# DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference EA/2015/0048, made on 19 January 2016, did not involve the making of an error on a point of law.

I lift the stay on the appeal in *GIA/0649/2016*. I allow Mr Kirkham to make any submissions or applications on that appeal within one month of the date when this decision is issued to him.

## REASONS FOR DECISION

1. This has been a fascinating case. The arguments could be characterised as a battle over the way in which the Freedom of Information Act 2000 (FOIA from now on) should be interpreted and applied. On the one side, Mr Kirkham argued for what I am going to call a rigorous scientific approach; on the other side, Mr Paines for the Information Commissioner argued for a traditional legal approach. I have decided that there is much of value in Mr Kirkham's approach, but that it operates at the evidential level, not at the level of interpretation.

### A. The legislation

2. The relevant provisions of FOIA and the Regulations made under sections 12 and 13 are set out in Appendix A and Appendix B.

### B. History and background

3. On 12 June 2014, Mr Kirkham asked Cambridge University to provide the information that it held relating to proposals to the Engineering and Physical Sciences Research Council (EPSRC) in response to its Doctoral Training Call. The request was made under FOIA. Specifically, he asked the University to provide the following information for each proposal:

> 1. The section(s) of the proposal which were directed at Equality and Diversity, noting EPSRC's detailed instructions which required this to be explicitly considered.
>
> 2. Any drafts of the section(s) noted in 1.
>
> 3. Any email correspondence in relation to these section(s), including any advice provided by the University explicitly in respect of this proposal.
>
> 4. Any correspondence with EPSRC in furtherance of this matter (equality and diversity) in relation to this specific call, or otherwise relied upon for writing the proposal.

> Please note that you may, if it is easier or more efficient for you to do so, provide the proposal and its draft in totality.

The University refused, relying on section 12 of FOIA. It did, though, offer to provide the answer to Mr Kirkham's first question.

4. Mr Kirkham made a complaint to the Information Commissioner. The Commissioner investigated with the University how it had made its estimate of the expected costs of complying with the request. The Commissioner issued a decision notice on 17 February 2015, confirming that the University had dealt with the request in accordance with the requirements of Part I of FOIA.

5. Mr Kirkham exercised his right of appeal to the First-tier Tribunal. It first issued what it called a Preliminary Decision, as part of which it identified further questions that it asked the Commissioner to put to the University. When the answers were provided, the tribunal made its final decision on 19 January 2016, dismissing the appeal.

6. Mr Kirkham applied for permission to appeal to the Upper Tribunal. This was refused by the First-tier Tribunal, but was the subject of an oral hearing before Upper Tribunal Judge Turnbull on 28 April 2017. His decision was:

> My decision, for the reasons set out above, is therefore to give permission to appeal in respect of Grounds 1 to 6 of Mr Kirkham's grounds of appeal (i.e. those set out under his 'Theme 1'), but to refuse permission to appeal in respect of all other grounds.

He also gave permission to appeal in *GIA/0649/2016*, which relates to costs. For convenience, Grounds 1 to 6, aka Theme 1, can be found at pages 16 to 18 of the Upper Tribunal's papers.

7. Following Judge Turnbull's retirement, the case was transferred to me and I held an oral hearing on 26 February 2018. Mr Kirkham attended and spoke on his own behalf. Rupert Paines of counsel represented the Information Commissioner. I am grateful to them both for their submissions. After the hearing, Mr Kirkham was provided with a copy of the recording of the hearing on the basis of which he made his final written submissions.

8. Mr Kirkham did address me on some matters on which Judge Turnbull had refused permission to appeal. I am not going to deal with them. He gave permission only on what was included within the various headings used by Mr Kirkham: Theme 1, Grounds 1 to 6, and Head III. The judge dealt with them in paragraphs 24 to 46 of his reasons.

9. For completeness, Cambridge University did not wish to be a party before either the First-tier Tribunal or the Upper Tribunal.

