Case Reference: EA/2023/0220.
NCN: [2023] UKFTT 00641 (GRC)

First-tier Tribunal
General Regulatory Chamber
Information Rights

Heard on the papers.

Heard on: 28 July 2023.

Decision given on: 2 August 2023.

Before:

Tribunal Judge: Brian Kennedy KC

Between:

Peter Hayes Appellant

and

The Information Commissioner Respondent

In an application by the Respondent to Strike out the Appeal

Decision: The application is granted, and the appeal is struck out.

REASONS

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[1] This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 ("the FOIA") as, against the Commissioner's decision notice

17 April 2023 with reference number IC-219609-Q1Z2 (the "DN"), which is a matter of public record.

[2] Full details of the background to this appeal, the complainant's request for information and the Commissioner's decision are set out in the DN.

[3] In short, the complainant requested information from North East Combined Authority, the public authority herein ("the PA"). The DN determined that the PA was entitled to refuse to comply with the request in accordance with section 12(1) (cost limit) of the FOIA. The Commissioner also finds that the public authority complied with its obligations under section 16 of FOIA to offer advice and assistance.

[4] On 10 January 2023, the complainant made the following request for information to the public authority: *"Please could you specify; (a) the number of "Unpaid Toll Charge Notices" issued to people who travelled by motor vehicle through the Tyne Tunnel on December 22nd, 2022. and (b) How many of these "Unpaid" Toll Charge Notices were dated at least one day after a toll payment had been made for the vehicle in question."*

[5] The PA responded to the request on 6 February 2023, providing an *"estimated figure"* for part (a) and refusing to provide the requested information in respect of part (b) of the request, citing section 12 (cost limit) as its basis for doing so.

[6] On 7 February 2023, the complainant requested an internal review.

The internal review outcome was provided on 1 March 2023 and advised the complainant as follows:

"• that the answer to part a) their request was an: "estimate with a good degree of confidence in its accuracy. Here, the Combined authority and TT2 were mindful that confirming the absolute accuracy of the number in question would require officer time in addition to what would be required to answer your second question, and so would have been likely to have resulted in both questions being refused under section 12 (1) of the FOIA.

• of a more detailed explanation about how the "Unpaid Toll Charge Notices" are generated Notices" are generated and advised: "At present, no business need has been identified to report on numbers of cases that would meet the criteria set out in your question and so the information you seek was not held by or on behalf of the Combined Authority, either at the time of your request or at the present time. To this extent, the Combined Authority confirms that the information you seek in question (b) is not held in a substantive form for the

purposes of the Act (FOI Section 1(1a) refers). While it may be possible to derive the information you seek from data in Tolling, Payment and UTCN systems, the organisational separation between UTCN and Tolling & Payment systems and processes means that this would require –

• The extraction and compilation of the date on each of the 1,755 UTCN's issued in relation to 22/12/2022 journeys, followed by-

• The identification and compilation of every VRN covering the 1,755 UTCN's issued in relation to 22/12/2022 journey's, followed by - The examination of payments systems records to determine –

• Whether any payment had been received in relation to a VRN linked to a UTCN (i.e "payment made for the vehicle in question"), and

• Whether such payments had been made one or more days prior to the date on the UTCN.

The Tunnels operator has advised that there is no report that would allow the requirements above to be undertaken electronically / automatically by (for example) filtering and cross-referencing and, as such, the necessary tasks would require manual examination and cross-referencing of the datasets in question."

[7] The complainant contacted the Commissioner on 4 March 2023, to complain about the way their request for information had been handled. The complainant was dissatisfied that an "estimated" _figure had been provided in response to part (a) of the request and, with regard to part (b) of the request, disagree with the public authority's application of section 12 of FOIA.

[8] The issue for the Commissioner was identified as whether the public authority is correct to apply section 12(1) (cost limit) of FOIA to the request. The appropriate limit for the public authority in this case is £450 (calculated at a flat rate of £25, equating to 18 hours of work).

[9] A significant background taken into consideration by the Commissioner was that a third party concessionaire (TT2) operate the system on behalf of the public authority and the PA advises that, with regard to part (a) of the request, there is no contractual requirement for TT2 to provide the public authority with daily numbers of how many Unpaid Toll Charge Notices (UTCNs) have been issued. Rather, TT2 provide the public authority with a monthly services report. However, the public authority has advised that: *"TT2 (NECA's Concessionaire in relation to the*

Tribunals) was able to interrogate UTCN systems for the number that [redacted] had requested, and this number was provided accordingly. While there was a good degree of confidence in the accuracy of the number, it was supplied with the caveat of an estimate as the systems interrogation needed was an ad-hoc exercise, outside of normal contractually-established enquiries or reporting, prompted solely by the FOI request received from [redacted]. _"

[10] The Commissioner maintains the position set out in the DN and in the Response to the Grounds of Appeal argues that the appellant fails to set out any cogent argument as to why the DN is not in accordance with the law and/or why the Commissioner ought to have exercised any discretion differently.

[11] The Appellant effectively abandoned his claim to part a) of his request and argued in relation to part b) of his request, inter-alia in his Grounds of Appeal that the Commissioner has failed to rebut his general observations on the ability of modern data systems to aggregate data, nor provided any evidence that the information sought is kept in some kind of antiquated system to which these observations apply.

[12] This Tribunal have read all the papers carefully and agree with the Commissioner that the Appellant is speculative, and his arguments are based on supposition and guesswork rather than any clear reasoning which would disturb the estimate provided by NECA and supported by TT2. NECA has confirmed the four steps required to locate, retrieve and extract the information to answer part 'b' of the request [DN 12]. The Tribunal accepts that the steps required were confirmed by the third-party concessionaire (TT2) who operates the system on behalf of NECA. NECA has confirmed that the information required to answer this request is held across a number of systems requiring different complex tasks to locate, retrieve and extract the required information. The Commissioner submits that he was correct to make his decision on the application of section 12(1) FOIA based on how the records are held rather than how the Appellant considers they should or are 'most likely' to be held.

[13] For the avoidance of doubt the Tribunal refers to the letter dated 3 April 2023 from Joanna Charlesworth, the Case Officer in the ICO who carried out the in-depth investigation in response to the Appellants complaint. This letter demonstrates beyond doubt a thorough and comprehensive investigation was

carried out by the Commissioner's office and leaves this Tribunal persuaded that the impugned DN was correct and contains no error of Law or flawed exercise of any discretion.

Conclusion:

[14] The Tribunal recognises that each case must be determined on its own merits. Having considered all the evidence before me I am satisfied there is no arguable appeal of the impugned DN to be tried and accordingly, I allow the application to Strike out the Appeal at this stage.

Brian Kennedy KC 28 July 2023.