



NCN: [2023] UKFTT 00542 (GRC)

Case Reference: EA/2022/0201

**FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

Heard: by determination on the papers

Heard on: 19 June 2023

Decision given on:

Before:

Judge Alison McKenna  
Tribunal Member Paul Taylor  
Tribunal Member Marion Saunders

**PAUL JOHN CALVERT**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER First Respondent**

**and**

**THE CHIEF CONSTABLE OF NORTHUMBRIA POLICE**

**Second Respondent**

**DECISION**

1. The appeal is dismissed.

## REASONS

### *Mode of Hearing*

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of the Chamber's Procedure Rules<sup>1</sup>.
3. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 97.

### *Background to Appeal*

4. The Appellant made an information request to the Second Respondent, who is a public authority under schedule 1 of the Freedom of Information Act 2000 ('FOIA').
5. The Second Respondent confirmed that it held some of the requested information but refused disclosure in reliance upon s. 12 (1) FOIA (costs limit). The Appellant complained to the Information Commissioner.
6. The Information Commissioner issued a Decision Notice on 19 July 2022, upholding the Second Respondent's reliance on s. 12 (1) FOIA. The Appellant appealed to the Tribunal.

### *The Decision Notice*

7. The Decision Notice recorded that the Appellant had requested information about the classification of crimes and crime numbers associated with a particular incident number.
8. The Decision Notice found that the Second Respondent had appropriately applied s. 12 (1) FOIA to the request. Further, that it had complied with its obligations under s. 16 (1) FOIA to offer advice and assistance. It required no steps to be taken.
9. The Decision Notice noted that the appropriate costs limit for the Second Respondent is £450, effectively imposing a time limit of 18 hours at £25 per hour. It accepted the Second Respondent's estimate that determining whether the requested information was held, locating it, retrieving it and extracting it would exceed the costs limit.
10. One of the information requests related to incidents involving a particular employer and/or its employees. The Second Respondent explained that it does not record a person's employer details in a standard field when recording an incident. This meant that the requested information could not be identified with electronic searches and would require a manual search of 838,700 records at an estimated 3 minutes per record. The Decision Notice noted that the Appellant did not dispute the number of records to be searched but maintained that they could be searched more quickly using a computerised search method. The Decision Notice noted that even if the

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<sup>1</sup><https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules>

search time could be reduced to one minute per record, the cost would exceed the limit.

11. The Decision Notice concluded that the Second Respondent's estimate was a reasonable one in all the circumstances and that the Second Respondent was entitled to rely on s. 12 (1) FOIA in refusing to comply with the request.

#### *The Law*

12. Section 12 of FOIA provides (where relevant) as follows:

*“(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)...*

*(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)...*

*(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.*

13. Regulation 4 (3) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 provides as follows:

*“(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”.*

14. The Upper Tribunal's Decision in *Kirkham v Information Commissioner* [2018] UKUT 126 (AAC)<sup>2</sup> set out the approach which this Tribunal should take in considering an appeal concerning s. 12 FOIA as follows:

*17. On a complaint, the issue for the Commissioner is whether the public authority dealt with the request in accordance with Part I of FOIA (section 50(1)). On appeal, the issue for the First-tier Tribunal is whether the Commissioner's*

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<sup>2</sup> [https://assets.publishing.service.gov.uk/media/5ae969fc40f0b631578af0c5/GIA\\_1055\\_2016-00.pdf](https://assets.publishing.service.gov.uk/media/5ae969fc40f0b631578af0c5/GIA_1055_2016-00.pdf)

*decision notice was in accordance with the law (section 58(1)). The latter in effect requires the First-tier Tribunal to consider afresh whether the public authority dealt with the request in accordance with Part I.*

*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. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

*"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.*

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

16. In any case where the public authority has relied upon s. 12 FOIA to refuse a request, if the appeal to the Tribunal is successful then the Tribunal would require the public authority to issue a fresh response to the original information request, confirming whether or not information is held and claiming any exemptions, on the basis that s. 12 (1) FOIA is not engaged.<sup>3</sup> Thus, a successful appeal against a s. 12 (1) FOIA determination does not automatically lead to the disclosure of the information requested.
17. The burden of proof in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant. The relevant standard of proof is the balance of probabilities.

