NCN: [2023] UKFTT 01084 (GRC)
Appeal Number: EA/2023/0096

First-Tier Tribunal
(General Regulatory Chamber)
Information Rights

Between:

AARON WALAWALKER

Appellant:

and

THE INFORMATION COMMISSIONER

First Respondent:

and

THE MARITIME AND COASTGUARD AGENCY
(DEPARTMENT FOR TRANSPORT)

Second Respondent:

Date and type of Hearing: Heard at an oral appeal through the GRC – CVP;
on 05 December 2023.

Panel: Brian Kennedy KC, Paul Taylor and David Cook.

Representation:

The Appellant: as a Litigant in person by way of Grounds of Appeal dated 21 February 2023 and further oral submissions at this hearing.

First Respondent: Ben Mitchell of Counsel in a written Response dated 19 June 2023.

Second Respondent: Heather Emmerson of Counsel in a written Response dated 24 July 2023.

Decision: The Tribunal dismiss the Appeal.

REASONS

Introduction:

1. This decision relates to an appeal dated 21 February 2023 and brought under section 57 of the Freedom of Information Act 2000 ("the FOIA"). The appeal is against the decision of the Information Commissioner ("the Commissioner") contained in a Decision Notice ("DN") dated 24 January 2023 (reference IC-192560 – C7P2), which is a matter of public record.

Background:

2. Full details of the background to this appeal and the Commissioner's decision are set out in the DN (at Open Bundle pA1 - A12), a matter of public record. The Appellant requested information ("the Request") from the Maritime and Coastguard Agency ("MCA") which is part of the Department for Transport, a public Authority.

3. The Appellant has requested audio recordings of distress calls made from the English Channel and transcripts of those recordings. MCA relied on a number of different exemptions as its reasons for not providing the information. The Commissioner's decision is that it would not be reasonably practicable in the circumstances to expect the public authority to provide the information as transcripts and therefore it has complied with its obligations under section 11 of FOIA. The Commissioner further considers that the public authority is entitled to rely on section 40(2) of FOIA to withhold the audio recordings. The public authority breached section 17 of FOIA in responding to this request.

4. The Appellant appealed the DN on 21 February 2023 as set out in his Grounds of Appeal (Open Bundle ppA13 – A20). The Appellant makes several arguments in his 3 grounds of appeal, which the Commissioner helpfully summarised in three parts as follows:

"a. The Appellant argues that the Commissioner misconstrued s.11 FOIA by deciding that it required disclosure of transcripts "unless it is not reasonably

practicable" to do so, whereas the Appellant argues that s.11 requires disclosure in the preferred format "so far as reasonably practicable" and that this requires disclosures of as many transcripts as could be provided within the appropriate cost limit.

b. The Appellant argues that there is significant public interest in the information as it relates to the time preceding a tragedy on 24 November 2021 and there is a suggestion that UK and French authorities were both shirking responsibility in that time.

c. The Appellant observes that the MCA's response is inconsistent with its response to a previous request, in which it did provide transcripts of distress calls."

5. The Appellant expands further in his legal submissions (Open Bundle ppB79 – B86") where he explores the various options and invites the Tribunal to release at least some of the requested information.

The Relevant Law:

6. S.1 FOIA 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.
   S.11 FOIA – *"Section 11 - Means by which communication to be made.*
   (1) Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely
   (a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,
   (b) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and
   (c) the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant, the public authority shall so far as reasonably practicably give effect to that preference.

(2) In determining for the purposes of this section whether it is reasonably practicable to communicate information by particular means, the public authority may have regard to all the circumstances, including the cost of doing so."

7. Section 11(2), in determining whether it is "reasonably practicable" to provide transcripts of the audio recordings, the Second Respondent "may have regard to all the circumstances" including, but not limited to, the cost of doing so.

8. The phrase "all the circumstances" is broad in scope, encompassing factors other than the cost of complying with the specific request. As noted by Richards LJ (with whom Ryder LJ and Lord Dyson MR agreed) in Independent Parliamentary Standards Authority v Information Comr. and another [2015] EWCA Civ 388:

   "In my view, 'in all the circumstances' means what it says. It refers to all the circumstances, and I see no justification for limiting it to the circumstances of the individual request. It is apt to include everything capable of affecting the reasonable practicability of communicating information by particular means. It is wider in scope than sections 12 and 13, which focus on the costs of complying with the specific request." (Para. 63).

The Issues for the Tribunal:

9. The Tribunal note there is no dispute between the parties that s.40(2) applies to the audio recordings. Consequently, we do not need to decide this point. For the avoidance of doubt however we accept and adopt the material reasoning as set out in the DN at paragraphs 43 to 61 wherein the relevant information contained personal data and in all the circumstances the balance of interests favours non-disclosure.

10. The issues for consideration principally relate to s.11 FOIA as set out by Ms Emmerson, counsel representing the MCA at para.3 of her Skeleton Argument; namely:

    "a. Firstly, the extent of the duty on a public authority under section 11(1) to comply with an expressed preference for the means by which information is communicated, and in particular (i) whether a public authority is obliged to comply with such a preference up to the limit provided for by the costs exemption in section 12 FOIA (as the Appellant contends under Ground 1) or (ii) whether it is necessary to have regard to the public interest in disclosure of the underlying

information (as the Appellant contends under Ground 2)? These are questions of law.

b. Secondly, whether in the circumstances of this case, the IC was correct to conclude that it was not reasonably practicable for the MCA to provide any transcripts to the Appellant. This is mixed question of fact and law."

