Appeal Number: EA/2021/0285

First-Tier Tribunal
(General Regulatory Chamber)
Information Rights

Between:

Malcolm Meerabux

Appellant:

And

The Information Commissioner

Respondent:

Date and type of Hearing: 13th May 2022 on the papers.

Panel: Brian Kennedy QC, Naomi Matthews and Pieter De Waal

Representation:

For the Appellant: Malcolm Meerabux as a Litigant in person through written submissions.

For the Respondent: Richard Bailey, Solicitor through written submissions.

Decision: The appeal is dismissed

REASONS

Introduction:

[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA"). The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice ("DN") dated 10 September 2021 (reference IC-65020-T8Z3), which is a matter of public record.

Factual Background to this Appeal:

[2] Full details of the background to this appeal, the complainant's request for information and the Commissioner's decision are set out in the DN. The appeal concerns a request for information relating to the employment and career pay advancement of black staff at the Diocese of Westminster Academy Trust ("the Trust"). In response, the Commissioner held that the Trust are entitled to rely on section 12 of the FOIA (exceeds appropriate limit) and that it was not possible to refine the request meaningfully in order to bring the cost of compliance within the cost limit. Therefore, the Commissioner is satisfied that the Trust has not breached section 16(1) FOIA (duty to provide advice and assistance). However, the Commissioner recorded procedural breaches of section 1(1), section 10(1), and section 17(1) of the FOIA.

[3] The Commissioner maintains the position set out in her DN; namely that the Trust is entitled to rely on section 12 of the FOIA (exceeds appropriate limit) and that it had complied with the requirement of section 16 of the FOIA (advice and assistance). The Appellant now appeals against the DN. The Commissioner opposes the appeal and invites the Tribunal to strike out the appeal under Rule 8(3)(c) or dismiss the appeal for the reasons given in her DN. The Appellant considers that this is an appeal which may appropriately be dealt with on the papers. The Commissioner agrees with the Appellant's proposal.

History and Chronology

[4] On the 06 July 2020 the Appellant wrote to the Trust and made the following request:

> *"I'm formally submitting an FOI to DOWAT regarding the employment and career pay scale advancement of black staff for the last ten years in your schools especially secondary schools with their extended SLT promotional ladders"*

[5] The Trust responded to the request on 26 October 2020 as follows:

"The Trust does not collate the progression data of staff by ethnicity so the information you have requested is not held by us. Steps are being taken by the Trust to record ethnicity data centrally and for this to then help inform a review of Trust policies to ensure the Trust is fully meeting its equality duties and responding to developing good practice. A report on our progress in doing so will be shared. The Trust does not have any fast-tracking scheme for promotion."

[6] The Appellant requested an internal review on 9 November 2020.

[7] The Trust sent the complainant the outcome of its internal review on 28 January 2021. The Commissioner understood from this response that the Trust does not hold any progression data centrally, but that some data relating to staff progression is held by individual schools. However, the Trust refused to comply with the request under the exemption provided by section 12(1) of the FOIA, on the basis that providing the requested information would exceed the appropriate cost limit set out in the FOIA.

[8] Legal Framework

S1 FOIA – General right of access to information held by public authorities

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

(3) Where a public authority—

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.

(4) The information—

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.

(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).

(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

S12 Exception where cost of compliance exceeds appropriate limit

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

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

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

(4) The Minister for the Cabinet Office may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority—

(a)by one person, or

(b)by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

(5) The Minister for the Cabinet Office may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated.

Regulations made under section 12(4) and 12(5) FOIA, namely the Freedom of Information and Data Protection (Appropriate Limits and Fees) Regulations 2004 ("the Fees Regulations", make the following provisions in relation to the "appropriate limit", and the costs which can be included when calculating that limit:

a. Regulation 3 of the Fees Regulations, read in conjunction with Schedule 1 FOIA, provides that 'the appropriate limit' for the purposes of section 12(1) FOIA is £600 for central government departments (reg.3(2)), and £450 in the case of any other public authority (reg.3(3)).

b. Not all costs which may be incurred in complying with the request may be taken into account. Regulation 4 of the Fees Regulations sets out the activities which can be taken into account when estimating the cost of compliance with section 1(1) FOIA for the purposes of the appropriate limit, together with the estimated cost for the time spent in undertaking those activities:

> *"(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,*
> *(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."*

Section 12 FOIA is not an exemption under Part II of FOIA, and therefore is not subject to the public interest test.

