



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0124
Information Commissioner's Ref: 50085372

Heard at Procession House, London, EC4
On 2nd June 2008

Decision Promulgated
17th June 2008

BEFORE

CHAIRMAN

ANNABEL PILLING
and

LAY MEMBERS

SUZANNE COSGRAVE
ROSALIND TATAM

Between

IAN FITZSIMMONS

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

THE DEPARTMENT FOR CULTURE, MEDIA AND SPORT

Additional Party

Representation:

For the Appellant: Ian Fitzsimmons
For the Respondent: James Cornwell
For the Additional Party: Richard Dayle

Decision

The Tribunal upholds the Decision Notice dated 9th October 2007 and dismisses the Appeal.

Reasons for Decision

Introduction

1. This is an Appeal by Mr. Ian Fitzsimmons against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 9th October 2007. The Decision Notice relates to a request for information made by Mr. Fitzsimmons to the Department for Culture, Media and Sport (the 'DCMS') under the Freedom of Information Act 2000 (the 'FOIA').
2. The Commissioner concluded that the DCMS was entitled to refuse to disclose the information on the basis of section 12(1) of FOIA, which provides that a public authority is not obliged to comply with a request for information if it estimates that the cost of complying would exceed the appropriate limit.

The request for information

3. By an e-mail sent 13th June 2005, Mr. Fitzsimmons made a request (the 'Request') for information to Tessa Jowell at the DCMS:
 - (1) Please provide a copy of all the expense statements submitted by Mrs Sue Street for the past two years. Such statements should be authorised and certified by a named official/manager.
 - (2) Please provide details and a copy of all the records of all the hospitality received by Mrs Sue Street in her role of permanent secretary at the DCMS for the past two years.
 - (3) Please provide a copy of the record of all matters discussed and arising from 1) and 2) above.

- (4) Please provide details and copies of all expense statements submitted by Tessa Jowell to the DCMS and any other government department for the past two years.
 - (5) Please provide details of all hospitality received from the BBC by Tessa Jowell for the past two years.
 - (6) Please provide a copy of the record of all the matters discussed and arising from 4) and 5) above.
4. The DCMS replied on 26th July 2005. It apologised for the delay in replying. It confirmed that it did hold the information requested but that it was not able to comply with the Request because the cost in doing so would exceed the relevant fees limit:

“..the Department is not in a position to comply with the requests you made, because the cost to the Department of complying with them would exceed our fees limit of £600. Since the requests relate to the same or similar information, namely, as you state in your e-mail, the relationship between the DCMS and the BBC, we have, in accordance with the legislation, considered the cost of all the requests taken together.

“The £600 limit is calculated by estimating the amount of time and official would spend looking for, identifying and extracting the information and preparing it to be sent out, where the official's time is charged at £25 an hour.”

5. The DCMS added that if Mr. Fitzsimmons were able to narrow the scope of the Request, for example by restricting the time frame or selecting those items he considered the most important, it might be possible to comply, subject to the application of any exemptions.
6. Mr. Fitzsimmons was dissatisfied with this response and requested internal review by e-mail sent on 26th July 2005. He stated, inter alia, that he had made six discrete and individual requests for information

and that he was simply asking for a photocopy of specific information which the DCMS agreed it held. He did not indicate that he would narrow the scope of his Request in any way.

7. On the same date, that is 26th July 2005, Mr. Fitzsimmons wrote to the Commissioner complaining that the DCMS were in default of the statutory time frame and had wrongly construed his requests as a single request for information.
8. Mr. Fitzsimmons has stated that he did not receive the response to the internal review. This was sent by e-mail dated 12th September 2005 and the DCMS confirmed that the e-mail had left the DCMS network. We are satisfied that this was an appropriate and reasonable means by which to communicate, particularly as the initial Request was made by e-mail by Mr. Fitzsimmons.
9. The internal review upheld the original decision that the information requested should not be disclosed because the cost to the DCMS of complying would exceed the fees limit of £600. The reviewer also explained why the DCMS took the view that the requests were related and could properly be aggregated for the purpose of calculating the fees limit under FOIA. He also stated:

“As the DCMS reply of 26 July made clear, the Department holds the information you requested. However, much of it is in a format that would require an extensive search through records and a judgement to be made about whether particular documents or extracts of documents were relevant or not. It is our view that it would take substantially more than the 24 working hours covered by the £600 fees limit to locate, retrieve and extract all the information you requested.

