Case Reference: EA/2024/0026/GDPR

Neutral Citation Number: [2024] UKFTT 00597 (GRC)

First-tier Tribunal

General Regulatory Chamber

Information Rights

Heard: Determined on the papers

Heard on: 2 July 2024

Decision given on: 2 July 2014

Corrected pursuant to r 40: 8 July 2024

Before

RECORDER CRAGG KC sitting as a Judge of the FTT

Between

ED SURRIDGE

Appellant

And

THE INFORMATION COMMISSIONER (1)

CABINET OFFICE (2)

Respondents

DECISION ON STRIKE OUT APPLICATION

1. Decision: The 2nd Respondent's Strike Out Application dated 9 May 2024 made pursuant to rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009 ("the Rules") on the grounds that there is no reasonable prospect of the appeal succeeding, is granted.

REASONS

LEGAL BACKGROUND

1. The Tribunal has the power to strike out the present appeal under rule 8(3)(c) of the Tribunal Rules on the ground that it has no reasonable prospect of success. The phrase 'reasonable prospect of success' has been explained by the Court of Appeal in *Swain v Hillman & Another* [1999] EWCA Civ 3053 in the context of considering the phrase for the purposes of summary judgment under Part 24 of the CPR at [7]:

> "…the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words "no real prospect of being successful or succeeding" do not need any amplification, they speak for themselves. The word "real" distinguishes fanciful prospects of success or, as Mr Bidder submits, they direct the court to the need to see whether there is a "realistic" as opposed to a "fanciful" prospect of success."

2. By way of a Notice of Appeal dated 11 January 2024, the Appellant appealed to the First Tier Tribunal (the Tribunal). The Commissioner opposes the application and invites the Tribunal to strike it out under rule 8(3)(c) of the Tribunal Rules on the grounds that it has no reasonable prospect of succeeding:-

Rule 8(3)(c)

(3) The Tribunal may strike out the whole or a part of the proceedings if—

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

3. Section 12(1) Freedom of Information Act 2000 (FOIA) states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the "appropriate limit" as set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations").

4. S 12(2) FOIA adds that s 12(1) does not exempt the public authority from the obligation to comply with s 1(1)(a) FOIA (the duty to inform an applicant whether it holds information of the description specified in the request) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

5. The Fees Regulations set the appropriate limit at £600 for central government, legislative bodies and the armed forces. The Fees Regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that s 12(1) imposes a time limit of 24 hours before the £600 appropriate limit is exceeded.

6. Reg 4(3) of the Fees Regulations states that a public authority can only take into account the cost it reasonably expects to incur in carrying out the following permitted activities in complying with the request:

> (a) determining whether the information is held;
> (b) locating the information, or a document containing it;
> (c) retrieving the information, or a document containing it; and
> (d) extracting the information from a document containing it.

7. In *Arthur v IC and CPS* [2023] UKFTT 00686 (GRC), the FTT struck out an appeal against a DN based on s 12 and gave this summary of the requirements of and the FTT's approach to s 12:-

> 11. It is well established that section 12 FOIA does not oblige public authorities to keep their records in such a way that they can be quickly and easily located. The costs limit under section 12 is considered on the basis of the public authority's actual record keeping practices, not on the basis of how the requested information should have been kept (Commissioner of Police for the Metropolis v Information Commissioner and Mackenzie [2014] UKUT 479 (AAC)).

8. This is the case even if the public authority has a separate legal duty to keep the information in question. The Upper Tribunal considered this issue in *Cruelty Free International v Information Commissioner* [2017] UKUT 0318 (AAC). UT Judge Markus rejected the submission that there is a distinction between the costs consequences of inefficient record-keeping and those of a breach of legal obligation – "...the requester has to take the public authority's record-keeping practices as they are, even if they are defective...."".

9. That principle extends to arguments that technology may be used to search for information more expeditiously. See e.g. *Ryan v IC and NHS England* [2023] UKFTT 00113 (GRC), para 30:

> "NHSE has repeatedly and in detail set out the facts and assumptions upon which its estimate is based. The ability to neatly use technology to respond to the request, which Mr Ryan assumes exists, in fact does not. It is no part of this Tribunal's jurisdiction to make any assessment about NHSE's practices, procedures and record management techniques more generally. It is clear that the scope of Mr Ryan's request is such, that to attempt to comply with it would result in the appropriate limit being vastly exceeded."

10. In *Oakley v Information Commissioner* [2024] UKFTT 00315 (GRC), the appellant requester challenged the adequacy of the searches conducted by the DWP. He relied on ChatGPT evidence: §22-25. Before rejecting the appellant's case that the searches were too narrow:

> 27. Firstly, we must assess the weight that we give to the ChatGPT evidence. We place little weight upon that evidence because there is no evidence before us as to the sources the AI tool considers when finalising its response nor is the methodology used by the AI tool explained. If comparisons are drawn to expert evidence, an expert would be required to explain their expertise, the sources that they rely upon and the methodology that they applied before weight was given to such expert evidence. In the circumstances we give little weight to the ChatGPT evidence that searches should have been conducted in the form set out within that evidence."