The Upper Tribunal in *Kirkham v information Commissioner* [2018] UKUT 126 (AAC) ("*Kirkham")* provided a useful summary of the approach to take when considering the application of section 12 FOIA:

> *"18. Two issues arise under Part I. The first is whether the authority made an estimate. This arises under section 12. If it did not make an estimate, it is not entitled to rely on the section, as the existence of an estimate is a precondition for the application of the section. If it did, the second issue is whether the estimate included any costs that were either not reasonable or not related to the matters that may be taken into account. This arises under regulation 4(3). Both issues focus on the authority, on how it holds the information, and how it would retrieve it.*
>
> *19. The first issue is entirely subjective to the public authority. That is the language of section 12; it is personal to the authority. The cost of compliance will be related to the way that the authority holds the information. This is consistent with Upper Tribunal Judge Markus's analysis in Cruelty Free International v Information Commissioner [2017] UKUT 318 (AAC). I agree with her that it does not matter if the way in which the information is held fails to comply with other legal obligations than FOIA. 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.*
>
> *20. The second issue contains an objective element. The issue arises under regulation 4(3) of what costs 'a public authority … reasonably expects to incur in relation to the request'. The word 'reasonably' introduces an objective element, but it does so as a qualification of the costs that the authority in question expects to incur. 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. This mixture of subjective and objective elements is comparable to the approach taken to the interpretation and application of similar*

language in what is now regulation 100(2) of the Housing Benefit Regulations 2006."

Commissioner's Decision Notice

[9] The Commissioner investigated the matter and held that the Trust was entitled to rely on section 12(1) FOIA. Further, the Commissioner was satisfied that there was no breach of section 16(1) FOIA. The Commissioner reached her decision on the following grounds:

a) *"There are 11 academies consisting of six secondary schools and five primary schools which are spread across a wide geographical area in the South East of England [DN §22].*
b) *Data about staff progression is held within individual personnel files and progression data of staff by ethnicity is not collated [DN §23].*
c) *Before September 2020 there was one member of staff at the Trust who undertook some central strategic functions across the Trust. This had increased to a small number of part-time staff since September 2020 [DN §24].*
d) *Individual personnel files relating to current and former employees are held by individual academies and not centrally [DN §25].*
e) *To locate the requested information would require each school to first identify the ethnicity of each member of staff both current and former. Each school could search an electronic database of current employees, but a search of every personnel file held by each school would need to be searched to determine the ethnicity of the person the file relates to [DN §26].*
f) *If either file, electronic or personnel, recorded the individual's ethnicity as "black", it would be then necessary to search through the entire file to find letters and other correspondence to understand the individual's "employment and career pay scale advancement" [DN §27].*
g) *A manual search would also be required of recruitment application forms and monitoring information to determine the ethnicity of applicants and the success rate [DN §28].*

h) *The Trust's primary schools have 23 staff members, and its secondary schools have 109 members of staff. Since the Trust's formation in 2012 some members of staff have left, and recruitment has taken place [DN §30].*

i) *Accordingly, it could take between 17 and a half and 25 hours to search for the records at the primary schools, and between 24 and 36 hours to search for the records at the secondary schools. This equates to a figure between £1037.50 and £1525, both amounts being over the £450 threshold. Furthermore, staff located centrally at the Trust completed a sampling exercise in which they asked schools for electronic information relating to current employees and whether any other information could be provided. Carrying out the enquiries alone took approximately 30 hours [DN §31-32]."*

Grounds of Appeal

[10] The Appellant's Grounds of Appeal detailed that the Trust has expanded his request for information when the request specifically related to the career development of black staff to deputy or head teacher roles. Specifically, the request did not ask for information relating to a fast-track scheme for promotion. The Appellant contended that the Trust has chosen a deliberate path which was not cost effective when a more direct route to the FOI would have produced the information – *"a simple email to staff would have produced the answers"*. The Appellant commented on the promotion of staff which he considered to be by virtue an extended SLT promotional ladder. The Appellant challenged the internal review process and remarked on how the Trust's board answer equality questions.

