



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

Appeal Reference: EA/2016/0150

Heard at Field House on 29th September 2016 and thereafter on the papers

Before

**JUDGE
FIONA HENDERSON
AND
TRIBUNAL MEMBERS
MALCOLM CLARKE
AND
ALISON LOWTON**

Between

BEN LOTZ

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

DEPARTMENT OF WORK AND PENSIONS

Second Respondent

Representation at the oral hearing:

Mr Lotz represented himself

The Information Commissioner chose not to be represented

The DWP were represented by Mr Russell Fortt – Counsel

Subject: s12 FOIA – cost of complying with the request
S16- Advice and assistance

Case Law:

The Chief Constable of South Yorkshire Police v The Information Commissioner [2011] EWHC 44 (Admin)

Beckles v Information Commissioner EA/2011/0073 &74
Commissioner of Police for the Metropolis v (1) The Information Commissioner (2) Donnie Mackenzie [2014] UKUT 479 (AAC)

Decision and Reasons

Introduction

1. This appeal is against the Information Commissioner's Decision Notice FS50595166 dated 16th May 2016 which held that the Department for Work and Pensions (DWP) had correctly relied upon s12 FOIA (cost limit) not to provide information to the Appellant. The Commissioner also concluded that the DWP had breached s16 FOIA by failing to provide adequate advice and assistance to the complainant when refusing his request. The Commissioner did not require the DWP to take any steps to ensure compliance with the legislation.

Background

2. The request relates to information about the number and type of emails sent and received by the Secretary of State for Work and Pensions (SSWP) over a 2 year period. The DWP estimate that 200 emails are sent and 200 emails are received each day by or on behalf of the SSWP. Each Private Office uses a team email account which should capture all DWP emails received. They are managed on a day by day basis by a team of private secretaries (PSs). Responses to these ministerial communications are handled by the Private secretaries¹ and related sent emails will be retained in the personal email accounts of the private office staff

¹In relation to the DWP there are 6 at any one time although the turnover of personnel means that there are more individual accounts involved.

sending them but they are copied to the SSWP mailbox for reference. This is what has been archived².

3. The information sought from 1st June 2013 to 7th May 2015 relates to the Coalition Government's period of Government. The convention is that incumbent ministers should not have access to documents written by a predecessor of a different party or documents which would inform them of their predecessor's view, unless the document was already in the public domain. Consequently, following convention, the emails actioned in a particular month were archived and are stored in multiple Outlook PST³ files each holding one month of emails. Consequently, from 1st June 2013 to 30th April 2015 there are approximately 23 folders encompassed within this element of the request.
4. In May 2015 the entire mailbox (made up of 270 subfolders) was exported as part of "purdah". It is a snapshot of the mailbox at that date.

Information Request

5. On 24th June 2015 the Appellant asked the DWP:

"Under the Freedom of Information Act, could you please advise how many emails the Secretary of State for Work and Pensions (SSWP) or his office received or sent since June 2013 (until today/June 2015)?

Could you break this down by: sent, received?

Could you break this further down by: topic, month-and -year (starting with June 2013), SSWP/office-staff.

Where this does not breach individual privacy rights, could you also add a column for the department/agency/office/organisation who this correspondence was with?

And if this is still within the cost limit, could you give the same breakdown for the Minister of State for Employment (MSE) and her office (also since June 2013)?

(If any part of the above exceeds the cost-limit, please advise for how many months you can provide this information for without exceeding the limit).

² p127 Bundle excluding May 2015 when different considerations apply

³ Personal Storage table

6. The DWP's initial position was that this did not comply with s8 FOIA but following an internal review (notified on 21st September 2015), they relied upon s12 FOIA (costs) not to provide the requested information. They informed the Appellant that he may wish to refine his request by narrowing the time frame or dates adding the caveat that "*the DWP cannot guarantee that any revised request will be within the cost limit...*".
7. In his application for an internal review the Appellant stated: "*If the earlier request exceeds the cost limit, please simply export all email headers into csv files from the relevant email accounts for the SSWP and his office. This is quickly done and contains most of the relevant information anyway...*"
A CSV file is a comma separated value file which allows data to be saved in a table structured format. The internal review did not address this suggestion.

