



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

Appeal Reference: EA/2020/0008V

Before

Judge Stephen Cragg Q.C.

and
David Cook
Paul Taylor
Tribunal Members

Heard via the Cloud Video Platform on 14 December 2020

Between

Maya Esslemont

Appellant

and

**The Information Commissioner
Home Office**

Respondents

The Appellant was represented by Mr Maurice Frankel

The Commissioner was represented by Mr Leo Davison

The Home Office was represented by Mr Aaron Moss

DECISION AND REASONS

DECISION

1. The appeal is allowed and a substituted decision notice is issued.

MODE OF HEARING

2. The proceedings were held via the Cloud Video Platform. All parties joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
3. The Tribunal considered an agreed open bundle of evidence comprising 543 pages, a closed bundle and written submissions from all the parties.

BACKGROUND

4. On 1 May 2019, the Appellant submitted a FOIA request to the Home Office (HO), asking for:
 - the total number applications and rejections (represented as separate figures) for the following immigration outcomes amongst recognised victims of trafficking since 2016:
 - Discretionary leave
 - Limited leave to remain
 - Humanitarian protection.
5. The request was refused by the HO on 31 May 2019 on the basis that the time taken to comply with the request would exceed the appropriate limit, and that therefore section 12 FOIA applied to the request. On 14 October 2019, the Appellant confirmed her complaint to the Commissioner about the way her request had been handled.

6. During the Commissioner's investigation of the complaint the HO revised its estimate of how long it would take to deal with the complaint downwards significantly, but still claimed that the revised time of 36 hours would exceed the appropriate limit.

7. Section 1(1) FOIA sets out the basic right of the freedom of information regime:-

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.

8. Section 12(1) of the FOIA states that:-

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.

9. This limit is set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the Fees Regulations) at £600 for central government departments. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 24 hours in this case. Such costs are 'attributable to the time which persons undertaking any of the activities mentioned in paragraph (3)[see below] on behalf of the authority are expected to spend on those activities'.

10. Under regulation 4(3) of the Fees Regulations, when making its cost estimate, the public authority may take account *only* of the costs it reasonably expects to incur in relation to the request in carrying out four specified activities, namely:

- (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.

11. The 2018 Code of Practice also refers to certain activities where it will not be possible to rely on section 12:-

6. Cost limit

6.3 Public authorities can only include certain activities when estimating whether responding to a request would breach the cost limit. These are:

- establishing whether information is held;
- locating and retrieving information; and
- extracting relevant information from the document containing it.

6.4 Other factors including redaction time or any other expenses likely to occur in cost limit calculations cannot be included when estimating whether the response would exceed the cost limit.

12. The Commissioner's decision notice of 5 December 2019 recorded the HO's reasons as to why it would take 36 hours to deal with the request. In essence, the HO explained that the information was not readily available on its Case Information Database (CID) and that bespoke systems would need to be set up to "... to write the code, apply the business rules and to extract and process the data to find the requested figures". The HO provided the Commissioner with details of its calculation in support of its estimate that it would take more than 24 hours to respond to the request in this case.

13. The Commissioner provided a short summary in the decision notice which reads as follows:-

35. ...this case turns on whether the estimate provided by the Home Office was reasonable.

36. The Commissioner considers that a reasonable estimate is one that is "...sensible, realistic and supported by cogent evidence".

37. In this case, the Home Office presented arguments which focused on it having to check approximately 4,000 cases.

38. From the evidence she has seen during the course of her investigation, the Commissioner is satisfied that the Home Office has demonstrated that it would exceed the appropriate limit to locate, retrieve and extract the requested information.

39. Section 12(1) does therefore apply and the Home Office is not required to comply with the request.

THE APPEAL AND RESPONSE

14. On 2 January 2020, the Appellant filed an appeal against the decision notice, in essence questioning the estimates and methodology adopted by the HO and suggesting that the information could be provided within the relevant costs limits.