## C. The right to information - failure cannot be the only option

10. Mr Kirkham's argument was based on the proposition that no search could be guaranteed to produce all the information held. He set out his proposal for how a public authority should respond to a request. As an example, he explained

to me how the University could have searched for emails relevant to his request. As the individual authors were known, their email accounts could be identified. The account or specific boxes within it could be converted into an easily searchable format and the results sampled in order to identify ways in which the search could be modified. If the University did not have the necessary software, it could be obtained as open source. This, he said, showed that the time taken for a search did not necessarily relate to the number of documents being searched. He argued that, if this approach were taken, it would almost always be possible for an authority to comply with section 1 without the possibility of relying on section 12. He argued that if there were cases in which a request would be burdensome to an authority, the proper course was to rely on section 14. This is a very simplified version of his argument, but it is sufficient to identify the flaw in it.

11. I pointed out, as did Judge Turnbull in his grant of permission to appeal, that Mr Kirkham's method of searching was not guaranteed to produce every piece of information held by a public authority. Mr Kirkham argued that that was not possible and FOIA should be interpreted and applied in the light of that reality. He referred me to a decision of Master Matthews, a Master of the Chancery Division of the High Court, in a case in which he approved the use of predictive coding in the disclosure process: *Pyrrho Investments Ltd v MWB Property Ltd* [2016] EWHC 256 (Ch). The Master's reasons include this quotation from the Irish case of *Irish Resolution Corporation Ltd v Quinn* [2015] IEHC 175:

> 66. The evidence establishes, that in discovery of large data sets, technology assisted review using predictive coding is at least as accurate as, and, probably more accurate than, the manual or linear method in identifying relevant documents. Furthermore, the plaintiff's expert, Mr. Crowley exhibits a number of studies which have examined the effectiveness of a purely manual review of documents compared to using TAR and predictive coding. One such study, by Grossman and Cormack, highlighted that manual review results in less relevant documents being identified. The level of recall in this study was found to range between 20% and 83%. A further study, as part of the 2009 Text Retrieval Conference, found the average recall and precision to be 59.3% and 31.7% respectively using manual review, compared to 76.7% and 84.7% when using TAR. What is clear, and accepted by Mr. Crowley, is that no method of identification is guaranteed to return all relevant documents.

12. I do not accept Mr Kirkham's argument. FOIA imposes an obligation on a public authority to provide the information requested. Section 1(1) confers a right for a requester to have the information sought and that right carries with it a correlative duty on the public authority to provide it. The right and the duty are subject to the other provisions of FOIA. Section 12 protects the authority from burdensome requests: *McInerney v Information Commissioner and the Department of Education* [2015] UKUT 47 (AAC) at [41]. The same could be said of section 14. The two sections deal with different types of burden, but the circumstances of a particular case may be such that a public authority may be entitled to rely on one or other or both of them. Just looking at those provisions,

the responsibility rests with the requester to make requests that do not fall foul of sections 12 and 14. There is, however, a counterweight in section 16, which provides the power and the duty for an authority to assist a requester to make a request in appropriate terms. That is what the University did in this case when it indicated to Mr Kirkham that it would be able to provide the answer to his first question within the appropriate limit in section 12.

13. I accept that there is never a guarantee that public authorities will be able to retrieve every piece of information that they hold within the scope of a request. That may be because it was wrongly stored: a document may be put into the wrong file or a name may be misspelt in an email. Or it may be because of a mistake in the search, whether human or electronic. But just because a search may fail to discover all the relevant information does not mean that it will always do so. Nor is it an excuse for relieving the authority of its legal responsibility if (i) the information is not stored in a way that can be retrieved when a request is made or (ii) the search is inadequate to find that information. I do not accept that it is permissible to interpret FOIA in a way that is guaranteed not to allow a public authority the chance to comply with its duty. Success may not be guaranteed, but failure cannot under the terms of the legislation be the only option.

14. Mr Kirkham was, naturally enough, looking at the matter from his own perspective, and in particular his concern to obtain the information he had asked for or at least sufficient of it for his purpose. He was content, as he put it at one stage, for the University not to search 'every nook and cranny'. The flaw in that argument is that it overlooks the University's duty. If Mr Kirkham, or any other requester, wants to limit the extent of a public authority's duty, the way to do it is through the terms of the request, if need be with the advice of the authority. The terms of the legislation do not allow for a half-way house between complying with a request and relying on an exemption. A public authority cannot comply with FOIA by providing such information as it can find before section 12 applies.

