



NCN: [2024] UKFTT 876 (GRC)

Case Reference: EA/2023/0432

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

**Heard by Cloud Video Platform
Heard on: 11 September 2024
Panel Deliberations on: 13 September 2024
Decision given on: 02 October 2024**

Before

**JUDGE SOPHIE BUCKLEY
MEMBER DAVE SIVERS
MEMBER NAOMI MATTHEWS**

Between

G BRIDA

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) THE FINANCIAL OMBUDSMAN SERVICE LIMITED**

Respondents

Representation:

For the Appellant: In person

For the Respondent: Stephen Kosmin (Counsel)

Decision: The appeal is allowed to the extent that the tribunal's decision is based on section 12 rather than section 14.

Substituted Decision Notice:

Organisation: The Financial Ombudsman Service Limited

Complainant: Mr G Brida

The Substitute Decision - IC-245847-C7S8

1. For the reasons set out below the public authority was entitled to rely on section 12 of the Freedom of Information Act 2000 (FOIA) to refuse to comply with the request for information.
2. The tribunal does not need to make any findings in relation to section 14 FOIA.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-245847-C7S8 of 11 September 2023 which held that the Financial Ombudsman Service (The Ombudsman Service) was entitled to rely on section 14(1) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner did not require the public authority to take any steps.

Background to the appeal

3. The request in issue in this appeal relates to internal guidance notes held by the Ombudsman Service for staff who deal with complaints about regulated firms or Ombudsman Service complaints.
4. Mr. Brida had made a previous request on 11 February 2023 for 'copies of the index/content' to all such guidance notes and a short description where the purpose of the guidance is not obvious from the title. Mr. Brida also requested copies of specific internal guidance on three specified topics. Mr. Brida was initially provided with an explanation relating to the three topics and ultimately with a list of 1632 document titles in response to that request. The Ombudsman Service withheld some information under section 31(1)(a) and (c) and section 36(2)(b)(i), (ii) and (2)(c).
5. Following the request in issue in this appeal, Mr. Brida wrote to the Ombudsman Service on 23 June 2023. In that letter he requested seven specified guidance notes. The Ombudsman Service provided those seven guidance notes.

6. In the same letter Mr. Brida requested, or at least suggested as ‘a possible way forward’, and opportunity to inspect the Ombudsman Service’s records (or an edited version) remotely under section 11(1)(b) FOIA.

The request

7. The appeal relates to a request made on 14 May 2023. The request is 40 pages long and so is not reproduced here. It is a request for a large number of the Ombudsman Service’s internal guidance notes. The request included a request for copies of 656 documents (save where they relate only to a list of 12 excluded ‘topics’) and a request for a brief summary or, if more convenient, a copy of 302 further documents.

The Ombudsman Service’s reply

8. The Ombudsman Service responded on 9 June 2023. They refused to comply with the request on the basis of section 12(2) of the Freedom of Information Act (FOIA). The Ombudsman Service upheld its decision on internal review on 11 July 2023.
9. Mr. Brida referred the matter to the Commissioner on 18 July 2023. In the course of the investigation the Ombudsman Service relied, in addition, on section 14 and revised its reliance on section 12.

The decision notice

10. In a decision notice dated 11 September 2023 the Commissioner decided that Mr. Brida was entitled to rely on section 14 FOIA.
11. The Commissioner accepted that the estimate of in excess of 100 hours to extract and compile the information and check for redactions was robust. He recognised that the Ombudsman Service was not a particularly large organisation and therefore complying with the request would likely have caused significant diversion of resources from its core functions. The Commissioner considered the overall value of the request to be low.
12. The Commissioner was satisfied that the request engaged section 14 FOIA because it would have imposed a grossly oppressive burden.

Notice of appeal

13. In essence, the grounds of appeal are:
 - 13.1. The Commissioner was wrong to conclude that section 14 applied.
 - 13.2. Mr. Brida does not accept that section 12 applies. In particular he does not accept that it was necessary to manually convert the information into a different format when disclosure must or could be made in the native format and/or any conversion automated.