“I repeat the statement made in the Department’s letter of 26 July that if you were able to narrow the scope of these requests we may be able to comply within the fees limit...”

He also provided a contact name, telephone number and e-mail address should Mr. Fitzsimmons need any help or advice in sending a narrower request or if he had any other questions about this letter.

The complaint to the Information Commissioner

10. As indicated above, Mr. Fitzsimmons contacted the Commissioner on 26th July 2005 to complain about the way his Request had been handled. This was before the internal review. It does not appear that he had any response to this letter until 4th August 2006. The Complaints Officer requested clarification of whether the complaint related solely to the delay in the DCMS response to his initial Request or whether he also complained about the content of the response.

11. In the course of further correspondence between the Complaints Officer and Mr. Fitzsimmons, Mr. Fitzsimmons repeated his contention that the original Request for information contained six discrete and separate requests. He also stated that the DCMS had not considered whether it could respond to one request within their budget and that the DCMS had never responded to his request for an internal review. The Appellant had made another complaint to the Commissioner about a wholly different request for information made to the DCMS. There was some confusion initially about which complaint was being dealt with.

12. The Complaints Officer sought clarification from the DCMS of how the cost estimate was made and whether any part of the Request could be complied with without exceeding the cost limit. There was a not inconsiderable delay before the DCMS provided that clarification. The DCMS responded substantively to the Complaints Officer by e-mail on 20th November 2006 stating, inter alia:

- (1) The internal reviewer had made inquiries of the Private Offices of the Permanent Secretary and the Secretary of State to

ascertain the working practices, systems and records that were in place to enable an assessment to be made of the DCMS's ability to answer the request. This also included an assessment of the DCMS's accounting and management systems to see if, and to what extent, these may be able to assist with locating, retrieving and extracting the information requested within the cost limit;

- (2) To acquire the level of detail required by Mr. Fitzsimmons would need a detailed search through a large volume of information;
- (3) The reviewer estimated that the time required to determine whether the DCMS holds the information as well as locating, retrieving and extracting it would be 3 working hours for request 1, 20 working hours for request 2, 16-40 working hours for request 3, 16-32 working hours for request 4, 1 working hour for request 5 and 24-48 working hours for request 6, that is, 80-144 working hours in total.
- (4) The reviewer accepted and concluded that it would be impossible to produce the information requested within the 24 hours/£600 limit.
- (5) The DCMS believed "it would be speculative and presumptive for the Department to try and ascertain to what extent any single question, permutation of questions or elements of questions could be definitely undertaken within the costs limits. To do so, the Department would need to spend considerable time and resource to establish whether and what was feasible without any indication that this would meet the applicant's preferences." Mr. Fitzsimmons did not take up the invitation to refine or narrow his request.

13. The Complaints Officer wrote to the DCMS on 24th November 2006 requesting that it supply Mr. Fitzsimmons with the breakdown of the

time estimated in dealing with each aspect of his Request and provide him with a response to parts 1 and 5 of his Request.

14. The DCMS responded on 8th December 2006 stating that, while accepting the obligation under section 16 of FOIA to advise and assist a requestor to bring the request within the appropriate limit, it was of the view that there was no duty to disclose the breakdown of the estimated costs. It also stated that as Mr. Fitzsimmons had not given an indication whether he wished to narrow his Request as suggested by the Complaints officer, or at all, "it would be presumptuous for the Department to assume that Mr. Fitzsimmons would wish us to answer parts 1 and 5 as a means of satisfying his entire request."

