First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2017/0047

Heard at Fleetbank House
On 18 July 2018

Before
CHRIS RYAN
JUDGE
DAVE SIVERS
TRIBUNAL MEMBER

Between

NICK ROSEN

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

LONDON BOROUGH OF HACKNEY

Second Respondent

DECISION AND REASONS

Attendances:

The Appellant represented himself
The First Respondent did not attend and was not represented.
The Second Respondent was represented by Christopher Knight of Counsel.]

IN THE FIRST-TIER TRIBUNAL Case No. EA/2017/0047

GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed.

REASONS FOR DECISION

Introduction – the previous stages of this Appeal

1. We issued a decision on this Appeal on [date] ("the First Decision"). Capitalised terms in this document have the meaning attributed to them in the First Decision. Background information on the circumstances surrounding the Request are set out in the First Decision and are note repeated here.

2. The First Decision concluded that the Council had not been entitled to refuse the Request on the ground that it was manifestly unreasonable (for the purposes of EIR regulation 12(4)(b)) by reason of being vexatious. However, we were unable to decide at that stage whether it was manifestly unreasonable simply because of the estimated cost of complying with it. As we recorded in paragraph 18 of the First Decision, we were not able to determine whether the Council's costs estimate had been reasonable without a better understanding of the way in which its records were maintained, the facilities that were available to it to search and interrogate those systems and the particular steps it took when carrying out the sample searches on which the estimate was based. We therefore directed the Information Commissioner to make enquiries of the Council on the particular concerns and questions we recorded in that paragraph.

3. On 23 January 2018 the Information Commissioner reported to the Tribunal on the outcome of her enquiries in the following terms:

> *"…the Commissioner considers that the electronic search facilities open to the Council are very limited. The Commissioner understands that the eDocs system may only be interrogated on file title only. Whilst it is not possible to 'search within results', logical operators may be used in the initial search. Some emails may be stored in eDocs – if they are not then emails may only be retrieved by searching on a particular Council employee's name and then manually reviewed. The large number of search results returned suggest that it would take a long time to deal with* [the Request]."

That was a fair summary of the information contained in email communications between the Information Commissioner and the Council (copies of which were provided to the Tribunal at the time).

The joinder of the Council as Second Respondent and the conduct of the Appeal since.

4. We found the response from the Council, passed to us by the Information Commissioner in this way, still left open questions and accordingly, on 28 February 2018 we directed that the Council be joined as Second Respondent to the Appeal and that it should file both a written Response to the Appeal and written evidence.

5. The Council's Response, filed on 6 April 2018, set out the Council's arguments in favour of concluding that its cost estimate had been reasonable and that the Request was manifestly unreasonable by reason of the cost of compliance. It drew attention to Upper Tribunal authority stating that the exception could apply to a "*one-off burdensome request*" and that it was appropriate to have regard to the financial limit imposed by FOIA section 12 when assessing whether an information request fell within the exception provided by EIR regulation 12(4)(b). It also argued, on the basis of Upper Tribunal authority, that neither EIR or FOIA require any particular standard of public authority record-keeping – cost estimates were to be assessed against the actual nature of the records requiring to be searched.

6. As to the cost estimate itself the Council relied upon the letter it wrote to the Appellant when reporting to him the outcome of its internal review, which, it said, would be supplemented by witness evidence. It also acknowledged that EIR 12(1) provided that, even when an exception applied to requested information, a public authority was still required to disclose it on request unless the public interest in maintaining the exception outweighed the public interest in disclosing it. It stressed the strong public interest in not subjecting the Council to the cost burden imposed by the Request, with a consequent diversion of resources away from the Council's principal obligation of providing local services.

7. The Information Commissioner decided, as she had in respect of the earlier stage of the Appeal, not to attend the hearing or be represented. The Appellant represented himself and the Council was represented by Christopher Knight of counsel.

8. Since the First Decision was promulgated one of the Tribunal lay members who contributed to it has retired. The parties agreed that the Appeal should proceed with a two-member panel.