The Commissioner’s response

14. The Commissioner submitted that Mr. Brida's expression of dissatisfaction with the Ombudsman Service's response in his correspondence of 14 May 2023 was correctly processed as an internal review.
15. The Commissioner noted that Mr. Brida disputes the methodology adopted by the Ombudsman Service to locate, retrieve and extract the required information, but the Commissioner vehemently opposed the suggestion that the volume of guidance notes requested would not impact upon the burden of compliance.
16. The Commissioner did not consider that Mr. Brida had clearly explained how the task could be automated.
17. The Commissioner noted that even allowing a minimal time of 1 minute per guidance note would equate to nearly 16 hours work, without taking account of the burden of considering exemptions and making any necessary redactions.
18. The Commissioner remained of the view, given the Ombudsman Service's functions and the likely content of some of those guidance notes it is highly likely that some information would require redaction. The Commissioner submits that given the volume of guidance notes requested, this is clearly a case in which section 14 applies on the grounds of resources alone due to the significant burden compliance would impose.
19. The Commissioner submitted that, allowing an average time of 5 minutes per guidance notes to redact exempt material, it would take almost 80 hours to provide the 958 guidance notes in full or over 54 hours for the 656 guidance notes.
20. The Commissioner remained of the view that overall the value of the request is low.
21. The Commissioner submitted that the fact that another public body has chosen to reply to a similar request does not prevent the request to the Ombudsman Service from being vexatious.

The response of the Ombudsman Service

22. The tribunal has read and taken full account of the Ombudsman Service's response. Given the full skeleton argument and oral submissions made by the Ombudsman Service it is unnecessary to summarise the response in this decision.

Mr. Brida's replies/further written submissions

23. The tribunal has read and taken full account of the replies and further written submissions submitted by Mr. Brida. Given the full skeleton argument and oral submissions made by Mr. Brida it is unnecessary to summarise the replies and written submissions in this decision.

Skeleton argument and oral submissions by the Ombudsman Service

24. The tribunal read and took account of all the arguments set out in the Ombudsman Service's skeleton argument. This section focusses primarily on the oral submissions that were made at the hearing and it is unnecessary to summarise all the arguments set out in the skeleton argument here. Not all of the points made in the oral submissions are set out here, but the tribunal listened carefully to all the matters addressed by Mr Kosmin and took those into account.
25. It was submitted that the request, in the form it was made on 14 May 2023 circumscribes the appeal, and it is not open to Mr Brida to seek to refine or re-draft the request during the proceedings. The Ombudsman Service submitted that a public authority need only comply with a requestor's preference for the means of communication if they express that preference when submitting the request (**Innes v Information Commissioner and Buckinghamshire County Council** [2014] EWCA Civ 1086).
26. Mr Brida did not request remote access i.e. did not request to inspect a record containing the information at the time.
27. It is submitted that the request was framed by the earlier request of 11 February 2023. As both requests were framed in the present tense 'what guidance **is** available' despite section 4(1) the Ombudsman Service submitted that it was necessary also to search the archive repository. The Ombudsman Service submitted that it was happy to take the appellant's case at its most favourable, i.e. that it was a request for the guidance as and how it might come to be updated, because it submitted that the section 12 limit was exceeded in any event.
28. The Ombudsman Service submitted that even if the archive repository was only checked where there was no guidance note with the specified name in the live repository, the estimate would still exceed 18 hours. The Ombudsman set out its calculations in its oral submissions, which are dealt with in the findings of fact and in our discussions and conclusions.
29. The Ombudsman Service submits that all viable methodologies to respond to the request would have entailed the performance of relevant steps for substantially more than 18 hours.
30. The Ombudsman Service submitted that none of the alternative methodologies proposed by the appellant, save for print to PDF, were viable and could have been applied at the relevant time. It was submitted that the organisational structure, management system and information storage systems in place within a public authority, including its internal governance processes, the software it has installed and the way it has configured SharePoint, bear upon section 12, relying on **Kirkham** and a number of First-tier Tribunal decisions.

31. It was submitted that the Ombudsman Service is not obliged to start installing new programmes to meet the request when to do so would require lengthy and costly governance processes.
32. It is submitted that where the public authority has set out the facts and assumptions on which its estimate is based, the tribunal should not make an assessment that novel technologies might be introduced to respond to the request 'neatly'.
33. It was submitted that the comparison to the Legal Ombudsman does not assist the appellant.
34. It was submitted that section 12 was determinative and that the tribunal did not need to go on to consider section 14 if it found in the Ombudsman Service's favour in relation to section 12.
35. Given the tribunal's conclusions on section 12 it is not necessary to set out the Ombudsman Service's arguments on section 14. Nor is it necessary to set out any submissions on section 16 for the reasons set out in our discussions and conclusions below.
36. The Ombudsman's skeleton argument also addresses a number of issues it terms 'satellite issues' including the allegation that the Ombudsman was in breach of its section 16 duty to provide advice and assistance.

