IN THE FIRST TIER TRIBUNAL **Appeal No: EA/2015/0157**

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

On appeal from the Information Commissioner's Decision Notice No FS50579794 dated 15.7.15

Before

Andrew Bartlett QC (Judge)

Marion Saunders

Steve Shaw

Heard at Field House, London EC4

Date of hearing 17 December 2015

Date of decision 21 December 2015

Date of promulgation 22 December 2015

APPELLANT:	**CHRIS AMES**
FIRST RESPONDENT:	**INFORMATION COMMISSIONER**
SECOND RESPONDENT:	**THE CABINET OFFICE**

Attendances:

The appellant in person

For the 1st respondent Laura Elizabeth John

For the 2nd respondent Andrew Sharland

Subject matter:

Freedom of Information Act 2000 – cost of compliance and appropriate limit

Freedom of Information Act 2000 – qualified exemption – information intended for future publication

Cases:

McInerney v IC [2015] UKUT 47 (AAC)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal on the basis of the application of the costs limit in Freedom of Information Act 2000, s12. The Tribunal expresses no conclusion on whether FOIA s22 was correctly applied in the Information Commissioner's Decision Notice.

REASONS FOR DECISION

Introduction

1. The 2003 invasion of Iraq generated considerable public controversy. The Iraq Inquiry was set up, under the chairmanship of Sir John Chilcot, in July 2009. Over six years later, its report is still awaited.

2. The information request in this case is concerned with information held by the Cabinet Office, which has been cleared for publication by the Inquiry. The exemptions under consideration are FOIA s22 (information intended for publication) and s12 (costs limit).

The request, the public authority's response, and the complaint to the Information Commissioner

3. On 21 January 2015 Mr Ames made an information request to the Cabinet Office under FOIA:

   'I would like all documents held by the Cabinet Office that have been declassified for the purpose of publication by the Iraq inquiry (excepting those that have already been published by the Inquiry).'

4. On 16 February 2015 the Cabinet Office refused the request, relying on FOIA s22, which defines a qualified exemption for information intended for future publication. Section 22(1) provides:

   'Information is exempt information if-

   (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

   (b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).'

5. Mr Ames requested an internal review. This was delayed, and he complained to the Information Commissioner. After he had done so, the Cabinet Office by letter of 12 May 2015 notified him that the result of its internal review was that it would adhere to the position previously expressed. After investigation, the Commissioner upheld the position adopted by the Cabinet Office. The Commissioner decided that s22 was engaged, and that the public interest balance was in favour of maintaining the exemption.

The appeal to the Tribunal and the questions for the Tribunal's decision

6. Mr Ames appeals to the Tribunal against the Commissioner's decision on a number of grounds. One ground relates to the scope of his information request: he argues that the Cabinet Office and the Commissioner were wrong to interpret his request as applying only to complete declassified documents with no redactions. His other grounds of appeal relate to the application of s22 and the public interest. They may be briefly summarised as follows:

    a. The Commissioner misapplied s22, which on a proper interpretation requires a link between the holding of the information and the intention to publish. Here, the Cabinet Office did not hold the information with a view to its being published by the Iraq Inquiry.

    b. The intention to publish the requested information was not shown to exist at the time of Mr Ames' information request. The Inquiry's view of the relevance of certain documents may have changed in the course of its deliberations. A general intention on the part of the Iraq Inquiry to publish declassified documents does not establish an intent to publish all of them.

    c. The lack of a definite timescale for publication was not properly taken into account on the question of reasonableness under s22(1)(c) or in the public interest balance. It is not reasonable or in the public interest to delay disclosure of information whose promised publication is continually being postponed.

    d. The case for withholding the documents was superseded by more recent developments. It was based on a statement by Sir John Chilcot in a letter to the Prime Minister in July 2012, describing the undesirability of 'piecemeal' disclosure. But in February 2015 Sir John told a Select Committee that the Inquiry held a settled body of evidence. This could be published.

    e. It was not proper under FOIA for publication to be refused on the ground that the public might misinterpret the documents.

    f. The Commissioner wrongly equated the wishes of the Inquiry Chairman (Sir John Chilcot) with the public interest.

