First-tier Tribunal
General Regulatory Chamber
Information Rights

Appeal Reference: EA/2019/0230

Heard on 12 December 2019

Before

JUDGE HAZEL OLIVER
MRS SUZANNE COSGRAVE
MR JOHN RANDALL

Between

TOM HERBERT-MAYNARD

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

THE UNIVERSITY OF MANCHESTER

Second Respondent

Appearances:

The Appellant – Mr Andrew Maynard
The Information Commissioner – Did not attend
The Second Respondent – Did not attend

DECISION

The appeal is dismissed.

REASONS

Background to Appeal

1. This appeal is against a decision of the Information Commissioner (the "Commissioner") dated 6 June 2019 (FS50790477, the "Decision Notice"). It concerns information sought

under the Freedom of Information Act 2000 ("FOIA") relating to disciplinary processes and procedures from the University of Manchester (the "University").

2. On 1 December 2017 the appellant sent a multi-part request for information to the University (the "Request"). Some of these were answered by the University. The parts of the request which are relevant to the issues which remain in dispute are as follows:

> *"The subject of my requests is the University's disciplinary procedures in so far as they apply to practice and procedure in respect of summary action leading to School and Faculty hearings and appeals therefrom.*
>
> *References to 'staff' below include both administrative and academic members of staff.*
> …..
> *4. Have records been kept by Administrative Officers in compliance with paragraph 35 AMP?*
>
> *5. Please supply copies of all such records that have been kept in the last four years.*
> …..
> *7. Have records been kept by Administrative Officers in compliance with paragraph 37 AMP?*
>
> *8. Please supply copies of all such records that have been kept in the last four years.*
> …..
> *17. Has the University supplied training in the procedures for staff?*
>
> *18. In relation to such training please identify (i) the person(s) responsible for the overall supervision of such training; (ii) the person(s) responsible for carrying it out; (iii) the number and duration of such training events that have taken place over the last four years; (iv) the average number of staff attending each such event.*
>
> *19. Please supply copies of training materials utilised in such training programmes*."

3. The University responded on 6 March 2018. It complied with some parts of the request (omitted here), refused other parts under section 40(2) FOIA (personal information) and 42 FOIA (legal professional privilege), and refused to comply with parts 18(ii), (iii) and (iv) on the grounds that the cost of doing so would exceed the appropriate limit in accordance with section 12(1) FOIA.

4. The appellant requested an internal review on 9 April 2018, in which he refined requests 18(ii) and (iii) to cover only the academic year 2016/17. In response the University released some further information. It maintained its reliance on section 40(2) for parts 5 and 8, and section 42 for part 19. It also maintained its reliance on section 12(1) in relation to the refined requests 18(ii), (iii) and (iv).

5. The appellant complained to the Commissioner on 2 October 2018. During the Commissioner's investigation, the University changed its position and advised that it should have refused to comply with any part of the request under section 12(1). It contacted the appellant about this in April 2019. The appellant also submitted a new request ("New Request") to the University which was similar to parts 18(ii), (iii) and (iv) of the Request but

refined them by limiting them to the School of Arts Languages and Cultures ("SALC") – the New Request has been answered and does not form part of this appeal.

6. The Commissioner issued her decision on 6 June 2019. The Commissioner decided that replying to the Request would exceed the appropriate cost limit under section 12(1). The University provided information that training is carried out by individual Schools within the University, with no obligation for central reporting. They would have to contact each of the 17 Schools, as well as those responsible for training staff who fall outside these Schools. There is no requirement to log training and records would vary between Schools. The person responsible for training would then have to contact the relevant areas of each department to check who had done the training and what records were kept, involving some 12,000 members of staff over a four-year period, and then work out when and for how long the training took place. The University conservatively estimated a minimum of 38 hours to answer all parts of part 18, based on two hours per responsible person. The further 29 parts of the request might have taken 15 minutes each to answer, giving a further 7.25 hours. The Commissioner found this explanation and the estimates credible.

7. At the time of the appeal, parts 5, 8, and 18(ii), (iii) and (iv) of the original request remain unanswered.

The Appeal

8. The appellant appealed to this Tribunal on 3 July 2019. His grounds for appeal can be summarised as follows:

a. The Commissioner had correspondence and discussions with the University which were not disclosed to him, and he did not have the opportunity to comment.

b. The Commissioner did not give due weight to his submission dated 17 April 2019. In response to his New Request, the University stated that there were not training events in SALC during the academic year 2016/17, and so no staff attending events. Question 18 is concerned with formal training events only, not personal guidance, and the costs estimate is based on information that was not requested by him.

c. In response to question 19 the University released well over one hundred training slides which do not relate to the type of training that was the subject of the request.

d. The University has said that apart from question 18, the remaining parts might have taken 15 minutes each to answer – so 7.5 hours in total. Questions 5 and 8 should therefore be answered if the challenge to the Commissioner's finding is successful.

