NCN: [2023] UKFTT 216 (GRC) Case Reference: EA/2022/0260

First-tier Tribunal
General Regulatory Chamber
Information Rights

Determined on the papers

Decision given on: 27 February 2023

Before

TRIBUNAL JUDGE CL GOODMAN
TRIBUNAL MEMBER DR A GASSTON
TRIBUNAL MEMBER MS N MATTHEWS

Between

DARRAGH O'SULLIVAN

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is dismissed. Decision Notice IC-123372-N6HO is in accordance with the law.

REASONS

Background and Decision Notice

1. The Health and Safety Executive ("HSE") regulates health and safety legislation in the UK. Under the Construction (Design and Management) Regulations 2015, the HSE must be notified via a F10 form of any construction project, whether domestic or commercial, lasting longer than 30 days, or with more than 20 workers, or exceeding 500 person days. The F10 form contains amongst other details, the name of the client, principal designer and principal contractor for the project.

2. On 5 June 2021, the Appellant made the following request for information from the DfE under the Freedom of Information Act 2000 ("FOIA") ("the Request"):

> "The following request relates to non-personal data only.

Please provide an excel/CSV export of the F10 Notifications database since 1/1/2016, including the following information for each notification:

- Date of Submission
- Local Authority Name
- Geographical Area
- Client Organisation Name
- Client Organisation Address & Postcode
- Principal Designer Organisation Name
- Principal Designer Address & Postcode
- Principal Contractor Organisation Name
- Principal Contractor Address & Postcode
- Organisation Name, Address and Postcode for any other Designers and Contractors notified
- Site Address, Street & Postcode
- Type of Project
- Project Category
- Total weeks allocated for construction work (under reg 4(1))
- Construction Phase Planned Start Date
- Construction Phase Planned End Date
- Maximum planned number of people on site
- Maximum planned number of contractors on site

NB: Excluding: Any personal information – Please ONLY provide details where an organisation's name includes the word "Ltd", "plc", "LLP" or "Limited". We do not seek any personal information."

3. The HSE refused to disclose the requested information on the grounds that the Request was vexatious under section 14(1) FOIA because it would place a grossly oppressive burden on the HSE.

4. The Appellant requested an internal review. He made a number of suggestions to reduce the burden of the Request as follows:

   (i) using the same date range but removing address and postcode for the client, designers or contractors (but including their names if they include the words "Limited", "Ltd", "LLP" or "PLC");

   (ii) filtering to 10,000 unique postcodes to be provided by the Appellant;

   (iii) reducing the date range to the last 12 months;

   (iv) filtering to approximately 100 organisations, details to be provided by the Appellant.

5. The HSE did not respond to these suggestions and no internal review took place.

6. The Appellant complained to the Commissioner. The HSE confirmed its position to the Commissioner and explained why the Appellant's first suggestion would not reduce the scope of the Request nor the burden on the HSE. The HSE invited the Appellant to make new requests for information in line with his other suggestions.

7. On 8 September 2022, the Commissioner issued Decision Notice IC-123372-N6HO finding that the Request was vexatious and that the HSE were entitled to refuse it, but that the HSE had breached section 16 FOIA by failing to provide adequate advice and assistance to the Appellant. The HSE was not required to take any steps.

8. The Appellant appealed. In its Response to the appeal, the Commissioner addressed the Appellant's grounds of appeal and invited the Tribunal to dismiss the appeal.

9. All parties consented to this matter being dealt with on the papers and the Tribunal decided that it was fair and in the interests of justice to do so.

10. In reaching its decision, the Tribunal took into account all the evidence before it. The Tribunal had before it an open bundle of 58 pages. Our findings were made on the balance of probabilities.

The Law

11. Section 1(1) FOIA provides that:

> '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.'

12. Section 12(1) FOIA provides that:

> '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.'

For HSE, the appropriate limit is £400 or 18 staff hours.

13. Only certain activities can be taken into account towards the maximum number of hours. The Commissioner's guidance on section 12 states that a public authority cannot include staff time taken to consider whether exemptions apply and redacting exempt information.

14. Section 14 FOIA provides that:

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

15. In *Information Commissioner v Devon CC and Dransfield* [2012] UKUT 440 (AAC), the Upper Tribunal said that the purpose of section 14 was to protect the resources of public authorities from being squandered on the disproportionate use of FOIA. The word "vexatious" connoted "manifestly unjustified, inappropriate or improper use of a formal procedure" [paragraph 27]. The Upper Tribunal considered four broad criteria for assessing whether a request was vexatious, namely (i) the burden imposed by the request on the public authority and its staff; (ii) the motive of the requester; (iii) the value or serious purpose of the request and (iv) whether there is harassment of or distress to the public authority's staff. The Upper Tribunal stressed the importance of taking a holistic and broad approach.