15. A Decision Notice was issued on 9th October 2007. There has been no explanation as to what, if anything, occurred between December 2006 and October 2007 in relation to this matter.

16. In summary, the Commissioner concluded that:

- (i) the DCMS had failed to comply with its obligation under section 10 of FOIA to respond to the Request for information within 20 working days. He found that this breach did not necessitate any remedial action; and
- (ii) the DCMS dealt with the Request in accordance with section 12 of FOIA in that it accurately estimated that the cost of complying with the Request would exceed the appropriate limit.

17. Whilst the Commissioner did not find that there had been a breach of section 16 of FOIA, he noted that the DCMS should have provided a breakdown as to how the cost estimate was formed and that the DCMS should have offered to disclose information in response to those parts of the Request that could be met without exceeding the cost limit.

The Appeal to the Tribunal

18. Mr. Fitzsimmons appealed to the Tribunal on 15th November 2007.

19. The grounds of appeal were clarified with Mr. Fitzsimmons at the Directions Hearing to be:

- (a) the Commissioner's interpretation of FOIA that more than one request for information could not be contained in one letter;
- (b) the Commissioner endorsed the right of the DCMS not to provide a detailed time estimate breakdown when refusing to comply with a request on the grounds of cost;
- (c) the Commissioner endorsed the right of the DCMS not to work up to the prescribed time limit when responding to a request;
- (d) the Commissioner did not execute an honest review of the time estimates prepared by the DCMS;
- (e) the Commissioner was not impartial in the formulation of the Decision Notice;
- (f) the Commissioner took 29 months to issue his Decision Notice in response to the original complaint, thereby deliberately and maliciously suffocating the public concern that existed within the request;
- (g) the Commissioner failed to reprimand the DCMS for its failure to comply with FOIA from the outset.

20. The Tribunal joined the DCMS as an Additional Party.

21. The Appeal has been determined without a hearing on the basis of written submissions and an agreed bundle of documents. This included a Chronology and Statement of Facts that was not agreed by Mr. Fitzsimmons as it did not cover, in his opinion, every piece of correspondence that existed. We consider the Chronology as

providing nothing more than a very brief summary of the key stages of the process.

22. Although we may not refer to every document in this Decision, we have considered all the material placed before us.

The Powers of the Tribunal

23. The Tribunal's powers in relation to appeals under section 57 of the FOIA are set out in section 58 of the FOIA, as follows:

(1) 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.

24. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether FOIA has been

applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

25. The question of whether DCMS was entitled to refuse to disclose the information on the basis that it estimated that the cost of complying would exceed the appropriate limit is a question of law based upon the analysis of the facts. This is not a case where the Commissioner was required to exercise his discretion.

The questions for the Tribunal

26. The Tribunal has concluded that the relevant issues in this Appeal are as follows:

- a) Was the DCMS entitled to aggregate Mr. Fitzsimmons' requests?
- b) Did the DCMS properly apply section 12 of FOIA?
- c) Was there an obligation on the DCMS to "work up to" the appropriate limit?
- d) Should the Commissioner have dealt differently with the breach of section 10 of FOIA?
- e) Should the Commissioner have dealt with any other breaches of FOIA?
- f) Did the Commissioner fail to conduct an honest review or fail to act impartially?

Legal submissions and analysis

27. Under section 1 of FOIA, any person making a request for information to a public authority is entitled to be informed if the public authority holds that information and, if so, to have that information

communicated to him. This obligation is subject only to section 2, 9, 12 and 14 of FOIA.

28. The effect of section 12 of FOIA is to render inapplicable the general right of access to information contained in section 1 if a public authority estimates that the cost of complying with the request would exceed the appropriate limit:

Section 12

(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 is such amount as may be prescribed, and different amounts may be prescribed in relation to different cases."

(4) The Secretary of State 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 request is to be taken to be the estimated total cost of complying with all of them.

(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.

29. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the 'Fees Regulations') prescribe the appropriate limit referred to in subsection (3) and the matters in subsections (4) and (5).