Complaint to the Commissioner

8. Prior to the Commissioner's decision in his email of 1st February 2016 the Appellant suggested that:
*"I would be happy to compromise or refine my request as follows:
I will do the sorting +formatting +in exchange only ask for a csv file (of the email account Secretaryofstate@dwp.gsi.gov.uk)... I will limit my request to the fields/columns that do not contain personal data, such as date, time, size and the field with the email-address of the SSWP, and the domain of the correspondent."*
9. The Commissioner did not address the suggestion of a CSV file as a tool to enable the information to be manipulated more efficiently and thus within the cost limit in his decision notice. Neither did the Commissioner address the Appellant's attempt to refine the scope of his request or the implication that this would not require each email to be opened, in his consideration of s16 FOIA.
10. The number of sent emails within the request relating to the SSWP was estimated at around 208,000 for the time period identified. The DWP's refusal was based upon the assertion that in addition to complications in retrieving the information so that it could be manipulated, the terms of the request would require each email to be opened which allowing 1 minute per email gave a figure of £86,666.67. The

Commissioner had some concerns with the calculation but was satisfied that a reasonable estimate was substantially in excess of the £600 limit.

11. The Commissioner was not persuaded that the DWP provided adequate advice and assistance since, given the volumes of emails involved, even if the request were limited to a single month for the SSWP this would still comfortably breach the cost limit. The Commissioner indicated that the DWP should have given consideration to explaining the details of the costs estimate but as this had now happened via the decision notice, the Commissioner did not require any steps to be taken.

Appeal

12. On 11th June 2016, the Appellant appealed on the grounds that:

- i) the request did not require each email to be opened as the DWP could run an appropriate query over their database/archive that provides rudimentary non personal information.
- ii) He was prepared to compromise on the precise fields, and the DWP ought to release the basic information as proposed in his compromise.
- iii) The Commissioner erred in not requiring the DWP to take steps in relation to the breach of s16 FOIA.

13. The Commissioner opposed the appeal and relied upon his Decision Notice. The DWP were joined on 28th July 2016. They opposed the appeal on the grounds that:

- i) the request was very wide ranging and could not conceivably be achieved within the relevant cost limit.
- ii) The obligation under s16 does not oblige a public authority to provide a breakdown of costs, but (if it was as found by the Commissioner) the information was provided by way of the Decision Notice and it was thus rational and lawful not to require any additional steps to remedy that breach.

Oral hearing on 29th September

14. The DWP had provided a witness statement from Mr Robert Specterman (Principal Private Secretary of State for Work and Pensions and Head of Private Office of the DWP). The Appellant asked that a database administrator be provided as a witness rather than a private secretary. Whilst it is of course a matter for the party whom

they choose to call as a witness, the issues in this case were technical and related to how information could be accessed and the search-ability of the archived information. The Tribunal observes that despite being on notice that these were issues in dispute the DWP did not proffer a witness statement from a witness with expertise in these areas. Mr Specterman attended and was available to give evidence if necessary, however, in light of the issues before it, the Tribunal was satisfied that it was proportionate to hear the technical evidence directly from the technical expert who had attended to advise the DWP even though he had not been asked to provide a written witness statement in advance of the hearing. The Tribunal therefore heard oral evidence from Mr Shaun Horrigan (Hewlett Packard Enterprise VIP and Private Office Support Engineer for DWP).

15. In light of the Appellant's suggestions for compromise following the evidence, it was agreed between the Appellant and 2nd Respondent that the case be disposed of by way of a consent order pursuant to rule 37(1) GRC Rules. A draft was agreed and signed by both parties that were present. Prior to the Commissioner indicating his consent to the making of such an order the Appellant sought to redraft the terms of the consent order and when agreement could not be reached on this he withdrew his consent and the Tribunal was satisfied that it therefore needed to determine the Appeal.

16. The case having already had an oral hearing at which oral evidence was given, having regard to the overriding objective as set out in rule 2 of the GRC rules, the Tribunal was satisfied that the matter could be appropriately concluded by way of written submissions and without the need for a further oral hearing and that this was in the interests of justice. The Tribunal made directions dated 13th October 2016 for the submission of any additional submissions. The Appellant had asked for a written copy of the oral evidence already heard as no witness statement had been served from Mr Horrigan prior to the hearing. The Tribunal was satisfied that this was not proportionate having regard to the overriding objective as set out in rule 2 GRC rules as both the DWP and the Appellant were present and heard the oral evidence which had the same status as any evidence given at an oral hearing. In addition to the oral evidence, in determining the appeal, the Tribunal has had

regard to all the documentary evidence before it, even where not mentioned directly in this decision.