16. The Upper Tribunal's approach was broadly endorsed by the Court of Appeal in its decision (reported at [2015] EWCA Civ 454), emphasising the need for a decision maker to consider 'all the relevant circumstances'. Arden LJ observed that:

> 'vexatiousness primarily involves making a request which has no reasonable foundation, that is, no reasonable foundation for thinking that the information sought would be of value to the requester, or to the public or any section of the public. Parliament has chosen a strong word which therefore means that the hurdle of satisfying it is a high one and that is consistent with the constitutional nature of the right.' [paragraph 68]

17. The Upper Tribunal confirmed in *Cabinet Office v Information Commissioner and Ashton* [2018] UKUT 208 (AAC) that 'section 14 may be invoked on the grounds of resources alone to show that a request is vexatious'. The Upper Tribunal approved the Commissioner's submissions that:

> 'In some cases, the burden of complying with the request will be sufficient, in itself, to justify characterising that request as vexatious, and such a conclusion is not precluded if there is a clear public interest in the information requested. Rather, the public interest in the subject matter of a request is a consideration that itself needs to be balanced against the resource implications of the request, and any other relevant factors, in a holistic determination of whether a request is vexatious.'

18. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

> '(1) If on an appeal under section 57 the Tribunal considers -
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> (a) that the notice against which the appeal is brought is not in accordance with the law, or
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> (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,
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> 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.'

19. The Tribunal stands in the shoes of the Commissioner and takes a fresh decision on the evidence before it. The Tribunal does not undertake a review of the way in which the Commissioner's decision was made.

Analysis

20. While the Appellant has made some general suggestions to reduce the burden of the Request, he has not yet expressly narrowed the Request (in part due to the HSE's failure to advise and assist him as required by section 16 FOIA – see paragraph 38 below). It is therefore the Request in the form in which it was originally made that is the subject of this appeal.

21. The Tribunal applied the law as set out in paragraphs 14-17 above, and in particular considered the four criteria from *Dransfield*. There was no suggestion in this case of harassment or distress to HSE staff, of a previous course of dealing between the Appellant and the HSE, nor that the Appellant's motive was improper or malicious.

22. In relation to burden, the HSE's position was that 332,400 F10 records were in scope of the Request. Many of these records contain personal data of individuals such as domestic clients and individual contractors, designers and architects. This was not disputed by the Appellant.

23. The Request required the HSE to remove all personal data from the F10 records before providing the information to the Appellant (it started: "the following request relates to non-personal data only" and ended: "NB: Excluding: Any personal information… We do not seek any personal information").

24. The HSE advised the Commissioner that the only way to remove personal data from the F10 records was to manually review each record. In his grounds of appeal, the Appellant suggested that the HSE should be able to filter their records by column to produce a sample containing only organisations with the words "Limited", "Ltd", "LLP" or "PLC" in their names, which would therefore contain no personal data. Even if that smaller sample then had to be manually checked, it would be only a subset of the 332,400 records.

25. The HSE advised that it could not filter its records in the ways suggested by the Appellant because, for example, the only way to identify clients with the word "Ltd", "plc", "LLP" or "Limited" in their name was to manually check each record. The HSE estimated that it would take 6,648 hours to review all 332,400 records to identify records containing personal data, based on one minute per record.

26. The HSE did not provide a witness statement or sample to support its assertions about the limitations of its database. However, the information was set out in letters from a Central Disclosure Officer to the Appellant, and in a second letter from a Disclosure Manager to the Commissioner, and was accepted by the Commissioner. The HSE's position was consistent and credible and the Tribunal found it unlikely that public officials at HSE would mislead the regulator in this respect, taking into account their duty of candour. The Tribunal therefore accepted on the balance of probabilities that the database was as limited as the HSE reported.

27. The Tribunal accepted the Commissioner's more conservative estimate of 1,662 hours (based on 15 seconds per record) to identify all personal data in the relevant records and noted that additional time would then be required to redact the personal data from the record in order to provide the requested information. The Tribunal found that this was a "grossly oppressive" burden on the HSE, amounting to more than 200 working days or almost a year of one staff member's time. Public authorities are not required to organise their information in a particular way in order to facilitate responses to requests under FOIA.

