ON APPEAL FROM

THE INFORMATION COMMISSIONER'S DECISION NOTICE NO:FS50588275

Dated: 1st, March, 2016

Appeal No. EA/2016/0075

Appellant: Julian Rosen

Respondent: The Information Commissioner ("the ICO")

Before

David Farrer Q.C.

Judge

and

Malcolm Clarke

and

Dave Sivers

Tribunal Members

Date of Decision: 13th. August, 2016

Date Promulgated: 05th September 2016

Mr. Rosen appeared in person

The ICO did not appear but made written submissions.

Subject matter : Was Mr. Rosen's request manifestly unreasonable ?

(EIR 2004 Reg. 12(4)(b))

The Tribunal's decision

It was manifestly unreasonable. The appeal is dismissed.

David Farrer Q.C.

Tribunal Judge

13th. August, 2016

The reasons for our Decision

The Background

1. The creation of facilities for the London Olympic and Paralympic Games in 2012 involved the acquisition of a very considerable area of developed land in East London, centred on the Olympic Stadium. Much of that land was occupied by commercial premises involved in a wide range of industrial, retail and storage activities.

2. The land was acquired by the London Development Agency ("the LDA"), which was created by statute to acquire, develop and, in whatever manner, dispose of the required properties. The acquisition was made under a Compulsory Purchase Order ("the 2006 CPO") made in 2005 and confirmed about a year later.

3. A CPO is followed by an invitation to treat to the owner of the acquired property from the purchasing authority, which leads to negotiations as to compensation leading in most cases to agreement. Compensation must take account of a range of consequences to the business to be uprooted; much will depend on whether it can survive in another location. Disputes as to the proper level of compensation are referred to the Lands Chamber of the Upper Tribunal for adjudication.

4. The 2006 CPO caused a large number of businesses to relocate outside the Olympic boroughs or outside London altogether. Some businesses could not do so and were "extinguished", that is to say that they ceased to trade. In a response to a FOIA request dated June, 2008, the LDA stated that the CPO

affected 208 businesses. In 2016, the GLA referred to 430 files relating to properties compulsorily acquired.

5. Mr. Rosen's company, Bluefoot Foods Limited had since 2002 occupied premises forming part of a large cold store facility in Stratford by virtue of a sublease. Notice to treat and notice of entry were served on it in May, 2007 and the LDA took possession in July, 2007. Negotiations on Bluefoot's claim for compensation continued until 2008 and discretionary advance payments were made. The claim was referred to the Lands Chamber in 2013. It issued its decision on the level of compensation in March, 2016.

6. When the LDA was wound up after the 2012 Games, its records were passed to the Greater London Authority (" the GLA").

The Request

7. On 22nd. December, 2014 Mr. Rosen submitted four linked requests for information to the GLA. The GLA provided the information requested in the first, subject to editing for data protection purposes. The DN upheld his entitlement to the information sought in the second. He accepts that the GLA holds no information within the scope of the third. The fourth request was for –

"A list of businesses that were extinguished under the CPO for the delivery of the infrastructure for the 2012 Olympics. For all settled claims, provide the details and terms of compensation agreed and the underlying basis of calculation".

This is, therefore, the only request which is the subject of appeal

8. On 18th. February, 2015 the GLA responded by making three points –
   - This request was very broad and "extinguished" was hard to define.
   - It was unlikely that it would hold this specific information.
   - Compliance with the request would involve the creation of a new document, hence new information.

9. In due course the GLA carried out an internal review and, as to this request, cited FOIA s. 12 (compliance exceeding the cost limit) as the exemption on which it relied. Mr. Rosen complained to the ICO on 5th. July, 2015.

The ICO's investigation and the DN

10. In the course of this investigation it was agreed between the ICO and the GLA that the relevant jurisdiction was that provided by the EIR rather than FOIA, so that the material exception was that provided by regulation 12(4(b), namely –
"the request is manifestly unreasonable"

The only basis for such a claim was the cost which, the GLA claimed, would be incurred in complying with the request.

11. The ICO evidently accepted that the GLA did not hold the information in the form requested, since his findings related only to the costs likely to be incurred by assembling the information from the 430 files which, the GLA said, would require examination. He examined in some detail the nature of the task foreseen by the GLA and treated as a starting point in his assessment of what cost was manifestly unreasonable the "appropriate limit" provided for in FOIA s.12 and The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations, 2004, together with the activities

of which the public authority is entitled to take account in computing the costs. He concluded that the costs involved, based on the prescribed flat rate of £25 per staff member hour, comfortably exceeded the £450 limit applicable to the GLA, whichever GLA estimate was adopted. He concluded that the request was manifestly unreasonable.