11. On the issue as to whether a public authority has to comply with an expressed preference as to format, in our view, it clearly must do so, but only as "*far as reasonably practicable*" per s.11(1).

12. On the issue as to whether the appropriate limit under s.12 FOIA should be used as a guide as to whether it is reasonably practicable to comply with an expressed preference, the Tribunal find that it should not. This is because the matters which a public authority can consider when estimating the cost of compliance (i.e., whether or not it falls within the limit set out under s.12) all relate to actions relevant to first stages in responding to a request. For example, locating, retrieving and extracting the requested information. By contrast, considerations of the preferred format come right at the end of the process, after the information has been identified. The Tribunal do not therefore accept that the appropriate limit has any bearing on s.11, that section (s.12) is merely the mechanism by which a public authority assesses how much work it must do at the beginning of the process.

13. It follows that neither do we believe that the public interest in disclosure is something to be factored into "*all the circumstances"* (per s.11(2)), as argued by the Appellant. Assessment of the public interest in disclosing the requested information must be done before deciding whether any information actually can be disclosed. s.11(2) is couched in terms of "*In determining for the purposes of this section whether it is reasonably practicable to communicate information by a particular means...*" In other words, only in relation to the practicalities of doing so. Such practicalities are specific to the public authority considering the request. Matters of public interest are obviously far wider than this, consequently we believe not something to be taken into account in this regard.

14. Further, the Tribunal accept that the Commissioner was correct to conclude that it was not reasonably practicable for the MCA to provide any transcripts. The transcripts do not currently exist. If the Tribunal were to require MCA to disclose some, firstly they would need to be transcribed, incurring the very burden that MCA say prevents them from reasonably practicably doing so. The MCA would also need to address redactions in order to account for the s.40(2) exemption which the parties agree should apply. Secondly, the Tribunal would need to find a mechanism under FOIA to draw a line at a certain number or amount of time. As previously argued, that cannot be the mechanism under s.12. The short answer is that no mechanism is provided under FOIA for the time a public authority must spend complying with a requested format. The only mechanism that does exist is a decision on whether or not it is reasonably practicable to provide any at all.

Conclusions:

15. In relation to the Grounds of appeal; Ground 1 relates to the Appellant's submission that the MCA should have transcribed as many calls as possible within the costs limit in section 12 of FOIA and that section 11 had been misapplied when the Commissioner considered the issue. But section 11 is distinct from section 12, in law and in subject matter, and should not be conflated. The approach set out in respect of section 12 cannot be imported into section 11. A broader approach is permitted when assessing what is reasonably practicable under section 11 FOIA. MCA have reviewed the exercise of transcribing the call recordings and have concluded that it would be time consuming, burdensome, and difficult (given the subject matter). MCA have concluded the conversion of the information from one form to another is not reasonably practicable. The Court of Appeal considered an analogous scenario in the Innes case and Underhill LJ noted that, *"I doubt if it was part of the purpose of the Act to oblige authorities to input information into a spreadsheet when it does not already exist in that form"*. While the format differs as to the form that the information existed in and was to be converted to is different in Innes, the conclusion is instructive.

16. Ground 2 is that there is a significant public interest in the disclosure of the call records given the tragedy of 24 November 2021. Section 11 does not include a public interest assessment, simply an analysis of whether it is "*reasonably practicable"* for the MCA to provide the transcripts of the calls. The argument made by the Appellant is, in our view wrong in law. While he suggests that an assessment of what is *"reasonable"* must include an analysis of public interest - with, he submitted, a sliding scale depending on the level of public interest, for which the conclusion was that something of an extreme public interest would require a greater effort in order to be "*reasonable"* – We find this is not only beyond the spirit and wording of the legislation, but a flawed argument. We find the correct analysis of what is reasonably practicable requires an assessment of a myriad of issues which are independent of and do not relate to what is in the public interest. The Appellant is right to say that the incident of 24 November 2021 is of significant public interest, and we would not want to suggest otherwise in any way. However, that great public interest has no impact on or relevance to the assessment of whether it is reasonably practicable for MCA to transcribe the call recordings in question.

17. Ground 3 is that MCA previously provided transcripts of calls in response to a FOIA request and so should do so again in this instance. We are persuaded by the arguments submitted on behalf of MCA. MCA is not obliged to provide transcripts of distress calls for all of the reasons set out above. It may voluntarily do so and has done so previously, but this does not undermine MCA's position as to why it is not obliged to do so or, in some way, fetter its ability to raise such an argument. MCA's previous conduct of voluntarily providing transcripts of call recordings does not and could not bind its future conduct and approach or disapply section 11 in some way. The Appellant argues the conduct of other public authorities also release similar material under FOIA and therefore the MCA arguments must be flawed. The Tribunal will judge each case on its merits and ew find the conduct of other public authorities in this regard has no bearing on another. This conduct that may occur in some instances does not impact upon the assessment specific to this information in these particular circumstances.

18. Further or in the alternative, we accept the reasoning in the DN and find no error in law or in the exercise of his discretion by the Commissioner therein.

19. Each case must be decided on its merits and for all the above reasons and the circumstances of this case we must dismiss the appeal.

Brian Kennedy KC. 29 December 2023.

Promulgation Date: 03 January 2024