NCN: [2023] UKFTT 00845 (GRC)
Case Reference: EA/2023/0131

First-tier Tribunal
General Regulatory Chamber
(Information Rights)

Heard on: 6 September 2023
(via Cloud Video Platform)

Decision given on: 13 October 2023

Before

Judge O'Connor – Chamber President
Tribunal Judge Foss
Tribunal Member Yates

Between

Anthony Mott

Appellant

and

The Information Commissioner

Respondent

Representation:
Appellant: Not legally represented
Respondent: Did not attend the hearing and was not represented.

Decision: The appeal is ALLOWED. The Information Commisioner's Decision Notice, referenced as IC-128677-P7B7, is not in accordance with the law.

Substituted Decision Notice:

The Cabinet Office must, by no later than 4pm on 31st October 2023, state if it held the information requested by the appellant in his request of 21 July 2021 and, if it did hold it, either supply the information to the appellant by 4pm on 31st October 2023 or, by this same date, serve a refusal notice under section 17 of FOIA, including what grounds the Cabinet Office relies on (save for section 12 (1) of FOIA which the Cabinet Office is precluded from relying upon).

A failure to comply with this Substituted Decision Notice could lead to contempt proceedings.

DECISION AND REASONS

Introduction

1. On 21 July 2021, the appellant made a request for information to the Cabinet Office - a public authority under schedule 1 of the Freedom of Information Act 2000 ('FOIA'). In its response of 11 August 2021, the Cabinet Office refused disclosure, placing reliance on section 12 (1) of FOIA. The Cabinet Office maintained that position upon internal review. The appellant complained to the Information Commissioner ("ICO").

2. This an appeal against the ICO's Decision Notice drawn in response to the aforementioned complaint, referenced as IC-128677-P7B7 and dated 2 March 2023. Therein the ICO concluded that the Cabinet Office was entitled to rely on section 12(1) and that it had met its obligations under section 16 of FOIA. The ICO required no steps to be taken by the Cabinet Office.

3. The appellant appealed this Decision Notice to the First-tier Tribunal ("the FtT"). The hearing of the appeal took place on 6 September 2023, via CVP. The composition of the judicial panel determining the appeal is in accordance with paragraphs 3 and 6 of the Senior President of Tribunal's Practice Direction on the "*Composition of the First-tier Tribunal in relation to matters that fall to be decided by the General Regulatory Chamber*", dated 19 May 2023.

4. The ICO was given notice of the hearing. By way of an email of 26 June 2023, the ICO evinced an intention to be neither present nor represented at this hearing and sought to place reliance on the contents of the Decision Notice and the written Response to the appeal. Having considered the papers before us, and the First-tier Tribunal (General Regulatory Chamber) Rules 2009 ("2009 Rules") ,we conclude that it would not impinge upon the two primary tenets of the overriding objective, fairness and justice, to determine this appeal in the absence of the ICO.

5. It is also prudent to identify at this juncture that the Cabinet Office were provided with an opportunity by the FtT to join these proceedings but, by way of an email dated 15 June 2023, stated that it "*would not be joining the appeal or making submissions*".

Background, the Information Request and the Cabinet Office response

Background

6. The appellant is a retired member of the Principal Civil Service Pension Scheme (PCSPS). During the time of the appellant's service this was a non-contributory pension scheme, except for a payment of 1.5% of salary towards the Widows & Orphans Pension Scheme (WPS). In the event that the scheme member remained single at retirement these contributions were to be refunded along with compound interest and less a small premium to cover a marital status change after retirement. In addition, scheme members in post on or after 20 July 1995 could opt to pay additional WPS contributions for the purpose of eliminating or reducing any potential lump sum deduction in the event of retiring before the age of 60. Under specified circumstances

these additional voluntary WPS contributions would be refunded, along with compound interest, via salary by the employing department. In the appellant's case the additional voluntary WPS contributions were not refunded via salary by the employing department, but were, in error, commuted to a small additional pension.

7. The Cabinet Office is responsible for the management of the Civil Service pension. MyCSP administers the Civil Service pension arrangements on behalf of the Cabinet Office.