12. He proceeded to weigh the public interests in disclosure as required by EIR 12(1)(b) and found that the limited interest in disclosure in 2015 was outweighed by the interest in keeping down costs and avoiding a wasteful diversion of human resources. Logically, the question of competing public interests must arise at the first stage, when assessing the reasonableness or otherwise of the request, hence whether Reg.12(1)(a) and 12(4)(a) are satisfied. It is hard to see how it could ever be in the public interest to accede to a manifestly unreasonable request. However, the drafting of regulation 12 appears to require this rather bizarre two – stage process, as it does, still more oddly, where the authority does not hold the information (Reg. 12(4)(a)).

13. On these findings the ICO upheld the reliance of the GLA on the EIR 12(4)(b) exception. Mr. Rosen appealed.

The Submissions on appeal

Mr. Rosen's case

14. Mr. Rosen's primary contention was that the GLA must hold a record of the kind requested. If that is so, then the cost of retrieving and providing it could not possibly be unreasonable nor exceed the FOIA threshold. In support of that contention, he produced evidence of GLA responses to other FOIA requests demonstrating possession of detailed data on a range of financial or related matters. They included land disposed of in the previous year, planning applications received by the mayor, the costs of advertising in various media and the cost of alcohol consumed at City Hall over specified periods. He further relied on reports and a press release from the Department of Culture, Media and Sport before and after the Games, containing a range of fairly high – level financial statistics as to funding and costs, a report from the National Audit Office, dated 5th. December, 2012 and a Datablog from the Guardian examining the sources of funding and how those funds were being spent.

15. None of these documents provided any information specific to Mr. Rosen's fourth request. A large share of the data related to activities for which LOCOG (the London Organising Committee of the Olympic Games) or the Olympic Delivery Authority were responsible. His contention was, however, that they demonstrated the amount of financial information created by and available to the LDA, which must include information in respect of the acquisition of land. This was, as he agreed, an argument by analogy.

16. He argued in the alternative, though perhaps without the same conviction, that the requested data could be quite easily assembled, if not already

incorporated in a specific record. He pointed out that the numbers of files and extinguished businesses identified by the LDA in response to a FOIA request in 2008 were respectively 208 and 25. The former number was less than half the number of files specified by the GLA in 2015. In oral submissions he argued that the relevant files could be captured by the use of keywords and expressed polite skepticism as to the GLA contention that this was a manifestly unreasonable burden.

17. He alleged at the hearing that the GLA had a motive to "deflect" his requests because he had a live claim for compensation when the request was received and indeed now, since he would or might appeal the UT decision on the quantum of compensation.

The ICO's case

18. The ICO, having scrutinized the cost question very fully in the DN did not add significantly to his findings there. As to Mr. Rosen's primary argument – that the GLA must already hold a responsive record - he submitted that the argument by analogy referred to above was unpersuasive. A large authority is in the best position to judge the best form in which to hold its records and it is impossible to infer from the creation of one the existence of another relating to a different issue

The reasons for the Tribunal's decision

19. It may be helpful to summarise them at the outset –

(i) There is no good reason to suppose that the GLA holds a single specific record containing the requested information or a significant part of it in a form responsive to this request.

(ii) Given its willingness to answer related requests, it is hard to see why the GLA would conceal such a record, if it existed.

(iii) As to the secondary argument relating to the costs of assembling the requested information, it is plain that they would vastly exceed any reasonable limit, whether there were 430 files or merely half that number to examine.

(iv) Allowing a fair margin over and above the FOIA limit to take account of the requirement that the request be "manifestly" unreasonable, that test is clearly met. That assessment takes account of the very limited public interest in disclosure of the requested information in 2015.

(v) If the request is manifestly unreasonable, the public interest must favour withholding the information.

20. Two preliminary matters require a brief mention.

21. Whilst there was agreement that the EIR were the applicable regime, it is, in the Tribunal's view, arguable that the GLA was right originally when it invoked FOIA. However, since the Tribunal would have upheld reliance on FOIA s.12 as readily as on EIR 12(4)(b), there is no purpose to be served in ruling on the matter, especially since it has not had the benefit of submissions either way.