Scope

17. The Appellant's request originally asked for the same information in relation to the Minister of State for Employment, as he had requested for the SSWP, if this was still in the cost limit. He confirmed in his grounds of appeal that he agreed to limit his request to the SSWP element of his request if cost was an issue. The Tribunal has therefore confined itself to consideration of the request in relation to the SSWP only.

18. This is an appeal against a specified Decision Notice.⁴ The Decision Notice arises out of a complaint to the Commissioner pursuant to s50 FOIA which provides:

(1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority⁵ has been dealt with in accordance with the requirements of Part I.

19. The Tribunal's jurisdiction is therefore limited to consideration of the information request that was the subject of the decision notice and not of subsequent additional requests. In his attempts to obtain clarity for the reasons behind the reliance on s12 FOIA the Appellant has made 8 additional requests for information from the DWP as set out in the FOI-table included in the bundle⁶. As late as 2.10.16 when seeking to reframe the terms of the consent order the Appellant asked:

"I know this was not included in my original request, but I would very much appreciate, if you could also include the date + time column (obtained as discussed in the hearing), which would provide additional useful information for analysis.."

The Tribunal cannot rule on these subsequent requests as they were not the request upon which the Commissioner issued the Decision Notice under appeal.

⁴ S57 FOIA

⁵ Emphasis added

⁶ P186-8 Bundle

20. There is no dispute that if the request as formulated required each email to be opened the request would vastly exceed the cost limit. The evidence was that within the archived restricted area at no point are the contents arranged on the basis of the name or domain name of the sender or recipient, or topic or subject matter. The DWP's estimate was predicated on opening each email to establish: Topic, date it was produced and whether it was in scope.

21. It is the Appellant's contention that the objective construction of the request did not require each email to be opened and the information could be gleaned from the information available either in outlook (which he would need to analyse from manually redacted screenshot printouts) or following the conversion into a CSV file and electronic redaction of the data. In his application for an internal review he appears to concede that not all the information requested by him would be visible from the information available in that format as provision of a CSV file:

“contains most⁷ of the relevant information anyway”.

22. The Information Request has 4 separate elements which we are satisfied ask for.

a) A combined total of emails sent and received by the SSWP or his Office,

We are satisfied that this could be obtained from the mailbox of each file in outlook, as a total figure for emails is provided. As set out below the Tribunal is not persuaded that political or personal emails would or should be excluded from that figure.

b) A breakdown of (a) by total of emails sent and received

This would be evident by analysis of the sender. Emails received from outside the SSWP would have an external domain name, those sent would all have been received from PSs.

c) A breakdown of (b) by (i) topic; (ii) month; (iii) year; and (iv) whether this was by SSWP or office-staff.

i) The Tribunal has considered what is meant by topic. Although the agreement reached in the draft consent order was for totals provided by broad subject area (such as “Universal Credit”) and made provision for “unascertainable” where the topic was not readily ascertainable from the subject line; we are satisfied that this requires a judgment to be made by the DWP and is a subjective

⁷ Emphasis added

interpretation of the request to accommodate the fact that the emails were not stored by topic or category. Whilst we are satisfied that in theory the subject heading would be sufficient to meet the definition of “topic” (since that is what the email is about) in practice it is likely that many emails would still need to be opened where the subject matter is not readily ascertainable. Whether this would be a sufficient number to engage the costs provisions is not something we have needed to make a determination upon in light of our other findings. The Appellant has suggested that if he was given a breakdown of PSs converted into their area of responsibility this would be indicative of the topic. The Tribunal is not satisfied that this is an objective construction of the request as worded. Whilst it may be a pragmatic way for him to obtain the information that he seeks, it is not what was asked for in the information request.

ii and iii) Month and year would be apparent from the archived file that was being considered as they are named for the month and year.

iv) The issue of whether emails were sent by SSWP or Office-staff would also be apparent from the sender details which would come from the email of particular PSs.

d) *A breakdown of (c) by the name of the department/agency /office /organisation from/to whom the correspondence was received/sent*⁸ .

The Tribunal is satisfied that this cannot be ascertained without opening the individual emails. Mr Horrigan’s evidence was that the information in the mailbox listing would not show to whom the email was copied. It is not apparent to the Tribunal whether emails sent from PSs email accounts and copied to the SSWP mailbox would show who the primary recipient was, but in any event we are satisfied that any additional correspondents copied in to the email would not be apparent and this information could only be obtained by opening the email. The terms of the request are for the “*department/agency/office/organisation who this correspondence was with*”. The tribunal is satisfied that the objective definition of a correspondent would include anyone who was sent a copy of the email, and thus entitled to action it or respond to it. We take judicial notice of the every day usage of emails whereby multiple recipients each with an equal interest in a topic are copied in below the first recipient. Indeed we note that the Appellant in his correspondence with the 2nd respondent during this

⁸ Element d) is subject to the caveat “where this does not breach individual privacy rights”

appeal “cc’d” an additional member of staff as he believed the primary recipient might have been away⁹ clearly on the assumption that this staff member would action it in the absence of the primary recipient.

