



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2011/0215

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50366306

Dated: 30 August 2011

Appellant: Cardiff Council
Respondent: Information Commissioner
Additional Party: Christopher Hastings

Heard at: 45 Bedford Square London
Date of hearing: 16 February 2012
Date of decision: 23 February 2012

Before

Angus Hamilton

Judge

and

Dave Sivers

and

Gareth Jones

Subject matter:

s 12(1) Freedom of Information Act 2000 and the Freedom of Information & Data Protection (Appropriate Limit & Fees) Regulations 2004

Cases considered:

Alasdair Roberts v Information Commissioner [EA/2008/0050]

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 30 August 2011 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. Under section 1(1) of FOIA (the Act) a person who has made a request to a public authority for information is, subject to other provisions of FOIA:
 - (1) entitled to be informed in writing by the public authority whether it holds information of the description specified in the request (section 1(1)(a)); and
 - (2) if the public authority does hold the information, to have that information communicated to him (section 1(1)(b)).

2. Section 12 of FOIA provides, so far as material, as follows:
 - (1) 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.

 - (2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

 - (3) In subsections (1) and (2) "the appropriate limit" means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

3. The Secretary of State has made regulations which prescribe the appropriate limit for the purposes of section 12 of FOIA, namely the

Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations').

4. Regulation 3 of the Regulations prescribes that the appropriate limit for public authorities listed in Schedule 1 of the Regulations is £600 and for all other public authorities is £450. In this Appeal the appropriate limit is £450.
5. Regulation 4(3) of the Regulations provides that in estimating the cost of complying with a request to which section 1(1) of FOIA would otherwise apply, a public authority may "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."
6. Regulation 4(4) of the Regulations provides that where costs are attributable to the time that is expected to be taken by persons undertaking the activities specified in regulation 4(3), "those costs are to be estimated at a rate of £25 per person per hour". £450 is therefore the equivalent of 18 hours work.

Request by the Second Respondent

7. By email dated 11 December 2010 Mr Hastings (the Second Respondent) wrote to the Appellant making the following request:

- 1. Could the city council please provide all communications (including emails) with the BBC which in any way relate to the television programme Doctor Who.*
 - 2. Could the council please provide all communications (including emails) with any utility company and or water provider and or energy company and or similar which in any way relates to the television programme Doctor Who.*
 - 3. During the aforementioned period has the council received any written complaints which in any way relate to Doctor Who. If so can it please provide copies of those complaints. Please feel free to redact the name of the complainant.*
 - 4. During the aforementioned period has the council been in contact with any other public body about Doctor Who. If so, can it please provide copies of correspondence including e-mails.*
8. By email dated 14 December 2010 the Appellant confirmed that it held information relevant to this request but refused to disclose it, relying on section 12 of the Act. The Appellant confirmed its position on 15 December 2010 following an internal review, and stated that 'further and in the alternative' it also considered the request vexatious, relying on section 14 of the Act.
9. The complainant complained to the Information Commissioner (the Commissioner) on 20 December 2010 challenging the decision to withhold the information requested.

10. The chronology of the Commissioner's investigation of this case is set out at paragraphs 7-10 of the Commissioner's Decision Notice.

The Commissioner's Decision

11. The Commissioner served a Decision Notice dated 30 August 2011 in relation to this matter in accordance with s. 50 of the Act. The Commissioner found that sections 12(1) and 14(1) of the Act were not engaged.

The Appeal to the Tribunal

12. On 27 September 2011 the Appellant submitted an appeal to the Tribunal (IRT).

13. The original Notice of Appeal challenged the Commissioner's Decision Notice on grounds that the Commissioner erred in finding that neither sections 12(1) nor 14(1) of the Act were engaged. During the course of the appeal proceedings the Appellant withdrew the challenge to the Commissioner's decision in relation to s14(1) of the Act and that point is not therefore considered here.

The Questions for the Tribunal

14. The Tribunal judged that the sole question for them was to consider whether the Appellant had proved on the balance of probabilities that the work involved in answering Mr Hastings' application under the Act would have involved more than 18 hours work.

