



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0050

Information Commissioner's Ref: FS50107607

Heard on Papers at Procession House
On: 21 October 2008

Decision Promulgated
On: 4 December 2008

BEFORE

CHAIRMAN
CHRIS RYAN
and
LAY MEMBERS
ROGER CREEDON
MICHAEL HAKE

BETWEEN:

ALASDAIR ROBERTS

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

Decision

The Tribunal upholds the decision notice dated 22 May 2008 and dismisses the appeal.

Reasons for Decision

Introduction

1. The issue that arises in this Appeal is whether the Information Commissioner was correct in deciding that the Ministry of Defence (“MOD”) had complied with its obligations under the Freedom of Information Act 2000 (“FOIA”) when it refused a request for certain information on the basis that the estimated cost of complying with it would have exceeded the cost limit provided for under FOIA section 12 and regulations made under it.

The request for information

2. On 30 October 2005 Professor Alasdair Roberts of Syracuse, New York State, USA (“the Complainant”) submitted a freedom of information request to the MOD requesting the following information:

“For all FOIA requests recorded in the MOD AIT on the date of processing this request, the following fields of data:

Date Request Received;

Expiry Date;

Organisation;

Applicant Type;

Postcode;

Country;

Status;

Date Response Sent;

Closed Date

I wish to receive this data only in electronic form, either as a tab-delimited text file, or as an Excell spreadsheet.

Please contact me if you like clarification of this request. In particular, I would be glad to discuss the deletion of fields which may contain data that might be subject to exemption under FOIA.”

3. Following an exchange of communications which clarified that the request had been intended to cover all FOI requests up to the date of the request, the MOD refused it in a letter dated 20 December 2005, relying on FOIA section 12. The refusal was maintained, following a request for an internal review. The review was undertaken by David Wray OBE, the MOD’s Director of Information (Exploitation), who notified the Complainant of the outcome of the review in a letter dated 17 February 2006.
4. FOIA section 12 provides that a public authority is not required to communicate information to any person requesting it if it *“estimates that the cost of complying with the request would exceed the appropriate limit.”* It is accepted by both parties to this Appeal that the “appropriate limit” is that provided in The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Regulations”) and that, on the facts of this case, it was £600. The Regulations also determine how the estimate is to be carried out. They do so in the following terms:

“Estimating the cost of complying with a request - general

4. – (1) This regulation has effect in any case in which a public authority proposes to estimate whether the cost of complying with a relevant request would exceed the appropriate limit.

(2) ...

(3) In a case in which this regulation has effect, 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.

(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.”

5. The rationale for both the initial refusal and Mr Wray’s decision to uphold it on review was as follows:
- a. The MOD acknowledged that it held the information requested as part of a computerised information system (the Access to Information Toolkit – “AIT”), which had been specially developed by a third party contractor for the purpose of logging and tracking FOIA requests.
 - b. AIT had been designed to capture, track and monitor requests for information but was not capable of generating, automatically, statistics or management reports other than a report for a single working day. The information requested by the Complainant would therefore have to be extracted from the system manually.
 - c. The estimate that the £600 limit referred to in paragraph 4 above would have been exceeded was based on the cost of one person spending three and a half working days on the task. This represented 1512 minutes, on the basis of a standard working day of 7 hours 25 minutes.

- d. The effect of the request for information was that the relevant data for 244 days would have had to be extracted and the MOD estimated that this would have taken 10 minutes for each day, resulting in a total of 2440 minutes, which exceeded, by some margin, the “cap” of 1512 minutes mentioned above.
- e. These calculations were said not to take account of any additional time that would have been taken up in validating the data for omissions or errors.
- f. It was not possible to overcome the need for day to day data extraction by having a database report program written by one of the MOD’s own programmers, as the Complainant had suggested, because the design and maintenance of AIT had been contracted out to a third party.

The complaint to the Information Commissioner

6. On 20 February 2006 the Complainant lodged a complaint with the Information Commissioner about the way in which the MOD had handled his request. His complaint included criticism of the MOD’s failure to comply with its obligation (imposed by FOIA section 16) to advise and assist those seeking information.
7. After a seriously delayed investigation the Information Commissioner finally issued a Decision Notice on 22 May 2008 in which he concluded that the MOD had acted correctly in refusing the Complainant’s request under section 12 of the Act as the appropriate limit would have been exceeded. However he also decided that MOD had been in breach of its duty under section 16 of the Act to advise and assist the Complainant. The MOD has not appealed the section 16 aspect of the Decision Notice and so that stands. As to section 12 the Information Commissioner accepted the MOD’s estimate of the cost of manual extraction of the information summarised above. He also investigated the cost of having an appropriate program written by the third party contractor responsible for maintaining the AIT system and concluded that this too would have exceeded the £600 limit under the Regulations.

