



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

**Case No. EA/2011/0016**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50313603**

**Dated: 19 January 2011**

**Appellant:** Ian Benson

**Respondent:** Information Commissioner

**Additional Party:** The Governing Body of Buckinghamshire New University

**On the papers**

**Heard at:** Field House London

**Date of hearing:** 23 August 2011

**Date of decision:** 28 September 2011

**Before**

Angus Hamilton

Judge

and

Suzanne Cosgrave

and

Nigel Watson

**Subject matter: s 12(1) Freedom of Information Act 2000 and the Freedom of Information & Data Protection (Appropriate Limit & Fees) Regulations 2004**

**Cases considered:**

Ian Fitzsimmons v DCMS [EA/2007/0124]

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 19 January 2011.

**SUBSTITUTED DECISION NOTICE**

**Dated : 27 September 2011**

**Public authority:           The Governing Body of Buckinghamshire New  
University**

**Address of Public authority:   High Wycombe, Bucks, HP11 2JZ**

**Name of Appellant:       Ian Benson**

**The Substituted Decision**

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 19 January 2011.

**Action Required**

The Governing Body of Buckinghamshire New University is to respond to the enquiries submitted by Mr Benson and described as Requests 1-4 in the Decision Notice of 19 January 2011 by 28 October 2011.

Dated this 28<sup>th</sup> day of September 2011

Signed

Angus Hamilton DJ(MC)

Judge

## **REASONS FOR DECISION**

### Introduction

1. Under section 1(1) of FOIA a person who has made a request to a public authority for information is, subject to other provisions of FOIA:
  - (1) entitled to be informed in writing by the public authority whether it holds information of the description specified in the request (section 1(1)(a)); and
  - (2) if the public authority does hold the information, to have that information communicated to him (section 1(1)(b)).
  
2. Section 12 of FOIA provides, so far as material, 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.
  
3. The Secretary of State has made regulations which prescribe the appropriate limit for the purposes of section 12 of FOIA, namely the

Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Regulations").

4. Regulation 3 of the Regulations prescribes that the appropriate limit for public authorities listed in Schedule 1 of the Regulations is £600 and for all other public authorities is £450. In this Appeal the appropriate limit is £450.
5. Regulation 4(3) of the Regulations provides that in estimating the cost of complying with a request to which section 1(1) of FOIA would otherwise apply, a public authority may "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."

6. Regulation 4(4) of the Regulations provides that where costs are attributable to the time that is expected to be taken by persons undertaking the activities specified in regulation 4(3), "those costs are to be estimated at a rate of £25 per person per hour".

7. Regulation 5 of the Regulations provides so far as material as follows:

"(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”

8. The Appellant set up a website that aims to be able to provide a service which allows interested individuals to request relevant recorded information from every member of staff of a university. In addition, it provides the facility to request the same information from every university in the country simultaneously.
9. The Appellant made a number of requests for information. These included the four requests for information that are the subject of this Appeal. Two were made on 26 April 2010 and two were made on 28 April 2010. A full copy of the requests can be found in Appendix A

which is attached to the bottom of this judgement (numbered requests 1 to 4). [Pages 17-21 of the Decision Notice]

10. On 29 April 2010 the public authority issued its response. It explained that having aggregated the requests it had received within the last 60 days it estimated that the work it was required to undertake in order to comply with these requests exceeded the appropriate limit of 18 hours. The public authority provided a breakdown of the work it had undertaken in respect to 4 earlier requests for information from the Appellant and indicated that that work had already exceeded the 18-hour limit. The breakdown showed that some 21 hours had already been expended.
11. A copy of these four earlier requests for information can be found in Appendix B, which is also attached to the end of this Judgement (these are numbered requests 5 to 8). [Pages 22-25 of the Decision Notice]
12. The public authority explained that complying or being in the process of complying with these four requests meant that the appropriate limit had already been reached and that it was excluded from complying with the four later requests (as listed in Appendix A).
13. Later that day, the Appellant wrote to request an internal review. He said that aggregation was not appropriate as the requests were not for similar information and this was a requirement to apply section 12(1). He explained that in his view the requests covered entirely different topics. He also explained that he had made the same requests to all the other universities in the country who had not raised the issue of aggregation that led to the application of the costs limit.
14. On 6 May 2010 the public authority explained that its response was based on its understanding of the relevant guidelines and regulations. The public authority explained that the similarity between the requests was that they were all related to staff and staff operations. It then cited

the relevant parts of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

The complaint to the Information Commissioner

15. On 8 May 2010 the Appellant contacted the Commissioner to complain about the way his requests for information had been handled. The Appellant specifically asked the Commissioner to consider the following points:

- That the requests covered entirely different topics and that invoking section 12(1) was inappropriate; and
- That the original requests were sent to a number of universities simultaneously.

