IN THE UPPER TRIBUNAL **Case No.** GIA/524/2019
ADMINISTRATIVE APPEALS CHAMBER

Before **T H Church, Judge of the Upper Tribunal**

Decision: As the decision of the First-tier Tribunal (which it made at Newport on 14 November 2018 under reference EA/2018/0056) involved the making of an error of law, it is set aside. I remake the decision in the terms set out below.

This decision is made under Section 12 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

Background

1. This is an appeal by the Appellant, Mr Richards, against a decision of the panel of the First-tier Tribunal which heard his appeal at Newport Court Centre on 14 November 2018 (the **"Tribunal"**).
2. The background to the appeal is that the Appellant made a series of requests for information from the Welsh Government, one on 15 May 2016 (request 10540), to which the Welsh Government responded on 30 June 2016, and a refined request on 9 July 2016 (request 10560), to which the Welsh Government responded on 4 August 2016 saying that it had identified four categories of information that might be relevant to the request, comprising 8,106 documents in total. It said that to comply with the request it would need to inspect each of the 8,106 documents to ascertain their relevance, which it estimated would take 108 hours. It invoked the exemption under section 12 of FOIA.
3. The Appellant submitted a further request (request 10712) which asked (among other things) how many documents fell within each of the four categories of documents identified in the response to request 10560, and which made a narrowed request for a subset of the information requested in request 10560 (in response to the Welsh Government's response to it).
4. In response to request 10712 the Welsh Government said that the search for documents belonging to its "category (i)" turned up 440 records, categories (ii) and (iii) combined turned up over 5,000 records and category (iii) on its own turned up 2,212 records.
5. The Appellant then submitted a yet further request (request 10862) restricted to the "category (i)" records, being the request for "Emails sent to Ceri Breeze i.e. as the "originator" or "sender" to Huw Lewis (to him personally or to him as Minister for Housing, Regeneration and Heritage)". Mr Lewis was a former Minister for Housing, Regeneration and Heritage and Ms Breeze was the Deputy Director of Housing. It is this request (which I will call the "Fourth Request") which is at the heart of this appeal.

6. The Welsh Government responded to the Fourth Request on 15 November 2016, saying that of the 440 emails it had identified as potentially relevant to “category (i)”, only five emails had been established to be relevant to the request. It disclosed those five emails to the Appellant.
7. The Appellant did not accept that the five emails disclosed in response to the Fourth Request represented all of the information falling within the category identified. He said that the Welsh Government’s response represented “…a clear refusal to supply the email correspondence that I was originally told was available”.
8. The Appellant complained to the Information Commissioner about the Welsh Government’s response to the Fourth Request.
9. The Information Commissioner considered not only the Fourth Request but also the handling of the Appellant’s previous requests in what was a broad-ranging decision. She issued a decision notice on 21 February 2018 (the **“Commissioner’s Decision”**).
10. The Commissioner’s Decision was critical of the Welsh government’s handling of the Appellant’s requests. She noted that to investigate the Welsh Government’s claim that all but five of the 440 “category (i)” emails were not relevant to the Appellant’s request she had asked to see copies of them to inspect their content, but the Welsh Government said it couldn’t provide a record of the search results, and would have to replicate the search if it were to provide the Information Commissioner with the evidence she sought.
11. In the Commissioner’s Decision she said she was not satisfied that the Welsh Government was entitled to rely on section 12 FOIA. This was because, being unable to test its search strategy, she was not confident that it was appropriate or proportionate and was therefore not confident that the cost estimate on which it was based was reasonable.
12. The Commissioner’s Decision also said she was “unable to say whether or not the Welsh Government acted correctly in assessing that only five emails were relevant to the request” and she noted that the Welsh Government had explained that it had made significant changes to its records management processes since the request was refused and that it was unable to confirm whether it was now able to comply with the request without relying on section 12 of FOIA.
13. The Commissioner’s Decision ordered the Welsh Government to conduct a fresh search for the information requested and to issue a revised response to the Appellant, while acknowledging that the Welsh Government may still estimate that compliance would exceed the appropriate limit for the purposes of section 12 of FOIA, but stating that in such circumstances she would expect the Welsh Government to provide a clear and detailed explanation of that in its refusal notice to the Appellant.