30. In the case of a public authority which is listed in Part 1 of Schedule 1 of FOIA, which includes all government departments, the appropriate limit prescribed in Regulation 3 is £600.

31. Regulation 4, to the extent that it is relevant to this appeal, provides as follows:

4.-(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.

(3) In a case in which this regulation has effect, a public authority may, for the purposes 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.

32. Since the time cost is to be estimated at the rate of £25 per person per hour, this allows for 24 hours of activity before the £600 limit is reached.

33. Regulation 5, to the extent that it is relevant to this appeal, provides as follows:

5.-(1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply, 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 total costs which may be taken into account by the authority, under regulation 4, of complying with all of them.

(2) This regulation applies in circumstances in which-

(a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and

(b) those requests are received by the public authority within any period of sixty consecutive working days.

34. Although these are clearly the legislative provisions that the DCMS and the Commissioner had regard to in dealing with Mr. Fitzsimmons' Request, his request for an internal review and the subsequent complaint, they were not specifically referred to at any stage until the Notice of Appeal to this Tribunal was lodged.

35. In particular, in the initial refusal of 26th July 2005, although it was stated that "we have, in accordance with the legislation, considered the

costs of all the requests taken together”, there was no explanation as to what the legislation provided and how those provisions had been applied. The refusal to comply with the Request was put in the following terms with no reference to the Fees Regulations:

“..the Department is not in a position to comply with the requests you made, because the cost to the Department of complying with them would exceed our fees limit of £600.”

36. In dealing with the internal review, it was stated that “the cost of Department complying with your requests would exceed the fees limit of £600...the cost of complying with all the requests taken together should be considered for this purpose.” The reviewer did go on to explain why the requests were regarded as related such as could properly be aggregated for the purpose of calculating the fees limit under FOIA, but again Mr. Fitzsimmons was not given a full explanation with reference to the Fees Regulations.

37. The Decision Notice issued by the Commissioner also failed to draw Mr. Fitzsimmons’ attention to the Fees Regulations. We were troubled by the description of the “Commissioner’s general approach” being that where a number of information requests are made within a single item of correspondence it is appropriate for these to be considered a single request, unless the requests were entirely unrelated. The Fees Regulations prescribe the circumstances in which requests may be aggregated for the purposes of section 12 of FOIA and should be followed by a public authority and the Commissioner. It is wrong to describe this as a “general approach” and understandably misled Mr. Fitzsimmons.

Was the DCMS entitled to aggregate Mr. Fitzsimmons’ requests?

38. Mr. Fitzsimmons submitted that it is lawful to make several requests for information in the same document and that the DCMS decided to aggregate his requests for convenience and “other spiteful motives.” He submitted that the requests related to different topics, that is, to

expenses, hospitality and meeting notes, and related to two different individuals in different occupational categories.

39. The Commissioner argued that if the items requested relate to any extent to the same or similar information, a public authority is entitled to aggregate the individual requests whether they are contained in one document, as is the case here, or a number of documents received within a period of 60 consecutive working days. It was submitted that it was plain the six requests did relate to some extent to the same or similar information because, inter alia:

- (1) All the requests related to expenses of the Permanent Secretary of the DCMS or the Secretary of State;
- (2) The Appellant himself stated that the requests all related to the relationship between the BBC and the DCMS;
- (3) Request (3) was expressly stated to relate to requests (1) and (2), while request (6) was expressly stated to relate to requests (4) and (5); and
- (4) Save for the identity of the person about whom the requests were made, requests (1) to (3) mirrored requests (4) to (6).
- (5) The Request was expressly headed "Request for Information" in the singular.

40. The DCMS endorsed the Commissioner's submissions. In relation to Regulation 5 of the Fees Regulations, it submitted that it was plain that the requests related to the same or similar information, although it did not elaborate. We were provided with a statement prepared by Sarah Taylor, a civil servant at the DCMS and Private Secretary to the current Permanent Secretary. This set out in some detail how the record keeping and accounting systems of the DCMS' Private Offices operated at the time of the request. It would have been helpful if this witness had addressed the reasoning why the requests were

aggregated and treated as requests relating to any extent to the same or similar information.

