NCN: [2023] UKFTT 674 (GRC)
Case Reference: EA 2022 0010

First-tier Tribunal
General Regulatory Chamber
Information Rights
Decision notice IC-62542-H3V1

Heard by: CVP

Heard on: 27 July 2023
Decision given on: 15 August 2023

Before

TRIBUNAL JUDGE Hughes
TRIBUNAL MEMBER Wolf
TRIBUNAL MEMBER Cook

Between

DEREK MOSS

Appellant

and

INFORMATION COMMISSIONER
MINISTRY OF JUSTICE

Respondents

Representation:
For the Appellant: In person
For the Respondent: Did not appear
For the Second Respondent: Ms Parekh instructed by Serra Yakappur (Government Legal Department)

Cases
Birkett v DEFRA [2011] EWCA Civ 1606
McInerney v IC & DfE [2015] UKUT 0047 (AAC)
Derek Moss v the Information Commissioner and the Cabinet Office [2020] UKUT 242 (AAC)

Decision: The appeal is Dismissed

REASONS

1. On 11 August 2020 the Appellant wrote to the Second Respondent (MoJ) in the following terms:-

   "I wish to may a FOI request.

   I've been told that the courts have a policy or practice whereby any claims filed by a litigant in person which raise claims for breach of Human Rights Act 1998 are referred to a judge for review before being served. Please provide any records relating to this policy or practice, including but not limited to records showing which statute, rule or practice direction provides for this departure from the normal process of serving claims; records showing what the purpose of this policy or practice and what options are available toa judge when such a claim is referred to them, other than to direct that the claim be served.

   I've been told that the courts have a policy or practice of disregarding CPR [Civil Procedure Rules] 10.2 and CPR 12.3 and not actioning valid Requests for default judgment (which are ordinarily granted automatically by the court staff as an administrative decision if no acknowledgment of service or Defence has been filed and the time for doing so has expired) where a claim has been referred to a judge because it includes claims for breach of Human Rights Act 1998 and the judge has directed that it be transferred from the CCMCC [County Court Money Claims Centre] to another court office. Please provide any records relating to this policy or practice, including but not limited to records showing which statute, rule or practice direction provides for this policy or practice; records showing the reason for this policy or practice; records showing how a claim is expected to be dealt with if the court staff can't process a Request for default judgment because of this policy or practice but the claim can't be heard because the Defendant has decided to ignore the proceedings"

   Please also provide the following:

   any records relating to DDJ [redacted] decision on [redacted] to transfer claim [redacted] to the County Court at [redacted] for the application to be listed for hearing (on notice) and served, including any records showing which application the learned judge was referring to and any records showing what was served on the Defendant as a result of this Order;

   any records relating to DDJ [redacted] decision on [redacted] to "list for hearing for further directions and case management", including any records showing why the learned judge directed this hearing when no acknowledgment of service or Defence had been filed, the time for doing so had expired on [redacted] and a Request for default judgment had been filed on [redacted] ;

   any records relating to DDJ [redacted] decision to stay the claim on [redacted], including any records showing why the learned judge had "concerns about whether service has been effected on the Defendant".

[tribunal note -The redacted information identifies the judge, the court, the case number and the relevant dates, it did not identify the parties to the litigation]

2. On 1 September 2020 the MoJ replied refusing the request:

"I can neither confirm nor deny if the MoJ holds the information that you have requested. Under sections 32(3) and 40(5) of the FOIA we are not obliged to confirm or deny whether we hold information that relates to court records and to do so would contravene any of the principles set out in Article 5(1) of the General Data Protection Regulation and section 34(1) of the Data Protection Act 2018."

3. On 3 September 2020 Mr Moss wrote asking for an internal review. He stated that

"The first two parts of my request are for records relating to matters of policy or practice, not for court records relating to a specific cause or matter which would identify any individuals. So s32(3) and 40(5) of FOIA which you have relied on are inapplicable.

I also requested records relating to the decisions by three judges in a specific case where I am the claimant as such this was a request for data that relates to me and should have been processed as a subject access request as per the Data Protection Act 2018 and GDPR. … in any event the ICO's guidance explains that a request does not have to include the phrase "subject access request" as long as it is clear that the individual is asking for the only legal own personal data"

4. The MoJ replied on 1 October 2020 asserting that the original decision was correct. It set out the MoJ's duty to protect personal information, and the protection s32 FOIA provided for court records. With respect to the third part of the request it stated: *In relation to the last part of your FOI request. It was not clear who was the claimant in the proceedings, therefore the response you received was correct.* The response went on to seek confirmation of identity so that the subject access request could be carried forward.