15. At that point matters took an unexpected turn. On 3 June 2020, the Commissioner filed a response to the appeal in which she said:-

The Commissioner has reviewed her position and considers that s.12 FOIA is not engaged in respect of the 1 May 2019 request, which is the only request within the scope of the Decision Notice. Accordingly the Commissioner consents to a substituted Decision Notice requiring the Home Office to issue a fresh response to the 1 May 2019 request without reliance on s.12 FOIA. However the Commissioner considers it appropriate for the Home Office to be given an opportunity to join the proceedings in light of the Commissioner's change of position.

16. The Commissioner explained further at paragraph 17 of the Response when she said:-

17. ...the Home Office may have included activities within the s.12 FOIA estimate which were not within the permitted activities under regulations 4(3)(a)-(d) of the Fees Regulations. The Commissioner did not consider the time in which it would take for the computer system itself to run and sort the data with no additional cost or direct staff involvement, or the time taken to conduct quality assurance / data checking, to be capable of inclusion in the estimate. However the extent to which the estimate would be impacted was unclear.

17. The Commissioner carried out further investigations and enquiries and the Response sets out the HO reply in some detail which is repeated here, in part:-

...[O]ur projected timescale for completing the data for the response would actually take around 36 hours....

...

This timescale breaks down as follows. Firstly, a report would first have to be built and run to identify the 4000 individuals. This is expected to take approximately 4 hours. Those subjects would then need unique person identifiers coded into a number of subsequent reporting criteria as a condition of those specific reports. The software used to extract that data has a limit on the number of person identifiers which can be coded into the report, and therefore the bespoke report would need running on 4 separate occasions to extract the data. It has been estimated that the building and running of this data to take upwards of 8 hours.

This extracted data would then need to be embedded into a bespoke database, requiring a developer to create it and code a number of complex queries and business rules. The development and data checking to ensure correct and accurate rule applications would take, at least, a further 16 hours work.

None of this data is routinely available in a pre-defined data set, so would also require quality assurance, and confirmation of validity alongside operational colleagues responsible for a range of different deliveries to ensure that the data was indeed correct. Due to the complexity of the query and subsequent database development, the quality assurance process by operational and senior staff would be complex and would add approximately 8 hours. In total therefore we conservatively estimate the request would take approximately 36 hours to provide the information requested. I can confirm that this estimate is based upon the quickest method of gathering the requested information.

...

Whilst the timings above are estimations, they are consistent with routine activity and are conservative estimates....

18. The Commissioner states that HO has provided a revised costs estimate set out in a number of stages. We list these here as these stages became the focus of evidence and submissions during the hearing of the appeal.

Stage	Description	Time estimate (hours)	Manual (person hours) or automated (computer processing hours)	Basis of estimate
1	Determine and design the most accurate methodology to answer the question (this would be particularly difficult in this instance as the question is not straightforward or part of pre-existing reporting and could be answered in various different ways. Input from operational colleagues and multiple PRAU teams would be required to define the reporting criteria).	4	Manual	Previous experience of similar requests
	Extract records of people with a			

2	positive Conclusive Grounds (CG) Decision since 2016 from regular automated PVOT report			
	Extract records from report	0.5	Manual	Previous experience of similar requests
	Check to confirm records extracted correctly, as part of standard process for producing correct data (see note below).	0.5	Manual	Previous experience of similar requests
3	Business Objects (BO) query build to extract data for all other applications and outcomes for the people in Stage 2			
	Build query	0.5	Manual	Test run
	Verify query working correctly	0.5	Manual	Test run
4	Run BO query. The physical time input from the analyst during this process would be around 15 minutes: it is estimated that there would be 4,000 people identified in Stage 2, who would have to be run through BO in four lots because of the software size limit. As such the analyst would be required to trigger this query every hour. During this time it would be possible for the analyst to undertake other work: however this would be limited as no other tasks requiring BO could be performed during this time and therefore we have included this time (separately) in the total estimate because if this time is discounted completely then it	4	Computer	Test run

