First-Tier Tribunal
General Regulatory Chamber
Information Rights

Appeal reference: EA.2020.0338
V[1]

Between

Philip Swift

Appellant

And

Information Commissioner

Respondent

And

Highways England

Second Respondent

TRIBUNAL: **JUDGE LYNN GRIFFIN**
TRIBUNAL MEMBER MARION SAUNDERS
TRIBUNAL MEMBER ROSALIND TATAM

Appearances: **The Appellant appeared in person**
The First Respondent did not appear and was not represented
Ms C Ivimy, counsel, for the Second Respondent

[1] *V: video (all remote)*

DECISION

The appeal is dismissed.

MODE OF HEARING

1. The proceedings were held by remote video hearing. All parties joined remotely; the Appellant joined by telephone as is his right. Although there were some issues with communication at points within the hearing there were none that overall, adversely affected the ability of all parties to participate as any breaches in communication were remedied. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.

2. The Tribunal considered an agreed open bundle of evidence comprising pages 1 to 163. The Tribunal also received skeleton arguments and a further witness statement before the hearing and another document from Mr Swift after the hearing at the Tribunal's request, this was his request for an internal review for questions 1-8.

3. The Tribunal had witness statements from

    a. Sian Jones - Lead Information Rights Officer for the Second Respondent. Two statements

    b. Liz Herridge - Director of Network Claims & Transformation for the Second Respondent

    c. Dana Bourne – Legal Advisor (Commercial) in the General Counsel Directorate at the Second Respondent

4. Sian Jones did not give evidence to the tribunal and as her evidence was disputed by the Appellant, we set it aside and do not rely on it in making this decision.

REASONS

Background to Appeal

5. Highways England is responsible for the operation, improvement, renewal, maintenance and repair of the strategic road network. The work is carried out by contractors and divided into 12 numbered areas.

6. Where damage is caused to the road network by a third party, such as when there has been a road traffic accident, these repairs are known as damage to Crown property or "DCP repairs".

7. In some numbered areas the contractors are responsible for these DCP repairs under the terms of their contract with the Second Respondent such that when the cost of repair is estimated to be less than £10,000 the contractor may seek to recover its costs by bringing a claim in negligence against the third party who caused the damage. These claims are brought in the name of the Second Respondent. These are known as "green claims".

8. If the damage is estimated to be above the threshold of £10,000 the Second Respondent will pay the contractor for the cost of the repairs and sue the third party itself.

9. The contractor relevant to this case is Kier.

10. The request mentions Corclaim/Shakespeare Martineau LLP. Shakespeare Martineau LLP is a solicitor's firm and Corclaim is likely to be a trading name or division of that firm.

11. This is one request under FOIA in a series made by the Appellant.

The request

12. On 10 September 2018 Mr Swift (the Appellant) requested information from Highways England (the Second Respondent), relating to third party claims and Corclaim (Shakespeare Martineau LLP).

13. The text of the request is set out below.

> *Your lawyers, Corclaim (Shakespeare Martineau LLP) wrote in respect of Coles v Hetherton in 2014 (see below), seemingly before they were instructed by Kier Highways Ltd and yourselves to pursue claims against drivers, fleets and insurers.*
> *Corclaim refer to the process as 'inflating claims. Highways England and their contractors engage Corclaim who utilise the decision. It appears the moral dilemma is not one that concerns your Public Authority whose role is to serve their public.*
> *The article below appears to have been written from the perspective of Corclaim acting for fleet managers. On the one hand, Corclaim act for fleets using the 'Coles' argument. On the other, they engage the same decision when pursuing fleets and their insurers in your name for repairs to Crown Property such as barriers.*
>
> *1. Please provide all information you possess about the consideration to utilise Corclaim and support their use of a process identified as 'inflating claims for profit' when pursing*

drivers, fleets and insurers following damage to Crown Property. Additionally, I ask to be provided:
2. The due diligence process used pre- engagement of law firms by Highways England
3. The due diligence undertaken pre- engagement of Corclaim
4. The number of claims involving Court hearings following which Corclaim have remitted monies to Highways England for the past 3 years.
5. In what respect are Corclaim acting for Highways England when:
o You do not instruct them
o You do not pay them
6. How many highway claims are currently being progressed to Court and of these
7. For how many do Corclaim act?