9. The Commissioner resists the appeal, and maintains her original position. The Commissioner is not obliged to seek input or clarify matters with the appellant during the investigation. A reasonably objective interpretation of the appellant's request part 18 would cover any type of training, not just "formal" training. The Decision Notice makes no finding on part 19 of the Request. A finding in the appellant's favour does not mean the University has to provide a response to parts 5 and 8. The University seeks to withhold this under section 40(2).

10. The University was joined as a party to these proceedings. Their response relies on the Decision Notice.

11. The appellant has provided a response to the Commissioner's response, which disputes the figures provided by the University, and maintains that the wording of the Request as a whole makes it clear that it was about formal training programmes. We address these arguments in more detail in our discussion and conclusions below.

The Hearing

12. We had a hearing on 12 December 2019. The appellant was unwell, but had notified the Tribunal in advance that he wished to be represented at the hearing by his father, Mr Andrew Maynard. The Commissioner and the University did not attend and were not represented.

13. The issue in the case is whether responding to the Request would take the University more than 18 hours. If we find that responding to parts 18 (ii) (iii) and (iv) of the Request would take the University over this threshold, the University will not be required to respond to the Request as a whole, in accordance with section 12(1) FOIA

14. We had an agreed bundle of open documents, which we have read, and we heard submissions from Mr Maynard on behalf of the appellant.

Applicable law

15. The relevant provisions of FOIA are as follows.

> *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.*
> *……*
> *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.*
> *……*
> ***58*** ***Determination of appeals.***
> *(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.

16. The "appropriate limit" under section 12(1) is £600 for central government and £450 for any other public authority (Regulations 3(2) and 3(3) of the Freedom of Information and Data Protection (Appropriate Limits and Fees) Regulations 2004).

17. Costs are estimated at a rate of £25 per person per hour (Regulation 4(4)). The costs which a public authority can take into account are set out in Regulation 4(3) as follows: (a) determining whether it holds the information; (b) locating the information, or a document which may contain the information; (c) retrieving the information, or a document which may contain the information; and (d) extracting the information from a document containing it.

18. Requests from the same person can be aggregated for the purposes of assessing costs if they relate to any extent the same or similar information, and are received within sixty consecutive working days (Regulation 5).

19. A public authority does not have to provide a precise calculation of the cost of complying with a request, only an estimate is required. However, it must be a reasonable estimate. ***McInerney v Information Commissioner and the Department for Education*** [2015] UKUT 0047 (AAC) para 40 states, *"[s12(1)]…depends on an estimate and…the issue for the Commissioner is whether the estimate is reasonable. If the public authority relies on the section before the Tribunal it will take the same approach as the Commissioner would*."

Discussion and conclusions

20. We have taken all of the evidence and submissions into account in making our decision. In accordance with section 58 FOIA, our role is to consider whether the Decision Notice was in accordance with the law.

21. The cost limit of £450 applies in this case, at a rate of £25 per hour. We note that this hourly rate is fixed by law and is not dependent on the seniority of the people within a public authority who are tasked with dealing with a request for information. The question for the Tribunal is whether it would take the University more than 18 hours to respond to part or all of the Request.

Background

22. Mr Maynard provided us with some background to the appellant's dispute with the University, relating to how they handled disciplinary proceedings based on an allegation of plagiarism. We note that there is a history of problems with the way in which the University dealt with this matter, including failing to follow their own procedures. This ultimately resulted in the disciplinary decision being changed and the appellant was awarded a first-class degree. However, our role in this hearing is limited to deciding whether the appellant's Request has been responded to correctly under FOIA.

Natural justice

23. The appellant has complained that the Commissioner had correspondence and discussions with the University which were not disclosed to him at the time, and he did not

have the opportunity to comment on this before she made her decision. Mr Maynard discussed this further during the hearing, and said this did not comply with natural justice.

24. As set out in section 58(2) FOIA, the Tribunal may review any finding of fact on which the notice in question was based. This means that we can review all of the evidence provided to us and make our own decision as to whether or not the University was entitled to refuse to provide the requested information. We may or may not agree with the Commissioner's conclusions, but our role does not involve addressing detailed criticisms of the Commissioner's investigation. As noted by the Commissioner in her response, there is a general duty to act fairly in reaching a decision, but FOIA does not impose any specific procedural duties and there is no requirement to disclose correspondence to the other party during an investigation. The appeal process involves disclosure of all relevant documents to all parties, and this has provided the appellant with a full opportunity to comment on the correspondence from the University.

Parts 18 (ii) (iii) and (iv) of the Request

25. The appellant takes particular issue with the University's position that it would be necessary to search the records of some 12,000 members of staff in order to respond to these parts of the Request. This information was provided to the Commissioner by the University in an email of 7 May 2019. Mr Maynard submits that the Commissioner had asked the University to provide specific information a number of times, and they consistently failed to answer her questions.