	would not recognise the impact this activity has on the availability of staff for other work (and opportunity cost even if not a direct cost).			
5	Build and assurance of Access database to identify relevant cases and categorise applications and outcomes in accordance with methodology planned in stage 1. Given that this would be a complex and new dataset, it would require running require multiple iterations of the data to ensure the database is reporting the data correctly. It would also require comparisons to previous related datasets, checking samples of records and confirming figures are as expected with operational colleagues.			
	Initial design and build of the database.	10	Manual	Previous experience of similar requests
	Assurance and verification of the outputs.	4.5	Manual	Previous experience of similar requests
6	Presentation of data in final output form (this would take longer than for more straightforward requests given the complexity of the question and data and the need to make sure each element had been presented and explained correctly and in an understandable way).			
	Presentation of data in Excel,			

	including initial articulation of clarifying notes to explain to the requestor what the data related to and any caveats.	2	Manual	Previous experience of similar requests
	Assurance of final response, focusing on ensuring the response is clearly presented and understandable to a third party, with detailed notes explaining what the data relates to and any caveats that may apply.	2	Manual	Previous experience of similar requests
Total		28.5		

19. Thus the revised estimate from the HO was a total of 28.5 hours to deal with the request (down from 36 hours). The Commissioner set out her analysis as to what should be excluded, in her view, from this estimate:-

- (a) Stage 4: Running of Business Object Query: The Commissioner only considers the 15 minutes of manual work required to run the task to be capable of inclusion. Given that four queries would need to be undertaken this would amount to 1 hour, resulting in the estimate being reduced by 3 hours...
- (b) Stage 5: Assurance and Verification of the Outputs: The Commissioner does not consider this activity to fall within the permitted activities and therefore the estimate is reduced by 4.5 hours.
- (c) Stage 6: Presentation in Excel and Assurance of Final Response: The Commissioner does not consider this activity to fall within the permitted activities and therefore the estimate is reduced by 4 hours. The Commissioner does [not] consider there to be any provision within the Fees Regulations to suggest that a public authority can take into account the cost of creating a specific format to produce the requested information rather than the more limited task of extracting the data as permitted under the Fees Regulations.

20. On this basis the Commissioner's response identified only 17 hours of time. The estimate is therefore below the appropriate limit for a

government department under the Fees Regulations and the Commissioner accepted that s.12 FOIA is not engaged.

21. In addition, the Appellant took issue with the time estimate for Stage 1 (determine and design the most accurate methodology). The Appellant considered that the HO's time estimate of four hours was excessive.

THE APPEAL HEARING

22. For the purposes of the appeal hearing, therefore, these were the four areas at issue for the witnesses and for submissions.

23. The HO relied on the evidence of two witnesses: Dr Christopher Seward and Mr Richard Green. They are respectively the Head and Deputy Head of the Performance Reporting and Analysis Unit ("PRAU"). Both provided witness statements for the appeal, and both gave evidence at the hearing and were cross-examined by Mr Davison for the Commissioner and Mr Frankel for the Appellant.

24. Dr Seward's evidence concerned the HO's calculation of the time estimate from which it concluded and maintained that the s12 FOIA exemption is engaged in this case. He explained the need to define and create database queries to produce summary statistics that cannot be derived directly, as in this case, from one of the HO's assured datasets.

25. Dr Seward explained that in his view the "assurance" step in Stage 5 is an essential part of the process for creating the new dataset as it involved checking whether or not the dataset contains all the information needed and expected (and if not repeating the process until it does). Dr Seward then explained that the 'presentation' in Stage 6 was essentially the process of extracting the statistics from the assured dataset file to present in the final output document, which is an Excel file 'because it allows for

easy manipulation of data into output tables and efficient assurance checks that figures have been copied across correctly', and which can be presented in a way the requester can understand – including the provision of explanatory notes. He called this stage 'a necessary part of the extraction process itself'.

26. Another issue discussed during the hearing was, for the purposes of Stage 4, whether the staff member carrying out the search would be available for additional work while the computer was running. Dr Seward described that the software can only search a maximum of 1,000 case or person reference numbers in a single query. The computer would only need attention of the staff member for 15 minutes every hour, to re-set the system after each search. On the other hand that member of staff would not be able to use the Business Objects system for any other purpose while the search was running.