5. Mr Moss complained to the ICO:-

On 3.9.20, it refused all of my requests, relying on s32(3) (court documents relating to a specific case) and s40(5) (personal information).
…
On 1.10.20 I received the internal review response, upholding the decision to rely on s32(3) and s40(5) to refuse my request for the documents relating to general policy or practice.

My complaint is that these reasons are inapplicable, as I explained in my internal review request on 3.9.20, as the documents relating to general policy or practice that I requested do not relate to a specific case or identify any individuals. I am not complaining about the mistake in treating the latter part of my request as a FOIA rather than a SAR on 1.9.20 and refusing to provide that information.

6. The ICO acknowledged receipt of the complaint and indicated an intention to proceed with it but warning of delay on 20 October 2020. The investigation started

on 31 March 2021 with an officer of the ICO writing to Mr Moss and the MoJ explaining:

The focus of my investigation will be to determine whether the MoJ handled the first two parts of your request in accordance with the FOIA. Specifically, I will look at whether the MoJ is entitled to rely on exemptions as a basis for refusing to confirm or deny whether it holds the requested information.

7. On 30 April 2021 MoJ set out its new understanding of the position:

You have clarified the scope of your complaint is that you require only general policy documents, and not any specific details of specific cases or any personal data. Therefore, we can confirm that for general policy information the MoJ previous Neither Confirm Nor Deny exemptions S32(3) and S40(5) of the FOIA no longer applies to that specific data.

Your clarified FOIA request has been handled under the FOIA.

I can confirm that the MoJ holds the general policy information that you have requested, and I have provided it below.

8. The MoJ in its letter set out how claims may be commenced in the civil courts.

9. On 17 May 2021 Mr Moss expressed his dissatisfaction to the ICO:

The MoJ has still not complied with my request.

Contrary to what you have said, my complaint was not about "the MoJ's refusal to confirm or deny holding information" within the scope of the first two parts of my request. It was a complaint about their failure to comply with FOIA and provide the requested information. They have now confirmed that they hold that information and that it is not subject to any exemptions but they haven't provided any of the documents or records which I requested.

Their letter discusses the ways in which a claim can be started and confirms that the MoJ has a policy whereby claims which raise issues under the Human Rights Act 1998 and are filed on paper AND the claimant is a litigant in person, are referred to a judge before being served on the defendant, but not where the claim is filed electronically by a litigant in person, or where it is filed on paper by a solicitor.

I already knew this, because the court staff had told me about this policy. Hence my request, which the MoJ has quoted in its letter dated 30 April 2021
…
My request clearly requested records relating to "a policy or practice" and no-one could have reasonably read those parts of my request as requesting records about a specific case. *[tribunal's emphasis]*
….
So I reject the MoJ's assertion that I clarified my request in my complaint to the ICO and that prior to that, it wasn't apparent that I was seeking documents relating to a general policy or practice.

I'm disappointed that you think that the MoJ has complied with my request, despite having not provided me with any of the documents that I requested. *[tribunal's emphasis] Please proceed to investigate my complaint.*

10. In response to this concern the MoJ wrote to Mr Moss on 25 August 2021

The ICO in an e-mail dated 7th July, advised MoJ you were dissatisfied with MoJ's response to your FOIA request. This reply from the MoJ provides further information, and clarification, regarding your Freedom of Information (FOIA) request 200811013, and Internal Review (IR) 200903026, which we hope will help to informally resolve this case.

In order to provide context to the information that was disclosed, I can confirm how the information that the MoJ disclosed is held. The information that was provided in our previous response to you, was an amalgamation of advice given to a previous responder, by the Court managers, at each of the three different sites, listed in the response, in order for us to provide an overview of the process. The information on court processes, and procedures, are held within Job Cards, Standard Operating Procedures, and Knowledge Banks.

For your advice and assistance, I can advise that general information about how and where to start claims can be found below.
….