26. We note that the University has not provided evidence to support its figure of 12,000 as the relevant number of members of staff. The scope of the Request was clear. As stated at the beginning of the Request, it concerned, "*the University's disciplinary procedures in so far as they apply to practice and procedure in respect of summary action leading to School and Faculty hearings and appeals therefrom".* The University should have focussed on numbers of staff likely to be involved in that type of activity. Instead, it appears to have assumed it would be necessary to consider the training of all members of staff across the whole University without providing the evidence to support that position. We do not consider the 12,000 figure to be credible, as it assumes every member of staff (including for example all administrative, secretarial and maintenance staff) would be involved in these types of disciplinary procedures and hearings.

27. We do accept the evidence from the University that they do not hold central records of all staff training. This means that they would need to send these parts of the Request out to 17 separate Schools within the University, which would each need to check their own training records and collate the relevant information. Other departments may also have staff who may have received such training, such as HR staff within Professional Services, particularly because each hearing requires the involvement of an administrative officer. As discussed with Mr Maynard during the hearing, this is likely to involve looking at personnel or appraisal records – including for academic staff because contributing to academic governance (which may include disciplinary matters) forms part of their job. Even if it only took each School plus the Professional Services Department one hour each to do these checks for details of training and respond centrally to the Department for Student Experience ("DSE"), who were dealing with the Request as a whole), this would reach the 18 hour limit. Other departments may also have relevant staff. This is a conservative estimate of the work involved in checking

records of relevant staff, and does not take account of the further work involved in DSE collating the responses.

28. The appellant submits that the University's response to his New Request shows that there was no training for staff in SALC, and this is relevant to how easily the University could have responded to his earlier Request. Mr Maynard explained that this showed no training had been done, and the same answer was likely for all the other Schools.

29. It is correct that the University has told the appellant that they are not aware of any training events in SALC which match the description in his request. However, the fact that they have provided a negative answer does not mean that this response could be provided very quickly. The costs that can be taken into account by a public authority include determining whether it holds the information. As there are no central records of training, SALC may have had to search individual staff records or other records in order to provide this response. In addition, the fact that SALC has not carried out any training does not mean that the other 16 Schools or relevant administrative departments have not carried out their own training. Similarly, these other Schools and departments would need to carry out their own searches to check what training had taken place, even if the ultimate answer was that there had not been any relevant training.

30. The appellant has also said that he was only asking about "formal" training, not personal guidance. Mr Maynard provided further submissions on this point, referring to "arm over the shoulder" chats with someone who has been tasked with a disciplinary hearing as not being training, and "on the job" training not being applicable to academics. We do not agree with this point. The Request simply refers to "training in the procedures" and does not mention formal training. Ad-hoc on the job guidance or coaching is still training. As noted above, this type of activity is part of the job of an academic and so on-the-job training may take place.

31. During the hearing, Mr Maynard discussed the likely numbers of staff involved in each disciplinary matter as being five or six. He directed us to statistics from 2014/15 showing 171 discipline cases, not all of which would be of the type covered by the Request. If administrative records of disciplinary cases have been kept correctly, he says it would be easy to see who was involved in each case and check whether they had received any training.

32. We do not agree that this is the right approach. The Request is not limited to staff actually involved in disciplinary hearings. The University may train all staff who might be involved in disciplinary cases, or they may have pool of people who can be called to sit on panels. We note that each panel requires an expert in the relevant field. As noted above, we have not accepted that there is evidence to support the University's position that 12,000 staff records need to be considered. It may also be the case that not all academic staff would be expected to become involved in disciplinary cases, and so not all records would need to be searched. However, simply considering the training of staff who have been involved in actual disciplinary cases would not answer what is being asked in the Request. It appears that all Schools have their own approach to training, and the University would need to consider records for all staff who might be involved in these procedures.

33. We therefore find based on the evidence that the University does not hold training records centrally, meaning that responding to parts 18(ii), (iii) and (iv) of the Request would involve referring those requests to 17 Schools and at least one other department, and their responses would then need to be collated by DSE. It would take more than 18 hours to

respond to parts 18(ii), (iii) and (iv) of the Request. We do not have a precise calculation, but this is a reasonable estimate based on the evidence.

Remainder of the Request

34. As we have found it would take the University more than 18 hours to respond to part of the Request, they are not required to respond to the Request as a whole, as this will exceed the costs limit under section 12(1) FOIA. The University has, in fact, responded to most of the other parts of the Request. They are not required to respond to the remaining questions which remain unanswered, being parts 5 and 8.

35. For the reasons given above we dismiss the appeal.

Hazel Oliver

Judge of the First-tier Tribunal
Date: 20 December 2019
Date Promulgated 23 December 2019