Your contractors and Corclaim step into the shoes of the Public Authority yet appear to gain all of the benefits without the accountability (for example, they are not subject to FoIA) What reviews or considerations have been undertaken about the conduct of Corclaim by Highways England:

8. Please provide all information.

The information will extend to:

9. All information resulting from the 'effort' put into reconciling past costs as referred to by [name redacted] in 2016, the processes, outcome and simplification that has resulted:

From: [name redacted]
Sent: 21 November 2016 17:04
To: Philip Swift
Subject: Your Ref: Kier Highways Ltd ('Kier') ref GC\026142 Our Ref: U02A567

Philip,
Thanks for your note. I also want to ensure that drivers only pay appropriately for the damage they do to Crown property. I'm sure the current process could be simpler and I know [names redacted] will be working to achieve this. We are certainly putting a lot of effort into reconciling the past costs that you are talking about.

Regards
[name redacted]
Highways England

The above appears at odds with the method of inflating claims described, engaged in your name by your lawyers.

Yours faithfully,
P. Swift
[Case article omitted]

14. The Request can be split into 4 broad topics

    a. Questions 1, 3, 4, 5 and 7 are requests for information relating to the alleged instruction of Corclaim by the Second Respondent to conduct claims.

    b. Question 8 is a request for information about any "reviews or considerations" undertaken by the Second Respondent about the conduct of Corclaim.

    c. Question 9 is a request for information about an "effort" to reconcile past costs and the "processes, outcome and simplification" that resulted.

    d. Questions 2 and 6 are requests for information, respectively, about due diligence processes and the number of claims being progressed to Court; not a part of this appeal.

15. The request was initially refused by the Second Respondent as vexatious and this response was the subject of an earlier decision notice under reference FS50803075, see bundle page C107, in which the Second Respondent was instructed by the Information Commissioner to issue a fresh response that did not rely on section 14(1) Freedom of Information Act 2000 (FOIA).

16. On 10 February 2020 the Second Respondent did so, stating that it did not hold the requested information in questions 1 to 4 inclusive, 6 and 7 as well as part of the information sought in question 8. So far as question 5 is concerned an explanation was provided in answer to the question. The remainder of question 8 was subject to a request for the Appellant to clarify the term "considerations" and additionally the Second Respondent relied on section 12 FOIA as regards the request in question 9 for all information resulting from "the effort" put into reconciling past costs and the outcome of that effort.

17. The Appellant requested an internal review on 11 February 2020 which he split across two emails as what he called a separated request. The Second Respondent issued its internal review on 10 July 2020 to both section of the request for internal review. The Second Respondent maintained its reliance on s12(1) FOIA and explained its position that in explaining Corclaim's role

it had answered the question where it had previously asked the complainant for clarification.

18. The Appellant complained to the Commissioner on 21 April 2020 who approached the complaint as raising the questions

    a. whether the Second Respondent is correct when it says that it does not hold some of the requested information,
    b. whether it appropriately cited section 12 and whether the Second Respondent provided advice and assistance in accordance with its duty under section 16 FOIA.

19. In her decision dated 18 November 2020, under reference IC-39115-Y4Q1, the Commissioner decided that, on the balance of probability, the Second Respondent does not hold the information, as stated. She went on to state that the Second Respondent has also correctly cited section 12 FOIA. However, she found the Second Respondent in breach of the legislation by not providing advice and assistance in line with its duty under section 16 FOIA. The Commissioner did not require any further action to be taken by the public authority.

20. The Commissioner accepted that the Second Respondent does not hold the information requested at parts three and six of the request for the reasons the Second Respondent provided.

21. The Commissioner did not consider whether information was held under part 9 of the request because the Second Respondent relied upon s12 FOIA (cost of compliance) in relation to that part of the request. The Commissioner found that in the light of the terms of the request which asked for "all" the information, multiple search terms would need to be used, results would inevitably be duplicated and given the generalised and vague terms of the phrasing searching for the information would exceed the fees limit.

22. The Second Respondent told the Commissioner that it could not advise the Appellant how the scope of the request could be reduced, both at refusal and review stage, but it did not provide any details as to why. Therefore, the Commissioner found that the Second Respondent breached section 16 but did not require the Second Respondent to carry out any steps, as the explanation it provided to the Commissioner about the searches that would

be required and that is contained in this decision notice, rendered any further advice and assistance unnecessary.

The Appeal

23. The Appellant was not satisfied with the decision of the Commissioner and appealed to the Tribunal on 19 November 2020 asking for the disclosure of the information he sought and "review of the ICO's conduct". The second limb of the outcome sought by the Appellant is outside the jurisdiction of the Tribunal except insofar as any conduct on behalf of the Commissioner is relevant to whether the decision was in error of law or involved a wrongful exercise of discretion.