MoJ can advise that the authority to diverge from any administrative process, and involve a judge, is held within the Civil Procedure Rules (CPR 3.2). MoJ has to advise that the we do not hold anything that specifies what those situations might be, just that it is within the general Case Management powers for a court officer to refer.

No further information is held that can be disclosed to you. The searches that were previously undertaken by the original FOIA response to check this still stand. There may be some court level processes only, held by each individual court, but searches for that information instead, would fall under Section 12(1) (costs) exemption of the FOIA. *[tribunal's emphasis]*

For your information MoJ can advise that Section 12(1) of the FOIA means a public authority is not obliged to comply with a request for information if it estimates the cost of complying would exceed the appropriate limit. The appropriate limit for central government is set at £600. This represents the estimated cost of one person spending 3.5 working days determining whether the department holds the information, and locating, retrieving and extracting the information.

A search of the MoJ/HMCTS Intranet did not provide any other further information we could provide you to assist, or answer your request. Another, search of the civil procedure rules, was also undertaken, but did not provide any further information, other than that previously disclosed to you about section 3.2.

11. On 12 September 2021 Mr Moss wrote to the ICO asking for a formal decision. In that communication he provided details of a service complaint he had made about his litigation on 7 May 2020, pursued to higher levels in CCCMCC on 10 June and 29 June and in August to the Head of Customer Investigations at HMCTS. He summarised his interpretation of what he had been told and argued that,

it must hold documents relating to a policy or practice which the CCMCC, HMCTS and the MoJ have all confirmed exists, of referring certain claims filed by litigants in person on paper to a judge before serving them,

…

The MoJ has been in breach of Part 1 FOIA in respect of both parts of my request since it first refused it, in its letter dated 1 September 2020, by relying on inapplicable exemptions and the Commissioner should find it in breach of Part 1 FOIA for failing to either comply with my request or provide a valid reason for refusing it within 20 working days and she should order it to comply with both parts of my request and provide the relevant documents now."

12. On 17 November 2021 the MoJ replied to the ICO setting out its position, confirming the general position as set out in the Civil Procedure Rules and that to find whether there were any local procedures would require a search at each of 95 courts. It confirmed its reliance on the provisions of s12– the cost of compliance with an information request. On 18 November the MoJ wrote to Mr Moss:-

Where section 12 applies to one part of a request we refuse all of the request under the cost limit as advised by the Information Commissioner's Office. In this instance to determine if all of the information requested is held, including any local policies, and answer a question on how the general overarching processes, are specifically interpreted in each court, that would require contacting 95 county courts. Each court would need to identify if there are any local practices in place for processing a claim under the Human Rights Act. Staff would have to conduct searches of their local computer and paper documents if necessary. They would then need to extract and collate the information before returning it which would exceed the appropriate limit. MoJ therefore do not know whether we hold the information, but to determine that fact it would exceed the appropriate cost limit under s12 (2) FOIA. Consequently, we are not obliged to comply with your FOI request.

Although MoJ cannot answer your request at the moment, we may be able to answer a refined FOI request within the cost limit. You may wish to consider, for example submitting a new FOI request, asking for information on local policies, but from only a few specific courts, and during a specific and short time period, which could reduce the volume of the request. Please be aware that we cannot guarantee at this stage that a refined request will fall within the FOIA cost limit, or that other FOI exemptions will not apply.

13. In the decision notice of 9 December 2021 the ICO accepted that the MoJ was entitled to rely on s12(2) (cost of compliance), had complied with its duties on s1(1) (general right of access to information) and s16 – (advice and assistance) and found a procedural breach of s17(5) the refusal notice. The ICO was satisfied that the wording of the request, "the courts" meant that it was generic and did not refer to specific

courts and therefore that to obtain the information it would be necessary to contact all the county courts to discover what local policies each might hold relevant to the request. The ICO was satisfied that having established that interpretation the advice provided was appropriate. However since a refusal notice relying on s12(2) was not provided within 20 days of the request there was a breach of s17(5). The ICO also considered that the MoJ response to the internal review did not comply with the Code in that it did not address the specific concerns Mr Moss had raised.

The Appeal

14. In his notice of appeal dated 6 January 2022 Mr Moss asked-

"That the Tribunal find the MoJ breached my rights to access information under FOIA and orders it to provide the information requested, or to provide s.16 advice and assistance to enable me to reformulate my request to come within the s.12 cost limit."

