



IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
(INFORMATION RIGHTS)

ON APPEAL FROM:

The Information Commissioner's Decision Notice NO: FS50546033.

EA/2014/0318

B E T W E E N:-

NEIL KENT

Appellant

-and-

THE INFORMATION COMMISSIONER

-and-

CARDIFF COUNCIL

Respondents

Tribunal

**Brian Kennedy QC
Alison Lowton
Narendra Makanji**

Hearing: 3 November 2015 (Cardiff)

Decision: Appeal Refused.

Appearances:

Appellant: The Appellant

Respondent: Richard Grigg on behalf of the 2nd Respondent.

Subject Matter: The Appellants challenge to the refusal notice of the 2nd Respondent to provide the requested information, on the grounds that the cost of compliance would exceed the appropriate limit within the meaning of section 12 of the Freedom of Information Act 2000 ("FOIA"),

Result: Appeal Refused.

Introduction:

1] This appeal concerns the second of two Decision Notices, ("the Second DN"), issued by the Information Commissioner ("the Commissioner") in respect of the Appellant's request for certain information concerning the application of a "Class C" exemption from Council Tax by Cardiff Council ("the Council").

2] Because both appeals relate to the original request concerning essentially the same facts, pertinent to the same parties and relating to the same subject matter, it is worth looking at the background to provide the necessary context.

Background:

3] The background to the appeals is set out in detail in both the First DN and the Second DN, as well as in the earlier Tribunal's determination dated 27 January 2014. The Appellant's initial request for information dated 8 June 2012, sought information relating to the inspection of premises in the Council's area subject to what they described as a "Class C" exemption from Council Tax, available inter alia, in Cardiff in relation to unoccupied and substantially unfurnished properties. The Appellant had applied for and obtained such an exemption but this was subsequently revoked. In communication the parties have described the revocation of this exemption as part of a "policy" of the Council. Part of the request relevant to this appeal is set out at paragraph 4 of the second DN and inter-alia seeks " --- *" If this is yet another verbal and unwritten policy, ---please confirm on what date the policy came into place, please provide the minutes of the meeting at which the policy was introduced, and please provide copies of all emails and letters that put in writing any part of this policy - both those that have been sent internal to the Council, and those that have been sent to the public."* (see Question 8 in paragraph 4 of the second DN at page 2 of the Open Bundle).

4] In the First DN, FS50486424, the Commissioner concluded that the Council did not hold the requested information. An earlier and different Tribunal

overturned the First DN on appeal in a determination dated 27 January 2014 in EA/2013/0183. As a result, that Tribunal ordered the Council either to supply the information requested, or to serve a refusal notice under section 17 of FOIA by the end of February 2014. In doing so, the tribunal indicated that, notwithstanding its conclusion that the requested information was “*probably held*”, the Council “*may well have valid grounds for withholding it*”. The Council subsequently issued a refusal notice under section 17 of FOIA to the Appellant on 18 February 2014. This stated that the Council had re-considered the request, but that it had concluded that the cost of dealing with the request would exceed the appropriate limit under section 12 of FOIA (i.e. greater than £450, corresponding to 18 hours of staff time at the statutorily prescribed amount of £25 per hour - under the prescribed legal framework). Specifically, the Council estimated, on the basis of a sample analysis that it had carried out that it would be possible to review a maximum of 30 Council Tax account records per hour to assess whether they contained information pertaining to the Appellant’s request. Given that the Council had 150,000 “live” Council Tax accounts overall; it would take 5,000 hours to review all the accounts (without taking into account the need to search archived accounts, which may also fall within the scope of the request).

5] The Appellant again complained to the Commissioner, who then investigated. Further to his investigation the Commissioner issued the second DN in which he set out the nature and extent of his investigations and his assessment of the reasonableness of the Council’s costs estimate by reference to the various screen-shots, which the Council had provided of the electronic databases used to store Council Tax information. Ultimately the Commissioner was satisfied that the overall time involved in properly responding to the request was such that the appropriate cost limit for the purposes of section 12 of FOIA would be exceeded, and in deed, that the estimate was so far in excess of the appropriate limit that it would be “*meaningless*” to attempt to refine the request to bring it within that limit. On this basis the Commissioner rejected the complaint in his second DN.