Skeleton argument/oral submissions by the appellant

37. The tribunal read and took account of all the arguments set out in Mr Brida's skeleton argument. This section focusses primarily on the oral submissions that were made at the hearing and it is unnecessary to summarise all the arguments set out in the skeleton argument here.
38. Not all of the points made in the oral submissions are set out here, but the tribunal listened carefully to all the matters addressed by Mr Brida and took those into account
39. Given the tribunal's conclusions on section 12 it is not necessary to set out Mr Brida's arguments on section 14. Nor is it necessary to set out any submissions on section 16 for the reasons set out in our discussions and conclusions below.
40. Mr Brida noted that his request for summaries was made in the alternative, in that it allowed the respondent to provide the full guidance note if that was quicker. He accepted on the basis of the evidence of Mr. Creighton that it appeared that it would be at least as difficult to provide the summaries as to provide the full guidance note.
41. Mr. Brida submitted that Mr. Creighton accepted that the alternative methodologies proposed by Mr. Brida were practicable, and that the barrier was the governance procedures rather than any technical issues. Mr. Creighton had already accepted

that the print to PDF function is already built into the browser and Mr. Brida submitted that eDiscovery was no different. Mr. Brida submitted that on the basis of Mr. Creighton's evidence the issue was not whether these methodologies would work but whether they were permitted within the organisation.

42. Mr. Brida argued that that was not something that can be argued as a barrier to prevent FOIA requests.
43. Although Mr. Kosmin complained about the late introduction of another 'alternative method' at a very late stage, namely the use of a sandbox, Mr. Brida submitted that this was not put forward as an alternative methodology. The use of a sandbox was intended to reduce the burden for the purpose of the governance procedures and the concerns about organisational security. If the alternative methods were deployed inside a sandbox on an offline copy of the database, it would be isolated from everything else and there would be no possibility of anything from the software influencing anything outside the sandbox. Mr. Brida submitted that this would mean the use of the alternative methods 'would not really be an issue' in terms of governance procedures. Mr. Creighton accepted that the Ombudsman Service did use sandboxes and Mr. Brida submitted that perhaps this could be done under the existing approvals.
44. Mr. Brisa submitted that on the basis of Mr. Creighton's evidence, if the alternative methods were used, like HTTrack or eDiscovery, the process would be almost fully automated, and section 12 would not apply. The issue for the tribunal then, Mr. Brida submitted, is whether, for example, turning on the eDiscovery system is something that could reasonably be expected of a public body.
45. Mr. Brida submitted that if a new system would be costly or burdensome the case law shows that the tribunal can take that into account, but here, taking HTTrack as an example, the software is free and takes 5 minutes to download and eDiscovery is already built into the Ombudsman Service's software.
46. Mr. Brida accepted that an organisation is not expected to modify the way its data is stored or go to extreme measures to lower the cost of the request, but in this appeal Mr. Brida submitted that it is a matter of either turning on what the Ombudsman Service already has (eDiscovery) or sourcing and implementing a software solution that is recognised and is generally used for this type of job.
47. Mr. Brida disputed that the caselaw that provides that the costs limits under section 12 are assessed on the public authority's actual record keeping practices can be extended to arguments suggesting that technology or new software could be employed to search for information more efficiently. He submitted that the test is instead what is reasonable for the public authority to do.
48. He submitted that the Commissioner's guidance on section 12 under the heading 'Costs other than staff time' would otherwise be incorrect:

“Sometimes, you may expect to incur costs other than staff time when carrying out the permitted activities. The key to deciding whether or not you can include these costs in the estimate is whether it would be reasonable to do so.

For example, if you can show that your existing software is unable to do the job, but that you could purchase other specialist software which would allow you to retrieve the requested information, then you could include the cost of that software in the estimate. In such cases, the Commissioner would expect you to have evidence to support your estimate of the software’s cost if we received a complaint.”

49. Further, Mr. Brida submitted that Kirkham did not support the Ombudsman Service’s position, and relied on the following section of paragraph 19 of that judgment:

“It might be otherwise if the authority had deliberately distributed the information in a way that would always allow it to rely on section 12. That is not the case here, and it was not the case in Cruelty Free.”