8. In light of the aforementioned error identified in the appellant's case, between July 2020 and March 2021 MyCSP and the Cabinet Office undertook a review of the pension arrangements of members who met specified criteria ("the sift criteria"), with a view to ascertaining whether these members had had their additional voluntary WPS contributions correctly refunded via salary. 326 PCSPS members were found to be in scope of the review, and a sample of 36 cases were 'rigorously reviewed'. No errors were identified in those 36 cases. It was thereafter decided not to continue with the review as no conclusive evidence of a systemic issue had been found.

The Information Request

9. By way of an e-mail dated 21 July 2021, the appellant made a request of the Cabinet Office for information in the following terms:

> "MyCSP have conducted a review on the following sift criteria: members who took partial retirement, paid additional Widows Pension Scheme contributions and were single at retirement. Of these 36 cases were fully reviewed. **Please provide me with the number of cases, within the batch of 36 fully reviewed, that had their additional contributions repaid via salary?**
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> If this request is too wide or unclear, I would be grateful if you could contact me as I understand that under the Act, you are required to advise and assist requesters. …" (emphasis original)

Cabinet Office response

10. In a response to the information request of 11 August 2021, the Cabinet Office stated as follows:

> "As you know, the original review undertaken by MyCSP identified 36 cases for review out of 326. Your request exceeds the cost limit because in order to establishing (sic) whether the requested information is held, MyCSP would have to review the 36 to identify details relating to contributions repaid by salary. We estimate that these activities would take an hour per case and therefore exceeds the appropriate limit.
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> We are mindful of our section 16 duty to provide reasonable advice and assistance to requesters. However, in the circumstances of this case, given that MyCSP would have to re-sift the 36 cases we are unable to provide any suggestions as to how your request could be narrowed to bring a fresh request within the cost limit."

11. By way of a reply of 30 September 2021 to the appellant's request for an internal review, the Cabinet Office maintained its position in the following terms:

> "As the information you require is not held, it has been estimated that to review the 36 identified cases, would take an hour per case. This exceeds the appropriate limits stipulated under section 12."

The ICO's Decision Notice

12. The ICO determined that the scope of the investigation was to consider whether section 12(1) FOIA had been correctly applied in this case.

13. On 29 November 2022, the ICO wrote to the Cabinet Office indicating an intention to issue a Decision Notice *"for disclosure due to a lack of supporting information why section 12 was engaged*". The Cabinet Office responded to this letter on the 24 January 2023, stating as follows under the heading *"Application of Section 12":*

14. In a response dated 24 January 2023, the Cabinet Office maintained that it would exceed the appropriate cost limit under section 12(1) to comply with the appellant's request, stating as follows under the heading *"Application of Section 12":*

> "The complainant argues that because MyCSP has already compiled the data for the 36 cases, there should be no additional cost to return to the review and provide the information he has requested. The department disagrees with the complainant's position. The complainant has requested additional data relating specifically to the parameters of the sift rather than the original basis for the review which was to look for errors. To answer the FOI request would exceed the section 12 costs limits under the Act.
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> The Cabinet Office, including through any information held by MyCSP on its behalf, do not currently hold the information required, or record it in the specific manner that the complainant has requested. As background knowledge, MyCSP build members' pension records based on data provided by employers by way of an electronic interface. MyCSP are wholly reliant on data provided by employers and have no direct access to a member's service history or payroll data. This data changes every month with a new upload arriving, which then erases the old payment data. Therefore, to revisit the 36 cases, would be on a fresh basis as any records and calculations held as part of the original review would now be obsolete and would need to be completed again in its entirety.
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> This additional data request, namely the parameters of the sift, would be outside of business as usual (BAU) salary clarification requests. To ensure that the data is provided in the manner requested would require MyCSP to liaise with potentially 36 different employers to find the appropriate person to review the matter within the applicable human resources (HR) team for that case. This input would likely need to be chased and when the historic payroll data arrives, would then need to be checked for accuracy. Clarification between HR and MyCSP on aspects of the data, anomalies, and how the data should be provided would take further time. Additionally, a complex manual calculation to confirm if the contributions paid are equivalent to either 1.5%, 3%, or 4.5% of

pensionable earnings would then need to be undertaken. This would be to ensure accuracy of each case and calculation, which would need to be checked by another person.