FACTUAL BACKGROUND

11. The Appellant's FOIA request concerns information about 'wildfire preparedness for the safeguarding of people and their homes near woodland'. The Cabinet Office notified the Appellant that it did hold information within the scope of the complainant's request, however it was applying s 12(1) FOIA. On 1 August 2023, the Appellant complained to the Commissioner about how his request was handled, specifically contesting the application of s 12 FOIA. The Commissioner issued a decision notice (DN) on 6 December 2023 which dismissed the complaint:-

> 16. As is the practice in a case in which the public authority has informed the complainant that it holds the information, the Commissioner asked the Cabinet Office to provide a detailed estimate of the time/cost taken to provide the information falling within the scope of this request.
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> 17. In its internal review response and its submission to the Commissioner the Cabinet Office stated that it had interpreted the term 'document' to include emails, word documents, spreadsheets and presentations. It also stated that it had also interpreted 'involving' to mean documents on the subject of wildfire preparedness which the Cabinet Office created, has had some input into or on which the Cabinet Office has been consulted.
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> 18. The Cabinet Office informed the Commissioner that an initial search was carried out by an official within the policy team believed to hold information in scope of this request for the period 1 January 2019 to the date of the request. It was established that the term 'wildfire' generated 3,568 emails. These emails, however, covered a wide range of subjects such as invitations to meetings, risk assessment and briefing notes. Several of these emails were also shared for information purposes, and therefore would not fall within the relevant subject matter for this request.
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> 19. The Cabinet Office has estimated that it would take an average of 30 seconds for an official to determine whether an email would be within the scope of this request, to isolate this email and save it to a separate area if appropriate. It estimated that this stage would take approximately 29 hours (3568 emails x 30 seconds).
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> 20. In relation to documents, the Cabinet Office stated that a search was also carried out within the main file repository for emails held by the policy team for the search terms 'wildfire' and 'preparedness'. It was, however, not possible to limit the results of these searches for the period 1 January 2019 to date as the dates of these files were overwritten during the transition of the system to using Google products. These searches returned 1,687 returns, also covering a wide range of records. The Cabinet Office estimated this to also take an average of 30 seconds for an official to access and isolate each record. It estimated that this stage would take approximately 14 hours (1687 x 30 seconds).

> 21. The Cabinet Office therefore concluded that conducting searches through for the terms that concern the scope of the request over 3,568 emails and 1,687 documents, as well as determining which records are in scope, would require approximately 43 hours to accomplish.
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> 22. The Commissioner considers that the Cabinet Office estimated reasonably that it would take more than the 24 hours to respond to the request. The Cabinet Office was therefore correct to apply section 12(1) of FOIA to the complainant's request."

12. The Commissioner also found that the Cabinet Office had complied with its duty to provide advice and assistance to the Appellant. On 11 January 2024, the Appellant lodged an appeal against the DN. By way of response and application dated 27 February 2024, the Commissioner made an application to the FTT for an order striking out the appeal pursuant to rr 8(2) and 8(3)(c) of the GRC Rules. On 25 April 2024, the FTT declined to strike out the appeal, reasoning:

> 14. The Appellant has provided screen shots of AI suggested search paths that the public authority might consider in interrogating it systems. My reading of those suggestions also provides the Appellant with ways he might refine his information request.
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> 15. It seems to me that the Tribunal might be assisted by the public authority submissions on its reliance on section 12 FOIA. It would be a matter for the public authority as to whether the AI suggested search pathways should be considered or any submissions on that point.
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> 16. At this stage I do not consider the appeal has no reasonable prospect of success pursuant to Rule 8(3)(c).

13. The Cabinet Office now applies for an order striking out the appeal on the basis of para 8(3)(c) of the Rules. (no reasonable prospect of success). The Cabinet office argues that there is no prospect of the FTT finding the Commissioner's judgment, that the Cabinet Office was correct to apply s 12(1) FOIA to the Applicant's request, to contain an error of law, as follows:-

(a) The Applicant's views on methods of search based on artificial intelligence have no reasonable prospect of showing error of law in the s 12 decision, not least because no error of law ground is advanced, but additionally because of the principle summarised by the FTT in *Arthur* (see above) and in *Ryan*.

(b) In line with *Oakley*, little weight should be attached to the Applicant's assertions in reliance on responses to "quick requests of AI chatbots": Grounds, p 3.

(c) For completeness and to assist the Tribunal with the evidential issue posed by the FTT in its 24 April 2024 decision (see above) the Cabinet Office has filed and served with its application the witness statement of David Canning, dated 1 May 2024, confirming that it does not have AI tools that enable it to search its records in the way that the Appellant envisages.

14. The Appellant has submitted a response by email which criticises again the approach of the Cabinet Office to his request.

DISCUSSION

15. I have considered the parties' representations and concluded that this is an appeal which cannot be permitted to go any further and should be struck out, on the basis that there is no reasonable prospect of success.

16. I understand why the Registrar previously decided not to strike out this claim as the Appellant had raised the possibility of further ways for the Cabinet Office to search its records which may have shortened the time for the appropriate searches to take place.

17. However, the Cabinet Office evidence now confirms that these methods are not available to it. The case law set out above essentially says that the Tribunal must assess the applicability of s12 FOIA by looking at the processes actually used and adopted by the public authority.

18. On that basis, and looking at the DN, it is impossible to find an error of law in its conclusion that the Cabinet Office was reasonable to apply s12 FOIA to the request. It was not an error for the Commissioner to accept the account of the Cabinet Office as to how long the searches would take. There is nothing in the suggestion

that AI processes could be used (in the light of the evidence that they are not) which could challenge the conclusions reached by the Commissioner.

19. In my view, given the absence of an error of law identified in the DN, the appeal has no prospect of success, and is struck out under rule 8(3)(c) of the Tribunal Rules.

Signed: Judge S Cragg KC

Date: 2 July 2024

Corrected pursuant to the slip rule (rule 40 of the Tribunal Rules) 8 July 2024.