50. Mr. Brida submitted that this appeal involves restrictions which have deliberately been placed on Discovery and which have the effect (albeit unintended but as a matter of fact) of frustrating the purposes of FOIA without fulfilling the stated business need to prevent staff distributing guidance (because staff are, in any event, free to save and print the guidance notes).
51. Mr. Brida submitted that the First-tier tribunal decisions relied on by the Ombudsman Service were wrong and, in any event, provided limited if any assistance to the tribunal in this appeal.
52. Mr. Brida submitted that the existing cost estimates were not realistic, because other methods were practicable.
53. In relation to eDiscovery Mr. Brida submitted that would be the easiest solution because it is already built into the system and the only barrier is the governance procedures which Mr. Brida submitted either cannot be relied on as part of the costs under section 12 and/or would not be burdensome enough on their own.
54. Mr. Brida noted that Mr. Creighton accepted that external access was possible to the contents of the intranet/discovery platform/discussion forums and that there was no reason why he could be provided remote access to inspect a duplicate edited database.
55. Mr. Brida submitted that the way in which pages in the bundle had been produced from external websites showed that the Ombudsman Service had followed the same

process to produce the bundle that it could have followed to respond to the request. Mr. Brida submits that this shows that this is standard organisational practice and although the Ombudsman Service is saying that it is too burdensome to do for the request it was not for the tribunal hearing.

56. Mr. Brida submitted that he asked for the guidance that was given to people and so what is responsive to the request is the text of the guidance, not the metadata etc.
57. In relation to the Ombudsman Service's submission that they would need to search the archived repository, Mr. Brida submitted:

57.1. This was not necessary because of section 4(1) FOIA.

57.2. In any event it would only be necessary to search for any titles that had not already been located in the live repository. The number of which was likely to be very small, given the short period of time and the fact that only obsolete, rather than simply updated or amended, guidance notes were stored in the archive repository.

58. In relation to section 11, Mr. Brida submits that there was a live request for disclosure by inspection at the relevant time, and **Innes** confirms that the absence of such a request poses no barrier in this jurisdiction. He submitted that this part of the appeal must be upheld because (i) the burden would not be grossly oppressive (ii) the Ombudsman only challenge is the assertion that no such request existed and (iii) the Commissioner did not address this aspect of the case at all.

Issues

59. The issues for the tribunal to determine are:
- 59.1. whether or not the public authority was entitled to rely on section 12
- 59.2. whether or not public authority was entitled to rely on section 14.
60. For the reasons set out below the issues raised by the parties relating to section 11 and section 16 FOIA are not within our remit.

Legal framework

Section 12 Costs Limit

61. Under section 12(1) a public authority is not obliged to comply with a request for information where:

“the authority estimates that the costs of complying with the request would exceed the appropriate limit. “

62. The relevant appropriate limit, prescribed by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations') is £450.
63. In making its estimate, a public authority may only take account the costs it reasonably expects to incur in relation to the request in-
 - (a) determining whether it holds the information,
 - (b) locating it, or a document which may contain the information,
 - (c) retrieving it, or a document which may contain the information, and
 - (d) extracting it from a document containing it. (See Regulation 3).
64. The 2004 Regulations specify that where costs are attributable to the time which persons are expected to spend on the above activities the costs are to be estimated at a rate of £25 per person per hour.
65. The estimate must be sensible, realistic, and supported by cogent evidence (**McInerny v IC and Department for Education** [2015] UKUT 0047 (AAT) para 39-41).
66. The test is not a purely objective one of what costs it would be reasonable to incur or reasonable to expect to incur. It is a test that is subjective to the authority but qualified by an objective element. It allows the Commissioner and the tribunal to remove from the estimate any amount that the authority could not reasonably expect to incur either on account of the nature of the activity to which the cost relates or its amount. (**Reuben Kirkham v Information Commissioner** [2018] UKUT 126 (AAC)).

The role of the tribunal

67. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Evidence

68. We read and took account of
 - 68.1. An open bundle
 - 68.2. A supplementary open bundle
 - 68.3. A closed bundle, which contained a short, redacted paragraph from the letter from the Ombudsman Service to the Commissioner.
 - 68.4. A bundle labelled 'Appellant's further documents'
69. The Judge raised with the Ombudsman Service at the start of the hearing the question of whether it was necessary to withhold the closed bundle from the

appellant. As a result, it was largely made open during the hearing, save for one small item of personal data.

70. As the formerly closed material concerned only the potential exemptions relied on by the Ombudsman Service which, it argued, would lead to the need to redact under section 14, it was not material to our decision. As such there was no prejudice to Mr. Brida as a result of the late disclosure and no need to give him the opportunity to make any further submissions on that material following the hearing.
71. We heard oral evidence and read witness statements from Mr. Danny Creighton, Knowledge Systems Manager for the Discovery Platform at the Ombudsman Service.
72. The tribunal did not hold a closed session.