The Council's evidence

9. The Council's written evidence took the form of a witness statement signed by Michael Coleman, the Council's Strategic Head of Education Property. This set out to address each of the areas of uncertainty identified in paragraph 18 of the First Decision. It included the following information:

a. Mr Coleman had been in post since March 2016, some eleven months before the Request was submitted, and had been responsible for securing the use of the Audrey Street land as a temporary site for a school.
b. He had carried out the document search behind the cost calculations which had been accepted by the Information Commissioner, as recorded in paragraph 7 of the First Decision.
c. The Council maintained a central depository of electronic files (called eDocs) which could be searched using parameters such as date, document number or key words.
d. Certain documents were retained in paper form because they were original contracts, or where there was no alternative format (e.g. architectural drawings).
e. The Council's system for storing and archiving emails was also separate although some emails would have been saved as an eDocs file.
f. Mr. Coleman had treated the eDocs system as the prime source of relevant data and, having concluded that the work involved in checking the records emerging from his searches would have exceeded 18 hours, did not address paper records or emails.
g. The eDocs search covered all formats (such as "Word", "PowerPoint", "Excel" and "pdf") because each might include material falling within the scope of the Request. Mr Coleman thought that "Word" might be considered the most likely depository of relevant data in this case but focusing on one document type would not necessarily be productive given the broad nature of the Request.
h. The original search had not been limited by reference to a particular range of dates, but Mr Coleman calculated that 662 of the files identified in his search seemed likely to fall within the relevant time period.
i. Mr Coleman had concluded that the files listed in his search report would need to be investigated further. This was because the file names were largely uninformative and trying to reduce numbers by inserting one or more names as "author" would be likely to fail because the name inserted in that field might be the junior staff member responsible for uploading the relevant document, rather than the more senior individual or individuals responsible for its content. Mr Coleman concluded:

> *"The majority of files identified on the lists would therefore need to be opened to ascertain precisely what information they contained and whether they were relevant …"*

j. A similar outcome would have resulted if the Council had adopted a suggestion by the Appellant that the search could be carried out by reference to the name of the previous head of education property. Even if that had reduced the number of documents, each one would have had to have been opened and the content checked.
k. In commenting on various search terms that Mr Rosen had suggested, Mr Coleman expressed the view that, although they would have reduced the number of search results, they would not have generated a set of search results which he could be confident would have contained all information responsive to the Request, in accordance with the Council's obligations.
l. Mr Coleman also sought to justify his assessment (reflected in the Information Commissioner's calculations mentioned previously) that it would take, on

average, 3 minutes to check each file to establish its relevance. He also pointed out that, even if the files identified from his search could have been reduced by a third and the time spent on each one reduced to two minutes, the cost to the Council would still have been excessive.

m. Paragraph 26 of Mr Coleman's witness statement included this statement:

> *"A number of officers who may have been expected to have knowledge of any proposals involving the use of the Audrey Street depot site were asked whether documents existed. Those spoken to included Ginevra Davis, former Head of Education Property. None of those spoken to thought such documents existed, so were unable to provide information that would have allowed the search to be restricted to a specific data set."*

n. Mr Coleman also addressed the question of public interest for and against disclosure, stressing the extent to which Council decisions had already been exposed to public debate during the planning process.

10. Mr Coleman attended the hearing and answered questions posed by the Appellant and the panel. The following information emerged in answer to those questions:
    a. The facility to search for keywords within the titles given to documents when saved into eDocs was not the only tool available. There was a second search facility within eDocs. This "advanced search" function did enable logical connectors to be applied across the text of all documents saved in eDocs, but only if the search were limited to documents in "Word" format. The original witness statement had exhibited a screenshot of the search options, which did include a mention of "document content" in a drop-down menu, but the function was not explained in the body of the witness statement. At least it was not explained in terms that the Tribunal understood to mean that the whole text of saved Word documents could have been searched by reference to words connected by common connectors such as "AND"and "OR".
    b. Mr Coleman did not have sufficient familiarity with the system to be certain of all search string options available in this facility and had not sought assistance on the point from the Council's information technology team. He could not comment on whether, for example, a search string that linked an address, an individual's name and a topic would be effective either at all or where the connector addressed the relative locations of the search terms (as, for example, one word being in the same paragraph as another or separated by no more than a specified number of other words).
    c. The Council's freedom of information team, when preparing the Council's response to the Request and subsequently answering questions from the Appellant or the Information Commissioner, did not ask Mr Coleman to use the advanced search facility to explore whether his sample searches could be adapted to generate a smaller number of "hits".
    d. Despite the rather vague, passive language of paragraph 26 of his witness statement (quoted at paragraph [9. m.] above), the reality was that Mr Coleman had himself spoken directly to Ms Davis and asked, among other questions, if she was aware of any proposal for a school at the Audrey Street Depot. He thought that this happened around the time when the Request was originally