41. As noted above, it was unfortunate that Mr. Fitzsimmons was unaware of the existence of the Fees Regulations until the Appeal stage. It was misleading for the Commissioner to suggest the proper application of section 12 of FOIA and Regulations 4 and 5 of the Fees Regulations was simply a “general approach”. Additionally, the figure of £600 was not one reached arbitrarily by the DCMS but again provided for by the Fees Regulations.

42. Mr. Fitzsimmons does not accept the validity of the Fees Regulations. He has made submissions, inter alia, challenging the Royal Prerogative and the standing of the Parliamentary Under Secretary of State who signed the Statutory Instrument. While the Fees Regulations are a Statutory Instrument, they are still part of the legislation and part of FOIA. As a Tribunal we are obliged to apply the legislative framework as it exists and we do not consider it appropriate or necessary to consider this issue of validity of the Fees Regulations further.

43. The test in Regulation 5 of the Fees Regulations seems to us to be very wide; the requests need only to relate *to any extent* to the same or *similar* information. We accept the arguments¹ on behalf of the Commissioner and are satisfied that the requests made by Mr. Fitzsimmons in his e-mail of 13th June 2005 do relate to a significant extent to the same or similar information.

Did the DCMS properly apply section 12 of FOIA?

44. We have already noted that the effect of section 12 of FOIA is to render inapplicable the general right of access to information contained in section 1 of FOIA where the cost of complying would exceed the appropriate limit. It was described by a differently constituted Tribunal

¹ Save for (5) supra; we are not persuaded that it is relevant that an individual making a request for information from a public authority heads multiple requests in the singular.

in Quinn v The Information Commissioner and The Home Office² as “a guillotine which prevents the burden on the public authority from becoming too onerous under the Act.”

45. A public authority does not have to rely on section 12 of FOIA and may decide to comply with a request for information even if it estimates that the cost of doing so will exceed the appropriate limit. If it does rely on section 12 of FOIA, it is not required to make a precise calculation of the cost of complying. What is required is simply an estimate. We, like differently constituted Tribunals in other cases³, regard it as implied that the estimate must be reached on a reasonable basis.

46. Section 12 of FOIA does not require a public authority to provide a costs estimate to a requestor. Paragraph 14 of the Second Edition of the Code of Practice issued in November 2004 by the Secretary of State pursuant to section 45 of FOIA (the ‘Code’) states:

Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the “appropriate limit”... the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focusing their request, information may be applied to be supplied for a lower, or no, fee.

47. A public authority that complies with the Code will be taken to have complied with its obligation to provide advice and assistance for the purposes of section 16 of FOIA. However, failure to comply with the Code does not necessarily mean that there has been a breach of section 16 of FOIA.

² EA/2006/0010

³ For example, James v The Information Commissioner and DTI et al., (EA/2006/003) and Brown v The Information Commissioner and The National Archives (EA/2006/0088)

48. The DCMS, in both its initial refusal and internal review decision, expressly suggested that Mr. Fitzsimmons might narrow his Request (and indicated how he might do so in broad terms) and gave him contact details for someone to provide advice and help in doing so. Mr. Fitzsimmons did not pursue this. He continues to maintain that all that is required is to photocopy information the DCMS accepts it holds and he does not accept that would take as long as estimated.

49. As noted above, we were provided with a statement prepared by Sarah Taylor from the DCMS. She has provided an explanation for how the time estimate for complying with Mr. Fitzsimmons's Request was reached.

50. In the initial refusal, Mr. Fitzsimmons was informed that to comply with his Request "would exceed our fees limit". Ms. Taylor indicated that the original estimates were as follows:

- (1) Permanent Secretary's expenses: 1.5 working days
- (2) Permanent Secretary's hospitality: 5 working days
- (3) Matters discussed and arising from 1 and 2: between 2 -5 working days
- (4) Secretary of State's expenses: between 2-4 working days
- (5) Secretary of State's hospitality from the BBC: around 1 hour
- (6) Matters discussed and arising from 4 and 5: between 3-6 working days.