Findings of fact

73. We make the following findings of fact based on the evidence before us on the balance of probabilities.
74. At the relevant time, the requested guidance notes were stored by the respondent on the Discovery platform, which is a knowledge platform used by staff. This was hosted on Microsoft SharePoint at the relevant time.
75. Guidance notes contain text, images and webparts. Some webparts display as substantive content and some as icons.
76. Some, but not all of the guidance notes contain an opening summary. In a random sample of 20 guidance notes, around a quarter did not include a summary.
77. Live and archived guidance notes are stored in different content repositories. A guidance note is only 'archived' when it is obsolete or has been replaced. If a guidance note is simply updated or amended it is not moved to the archive, nor is an unamended version stored in the archive.
78. At the relevant date (and indeed this remains the case) the respondent had not downloaded or installed any of the software programmes that the appellant asserts would make the extraction of data quicker nor had the respondent configured eDiscovery in SharePoint.
79. There is no real dispute that the section 12 cost limits are exceeded if the Ombudsman Service did not use any of the alternative methodologies contended for by Mr. Brida.
80. The only viable methodologies reasonably available to the Ombudsman Service to respond to the request at the relevant date, without downloading and installing new software or configuring eDiscovery in SharePoint were as follows.

81. Each requested guidance note had to be located separately by title by searching the title column in the relevant repository. Mr. Creighton estimated in oral evidence that that this would take on average, a minute for each guidance note if just one repository is checked. If both repositories needed to be checked to locate the guidance note in force at the relevant time, he estimated that this would take on average, 3 minutes.
82. Once the guidance note is located, the quickest way of extracting the content of the guidance note is by using the print to PDF function on Discovery. Mr. Creighton carried out a sample exercise on 10 guidance notes and this took on average 27 seconds for each guidance note.
83. Using the Excel export function was not contended to be a suitable alternative by either party at the hearing, and we find that it was not.
84. Copying and pasting the text and images into a Word document takes longer. In a previous exercise this took the Ombudsman Service between, on average, 5 minutes (for shorter notes) and 7 minutes (for longer notes). This is the only way to extract part of a guidance note so would have to be used if only the summary in a guidance note was to be provided.
85. Software is available, such as HTTrack, some of which can be downloaded from the internet free of charge, which could automate some of the above processes and we accept that would be likely to significantly reduce the amount of time it would take to locate and/or extract the requested information.
86. Configuring eDiscovery on SharePoint would also be likely to significantly reduce the time it would take to locate and/or extract the requested information.
87. Under the Ombudsman Service's usual processes, a software programme cannot simply be downloaded and used by an individual employee whether in the Information Rights team, the IT team or the Knowledge team. An extensive governance and testing process has to be followed, including testing in three different environments before it is installed.
88. This remains the case even if the downloaded software was only going to be used inside a 'sandbox' by the relevant team. A sandbox is an isolated digital environment where new software or updates can be tested without affecting the live systems. That requirement remains because, as explained by Mr. Creighton, the sandbox is still inside the Ombudsman Service's environment.
89. Similarly, an individual employee, whether in the Information Rights team, the IT team or the Knowledge team cannot simply configure eDiscovery on SharePoint, whether or not this was only to be done within a sandbox. That decision has to be made on an organisational basis following the same procedures and processes.

90. Although Remote access to the Discovery platform can be made available to employees of the Ombudsman Service working from home, by logging in remotely to the Ombudsman's internal network, this is still 'within' the internal network even though the employee is physically outside the Ombudsman Service's buildings.

Discussion and conclusions

First-tier tribunal decisions

91. We have not been assisted by the First-tier tribunal decisions cited to us. We note the following statement from *LO v Information Commissioner* [2019] UKUT 34 (AAC):

"The correct approach is to treat the decisions of the First-tier Tribunal with the respect they are due, no less but no more. What is their due? (a) A decision of that tribunal is, subject to any appeal, binding as between the parties on the issues decided. The Commissioner is under a duty to accept it as such and does. (b) I know from the documents in this case that the Commissioner analyses each case to see what lessons can be learned for the future. That is a proper and valuable practice. (c) The problem comes when the Commissioner treats the First-tier Tribunal's decisions as containing authoritative statements of the law. They do not. Anything that the tribunal says in one case is not binding in any other. If it is wrong, it must not be followed in other cases. If it happens to be right, all to the good, and the same law should be applied in later cases. But it should be applied only because it is the law, not because it was said by the tribunal in a previous case."

The relevance of section 16 FOIA

92. The Commissioner's decision notice does not consider or make any determination on whether or not there was a breach of section 16 by the Ombudsman Service. The question of whether or not the Ombudsman Service was in breach of section 16 is therefore not something on which it is within our jurisdiction to make a separate ruling.
93. The section 45 Code of Practice says the following in relation to section 12 FOIA, at paragraph 6.9 (emphasis added):

"Where a request is refused under section 12, public authorities should consider what advice, and assistance can be provided to help the applicant reframe or refocus their request with a view to bringing it within the cost limit. This may include suggesting that the subject or timespan of the request is narrowed. Any refined request should be treated as a new request for the purposes of the Act."