15. What I have said so far applies to requests and compliance under FOIA. There is nothing to prevent anyone asking a public authority for information without relying on FOIA, or an authority from providing some or all of that information. Nor is there anything to prevent a public authority from relying on section 12 under FOIA but nonetheless providing some of the information as a matter of good will. Those are not, however, matters for the First-tier Tribunal or the Upper Tribunal.

16. Mr Paines also argued that section 12 operated as a prediction, whereas Mr Kirkham's approach required the public authority to embark on a search. I do not need to decide this appeal on that ground, as it is unnecessary given the more fundamental flaw that I have identified. I accept the argument that section 12 operates predictively, but I would not want to reject the possibility that, in a particular case, the best way, or an appropriate way, to form an estimate might be to try a search, perhaps for just part of the information requested. This issue can be dealt with in a case where it arises.

## D. Estimate and reasonable expectation

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.

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.

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*.

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.

*Mr Kirkham's argument*

21. Mr Kirkham argued that it was the responsibility of the public authority to produce an estimate. It was not for the Information Commissioner or the First-tier Tribunal to come up with an alternative. If what the authority did was not an estimate, it could not rely on section 12. He then argued that there was a

proper way to make an estimate that had to take account of what any minimally competent computer programmer could do. Any public authority must employ such a person in order to comply with its data protection obligations.

*The role of the Information Commissioner and the First-tier Tribunal*

22. I accept Mr Kirkham's argument that it is not for the Commissioner or the First-tier Tribunal to undertake for themselves the task of making an estimate of the costs likely to be incurred, but I do not accept his argument that the First-tier Tribunal undertook the task of making its own estimate. The two issues that I have set out at the beginning of this section are legal issues. There are different ways in which a tribunal might consider whether the authority had acted in accordance with Part I. One way would be to undertake the estimate or part of it afresh. This might allow the tribunal to check on its reasonableness or to decide whether any possible mistakes that the authority may have made would have altered the ultimate conclusion that the costs would exceed the limit. The tribunal's reasons appear in part to be doing just that, but what was really happening was, as Mr Paines pointed out, that the tribunal was testing Mr Kirkham's argument. He cannot criticise the tribunal for doing that.

*Making an estimate*

23. Mr Kirkham set out in detail what I take to be the gold standard mathematical approach to making an estimate. His slides in support of his argument contained illustrations of the method and the formulae involved. I do not accept his argument that an estimate has to be made with the scientific rigour that he described.

24. An estimate involves the application of a method to give an indication of a result. In the case of FOIA, the result is whether the cost of compliance would exceed the appropriate limit (regulation 4(1)). It follows that the method employed must be capable of producing a result with the precision required by the legislation in the circumstances of the case. The issue is whether or not the appropriate limit would be reached. The estimate need only be made with that level of precision. If it appears from a quick calculation that the result will be clearly above or below the limit, the public authority need not go further to show exactly how far above or below the threshold the case falls.

25. The result does not have to be precise; that is the nature of an estimate. I accept that Mr Kirkham's approach is one way to make an estimate. It is not the only way and I do not accept that it is the only way that is permissible under FOIA. 'Estimate' is an ordinary word that is used in everyday language without the precision that Mr Kirkham attributes to it. He may be right that in a scientific context, that meaning is the right one. But legislation is not interpreted in a scientific context. The touchstone is the ordinary use of language. I can find nothing in the context of the legislation to suggest a narrower meaning. Indeed, if Mr Kirkham were right, the requirements of making an estimate would be so demanding that the right to rely on section 12 would be easily lost for any error in the process.

26. Mr Kirkham recognised that a public authority might not have the expertise to implement his approach to searching and estimating. This led to a discussion of what could be expected of the freedom of information staff in a public authority. What qualifications should they have and, in particular, what knowledge of computing? Mr Kirkham suggested that an authority should buy in the computer expertise required to implement FOIA in accordance with his scientific approach. That discussion missed the point. The test is what the public authority can reasonably expect, not what a particular member of the authority's staff can expect. Of course, an authority can only act through its staff, but their calibre and the need to buy in expertise are part of the general assessment of the reasonableness of the authority's estimate. To take an absurd example, suppose that an authority were to allocate the retrieval of information to an illiterate member of staff and the estimate of the costs likely to be incurred to someone who was innumerate. In those circumstances, there would probably not have been an estimate and the costs taken into account would probably not be reasonable.

