IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)

EA/2016/0250

Derek Moss

Appellant

And

The Information Commissioner

Respondent

Hearing

Held on 9 March 2016 by telephone from Fox Court.

Before Michael Jones, Malcolm Clarke, and Judge Taylor.

Decision

We find for the Appellant in part.
We find that the Royal Borough of Kingston upon Thames Council was entitled to rely on s.12 FOIA but failed to comply with its duties under s.16 FOIA. As regards Part 4 of the request, it also failed to comply with its duty under s.1(1)(a) FOIA by not making clear whether it held this part of the requested information. We do not consider that Article 10 of the European Convention of Human Rights alters our decision.

Steps to be taken: The Council is required to comply with the steps set out in paragraph 54 of the decision.

Our decision is unanimous.

Reasons

1. On 16 February 2016, the Appellant made a request from the Royal Borough of Kingston upon Thames (the 'Council') under the Freedom of Information Act 2000 ('FOIA'). He asked for the following: (We have categorised it, for ease of reference.):

   "1. Any information held, including e-mails and other electronic records, printed or handwritten notes, relating to the selection and appointment of Renaisi as consultants for the regeneration programme and the work they have been, or are expected to be, instructed to do. ('Part 1').

   2. Any information held, including e-mails and other electronic records, printed or handwritten notes, relating to the selection and appointment of BNP Paribas as consultants for the regeneration programme and the work they have been, or are expected to be, instructed to do. ('Part 2').

   3. Any information held, including e-mails and other electronic records, printed or handwritten notes, relating to the decision to set up an Affordable Homes Working Group, the remit and intended purpose of said group, any plans or decisions made as to what it is going to do, when it will be meeting and whether those meetings will be open to the public. ('Part 3').

   4. Details of the "stakeholders" in the regeneration programme." ('Part 4').

2. On 9 March 2016, the Council confirmed that it held information relating to the regeneration consultants and Affordable Homes Working Group. It refused to provide the information relying on section 12(1) of the FOIA ('costs'). We note that it was not apparent from this whether it held information related to Part 4.

3. On the same day, the Appellant requested an internal review, stating:

   "I do not accept it would take more than 18 hours to provide information showing how consultants Renaisi and BNP were selected/appointed and what they have been, or will be, instructed to do. Nor do I accept this is a valid reason to refuse to provide details of the 'stakeholders' in the regeneration programme".

4. On 13 July 2016, the Council provided the Appellant with the results of its internal review. Within this it gave links to material it had published online. These pertained to information on the Renasi and BNP Paribas contracts and material related to Part 3 of his request. Unfortunately, the Appellant found that the links related to the contracts did not work.

5. The Appellant progressed further with his request, leading to an investigation by the Information Commissioner ('Commissioner'). At that point, the Appellant made clear he was willing to narrow the request, omitting Part 3 regarding the Affordable Homes Working Group. In her decision notice of 21 September 2016, the Commissioner decided in favour of the Council. It accepted the Council's estimated that using the quickest search method compliance with request 1 would take 121 hours and 50 minutes; and that request 2 would take 20 hours and 45 minutes.

6. The Appellant now appeals this decision.

The Law

7. A person making a request of a public authority for information is generally entitled to be informed in writing whether it holds the information requested, unless exemptions or exclusions set out in the FOIA apply. If it holds the information, the public authority is generally required to disclose it subject to exemptions. Section 1 of FOIA provides:

> *"1. (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."*

A. Section 12: Costs

8. A public authority is not required to comply with a request under the FOIA if the authority estimates that the cost of complying would exceed the 'appropriate limit'. However, the authority is not exempted from its obligation to inform the requester whether it holds the requested information unless the estimated cost of complying with that alone would exceed the appropriate limit. *(See s.12(1)and(2) FOIA.)*

9. The 'appropriate limit' is set by the *Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004* (FIDP). Regulation 3 of the FIDP provides that for public authorities not listed under Part I of Schedule 1 of the Act (which includes government departments), the 'appropriate limit' is £450. This is regarded as 18 hours of the public authority's time (*See Regulation 4 of FIDP*).