27. Dr Seward's evidence was to the effect that he would expect the staff member to be available for at least some additional tasks during this period.

28. Mr Green's evidence provided support for Dr Seward's conclusion that the time estimate of 28.5 hours was reasonable. His evidence was also that the extraction process which the Appellant's request necessitated has now in fact been carried out and took more than 28.5 hours. Mr Green explained how this time was spent, and gave a breakdown comparing the estimated time to the actual time.

29. One of the issues which arose during the hearing was, for the purposes of Stage 4, whether the staff member carrying out the search would be available for additional work while the computer was running. Dr Seward described that the software can only search a maximum of 1,000 case or person reference numbers in a single query. The computer would only

need attention of the staff member for 15 minutes every hour, to re-set the system after each search. On the other hand that member of staff would not be able to use the Business Objects system for any other purpose while the search was running.

30. Dr Seward's evidence was to the effect that he would expect the staff member to be available for at least some additional tasks during this period, whereas Mr Green was less certain as to whether this was possible. The Commissioner's approach was that only 15 minutes every hour should be counted for the purposes of the s12 FOIA calculation.

31. Mr Moss on behalf of the Home Office, supported this evidence in submissions, arguing in particular that the steps in Stages 5 and 6 were part of the extraction process in presenting the material in an understandable manner that had been assured by the HO, such that the HO was satisfied that it had provided information which accurately reflected the data which it held in its various databases. The HO skeleton argument submits that:-

Only after carrying out Stage 6 could the HO be satisfied that it had provided information which accurately reflected the data which it held in its various databases. At no time did the HO carry out steps to verify the accuracy of the raw data. The only assurance and verification measures which were envisaged were those which were necessary to assure and verify the extraction process itself.

32. Having heard the evidence of Dr Seward and Mr Green, Mr Davidson for the Commissioner submitted that on balance the 4.5 hours listed for the verification process in Stage 5 was not a reasonable amount to be included in the estimate. Mr Davidson noted that verification of the process was already built into previous stages, and that although further verification was commendable it could not be said to be necessary to deal with the request. He submitted that the four hours in Stage 6 that related to

presentation was squarely outside the parameters of regulation 4(3) of the Fees Regulations.

33. In relation to the amount of time to take into account for Stage 4, Mr Davidson noted that public servants should be expected to use their time productively, while not being able to pursue main tasks because the computer was running the necessary programme.

34. Mr Frankel supported these submissions and referred to the case of *Chief Constable of South Yorkshire Police v Information Commissioner* [2011] 1 WLR 1387, which we will refer to further below, in which Keith J explored what the process of 'extraction' for the purposes of regulation 4(3)(d) of the Fees Regulations could include.

DISCUSSION

35. In the case of *Kirkham v Information Commissioner* [2018] UKUT 126 (AAC), the Upper Tribunal explained how to approach the issues in this case. Once it is established that the public authority has made an estimate:-

18. ...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....

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.

36. In relation to Stage 1, we accept the HO evidence on the estimate for the time spent determining and designing the most accurate methodology. The HO cited the Kirkham case (paragraph 19) to support its argument and that the cost of compliance will be related to the way that the authority holds the information. Further, the Upper Tribunal, when it said in *All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner* [2011] UKUT 153 (AAC) at paragraph 47 that “only the public authority knows what information it holds, where it holds it”; the HO has explained in detail how it holds information and why this particular information is difficult to extract and we accept that explanation. Although the Appellant is of the view that there may be better and quicker ways of obtaining the information we accept the detailed evidence of Dr Seward and Mr Green as to how and why this information was not easily available, and the bespoke steps that had to be adopted to obtain the information. The time estimates included in Stages 1-3 are reasonable, in our view.

37. In relation to Stage 4, we accept that the staff member involved in carrying out the search would have to spend some extra time each hour on top of the 15 minutes checking the computer and the functioning of the search but, with Dr Seward, we would expect some time to be available for other work. Doing the best we can we think that the reasonable time estimate to be counted towards the task in Stage 4 should be two hours and not four hours. That would allow for an extra 15 minutes per hour for the staff member to be involved in the computer search process, and therefore on that basis two hours should be deducted from the total of 28.5 hours.