94. Where a public authority fails to provide advice and assistance to bring a request within the cost limit, that does not mean that they cannot rely on section 12 in relation to the original request. It means that they may be found to have breached section 16. This is reflected in the Commissioner’s guidance:

“In line with your section 16 FOIA requirements, if you refuse a request under section 12, you will usually have to provide advice to the applicant. The objective of the advice and assistance is to help the applicant make a new, refined request which doesn’t exceed the appropriate limit.

Where a request raises concerns over cost your overall approach should be to estimate whether the cost would exceed the appropriate limit. If it would, you should refuse it under section 12. When doing so, you can provide advice and assistance, possibly using the calculations on which you based your estimate. This should allow the applicant to understand how and why their original request would exceed the appropriate limit. They should then be well placed to make a fresh request for a more limited amount of information, but targeting the information they are most interested in.

...

If we fail to provide advice and assistance does this invalidate our reliance on section 12?

No. The Information Tribunal in the case of Alasdair Roberts and the Information Commissioner (EA/2008/0050, 4 December 2008) confirmed that a breach of section 16 does not invalidate the original costs estimate.”

95. For those reasons we have not had to make findings on whether or not the Ombudsman Service was in breach of section 16.

The relevance of section 11(1)(b) FOIA

96. Section 11(1)(b) FOIA provides as follows:

“11 Means by which communication to be made.

(1) Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely –

...

(b) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and

...”

97. On 23 June 2023 Mr. Brida requested, or at least suggested as ‘a possible way forward’, and opportunity to inspect the Ombudsman Service’s records (or an edited version) remotely under section 11(1)(b) FOIA.
98. This request is not dealt with by the Commissioner in the Decision Notice.
99. The Court of Appeal in **Innes v Information Commissioner and Buckinghamshire County Council** [2014] EWCA Civ 1086 decided that the natural meaning of the phrase “on making his request for information” is that the expression of a preference about the means by which the requested information is to be provided must be made at the time of the original request.
100. The Court of Appeal went on to decide that there was no reason why a subsequent request could not be treated as a fresh request for the same information, but this time including a section 11 request, which would start the clock ticking again.
101. Thus, as a result of **Innes**, the request of 23 June 2023 should be treated as a fresh request for the same information but this time including a section 11 request. As the decision notice under appeal relates to the request of 14 May 2023 and not to any fresh request made on 23 June 2023, we have no jurisdiction to deal with any request made on 23 June 2023 that included a section 11 request. Where a request is not dealt with in the decision notice, the tribunal has no jurisdiction to deal with it (see the Upper Tribunal decision in **Public Law Project v Information Commissioner** [2024] UKUT 71).
102. Accordingly, we have no jurisdiction to determine this issue.

Section 12 – determinative of the appeal

103. Whilst Mr. Brida’s skeleton argument dealt first with section 12, he submitted in his oral submissions that even if the tribunal accepted that the section 12 cost limit was exceeded the tribunal was obliged to go on to consider section 14. Mr. Kosmin submitted that the tribunal could, if it accepted that the section 12 cost limit was exceeded, dispose of the appeal on that basis without considering section 14.
104. Section 58(1) FOIA provides as follows:

“58 Determination of appeals.

- (1) If on an appeal under section 57 the Tribunal 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,the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

105. In our view, the tribunal stands in the shoes of the Commissioner and is entitled to decide which (if any) exemptions apply, as set out in paragraph 90 of **Information Commissioner v Malnick and others** [2018] UKUT 72(AAC) at paragraphs 90 and 94:

“90. ... The question to be addressed under section 58(1)(a) is whether the decision notice is “in accordance with the law”. Although the statutory language is less than helpful, this formulation embraces all errors, and is not limited to the traditional taxonomy of errors of law. As is clear from section 58(2) and *Birkett* (see paragraph 45 above), the F-tT exercises a full merits appellate jurisdiction and so stands in the shoes of the Commissioner and decides which (if any) exemptions apply. If it disagrees with the Commissioner’s decision, the Commissioner’s decision was “not in accordance with the law” even though it was not vitiated by public law error.

...

