to accept this, as she stated:
- "... it is difficult to see how there could be a reasonable chance of retrieving any specific information from them within the cost ceiling ..."*
36. However, the Appellant had asked whether relevant policy units working in the same areas as the information she requested might be able to trace the information. Likewise, she thought it might be possible to ask MoJ library what was held. Given that the MoJ were asked at the prehearing whether any electronic

searches had been made of MoJ's own records (as opposed to those held in archive), we were surprised that this was never progressed. The Appellant had also asked whether the MoJ could have done a web-based search. If she meant a search of what material was publicly available online, they could not be required to do this.)

37. The witness stated that she had not conducted a search of MoJ's own websites because this did not fall within her remit. Taking into account our understanding of the law¹⁰, such a response would appear to be veering towards the 'going through the motions' end of the scale of what a reasonable process for considering how to investigate whether the information is held and to be assessing it properly. It is better to look for a needle in a sewing kit than a haystack, even if one knows the sewing kit is very depleted.
38. The witness also stated that the policy units were not consulted because they could not have been in a position to suggest how to provide *all* the documents originally requested because both electronically and hardcopy manual files had been requested. Even if this were correct, the duty to advise and assist under s16 FOIA arguably requires the department to consider whether part of the request could be satisfied within the cost limit, as ordered by the Commissioner in his decision notice.
39. As to the Appellant's arguments in paragraph 29, we agree with the Commissioner and Second Respondent that there is nothing in the legislation that can be construed to mean that if the records are poorly managed this precludes it from relying on section 12 FOIA. In our view, this would however heighten the need to consider any possible alternative places to look that might make the search quicker and more fruitful. Nothing in what the Appellant quoted from the Commissioner's guidance or Parliamentary papers detracts from this view. Whilst it is up to an authority to decide whether to rely on the cost exemption so as not to provide information, it has a right to do so within the terms of the FOIA.

Other Matters:

40. We note that we have found the MoJ's approach in this case somewhat confusing. It informed the Appellant that some of the information requested was held. It is unclear how this conclusion was reached when it had not find any of the information requested. It also suggested to the Appellant she refine her request to bring it within the cost limit when its case was that it was not the scope of the request that was the issue but its own un-indexed records management systems.
41. Our decision is unanimous.

Signed:

Judge C Taylor

16 October 2012

¹⁰ See paragraph 12 above.