51. These estimates had been prepared by the Private Office Division. They were revised during the internal review and, having conducted a thorough review herself, Ms. Taylor agrees with the revised estimates:

- (1) Permanent Secretary's expenses: 3 working hours
- (2) Permanent Secretary's hospitality: 20 working hours

(3) Matters discussed and arising from 1 and 2: between 16-40 working hours (2 -5 working days)

(4) Secretary of State's expenses: between 16-32 working hours (2-4 working days)

(5) Secretary of State's hospitality from the BBC: around 1 hour

(6) Matters discussed and arising from 4 and 5: between 24-48 working hours (3-6 working days)

52. The estimates were broad because at the time of the request it appears that there was no central system for recording this information. Ms. Taylor explained in her statement that in relation to the Secretary of State and the Permanent Secretary, expenses would rarely be incurred by the individuals directly but met by officials accompanying them on departmental business. While this may often be by members of their Private Office staff, in the Secretary of State's case particularly, frequently by a range of officials from across the department. It would not be possible to ascertain data on all the expenses incurred by Ms Street and Ms Jowell via the accounting system used by the DCMS. There would need to be reference back to their diaries and interrogate the expenses claimed by all officials accompanying them on departmental business in that period.

53. We note that request 1 includes a request that "Such statements should be authorised and certified by a named senior official/manager." It is important to remember that under FOIA it is "information" which will be disclosed, not necessarily a copy of a particular piece of documentation. Additionally, if the material does not exist because records are not kept in that particular way, for example, this sort of information may well have been dealt with electronically as opposed to a claim form being signed, the DCMS could not be obliged to create it following a request under FOIA.

54. We are concerned that the Permanent Secretary and Secretary of State appeared able to incur expenses that were not recorded and were not open to scrutiny.
55. Mr. Fitzsimmons challenged the time estimates provided and submitted that Ms. Taylor was “simply guessing”. He submitted that as the DCMS had indicated that it held the requested information, all that was required was a photocopying exercise.
56. We do not accept that because the DCMS indicated that it held the information it follows that the information was readily available.
57. It is clear from the wording of section 12 of FOIA that it is for the DCMS to estimate whether the appropriate limit would be exceeded based on the estimates of times for the activities set out in Regulation 4 of the Fees Regulations. The Commissioner and the Tribunal can inquire into whether the estimate was reached on a reasonable basis.
58. We accept the evidence of Ms. Taylor as to how records were kept and what exercises would have to be undertaken in order to collate the relevant information. Although we note that the estimates for each task have not been quantified as specifically as in some other cases before the Tribunal, we make no criticism of the DCMS for being so wide in its estimates in these circumstances. Thought should perhaps have been given to undertaking a sample exercise, for one given month for example, to demonstrate more precisely the scope of the task, although we consider that this would be of more assistance in a case where the estimate was just over the appropriate limit rather than this case where the estimate was so significantly over the appropriate limit.
59. Mr. Fitzsimmons has referred to the public interest in having disclosed the information he has requested. This has no bearing on the application of section 12 of FOIA, in contrast to several of the

exemptions under FOIA. The effect of section 12 of FOIA is absolute regardless of the significance of the information involved⁴.

60. We have already raised our concerns over the lack of a proper system; however, as this is the system that operated at the relevant time, we do not consider that it could be unreasonable to work out the estimate on that basis.

61. The Tribunal concludes that the DCMS came to a reasonable estimate as to the time it would take to comply with Mr. Fitzsimmons' Request and that it properly applied section 12 of FOIA.

Was there an obligation on the DCMS to "work up to" the appropriate limit?

62. There is no requirement under section 12 of FOIA or under the Fees Regulations or under the Code that a public authority should work up to the appropriate limit. To "split up" a Request and answer each item individually would defeat the purpose of the Fees Regulations.