10. In making its estimate, a public authority may only take account the costs it reasonably expects to incur in relation to the request in –

    (a) determining whether it 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. *(See regulation 3 of FIDP).*

11. A public authority does not have to make a precise calculation of the costs of complying with a request. Instead, only an estimate is required. However, it must be a reasonable estimate, which must be 'sensible, realistic, and supported by cogent evidence' *(See Randall v Information Commissioner EA/2007/0004).*

12. The estimate will involve making an informed and intelligent assessment of how many hours the relevant staff members are likely to take to extract the information. Our task is not to insist that a public authority considers each and every reasonable method of locating and extracting information. Rather, we adopt the Tribunal's reasoning in the case of *Roberts* [1], that the

[1] See Roberts v Information Commissioner (EA/2008/0050) para.s 12 and 13.

reasonableness of the cost estimate is only undermined if an alternative method exists which is so obvious that disregarding it renders the estimate unreasonable.

13. In applying the appropriate limit, the regulations make provision to aggregate requests. So far as is relevant here, regulation 5 of FIDP provides:

> "***5.****- (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—*
>
> *…*
>
> *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."*

B. Section 16: Advice and Assistance

14. Section 16 provides:

> *'(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 ['the Code'] is to be taken to comply with the duty imposed by subsection (1) in relation to that case.'*

15. In other words, a public authority has a duty to advise and assist a requester, and in circumstances where the cost of complying with the request would exceed 18 hours of the officials' time, it would be considered to have complied with that duty provided it has conformed with the Code. Paragraph 14 of the Code provides:

> *"Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the "appropriate limit" (i.e. cost threshold) the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or re-focussing their request, information may be able to be supplied for a lower, or no, fee."*

C. Article 10: Freedom of Expression

16. Article 10 of the European Convention of Human Rights (the 'ECHR') provides:

> *"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas*

without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Task of the Tribunal

17. The Tribunal's remit is governed by s.58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the ICO's decision involved exercising discretion, whether he should have exercised it differently. The Tribunal is independent of the Commissioner, and considers afresh the Appellant's complaint. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner. This is the extent of the Tribunal's remit in this case. Therefore, we do not consider any other issues raised, such as whether the Commissioner has satisfied s.47 FOIA *(General Functions of the* Commissioner) or the length of time before the Council conducted an internal review[2]. In other words, in this case, our task is to consider whether the Council was entitled to rely on s.12 FOIA *(cost of compliance)* so as not to respond fully to the request, and whether it satisfied its duties under s.16 FOIA *(duty to provide advice and assistance).*

18. We have received a bundle of documents that runs to 137 pages, further papers and submissions, a bundle of case-law, and submissions from the Council provided at the latest moment. We have also had the benefit of hearing from the Appellant in person by means of a telephone hearing. The Commissioner did not attend the hearing but we were assisted by Mr Bailey's thorough submissions. We have carefully considered all of the points made even if not specifically referred to below.

19. The Council did not seek to be joined as a party to this appeal. However, the panel and Appellant received an email in the morning of the hearing via the Commissioner containing representations from it. Additionally, the formatting as it appeared in the email made part of it difficult to follow. Of note, the Council made three points which we welcomed clarification on:

    a) The Council conceded that it would send the Appellant the two contracts it had entered into with Renaisi and BNP Paribas. On that basis, we have not considered the matter further below.
    b) As regards section 16, "*in similar circumstances the Council will enter a constructive dialogue with the requester in an effort to meet the request. The aim is to provide information and communication is very often the best way to do this*."

[2] The Council is not obliged under FOIA to conduct an internal review.

c) The Council referred to Part 4, and implicit in their response was that it held information related to Part 4. It further stated that as part of the evaluation of the use of Section 12, all four elements of the request was assessed, and that the times were aggregated for all of the request elements.

Issues

20. The issues in this appeal concern (a) Article 10 ECHR; (b) the scope of the request; (c) section 12; and (d) section 16. The Appellant raised many points within these. To the extent these pertain to why the request he has made should be responded to we address them below.

A. Article 10[3]

21. The Appellant argues that Article 10 ECHR confers a right of access to information. Article 10 confers a right to freedom of expression under the Convention. The European Court of Human Rights Grand Chamber decision in *Magyar Helsinki Bizottsag v Hungary (Application No. 18030/11) of 8 November 2016* ('Magyar') has interpreted the Article 10 right to freedom of expression a right of access to information in certain circumstances. The Appellant argues that it is for our court to apply Article 10.

22. So far as is relevant here, the Magyar case states:

> *"… the Court further considers that Article 10 does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual. However, as is seen from the above analysis, such a right or obligation may arise, … in circumstances where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right."*
>
> *(Magyar, para. 156. Emphasis added.)*

23. Under Magyar, the Article 10 information access regime seems to comprise of a two-stage process. First, it is necessary to consider whether a requester's right under Article 10 is engaged[4]. The Court sets out four indicative criteria for this. Second, if engaged, it is then necessary to consider whether the interference is justified under Article 10(2).