## E. Grounds 1 to 6

27. Judge Turnbull gave Mr Kirkham permission to appeal only on his grounds 1 to 6. I will now explain why I reject the arguments contained in them.

*Ground 1*

28. This is that the First-tier Tribunal refused to allow Mr Kirkham to perform his own searches on data obtained from the University or to arrange an alternative. I reject this argument because this approach would in effect allow Mr Kirkham access to data when the issue in the case was whether he was entitled to that data. I also reject this argument because arranging an alternative is outside the proper role of the First-tier Tribunal. Its function is set out in section 58. That does not involve organising or undertaking alternative methods. What it has to do is to decide whether the Commissioner's decision notice was in accordance with the law, in effect whether the University's response complied with Part I of FOIA. In contrast to, say, a social security appeal, the First-tier Tribunal is not (as it is sometimes put) standing in the shoes of the authority and undertaking the estimate afresh.

*Ground 2*

29. This ground is that it was sufficient for Mr Kirkham to succeed that he had shown the University's estimate was not sensible, correct or sufficiently accurate. I reject this argument because it is essentially part of the argument about how to undertake an estimate.

*Ground 3*

30. This ground is that the University's estimate was significantly and suspiciously out of line with the ability of other universities to comply with the same request. I reject this argument because it fails as a matter of evidence. The

only evidence that Mr Kirkham can produce is that the other universities were able to provide the information they did without relying on section 12. We know why Cambridge University says it would take so long as to engage section 12. We do not have any evidence about how the other universities held the information requested or the problems that might, or might not, be involved in extracting that information. To put the same point differently, Mr Kirkham's argument overlooks the subjective element in the task of making an estimate.

*Ground 4*

31. This ground is, in summary, that the tribunal misunderstood and misapplied the correct approach to estimating. I reject this argument because it is essentially part of Mr Kirkham's argument about the correct and only way to make an estimate. Once that approach is rejected, this argument falls away.

*Ground 5*

32. This ground is that the First-tier Tribunal refused to appoint an assessor, as a result of which it lacked the necessary expertise to decide the case. I reject this argument. The tribunal had power to appoint an assessor under section 28 of the Tribunals, Courts and Enforcement Act 2007. It did not do so and was none the worse for it. What was required was for Mr Kirkham to explain his points clearly. He did so, as he did before me, and the tribunal was able to deal with his arguments. He says that it did not understand them, but that is no more than his dissatisfaction with the tribunal for rejecting them.

*Ground 6*

33. This ground of appeal concerns the extent to which a particular level of expertise was required in order to implement Mr Kirkham's arguments. I reject this argument because it is essentially part of Mr Kirkham's argument about the need for a public authority to have or to hire the experience and expertise necessary to follow his approach to searching and estimating. Once that approach is rejected, this argument falls away.

## F. How do we know they're not just making it up?

34. That is what Mr Kirkham asked of Cambridge University and public authorities generally. It is a fair question, especially as it has been the practice not to require a public authority to be a party to proceedings on appeals in either the First-tier Tribunal or the Upper Tribunal. This is a question that is not unique to FOIA. It also arises, for example, in child support appeals when one of the parents refuses to participate or there is doubt about the completeness of their disclosure. The answer to Mr Kirkham's question is this: there is no guarantee of certainty, but the Information Commissioner and the tribunals should take a sceptical approach and require the public authority to provide persuasive evidence of how they undertook the estimate, with follow-up questions if necessary. That is what the Information Commissioner did in this case when Mr Kirkham lodged a complaint, and it is what the First-tier Tribunal did,

through the Information Commissioner, when Mr Kirkham appealed. There is no legitimate cause for concern in this case.