The Commissioner's Response

[11] The Commissioner maintained her position as outlined in the DN and resisted the appeal. The Commissioner set out additional observations in respect of the Appellant's Grounds of Appeal. The Commissioner noted that the onus is upon the Appellant to demonstrate that the Commissioner's DN was not in accordance with the law.

[12] In response to the first ground of appeal, the Commissioner submitted that the issue to consider is whether or not a reasonably objective interpretation of the scope of the Appellant's request is such that it solely covers promotion of black members of staff into the roles of deputy head and head teacher or whether it would cover any employment and career pay scale advancement.

[13] The Commissioner maintained that she is satisfied that the Trust correctly relied upon section 12 FOIA and that the Appellant's arguments do not now go on to disturb this finding. The Commissioner did not consider that this ground has a reasonable prospect of success.

[14] The Commissioner referred to *Kirkham v Information Commissioner* [2018] UKUT 126 (AAC), at [18], whereby the test for engagement of section 12 FOIA is provided:

"18. Two issues arise under Part I. The first is whether the authority made an estimate. This arises under section 12. If it did not make an estimate, it is not entitled to rely on the section, as the existence of an estimate is a precondition for the application of the section. If it did, the second issue is whether the estimate included any costs that were either not reasonable or not related to the matters that may be taken into account. This arises under regulation 4(3). Both issues focus on the authority, on how it holds the information, and how it would retrieve it.

19. The first issue is entirely subjective to the public authority. That is the language of section 12; it is personal to the authority. The cost of compliance will be related to the way that the authority holds the information. This is consistent with Upper Tribunal Judge Markus's analysis in Cruelty Free International v Information Commissioner [2017] UKUT 318 (AAC). I agree with her that it does not matter if the way in which the information is held fails to comply with other legal obligations than FOIA. 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.

20. The second issue contains an objective element. The issue arises under regulation 4(3) of what costs 'a public authority … reasonably expects to incur in relation to the request'. The word 'reasonably' introduces an objective element, but it does so as a qualification of the costs that the authority in question expects to incur. 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. This mixture of subjective and objective elements is comparable to the approach taken to the interpretation and application of similar language in what is now regulation 100(2) of the Housing Benefit Regulations 2006."

[15] Further, the Upper Tribunal in *Commissioner of Police for the Metropolis v The Information Commissioner & Donnie Mackenzie* [2014] UKUT 479 (AAC) held as follows:

"FOIA is not a means of reviewing a public authority's record-keeping and in some way testing it against best practice. In this case the Metropolitan Police has explained how information relevant to the request was collated and stored. The fact that Mr Mackenzie thinks there are obviously better ways of undertaking that task which can be assumed to be in place is neither here nor there…it is not a statute that prescribes any organisational structure or record-keeping practice in public authorities." [§37 & §42].

[16] The Commissioner argued that she was correct in her findings and that the Appellant's second ground of appeal does not have reasonable prospects of success.

[17] The Commissioner submitted that the Appellant advanced no argument of substance that challenges the finding in the DN, and the Commissioner invited the Tribunal to strike out the appeal under Rule 8(3)(c) or dismiss the appeal.

The Hearing:

[18] The Tribunal Panel met on 13 May 2022 to consider the appeal, on the papers with the consent of the parties. On consideration and deliberation of the papers in the Open Bundle ("OB") and the submissions before us we find the Appellant has failed to persuade us through the Grounds of Appeal that the Commissioner's DN is not in accordance with the Law or that the Commissioner ought to have exercised her discretion differently.