A further issue would be that certain individuals identified in the 36 cases may have worked longer in service and therefore would have more WPS contributions to review. Therefore, the time will vary from case to case depending on the personal circumstances of each individual.

Speculative Estimate:

As stated above, MyCSP does not currently hold the information required, or record it in the specific manner that the member has requested. Consequently, this case is particularly unique, as there are no search terms that can be utilised in this case and due to the length of time it would take to contact some of the employers to gather the information and ensure its accuracy, a sample exercise is unrealistic and burdensome to conduct.

As such, a sampling exercise would not be "sensible and realistic", and a small sample would not be representative of the whole due to the individual issues which may arise in allocating and extracting the relevant information. The ICO has accepted this in other cases, including in decision notice FS50768806 and FS50768657.

In line with these decision notices, the Cabinet Office is unable to provide an estimate for the Commissioner to consider and judge in this case.

At a minimum, an official would need to coordinate this search work. Searches would need to be identified and conducted and any information would need to be reviewed to ascertain if it is or is not in scope of the request. To allow this salary aspect to be addressed for the complainant, the hourly rate for a Senior Pension Advisor to search the WPS contribution based salary records and liaise with external, various employers to request and validate this information is £87.20 and it is expected to take, at the very minimum, 54 hours in total which will exceed the appropriate cost limit.

When the Cabinet Office originally commissioned a review, the time and costs of carrying out the work were significantly underestimated. However, the work provided internal assurance that there are no systemic issues in relation to WPS as well as providing assurance to the complainant. This additional labour had to be fitted in around BAU work as service levels. Pension payments are MyCSP's key priority. It took quite some time to identify 326 cases that fit the applicants criteria alone. From the 326 potential cases identified, 36 applicable cases (10%) were reviewed in full, without a single error discovered.

The review undertaken was a proportionate sample with no errors identified using the parameters and scope advised to the complainant. We have no reason to believe that MyCSP's review was not conducted in full and correctly. In this instance, we do not believe it is an appropriate use of public money to revisit this matter further."

15. The ICO concluded that the Cabinet Office *"estimated reasonably that it would take more than 24 hours to respond to the request"* and that it correctly relied upon section 12(1) FOIA to refuse to comply with the appellant's request.

16. The ICO also considered whether the Cabinet Office had complied with section 16 FOIA in its handling of this request and determined that it had.

Notice of Appeal and ICO's Response

17. In his Notice of Appeal to the appellant contended that for the 36 cases subject to a full and rigorous review to be correct, all of them must have had their additional WPS contributions paid via salary. This being the case no additional work was required to answer the FOIA request, as the Cabinet Office must have already concluded that payment was made by salary, otherwise MyCSP and the Cabinet Office could not say that no errors in the 36 members' cases had been identified.

18. By way of a written Response of 25 May 2023, the ICO contends that:

> "[22] The Cabinet Office has explained that neither they nor MyCSP have access to member's service history or payroll data, this is provided to them by employers and changes every month. Therefore, to revisit the 36 cases that were rigorously audited as part of the review would be on a fresh basis to answer the request made in July 2021 as any records and calculations held as part of the original review would be obsolete by the time of the request. The review was completed in March 2021 and the request was made in July 2021 and as explained above the Cabinet Office has said that the information required to answer the request is provided to them by employers and changes every month. If the method of repayment (which is the subject of the FOI request) could have potentially altered during the time between completion of the review and the FOI request it is clear the 36 cases would require reassessment.
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> [23] The Cabinet Office has however further explained that this is a new request for information, specifically regarding the parameters of the original sift carried out. So as the Commissioner understands it, potentially the request was made to check the scope of the original review undertaken. It is not however within the Commissioner's remit to comment upon the scope of the original review undertaken. If the Cabinet Office does not hold information which would answer the request in this case within records and calculations held as part of the original review either because this didn't fall within the parameters of the review or because this may have altered due to the time period between completion of the review and the FOI request being made, this would not disturb the Commissioner's conclusions regarding the application of section 12 FOIA in relation to this request."