22. The GLA's initial response to this request clearly, though not expressly, raised the issue whether it held the information at all (EIR 12(4)(a)) or whether it was, in effect, being asked to create information. In the Tribunal's

view, there was a strong case for reliance on EIR 12(4)(a), given the GLA's case on the need to reconfigure information organized in quite different ways and for different purposes. However, that was not the case put forward by the ICO and the Tribunal does not intend to investigate this exception any further, given its conclusions on EIR 12(4)(b).

23. We turn to our finding at §19(1). The best judge of the need to maintain particular forms of record is the body which uses them. However, where a public authority denies holding a particular record, an obvious question is whether it is the kind of record that it would be expected to hold for the proper performance of its functions. We do not consider that a single record of the kind proposed by Mr. Rosen would be a necessary part of the accounting or other functions of the LDA. No doubt the global figure for CPO compensation and perhaps even the individual payments to affected businesses could be accessible via a single database but whether the loss for which compensation was assessed was due to relocation or "extinguishment" was a matter which could be left unanalyzed in the 430 individual files.

24. Like the ICO, we are, despite Mr. Rosen's careful research, unimpressed by the examples of financial information available to LDA which he presented. We do not consider them analogous for three reasons. First, they have no connection with the information that he requested; secondly, unlike what was requested, the reports contain the kind of information that would be indispensable to the vast accounting exercise involved; thirdly, these statistics all present very broad categories of expenditure, such as security, advertising, construction of particular stadia and similar facilities. Of course, the more detailed information was held in a vast number of files but that is different from creating and holding detailed analyses of such expenditure in a long series of categories.

25. Furthermore, if the GLA held the requested information in a readily accessible form, it is hard to see why it would not disclose it, saving itself the burden of checking the number of files, the time needed to examine them and suchlike investigations. We do not accept that the appeal to the Lands Chamber influenced its response in any way. The evidence does not begin to justify the conclusion that a major authority deliberately suppressed a record for such an improper purpose. Indeed, all the indications from the evidence are that the GLA responded in a helpful manner to FOIA requests relating to the Olympic Games, where the requested data were accessible.

26. The Tribunal is satisfied that no single specific record covering the matters to which the request refers existed at any time,

27. As to the alternative submission – that a record could be compiled at a cost which was not manifestly unreasonable – the Tribunal finds that the FOIA limits are a rational starting point for its decision.

28. As summarized at §19(iv), a finding that the costs of compilation were "manifestly unreasonable" requires a substantial excess over the FOIA s.12 limit. It also demands an appraisal of the value to the public of disclosure. There may be cases where the value is so obvious that this exception would fail, despite breaching the s.12 limit by a wide margin. To this extent, the exception relied on is to be distinguished from the exemption afforded by FOIA s.12.

29. The GLA conducted tests to check how long the necessary examination of a case file would take. Two case files were reviewed, one much larger than the other. The larger took two hours, the smaller less than an hour. They

contained a wide range of material and were not well organized. The larger file, despite its size, did not reveal whether the claimant business had ceased trading and that information had to be sought externally.

30. The Tribunal accepts that this was a small sample but it is not hard to believe that claims of this sort may involve a great deal of correspondence, reports and material created for a Lands Chamber hearing. It is not easy to produce exhaustive search terms in such circumstances, especially where the great majority of those who dealt with these files at the time were not employed by the GLA in 2015. The number of business closures identified in 2008 was so small relatively as to be of little assistance in abridging this task.

31. Supposing the number of case files to be examined was around 300 and each could be adequately reviewed in half an hour, this would represent a task involving 150 hours' work, which, charged at £25 per hour, would cost nearly £4000. This probably represents a conservative estimate of time and cost.

32. The value of this exercise to the public would be very limited indeed because what matters is that proper compensation was paid to those who lost their businesses or sustained heavy costs as a result of disruption, not how many of each category there were. It was inevitable that some businesses would not be able to relocate. The public knows that an independent and highly qualified Tribunal adjudicated on claims that could not be settled and the aggregate amount paid out in compensation is published.

33. Mr. Rosen's comparison with the resources that a government department will devote to answering a parliamentary question to its minister is not valid. Civil servants are not constrained by the same cost considerations, when

arming their minister with a compelling answer to an opposition question which may have serious political implications for that minister.

34. It seems to the Tribunal that the requested information should have been sought when discovery was taking place for the purposes of the claim before the Lands Tribunal, if relevant to that claim, as it may well have been.

35. The Tribunal has no hesitation in finding that this was a manifestly unreasonable request in the limited sense indicated, making proper allowance for the factors identified at §28.

36. For these reasons this appeal is therefore dismissed.

37. Our decision is unanimous.

David Farrer Q.C.

Tribunal Judge

13th August 2016.