submitted and that Ms Davis had said that she did not think that there had been such a proposal.

e. Overall, Mr Coleman did not think the Council could reasonably have given the Appellant more advice and assistance than it had. It had complied with its obligation under EIR regulation 9 to "*…provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants*".

11. We found Mr Coleman's evidence unsatisfactory on a number of accounts. First, the existence of a facility to search the text of saved documents by keywords was not made clear in his witness statement. Indeed, the references to having to open all files identified in a search in order to check relevance pointed away from the existence of such a facility. It gave us the clear impression that, once a number of documents had been identified in an eDocs search, there was no alternative to human intervention in order to assess relevance. It was only when checking our understanding with Mr Coleman during the hearing that it became apparent that a more sophisticated electronic search, against the text of the saved documents, could have been used to narrow the focus of the search.

12. Secondly, when faced with what he clearly felt were criticisms of his methodology and/or the rigour with which it had been applied, Mr Coleman repeatedly fell back on the language of the Request and argued that it would, in any event, have been "*difficult*" and "*challenging*" to move from the broad scope of the Request to a manageable set of materials, whatever system tools might be deployed to automate at least the first stage of a search. Thirdly, the steps taken to discuss the Request with his predecessor, Ms Ginevra Davis, were not clearly explained in the witness statement and only limited additional information was given during the hearing. She appears not to have been asked, in clear and direct language, whether or not consideration had been given to school use of the site and/or where any information on the subject might be expected to be found. Fourthly, we felt that Mr Coleman prevaricated when asked about advice and assistance that might have been provided by the Council to enable the Appellant to understand the way in which the Council maintained its records and the tools that were available to search them. We were unable to discern from his responses any clear answer as to why the Council had said no more than that, in the most general terms, the Appellant might consider narrowing the scope of the Request. He stressed that the Council was at all times anxious to ensure that any searches it undertook enabled all information requested to be identified and not just some of it and stressed, again, the broad scope of the Request. Considered as a whole, the responses gave us the clear impression that the approach adopted was that the Council had no obligation to either use the advanced search facility itself to reduce the number of "hits", to obtain guidance from colleagues, or to give the Appellant sufficient information about the available tools to enable him to consider how the Request might be reduced in scope.

13. Mr Coleman's evidence was also criticised by the Appellant because of the Council's failure to disclose previously the conversations between Mr Coleman and his colleagues (paragraph [10. d.] above). He clearly believed that this undermined the credibility of the evidence. However, apart from our concern that the rather tentative

language of paragraph 26 of the witness statement was replaced, under questioning, by more direct language and greater detail, we have no basis for rejecting the evidence.

The arguments presented to us

14. There was no challenge to the Council's argument that the FOIA section 12 cost calculation was relevant to the regulation 12(4)(b) assessment. Nor did the Council, for its part, seek to avoid the fact that such a calculation was only of persuasive significance in the context of EIR and that the application of the public interest test could lead to a public authority being required to exceed the cost limit if the public interest in disclosure was strong enough to justify it. However, the Council argued that the estimated costs in this case were so high that the public interest in maintaining the exception ought to prevail. It also argued that the high cost figure emerging from the sample searches meant that the section 12 cost limit would clearly be exceeded, even if the Appellant persuaded us that some of his criticisms of the search process carried weight, and that this was a direct result of the Request being expressed in very broad terms.