15. He submitted that in failing to identify an applicable exemption (s17) in the initial reply

"there was also a breach of section 1, as having failed to identify an applicable exemption in its response dated 1 September 2020, the MoJ was obliged to notify me whether it held the requested information and if so, to provide that information, within 20 working days of the request, which it failed to do. It admitted in its letter dated 30 April 2021, after I complained to the ICO on 2 October 2020, that it held the requested information and the ICO should have made a decision at that point, as per his policy."

16. With respect to the provision of assistance he argued (relying on the ICO's published guidance:-

"…where a request is received with more than one possible meaning, the public authority must ask the requester to clarify which interpretation is correct; that it should never attempt to guess which meaning the requester intended; that where background and context is referenced in the request, including ongoing dealings or correspondence between the authority and the requestor, and it has the potential to alter the request's objective meaning, the authority must take it into account; that if having done so, the request is unclear or ambiguous, or it is apparent there is another possible interpretation, the authority must seek clarification from the requestor.

30. This is applicable to my request, because my email also contained a SAR referring to details of a specific case, so it should have been apparent that my two FOI requests, which both started "I've been told that the courts have a policy or practice…" related to what I had been told by the court staff at the courts that I'd had dealings with, i.e. the CCMCC and Kingston County Court.

31. Even if that hadn't been apparent from my request email, my internal review request referred to a letter from Richard Redgrave, Head of Customer Investigations for HMCTS, dated 7 August 2020, in which he told me I would need to make a FOI for information about

the specific case. This was a "reference to ongoing dealings" between myself and the authority and the MoJ should have taken this background and context into account."

17. In resisting the appeal both the ICO and MoJ relied on the findings of the Decision Notice. Before dealing with the substantive arguments raised by Mr Moss the MoJ noted:

"27. The Appellant advances two grounds of challenge. Notably, no challenge is made in respect of the MoJ's reliance on the s.12(2) exemption, and that substantive issue is therefore not considered further here."

18. In the light of this, with respect to the first ground of appeal the MoJ relied on the statutory wording (bundle pages 46/7 para 30)

"S.1(1), including the duty to confirm or deny, is disapplied by ss.12(1)-(2). In particular, by virtue of s.12(2), there is no obligation to comply with the s.1(1)(a) duty to confirm or deny where the estimated cost of such compliance would exceed the appropriate limit. The MoJ maintains (and the Commissioner agrees) that s.12(2) is made out on the facts of this case – importantly, the Appellant does not challenge this finding."

19. The MoJ resisted the claim that the original request had more than one meaning and accordingly it should have sought clarification (47, para 35):

At the initial stage, the MoJ reasonably construed the Request as a request for information relating to specific cases, given that it was plainly interlinked with requests about decision-making in specified claims. At that stage, the MoJ did not consider that there was ambiguity, based on the wording of the Request, and did not therefore need to clarify the Request.

36. During the course of the ICO investigation, the MoJ properly understood the nature of the Request, as described by the Appellant, to identify the information sought and responded accordingly. There was no ostensible confusion at this stage as to national versus local policy, and there was therefore no requirement to seek any clarification.

20. The MoJ maintained that it had given advice appropriately and accordingly by reason of s16(2) had complied with its obligations.

21. In his final written submissions (8 March 2023) Mr Moss argued:

21. No reasonable person could interpret the request as asking for local policy information held by 95 courts. The only reasonable interpretation was that it was requesting national guidance / polices, or if that didn't exist, the policies or practices of the courts which the Appellant had dealings with and had complained about.

22. *If, after taking the background and context into account, the MoJ was still unclear about what the Appellant was seeking, it was required by s16 to contact him to seek clarification. If it had told him in 2020 that there are no national policies and each court follows its own policies or practices, he would have confirmed that he was only interested in the policies or practices*

followed by the two courts he'd had dealings with, which could have been provided within the s12 limit, and that should have been done in 2020.

23. The ICO (16 March 2023) maintained the position that the late reliance on a different statutory provision (in this case s12) was allowed by the decision in *McInerney* and the MoJ, by suggesting a new FOIA request, had discharged the s16 duty.