## G. The difference between the parties and the value of Mr Kirkham's strictures

35. Both before and at the hearing, Mr Kirkham objected to the approach taken by the Information Commissioner and by Mr Paines on her behalf. He said at the hearing that she did not understand his argument. I characterised the different approaches as one party travelling south on the east coast mainline while the other was travelling north on the west coast line. At the heart of the differences of approach were Mr Kirkham's scientific rigour and its relevance to FOIA. The essence of his argument was that FOIA had to be interpreted in accordance with the scientific approach he relied on. I have explained why I do not accept that. This does not mean, though, that there is no value in his approach. It is just that it operates at the level of the assessment of evidence rather than at the level of interpretation. So, by way of examples:

- the possibility of using computing methods to isolate at least some of the information requested may be helpful in showing that attempts have (not) been made to find all the information held by an authority;
- the opportunities for carrying out electronic searches will inform the tribunal's assessment of whether to accept the public authority's estimate of the cost of complying with the request.

## H. Summary

36. I have not found it necessary to deal with much of the detail in Mr Kirkham's arguments. Underlying all the detail were two assumptions about the scientific rigour with which searches and estimates had to be made. I have explained why I reject those arguments. Thereafter, the detail falls away as it consists of a sustained attack on the First-tier Tribunal's reasoning on the assumption that Mr Kirkham's approach was the correct and only one to follow. Although the First-tier Tribunal devoted space to dealing with Mr Kirkham's arguments, its ultimate task was to decide whether the Information Commissioner's decision notice was in accordance with the law. I consider that, whatever may be said of some of the details with which it dismissed Mr Kirkham's arguments, it was entitled on the evidence before it and on my analysis of section 12 and the related Regulations to dismiss the appeal.

## I. Saving Fish Legal

37. Mr Kirkham told me that the Information Commissioner was failing to implement the three-judge panel decision in *Fish Legal v Information Commissioner and others* [2015] UKUT 52 (AAC), [2015] AACR 33. He produced a bundle of responses to complaints made to the Information Commissioner that he said should have been, but were not, in the form of decision notices. This issue does not arise in this case, because the Information Commissioner did issue a

decision notice and that notice was the subject of an appeal to the First-tier Tribunal. This issue can only be dealt with in a case where it arises.

## J. Wider issues

38. As my decision draws to a close, this is a convenient place to make a general point about some of Mr Kirkham's ambitious submissions to the First-tier Tribunal and on this appeal. The role of the Upper Tribunal is to decide first whether the making of the First-tier Tribunal's decision involved the making of an error on a point of law (section 12(1) of the Tribunals, Courts and Enforcement Act 2007). If, and only if, it so decides, it then has power to re-make the decision or to remit the case to the First-tier Tribunal for rehearing. It is part of the Upper Tribunal's function that it may give guidance to decision-makers and the First-tier Tribunal. That power is, however, confined to the issues that arise in the case before it. It does not include general guidance that extends beyond the scope of those issues. To take a couple of examples raised by Mr Kirkham, it does not include power for me in the context of this case to give guidance to the Information Commissioner on how to deal with issues under the Equality Act 2010 or on the proper form in which a decision should be made and issued.

## K. GIA/0649/2016

39. This is the related appeal against the First-tier Tribunal's decision refusing to award Mr Kirkham costs. It has been stayed by agreement pending the outcome of this appeal. Mr Kirkham has made some observations about that case. In order to keep things tidy, I have lifted the stay on that case and allowed Mr Kirkham a month in which to make any submissions or applications on that appeal.

**Signed on original**
**on 11 April 2018**

**Edward Jacobs**
**Upper Tribunal Judge**

# APPENDIX A

# Freedom of Information Act 2000

## 1 General right of access to information held by public authorities

(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.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

## 12 Exemption where cost of compliance exceeds appropriate limit.

(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 Minister for the Cabinet Office 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.

(5) The Minister for the Cabinet Office may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated.

## 13 Fees for disclosure where cost of compliance exceeds appropriate limit

(1) A public authority may charge for the communication of any information whose communication—

(a) is not required by section 1(1) because the cost of complying with the request for information exceeds the amount which is the appropriate limit for the purposes of section 12(1) and (2), and

(b) is not otherwise required by law,

such fee as may be determined by the public authority in accordance with regulations made by the Minister for the Cabinet Office.

(2) Regulations under this section may, in particular, provide—

(a) that any fee is not to exceed such maximum as may be specified in, or determined in accordance with, the regulations, and

(b) that any fee is to be calculated in such manner as may be prescribed by the regulations.