15. The Appellant did, indeed raise a number of issues about the selection of search terms and suggested that the process undertaken by the Council had not been a genuine attempt to locate relevant information but a means of ensuring that the cost guidance figure would be exceeded. He was particularly concerned that the Council had not, in his view, engaged with him in considering ways in which the focus of the Request could be narrowed.

16. Both sides referred us to a recent First Tier Tribunal decision (EA/2018/0025) on an Appeal involving the same parties and an information request which addressed the same broad subject matter, although in much narrower terms ("the 0025 Decision"). In particular, the information request in that case focused on the former head of the Council's Education Property Department. The panel decided that the Council's cost estimate was not reasonable. It was based on the same sample searches that were relied on in this case, (despite the fact that the request was in narrower terms) and covered document types and areas of search which the Tribunal thought were likely to have inflated the time estimate. In addition, the search had not involved input, from those who had been involved in the issues underlying the Request, as to the places where a targeted search might be made, which search terms were in common use at that time or any specific ways in which documents were stored. Finally, the Tribunal did not accept that it would take 3 minutes to check each document that emerged from the search.

17. The approach adopted by the Council to the 0025 Decision was that the facts were very different because the Request is in far broader terms. The Appellant acknowledged the differences but relied on some of the criticisms of the Council's approach, which he said were of general application. This included the rejection in the 0025 Decision of the estimate that reviewing each document would take 3 minutes.

18. The Council also invited us to bear in mind the guidance provided in the Upper Tribunal case of *Kirkham v Information Commissioner* [2018] UKUT 126 (AAC) which it said was relevant even though it was decided under FOIA section 12 rather than the EIR. It relied, in particular, on the following passages:

> *"12. … FOIA imposes an obligation on a public authority to provide the information requested. Section 1(1) confers a right for a requester to have the information sought and that right carries with it a correlative duty on the public authority to provide it. The right and the duty are subject to the other provisions of FOIA. Section 12 protects the authority from burdensome requests: McInerney v Information Commissioner and the Department of Education [2015] UKUT 47 (AAC) at [41]. The same could be said of section 14. The two sections deal with different types of burden, but the circumstances of a particular case may be such that a public authority may be entitled to rely on one or other or both of them. Just looking at those provisions, the responsibility rests with the requester to make requests that do not fall foul of sections 12 and 14. There is, however, a counterweight in section 16, which provides the power and the duty for an authority to assist a requester to make a request in appropriate terms. ….*
> *13. I accept that there is never a guarantee that public authorities will be able to retrieve every piece of information that they hold within the scope of a request. That may be because it was wrongly stored: a document may be put into the wrong file or a name may be misspelt in an email. Or it may be because of a mistake in the search, whether human or electronic. But just because a search may fail to discover all the relevant information does not mean that it will always do so. Nor is it an excuse for relieving the authority of its legal responsibility if (i) the information is not stored in a way that can be retrieved when a request is made or (ii) the search is inadequate to find that information. I do not accept that it is permissible to interpret FOIA in a way that is guaranteed not to allow a public authority the chance to comply with its duty. Success may not be guaranteed, but failure cannot under the terms of the legislation be the only option.*
> *14. Mr Kirkham was, naturally enough, looking at the matter from his own perspective, and in particular his concern to obtain the information he had asked for or at least sufficient of it for his purpose. He was content, as he put it at one stage, for the University not to search 'every nook and cranny'. The flaw in that argument is that it overlooks the University's duty. If Mr Kirkham, or any other requester, wants to limit the extent of a public authority's duty, the way to do it is through the terms of the request, if need be with the advice of the authority. The terms of the legislation do not allow for a half-way house between complying with a request and relying on an exemption. A public authority cannot comply with FOIA by providing such information as it can find before section 12 applies.*
>
> *…*
>
> *24. An estimate involves the application of a method to give an indication of a result. In the case of FOIA, the result is whether the cost of compliance would exceed the appropriate limit (regulation 4(1)). It follows that the method*

employed must be capable of producing a result with the precision required by the legislation in the circumstances of the case. The issue is whether or not the appropriate limit would be reached. The estimate need only be made with that level of precision. If it appears from a quick calculation that the result will be clearly above or below the limit, the public authority need not go further to show exactly how far above or below the threshold the case falls."

