FOIA s.12 – Cost of compliance and appropriate limit

FOIA s.16 – Duty to advise and assist

FOIA s.14(2) – Vexatious or repeated requests

Robert Andrew Brown v IC & the National Archives

EA/2006/0088
2nd October 2007

Cases:
Quinn v Information Commissioner [2006] UKIT EA_2005_0010

Facts
The Appellant requested TNA for information **"***in relation to the Princess Margaret Townsend Affair; and or any illegitimate child born on or about 05/01/55 to Princess Margaret".* TNA refused on the basis that they could not carry out a search for records that might not exist.

The Appellant then submitted 637 requests by reference to specific file numbers from TNA's online catalogue. Most requests related to "closed" records, not open to the public. TNA offered to deal with them at a rate of 50 requests per month. However, the parties had a different understanding of the nature of the review TNA would conduct. The agreement fell apart and the Appellant asked for all his requests to be dealt with immediately. Relying on section 12 and 14, TNA said that they were not obliged to respond further to his requests.

The IC agreed that TNA could rely on ss.12 and 14(2) and were not obliged to comply with the requests.

Findings
Section 12

The estimate under s.12 must be arrived at on a reasonable basis.

In this case, like in many others, s.12 cannot be regarded independently of s.16. Before the Tribunal can find that a given public authority is not obliged to comply with a request for information because it estimates that the cost of doing so would exceed the appropriate limit, it may need to consider a certain factors. These include, whether with assistance and advice that it would have been reasonable for the public authority to provide pursuant to s.16, the applicant could have narrowed, or re-defined his request such that it could be dealt with without exceeding the cost limits in s.12. If so, then it may mean that the public authority has not made its estimate under s.12 on a reasonable basis, and cannot rely on the s.12 cost limits to relieve it of its obligations to comply with the request. To hold otherwise would allow s.12 to be used to thwart the purpose of the legislation and would significantly undermine the effect of s.16.

One way in which an applicant may, in some cases, be able to re-define his request to come within the cost limit is to split up the request and present it in phases. Under Regulation 5(2)(b), requests for the same or similar information made more than 60 consecutive days cannot be aggregated for the purposes of s.12. This allows for the phasing of a request to strike a balance between enabling an applicant to have his request met on the one hand, and not allowing one applicant's request to over-burden a public authority on the other.

The duty on a public authority to provide assistance and advice under section 16 is expressly qualified by the words *"only in so far as it would be reasonable to expect the authority to do so"*. The issue is what is reasonable for *"the"* public authority in question to do. Unlike most other public authorities, searches are a core function of TNA. It would have been clear to TNA, from the outset that the Appellant's requests were going to involve searching through a large number of records and that this would exceed the s.12 cost limits.

The advice and assistance that it would have been reasonable to expect TNA to provide should have included advice and assistance in relation to how the Appellant might bring his request within the s.12 cost limits. The Appellant's requests were demanding, but primarily in terms of the number of records that would have to be searched. The task lent itself, quite obviously and logically, to being dealt with in phases, each phase being subject to the s.12 cost limit.

It would have been reasonable to expect TNA to advise the Appellant to phase his request in intervals of more than 60 days, and to assist him to do so in a manner that was logical, took account of his priorities and the nature of the searches that TNA could offer, as well as TNA's knowledge of the time that would be involved. Its failure to do so means that its estimate under s.12 was not made on a reasonable basis and therefore, it could not rely on s.12 to relieve it of its obligation to comply with the Appellant's request.

TNA gave no consideration to s.12 until after it reached a stage when it found the correspondence that was being generated, and the difficulty in reaching agreement with the Appellant, to be unmanageable. Before that point, it did nothing to suggest that his request would be subject to the s.12 constraints. This case does not turn on the finding in *Quinn* (that a public authority can rely on s.12 partway through a search). The issue here has to do with whether TNA can rely on s.12 in circumstances where, had they complied with their obligations under s.16, there may have been no basis to refuse the request under s.12.

Although TNA no doubt did spend time in meeting a number of the Appellant's requests, and did offer to deal with the Appellant's request in phases, even if not by reference to the s.12 cost limits, this does not mean that any breach of the Act by TNA is simply a technical matter. The Appellant did not have any meaningful opportunity to present and have his individual requests dealt with in terms of his priorities, and the type of review he wanted, in the knowledge of the limits to which his requests would be subject.

Section 14

TNA says that all the Appellant's requests were identical or substantially similar requests, and therefore, under s.14(2), it was not obliged to comply with them. This misconstrues s.14(2). The Appellant's requests were for the stated information from specific records. If TNA had complied with the request in relation to one specific record and the Appellant had then repeated the request for the information from the same record, s.14(2) would apply.

A request for information relating to the same subject from another record is not an identical or substantially similar request for the purposes of s.14(2). S.14(2) is not the safeguard against the burden of a large volume of requests. That safeguard is s.12 (albeit that in the present case, TNA cannot rely on s.12).

Conclusion
The appeal was allowed.

TNA was in breach of ss.10(1), 16(1), and 17(5) of the Act; and was not relieved from complying with the Appellant's request on the basis of ss.12(1) or 14(2).

However, no steps were required to be taken by TNA. A considerable period of time had passed since TNA's refusal of 21 December 2005. There was nothing resembling a clear or comprehensive list of which or how many individual requests were outstanding as at that date. The evidence was that many of those requests had since been met by other government departments. TNA's online search functionality had been considerably improved since 2005 and this may mean that the Appellant will no longer consider it necessary to have certain of his 2005 requests met. In these circumstances, it would not be appropriate to require TNA to undertake any specific steps by reference to the 2005 requests. The Appellant is of course free to submit a fresh request for information under the Act, which may include any previous individual requests which he still wishes to pursue.