Legal Principles

19. By section 1 FOIA, public authorities are under a general duty to disclose information they hold where it is requested:

> **"General right of access to information held by public authorities**

> (1) Any person making a request for information to a public authority is entitled –
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> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
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> (b) if that is the case, to have that information communicated to him.
>
> …
>
> (4) The information –
>
> (a) in respect of which the applicant is to be informed under subsection (1)(a), or
>
> (b) which is to be communicated under subsection (1)(b).
>
> is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

20. FOIA does not oblige a public authority to comply with a request for information if it estimates that the cost of compliance would exceed the appropriate costs limit. In this appeal, the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 prescribe a limit of £600 and an hourly rate of £25 for the work of the public authority's personnel. If no costs other than time are claimed, the question is therefore whether complying with the request would take more than 24 hours. The statute's use of the word 'would' likely indicates a higher degree of certainty than if read 'may' or 'might'.

21. The public authority's estimate must be reasonable, in the sense of being sensible, realistic and supported by cogent evidence. It may only take account of the following activities:

    a. determining whether the public authority holds the information,

    b. locating it, or a document which may contain the information,

    c. retrieving it, or a document which may contain the information, and

    d. extracting it from a document containing it.

22. The Upper Tribunal's decision in Kirkham v Information Commissioner [2018] UKUT 126 (AAC) sets out the approach which this Tribunal should take in considering an appeal concerning section 12 of FOIA:

> "17. On a complaint, the issue for the Commissioner is whether the public authority dealt with the request in accordance with Part I of FOIA (section 50(1)). On appeal, the issue for the First-tier Tribunal is whether the Commissioner's decision notice was in accordance with the law (section 58(1)). The latter in effect requires the First-tier Tribunal to consider afresh whether the public authority dealt with the request in accordance with Part I.
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> 18.Two issues arise under Part I. The first is whether the authority made an estimate. This arises under section 12. If it did not make an estimate, it is not

> entitled to rely on the section, as the existence of an estimate is a precondition for the application of the section. If it did, the second issue is whether the estimate included any costs that were either not reasonable or not related to the matters that may be taken into account. This arises under regulation 4(3). Both issues focus on the authority, on how it holds the information, and how it would retrieve it.
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> 19.The first issue is entirely subjective to the public authority. That is the language of section 12; it is personal to the authority. The cost of compliance will be related to the way that the authority holds the information. This is consistent with Upper Tribunal Judge Markus's analysis in Cruelty Free International v Information Commissioner [2017] UKUT 318 (AAC). I agree with her that it does not matter if the way in which the information is held fails to comply with other legal obligations than FOIA. It might be otherwise if the authority had deliberately distributed the information in a way that would always allow it to rely on section 12. That is not the case here and it was not the case in Cruelty Free.
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> 20.The second issue contains an objective element. The issue arises under regulation 4(3) of what costs 'a public authority … reasonably expects to incur in relation to the request'. The word 'reasonably' introduces an objective element, but it does so as a qualification of the costs that the authority in question expects to incur. The test is not a purely objective one of what costs it would be reasonable to incur or reasonable to expect to incur. It is a test that is subjective to the authority but qualified by an objective element. It allows the Commissioner and the tribunal to remove from the estimate any amount that the authority could not reasonably expect to incur either on account of the nature of the activity to which the cost relates or its amount. This mixture of subjective and objective elements is comparable to the approach taken to the interpretation and application of similar language in what is now regulation 100(2) of the Housing Benefit Regulations 2006."

23. In any case where the public authority has relied upon section 12 to refuse a request, if the appeal to the Tribunal is successful then the Tribunal would require the public authority to issue a fresh response to the original information request, confirming whether or not information is held and claiming any exemptions, on the basis that section 12 (1) FOIA is not engaged. Thus, a successful appeal against a section 12(1) FOIA determination, does not automatically lead to the disclosure of the information requested.

Discussion

24. For the purposes of determining this appeal, we have considered those documents contained within the "*Hearing Bundle*", which runs to 85 pages, the further written submissions of the appellant and the attachments thereto, and the oral submissions made by the appellant during the course of the hearing of 6 September 2023.