63. Under section 12 of FOIA, the obligation on the public authority is to estimate the costs of complying with the Request and not to carry out work on that Request until the appropriate limit is actually reached.

64. We consider that the DCMS were correct to refuse to following the request from the Complaints Officer dated 24th November 2006 that the DCMS provide a breakdown of the costs estimate and comply with items 1 and 5 of the Request. It would not have been right or proper for the DCMS to assume that Mr. Fitzsimmons would wish his Request to be narrowed as suggested by the Complaints Officer, or at all.

65. However, if it is possible for a public authority to comply with part of the Request within the appropriate limit, then, arguably, there is an obligation under section 16 of FOIA to engage with the requestor to see if the Request could be redefined or limited accordingly. We are satisfied that two invitations were made to Mr. Fitzsimmons to narrow

⁴ Randall v The Information Commissioner and MHPRA (EA/2007/0004)

the scope of the Request and that he did not respond. We are of the view that the DCMS could have entered into more constructive dialogue or made a more helpful offer to Mr. Fitzsimmons, such as, it would be possible to comply with part of this item of the Request, or these two smaller items for example. However, two invitations and offers of further assistance were made and we do not consider that the DCMS are in breach of section 16 of FOIA.

Should the Commissioner have dealt differently with the breach of section 10 of FOIA?

66. It is accepted by all parties that the DCMS was in breach of section 10 of FOIA in failing to respond to the Request within 20 working days.

67. At the time the complaint to the Commissioner was made, a late response to the Request had been received. Owing to the high volume of complaints that the Commissioner was working on, a policy decision had been made not to pursue any breaches of FOIA that had already been resolved. No further action was taken.

68. In the Decision Notice, the Commissioner confirmed that the DCMS had not complied with section 10 of FOIA but found that it did not necessitate any remedial action. No remedial action could be ordered as the breach had already been remedied by the response to the Request.

69. As the DCMS had responded to the Request, we are satisfied that under section 50 of FOIA the Commissioner had no power to make any direction in relation to this.

Should the Commissioner have dealt with any other breaches of FOIA?

70. We have already dealt with section 16 of FOIA at paragraph 64. We do not consider that there was any obligation on the DCMS to provide Mr. Fitzsimmons with a breakdown of the estimated costs of complying with Request or to work up to the appropriate limit. We do not consider

that there were any other breaches of FOIA that the Commissioner should have dealt with.

Did the Commissioner fail to conduct an honest review or fail to act impartially?

71. Complaints relating to the way in which the Commissioner and his staff handled the complaint are not matters for this Tribunal. Our jurisdiction is limited to the consideration of the Decision Notice and related matters as outlined above.

Other matters

72. We are concerned that this Appeal relates to a Request made in June 2005. There have been delays in this matter, both initially by the DCMS and in response to questions raised by the Complaints Officer, and by the Commissioner in issuing the Decision Notice. It is unclear what, if anything, happened in relation to this matter between December 2006 when the DCMS had answered the questions of the Complaints Officer and October 2007 when the Decision Notice was issued. It is understandable that Mr. Fitzsimmons would have felt mounting frustration with the lack of response.

73. Despite assertions by Mr. Fitzsimmons that there has been a breach of his human rights under Article 10 (freedom of expression), we do not find that there has been any breach of Mr. Fitzsimmons's human rights in this matter.

74. Throughout the process, Mr. Fitzsimmons has made allegations about, and criticisms of, the DCMS, the Complaints Officer, the Commissioner and the Tribunal. While we can recognise the frustration he must have felt, these allegations fall outside our determination on this Appeal.

Conclusion and remedy

75. For the reasons set out above, we have concluded that the DCMS was entitled to aggregate the requests for information for the purposes of

the Fees Regulations and correctly applied section 12 of FOIA. It was therefore entitled to refuse to provide the information requested on the ground that to do so would exceed the appropriate cost limit. The Tribunal dismisses the Appeal and upholds the Decision Notice.

76. Our decision is unanimous.

Signed

Deputy Chairman

Date 17 June 2008