



**IN THE MATTER OF AN APPEAL TO THE INFORMATION TRIBUNAL UNDER
SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

Information Tribunal Appeal Number: EA/2009/0029
Information Commissioner's Ref: FS50073464

Freedom of Information Act 2000

Determined on the papers:
12 October 2009

Decision Promulgated on:
14 December 2009

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

Anisa Dhanji

and

LAY MEMBERS

Dave Sivers and David Wilkinson

BETWEEN

THE CHIEF CONSTABLE OF SOUTH YORKSHIRE POLICE

Appellant

-and-

THE INFORMATION COMMISSIONER

Respondent

Subject matter

Freedom of Information Act 2000 – section 12; The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 - whether the costs of removing exempt material can be taken into account by a public authority when estimating the costs of complying with a request.

Cases

Jenkins v IC and DEFRA (EA/2006/0067)

DBERR v IC and FoE (EA/2007/0072)

Home Office and Ministry of Justice v IC [2009] EWHC 1611 (Admin).

DECISION

This appeal is dismissed.

REASONS FOR DECISION

Introduction

1. This is an appeal by the Chief Constable of South Yorkshire Police (“Appellant”), against a Decision Notice issued by the Information Commissioner (“Commissioner”), on 16 March 2009. It concerns a request for information made by Mr Rob Waugh (“the Complainant”) under the Freedom of Information Act 2000 (“FOIA”), relating to the recovery of firearms by the Appellant and reports on gun and gun related crimes.

The Request for Information

2. The Complainant made his request for information on 9 March 2005. The particulars of the request are not relevant to the issues in this appeal.
3. The Appellant replied on 6 April 2005. It confirmed that it held two documents (Documents 1 and 2) falling within the scope of the request. The Appellant disclosed Document 1, but redacted certain paragraphs in reliance on the exemptions in sections 31 and 38 of FOIA. This document is not in issue in this appeal.
4. The Appellant refused to disclose any part of Document 2. It explained that the document was 187 pages long and that it contained intelligence information that would be exempt under sections 31 and 38 of FOIA. These parts would have to be redacted before Document 2 could be disclosed. The Appellant estimated that the time required to undertake the redactions would exceed the appropriate limit set out in The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the “Fees Regulations”).

The Complaint to the Commissioner

5. On 29 April 2005, the Complainant wrote to the Commissioner to complain about the way his request for information had been handled.
6. The Commissioner undertook investigations, in the course of which the Appellant explained that it would take about 15 hours to read Document 2. The redactions would take at least twice that long and this would take the time involved well over the limit of 18 hours at £25 per hour set out in the Fees Regulations.
7. Following further communications between the Appellant and the Commissioner, the Appellant provided pages 1-81 of Document 2 to the Complainant which it had redacted relying on the exemptions in sections 31 and 38 of FOIA. The Appellant explained that carrying out these redactions had taken 18 hours and that it had, therefore, now reached the limit set out in the Fees Regulations.
8. The Commissioner issued a Decision Notice setting out a number of findings. As regards Document 2, he found that the Appellant had:
 - a) correctly applied section 31(1) to certain paragraphs in pages 1-81;
 - b) incorrectly applied section 31(1) and section 38 to certain paragraphs in pages 1-81; and
 - c) incorrectly applied section 12 to pages 82-187.
9. The Commissioner ordered the Appellant:
 - (a) to disclose the information incorrectly withheld under sections 31 and 38; and
 - (b) in respect of pages 82-187, to disclose the information or to issue a refusal notice setting out any exemptions it relies on.

The Appeal to the Tribunal

10. On 31 December 2008, the Appellant appealed to the Tribunal on the grounds (in relation to Document 2), that the Commissioner had erred:
 - a) where he had found that the information was not exempt under sections 31 and/or 38;
 - b) in finding that the Appellant could not rely on section 12 in respect of pages 82-187.
11. Before the appeal was heard, the Commissioner conceded that certain paragraphs in pages 1-81 that he had ordered to be disclosed were in fact exempt. The Appellant, in turn, decided that it would no longer maintain its appeal in relation to the other paragraphs which the Commissioner had ordered to be disclosed. The result is that the appeal now only concerns pages 82-187 of Document 2, and the only issue in this appeal is whether the Appellant can rely on section 12 in refusing the request in relation to pages 82-187.

