



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

**Case No. EA/2011/0214**

**ON APPEAL FROM:**

**The Information Commissioner's**

**Decision Notice No: FS50382311**

**Dated: 22 September 2011**

**Appellant: Mr Thackeray**

**First Respondent: Information Commissioner**

**Second Respondent : The National Archive**

**Considered on the papers at: Field House, London on 22 February 2012**

**Date of decision: 8 March 2012**

Before

**Christopher Hughes**

**Pieter de Waal**

**David Wilkinson**

**Subject matter: FOIA S.9 Fees, S.21 Information accessible to applicant by other means, Part VI Historical Records and Records in Public Record Office,**

**R v Secretary of State for the Home Department ex parte Jeyeantham [2000] 1  
WLR 354**

## DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal rejects the appeal for the reasons stated and this decision stands in substitution for the original Decision Notice.

Signed Christopher Hughes Tribunal Judge

Dated this 8<sup>th</sup> March 2012

### REASONS FOR DECISION

1. On 1 March 2011 the Appellant made the following information request to The National Archive:

*'Please release the following documents, in electronic format to this email address. I'd like all pages please; monochrome is fine.*

*- MH 164/8*

*- MH 153/616:-*

2. The National Archive ("The Archive") is the official archive of the United Kingdom government. The two files identified are paper files that are open to the public for inspection at the headquarters of the Archive in Kew. One of those two files has had material added to it in the last 30 years, the other has not. The latter file, consisting entirely of older material is therefore classified as a "historical record" under FOIA and therefore section 21 of FOIA does not apply to this file.
3. On 14.3.11, in response to a reply from the Archive indicating that a formal estimate of charges would be issued, the Appellant clarified that his request was being made under FOIA and requested that an internal review under FOIA be carried out. On 15 March 2011 the archive replied in the following terms:-

*"Thank you for your e-mail requesting an internal review.*

*To clarify the matter. The two files that you have asked about MH 164/8, MH 153/616 are both open records. As such they are available in full for the public to view either here in Kew or if you wish to order a copy of the record to be made for them, for which there is a charge.*

*In your e-mail of 1 March 2011, you requested an electronic copy of these files be made and sent to you. As a result of this e-mail you were advised the process that needs to be followed and also of what we also require from you before we can proceed. (Please see e-mail dated 14 March).*

*I have passed on your request to the record copying Department who handle requests for copies of files and they will be in touch in due course regarding this request providing you with details of the cost for this information so that you can decide if you wish to proceed with it.*

*As such there is no FOIA decision that can be reviewed."*

4. The Appellant challenged this and on 4.4.11, an official of the Archive informed the Appellant that the fee for complying with his request would be £647 + £773 plus postage (i.e. £1,420). He explained that the files would need to be scanned, burned to CD-ROM and posted as they were too large to email. He referred expressly to the power to charge under the Public Records Act 1958 (“the PRA 1958”) and the Public Record Office (Fees) Regulations 2005 (SI 2005/471) (“the PRO Fees Regulations”) and provided a hyperlink to the latter.
5. He also apologised for the way that the request had originally been handled and identified other (cheaper) options for the Appellant in accessing the information, namely: (1) inspecting the files on site (free); (2) inspecting the files on site (either the Appellant personally or by a representative) and photographing the pages using his own digital camera (free); (3) inspecting the files on site and using TNA’s self-service photocopying facilities (20p per page); or (4) using TNA’s photocopying service to make paper photocopies for him (45p per page).
6. On 4.4.11 the Appellant challenged this fee estimate on the grounds that the cost under FOIA had to be “reasonable”. He complained to the First Respondent (“The Commissioner”) about the Archive’s handling of his request. He alleged that it had refused to provide him with the information that he had requested and that “the public authority thinks that FOIA does not apply to them”. The Commissioner gave his preliminary view to the Appellant and the Archive on 5.4.11 that it was entitled to charge for providing copies. The Appellant indicated that he wished the Commissioner to issue a Decision Notice (“DN”). In the DN dated 22 September 2011 the Commissioner held that the Archive publishes information as to the charges it makes in its publication scheme available on its website and handled the Appellant’s request in accordance with its publication scheme; however he found the archive in breach of its duty under section 17 of FOIA to issue a valid refusal notice within the specified time.
7. The appellant challenged the Commissioner’s finding by an appeal dated 23 September 2011. He argued:-
  - *“The public authority proposes a charge of £1420 for the information I have requested, in the format I have requested it.*
  - *The charge is not reasonable. Commercial scanning services are available at around 1p/page. A reasonable charge for 505 pages concerned would therefore be around £5. The charge proposed by the public authority is 28,300% higher than this.*
  - *The public authority argues that the information is exempt from FOIA because it is available outside FOIA.*
  - *Although the information is available outside FOIA, it is not available on reasonable terms. It should not therefore be covered by the exemption.*
  - *In order to the information to be covered by the exemption, it should be available outside FOIA on terms which are broadly similar to those stated in FOIA. It is not.*
  - *Any public authority could claim that any information we was exempt from FOIA by making it available outside FOIA for an unreasonable fee or on reasonable terms; this is this something the tribunal should not support.*