[19] The Public Authority concerned; the Trust, provided an explanation that they are introducing steps to record ethnicity data centrally to aid the review of Trust policies and to ensure the Trust is meeting its equality duties and that they had, at the time of the request, no fast-tracking scheme for promotion. In the course of the Commissioner's investigation the Trust explained their reliance on s12(1) of FOIA on the basis as set out in detail at Paragraphs 15, 16 & 17 of the Commissioner's Response (dated 22 November 2021 at Page A26 OB) to the Grounds of Appeal. The Commissioner, reasoned correctly in our view, in finding that compliance by the Trust would exceed the appropriate limit, and it was therefore entitled to refuse to comply with the request under s12(1) of FOIA.

[20] Accordingly, we find the first Ground of appeal, (as set out at paragraph 18 a) of the Commissioner's Response, dated 22 November 2021 (see Page A28 OB) has not been established and that the Commissioners record stands.

[21] The more substantive challenge arising from the Grounds of Appeal as has been identified at paragraph 18 b) at Page A28 OB) of the Commissioner's Response dated 22 November 2021, vis: - "*The Trust has chosen a deliberate path which was not cost effective when. more direct route to the FOI would have produced the information. A simple e-mail to staff would have produced the answers"* - has in our view, been dealt with comprehensively in a letter dated 26 March 20212 to the Commissioners' office from the Chief Financial Officer of the Trust (see Pages D106 to D107 of the OB. On consideration and deliberation of the contents therein,

we find the Commissioner was correct to determine that the Trust has not chosen a deliberate non-cost-effective way of dealing with the request when the information could have been obtained by e-mailing staff and we accept and adopt the reasoning as set out in paragraphs 27 to 29 of the Commissioner's Response dated 22 November 2021 (see pages from A29 – A30 OB).

[22] In relation to s16 FOIA, the Tribunal note that the DN states that the commissioner considers the Trust to have breached Section 1(1), section 10(1) and section 17(1). This is not a matter under consideration within this appeal. Whilst we agree with the Commissioner that S 16 was not breached (which provides a duty on the public Authority to provide advice and assistance) we find that there could have been more proactive attempts utilised by the Trust to try and further narrow the response. This would be with a view to try and bring the response under the cost limit. We refer particularly to the letter of 11 March (at D109 OB) where it could have been made clearer to the requester that they were attempting to find a way to narrow the request to bring it under the cost limit. They could have also explored whether redirecting the requester to each individual Academy could have been an option as is outlined in the ICO guidance on advice and assistance.

[23] S16 provides: 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.

[24] The applicable guidance in the Code at the time of the request (and still currently applicable) states: "*Where it is estimated the cost of answering a request would exceed the "cost limit" beyond which the public authority is not required to answer a request (and the authority is not prepared to answer it), public authorities should provide applicants with advice and assistance to help them reframe or refocus their request with a view to bringing it within the costs limit."* (Our emphasis)

[25] At Paragraph 39 of the DN it is said: *"The Commissioner does not consider the complainant's request could be meaningfully refined to allow the information to be*

provided within the cost limit. As such, she is satisfied that there was no breach of section

[26] We have considered some tribunal decisions where the tribunal did not agree with findings made by the Commissioner in relation to S16 compliance. In EA/2014/0217 (also a S12 case) the tribunal upheld the DN but expressed concern and made observations about the S16 compliance. The same approach was followed in EA/2009/0037. In EA/2016/0286 (also a S12 case heard by a panel including Judge Lane, Chamber President) it was held: "*The decision notice is not in accordance with the law. We re-make the notice by substituting a finding that HM Treasury was in breach of its duty under section 16 to provide advice and assistance to the appellant. It should do so, not later than 42 days from the date of this decision".* However, on balance we are of the view that the Commissioner has cannot be said to have erred in Law or in the exercise of her discretion as we have not been so persuaded.

[27] For all the reasons above we must dismiss this appeal.

Brian Kennedy QC 20 May 2022.

Promulgate date 27th May 2022