24. The MoJ (20 March 2023) in rebutting the new argument of Mr Moss *"that the "only reasonable interpretation" of the Request was that it was for national policies or, if those didn't exist, then for the policies of the courts with which the Appellant had dealings"* submitted:-

"7. However, there was nothing in these paragraphs limiting the scope of the Request in the manner that the Appellant now claims. It is also notable that the Appellant appears to be stating, on the one hand, that regard should have been had to his subject access request ("SAR") in limiting the scope of his FOIA Request. On the other hand, he maintains that his SAR was a "quite separate and completely different request… for records in a specific case" and it should not have been taken into account in interpreting the first half of the Request letter (see Appellant's Reply, paras.5-6 [44]). The Appellant cannot have it both ways: he cannot require the FOIA Request to be treated as entirely separate from the SAR, but insist that the SAR should have been taken into account when assessing the scope of the FOIA Request."

Evidence

25. Faye Wates, a Senior Service Manager in the Civil Team within the Development Directorate of HM Courts and Tribunals Service ("HMCTS") provided a witness statement in behalf of the Second Respondent confirmed by a statement of truth (bundle pages 223- 250) She explained how the request had been handled and reviewed:-

12. The internal review was carried out by a member of the Civil and Family team who had not been involved or engaged in responding to the initial Request. Their role is to review the FOIA request and decision again.

13. In line with department practice, the reviewer consulted with the author of the original response to discuss how the initial decision was reached. Following this the reviewer considered the question of whether the initial interpretation and response to the Request, given the wording of the Request itself, had been reasonable. Upon completion of the internal review, the reviewer decided that the application of the exemptions in s 32(3) and 40(5) FOIA for court records and personal data had been reasonable.

26. After the ICO's intervention:

22. The Second Respondent reconsidered the Request and its response upon receiving the ICO's letter of investigation. This request was handled by a different member of the Civil and Family Service team to review the first two parts of Mr Moss request.

23. It was only at this stage that the Second Respondent fully appreciated the exact nature of the parts of the Request relating to general policy documents, which had previously been construed as being interlinked with the specific cases referred to in the Request, as set out above.

27. The MoJ further explained to the ICO further searches it had taken in response to additional inquiries from the ICO:-

47…These included:
1) A search of the MOJ/HMCTS Intranet using the following search terms 'Human Rights Act', 'HRA' and 'referring claims to judges under HRA'. These did not provide any other further information. Any policies, or procedures, in relation to the original request, if available, would be within the HMCTS and/or MOJ intranets, which is accessible by all MOJ/HMCTS staff.
2) Another search of the civil procedure rules terms 'CPR 3.2', 'CPR 10.2' and 'CPR 12.3' was also undertaken and did not provide any further information, other than that previously given around section 3.2.
3) A search of the HMCTS Civil Knowledge Bank which contains guidance for Courts and Tribunals Support Centres (CTSC) was conducted using the terms 'Human Rights Act' and 'HRA' and did not provide any further information.
4) Enquiries were made with the London Knowledge and Information Liaison Officer team, County Court Money Claims Centre, County Court Business Centre and Online Civil Money Claims service for details of any guidance or policies in relation to Mr Moss's request. The keywords used included, 'national guidance, 'local practice', 'agreed protocol' 'N1 Part 7 Claim Form', 'HRA box', 'HRA field', 'validation', 'case management powers', 'eligibility questions' and 'Human Rights Act'."

48. The Second Respondent also clarified in this letter that, although no further general information was held centrally or in a readily accessible format, some Courts might hold local policies explaining how the general overarching processes are specifically interpreted in each individual Court.

28. While in oral submissions Mr Moss noted that the witness had stated that there was a different person conducting the internal review from the person who handled the initial request; he argued "we don't know that." However he declined to question or challenge the witness in any way although prompted to do so by the tribunal.

29. On examination by the tribunal Ms Wates confirmed the training the staff had received and that all parts of the request had continued to be linked together at the internal review stage. She explained that specific investigations had been carried out with County Court Money Claims Centre, County Court Business Centre as these are the two business centres where the MoJ centralises its paper processes for issuing claim forms. She explained that it had not been felt necessary to seek clarification from Mr Moss about the request for information because "people felt that it was linked to a specific case and didn't need clarification".