24. The Appellant submitted grounds of appeal. In summary these grounds
    a. Set out the history of the other requests he had made to the Second Respondent
    b. Set out previous findings of this Tribunal in other appeals
    c. Set out what the Appellant described as "u-turns" by the Second Respondent which he suggested adversely impacted on the credibility of the public authority
    d. Explained he had attempted to split his request at the point of internal review between that part relating to Corclaim and that relating to the "effort" referred to by the Second Respondent
    e. Focussed on whether the requests were vexatious
    f. Suggested that the Second Respondent had provided inconsistent responses about their relationship with Corclaim
    g. Asserted that the evidence shows that Corclaim were acting for the Second Respondent
    h. Submitted that the reliance on s12 as regards part 9 of the request was disingenuous
    i. Suggested that providing the information requested under part 9 should have been straightforward and suggested ways it could have been accomplished.

25. The Commissioner resisted the appeal and applied for the appeal to be struck out in its response dated 24 December 2020.

26. The Registrar refused to strike out the appeal in her direction notice dated 6 January 2021.

27. The Second Respondent, who was joined to the appeal on 22 December 2020, also opposes the appeal and adopted the submissions of the Commissioner in their response, dated 8 February 2021, as well as expanding on a response to some of the factual assertions made by the Appellant.

The issues

28. The issues that arise for consideration by the Tribunal are

    a. Whether the Commissioner was in error of law when she found that the Second Respondent did not hold the information requested in questions 1, 3, 4, 5, 7 and 8

    b. Whether the Commissioner was correct to conclude that the Second Respondent was entitled to rely on s12 FOIA in relation to question 9

29. There is no ground of appeal relating to s16 FOIA, the duty to give advice or assistance but it was raised during the hearing and is dealt with in our decision.

30. There is no issue about the application of s14 FOIA because it is not relied upon by the Second Respondent and does not feature in the decision notice under appeal. Any issue about whether or not the request was vexatious was dealt with by the earlier decision of the Commissioner.

31. There is no issue to be determined as regards question 2 or 6.

The Law

32. The duty to provide information in response to a request under FOIA is set out in section 1 Freedom of Information Act 2000. Section 1(1) FOIA provides:

    "1(1) Any person making a request for information to a public authority is entitled –

    (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

    (b) if that is the case, to have that information communicated to him."

33. When determining whether information is held the civil standard of proof, on the balance of probabilities should be applied.

34. In a previous decision of this Tribunal Linda Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072; 31 August 2007) it was stated that when determining a dispute as to whether information is 'held':

> *"There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information. However, it argued (and was supported in the argument by the Information Commissioner) that the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner's findings of fact are reviewed. We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted."*

35. Section 12 of FOIA provides an exception to the general obligation to provide the information and says

> *"12. (1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.*
>
> *(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.*
>
> *(3) In subsections (1) and (2) "the appropriate limit" means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.*
>
> *(4) The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority-*
>
> *(a) by one person, or*

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign, the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them."

36. In summary section 12 of FOIA permits a public authority to refuse to deal with a request where the public authority estimates that it would exceed the appropriate costs limit to either comply with the request in its entirety or to confirm or deny whether the requested information is held.

37. The estimate must be reasonable in the circumstances of the case[2]. The appropriate limit is currently £450 for public authorities such as in this case; this figure is set by the Fees Regulations[3]. Where a public authority claims that section 12 is engaged, it should, where reasonable, provide advice and assistance to help the requestor to refine the request so that it can be dealt with under the appropriate limit. This aspect is governed by s16 FOIA.

38. Regulation 4(3) of the Fees Regulations states that a public authority can only take into account the costs it reasonably expects to incur in carrying out permitted activities in order to comply with the request. These activities are determining whether the information is held, locating the information, or a document containing it, retrieving the information, or a document containing it and extracting the information from a document containing it.

39. All public authorities should calculate the time spent on the permitted activities at the flat rate of £25 per person, per hour. This means that the appropriate limit will be exceeded if it would require more than 18 hours work for the public authority in this case.

40. What is a reasonable estimate will be considered on a case by case basis and will be one that is "…. sensible, realistic and supported by cogent evidence"[4].

41. The question of what is reasonable will be decided with reference to the systems in place at the public authority, not what systems could have been in place, or even should have been in place.

