



Neutral citation number: [2023] UKFTT 686 (GRC)

Case Reference: EA/2023/0236

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Heard: on the papers in Chambers

**Heard on: 11 August 2023
Decision given on: 21 August 2023**

Before

TRIBUNAL JUDGE HAZEL OLIVER

Between

PAUL NICHOLAS ARTHUR

Appellant

and

INFORMATION COMMISSIONER

Respondent

Decision:

The proceedings are struck out under Rule 8(2)(a) because the Tribunal does not have jurisdiction in relation to the proceedings.

REASONS

1. This is an appeal under the Freedom of Information Act 2000 (“FOIA”) against a decision notice from the Information Commissioner (the “Commissioner”) of 9 March 2023.
2. Under Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, the Tribunal must strike out the whole or a part of the

- proceedings if the Tribunal does not have jurisdiction in relation to the proceedings or that part of them.
3. In the response to the appeal, the Commissioner submits that the Appellant's grounds of appeal raise issues outside of the jurisdiction of this Tribunal, and accordingly the appeal should be struck out. The Appellant opposes this application.
 4. The Appellant requested information from the Crown Prosecution Service ("CPS") about documentation relating to assurances given by the United States in relation to extradition. The Commissioner decided that the CPS was entitled to refuse to provide the requested information under section 12(2) FOIA (cost of ascertaining whether it held information within scope).
 5. Under section 58 FOIA, the Tribunal can allow an appeal against a decision notice if it considers - (a) that the notice against which the appeal is brought is not in accordance with the law, or (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently.
 6. The Commissioner says that the Appellant's grounds of appeal do not identify any error of law or incorrect exercise of the Commissioner's discretion.
 7. The Appellant's grounds of appeal say that this appeal (and another appeal he has brought) relate to "*a systematic failure of the CPS to honour its obligations under law to disclose to the defence in extradition hearings any information that would assist the defence*". He says he is prepared to limit his appeal to the first part of his two-part request. He says that he strongly disagrees that the Commissioner's remit does not extend to determining disputes over whether the CPS has failed to fulfil its legal obligations of disclosure in extradition hearings. His requested outcome for the appeal is, "*For the Tribunal to 'disallow' the CPS section 12 ((1) or (11)) cost estimates as a basis for non-disclosure of the information requested in my Fol request on grounds of 'irrationality', and, accordingly, to require the CPS to search the 123 identified files (and earlier files at The Tribunal's discretion) to provide me with the information requested*".
 8. The Commissioner says that the Appellant has provided no argument which challenged his findings on the costs of reviewing files to determine whether information was held. Determining whether the CPS has failed to fulfil legal obligations of disclosure to the defence is not within his remit, and similarly is not within the remit of the Tribunal.
 9. I note that the Appellant states in his appeal, "*I believe that the cost estimates may well be correct as a matter of fact. But in law they should be 'disallowed' on the grounds that it is 'irrational' and wholly contrary to the intentions of Parliament in passing the Fol Act that cost estimates that arise only because of the failure of a public body to properly discharge its prior legal obligations should be regarded as a proper and legitimate reason for resisting Fol disclosure*". He says that this Tribunal can look at precedents on the precedence of Acts of Parliament and Article 6 of the European Convention on Human Rights, and order the CPS to provide the requested information.

10. It does appear that the Appellant is not challenging the CPS's position that locating the requested information would exceed the costs limit. Instead, he is arguing that the CPS has an inadequate filing system, and this makes it impossible to know whether or not it has fulfilled its disclosure obligations without extensive examination of the files. The Appellant's response to the strike out application makes it clear that he is arguing it is "irrational" to allow the CPS to rely on section 12 FOIA in these circumstances. He says that the current CPS filing system is incompatible with its common law and human rights obligations.
11. It is well established that section 12 FOIA does not oblige public authorities to keep their records in such a way that they can be quickly and easily located. The costs limit under section 12 is considered on the basis of the public authority's actual record keeping practices, not on the basis of how the requested information should have been kept (***Commissioner of Police for the Metropolis v Information Commissioner and Mackenzie*** [2014] UKUT 479 (AAC)).
12. This is the case even if the public authority has a separate legal duty to keep the information in question. The Upper Tribunal considered this issue in ***Cruelty Free International v Information Commissioner*** [2017] UKUT 0318 (AAC). UT Judge Markus rejected the submission that there is a distinction between the costs consequences of inefficient record-keeping and those of a breach of legal obligation – "...the requester has to take the public authority's record-keeping practices as they are, even if they are defective. That holds true whether the defect is poor administration or breach of a legal obligation." (paragraph 25). Instead, Parliament has chosen to address good record-keeping practice through a Code under section 46, and empowering the Commissioner to make recommendations under section 48, and "*There is no basis for concluding that Parliament also intended that there should be a separate assessment of compliance with such obligations where section 12 FOIA is in play.*" (paragraph 28).
13. The Appellant is clearly concerned about record keeping in the important context of extraditions and assurances relating to human rights. However, the Tribunal is bound by the decision in ***Cruelty Free International***. The Appellant is asking the Tribunal to "disallow" the use of section 12 because the CPS's record keeping is incompatible with its legal obligations. The Tribunal does not have the power to do this. The Appellant is asking the Tribunal to do something that falls outside its jurisdiction. The proceedings are struck out under Rule 8(2)(a).

Signed: *Judge Hazel Oliver*

Date: 18 August 2023