12. In determining this appeal we have considered all the documentary evidence received from the parties (even if not specifically referred to in this determination), to the extent relevant to the scope of the appeal as it now stands, including, in particular, the documents in the agreed bundle, and the parties' written submissions and replies. We have not, however, had to consider Document 2 since the issues to be determined in this appeal turn on a matter of statutory construction, and not on the contents of Document 2.

The Tribunal's Jurisdiction

13. The Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of FOIA. If the Tribunal considers that the Decision Notice is not in accordance with the law or, to the extent that it involved an exercise of discretion by the Commissioner, the Tribunal considers that he ought to have exercised his discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
14. Section 58(2) provides that on an appeal, the Tribunal may review any finding of fact on which the Decision Notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, the Tribunal will often receive evidence that was not before the Commissioner.
15. Pursuant to Rule 16 of the Information Tribunal (Enforcement Appeals) Rules 2005, this appeal has been determined without an oral hearing. Having regard to the nature of the issues raised, the Tribunal was satisfied that the appeal could be properly determined without an oral hearing.

Relevant Legislative Provisions

16. So far as is relevant, section 12 of FOIA provides 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) *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) *...*
 - (5) *The Secretary of State 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.*

17. The Fees Regulations are made pursuant to section 12(5), and so far as is relevant, they provide as follows:

3 The appropriate limit

- (1) *This regulation has effect to prescribe the appropriate limit referred to in section 9A(3) and (4) of the 1998 Act and the appropriate limit referred to in section 12(1) and (2) of the 2000 Act.*
- (2) *In the case of a public authority which is listed in Part I of Schedule 1 to the 2000 Act, the appropriate limit is £600.*
- (3) *In the case of any other public authority, the appropriate limit is £450.*

4 Estimating the cost of complying with a request – general

- (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) *A relevant request is any request to the extent that it is a request—*
 - (a) *for unstructured personal data within the meaning of section 9A(1) of the 1998 Act, and to which section 7(1) of that Act would, apart from the appropriate limit, to any extent apply, or*
 - (b) *information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply.*
- (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.*

Issues

18. The only issue in this appeal is whether, in estimating the costs of complying with a request for information under section 12, a public authority can take into account the time costs of redacting information that is exempt under FOIA.
19. The Tribunal is not called on upon, in this appeal, to determine whether any information in pages 82-187 of Document 2 is in fact exempt as claimed by the Appellant.

Findings and Reasons

Statutory Framework

20. Under section 12 of FOIA, a public authority is not required to comply with a request for information if it estimates that the cost of compliance would exceed the appropriate limit set by the Fees Regulation. In the case of the Appellant, being a public authority not listed in Part I of Schedule 1 to the 2000 Act, the appropriate limit is set at £450. In estimating the cost of compliance, only the time cost can be taken into account and that cost is to be calculated at the rate of £25 per person per hour. This means that if the Appellant estimates that complying with the request would exceed 18 hours (18 x 25 = £450), it is not obliged to comply.
21. The Fees Regulation further limits the costs that can be taken into account by stating that a public authority can only take into account the time it reasonably expects to incur in the tasks described in regulation 4(3)(a) – (d) of the Fees Regulation (“the Allowable Tasks”), i.e.:
 - (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.*
22. The issue in dispute between the parties is whether the redaction of information that is exempt under FOIA falls within the scope of the Allowable Tasks, and in particular, whether it falls within the scope of regulation 4(3)(d) as amounting to “extracting the information from a document containing it” .