24. However, drawing upon the Kennedy case[5], the Commissioner questions whether it is for our Tribunal to emancipate Article 10 rights conferred by the Magyar regime.

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[3] The Appendix to this Decision sets out the terms of Article 10.

[4] It seems from the Magyar case that Article 10 is engaged if the requested information is 'instrumental' for an individual's right to freedom of expression, satisfying the criteria summarised below at para.29.

[5] See the UK's Supreme Court decision in Kennedy v The Charity Commission UKSC 20 [2014] of 28 March 2014. As was explained at the hearing, this Tribunal is obliged to follow decisions made by higher courts such as the Upper Tribunal or Supreme Court. It is not obliged to follow decisions from other appeals made by this Tribunal or the Commissioner, or guidance from the Commissioner. However, the Tribunal may be persuaded by the force of reasoning contained within them.

25. In the Kennedy case, the FOIA request sought disclosure of information from certain Charity Commission inquiries. The Commission relied on the s.32(2) FOIA to exempt it from providing the information. The Court decided that Article 10 ECHR did not make a difference in how to construe this exemption:

    a) It decided that section 32(2) was not inconsistent with Article 10 because it put the requester in no less favourable a position than he was in under general statute and common law to access the information. The FOIA is not the only way to access information. The exemption only took information outside the scope of that particular disclosure regime. This did not mean it could not otherwise be required to be disclosed by law. Other statute, or the common law, might require disclosure, even though FOIA did not.

    b) In Lord Mance's opinion, the Charity Commission had the power to disclose information to the public concerning inquiries under specific charity legislation and under general common law duties of openness and transparency on public authorities.

    c) Lord Toulson emphasised that the exercise of the power of disclosure pursuant to the open justice principle would be subject to judicial review. emphasised the fundamental principle of open justice: '*It has long been recognised that judicial processes should be open to public scrutiny unless and to the extent that there are valid countervailing reasons. This is the open justice principle. The reasons for it have been stated on many occasions. Letting in the light is the best way of keeping those responsible for exercising the judicial power of the state up to the mark and for maintaining public confidence'* (paragraph 110).

26. The second reason why the Supreme Court in Kennedy that the requester was not assisted by Article 10 was because they found that it was not engaged. Lord Mance noted that the jurisprudence from the European Court was 'neither clear nor easy to reconcile'. *(See para. 57.)*

27. The Appellant questions the status of the Kennedy Supreme Court judgment in the light of the Grand Chamber's more recent Magyar decision. He asserts that it impacts the FOIA regime where the Tribunal cannot act in a way that it is incompatible with the ECHR or Magyar. He presumably also considers the jurisprudence now to be more clearly imposing a duty of disclosure on public authorities.

28. He distinguishes this case from Kennedy by asserting that there is no alternative route to access the information such as the Charity legislation. Given they were not present at the hearing, we have no submissions by the Commissioner on the point. However, it is not clear to us why the general common law duties of openness and transparency on public authorities pursued through the judicial review process would not similarly apply to this case. In our view, whilst the Magyar case may indeed be framing a regime to access information that had not been previously revealed under Article 10, it does not affect the Kennedy judgment or the requirement upon us to follow it.

This seems to us to require us to keep to the integrity of the FOIA regime, which under s.58 FOIA is the limit of our remit.

29. Even if we are wrong about this, we do not consider that the Magyar case assists the Appellant because we do not accept that any Article 10 right to access information has been engaged. The Court's four criteria for engaging the Article 10 right are:

    a) **Purpose of request**. As a prerequisite, the purpose of the request must be to enable [the requester's] exercise of the freedom to receive and impart information and ideas to others. The information must be "necessary" for the exercise of freedom of expression;
    b) **Nature of information sought**. The information must meet a legitimate public interest test to prompt a need for disclosure under the Convention.
    c) **Role of requester.** The applicant must be in a privileged position, seeking the information with a view to informing the public in the capacity of a public watchdog. Such a privileged position should not be considered to constitute exclusive access.
    d) **Information ready and available**. Weight should be given to the fact that the information requested is ready and available.

    (See the Magyar case).

30. The Commissioner asserts that it is not clear that disclosure is necessary for the Appellant's exercise of his ECHR rights, nor how the reliance by the public authority upon section 12 interferes with the Appellant's fundamental rights.

31. The Appellant explains that he needs the information to alert Kingston residents to the Council's plans for estate regeneration and what it means for them. He asserts that these are matters of public interest and any information obtained would be published on social media including a campaign group's blog.