7. The Commissioner and the Cabinet Office adhere to their previous positions.

8. In addition the Cabinet Office, in its Response to the appeal, introduced reliance on the costs limit in FOIA s12, contending that it was entitled to do so at that stage on the basis of the law as set out in *McInerney v IC* [2015] UKUT 47 (AAC). Mr Ames has not disputed this interpretation of the law, and we proceed on the assumption that it is correct.

9. Accordingly the principal questions for the Tribunal on appeal are:

    a. Whether s22 applied at the time the request was dealt with;

    b. Whether the balance of public interest at that time was in favour of maintaining the s22 exemption;

    c. Whether the Cabinet Office can successfully rely on s12.

10. We received written submissions and other materials from the parties, and in addition the Cabinet Office provided a witness statement by Dr Liane Saunders, a Director General in the Cabinet Office. At the oral hearing on 17 December 2015 Dr Saunders gave sworn evidence and was cross-examined. We found her to be straightforward and careful in the evidence which she gave. While we found some of her answers surprising, we had no reason to doubt their accuracy.

The scope of Mr Ames' information request

11. The Cabinet Office interpreted Mr Ames' request as relating to whole documents which had been declassified, rather than relating more broadly to declassified information contained in otherwise classified documents. The Information Commissioner agreed with this interpretation in his Decision Notice.

12. On appeal the Commissioner changed his position and accepted the broader interpretation, having regard to what Mr Ames said was his intention, and in pursuance of a non-technical approach to interpretation. Conversely, at the hearing Mr Ames made clear that he conceded that his request could reasonably be read in the sense in which it had been interpreted by the Cabinet Office.

13. In our view the correct approach to interpretation is to consider how, objectively, a request would be understood by a reasonable reader in the position of the public authority, given the practical context known to both parties. It needs to be borne in mind that information requesters are seldom lawyers, and will usually be expected to use language in a non-technical way, which may be imprecise; it would be wrong to approach the interpretation of an information request as if it were a statute or a legal contract. On the other hand, in this particular case, the Cabinet Office knew that Mr Ames was an intelligent and articulate individual who had a great deal of skill and experience in framing requests under FOIA. It was therefore reasonable to assume in this case that he was aware of the distinction

between information and documents, and that he used the word 'documents' advisedly. Accordingly, we uphold the Cabinet Office's interpretation of his request.

The application of the s12 costs limit

14. Having regard to the provisions of the relevant regulations, which specify a financial limit of £600 and an hourly rate of £25, the effective limit for a central government department is 24 hours of work.[1] Under the regulations, the authority may for the purpose of its estimate take account only of the costs it reasonably expects to incur in relation to the request in-

    '(a) determining whether it holds the information,

    (b) locating the information, or a document which may contain the information,

    (c) retrieving the information, or a document which may contain the information, and

    (d) extracting the information from a document containing it.'[2]

15. By an order of 1 October 2015 the Registrar required the Cabinet Office to provide detailed submissions concerning its estimate of cost for the purposes of s12. As originally provided, these were unsatisfactory, being both anonymous and difficult to understand. However, as a result of Dr Saunders' oral evidence, it became clear that the estimate was realistic and reasonable.

16. The method by which the Inquiry sought declassification of documents was to send copies of individual documents or sets of documents to the Cabinet Office, with details of the declassifications requested, which could either be of whole documents (Annex A requests) or of particular information (Annex B requests). The Cabinet Office would then deal with the relevant Government Department (or, as the case may be, consider its own documents) and secure either entire or partial agreement to declassify. Where necessary, this involved an iterative process of negotiation with the Inquiry, until a final position was reached. Around 200 such requests were made and considered, and the requests and related correspondence were (and are) held by the Cabinet Office in hard copy, in some 90 lever arch files.

17. What we found surprising was that the Cabinet Office has not kept any running record of the outcome of the requests. Instead, to determine what has been declassified in each case, it is necessary to consult the files and to trace through each request from its beginning to its final outcome. It seems that the Cabinet Office is leaving it to the Inquiry to keep such a record and is not intending, when the report is ready for publication, to check that the Inquiry has adhered to the extent of declassifications which have been determined. The security

[1] The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, regs 3(2) and 4(4).

[2] Ibid, reg 4(3).

checking of the final report before publication will be limited to certain national security issues only.