25. In both its response to the request for information of 11 August 2021, and its outcome letter of 30 September 2021 drawn in reply to the appellant's request for an internal review, the Cabinet Office state that it would take one person one hour per case to determine whether the department holds the information, and "*locating, retrieving and*

extracting it". The appellant's request relates to 36 cases and, consequently, although not specifically stated therein, a reader of these letters can deduce that the Cabinet Office's position at that time was that it would take 36 hours to undertake the specified activities necessary to respond to the information request (the letter of 11 August makes reference to "*3 ½ working days*" but does not identify the length of a working day). The relevant cost per hour is set at £25 and, therefore, we assume that the Cabinet Office intended to relay in its letters of 11 August and 30 September 2021, that the cost to it of responding to the appellant's information request would be £900.

26. Neither of these letters provides further detail as to how the figure of one hour per case was reached save, rather confusingly, that it is said that the 36 cases would have to be reviewed or re-sifted, "*in order to establishing (sic) whether the requested information is held*" [letter of 11 August] or because the information "*is not held*" [letter of 30 September 2021].

27. In the letter of 29 November 2022, the ICO observed the lack of "*supporting information*" from the Cabinet Office in this respect and sought further details. The Cabinet Office did not adhere to the ICO's timeline for the provision of those details but, nevertheless, provided further information by way of the letter of 24 January 2023. Without any explanation for the change in its position, the Cabinet Office's letter of the 24 January 2023 reveals that the cost estimate was, by that time, said to be based on "*at the very minimum, 54 hours*".

28. This letter provides the following context to the appellant's information request:

    (i) The original sift parameters for the Cabinet Office/MyCSP review, which started in July 2020 and was completed in March 2021, were PCSPS members who:

        - Took partial retirement.
        - Paid additional contributions.
        - Were single at retirement; and,
        - Had not had their additional contributions correctly refunded via salary.

    (ii) A rigorous review was undertaken in relation to 36 members and no errors were identified and there is no reason to believe that MyCSP's review was not conducted in full, and correctly.

29. The Cabinet Office's letter thereafter details its rationale for the cost estimate. We have comprehensively set out the terms of this letter at [14] above, and do not repeat it again at this stage. It is the content of this letter that forms the basis of the ICO's Decision Notice.

30. In the Decision Notice, the ICO alights upon two key features of the Cabinet Office's rationale, namely (i) that "*neither [the Cabinet Office] or MyCSP have access to member's service history or payroll data, this is provided to them by employers and changes every*

month… to revisit the 36 cases would be on a fresh basis as any records and calculations held as part of the original review would now be obsolete and would need to be completed again in its entirety…the information is live and changing monthly with each contribution" (at [23] and [26]), and (ii) as this is a request for new information, the Cabinet Office would potentially need to liaise with 36 different employers and find the appropriate HR person. The data would need to be checked for accuracy, may require clarification and would require a complex calculation in each case (at [24] and [25]).

31. Taking a step back and looking at the overarching picture presented to this Tribunal, on the evidence before us we do not accept the Cabinet Office's primary assertion as to the relevance of the fact that calculations held as part of the original review would now be obsolete and that such calculations would need to be completed again in their entirety. Indeed, we find that the contrary is true, and that the appellant is requesting information that is founded upon the calculations that formed a part of the original review. In our conclusion, there is no scope to read the appellant's request in any other way and, although not definitive of this issue, this is certainly how the appellant intended it to be read (see, for example, page A24 of the bundle at [21]).

32. The review undertaken by MyCSP and the Cabinet Office between July 2020 and March 2021 was subject to four parameters – *"the sift parameters"*. A letter from the Cabinet Office to the appellant of 24 June 2021 discloses the following: The first three sift parameters acted as a gateway to the application of the fourth sift parameter. The application of the first three sift parameters led to the identification of a pool of 326 PCSPS members who fell within the scope of the review. The fourth sift parameter was thereafter applied to a random sample of 36 PCSPS members, drawn from the pool of previously identified 326 PCSPS members. The application of the fourth sift parameter is later referred to by the Cabinet Office as the *"rigorous review"*.