32. As the Appellant appeals a decision by the Commissioner, the burden is on him to show that the Commissioner erred in her decision. From the arguments we have received, we consider that to the extent that the Council were entitled to rely on section 12, it cannot be shown that the information is ready and available and in these circumstances do not consider Article 10 to have been engaged.

B. Scope of Request

33. It is the Respondent's case that the request was widely drafted. The Appellant considers that it was capable of more than one meaning and his intention had been for a more narrow request. The Appellant argues that as he inadvertently phrased his request in an ambiguous way it was incumbent on the Council to then clarify the meaning. The implication being that had they done so, the Appellant would have made clear that his request was not as onerous as they had thought.

34. In the Appellant view: "*Any information held, including e-mails and other electronic records, printed or handwritten notes, relating to the selection and appointment of*", could be read in more than one way. His intention was not to

ask for every single record however inconsequential or repetitive. He was looking for sufficient information regardless of what form it was held in, to show how and why the consultants were chosen and what the Council expected them to do on its behalf.

35. He explains that he had made another request in similar terms, and the Council had sought to clarify what information he was seeking. *(See pages 84 to 85 of the Bundle.)*

36. We prefer the submissions of the Commissioner on the point. We consider the request was plainly clear, well drafted and unambiguous. (Likewise we consider the similarly phrased request on page 84 of the Bundle to have been similarly well drafted.) It is phrased carefully and widely, presumably to ensure he received all that was relevant to his needs.

37. We agree with the Commissioner that public authorities must interpret information requests objectively and answer a request based on what the requester has actually asked for. There is no requirement to go behind what is a clear and adequately specified request to contact the applicant for further clarification. Were it otherwise, the authority's task would seem to us to be relatively unworkable.

38. The request was clearly for "any information held…" Taking an objective interpretation, we do not accept that the Council unreasonably misread the request as being broader than the Appellant intended. The Commissioner considers that the Council reasonably interpreted the request to be for all recorded information held on the issue raised. The Appellant argues that 'any information held' does not mean 'all information held. When reading the words of the request, we do not think 'any information' means just one piece of information, or sufficient information. It is casting the net wide, to capture absolutely any information, that is, "all of it".

39. To conclude, there was no need to have clarified the unambiguous request.

<u>Narrowed the request</u>

40. Second, the Appellant argues that he clarified or refined his request on 9 March *(See paragraph 3 above and pages 52 and 69 of the Bundle.)* We do not accept this. From a plain reading of what he wrote, the Appellant did not clarify, refine or narrow his request particularly because he did not state or give any indication that he was doing so. The drafting of an FOI request is extremely important in determining what information might then be received. It is clear that the Appellant appropriately had taken care in drafting a well-worded request of 16 February. The language used on 9 March is more vague, because the focus of the communication was instead to phrased to show his scepticism that section 12 was properly relied upon.

C. Section 12

<u>Council's Estimate</u>

41. The Appellant argues that the Council's estimate of costs did not consider the obvious and quick means of locating, retrieving or extracting the information.

First, he argues that the lead officer should have been asked whether there was significant information that might have been enough to narrow the search. Whilst the Appellant has assumed that the Council "*must have had significant relevant information collated in a file already…*", the Council's estimate was reached by casting a broad net considering information held electronically and on paper in the files of the various officials involved. We accept that this was reasonable because the Appellant's request was very broad. It was not limited to the 'significant relevant information'.

42. The Appellant questioned the premise of needing to manually download individual emails. We do not accept that the FOIA require the Council to procure extra programmes to enable bulk downloads. However, in the absence of further information from the Council addressing the point, we find it highly unlikely that downloading emails from gmail would take 9 hours for the staff member 1 (the lead officer) concerned with BNP Paribas, and 49 hours 20 minutes for staff member 3 concerned with Renaisi. Further, the former estimates a rate for downloading one email of 2 minutes per an email and the latter estimates 4 minutes. In the absence of further information, this is incongruous. We find it would be extremely unusual not to be possible to download emails in bulk. In any event, we do not accept in that it would take such a vast amount of an individual's (as opposed to the computer's) time to download the material.

43. Notwithstanding the above, we have found no compelling reason to doubt the rest of the Council's thorough estimate. (See pages 79 to 82 of the bundle.) Whilst we find it appropriate to discount the time allocated for retrieving emails, the estimate still falls far beyond the appropriate limit of 18 hours. (We were not persuaded by the Appellant's argument that the number of emails held by staff 2 seemed excessive or as regards the differences between the length of time for providing information on Renaisi and BNP Paribas. The Council provided a detailed analysis based on how their records were held, and on balance, we found no reason to doubt these aspects.)