Case Law

23. The parties have drawn to our attention that a differently constituted Tribunal in *Jenkins v IC and DEFRA* (EA/2006/0067), has already taken the view that the time cost involved in redacting exempt information is not an Allowable Task. It has also been drawn to our attention that *Jenkins* was approved of in *DBERR v ICO and FoE* (EA/2007/0072). We are not of course bound by previous decisions of the Tribunal, but where relevant, such decisions are likely to be influential.

24. In *Jenkins*, the Tribunal expressed the view that the time cost for redacting exempt materials did not come within the Allowable Tasks. It stated:

“... proper force and effect should be given to the language of Regulation 4(3)(d) which speaks in an unqualified manner of extracting the information, i.e. the information which has been requested out of a document which, of necessity, contains other information that has not been requested. If, as the Tribunal finds, the remaining material represents unrequested information, the act of extraction addresses itself to requested information in the sense that extraction refers to and forms part of the process of disclosure. On the other hand, extracting or as it is somewhat curiously put in the Ministry of Justice’s guidelines, “redacting” exempt information is in effect an actual deletion as the Commissioner also contends. The Tribunal agrees with the Commissioner that such an act of deletion, i.e. removal of what may be thought to be exempt material, even at the stage at which the exercise is carried out, cannot sensibly be viewed as coming within the provisions of Regulation 4(3)(d) as it is presently drafted.

The exercise which a public authority may embark on in order to consider whether an exemption applies and the extent to which material otherwise disclosable may be subject to an exemption, is a separate exercise.”

25. We would make two observations about *Jenkins*. First, although the Tribunal found that the time cost of redactions was not an Allowable Task, it said that it considered that the issue was not free from doubt. Second, in that case, the evidence was that the cost of complying with the request, regardless of any redactions, considerably exceeded the cost limits. This means that what the Tribunal had to say about redactions, was *obiter*. It did not determine the appeal which was, in any event, decided on the basis of other exemptions and not on section 12.
26. In *DBERR*, the public authority relied on other exemptions and not on section 12 at all. It would appear that the issue which arises in the present case was not actually raised by the parties and the Tribunal heard no submissions on the issue. The Tribunal acknowledged that it did not need to decide the point, but in a brief comment, it said that in its view, following *Jenkins*, the time taken to redact documents was not caught by the Fees Regulations.
27. The High Court in *Home Office and Ministry of Justice v IC* [2009] EWHC 1611 (Admin), also touched on the issue quite briefly. It simply recorded that the public authority, in that case, had not sought to rely on section 12 because it had previously been held, by the Tribunal (presumably this was a reference to *Jenkins*), that the time involved in considering whether particular information is covered by an exemption did not come within the activities set out in regulation 4(3). However, the High Court did not itself consider the issue, and was not called upon to consider whether *Jenkins* was correct.
28. In short, the above cases were determined on the basis of issues other than the time cost of redactions. That issue, however, is central to the present case – indeed it is the only issue before us, and we have had the benefit of detailed and thoughtful submissions from the parties on the issue. All this gives this Tribunal an opportunity to consider the issue in more detail than previous cases have needed to.