33. The terms of the fourth sift parameter are of some import. The fourth sift parameter i.e., the error that MyCSP were seeking to identify in their rigorous review of the random sample of 36 PCSPS members drawn from the pool of 326 PCSPS members who met the first three sift criteria, was that the PCSPS member subject to review had "*not had their additional contributions correctly refunded via salary*". Having applied the fourth sift parameter to the sample pool of 36 PCSPS members, MyCSP concluded that, within this sample pool of members to which the fourth sift parameter was applied, *"no errors were identified"*.

34. The only information sought by the appellant, is the number of members (from the pool of the 36 PCSPS members whose cases were rigorously reviewed by having the fourth sift parameter applied to them) who had their additional WPS contributions repaid by salary. The response to the information request must, therefore, be a number between zero and 36, inclusive. The appellant has not sought anything other than information as to this number.

35. We accept that the requested information i.e., the number of cases (within the 36 sample cases reviewed) in which the PCSPS member had their additional WPS contributions repaid by salary, was not information which the application of the fourth sift parameter sought to identify *per se*. However, on the evidence before us, we are

driven to the conclusion that there is an absolute and strict inverse correlation between (a) the number of errors identified by application the fourth sift parameter to the 36 sample cases (i.e., the information derived from the rigorous review), and (b) the number of cases, within the 36 sample cases reviewed, in which the PCSPS member had their additional WPS contributions repaid by salary (i.e., the information requested by the appellant).

36. In our conclusion, this must be so given that the application of the fourth sift parameter could lead to one of only two outcomes (i) that the PCSPS member had *"not had their additional contributions correctly refunded via salary"* or (ii) that the PCSPS member had their additional contributions correctly refunded via salary. The evidence before us does not disclose the possibility any other outcome.

37. The ineluctable consequence of what we have found above is that, rather than the calculations held as part of the original rigorous review being obsolete for the purposes of responding to the information request, those calculations would form the basis of any response to the appellant's request. This is, in our view, significant because it is the Cabinet Office's conclusion that the historic calculations are obsolete that is causative of the Cabinet Office's stated need to complete a fresh review/re-sifting of the 36 cases in order to provide a response to the information request.

38. If we are wrong in what we say above and, contrary to the appellant's own views, the appellant's request is to be read as requiring consideration of information in relation to the 36 sample cases that post-dates the rigorous review, then we find that the Cabinet Office has failed to rationally explain how such relevant additional information could exist in relation to those 36 cases.

39. It is to be recalled that, by application of the third sift parameter, each of the PCSPS members who formed the pool of the 36 sample cases had, by the time of the rigorous review, retired. This is plain from the terms of the review but, in any event, we accept the appellant's evidence on this. Although not necessary for our decision, we also accept the appellant's evidence that each of the PCSPS members that formed the pool of 36 sample cases, were in receipt of pension benefits at the time of the rigorous review.

40. There is no evidence before us to rationally explain the basis upon which, in those circumstances, a PCSPS member who formed part of the 36 sample cases could have (i) made additional contributions to their pension at any time after completion of the rigorous review, or (ii) had additional contributions refunded via salary at any time after the date of the rigorous review.

41. In other words, we have found no evidence to support a conclusion that the requested information is not fixed as at the date of the completion of the rigorous review, and we conclude that the Cabinet Office was wrong to rely on the fact that post 'rigorous review' financial information would be relevant to a response to the appellant's information request.

42. In our conclusion, the Cabinet Office has proceeded on a misunderstanding of the appellant's information request. We accept the position is as the appellant states in his

case summary, i.e., that by his information request he was *"not seeking live or additional information"*, but *"historical information"* from *"within the exercise concluded in March 2021"*.

43. In light of what we have said above, we do not accept that the Cabinet Office's cost estimate is sensible and realistic, nor do we accept that it is supported by cogent evidence. On the evidence before us, we are unable to ascertain the extent of any records or calculations held by, or on behalf of, the Cabinet Office from the original review but, in our conclusion, ascertaining whether that information is held and then, if it is, *"locating, retrieving an extracting it"* is unlikely to cost anywhere close to £600 – using the appropriate calculation method identified in the 2004 Regulations. Accordingly, we conclude that the ICO's Decision Notice is not in accordance with the law.

Judge O'Connor 4 October 2023