#### *Submissions and Evidence*

18. The Appellant’s Notice of Appeal dated 24 July 2022 relies on grounds that the Decision Notice was wrong to find that the Second Respondent’s costs estimate was reasonable. This is because the Appellant submits that the Second Respondent has computer software which would allow him to carry out the relevant searches within the costs limit. The Appellant submits that, having worked for the Second Respondent himself, he is familiar with the relevant computer system’s capabilities. He also submits that the Decision Notice was wrong to conclude that the Second Respondent had complied with his duty to advise and assist pursuant to s. 16 (1) FOIA.
19. The First Respondent’s Response dated 16 September 2022 maintained his analysis as set out in the Decision Notice.
20. The Second Respondent’s Response dated 25 January 2023 disputed the Appellant’s assessment of his computer search capability and was supported by two witness statements from Hayley Young dated 26 January 2023 and 16 February 2023 respectively. Ms Young is the Head of the Information Management Department at Northumbria Police, where she has worked for 16 years. She states that she tried afresh to search the records electronically to locate the data the Appellant seeks, but as employer information is not recorded as standard, it had taken her six minutes to interrogate each crime record using the Appellant’s suggested method. Ms Young confirms that the Appellant is a former employee of Northumbria Constabulary and accepts that he had used the computer system in his work. However, she states that he had not received specialist training in the interrogation of large data sets, and that there was a limited access licence application used for this purpose. The Appellant did not have such a licence.
21. Ms Young records the view of the Chief Constable as being that the information request could not be refined and so it was not possible to offer advice and assistance as to how to bring it within the costs limit.

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<sup>3</sup> See *Malnick v IC and ACOBA* [2018] UKUT 72 (AAC)

22. The Appellant's Reply to the Second Respondent's Response dated 30 January 2023 again emphasised his personal knowledge of the Second Respondent's computer systems.
23. The Appellant has not filed any evidence to contradict Ms. Young's evidence and did not request an oral hearing at which to test her evidence before the Tribunal.

### *Conclusion*

24. As noted above, the question for this Tribunal in a s. 12 FOIA appeal is whether the public authority made a reasonable estimate of the costs legitimately involved in conducting the relevant search. In this regard, the Tribunal is not obliged to accept the public authority's evidence at face value and can question the reasonableness of the estimate. An Appellant may give evidence which is helpful to the Tribunal in asking such questions, but no Appellant can ask the Tribunal simply to substitute his or her own estimate for that of the public authority.
25. In this case, the Appellant has challenged the reasonableness of the Second Respondent's estimate, and the Information Commissioner's acceptance of it, with reference to his own claimed knowledge and experience of the Second Respondent's computer systems. We found it unhelpful that he made this assertion by attempting to give evidence in his pleadings rather than making a witness statement. We would expect any assertions made in pleadings to be supported by evidence, for example verification of his employment by the Second Respondent, how long he worked there and the nature of his duties. As it is, we only have his word for his claimed expertise, and this is not even supported by a signed statement of truth as it would be in a witness statement. Nevertheless, we acknowledge that the Appellant is a litigant in person and may have misunderstood the difference between pleadings and witness statements. We have therefore taken what he says into consideration despite these difficulties.
26. However, the Appellant's own statements about the extent of his knowledge of the Second Respondent's computer systems are contradicted by the second witness statement of Hayley Young. Her witness evidence, properly supported by a statement of truth, is that the Appellant had some basic knowledge of the systems but that he had not been trained in the use of its advanced search capability.
27. We note that the Appellant did not file further evidence or submissions after Ms Young's second witness statement. He also did not request an oral hearing at which to challenge her evidence. We conclude that her evidence is unchallenged.
28. It follows that we do not accept that the Appellant's own experience of the Second Respondent's computer systems was as extensive as he has suggested, and we accept Hayley Young's evidence had he did not have the relevant expertise to conduct the searches which he submitted could have been conducted within the costs limit. For this reason, we have discounted his claimed expertise in assessing the reasonableness of the Second Respondent's estimate.
29. Having considered the Second Respondent's estimate in the round, we conclude that it was a reasonable one and that the Decision Notice was correct to accept it. We accept that a manual search would have been needed to locate and extract the

information requested and that doing so would have exceeded the relevant costs limit.

30. Furthermore, we accept Hayley Young's evidence that she tried to search for the requested information using the Appellant's suggested method and that this was not only unsuccessful but would also have engaged s. 12 (1) FOIA in any event.
31. We conclude that there is some merit in the Appellant's submission that the Second Respondent did not provide him with adequate advice and assistance pursuant to s. 16 FOIA. It seems to us that more could have been done by the Second Respondent to explore the refinement of a very broad request at the initial stage. Nevertheless, we agree with the Decision Notice that no steps need be taken in this regard.
32. Having reached these conclusions, we are satisfied that s. 12 (1) FOIA was properly engaged by the Appellant's request. We find no error of law in the First Respondent's Decision Notice. Accordingly, we now dismiss this appeal.

**(Signed)**

**Judge Alison McKenna**

**DATE: 22 June 2023**

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