Grounds of Appeal:

4] These are set out quite clearly by the Appellant and as observed by the Commissioner and noted by this Tribunal they do not challenge the costing analysis provided by the Council and accepted by the Commissioner as reasonable. Instead he challenges the nature of the search and methods used in retrieving the requested information. He specifically argues that the response from the Council: “*presents only a laborious and obtuse way of searching*” based he argues on a fallacy that the relevant data-bases are the “*i world database and comino:*”. He argues that there had been no consideration “*of doing a search of the exchange system*” and adds searching for e-mails sent internal to the council had also been excluded.

In his grounds of appeal he inquires; “*Is it the case that one must specifically state the computer systems that one wishes to extract information from when submitting an FOI request*”. This is an interesting question about how a request should be prepared or formulated by a requestor and whether or not

and to what extent preliminary inquiries can be made with a public authority in advance of a FOIA request being made. Similarly, of interest, how much advice and assistance should a public authority provide to a requestor in the formulation of a request.

The Appellant also fairly acknowledges that searching through e-mails would take a large amount of time but suggests: “ -- *this would not be chargeable time as defined in the FOI regulations of 2004*”, He argues that this would not be chargeable i.e. only be computer time, not man time, searching the e-mails. This he argues is because:” – *the e-mail system can be interrogated by simple, straightforward command line queries (using exchange powershell – negating the need to manually search the graphical front end of data-bases record by record*”. This he suggests would take 18 hours. He does not expand on how he reached this estimate, nor does he apportion any human input required in this process.

Finally he indicates that alternatively the Information Officer of the Council could just have asked the relevant staff members to produce the documents, which informed them of the policy.

5] The Commissioner remains of the view that the Council’s estimate of the cost of compliance was reasonable, having regard to the evidence submitted by the Council in the course of the Commissioner’s investigation.

6] However in his response to the Grounds of Appeal, the Commissioner fairly indicated there were a number of areas where the grounds might require further explanation about the systems and/or methods of retrieval of the requested information and or the methodology available but not used by the Council. Inter-alia at paragraphs 36 and 37 the Commissioner specifically invited this Tribunal to join the Council as a Respondent to this appeal.

7] This Tribunal was, at an earlier paper hearing satisfied that on the information provided, by the Council, their stance was correct and accordingly we were not persuaded that the Commissioner was wrong in his reasoning in his second DN. We agreed with and adopted his reasoning and accepted his finding. However for the avoidance of doubt, and before writing Judgment, this Tribunal ultimately accepted the invitation of the Commissioner and took the precaution of joining the Council and directing an oral hearing to clarify precisely whether there was any or sufficient evidence to support any of the grounds of appeal and of the Appellant’s criticism, leveled at the methodology used by the Council in handling his request. The oral hearing took place in Cardiff on 3 November 2015.

8] The Appellant told the Tribunal he was critical that he had no formal response from the Council as to how the search was done. He referred to Microsoft products from 2007 which were powerful tools to use for searches. Cardiff, he asserted only used the exchange system, implying this was inadequate.

While clearly the Appellant was knowledgeable about computer systems and

analysis, he was unable to assist the Tribunal with any comparative analysis of other Public Authorities, including any other Councils who used any system or methodology such as he was suggesting might be used.

A tribunal member pointed out to him that his request was wider than just e-mails but also sought letters . He agreed that this was correct

Mr Grigg, who is an in house solicitor within the Council made representations to the Tribunal on behalf of the Council and indicated that he was satisfied that the Council staff had used the systems available and approved for use in searching according to established practice within for dealing with Information requests. He was satisfied that the submissions made on behalf of the Council to the Commissioner and to the Tribunal were a true reflection of the Council's position. He was not in a position to comment on computer software.

REASONS:

9] The Tribunal heard the Appellant in person to determine the nature and extent of his criticism of the searches and methodology as used by this Council. While clearly he was knowledgeable about systems for searching and had suggestions for the Council on how to improve their search methodology, he was not suggesting that the Council were any different than any other Public Authority or Council who would be required to carry out electronic searches for Information requests. In other words while he was criticizing the system they used and suggesting they should use better or more modern systems, he did not provide any evidence that they were any different than any other Public Authority or Council in that regard.

While the Appellant is maintaining the Council's search methods were inadequate, possibly in need of updating and otherwise unreasonable in all the circumstances, significantly he did not challenge the Council's estimate of the costs required to carry out the searches they indicate were required when using their method for dealing with his request. In this regard we find that he was not effectively challenging the application of section 12 of FOIA in the Council's refusal.

10] Accordingly we refuse the appeal for all the above reasons.

Brian Kennedy QC
10 NOVEMBER 2015