- *I therefore ask the tribunal to decide that the information is the not exempt from FOIA, and should be supplied subject to the terms of FOIA."*

8. In responding to the appeal the Commissioner revised his position. He remained satisfied that the appeal should be rejected but he considered that the grounds upon which the D N was based should be altered. He now considered that the initial response of the archive on 14 March 2011 was a "fees notice" issued under section 9 FOIA which states:-

*"(1) a public authority to whom they requested information is made may, within the period for complying with section 1 (1), give the applicant notice in writing stating that a fee of an amount specified in the notice is to be charged by the authority for complying with section 1 (1).*

*(2) Where a fees notice has been given to the applicant, the public authority is not obliged to comply with section 1(1) unless the fee is paid within the period of three months beginning with the day on which the fees notice is given to the applicant.*

*(3) Subject to subsection (5), any fee under this section must be determined by the public authority in accordance with regulations might made by the Secretary of State.*

*(5) Subsection (3) does not apply where provision is made by or under any enactment as to the fee that may be charged by the public authority for the disclosure of the information."*

9. The Commissioner drew attention to the Public Record Office (Fees) Regulations 2005 which are made under section 2(5) of the Public Records Act 1958. These entitled the Archive to charge for the inspection of the records and for other services afforded by its staff. In view of this the Commissioner considered that his decision notice should be amended to find that there was no requirement on the Archive to issue a refusal notice under section 17 FOIA because the Archive was not refusing to provide the information. Rather, it was issuing or seeking to issue a fees notice in accordance with section 9 (5) of FOIA. Once the fees notice had been issued the public authority was not obliged to comply with section 1 (1) of FOIA and communicate the information.

10. In its response to the appeal the Archive endorsed the Commissioner's approach. It pointed out that the relevant regulations for considering the fees to be charged were not those made under FOIA but those made under the 1958 Public Records Act - the Public Record Office (Fees) Regulations 2005, SI 2005/471. The Archive had issued a fees notice and the specified fee was not paid in the prescribed time, accordingly the Archive was not obliged to comply with FOIA section 1(1).

11. In his submissions the Appellant, in the light of the actual behaviour of the Archive, argued that the FOIA fees regulations apply. He advanced this argument on the basis that the Archive's evidence showed that it sometimes released material for a lesser charge than that set out in its own regulations. He argued

that a correct interpretation of section 9 (5) of FOIA was that since the Archive did not treat the fee levels set out in its own regulations as "a level which must be adhered to exactly" then it could not displace the requirement that the fee charged must be reasonable. He then argued that:-

*"if we look at the case of a document which is created by a Government Department and then passed to the National Archive for storage, it is does not seem reasonable for the National Archive's fee to be higher than that which would have been charged by the Government Department for providing the same document. The level of the fee should reflect a reasonably calculated cost of providing the actual information requested; it should relate directly to the information, rather than to the public authority."*

12. He made an alternative submission that the Archive was not the same public body as the Public Record Office and therefore the Public Records Office (Fees) Regulations did not apply.

13. In considering this appeal the tribunal has borne in mind that the role of the Tribunal is laid down by S58 of FOIA:

“

*(1) If on 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 in exercise discretion by the Commissioner, that he ought to have exercised his discretion do 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."*

14. The primary issue in this appeal is whether or not the Archive is entitled to charge a different level of payment for information than would normally be the case of a public body (such as a local authority or any Department of State handling its working documents) because of a separate statutory framework to which it is a subject which is different from FOIA because it is charged with the conservation, retention, storage, retrieval and copying of documents as its primary purpose as an organisation.

15. The Public Record Office was first established by Act of Parliament in 1838. The Public Records Act 1958 transferred responsibility for public records to the Lord Chancellor. In 2003 the Archive was formed by bringing together the Public Record Office and the Royal Commission on Historical Manuscripts. The Tribunal is satisfied that the Appellant's alternative plea, that the Public Record Office (Fees) Regulations do not apply to the Archive, is without foundation.