The appeal to the First-tier Tribunal

14. The Appellant appealed the Commissioner’s Decision to the First-tier Tribunal. By the time the matter came before the Tribunal the Welsh Government had carried out the search ordered by the Commissioner’s Decision and the issues in the appeal had been narrowed further. No-one had challenged the Information Commissioner’s decision that the Welsh Government had not made out its case for reliance on section 12 of FOIA or sought to appeal her order that the Welsh Government should conduct a fresh search and issue a further response. The appeal now centred around

the question whether the Welsh Government had further information which it should have disclosed in response to the Fourth Request.

15. The Appellant's position on the appeal was that the Welsh Government had identified that 440 emails had been "sent by Ceri Breeze…to Huw Lewis" in the timescale specified in the Fourth Request and had only disclosed five. He said that the Commissioner's Decision failed to address this.
16. The Information Commissioner's position was that, in the light of the witness evidence of Mr Howells (a witness for the Welsh Government), she had no reason to doubt either that the searches conducted were reasonable or that the remaining 435 emails fell outside the scope of the Fourth Request at the time it was made.
17. The Welsh Government's position was that it has not retained copies of the 435 emails which the Appellant sought and it accepted that there were deficiencies in the searches it made, due to software problems. It said it had conducted a fresh search following the order in the Commissioner's Decision using its enhanced search capability following an IT upgrade. This had returned "613 emails with a total of 1210 attachments" but the Welsh Government didn't know which of those documents fell within the scope of the request. It relied on section 14 of FOIA (which concerns vexatious or repeated requests) in refusing to disclose the information.
18. The Tribunal found on the balance of probabilities based on the evidence it heard that the Welsh Government did not hold further information within the scope of the Appellant's request. It therefore dismissed the appeal. However, that wasn't all it did. It said (in paragraph 28 of its decision):

    > "On that basis the Tribunal dismisses the appeal, finds that no information within the scope of the request was held by the Welsh Government at the time of the request, and the Commissioner's decision notice is substituted by this decision accordingly."

The permission stage

19. The claimant applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal but his application was refused. He then exercised her right to apply to the Upper Tribunal for permission to appeal and the matter came before me.
20. Although I was not persuaded by the grounds of appeal raised by the Appellant I granted permission to appeal because I thought it was arguable with a realistic prospect of success that, having refused the appeal, the Tribunal wasn't entitled to substitute its decision notice for the Commissioner's decision, and that this would amount to a material error of law.

The appeal

21. Mr Bailey provided helpful written submissions on behalf of the Information Commissioner, who supported the appeal on the ground that I had identified at the permission stage. Mr Bailey said this was consistent with the Upper Tribunal decision in The Information Commissioner v Malnick & ACOBA [2018] UKUT 72 (AAC) (**"Malnick"**), which was binding on the Tribunal. He invited me to allow the appeal and remake the Tribunal's decision in terms which simply refused the appeal against the Commissioner's Decision without more.
22. Mrs Charles provided helpful written submissions on behalf of the Welsh Government. She agreed with the Information Commissioner that Malnick was

relevant and that the Tribunal misdirected itself in law when it purported to substitute its decision for that of the Information Commissioner, having dismissed the appeal. However, she argued that the Commissioner's Decision was itself wrong in law and so to remake the Tribunal's decision as a simple dismissal of the appeal, leaving the Commissioner's Decision to stand as proposed by Mr Bailey, would have "an odd effect".

23. Mrs Charles urged me to make a finding that the Commissioner's Decision is not binding on the Welsh Government and to uphold the Tribunal's decision insofar as it substituted the Commissioner's Notice with a notice that no information within the scope of the request was held by the Welsh Government at the time of the request.
24. The Appellant did not respond to the submissions of the First and Second Respondents.