(3) Subsection (1) does not apply where provision is made by or under any enactment as to the fee that may be charged by the public authority for the disclosure of the information.

**14 Vexatious or repeated requests**

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

(2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

**16 Duty to provide advice and assistance**

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

**50 Application for decision by Commissioner.**

(1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.

**58 Determination of appeals.**

(1) 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.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

# APPENDIX B

## Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (SI No 3244)

### 1 Citation and commencement

These Regulations may be cited as the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 and come into force on 1st January 2005.

### 2 Interpretation

In these Regulations—

'the 2000 Act' means the Freedom of Information Act 2000;

'the 1998 Act' means the Data Protection Act 1998; and

'the appropriate limit' is to be construed in accordance with the provision made in regulation 3.

### 3 The appropriate limit

(1) This regulation has effect to prescribe the appropriate limit referred to in section 9A(3) and (4) of the 1998 Act and the appropriate limit referred to in section 12(1) and (2) of the 2000 Act.

(2) In the case of a public authority which is listed in Part I of Schedule 1 to the 2000 Act, the appropriate limit is £600.

(3) In the case of any other public authority, the appropriate limit is £450.

### 4 Estimating the cost of complying with a request – general

(1) This regulation has effect in any case in which a public authority proposes to estimate whether the cost of complying with a relevant request would exceed the appropriate limit.

(2) A relevant request is any request to the extent that it is a request–

(a) for unstructured personal data within the meaning of section 9A(1) of the 1998 Act, and to which section 7(1) of that Act would, apart from the appropriate limit, to any extent apply, or

(b) information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply.

(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in–

(a) determining whether it holds the information,

(b) locating the information, or a document which may contain the information,

(c) retrieving the information, or a document which may contain the information, and

(d) extracting the information from a document containing it.

(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.

**5 Estimating the cost of complying with a request – aggregation of related requests**

(1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply, 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 total costs which may be taken into account by the authority, under regulation 4, of complying with all of them.

(2) This regulation applies in circumstances in which–

(a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and

(b) those requests are received by the public authority within any period of sixty consecutive working days.

(3) In this regulation, 'working day' means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.

**6 Maximum fee for complying with section 1(1) of the 2000 Act**

(1) Any fee to be charged under section 9 of the 2000 Act by a public authority to whom a request for information is made is not to exceed the maximum determined by the public authority in accordance with this regulation.

(2) Subject to paragraph (4), the maximum fee is a sum equivalent to the total costs the public authority reasonably expects to incur in relation to the request in–

(a) informing the person making the request whether it holds the information, and

(b) communicating the information to the person making the request.

(3) Costs which may be taken into account by a public authority for the purposes of this regulation include, but are not limited to, the costs of–

(a) complying with any obligation under section 11(1) of the 2000 Act as to the means or form of communicating the information,

(b) reproducing any document containing the information, and

(c) postage and other forms of transmitting the information.

(4) But a public authority may not take into account for the purposes of this regulation any costs which are attributable to the time which persons undertaking activities mentioned in paragraph (2) on behalf of the authority are expected to spend on those activities.

**7 Maximum fee for communication of information under section 13 of the 2000 Act**

(1) Any fee to be charged under section 13 of the 2000 Act by a public authority to whom a request for information is made is not to exceed the maximum determined by a public authority in accordance with this regulation.

(2) The maximum fee is a sum equivalent to the total of—

(a) the costs which the public authority may take into account under regulation 4 in relation to that request, and

(b) the costs it reasonably expects to incur in relation to the request in—

(i) informing the person making the request whether it holds the information, and

(ii) communicating the information to the person making the request.

(3) But a public authority is to disregard, for the purposes of paragraph (2)(a), any costs which it may take into account under regulation 4 solely by virtue of the provision made by regulation 5.

(4) Costs which may be taken into account by a public authority for the purposes of paragraph (2)(b) include, but are not limited to, the costs of–

(a) giving effect to any preference expressed by the person making the request as to the means or form of communicating the information,

(b) reproducing any document containing the information, and

(c) postage and other forms of transmitting the information.

(5) For the purposes of this regulation, the provision for the estimation of costs made by regulation 4(4) is to be taken to apply to the costs mentioned in paragraph (2)(b) as it does to the costs mentioned in regulation 4(3).