23. The Tribunal has also considered whether, if we are wrong about the objective construction of the request and the need to open the individual emails, the information can be extracted and disclosed within the costs limit.

24. s12 FOIA provides:

(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.

...

(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.

The appropriate limit for a Government department such as the DWP is £600 based on a flat hourly rate of £25 which equates to 24 hours’ worth of work. This is set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulation 2004 SI 2004 No 3244 (“the Fees Regulations”).

25. S4 of these regulations provides:

(3) In a case in which this regulation has effect, a public 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.

⁹ Email of end October 2016 at 19.11

Redaction and Extraction

26. In The Chief Constable of South Yorkshire Police v The Information Commissioner

[2011] EWHC 44 (Admin), the High Court found:

"there is no basis for asserting that the time spent in redacting from the relevant document information which is exempt from disclosure is to be included in reg. 4(3)(d)".

The ICO agrees, but argues that the Appellant having excluded personal data from the ambit of his request, time spent removing personal data would constitute extraction, not redaction, and it is therefore chargeable.

27. The terms of the Appellant's request were:

"Where this does not breach individual privacy rights, could you also add a column for the department/agency/office/organisation who this correspondence was with?"

From this, the Tribunal is satisfied that the objective construction of the request limits the exclusion of individual privacy rights to the identity of the "outside" correspondent and not the subject matter or the individual at the SSWP office who had sent the email. Therefore, whilst removal of the details of the outside correspondent would constitute extraction, removal of topic or personal details for those within the SSWP office would constitute redaction in reliance upon s40 FOIA.

28. The DWP argue that personal emails and party political emails are excluded from FOIA and therefore are outside of the scope of the request as the information is not held on behalf of the DWP and they have no control over its retention/deletion etc. They rely upon the ICO's guidance Freedom of Information Act Awareness Guidance No. 12 which recognises that certain types of communications fall outside of FOIA e.g. 9b personal emails and 9c party political communications, would not be "held" on behalf of the public authority

29. The Tribunal observes that the request did not ask "how many official emails were sent"? and in asking for totals there needs to be clarity about why the totals would need to be amended to exclude certain types of email. There is a distinction

between the content of a personal or political email sent from a DWP email account and the fact that one has been sent which might reflect upon the use of resources within the DWP (within the Act) rather than the content of the emails (which is not). The complication has arisen in this case because of the difficulties in manipulating the data which led to consideration being given to providing raw data to the Appellant which he would then be able to analyse to provide the totals he seeks.

30. In light of the above the Tribunal is satisfied that obscuring topics revealing personal data would be redaction pursuant to s40 FOIA not extraction. Similarly, the removal of the date, topic and identity of the sender of political emails could arguably be redaction under s40 in relation to the member of staff who sent or received the email. For the purposes of this decision the Tribunal has only included the cost of extraction attributable to the excluded personal data relating to “outside” correspondents. The Tribunal did not hear evidence about the time that would be needed for extraction since this would depend upon what was in scope and the method being used. The possibility of various methods was discussed such as:

- Manually obscuring excluded information on printed screenshots which would remove the need for conversion to CSV files.
- Truncating the email addresses in each file once in CSV format.
- Performing alphabetized searches on topics/ recipients from Outlook and deleting the other emails to generate a total in a particular category electronically.
- Manually counting the product of searches to provide totals.

Whatever the method we are satisfied that any process could be expected to add considerably to the operator time when multiplied across all files and subfolders.

Retrieving the data

31. It is not disputed between the parties that computer processing time that does not require an operator to be present and which allows the operator to be engaged in other tasks does not count towards the 24 hours of staff time envisaged by the rules

and that on the facts of this case there was no separate and identifiable cost attributable to the computer processing.