Why there was no oral hearing of this appeal

25. None of the parties requested an oral hearing of this appeal. I could identify no compelling reason to hold an oral hearing and I decided that the interests of justice didn't require one. I decided that it was proportionate and appropriate to determine this appeal on the papers alone.

My decision

26. When deciding whether to grant permission to appeal the test I had to apply was whether it was arguable with a realistic prospect of success that the Tribunal erred in law in a way which was material. The test I must now apply is whether the Tribunal did indeed make a material error of law.
27. Section 58 FOIA provides:

> "(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."

28. This provision is undoubtedly inelegantly drafted. A three-judge panel of the Upper Tribunal grappled with its meaning in Malnick, and said (at 104):

> "It is clear from the concluding phrase "and in any other case the tribunal shall dismiss the appeal", that the words before that describe the tribunal's duty where it allows the appeal. That means that the substitution of a decision notice must occur where an appeal is allowed. It is not an alternative to allowing an appeal and so the word "or" must be read as meaning "and"."

29. In that case the Upper Tribunal took the unusual step of citing a decision of the Information Tribunal (the predecessor of the First-tier Tribunal (General Regulatory Chamber), albeit that it had no precedential value:

> "It follows that we agree with the analysis of the information tribunal in <u>Guardian Newspapers and Brooke</u> at paragraphs 18-23 and in particular the conclusion at paragraphs 22 and 23:

> “22. In the circumstances we can only make sense of section58(1) by interpreting the word "or" disjunctively in the context of appeals by public authorities and conjunctively in the context of appeals by applicants for information. In other words, we construe the subsection as if it read: the tribunal shall allow the appeal and/or substitute such other notice as could have been served by the Commissioner; and in any other case the tribunal shall dismiss the appeal.
> 23. In our judgment the tribunal has power, in the case of an appeal by an applicant for information, to allow the appeal and substitute such notice as could have been served by the Commissioner.””

30. In line with the reasoning of the Upper Tribunal in Malnick (and the Information Tribunal in Guardian Newspapers and Brooke), I find that the options potentially open to the Tribunal were either to allow the appeal and substitute its notice for that of the Information Commissioner, or to refuse the appeal. The one option that was clearly not open to it was to refuse the appeal and substitute the notice which was what it purported to do. In doing so the Tribunal erred in law. Its error was clearly a material one and it must be set aside, albeit that the Tribunal’s findings on whether information within the scope of the Appellant’s request was held by the Welsh Government were within the range of findings open to it on the evidence before it.
31. That leads me to the question of disposal. The Welsh Government has invited me to uphold the Tribunal’s decision insofar as it substituted the Commissioner’s Decision for a notice that no information within the scope of the Appellant’s request was held by the Welsh Government at the time of his request, and to make a finding that the Commissioner’s Decision is not binding on the Welsh Government.
32. My concern with that course of action is that it risks stepping into the Tribunal’s shoes and then committing almost the same error that led to the Tribunal’s decision being set aside, because it involves the Upper Tribunal effectively dismissing the Appellant’s appeal but still substituting a new notice for the Commissioner’s Decision.
33. The Welsh Government was concerned that allowing the Commissioner’s Decision to stand would create an “odd effect” because it would leave the Welsh Government bound to comply with the Commissioner’s Decision, requiring it to carry out a further search. However, the Welsh Government has carried out a further search in response to that notice already, so its objection seems somewhat academic. Further, while some of the arguments put forward by the Welsh Government have some force it does not appear that these arguments were made in the appeal before the Tribunal. For these reasons I consider that the Tribunal should have simply dismissed the appeal against the Commissioner’s Decision without more.
34. I acknowledge that the success of this appeal is therefore something of a pyrrhic victory for Mr Richards, because it doesn’t achieve what he seeks to achieve, namely disclosure of the “missing” 435 emails which the Welsh Government had initially told him were potentially relevant to his request.

35. For the reasons set out above this appeal is allowed. The decision of the Tribunal is set aside. I substitute the Tribunal's decision with my decision that the appeal against the Commissioner's Decision is refused. The Commissioner's Decision therefore stands.

Signed

Thomas Church
Judge of the Upper Tribunal

Dated **29 November 2019**