16. On 13 July 2010 the Commissioner wrote to the Appellant. He confirmed that this case would consider only the four requests outlined in Appendix A. He said he would make a decision about the operation of section 12(1) specifically in relation to these requests.

17. The Commissioner issued a Decision Notice dated 19 January 2011 which determined that it was appropriate to aggregate the work required to answer for requests 1-4 and 7-8 because these six requests had an overarching theme; according to the Commissioner “they were similar to some extent as they were enquiries for the policies or regulations and/or how those policies or regulations operated in the university”



The appeal to the Tribunal

18. On 20 January 2011 Mr Benson submitted an appeal to the Tribunal (IRT).

19. The Notice of Appeal challenges the Commissioner's Decision Notice on ground that the Commissioner erred in finding that requests 1-4 and 7-8 could be aggregated under Regulation 5 of the Regulations. In particular, the Commissioner noted in his Response,:

(1) the Appellant challenged the Commissioner's use of the language of an 'overarching theme';

(2) he suggested that if the Commissioner's interpretation of Regulation 5 of the Regulations is correct, then all information requested by one person in any period of sixty working days will be aggregated;

(3) he illustrated his argument by reference to a worked example; and

(4) he relied on the ICO guidance notes, the position under the Scottish regulations on the aggregation of costs and the fact that 144 other universities did not attempt to aggregate his requests.

The questions for the Tribunal

20. The Tribunal considered that the sole question for them was to consider whether the Commissioner erred in finding that requests 1-4 and 7-8 could be aggregated under Regulation 5 of the Regulations. The Tribunal noted that there appeared to be no dispute between the parties that the 6 requests were all submitted by the same person within a period of 'sixty consecutive working days'. There also

appeared to be no dispute that, if aggregated, then the work involved would in total exceed the costs threshold.

### Evidence

21. The parties agreed that this matter should be considered 'on the papers' only and we have heard no live evidence or oral submissions. No parties or representatives have attended the hearing.
22. We have considered, from the Appellant, the Notice and Grounds of Appeal.
23. We have considered, from the Commissioner, the Decision Notice, and the Response to Appeal.
24. There were no submissions from the public authority.
25. The Commissioner submitted that he had considered whether the requests related, "to any extent, to the same or similar information". The Commissioner relied on the observations of the Information Tribunal in *Ian Fitzsimmons v Department for Culture, Media and Sport* [EA/2007/0124] that the test seemed very wide and only required that the requests relate to *any* extent to the same or *similar* information (Tribunal emphasis).
26. The Commissioner also referred to the dictionary definition of "similar" as meaning 'Having a resemblance or likeness: of the same kind'. The Commissioner took the view that requests were 'similar' where there was an overarching theme or common thread running between them, in terms of the nature of the information that had been requested.

Conclusion and remedy

27. The Tribunal noted the lack of authorities on the interpretation of s.12 FOIA and the associated Regulations. The Tribunal also noted that the Fitzsimmons case referred to at paragraph 25 merely restates the legislative requirement with added emphasis.
28. The Tribunal carefully considered the requests from the Appellant numbered 1-4 and 7-8 and concluded on balance and as a matter of fact that they did not all relate, "to any extent, to the same or similar information".
29. Whilst the Tribunal understood the Commissioner's analysis the Tribunal felt that it was not compelling and relied on concepts that were not actually within the legislation – e.g. 'overarching theme'. The Tribunal felt that any consequent uncertainty should, on balance, be resolved in the Appellant's favour.
30. The Tribunal did not therefore give further consideration to the estimates provided by the public authority except that to note that in each case the estimate of the work required for each request taken individually would not reach the limit set under the Regulations and hence s 12(1) of FOIA is not engaged. The Tribunal noted and supported the view on the estimates taken by the Commissioner in his Decision Notice which was, "*that there are no obvious alternatives in this case that would render the estimates unreasonable.*" (paragraph 52)
31. It should be noted that the Tribunal did not reach a firm conclusion on whether requests 7 & 8 could be aggregated on the basis that they both related to 'human resources' issues. However the Tribunal found it unnecessary to reach a conclusion on the point as even if aggregated the work involved fell below the costs threshold.

32. The Tribunal also wished to endorse the Commissioner's view that the public authority should have provided the Appellant with reasonable advice and assistance in accordance with s.16(1) FOIA (paragraphs 64 and 66 of the Decision Notice). In particular the Tribunal noted that under the Code of Practice on the discharge of public authorities' functions under part 1 of the FOIA 2000 (Issued under s45 of the Act in November 2004), this has been clarified in relation to s12(1) matters in the following terms, "*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-focussing their request, information may be able to be supplied for a lower, or no fee.*"

Our decision on allowing this appeal is consequently unanimous

Signed:

Angus Hamilton DJ(MC)

Judge

Date: 28 September 2011