38. In relation to Stage 6 the HO argues that until the presentation of the data in a way which provided the information requested by the Appellant, the data had not been extracted. It was estimated that it would take two hours to transfer the data into the format for presentation including the addition of brief notes which provide the caveats to the data. The final two hours of the time estimate were intended to be the assurance of the data extraction task and the final product by a supervisor.

39. The Commissioner's submission was that she does not consider there to be any provision within the Fees Regulations to suggest that a public authority can take into account the cost of creating a specific format to produce the requested information rather than the more limited task of extracting the data as permitted under the Fees Regulations.

40. As mentioned above we were referred to the South Yorkshire case. In that case Keith J commented at para 28 that:-

28. The statutory scheme permitted the Secretary of State to provide for how the cost of complying with a request for information is to be estimated. Section 12(5) of the 2000 Act in effect enabled the Secretary of State to provide that only part of the cost of complying with a request for information can be taken into account by a public authority when estimating whether the appropriate limit will be exceeded. It was pursuant to that power that the Secretary of State limited the public authority's estimate of the cost of complying with the request to the tasks referred to in regulation 4(3). There is no basis for giving the words extracting the information in regulation 4(3)(d) a wider meaning than that which would otherwise be appropriate simply because complying with a request for information may well involve the completion of other tasks as well.

41. At paragraph 29, the High Court sets out a list of tasks which have *not* been included in regulation 4(3) of the Fees Regulations including 'in the

event that the information is to be disclosed, disclosing the information to the person who made the request’.

42. At paragraph 31, Keith J provides a definition of what is included in paragraph 4(3)(d):-

It follows that the words extracting the information from a document containing it in regulation 4(3)(d) can only refer to extracting the information which has been requested from a document which contains the information which has been requested, thereby distinguishing it from the information in the document which has not been requested.

43. In our view this does not fit with the description of what the HO says it was doing in Stage 6. We do not dispute that this work was done by the HO but we do not see how Stage 6 could be said to be ‘extracting the information from a document containing it’ for the purposes of regulation 4(3)(d) of the Fees Regulations, or any other of the list of items for which charges can be made in regulation 4(3)(d). Stage 6 entails (i) presenting the results in Excel; (ii) preparing explanatory notes; and (iii) carrying out further assurance and verification. We agree with the Commissioner, therefore, that the four hours in Stage 6 should be deducted from the estimate.

44. Thus, on the basis of our analysis of Stage 4 and Stage 6 in our view a total of 6.5 hours should be deducted from the estimate of 28.5 hours, which makes a total of 22 hours which brings the estimate within the 24 hour time limit set out in the Fees Regulations.

45. This means that, strictly speaking we do not need to consider the position in relation to Stage 5. The Commissioner’s skeleton argument comments that although some degree of checking is involved in any extraction process the HO is required to justify the amount of “verification” and “quality assurance” included in its estimate as reasonable. The

Commissioner notes that checking and verification would have been continuing throughout the process from the creation of the search criteria onwards. The Commissioner does not consider this activity to fall within the permitted activities and therefore the estimate is reduced by a further 4.5 hours.

46. However, we note that the checks that occur under Stage 5 are necessary, according to the HO, because 'Given that this would be a complex and new dataset, it would require running multiple iterations of the data to ensure the database is reporting the data correctly. It would also require comparisons to previous related datasets, checking samples of records and confirming figures are as expected with operational colleagues. These seem to us to be significant tasks and we accept the evidence that, with the systems the HO has in place, they are necessary to ensure that the process is working. Although the estimate of 4.5 hours seems on the high side it does not seem to us to be unreasonable.

CONCLUSION

47. On that basis this appeal is allowed.
48. The Tribunal issues a substituted decision notice which requires the Home Office to issue a fresh response, by 5 February 2021, to the 1 May 2019 request without reliance on s.12 FOIA.

Stephen Cragg QC

Judge of the First Tier Tribunal

20 January 2021.