94. ...As already noted, *Birkett* makes clear that on a proper reading section 58 is concerned with any error of law or fact or even a difference in view. It follows the F-tT may allow an appeal because it makes a different assessment to that of the Commissioner even though the Commissioner has not made any error of law in the public law sense...If the F-tT decides that the Commissioner’s decision was made in error of law but agrees with the decision, then it will dismiss the appeal. If the F-tT decides that the Commissioner’s decision was not made in error of law but disagrees with it, then the appeal will be allowed and a different decision notice will be substituted.”

106. For those reasons the tribunal is entitled to consider section 12 first, and, having concluded that the public authority is entitled to rely on section 12, it is not obliged to go on to deal with section 14.
107. Otherwise, if the tribunal were always obliged to deal substantively with the exemption dealt with in the decision notice, it would have to do so even if, for example, the public authority no longer relied on that particular exemption by the time of the tribunal hearing.
108. Our conclusion, in effect, is that in the light of the evidence before the tribunal we disagree with the Commissioner’s decision to look at section 14 first. The consequence of that is that we allow the appeal but substitute a decision notice to the effect that the public authority was entitled to rely on section 12 to refuse the request.

Section 12 – was there an estimate which was reasonable and supported by cogent evidence?

109. It is clear to us that the Ombudsman Service has made an estimate, albeit that it has been refined during the tribunal process. That does not prevent the Ombudsman Service from relying on that estimate under section 12.
110. Mr. Brida made submissions which the tribunal understands were to the effect that section 12 was not engaged because there was no estimate in relation to the use of HTTrack. The need for an estimate under section 12 does not oblige a public authority to produce an estimate in relation to each alternative method put forward by the requestor.
111. Having determined that there is an estimate, we must ask whether it included any costs that are not reasonable or not related to the matters that may be taken into account. We can disregard any costs that are not reasonable or not related to matters that may be taken into account. An estimate has to be 'reasonable' in the sense of being 'sensible, realistic and supported by cogent evidence'.
112. We have some doubts on the need to look at the archive repository at all given the terms of section 1(4) FOIA, and Mr. Brida's submissions on the need to only check the archive repository where a named guidance note is no longer in the live repository were attractive, however we do not need to decide this issue because the estimate exceeds the relevant cost limits in any event even if the time taken to look at the archives is removed.
113. It is not necessary to include in the estimates any time that relates to the provision of summaries. The request states that Mr. Brida is seeking a summary of certain of the guidance notes 'in the interest of saving time and costs' and states 'You are welcome to provide the full document if it is more convenient.' The request is, we find, only for summaries if that would be quicker to provide than the full guidance note. Mr. Brida accepted, rightly, in his submissions that the provision of summaries in this case would take longer than the provision of the entire guidance notices. Any summaries that do exist would have to be extracted via the cut and paste method, which would take much longer than simply printing the entire guidance note to pdf.
114. We note in passing that the Ombudsman Service has included in its estimates the amount of time it would take to create or generate summaries where those summaries do not already exist. A public authority is not obliged to create information in response to a request for information. The Ombudsman Service would only be entitled to include the amount of time it would take to locate and extract any summaries that it already held.
115. Disregarding any time referable to checking the archive repository or to generating, locating or extracting summaries, we accept the following estimates are sensible, realistic and supported by cogent evidence, being based on a mixture of sampling exercises and Mr. Creighton's knowledge and experience of the Discovery system:

- 115.1. It would take 1 minute per guidance note to locate the note in the live repository: 1 minute x 958 = 15.97 hours
- 115.2. It would take 27 seconds to print each guidance note to PDF: 27 seconds x 958 = 7.1 hours.
116. This results in a total of 23.07 hours which exceeds the appropriate limit.
117. There is no real dispute that the section 12 cost limits are exceeded if the Ombudsman Service did not use any of the alternative methodologies contended for by Mr. Brida.
118. We are not persuaded by Mr. Brida that we should conclude that the estimate is not sensible, realistic and supported by cogent evidence because of the existence of software or alternative configurations of SharePoint that would automate the process and would be likely to reduce the time estimate by an unknown extent.
119. The tribunal does not accept that it is possible to draw any inferences on the Ombudsman Service's ability to use alternative methods from the way in which the documents/webpages Mr. Brida requested to be included in the bundle appear on the page, when the tribunal had before it clear and persuasive evidence from Mr. Creighton on the methods available to the Ombudsman Service at the time and the difficulties in adopting the alternative methods proposed by Mr. Brida.
120. Nor do we accept that it is possible to draw any useful inferences from the way in which the Legal Ombudsman was able to produce information, given the differences in the requests and our lack of awareness of the Legal Ombudsman's systems.
121. Based on Mr. Creighton's evidence we have found as a fact that the Ombudsman did not have any of those methodologies available to it at the relevant time. We have found as a fact that to download new software or to reconfigure eDiscovery on SharePoint would have required an extensive governance and testing process to be followed, including testing before it is installed/reconfigured even if a sandbox was to be used.
122. The fundamental purpose of section 12 is to protect a public authority's resources. Mr. Brida's proposed approach would require a public authority to actively research and seek out any alternative methodologies not currently known or available to it, to download install and test alternative software or to configure applications not currently configured, or risk falling foul of a finding by a tribunal that some other alternative methodology existed that might have completed the process in less than 18 hours. That would, in our view, render section 12 unworkable.