Final Submissions

30. In his oral submissions Mr Moss emphasised the first two parts of the request didn't refer to any personal data and public authorities had a duty to identify a subject access request. He relied on the Cabinet Office guidance on FOIA (2018) (bundle pages 367 et seq)

"1.5 A request for environmental information only should be dealt with under the Environmental Information Regulations 2004 , and a request for a person's own personal data should be dealt with under the subject access provisions of the Data Protection Act 2018. Sometimes it may be necessary to consider a request under more than one access regime."

31. He also relied on the ICO guidance on "Interpreting and clarifying requests" (bundle page 430-431):

Public authorities must interpret information requests objectively. They must avoid reading into the request any meanings that are not clear from the wording.
….
When an authority receives an unclear or ambiguous FOI request, its Section 16 duty to provide advice and assistance will be triggered and it must offer the requester help to clarify the request.

32. He argued that the refusal and the internal review were on the basis of inapplicable exemptions and therefore the tribunal should uphold his case. He produced a number of authorities in support of the proposition that the MoJ was not entitled to rely on s12 at the time that it did.

33. In resisting the appeal Ms Parekh noted that as originally formulated the appeal on the basis of breach of s1 had not mentioned the provisions of s12. However Mr Moss had relied on authorities which were no longer good law in the light of the Court of Appeal decision in *Birkett* that public authorities could rely on exemptions first claimed during proceedings and the Upper Tribunal decision in *McInnerney* which expressly applied this principle to s12. In addressing the question of advice and assistance she drew attention to the Code of Conduct:-

"6.9 Where a request is refused under section 12, public authorities should consider what advice and assistance can be provided to help the applicant reframe or refocus their request with a view to bringing it within the cost limit. This may include suggesting that the subject or timespan of the request is narrowed. Any refined request should be treated as a new request for the purposes of the Act."

Consideration

34. It is important to emphasise the statutory basis of this case and the powers of the tribunal within the context of FOIA:-

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.
(3) Where a public authority—
(a) reasonably requires further information in order to identify and locate the information requested, and
(b) has informed the applicant of that requirement,
the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.
(4) The information—
(a) in respect of which the applicant is to be informed under subsection (1)(a), or
(b) which is to be communicated under subsection (1)(b),
is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.
(5) A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).
(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny"

2.— Effect of the exemptions in Part II.
(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the
effect of the provision is that where either—
(a) the provision confers absolute exemption, or
(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, section 1(1)(a) does not apply.
….
(3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—
…
(c) section 32,
…

8. ¬-Request for information
8(1) In this Act any request for information is a reference to such a request which-
…
(c) describes the information requested

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.

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.

35. The role of the tribunal. is to consider appeals under s58 FOIA:

58 Determination of appeals
58(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.

36. The starting point is a consideration of the request lodged on 11 August 2020 and the words used to describe the information requested. The Freedom of Information Code of Practice (first issued in 2004 and a revised version by the Cabinet Office in 2018) under s45(5) and provides:

"*1.14 Section 8(1)(c) requires that a request for information must also adequately describe the information sought*.

…

Clarifying the request

2.8 *There may also be occasions when a request is not clear enough to adequately describe the information sought by the applicant in such a way that the public authority can conduct a search for it. In these cases, public authorities may ask for more detail to enable them to identify the information sought.* "

37. In similar terms the ICO's guidance on interpreting and clarifying requests:-

"Public authorities must interpret information requests objectively. They must avoid reading into the request any meanings that are not clear from the wording.
The authority must answer a request based on what the requester has actually asked for, and not on what it thinks they would like, should have asked for or would be of most use to them"

38. Although the request was subsequently (once it was revealed as in part a subject access request) severed into two parts; as made it was described by Mr Moss as "a FOIA request" and dealt with by MoJ as such. It begins with two extended paragraphs seeking information of court policies and procedures in connection with cases related to the Human Rights Act including issues of transfer of cases and default judgements. It then moves on "**Please also provide the following**" seeking information about decision making in one case involving transfer between courts and questions of service of proceedings and default judgement – issues raised by the two preceding paragraphs. It was clearly, in Mr Moss's own terms, a single request. The three concluding paragraphs clearly indicate what information is sought on a specific case.

39. The tribunal is satisfied that, given that it is a single request which seeks the detail of an individual case before the courts the MoJ properly applied s32(3) and s40(5) to the request and made a refusal on that basis, in accordance with s2.