[2] The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulation 2004
[3] The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulation 2004
[4] Randall v Information Commissioner and Medicines and Healthcare Products Regulatory Agency (EA/2006/0004, 30 October 2007) as approved by the Upper Tribunal in cases such as Commissioner of Police for the Metropolis v Information Commissioner and Mackenzie [2014] UKUT 479 (AAC)

42. The powers of the Tribunal in determining an appeal under the Freedom of Information Act 2000 (FOIA) are set out in s.58, as follows:

> "*If on an appeal under section 57 the Tribunal considers -*
>
> *(a) that the notice against which the appeal is brought is not in accordance with the law, or*
> *(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*
>
> *the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.*
>
> *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."*

The submissions

43. The Appellant submits that
    a. the Second Respondent has misled the parties, undertaken irrelevant searches and did not consider the basis of the request
    b. He had been informed that Corclaim were instructed by the Second Respondent which is why he made the request. The Second Respondent has "u-turned" on that issue
    c. If the information is not held this should have been clear earlier in the history of his request
    d. The previous findings that the Second Respondent were wrong to rely on s14 FOIA mean that the weight that can be put on their evidence is diminished
    e. He had attempted to split the request at the point of the internal review as a mechanism to narrow the scope
    f. His previous dealings with the Second Respondent show that they did have control over the contractors but that Kier and Corclaim were not following their direction

g. The scope of the request in question 9 relates only to 3 individuals and therefore the volume of material and places that would need to be searched are limited
h. There would be only a small amount of material for question 9 as no effort had in fact been expended. In addition, during closing the Appellant said he had the material.
i. The request was simple, precise and targeted and any submissions by the Second Respondent about their searches are designed to distract and make the exemption in s12 fit

44. The Commissioner submits that
a. given the test as set out in Bromley, above, the question is not what information the Appellant expects or believes is or should be held by the Second Respondent but whether on a balance of probability information is held,
b. the Second Respondent has provided a reasonable explanation of why it does not hold the material; that it does not instruct Corclaim
c. the Second Respondent has provided the Appellant with details of public authorities who may hold the information he seeks
d. the Commissioner is entitled to accept what is said by the Second Respondent at face value and there is no reason to depart from that principle
e. the Appellant has misunderstood the application of s12 FOIA. He believes that the information he has requested at question 9 does not exist and thus asserts that s12 cannot apply, but he has made a request for information and the Second Respondent provided sensible and cogent evidence to support their reliance on s12.

45. The Second Respondent submits that
a. The assertion that the Second Respondent instructs or engages Corclaim is wrong
b. Corclaim is engaged by an independent contractor and the Second Respondent had no input into that instruction
c. There was no business or contractual reason for the Second Respondent to hold the information requested in questions 1, 3, 4, 5, 7 and 8.
d. the Appellant has not provided any evidence to show that his assertions are correct
e. Question 9 is linked to question 8.

f. The Request is for "all information" about any steps taken by the Second Respondent since 2016 to reconcile DCP repair costs in third party claims brought by Kier acting through Corclaim, and all information about any changes to processes or practices which resulted. This is an extremely broad topic and does not relate to a discrete project or review. Given the breath of the request and the size of operations conducted by the Second Respondent any review of the records held by the Second Respondent to determine what information was held and that which was in scope of the request would involve the review of thousands of documents
g. the Appellant suggests that a more targeted search should have been undertaken but that is not the terms of his request and in any event such a search would not reliably identify the information he was seeking
h. There is no ground of appeal relating to s16 FOIA

The facts

46. The Tribunal accepted the evidence of Ms Herridge and Ms Bourne.

47. On behalf of the Second Respondent Ms Bourne had conduct of a number of appeals brought by the Appellant against decision notices of the Commissioner. When the request in this case had been received in September 2018, she was part of the team that ensured the requests went to the correct team within the Second Respondent. There was a "triage" team because of the number of FOI requests about "green claims" as an attempt to address delays in response.

48. Ms Bourne then oversaw the preparation of the original response to the request which had relied on s14 FOIA. Once the Commissioner had directed that a fresh response be made that did not rely upon s14 Ms Bourne was allocated that task.

49. In order to provide the fresh response, she had contacted individuals and teams within the Second Respondent who in tune liaised with others outside the business including Kier and Corclaim. She had asked her line manager who was mentioned in the request to liaise with the chief executive officer.

50. At the relevant time Corclaim was instructed by Kier and not the Second Respondent. There was no contract between the Second Respondent and

the LLP at that time as it would have to be on the contracts register and it was not. The Second Respondent did not decide when a contractor should issue proceedings or when to place a claim on hold but could make a request for them to do so. For example, in 2019 such a request had been made due to work that was taking place about a national schedule of repair costs.