Evidence

15. The Tribunal heard oral evidence from Mr Parsons, the Information Officer with Cardiff Council. The Tribunal also heard submissions from Mr Grigg representing the Appellant and from Mr Cross representing the Commissioner. Mr Hastings did not appear and was not represented. Mr Hastings sought to be excused prior to the hearing and this was agreed to by all parties.
16. We also considered, from the Appellant, the Notice and Grounds of Appeal, the correspondence between the Appellant and Mr Hastings and between the Appellant and the Commissioner, and the statement of Mr Philip Bradshaw.
17. We also considered, from the Commissioner, the Decision Notice, and the Response to Appeal.
18. The Commissioner submitted at the hearing that the Tribunal should have regard to the decision of the IRT in Roberts v Information Commissioner (EA/2008/0050) in relation to the nature and quality of the evidence or information that should be provided by a public authority which is seeking to rely on s12 of the Act.
19. The Roberts case confirms that a public authority is not required to provide a precise calculation of costs, only an estimate: ***That estimate, however, must be a reasonable one and may only be based on the activities covered by Regulation 4(3) It is not sufficient for a public authority simply to assert the appropriate limit has been exceeded. As was made clear in Randall (EA/2007/0004) and estimate has to be 'sensible, realistic and supported by cogent evidence'. The word estimate ... points to something more than a guess or an arbitrarily selected figure. It requires a process to be undertaken which will involve 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 ... 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.

20. Although the Roberts case was not binding on the Tribunal we accepted and adopted the comments in that case as being an eminently sensible approach to the requirement placed upon a public authority which seeks to rely on s.12 of the Act.

21. In this context the Tribunal were rather bewildered by the nature and quality of the evidence presented by the Appellant.

22. Mr Bradshaw, who had dealt with the internal review and correspondence with the Commissioner, had made some effort to analyse and estimate the work that might be required to respond to Mr Hastings' request. It was this analysis that the Commissioner reviewed and adjusted in order to conclude that the necessary work could be undertaken in less than 18 hours.

23. Mr Parsons however told us that Mr Bradshaw had now left employment with the Appellant and that his analysis was quite incorrect and could not be relied on. Mr Parsons pointed to a number of errors made by Mr Bradshaw including his estimate of the number of 'principal officers' employed by the Appellant. We also noted for ourselves certain contradictions within Mr Bradshaw's material including over the number of principal officers and whether all or only some principal officers would need to be consulted in relation to Mr Hastings' request.

24. The Tribunal was faced therefore with the rather odd situation of two of the Appellant's employees contradicting each other and, indeed, in Mr Bradshaw's case, of an employee contradicting himself.

25. The approach of the Appellant appeared to be that Mr Bradshaw's evidence or material had to be disregarded and 'replaced' with the evidence of Mr Parsons. The Tribunal however felt that Mr Parsons' evidence consisted of little more than a bald assertion that the work required would 'obviously' take longer than 18 hours. Mr Parsons based this assertion in large part upon the time it had taken him and his colleagues to deal with a related enquiry from Mr Hastings that had been addressed in 2008. The work in relation to this matter however was described in the most general terms ('it took three weeks') and the Tribunal was not provided with any analysis or breakdown. Mr Parsons also asserted that he would have 'at least' to contact all 1400 of the principal officers working for the Appellant although the work involved in doing so, or by the officers responding, had not been estimated by Mr Parsons.

26. Mr Parsons confirmed that he had not undertaken any analysis to provide any estimate of the work likely to be required to deal with Mr Hastings' enquiry either as a total or broken down into the four 'heads' or work specified in Regulation 4(3) [see para 5 above].

Conclusion

27. In summary the Tribunal considered that the approach adopted by the Appellant in this matter – simply asserting that the limit would be exceeded - was exactly the approach that was deprecated in Roberts. Conversely the Tribunal considered that the Appellant had failed to adduce 'cogent' evidence to support their assertion and had failed to demonstrate that they had undertaken a process involving 'an investigation followed by an exercise of assessment and calculation'.

28. The Tribunal therefore concluded that the Appellant had failed to prove, on the balance of probabilities, that responding to Mr Hastings' enquiry would have involved in excess of 18 hours work. Consequently, the Tribunal confirms that the Commissioner was correct to conclude that s.12 of the Act was not engaged.

29. Our decision to dismiss this appeal is unanimous.

30. Although not forming a formal part of this judgement the Tribunal wishes it to be noted that they are concerned by the Appellant's lack of an appropriate case or record management system, as was acknowledged by Mr Parsons. Conversely the Tribunal was also concerned by the somewhat unhelpful manner in which Mr Hastings declined to narrow the scope of his enquiry as initially suggested by the Appellant. The Tribunal felt that Mr Hastings could have engaged with the Appellant more constructively.

Signed:

[Signed on the original]

Angus Hamilton DJ(MC)

Judge

Date: 23 February 2012