123. That approach runs contrary to the fundamental purpose of section 12. We adopt the following from paragraph 30 of **Cruelty Free v Information Commissioner** [2017] UKUT 0318 (AAC):

“It is apparent that, rather than protecting the authority’s resources, reliance on section 12 would create difficult, complex and at times unanswerable questions, carrying greatly increased risk of dispute and further expense. It is a far cry from the sensible, realistic and evidence-based dispute which section 12 calls for.”

124. In our view this appeal is analogous to the scenario dealt with in **Cruelty Free** and **Kirkham**. The Ombudsman Service’s information existing information storage systems did not include HTTrack or any of the other software that Mr. Brida asserts is freely available to download. eDiscovery was not configured on the Ombudsman Service’s existing information storage systems. The cost of compliance is subjective and is related to the way that the authority holds the information.

125. Mr. Brida relies on the statement by Upper Tribunal Judge Jacobs in paragraph 19 of **Kirkham** that “It might be otherwise if the authority had deliberately distributed the information in a way that would always allow it to rely on section 12”.

126. We do not accept that the ‘carve out’ in paragraph 19 of **Kirkham** applies to this appeal. Mr. Brida interprets it as applying to any scenario where (a) a deliberation decision has been taken to distribute information in a particular way and (b) this had the effect, whether intended or not, that the information would always allow it to rely on section 12.

127. There are two difficulties with Mr. Brida’s argument. First, the natural reading of paragraph 19 is that it applies to a scenario where the information has been deliberately distributed in such a way *in order to* allow the authority always to be able to rely on section 12. It is not, read naturally and in the context, it appears, intended to apply to all cases where a public authority has made a conscious decision to distribute information in a particular way for other reasons and that way happens, as a matter of fact, to always allow it to rely on section 12.

128. Secondly it is clear in this case that the public authority would not always be able to rely on section 12. It is only because of the sheer number of guidance notes that are requested that the section 12 limit is reached. The estimate, if the archive repository is not searched, is approximately 1.5 minutes per guidance note. The Ombudsman Service could provide a large number of guidance notes before exceeding that limit.

129. Mr. Brida argues that the principles in **Cruelty Free** and **Kirkham** do not extend to excluding consideration of technology or software that could be downloaded or configured and employed by a public authority to search for or extract information more efficiently. He submits that this would be contrary to the Commissioner’s

guidance. He submitted that the test is instead what is reasonable for the public authority to do.

130. The extract from the Commissioner's guidance relied on by Mr. Brida concerns costs that might be included in a section 12 estimate does not, in our view, assist. That part of the guidance deals with a situation where a public authority's existing software was unable to retrieve the requested information, and where the public authority itself considered that it could purchase other specialist software which would allow it to retrieve the requested information and wanted to include the cost of that software in the estimate. The fact that it might be reasonable for a particular public authority to purchase software to claim the costs of retrieving information that could not otherwise be retrieved still entails the application of a subjective test, taking into account the position of that particular authority.
131. In any event, we find that whichever approach is taken by the tribunal the outcome is the same. In the alternative, even if we are wrong and the question for the tribunal is, as Mr. Brida submitted, whether installing or enabling the alternative methodologies is something that could reasonably be expected of the Ombudsman Service, we are satisfied that the answer is clearly 'no'. Given the Ombudsman Service's existing information management systems and its organisational processes it would not be reasonable to expect it to either (a) lavish ingenuity on discovering some alternative quicker methods not currently available to it or (b) configure eDiscovery on SharePoint or download and install new software, even if confined to use on a copy in a sandbox, in order to respond to a single request for information under FOIA.
132. For those reasons, we conclude that the Ombudsman Service was entitled to rely on section 12 FOIA. For the reasons set out in paragraphs 102-107 the appeal is allowed and we substitute the decision notice set out above.

Signed Sophie Buckley

Date: 26 September 2024

Judge of the First-tier Tribunal

Promulgated

Date: 02 October 2024