16. One of the powers conferred on the Lord Chancellor by the Public Records Act is the power to prescribe by means of a statutory instrument the fees to be charged by the Public Record Office for the supply of copies of records and other services provided by it under S.2(5):-

*"the Lord Chancellor may by regulations made with the concurrence of the Treasury and contained in a statutory instrument prescribe the fees which may be charged for the inspection of records under the charge of the Keeper of Public Records, for authenticated copies or extracts from such records and for other services afforded by officers of the Public Record Office and authorise the remission of the fees in prescribed cases."*

17. The Public Record Office (Fees) Regulations 2005, SI 2005/471 provide :-

*".....*

*2.—(1) Subject to paragraph (3), the fees to be charged for the authentication of copies of, or extracts from, records under the charge of the Keeper of Public Records, and for other services afforded by officers of the Public Record Office, shall be those set out in column A of the Schedule, in place of those set out in column B of the Schedule.*

*(2) In the Schedule, where a charge is made by reference to a period of time, the full charge shall be payable in respect of part of that period.*

*(3) The Keeper of Public Records may remit a fee where the service performed or to be performed by him has been, or is likely to be, exceptionally simple."*

18. The Appellant's basic contention is that the Archive must determine any fee which it charges in accordance with the FOIA fees regulations (S.9(3) FOIA). This subsection however does not apply where *"provision is made by or under any enactment as to the fee may be charged by the public authority for the disclosure of the information"* (S9(5) FOIA). It is clear therefore that the Public Records Act enables a statutory instrument to be made setting out the fees which may be made in connection with the supply of information from the Archive. The 2005 Public Record Office (Fees) Regulations specify the fees to be charged. Furthermore they provide a mechanism by Regulation 2(3) for fees to be remitted. This is consistent with the wording of the primary legislation which states that the regulations specify the fees which "may" be charged which means that it is a power to charge and not a duty to charge in every case. Accordingly the tribunal is satisfied that the Archive is lawfully entitled to charge for its services at a rate different from that prescribed by regulations made under FOIA. Furthermore its own fees regulations allow it to charge at a rate less than that prescribed in the regulations. The evidence indicates that, in accordance with Treasury guidance, the Archive charges for some services less than the amount prescribed in the regulations to better reflect the actual cost of providing services. The tribunal is satisfied that this is a proper exercise of the power of the Keeper of Public Records to "remit any fee" - this expression should be taken to include "partially remit any fee". In the event that the tribunal is wrong on this point, however, it is of no assistance to the Appellant since the consequence of that is that the Archive is obliged to charge the full scale rate of fees laid down in the

2005 Regulations which would approximately treble the charge which the Appellant faces. The Tribunal is satisfied that the Archive, in its e-mails of 14 March 2011 and 4 April 2011 is in substantial compliance with its obligations under its own Fees Regulations and therefore with its obligations under FOIA. *R v Secretary of State for the Home Department ex parte Jeyeantham* [2000] 1 WLR 354.

19. The tribunal is therefore satisfied that the Archive handled the request for information appropriately and the appeal must be rejected. On a proper analysis of the evidence it is clear that the Archive was in substantial compliance with its obligations and issued a fee notice in accordance with section 9 of FOIA and so the references in the DN to a breach of section 17 (1) (c) cannot stand. In a very late submission the Commissioner invited the tribunal to find a breach of section 10(1) of FOIA in that the Archive had not complied with the request for information within the 20 working day time limit laid down. This late application was resisted by the Archive on the basis that the reliance on FOIA only became apparent in the communication of 14 March 2011 less than 20 working days before the Archive issued its fees notice.

20. The lateness of this application meant that neither the Commissioner nor the Archive have explored the issues raised by it in any detail, nor has the Appellant addressed the substantive matter. While the original request of 1 March 2011 is clearly a request for information, it must be viewed in the context of the Archive's sole function to hold and supply information in accordance with its own statutory framework; unlike any other public body where the provision of information is secondary to and ancillary to a substantive function-for example the provision of local government services. In this context it seems to the tribunal that it is at least arguable that the Archive was fully entitled to treat the request as falling within the ordinary course of its business: the provision of information in accordance with the Public Records Act 1958 rather than under the FOIA. Accordingly the tribunal does not make the finding requested by the Commissioner.

21. The tribunal directs that this decision stands in substitution for the original DN.

**Chris Hughes**  
**Information Judge**  
**8 March 2012**