51. If the claim was under the threshold of £10,000 then the contractor would be responsible for the claim under the terms of their contract. Ms Herridge was in charge of the team that oversaw the claims process and thus if there had been any interaction with them, she would have known about it.

52. Since the time of the response the Second Respondent has instructed the firm via an open procurement exercise for a small value contract; the procurement exercise did not involve any negotiations. The procurement documents were not held on the same system as the material sought in this case. This is done to avoid a conflict of interest arising.

53. Question 9 of the request is expressly linked to question 8. It has to be read in the context of the request as a whole. Ms Bourne understood that to relate to the Appellant's belief that Kier was overcharging for DCP repairs. the Appellant has repeated that claim on many occasions over a period of years and has made previous FOIA requests in that regard.

54. The "effort" referred to in the request arising from the 2016 email does not relate to a defined project but to on-going discussions within the Second Respondent 's business about DCP repair costs and consideration of recovering the diminution in value of assets damaged in road traffic collisions from the responsible third parties. Thus, there was not a straightforward search that could be performed.

55. The Second Respondent's contractual operations are on a very large scale and thus produce thousands of communications and documents each year.

56. The Second Respondent operates a document management system called "SHARE". It did not use SharePoint in 2018 (the date of the request) for either green claims or contract management. Ms Bourne conducted the searches of this system in relation to the request in this case. She used terms in the light of the scope of the request as a whole.

57. As a scoping exercise Ms Bourne had searched for any document on the system within the search terms used chosen because they related to the request as a whole. The figures returned relate to how the system categorises the material. Ms Bourne's search returned thousands of "hits". Had the numbers been manageable further steps would have been taken. She had acted cautiously in not reducing the search terms too early and thereby missing documents. She had tried to capture all relevant information within scope of the request.

58. The Second Respondent produced a table of the result of the searches that had been undertaken

	Search terms	Emails	Documents	Total	Total in last 5 years
1	Shakespeare Martineau	399	165	600	513
2	Corclaim	214	30	257	239
3	Corclaim Kier	171	25	225	213
4	Kier	379,309	179,899	585111	550189
5	Court	473,984	246,872	756,280	580,689
6	Court Kier	110,539	29,476	145,929	138,344
7	Review Kier	138,398	82,340	230,298	216,209

59. Ms Bourne chose to search for the period of the previous 5 years because she searched from the point the request was received back in time, bearing in mind it was not limited as to the period for which information was requested. She could not say what a reduction in the period searched would produce but it was reasonable to infer there would be less documents for a shorter period.

60. As well as material about green claims, some of which may have related to claims outside the area, the system would hold material about relationship management between the Second Respondent and Kier, these would be meetings to check on any issues and ensure consistency. The system would also hold information about cases in which LLP had acted for a party in an action brought against the Second Respondent. However, none of this detracts from the large numbers of emails and documents produced at sections 4 to 7 above in the table.

61. Ms Bourne had not been aware of the content of contact with Ms Green [A32] until she had seen a copy of the appeal bundle. Ms Herridge found out they had met only later. The Appellant's query as to why the Second Respondent had not asked Ms Green does not assist because FOIA only relates to recorded information. There was no need to follow it up as the Second Respondent had given Kier permission to bring proceedings in their name and the contents of the document at A32 is consistent with the assignment of the ability to bring proceedings. There was no need to examine Ms Green's emails as if she had been using this LLP then this would be in the contracts database and not in her emails.

62. In hindsight Ms Bourne could see that there may have been some merit in seeking further clarification from the Appellant but given his request was for all information she did not know how to suggest he reduced its scope.

63. Ms Bourne had worked with her colleagues to answer every part of the request that they could even though the Second Respondent could have applied s12 to the whole request.

Analysis and discussion

64. WE find that the request made by the Appellant is based on the flawed assertion that the Second Respondent instructed Corclaim.

65. There is no evidence in that which has been placed before us that indicates that the Second Respondent was involved in the control of the sub-threshold claims process. The Second Respondent had assigned the right to make claims at that level to its contractors and was thereafter only able to monitor the performance of the contractor under the contract and make requests to them where appropriate.

66. The fact that the proceedings were brought "in the name of "the Second Respondent by their contractor(s) does not indicate factual control of the proceedings.

