



IN THE FIRST-TIER TRIBUNAL

Case No. Appeal No. EA/2015/0192

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice FS50550891

Dated 4th August 2015

BETWEEN

Police Service of Northern Ireland

Appellant

And

The Information Commissioner

Respondent

Determined on the papers on 9th May 2016

Date of Decision 23rd May 2016

BEFORE

Miss Fiona Henderson (Judge)

Subject: s12 FOIA – cost of compliance exceeds the appropriate limit.

Case Law: *All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and the Ministry of Defence 2011 UKUT 153 AAC*

Decision: The Appeal is refused

REASONS FOR DECISION

Introduction

1. This appeal is against the Information Commissioner's Decision Notice FS50550891 dated 4th August 2015 which held that the Police Service of Northern Ireland (PSNI) had incorrectly relied upon s12 FOIA when refusing to confirm or deny that it held the requested information. The Commissioner required the PSNI to issue a fresh response to the complainant that does not cite s12 FOIA in respect of the duty to confirm or deny that the requested information is held.

Background

2. Patricia Curran was murdered in County Antrim in 1953. A man was found guilty of her murder at the time however, this conviction was quashed in 2000 following a review by the Criminal Complaints Review Commission (CCRC).

Information Request

3. The requestor wrote to the PSNI on 5th May 2014 asking:

"I request permission to be able to consult 2 documents that are held by the Police with regard to the murder of Patricia Curran in 1952.

- 1) *Report from Inspector Kennedy to Sir Richard Pym undated but endorsed prior to the arrest of Ian Hay Gordon.*
- 2) *Report from Inspector Kennedy to Sir Richard Pym dated 29th January 1953".*

4. On 2nd July 2014, the PSNI refused the request relying on s12 FOIA. Their case was that there were 13 boxes which may contain relevant information and that it would take approximately 90 hours to examine these boxes. The PSNI upheld their refusal on the basis of s12 FOIA by letter dated 4th July 2014.

Complaint to the Commissioner

5. The requestor complained to the Commissioner on 8th August 2014 arguing that he would expect that there would be a catalogue and index of the material and he did not accept the 90 hour estimate.

Appeal

6. The PSNI appealed on 1st September 2015. Pursuant paragraph 11(3) (a) (iv) of the *Practice Statement composition of Tribunals in relation to matters that fall to be decided by the General Regulatory Chamber on or after 6 March 2015*, the case is being determined by a Judge sitting alone.
7. Originally the PSNI had 6 grounds of appeal however, by letter to the Tribunal dated 5th April 2016 the PSNI indicated that they have reviewed the papers and believe on a balance of probabilities that they have now identified the 2 requested documents. They have therefore issued a fresh response to the requestor under FOIA dated 25th March 2016 refusing the request, relying upon s30 FOIA. Consequently the PSNI now only wish to pursue ground 6 of its appeal¹ namely:

“The Commissioner has erred in ordering PSNI to issue a fresh response that does not cite Section 12 of the FOIA in respect of the duty to neither confirm nor deny that the requested information is held”.

The search strategy

8. S12 FOIA provides:

(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.

9. The appropriate limit is set out in The Freedom of Information and data Protection (Appropriate Limit and Fees) Regulations 2014 which provides:

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

(3) In the case of any other public authority, the appropriate limit is £450².

¹ In case the documents identified prove not to be those requested.

² There is no dispute that the appropriate limit is £450 for the PSNI which equates to 18 hours of searching time pursuant to regulation 4.

The PSNI scoping exercise

10. Prior to relying on s12 FOIA, the Appellants carried out a scoping exercise by an assistant investigator during which each of the 13 boxes was opened to ascertain their contents which took 3 hours. Each box contained 15-25 individual files of 200-500 pages. Therefore it was estimated that the 13 boxes contained 260 files totalling up to 65,000 sheets of paper. Allowing 5-10 seconds per page this would take between 90-180 hours. They argued that each page would need to be looked at because although files are generally marked with a description, statements have been located in other files and reports have been located out of place.