Interpreting the Legislation

29. As already noted, the issue of whether the time cost of redactions comes within the scope of the Allowable Tasks, is essentially one of statutory construction. The proper place to begin, therefore, is with the actual wordings of the provisions in issue.
30. We note first that the Allowable Tasks are stated in terms that indicate that the list is exhaustive. Under regulation 4, a public authority may take account “only” of the costs it reasonably expects to incur in relation to the tasks listed in 4(3)(a) – (d). This is quite different, for example, from regulations 6(3) and 7(4) in respect of charges that public authorities may levy under sections 9 and 13 of FOIA. There, the costs which a public authority can take into account “include, but are not limited to” those specified in the lists that follow. It is reasonable to conclude from the absence of the readily available wordings “include, but are not limited to” used elsewhere in the Fees Regulations, that it was intended not to include any task unless specifically listed in regulation 4(3).
31. The Appellant says that if time spent redacting exempt material was not to be included within the scope of regulation 4(3), one would have expected to find a caveat similar to that found in regulation 6(4), which commences “*But an authority may not take into account...*”
32. We do not agree. Such wordings may be appropriate where there might otherwise be doubt as to whether the costs of a particular task are or are not to be included. Regulation 6 allows a public authority to charge a fee for informing a requester whether it holds the information requested and for communicating the information to the requester. Regulation 6(3) sets out the costs which can be taken into account for this purpose. Regulation 6(4) says that a public authority cannot take into account any time costs for undertaking the specified activities. This qualification is necessary because without it, such time costs may, quite properly, be taken to be included, particularly because regulation 6(3) is not stated to be exhaustive. This is quite a different situation from regulation 4, both because the list in 4(3) is stated to be exhaustive thereby limiting its scope, and also, because on the face of it, there is nothing in regulation 4(3) that would imply that the time cost of redactions is included such that it would be necessary specifically to state that it is not included.
33. It follows from what we have said, above, that for the time cost of redactions to be included within the scope of regulation 4, it must come within the scope of regulations 4(3)(a) – (d). However, these do not make any specific reference to the time spent considering whether or not the information is exempt, let alone the task of actually redacting exempt information. The first argument the Commissioner makes therefore, is that had it been intended that such tasks be included, it is difficult to imagine that this would not have been expressly stated. The Appellant disagrees and argues that the regulations have been drafted in such a way as to indicate charges are allowable unless subsequently excluded expressly. However, while that may be the case for regulation 6 and 7, it is patently not the case for regulation 4 which, as already noted, has been drafted quite differently.
34. The Appellant says, in the alternative, that the time cost of redactions comes within the scope of regulation 4(3)(d) which covers “*extracting the information from a*

document containing it". In our view, it is clear that what regulation 4(3)(d) is concerned with is the process of differentiating the requested information from other information which has not been requested where a document contains both. The task of differentiating exempt information from the rest of the information requested is logically the next stage (whether or not for practical purposes the two tasks may sometimes be carried out simultaneously), and it is not what regulation 4(3)(d) is concerned with.

35. A number of arguments made by the parties have focused on the meaning of "extraction", "retrieval" and "redaction". We do not consider that the issue in this appeal turns on any semantics about what "extraction" means. Even if, for example, one were to say that redacting the exempt information from non-exempt information actually amounts to "extracting" such information, that would still not bring such tasks within the scope of regulation 4(3)(d). This is because regulation 4(1) says that it has effect in relation to the cost of complying with "a relevant request". Under regulation 4(2), a "relevant request" is any request to the extent it is a request for information to which section 1(1) of FOIA would, apart from the appropriate limit, "to any extent apply". Section 1(1) sets out the rights of access of any person who makes a request for information. The "information" for the purposes of regulation 4 is thus the information requested. It follows that "extracting the information" in regulation 4(3)(d) refers to extracting the requested information from other information not requested. It does not refer to extracting requested information that is not exempt from information which, though exempt, is still requested information. The Appellant says that when considering section 1(1), we should focus not just on the fact that the "information" is what has been requested, but also that it refers to what the requester is "entitled" to, and that a requester is never entitled to exempt information. We do not see how that argument advances the appellant's case since clearly the entitlement in section 1(1) is subject to the provisions referred to in section 1(2) which includes the Part II exemptions.
36. The Appellant also says that section 12 and regulation 4 are expressly concerned with complying with a request, not partial compliance, and that complying with a request encompasses the whole process commencing with when a request is made and concluding with when the information is disclosed. The Appellant says that this must, therefore, include redactions. We do not agree. If it was intended to include any and all costs associated with complying with a request, there would have been no need to specify, as regulation 4(3) clearly does, what costs can be included - and by implication, what costs cannot be included.
37. For all these reasons, we find a public authority cannot include the time cost of redaction when estimating its costs under regulation 4(3)(d).