67. There has been no u-turn by the Second Respondent. The correspondence and details of conversations provided by the Appellant with Ms Green that he relies upon is not inconsistent with the facts as we find them. We note that according to documents provided in the Appellant 's submissions

Corclaim had been "instructed" to put proceedings on hold in 2017 but had continued to issue proceedings in 2018. We find that this is more likely to have arisen and be more consistent with the position where there is no control from the Second Respondent rather than the Appellant's interpretation that the proceedings were issued in defiance of the control that the Second Respondent was entitled to exercise.

68. We reject the suggestion that the Second Respondent has misled the parties, undertaken irrelevant searches and did not consider the basis of the request. There is no evidence to support any of these contentions.

69. The Second Respondent initially responded to this request with reference to s14 FOIA, they were entitled to formulate their response at that time and there is no strength in the point made by the Appellant that if the information is not held this should have been clear earlier in the history of his request. The process followed by the Second Respondent was correct because a consideration of the nature of the request and the applicability of s14 to that request may arise before consideration of the applicability of s12 in certain circumstances.

70. The previous findings of the Commissioner that the Second Respondent was wrong to rely on s14 FOIA does not mean that the weight that can be put on the evidence from the Second Respondent is diminished. We found Ms Herridge and Ms Bourne to be credible witnesses who were doing their best to assist this Tribunal and had done their best working with colleagues, to provide as many answers to the request as possible on the fresh response ordered by the Commissioner.

71. The Commissioner concluded that it was more likely than not that the Second Respondent does not hold information within the scope of questions 1 – 8 because they do not utilise LLP for claims that are instead pursued by their contractors under the terms of their agreement with the Second Respondent. On the basis of the evidence we have considered we agree with her conclusion. The Second Respondent has produced sensible and cogent evidence to support the assertion that they did not instruct or engage Corclaim and did not directly control which claims were pursued. Given the Second Respondent did not engage Corclaim there would be no reason for them to hold the information requested.

72. The Commissioner was not in error of law in this regard nor did she wrongly exercise her discretion. Having asked appropriately probing questions and received satisfactory answers, we concur that the Commissioner is entitled to accept what is said by the Second Respondent.

73. The scope of the request in question 9 is very broad asking for "all information". Question 9 is preceded by the sentence "This information will extend to:" which is a clear link to question 8 and thus the earlier sections of the request. Question 9 does not make sense without reference to the earlier parts of the request. However, even if it were taken by itself question 9 requests the public authority to provide the entirety of the information they held on an extensive subject matter relating to the efforts, processes and outcomes including any simplification of the reconciliation of past costs. The Appellant submits he had attempted to split the request at the point of the internal review as a mechanism to narrow the scope but this was not effective in refining the scope of this request as it did not reduce the time period or subject matter of what he was requesting. We find that it was not realistic to split the request at the time of the Internal Review. The Appellant's assertions that there would not be much if any material are without evidential foundation.

74. It is clear from the table of results produced by the Second Respondent that thousands of documents were potentially within scope and that was not the only action taken by the Second Respondent to assess the search. The way they went about searching for material within scope was reasonable and logical. The Appellant may believe that there should have been quicker or more efficient ways to produce the information he sought but the law requires the tribunal to consider the systems that were in place rather than those that could have been in place.

75. It is clear from Ms Bourne's evidence that the appropriate cost limit would be exceeded in simply determining what information was held that was within scope. Further time would be needed to retrieve and extract that information. Even if one sets aside the time expended to conduct the searches and notes that 18 hours is the appropriate limit of time - allowing only the brief time of 1 minute per document only 1,080 documents of the many thousands could be perused.

76. As to s16, this was raised by the Appellant in the course of the appeal hearing and so we address it for completeness. The premise of this request

in question 9 was mistaken; each part of the request related to the other and the initial false premise. Question 9 was extremely broad in scope and even if the time period had been reduced it is more likely that not from the numbers produced on the search that the appropriate limit would be exceeded. If one makes a rough estimate of how many documents would be included in a search for one year of the 5 year period searched, by dividing the totals for each section by 5 one can see that there would still be many tens of thousands of documents that would need to be looked at. Thus, in this case it was reasonable for the public authority to take the view that they "felt that there was no advice or assistance that could be provided that would enable the scope to be sufficiently reduced to an appropriate limit and still provide an accurate response to the question raised", see D149.

Conclusion

77. For all these reasons we have concluded that the Commissioner neither fell into error of law nor exercised her discretion wrongly in the decision notice dated 18 November 2020, under reference IC-39115-Y4Q1. Accordingly, the appeal is dismissed.

Tribunal Judge Lynn Griffin
Dated: 12 April 2022

Corrected under the slip rule 26 April 2022