19. The decision was relied on by the Council to reject any suggestion that it should have searched until it either found the requested information or reached the costs threshold. The Council also argued that its sample search had been appropriate in the circumstances and that it had been right to stop the sampling exercise once it had shown that searching for just one category of document, out of three, produced a very high costs figure. It would not have been appropriate, in the light of the conversations that Mr Coleman had with his colleagues, for the Council to have said that it did not hold the requested information. It was therefore required to carry out a search and the steps it then took were reasonable and proportionate in view of the nature of the Request, which was based on the hypothesis that a proposal, to use the land in question for schooling, did exist. Criticism of the detailed methodology adopted in the sample search was not therefore fair and, even if justified in any part, would not have resulted in a cost estimate below the section 12 guideline, given the number of documents involved and the need to check for necessary redactions to any that were found to be within scope.

20. The Council's argument also addressed the issue of whether or not it had complied with its obligation to advise and assist under EIR regulation 9. It relied on *Metropolitan Police v Information Commissioner and Mackenzie* [2014] UKUT 0479 (AAC), as support for the proposition that the Council should not be criticised for having failed, in effect, to redraft the Request. The suggestions from the Appellant from time to time as to how a search might be conducted did not amount to a genuine narrowing of the request and, in any event, were largely proposed after the Request had been refused. The Appellant's response was that he was, throughout, simply seeking a common-sense dialogue with the Council as to how his concerns could be met without excessive costs.

21. Finally, as regards the public interest test, the Council argued that the public interest in disclosure (which it acknowledged existed) should be separated from the Appellant's private interest in respect of his own property. It was, in any event, outweighed by the public interest in not imposing an unreasonable cost burden on the Council. The Appellant argued that his private interest was inseparable from the public interest. He was an individual, along with others, who valued park space in Central London and feared that it was being steadily encroached upon or destroyed. Against that background, and what he perceived to be a casual approach to planning processes, the Council's conduct justified close scrutiny.

Our conclusions

22. We approach the 0025 Decision with some caution. The Tribunal's criticisms of Mr Coleman's approach were made in the context of a much more narrowly focused enquiry. We prefer to rely on our own assessment of his evidence (see paragraphs 11 and 12 above, although we do note that the limits of Mr Coleman's knowledge of how eDocs may be searched (as recorded in paragraph 35 of the 0025 Decision) appear not

to have been re-addressed in the weeks between giving evidence in that case and answering the Tribunal's questions in this one (see paragraph 10. b. above.

23. Our own conclusion is that Mr Coleman's sample search was inadequate for its purpose. The conversations with colleagues who might have assisted in focusing it on areas where any relevant information was likely to be found appear to have been vague and incomplete. The subsequent failure to explore how far the eDocs search facilities could have been used in order to exclude masses of irrelevant material suggests to us that the exercise was approached in a disappointingly casual manner. That relaxed approach to the freedom of information regime appears to have infected the preparation of evidence for the Tribunal. In places it was detailed and precise, but on the two issues we have raised in this paragraph it was vague and/or incomplete. Mr Coleman also appeared to have elevated the Council's obligation to make a reasonable attempt to locate information in scope into a requirement to guarantee with certainty that every single item of relevant information was found.

24. Despite the burden on the Council to establish that the exception is engaged, we are unable to say, with the degree of certainty required in an appellate jurisdiction, that, but for the shortcomings we have identified, the estimate would have produced a costs figure below the section 12 guideline figure or that the Request would have been handled without excessive cost. It would not be right, in these circumstances, to ignore the estimate completely and require the Council to do whatever proved necessary to establish whether or not it held the information requested. We are satisfied, despite the criticisms of the Council's conduct, that this would impose an unreasonable burden on it.