32. From Mr Horrigan's evidence the Tribunal is satisfied that the archived files could be searched. The PST file could be attached to Outlook and then outlook could perform searches, but the results of the searches are not exportable. Once it has become a folder within Outlook without opening the individual emails the mailbox display would show: from, to, subject, date and time fields. It would not be apparent from this who it had been copied to. Individual emails can be opened and the email lists could be alphabetized in relation to categories e.g. from, to and subject. Totals would not be provided for each category and would need to be manually counted (or electronic totals could be provided if all non counted emails were deleted), neither could the results of searches be cut and pasted into a table. Although whole entries could be deleted, redactions (e.g. removal or obscuration of the personal identifier prior to domain name in an email address) could not be done in Outlook. The fruits of searches could form screen shots which could be printed and manually redacted with a marker.

33. From Mr Horrigan's evidence we are satisfied that to export a PST file into a CSV file which would be searchable, redactable and provide totals (as there are line numbers) the steps required for each monthly PST file would be:

- i. To make a copy,
- ii. To attach it to outlook,
- iii. To create and move it into a sub folder,
- iv. To construct a query to say what the operator wished to export,
- v. Intermediary process to MSAccess,
- vi. Then to CSV.
- vii. In order to adopt the Appellant's suggestion to depersonalize email addresses, additional time would be needed to truncate the email addresses in each file once in CSV format.

34. It is accepted that the majority of the time involved would be computer time and thus on the facts of this case not chargeable under the Regulations. The precise operator time for this activity is difficult to pin point because if the search

query/CSV extraction activities require continual or intermittent human input throughout the retrieval and extraction process; then it may be reasonable to include the costs of this activity. Although the Appellant suggested a reasonable formula, the Tribunal has not calculated an exact figure for the operator time in light of its findings in relation to the May 2015 subfolders and additional extraction costs. It was common ground that the operator time for conversion to CSV would take less than 1 hour per monthly file.

35. Although there are fewer steps in relation to the May 2015 data (as they are already in sub folders) there are significantly more of them. In light of the number of subfolders we are satisfied that, the operator time in converting these subfolders into CSV files would be likely substantially to exceed the 24 hour limit on their own since anything in excess of 5 ½ minutes per subfolder would exceed the limit.

36. Taking all the above factors into consideration we are satisfied that the information that was requested could not be provided within the time allowed for within the costs regulations.

Advice and Assistance

37. We have gone on to consider the issue of advice and assistance. Whilst there is no statutory requirement to provide a breakdown or estimate of the costs demonstrating that a request would be likely to exceed the costs estimate; there is an obligation under s16 FOIA to provide advice and assistance. S16 FOIA provides:

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

38. The terms of the information request included the caveat:

(If any part of the above exceeds the cost-limit, please advise for how many months you can provide this information for without exceeding the limit).

The DWP's response informed the Appellant that he may wish to refine his request by narrowing the time frame or dates adding the caveat that "*the DWP cannot guarantee that any revised request will be within the cost limit...*".

As was held by the Commissioner this was wholly inadequate in particular because they now acknowledge that even 1 week for 1 Minister would be likely to breach the costs limit.¹⁰

39. Paragraph 14 of the s45 Code of Practice states that if a request is refused in reliance on the costs provisions then:

"it 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..."

40. The DWP rely upon a first tier decision: *Beckles v Information Commissioner EA/2011/0073 &74* which was approved as an accurate statement of the law in *Commissioner of Police for the Metropolis v (1) The Information Commissioner (2) Donnie Mackenzie [2014] UKUT 479 (AAC) (22 October 2014)* (although the appeal was not determined on this point) and stated: "*s16 requires a public authority, whether before or after the request is made to suggest obvious alternative formulations of the request which will enable it to supply the core of the information sought within the costs limits. It is not required to exercise its imagination to proffer other possible solutions to the problem*".

41. In his reply the Commissioner has stated that he did not order the DWP to carry out any steps on the basis that any advice and assistance would not enable the Appellant to submit any refined request which would not exceed the appropriate limit¹¹. This is based upon the assumption that each email would need to be opened, however, the Commissioner had not explored what information could be provided without opening each email.

¹⁰ P112 Bundle

¹¹ P42 Bundle

42. The Upper Tribunal noted in its discussion of s16 that “*application of section 16 is very much context- and fact-specific*”. The Tribunal observes that in the Beckles case the public authority had partially fulfilled the request and explained the problems inhibiting a complete provision of information and offered to provide information in an aggregated form.

43. It is apparent to the Tribunal that in light of the way in which the data was stored in this case, a more restrictive request in terms of time was not the issue; but rather it was the need to open emails and the breadth of the request that was the problem. It is apparent from the correspondence in the bundle that the Appellant had been trying to reformulate and refocus his request in order to come within the costs limit but was hampered by a lack of explanation as to what the block was. In his application for an internal review the Appellant stated:

“If the earlier request exceeds the cost limit, please simply export all email headers into csv files from the relevant email accounts for the SSWP and his office. This is quickly done and contains most of the relevant information anyway...”