The appeal to the Tribunal

8. On 19 June 2008 the Complainant issued a Notice of Appeal to this Tribunal asserting that the Decision Notice contained a number of errors. He elected to have his appeal determined without a hearing and, with the Information Commissioner's consent, we have proceeded on that basis, relying on an agreed bundle of documents and written submissions prepared by each party. The Grounds of Appeal, as supplemented by the Complainant's written submissions, categorised the Complainant's criticisms under four heads and we will deal with each one of them in turn after first making some comments about section 12 generally.
9. Section 12 does not require the public authority to make a precise calculation of the costs of complying with a request. Only an estimate is required. That estimate, however, must be a reasonable one and may only be based on the activities covered by Regulation 4(3). Those activities do not include consideration of exemptions, or redactions, as confirmed by the Tribunal in *Jenkins* (EA/2006/0067). Neither may costs include those relating to data validation or communication.
10. What amounts to a reasonable estimate can only be considered on a case by case basis. We recognise this aspect may be an important consideration for requestors seeking to exercise their information rights under FOIA. 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) an estimate has to be "sensible, realistic and supported by cogent evidence" In this case we have considered the evidence provided to us of the steps taken by the Information Commissioner to test the estimate and are satisfied with his decision that it complied with that test.

First Ground of Appeal: The MOD was not entitled to rely on its cost estimate because it failed to consider alternative methods for extracting the information as proposed by the Complainant.

11. The Complainant argues that the MOD should not be permitted to rely upon section 12 unless it has demonstrated that it contemplated all reasonable methods for extracting data from the database in question. He says that, in particular, it had an obligation to consider certain alternative methods which he had brought to its attention.

12. Section 12 provides that the public authority may rely on its costs estimate to refuse a request but does not expressly make that reliance conditional on the quality or nature of the estimate. One must look in the Regulations for any guidance as to how the estimate should be made. In that connection Regulation 4(3) provides that the public authority may only take account of the costs it reasonably expects to incur in carrying out certain specific tasks. It says no more about any steps that the public authority should take in evaluating possible methods of extracting data. However, 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 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.
13. 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.
14. In this case the Complainant suggested three alternatives. First, he said that the MOD could have used report-building capabilities incorporated in its own database program. Second, that one or more existing standard reports could have been utilised. However, the Information Commissioner accepted the MOD’s evidence that the AIT system did not include a report application that could generate the

information requested and that to create one would have required additional software to be written. No evidence was adduced before us to undermine that finding and we accept it. The Complainant's third suggestion was that the MOD's database specialists could have written a special program to extract the necessary information. The evidence on this was that the MOD's arrangement with the company it had engaged to maintain the AIT system precluded it from undertaking its own re-programming and that the contractor had estimated that it would have taken a total of 15 man days to develop the necessary program. The cost, based on the standard £25 per hour provided for in the Regulations (reg. 4(5)) would have exceeded by some way the £600 limit.

15. We conclude therefore:

- a. that the Complainant set the test at too high a level in requiring the public authority to consider all reasonable methods of extracting data;
- b. that circumstances might exist where a failure to consider a less expensive method would have the effect of preventing a public authority from relying on its estimate for the purposes of section 12; but that
- c. this was not the situation on the facts of this particular case because none of the alternatives proposed by the Complainant would have achieved the required cost reduction.

Second Ground of Appeal: The MOD failed to consider whether part of the requested data could have been released.

16. The Complainant asserted that he had made it clear in his initial request that he was prepared to accept partial release. The request is quoted in full in paragraph 2 above. It acknowledges that some of the data may fall within one or more of the exemptions set out in FOIA but makes no reference to any possible reduction in scope in order to reduce the costs of the exercise. Nevertheless there is some evidence to suggest that partial release might have been possible and the Decision Notice recorded the Information Commissioner's conclusion that the MOD could and should have done more to clarify the Complainant's request and explore how it might have been adapted to enable the MOD to comply with it. This was the basis

for the Information Commissioner's decision that the MOD had not complied with its obligation under section 16 to assist and advise the Complainant. In these circumstances we believe that we should assume, in the Complainant's favour, that a partial release could have been achieved and that the MOD's failure to explore that possibility with the Complainant was the reason why the option was not pursued.

17. The Complainant puts forward two arguments on the impact of the MOD's failure in this respect. First, he says that public bodies have an obligation to consider the possibility of partial release before invoking section 12. However, there is no suggestion to that effect in either section 12 or the Regulations and we reject it. The second argument, closely related to the first, is that the failure to explore the possibility of partial release constituted a failure to comply with the obligation under FOIA section 16 (to provide advice and assistance to those seeking information from a public authority) and that the duty to advise and assist must be fulfilled by a public body as a prerequisite to the application of section 12.