28. The Tribunal went on to balance the resources required to respond to the Request against the public interest in its subject matter, as suggested by the Upper Tribunal in *Cabinet Office v Information Commissioner and Ashton* (paragraph 17 above). The Appellant had informed the HSE that:

> 'the purpose of the request is to conduct a time-series analysis of the super-prime residential construction sector in Central London and the surrounding Home Counties - the information sought, and the detail requested, is entirely necessary in order to be able to perform this study, which is considered by the requester to be in the public interest.'

29. In an email to the Commissioner dated 25 April 2022, the Appellant added: "it doesn't feel right that HSE can hide behind the so-called vexatious nature of the request to avoid providing exactly the sort of data that FOIA is supposed to make available to citizens for legitimate purposes".

30. The Appellant provided no further information about the purpose of his study. He did not expand on this in his appeal nor in reply to the Commissioner's Response. He did not explain

whether his study would be used for commercial or non-commercial or educational purposes nor whether the results would be freely available to the public. He did not claim any connection to a university or research institution; his messages appear to come from private companies ("Meticulous (SaaS) Ltd" and "dos&co").

31. The Tribunal recognises that there is an inherent public benefit in research and education, and that as a public body, information held by HSE is subject to FOIA and available through FOIA to be used by researchers, academics and the general public for study and research. However, Parliament has made the duty to provide information under FOIA subject to certain exceptions and exemptions which are intended, in the case of section 14(1), to protect the resources of public authorities from being squandered inappropriately.

32. Without more information about the Appellant's study, the Tribunal was not able to put much weight on the value or serious purpose of the Request to balance against its grossly oppressive burden. The Tribunal therefore concluded, taking a broad and holistic approach, that the burden of responding to the Request was disproportionate to any value or serious purpose, even taking into account the high hurdle required for section 14(1). We concluded that the HSE was entitled to refuse the Request pursuant to section 14(1) on the grounds that it was vexatious.

33. The appeal is dismissed.

Other matters

34. The HSE's position, accepted by the Commissioner in the Decision Notice, was that personal data in the F10 records was provided on a confidential basis, and that the HSE was therefore required to remove this "potentially exempt" information before responding to the Request. The Appellant disputed the HSE's position on this, pointing out that the F10 notices, complete with personal data, are displayed publicly outside building sites, and that similar information about property ownership is publicly available at the Land Registry and in planning applications.

35. The Tribunal found that this issue was not relevant to the appeal. As noted by the Commissioner in its Response, the Request required the HSE to remove all personal data from the requested information before providing it to the Appellant. It was therefore irrelevant whether or not this was required by data protection or freedom of information legislation; it was required by the Request itself.

36. The Commissioner went on to suggest in their Response that as the extraction of personal data was required by the Request (and not a result of the application of FOIA exemptions), the HSE could have included time spent extracting personal data in their calculation of time required to comply with the Request, and therefore refused the Request pursuant to section 12(1) FOIA.

37. The Tribunal reaches no conclusion on this as we are satisfied that the HSE were entitled to refuse the Request based on section 14(1). We note however the guidance in the Cabinet Office statutory Code of Practice and from the Upper Tribunal (in *Craven v ICO and DECC* [2012] UKUT 442 (AAC)) that public authorities should consider section 12 before relying on section 14.

38. The Tribunal finds, as did the Commissioner, that the HSE breached section 16 FOIA by failing to provide adequate advice and assistance to the Appellant. The Appellant made suggestions to narrow the Request and reduce the burden. It seems likely that some of the Appellant's suggestions could helpfully have been used to narrow the Request, thereby avoiding the need for the Commissioner's investigation and this appeal. The Tribunal also

notes that the HSE failed to conduct an internal review and did not comply with the Commissioner's time scales until an information notice was issued.

39. None of the parties disputed that FOIA applied to the Request. The Tribunal noted, however, that the definition of 'environmental information' in Regulation 2(1)(c) Environmental Information Regulations 2004 ('EIR') includes information on 'measures.. such as… policies, legislation… and activities affecting or likely to affect' the state of the elements of the environment, such as land, and factors, such as noise and waste, affecting or likely to affect land. Regulation 2(1)(f) includes the state of human health and safety, including built structures in certain circumstances. The Tribunal was satisfied, however, that if the Request was for environmental information, it was also manifestly unreasonable pursuant to Regulation 12(4) EIR for the same reasons as noted in relation to section 14(1) FOIA. In reaching this conclusion, we took into account the presumption in favour of disclosure in Regulation 12(2) EIR and that grounds for refusing to disclose environmental information must be interpreted in a restrictive way.

40. The appeal is dismissed.

Signed District Tribunal Judge Goodman Date: 25/02/2023