40. The Ministerial guidance states, with respect to Internal Reviews:

5.1 It is best practice for each public authority to have a procedure in place for dealing with disputes about its handling of requests for information. These disputes will usually be dealt with as a request for an "internal review" of the original decision….

5.8 The internal review procedure should provide a fair and thorough review of procedures and decisions taken in relation to the Act. This includes decisions taken about where the public interest lies if a qualified exemption has been used. It might also include applying a different or additional exemption(s).

41. The obligation on MoJ upon receiving the request for internal review was to "provide a fair and thorough review of procedures and decisions taken in relation to the Act". The key decision it took on receiving the request was to interpret it as a single request. From a consideration of the text that was correct. On reviewing the request it looked at the decision it had taken and (correctly) concluded that it was a single request for information arising from a specific court case. Pragmatically it started to investigate whether the claimed SAR was an SAR in the light of the information Mr Moss had now provided. A further pragmatic response would have been to look at the remainder of the information request again, ***separately***; however that was not, from aa strict interpretation of the statutory guidance, what it was required to do.

42. On 30 April 2021 the MoJ, following the ICO's intervention, looked at the first two parts afresh and provided the information that it held from searches of its central systems. Following Mr Moss's statement in his letter of 17 May 2021 that the MoJ

had not provided any of the documents he had requested, the MoJ confirmed on 25 August that :-

MoJ can advise that the authority to diverge from any administrative process, and involve a judge, is held within the Civil Procedure Rules (CPR 3.2). MoJ has to advise that the we do not hold anything that specifies what those situations might be, just that it is within the general Case Management powers for a court officer to refer.

No further information is held that can be disclosed to you. The searches that were previously undertaken by the original FOIA response to check this still stand. There may be some court level processes only, held by each individual court, but searches for that information instead, would fall under Section 12(1) (costs) exemption of the FOIA.

43. It should be noted that the request identifies the information sought by the words "the courts have a policy or practice". The clear implication of that is that there exists something of general application to all the courts. This is confirmed by Mr Moss's challenge to the internal review finding (paragraph 5 above) that the MoJ had refused *"my request for the documents relating to general policy or practice. My complaint is that these reasons are inapplicable, as I explained in my internal review request on 3.9.20, as the documents relating to general policy or practice that I requested do not relate to a specific case or identify any individuals."*

44. The MoJ complied with its duty to provide the information requested as interpreted by Mr Moss in its letter of 30 April 2021 (paragraph 7). In order to assist Mr Moss it acknowledged that there might exist local procedures in individual courts, these points were re-iterated in the MoJ's letter of 25 August 2021 to Mr Moss and again in its letter to ICO on 17 November 2021.

45. Mr Moss remained dissatisfied and insisted on the ICO issuing a decision notice. This recorded the steps taken to clarify the issues and was issued on 9 December 2021. This found a breach of s17(5) by MoJ for failing to provide a notice relying on s12 within 20 days of the request. This finding is problematic since a refusal based on s30 was properly served within time; a refusal correctly based on the proper interpretation of the request. However since the MoJ has not appealed on this issue the tribunal makes no further comment. Mr Moss has raised a number of issues relating to ECHR, it seems to the tribunal that those issues were extensively canvassed in his previous appeal to the Upper Tribunal *Moss v IC and Cabinet Office* which is binding on this tribunal. His arguments do not assist his case.

46. Mr Moss's appeal against the ICO's Decision Notice is without merit and is dismissed.

47. The request was made on 11 August 2020. The Decision Notice is dated 9 December 2021. The hearing was 27 July 2023 and this decision is dated August 2023. Although some delay in the resolution of this request may have been occasioned by delays and staff shortages/resources constraints within the ICO and MoJ or the lack of availability of a tribunal; the simple issue has been complicated by way the request was formulated by Mr Moss, the way he has re-interpreted the request and his

approach to the conduct of the appeal. He has refused proper offers of assistance from the MoJ and made repeated and unnecessary applications and challenges in the appeal.

48. Rule 10(1)(b) of the tribunal's rules provides that the tribunal may make an order in respect of costs if the Tribunal considers that a party has acted unreasonably in bringing, defending or conducting the proceedings. If any party wishes to make an application in respect of costs it should do so within 14 days.

Signed C Hughes Date: 11 August 2023

Promulgated Date: 15 August 2023