18. Section 16 provides as follows:

“(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case”

As anticipated by section 16(2) a code of practice (“the Code”) has been issued by the Secretary of State under section 45 of the Act. It provides, in paragraph 14, that:

“Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the “appropriate limit” (i.e. the cost threshold) the

authority should consider providing an indication of what, if any, information could be provided within the cost ceiling.”

19. It is certainly the case that public authorities are encouraged to explore the scope of a request and to enter into a dialogue with the person who has made a broad request for information to see if it might be narrowed to the stage where it can be complied with. There have been a number of Information Tribunal decisions that have considered whether failure to consult in those circumstances might amount to a breach of section 16 (see for example *Fitzsimmons* (EA/2007/0124)) and others where it was found on the facts that there had indeed been such a breach (see for example *Urmenyi* EA/2006/0093 and *Meurnier* EA/2006/0059). In other cases it has been found that section 16 did not arise because the nature of the original request was such that no dialogue was likely to have resulted in the scope of the request being reduced to the level where it could be satisfied within the costs limit (see *Randall* EA/2007/0004). None of those cases included any suggestion that a breach of section 16 could have an effect on whether or not the public authority was entitled to rely on its estimate under section 12. However, in the case of *Brown v Information Commissioner* (EA/2006/0088) an issue that arose was whether the public authority could rely on section 12 in circumstances where, had they complied with their obligations under section 16, there may have been no basis to refuse the request under section 12. The Tribunal concluded in that case that if the public authority had complied with section 16 the original request could have been handled in such a way that it was possible that the costs limit under 12 would not have operated as a bar to disclosure. At paragraph 76 of its decision it said:

“We consider that in this case, like in many others, section 12 cannot be regarded independently of section 16. ... We consider that 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 whether, with assistance and advice that it would have been reasonable for the public authority to provide pursuant to section 16, the applicant could have narrowed, or re-defined his request such that it could be dealt with without exceeding the cost limits in section 12. If so, it may mean that the public authority’s estimate that the cost of complying with the

request would exceed the appropriate limit has not been made on a reasonable basis. To hold otherwise could allow section 12 to be used in a way that significantly undermines the effect of section 16.

20. We are, of course, not obliged to follow other decisions of this Tribunal and in this case, with respect to our colleagues we are not prepared to do so. We acknowledge the importance of public authorities discussing the scope of a request in an attempt to adjust it so that complying with it would not exceed the costs limit. However, that does not lead us to conclude that a failure to act in this way renders a section 12 costs estimate invalid. We reach that conclusion for the following reasons:

- a. There is nothing in the language of section 12 itself to suggest that the estimate may be challenged for any reason other than that it fails to comply with the Regulations.
- b. Nor does section 16 specify that failure to comply with its requirement should invalidate an estimate. In fact no sanction is mentioned in that section and it is to be inferred that the only available sanctions are those set out in Part IV of the FOIA, which make no reference to any consequential impact of breach on the applicability of other provisions.
- c. The relevant part of the Code of Practice quoted in paragraph 18 above indicates that the requirement to give advice only arises once the public authority has reached the stage where section 12 applies (*“Where an authority is not obliged to comply with a request for information...”*). Neither the statute nor the Code of Practice contain any suggestion that avoiding the obligation to comply is conditional on first complying with the Code of Practice or that a public authority must consult with the person seeking information as part of the process by which it reaches an estimated costs figure. This is entirely consistent with the purpose of the Code of Practice, (which is to provide guidance only), and with the language of section 16 itself, (which makes it clear in subsection (2) that the only impact of the Code of Practice is that a public authority which complies with it will be found to

have provided the advice and assistance necessary to avoid a breach of subsection (1)).

21. We are conscious that, without the direct connection for which the Complainant argues, a less than ideal situation may arise. An estimate may be made and communicated to the person seeking information without any offer of dialogue or explanation. The Information Commissioner may subsequently order the public authority to provide advice and assistance. Once his direction has been complied with a new request may be made, having a reduced scope. A new cost estimate will then have to be prepared if the public authority wishes to rely on section 12 in respect of the new request. In theory this process could be repeated several times, delaying the process for many months, if not years. However, we fear that if we seek to avoid that type of situation arising by declaring that the failure to advise or assist invalidated the costs estimate in this case, we risk falling into the trap of creating law, rather than interpreting the law as created by Parliament in the FOIA. And the law so created could have the harmful effect of requiring a public authority to spend many thousands of pounds over the costs limit in complying with a request, not because its original estimate had not been properly prepared, but solely because it had communicated it to the person requesting information without adequate advice or assistance.