Aggregation of Requests

44. The Appellant proffers that when estimating whether the cost limit would be exceeded, the Council should have considered each part of his request as a separate request. He explains that Renaisi and BNP Paribas took on very different roles acting as different kinds of consultant such that the requests are not related.

45. The Commissioner concedes that multiple requests within the same email can constitute separate requests for the purposes of section 12 such that we do not need to consider the point.[6] However, she points to an overarching theme or common thread running between the requests being for information related to Council's regeneration programme. We find that what the Appellant expressly referred to at the hearing as 'parts' 1, 2, and 4 of the request are indeed linked as they all relate to the regeneration programme. Regulation 5 FIDP is drafted widely, such that requests that are related *"to any extent, to the same or similar information",* may be aggregated. Where other cases have found that only a very loose connection is needed to aggregate requests, we do not consider this to be a particularly loose connection

[6] She refers to decision of the FTT in *Fitzsimmons v ICO & DCMS* (EA/2007/0124) in reaching this view.

because the regeneration programme is the overarching subject within which the parts of the requests are framed.

D. Section 16

46. The Appellant submits that section 16 required it to have considered what information it might be provided within the costs limits and also sought to assist in refining his request.

47. The parties refers us other decisions on this matter including the Upper Tribunal case in *Metropolitan Police v Information Commissioner & MacKenzie* [2014] UKUT 0479 (AAC)[7] which found that:

    "*s.16 requires a public authority, whether before or after the request is made to suggest obvious alternative formulations of the request which will enable it to supply the core of the information sought within the cost limits. It is not required to exercise its imagination to proffer other possible solutions to the problem*". *(See Paragraph 17 of the MacKenzie case.)*

48. The Commissioner notes that the Council had provided links for the Appellant and advised "*It may be that having considered these documents you will be able to make a fresh and refined request for information which would fall within the prescribed 18 hour limit*". The Commissioner considered that the Council had acted reasonably in waiting for a response from the Appellant once the Appellant had time to consider the documents he was referred to before seeking to suggest a refined request itself.

49. The Appellant argues that this cannot satisfy the Council's duty to comply with section 16 given that the response to the request for an internal review was over 4 months and in such circumstances, it was *"unreasonable to expect me to start the whole process again".*

50. On this point we agree with the Appellant. The working links that the Council had referred the Appellant to only dealt with Part 3 of his request. The appeal before us only relates to Parts 1, 2 and 4. At that stage, (in July 2016), the Council had not provided any accessible information on those aspects of the request such that considering the links would not have enabled the Appellant to consider how to make a request falling within the cost limits.

51. It seems clear to us that there were obvious alternative formulations for enabling the Council to provide the core of information sought within the cost limits, and that the Council failed to suggest these or enter into any meaningful dialogue. The Appellant suggested such options at the hearing, including just providing information held by the lead officer; or as regards the contractual obligations but not the selection and appointment of the consultants; or key material held electronically. We have seen no reason why the core material could not have been provided if there had there been a

[7] As was explained at the hearing, this Tribunal is obliged to follow decisions made by higher courts such as the Upper Tribunal or Supreme Court. It is not obliged to follow decisions from other appeals made by this Tribunal or the Commissioner, or guidance from the Commissioner. However, the Tribunal may be persuaded by the force of reasoning contained within them.

constructive dialogue between the Council and Appellant. Of note, since we do not accept the Council's estimate for retrieving emails, if limiting the request to material held by staff members 1 of the BNP Paribas and Renaisi work, the total estimated time falls below the 18 hour limit.

52. The Appellant argues that the Council should have also provided details of the stakeholders (Part 4 of the request) within the appropriate limit as the cost of doing so 'would have been insignificant'. On this, we agree with the Appellant. Despite the Commissioner having asked the Council, the latter never provided a cost estimate related to Part 4 of the request. On that basis, we have no reason not to accept the Appellant's arguments that the burden is negligible, such that the material should have been provided within a suggested reformulation of the request.

Conclusion

53. To conclude, we find that the Council justifiably relied on section 12, but in the circumstances, failed to comply with section 16. As regards Part 4, it also failed to comply with section 1(1)(a) FOIA. We do not consider Article 10 ECHR alters our decision.

54. The Council are now required to provide advice and assistance to enable a reformulation of the request that falls within the appropriate limit. This must include provision of Part 4 and be done within 30 working days.

55. Our decision is unanimous.

Judge Taylor

20 March 2017