44. On 24th August 2015 the Appellant added

“If exporting the relevant emails into a csv file is still too costly or not practical then please assist and advise why and how you arrived at that conclusion”.

He went on to add additional information that might assist him such as: how many email accounts fall within the request and how long it takes to export emails into a csv file etc. He never received an explanation of why in the view of the DWP this would not make the request compliant.

45. The Appellant characterised his frustration in front of the Tribunal as:

“I am sure that there is a way of producing (some/key) relevant recorded information without accessing each email individually.

The DWP have however not been particularly helpful e.g. in describing the technical circumstances of how the information is stored, +;leave me to make lucky guesses in order to obtain this information”¹²

46. In his response dated 6th September 2016¹³ he noted that:

“the bottom-line is : I am requesting metadata+ expect reasonable advice on how I should ask for that.

Can the DWP tell me for which fields (e.g. date, time, sender-domain, recipient-domain etc) ... they can produce the requested information... [for June-13 -May 15 and May 15-June 15]”.

He noted that if he had understood the position in relation to the “May 15 files” he could have excluded them from his request.

47. In our judgment notwithstanding the information provided by way of the Decision Notice there were additional steps that the DWP ought to have undertaken pursuant to s16 FOIA to comply with s45 code and Beckles. Engaging with the Appellant’s attempts to reduce the fields and his suggestion of technological tools to provide additional search-ability did not require the public authority to exercise its imagination but to recognise that some explanation of the challenges in retrieving and searching the data would be likely to assist him to refocus his request so that it was compliant. We are supported in our conclusion that the impact of further information was to enable the formulation of a request within the costs limit by the fact that a consent order in relation to a refined and refocussed request was agreed¹⁴ between the parties present at the oral hearing.

48. The Tribunal observes as set out above that some of the information in terms of totals of emails sent and received could have been obtained within the cost limit but no consideration appears to have been given to the possibility of answering any elements of the request.

¹² P44 Bundle

¹³ P129 Bundle

¹⁴ Notwithstanding that the Appellant withdrew his consent prior to the order being made.

49. The Appellant questions “*at what point the deliberate absence of useful information + the systematic lack of advice would amount to concealment.*”

The Tribunal is satisfied that there is no evidence of deliberate concealment here. Advice and assistance requires a judgment of what is reasonable and as set out above, the Tribunal is satisfied that the DWP were wrongly focused on time rather than content.

Steps:

50. The Appellant’s submission¹⁵ was that:

“where a Public Authority relies on costs (for refusing a request) + is not providing sufficient advice + assistance (i.e. is found in breach of section16) it should not be a requirement to look at the request in its entirety (when calculating the costs), but rather at what elements of it can be usefully provided (within the cost-limit)”

51. The Tribunal is satisfied that in determining whether and to what extent s16 has been breached it is pertinent to look at what elements could have been provided pursuant to paragraph 14 of the s45 code. However, the Tribunal could not direct that specified elements are provided in the absence of any evidence as to whether any exemptions are applicable or how long providing individual elements might take and a clear sense of what it is that the Appellant wants. In this case the Appellant has been provided (through the Tribunal process) with at least as much detailed information as would be reasonable to expect under the advice and assistance provisions. Attempts were made to agree a compromise with agreed definitions of scope and method over 2 hours of negotiation on the day of the Tribunal in light of the explanation of the challenges associated with retrieving and manipulating this data. The Tribunal is satisfied that the DWP have now fulfilled that obligation and the Tribunal does not require the DWP to take any further steps.

52. This does not prevent the Appellant from submitting a reformulated request outside this Tribunal process, utilising his knowledge of the steps required to retrieve, extract and manipulate the data.

Conclusion

¹⁵ Submissions 7.11.16

53. The Appeal in relation to s12 is refused. The Tribunal is satisfied that the DWP were entitled to rely upon s12 FOIA as the request exceeded the costs limits. Although the appeal is allowed to the extent that the Commissioner erred in not requiring the DWP to take steps in relation to the breach of s16 FOIA the Tribunal does not now require the DWP to undertake any steps to comply with the regulations in light of the advice and assistance that he has received during the Appeal process.

Signed

Fiona Henderson

Judge of the First-tier Tribunal

Date: 6th January 2017