22. Our conclusion on this point should not undermine the importance of public authorities complying with their obligation to advise and assist. It seems to us that section 16 has particular relevance to cases where it can be seen that a request for information might be adjusted to ensure that the task of complying with it would not involve cost in excess of the stipulated limit. We would hope that in most circumstances the giving of advice and assistance would lead to a dialogue which resulted in disclosure that was still of value to the person requesting it but did not expose the public authority to excessive cost. The need to rely on the estimate as a reason for refusing the request completely would only then arise where agreement on scope could not be reached.

Third Ground of Appeal: The MOD should have used new reporting facilities when they became available.

23. Since the date of the Decision Notice the MOD has informed the Complainant that it now has technical capabilities that it did not have at the time it refused the original request, which would enable it to provide more of the originally requested data within the cost limit. It had in fact informed the Information Commissioner of this fact before the Decision Notice was issued.
24. The Complainant has conceded that ordinarily it would be inappropriate to consider changes in circumstances after the time of the refusal of the original request. That is of course right. Our role is to determine whether the public authority was entitled to refuse to provide the information at the date when it communicated that refusal to the Complainant. Subsequent events, including technical developments, are irrelevant. However, the Complainant argues that the failure to provide advice and assistance in this case distinguishes it from the norm. He says that the duty to advise and assist persisted throughout the period after the original refusal so that, once the new facility became available, the MOD was no longer entitled to rely on section 12.
25. We were not referred to any provision of the FOIA which supported this argument and we do not believe that there is one. If any such rule did exist it could have the effect of requiring a public authority to notify a person who previously had a request for information refused under section 12 whenever new technology became available that would enable the request to be handled more cheaply. Any such rule would impose an unreasonable burden on public authorities to monitor the effect of new technical developments on all previous requests that had been rejected on this basis. We do not believe that the fact that the new technology became available in this case during the course of the Information Commissioner's investigation alters the position. We therefore consider that this ground of appeal lacks any merit and accordingly reject it.

Fourth Ground of Appeal: The Information Commissioner should not have concluded his investigation without requiring the MOD to comply with FOIA section 16.

26. The Complainant states that the Information Commissioner was aware, some time before he issued his Decision Notice, that the MOD had not complied with section 16 and argues that at that stage he should have notified the MOD of his conclusion

and made a “preliminary suggestion” that it should remedy the situation. He says that the Information Commissioner should not have concluded his investigation until the MOD had been given a direction to that effect.

27. We are aware that the Information Commissioner does on occasions assist parties to resolve their dispute over a request for information. That process may sometimes be assisted by him providing a preliminary indication of his views about the merits of the complaint. However, if the parties do not reach agreement, so that the complaint is withdrawn, he is obliged to proceed to make a decision – see FOIA section 50(2). That decision must be based on the facts that existed at the date when the public authority reached its decision. Events that occurred subsequently, during the course of the investigation, are unlikely to have any relevance.

28. It is conceivable that a material failure by the Information Commissioner to follow proper procedures in conducting his investigation could cause his Decision Notice to fail to be in accordance with the law, for the purposes of FOIA section 58(1)(a). However, we do not believe that the Complainant’s criticism in this case comes remotely near to establishing such an error. The criticism is directed, not at the manner in which the Information Commissioner conducted his investigation into the complaint, but at his alleged failure to do enough to broker a settlement that would have made it unnecessary to pursue the investigation further. Having reviewed the material provided to us in respect of the investigation we think that the criticism is unjustified in any event. But even if it were not we think that it relates to an element of the Information Commissioner’s activities over which the law gives us not jurisdiction.

A possible Fifth Ground of Appeal: The MOD’s estimate included costs of validating information after extraction

29. This ground of appeal was not pursued in the Complainant’s written submissions. However, it did appear in his original Grounds of Appeal and so we have considered it. It is common ground between the parties that the effect of the Regulations is that a public authority may not include in its section 12 estimate any costs associated with validating information that it traces and extracts. The

Complainant suggested that the Information Commissioner had been in error because he allowed the MOD to take the cost of validating information into account. However, we believe that the argument is based on a mis-reading of the Decision Notice. The Decision Notice recorded the basis of the estimate and then added that *“additional time would also be needed to validate the data for missing and erroneous entries”*. However, it is clear from the estimate itself that validating costs had not been included and the MOD’s letter of 20 December 2005 rejecting the original request expressly stated that time to validate data had not been taken into account for the purposes of its cost calculations. The effect of the words quoted from the Decision Notice was simply that, had the cost of validating been considered, the limit provided for under the Regulations would have been exceeded by an even greater margin.

Conclusion

30. For the reasons set out above we dismiss the Appeal.

31. Our decision is unanimous.

Signed

Chris Ryan

Deputy Chairman

Date: 3 December 2008