The Commissioner's scoping exercise

11. The Commissioner's published guidance recommends a search strategy to ensure that the estimate is based on an appropriate search. The Commissioner questioned the underlying assumption that every page would need searching and therefore conducted an inspection of the information not to "find" the information but to clarify whether the strategy was necessary and proportionate.

12. 7/13 boxes were labelled "original case papers" and 6/13 boxes were labelled as containing files relating to the review conducted by the CCRC in 2000. The ICO spent approximately 1 hour and 40 minutes inspecting 5/7 of the original case papers and 1/6 of the CCRC boxes.

13. He concluded that the request was for reports provided prior to the Trial, therefore they were likely to be in the original case papers. Consequently, it was reasonable to confine the search to the 7 boxes of case papers. The ICO rejected PSNI concerns (following their own re-inspection) that CCRC files could not be excluded as they contained copies of papers from original case files and some documents had been misfiled, because there was no evidence that the CCRC boxes included any original material rather than copies of original material and examples given of misfiling were not sufficient to suggest that any original papers had been misfiled.

14. Additionally, the ICO concluded that whilst it was correct that there was no comprehensive index, the files were more structured than PSNI had indicated:

- files with specific titles which would not appear to be relevant on face value could be excluded. (the ICO had examined a number of files with specific titles and the files contained information corresponding to its title).

- Untitled files or those whose title suggested they may contain the material (e.g. “miscellaneous reports”) would need examination but a cursory examination of the documents contained in a folder should be sufficient to ascertain whether it contained the requested information.
- It was not reasonable to examine every page just in case something had been misfiled.

15. The Commissioner concluded that since he had looked at 5/7 boxes within 1 hour 40 minutes the PSNI ought to be able to examine all 7 within 18 hours.

Analysis of arguments

16. In their appeal the PSNI argue that the decision is wrong in principle, whilst they no longer contest that the search strategy initially adopted by them was not sufficient to sustain a s12 exemption, they argue that they should not be precluded from relying upon s12 in the future, *“if supported by a further and more appropriate search strategy which resulted in the time and associated cost for compliance exceeding the appropriate limits under FOIA... Since the ICO investigator had only undertaken a preliminary inspection of all of the documents and had not in fact completed the search using the recommended search strategy, his report did not provide a sufficient basis upon which the Commissioner concluded that it would never be appropriate for PSNI to rely upon s12 FOIA.”*

17. The All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and the Ministry of Defence 2011 UKUT 153 AAC agreed with the approach that:

“it is not sufficient for the authority to simply assert that the appropriate limit has been exceeded; the estimate has to be “sensible, realistic and supported by cogent evidence”³.

18. The Tribunal is satisfied that the Commissioner’s assessment was sensible, realistic and supported by cogent evidence. Whilst it is accepted that the Commissioner did not complete the search using his identified search strategy, the Commissioner took the unusual step of viewing the material for himself and his conclusion was based upon a thorough scoping exercise which had regard to such filing as there was and which tested its reliability. The PSNI original strategy did not appear to take into

³ Paragraph 27

account that the search needs to be on a balance of probability and instead was aiming for certainty. The Tribunal is satisfied that in light of his analysis of the structure and contents of the majority of the boxes that the Commissioner has determined was in scope and the time that it took him, the Commissioner was entitled to conclude that it was possible to complete an examination of the relevant files for the purposes of confirming or denying whether the requested information was held within the 18 hour limit.

19. The PSNI speculate that it might not be possible to complete the search within 18 hours using “*a further and more appropriate search strategy*”, however, the Tribunal is satisfied that this is not realistic; they have been told what search strategy to use i.e. to limit themselves to the 7/13 boxes, to have regard to the labelling and to disregard matters that appear to be outside of scope on balance. Additionally, they do not have to look at every page in addition to the examples set out by the Commissioner, the Tribunal observes that in relation to documents that run to many pages, each page will not need to be looked at, as a cursory glance at the document as a whole ought to rule it and its related pages in or out of scope.

Conclusion

20. For the reasons set out above, the appeal is refused.

Dated this 23rd day of May 2016

Fiona Henderson
Tribunal Judge

Promulgated 24th day of May 2016