Other factors

38. The conclusion we have reached, as set out above, based on a proper construction of the statutory provisions in issue, is, in our view, also supported by both the architecture and spirit of FOIA.
39. The general right of access to information in section 1(1) is subject to section 1(2). Section 1(2) constrains the right of access to information by reference to the possible need for clarification of the request (section 1(3)), the possible application

of exemptions (section 2), the possible requirement to pay fees (section 9), the possibility that the cost of compliance may exceed the appropriate limit (section 12), and the possibility that the request might be vexatious. Apart from the exemptions in Part II where policy judgement is involved, all other constraints relate to the good administration of requests, and in our view, reflect the legislative intent to strike a balance between the public's right of access to information on the one hand, and the concern not to over-burden a public authority on the other. We regard it as significant that in the way FOIA is set out, the good administration constraints precede the policy constraints. It is only after a request has passed through the good administration hurdles and it is clear that it is a request which the public authority must comply with, that it becomes necessary to look at a request substantively and to consider the application of the exemptions in Part II. Section 12 is a good administration constraint. It is a preliminary exercise limited to estimating the costs of the initial mechanical processing of the request for information. Insofar as sequencing is important to the arguments made in this appeal, making the cost estimate under section 12 (to scope the work entailed in order to weed out voluminous and excessively costly requests for information), precedes the separate and more focussed task of responding to those requests for information that fall within the cost limit.

40. Second, the common thread running through the Allowable Tasks is that they are of an administrative nature. A public authority which is in receipt of a request has to determine whether it holds the information, it has to locate the information and then to retrieve or extract it. The relative ease with which a public authority can make an advance estimate of the potential costs involved in carrying out these non-judgemental tasks, contrasts markedly with the difficulty that is likely to be involved in estimating how long it would take to decide whether or not any of the exemptions in sections 21 to 44 of the Act apply to some or all of the information requested, and whether the exempt material could be edited so that some part of the information requested could be released. The amount of time (and thus the costs) involved, would depend not on relatively straightforward matters such as the range or quantity of information requested and how that information is organised, but on potentially very complex matters of judgement, including, in the case of qualified exemptions, the application of the public interest test.
41. In many cases, the more finely balanced the question is as to whether certain information is exempt, the more time is likely to be required to reach a decision. This would mean, paradoxically, that the less clear it is that an exemption applies, the more likely it would be that the public authority could refuse the request. In our view, this would run counter to the spirit of public access to information embodied in FOIA. If it was intended that such tasks should be included within the scope of the Fees Regulation, we find it most unlikely that there would not be both guidance in the legislation as to how such an estimate should be made, as well as safeguards to ensure that it did not significantly undermine the access rights which are at the heart of FOIA. It is also clear from the time limits in the Fees Regulations (18 hours and 24 hours depending on the public authority), that if it covered the time cost of redactions, in addition to the tasks listed in regulation 4(3), many, if not most, requests involving exemptions, particularly multiple exemptions, could be refused. This too, in our view, could not have been the legislative intent.

Decision Notice

42. To give effect to the matters agreed between the parties as set out in paragraph 11 above, and with the consent of the parties, paragraph 58(ii) of the Decision Notice is hereby substituted with the following:

“58. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

(ii) Disclose the following information withheld under sections 31 and 38:

- Document 1 “Drugs and Gun Crime in South Yorkshire, July to September 2004” – paragraphs 1, 3 and 14
- Document 2 “The Forcewide Threat and Risk Assessment for the Police use of Firearms and Less Lethal Options” – paragraphs 1, 4-31, the first sentence of paragraph 32, paragraphs 34, 37-38, 41, 43-46, 48, 60-69, 72, 83, 84, 86, 92-94, 98, 102, 104-106, 111-114, 117-123, 127, 132-134, 139, 140, 141, 142 and 146.”

Decision

43. This appeal is dismissed.

44. Our decision is unanimous.

Signed

Date: 12 December 2009

Anisa Dhanji
Deputy Chairman