18. The estimate of costs was arrived at by recording the time required to determine the information within the scope of the information request in relation to three sample declassification requests from the Inquiry, and then extrapolating, based on the number of declassification requests. Dr Saunders personally checked the estimate of costs by examining the first two samples again herself, and found it to be realistic. Based on the time taken, and the number of Annex A requests, it was clear that the cost of answering Mr Ames' information request would greatly exceed the costs limit. There was nothing to indicate that the time estimated included anything other than the activities specified in the regulations.

19. Accordingly, notwithstanding our surprise about the Cabinet Office's lack of any running record of the outcomes, we accept Dr Saunders' evidence and therefore uphold the Cabinet Office's reliance on s12.

Information intended for publication – s22

20. Given our conclusion that we must dismiss the appeal because of the application of s12, it is unnecessary for us to reach a decision on the issues arising under FOIA s22. We therefore confine ourselves to some brief observations on some of the issues that were ventilated.

Ground a (see paragraph 6 above)

21. Mr Ames argued that under the terms of s22 the intention to publish must be the intention of the public authority, even if the publication is to be made by another person. The holding of the documents by the authority must be prospectively 'with a view to' publication by someone. Here, in publishing the documents, the Inquiry will not be acting on the instructions of the Cabinet Office. The Cabinet Office has no control over which declassified documents the Inquiry ultimately chooses to publish. The Cabinet Office is holding the copy documents, which were agreed to be declassified, not for the purposes of publication but as the residue of the declassification process. Accordingly s22 does not apply.

22. The Commissioner accepted in written argument that the public authority should itself have an intention that the information be published in order to engage s22. In oral argument this became less clear, and Ms John submitted that the phrase 'with a view to' was linguistically irreducible.

23. The Cabinet Office contended for a wider interpretation of s22, which in substance equated 'with a view to its publication' with 'in connection with its publication'. It supported this by an example. Suppose Authority A planned to publish certain information, and sent it to Authority B for comment prior to publication, it would be very strange if s22 applied to the information in the hands of Authority A, because Authority A had the intention to publish, yet did not apply to the same information in the hands of Authority B, because Authority B had no positive intent that the information be published.

24. We agree with Mr Ames that there must be an appropriate link between the holding of the information and the intended publication. We agree with Ms John that it is important not to depart from the actual wording of s22. We do not consider it helpful to interpret the phrase 'with a view to' as effectively meaning 'in connection with'. Depending on circumstances, we consider that the kind of example posited by the Cabinet Office would be sufficiently and appropriately catered for by the expression 'with a view to'.

25. In the present case it seems to us that at the time of the request the Cabinet Office was holding the information 'with a view to' its publication by the Inquiry. From the evidence shown to us, it is clear that Government policy is that the Inquiry should carry out its task, and this will include the publication of declassified information. The Cabinet Office received the information for the purpose of facilitating such publication. Such purpose did not suddenly evaporate as each element of the declassification process was finalised. When a new request for declassification came in, it might be necessary to refer to the files to see how similar requests were resolved. If the Inquiry were to mislay the response to a particular request, the Cabinet Office would be able to supply it again. We therefore consider that s22(1)(a) was satisfied.

Ground b

26. Mr Ames argued that the Inquiry's view of the relevance of certain documents may have changed in the course of its deliberations. It could not therefore be said that the documents were necessarily held with a view to publication; some of them might never be published.

27. We do not accept this argument. The evidence showed that, as its deliberations proceeded, it was more likely that the Inquiry would add to the documents to be published than subtract from them. More fundamentally, the phrase 'with a view to' connotes a general intention or objective; it does not require that there be a guarantee of full publication. It is right to say that, if a particular item became definitely excluded from the intention to publish, the rejected item would at that time no longer fall under s22, but on the state of the evidence it was not possible to identify any such item.

Grounds c-f

28. In his capable and impressive arguments on the further grounds of appeal Mr Ames raised a number of important issues of principle, which would require extensive discussion in order to arrive at conclusions. Notwithstanding the inherent interest of the matters raised, given that the appeal must be dismissed because of s12, we do not consider that such discussion would be warranted in this case.

29. For the same reason, it is not necessary for us to resolve the extent to which we are entitled to receive as evidence and analyse the proceedings of the Parliamentary Select Committee to whom Sir John Chilcot recently gave evidence, on which all three parties relied.

Conclusion

30. The appeal must be dismissed because of the application of the costs limit.

Signed on original

/s/ Andrew Bartlett QC, Tribunal Judge