25. We face a very different challenge in this respect from that addressed by the panel that made the 0025 Decision. The Request was much broader in scope than the information request under consideration in that decision. The Appellant sought information on a policy discussion that may not have existed. If it did exist it may have been recorded informally (as in e-mail exchanges), or not at all. The scope of any search would therefore need to be extensive. Despite the shortcomings in Mr Coleman's sample searches, they produced such a very high cost figure, (even without any consideration of the paper and email records) that a better search methodology would be likely still to exceed the section 12 cost guidance figure.

26. The fact, which we acknowledge, that the Request might provide transparency as to the Council's approach to the issue of encroachment onto parkland by schools or other local authority facilities is not so great as to justify, on public interest grounds, an order for disclosure, despite the cost of compliance.

27. We are not able to say, either, that if the Council had given the Appellant better advice and assistance he would have been able to reduce the scope of the Request to a level where it could be responded to without excessive cost. That would require an inappropriate level of speculation as to the outcome of a dialogue between requester and public authority, which did not occur.

28. Although, therefore, the outcome may have been no different, we are clear in our view that the Council fell short of its obligations under EIR regulation 9. Those obligations act as a counterweight to the right of a public authority to rely on excessive costs to refuse an information request (see the words of Upper Tribunal Judge Jacob in *Kirkham*

quoted in paragraph 18 above – words that apply as much to an EIR request as to a FOIA one). This does not mean that a public authority is expected to reformulate an information request (see *Mackenzie* referred to above) or to enter into a lengthy dialogue with a requester to explore how an information request might be refined in stages. But it must do more that the Council did in this case.

29. Guidance on what is to be expected may be obtained from The Freedom of Information Code or Practice[1] (which has relevance to this case even though prepared to satisfy the requirement of FOIA section 45). Paragraph 2.10 of the Code provides:

> *"2.10 Where it is estimated the cost of answering a request would exceed the "cost limit" beyond which the public authority is not required to answer a request (and the authority is not prepared to answer it), public authorities should provide applicants with advice and assistance to help them reframe or refocus their request with a view to bringing it within the costs limit."*

Paragraph 6.9 provides:

> *"6.9 Where a request is refused under section 12, public authorities should consider what advice and assistance can be provided to help the applicant reframe or refocus their request with a view to bringing it within the cost limit. This may include suggesting that the subject or timespan of the request is narrowed. Any refined request should be treated as a new request for the purposes of the Act."*

30. The Code clearly anticipates that the obligation to provide advice and assistance extends beyond simply informing a requester that he or she may reformulate an information request to see if this reduces the cost of compliance to an acceptable level. An individual, with no knowledge of how the public authority in question maintains its records and what facilities exist for searching them, is at a very considerable disadvantage. They should be provided with that information in sufficient detail to enable them to see how their original request might be refined. In the present case the Council could quite easily have provided a paragraph of information describing eDocs and the Council's archive structure for email and hard copy materials. That could have been supplemented by a summary of the search facilities, including the advanced search tool and the logical connectors that enabled complex search strings to be applied at document text level.

31. Assistance at that level of detail need not open public authorities to the cost or disruption of having to provide detailed instruction to a requester on the operation of the search facilities. Nor would it require them to either maintain a dialogue over the detail of the records and facilities or to undertake a series of sample searches in order to refine an information request in stages. As the Code makes clear, once appropriate advice and assistance has been provided, the requester will be expected to settle upon a new formulation and submit that as a new information request.

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[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/659606/FOI_Code_of_Practice_-_Draft.pdf

32. We conclude, therefore, that the Council was in breach of EIR regulation 9 but that it has not been established that, but for that breach, the Request would have been reformulated by the Appellant in a way that would have enabled the Council to disclose requested information without incurring excessive cost and service disruption. The Information Commissioner was therefore entitled to conclude in her Decision Notice that the Request was manifestly unreasonable because of the likely cost of compliance. The Appeal should therefore be dismissed.

Signed

Chris Ryan
Judge of the First-tier Tribunal
Date: 15 August 2018