



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]**

Case No. EA/2014/0153

ON APPEAL FROM:

**Information Commissioner's
Decision Notice No: FS50532495
Dated: 22 May 2014**

Appellant: JOHN ILLINGWORTH

Respondent: INFORMATION COMMISSIONER

Heard at: Leeds

Date of hearing: 6 October 2014

Date of decision: 31 October 2014

**Before
CHRIS RYAN
(Judge)
and
MALCOLM CLARKE
PAUL TAYLOR**

Attendances:

The Appellant appeared in person.
The Respondent did not attend and was not represented

Subject matter: Cost of compliance and appropriate limit s.12

IN THE FIRST-TIER TRIBUNAL
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DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed and the Decision Notice dated 22 May 2014 is substituted by the following notice:

Public Authority: **NHS ENGLAND**

Complainant: **Cllr. J Illingworth**

Decision: For the reasons set out in the Reasons for Decision below the Public Authority may not rely on section 12 of the Freedom of Information Act 2000 as a ground for refusing the Complainant's information request and should, within 35 days, either disclose the requested information or identify the exemption or exemptions on which it relies as justifying a refusal to disclose.

REASONS FOR DECISION

The Request for Information and the Information Commissioner's Decision Notice in respect of it.

1. The Appellant has, for some little time, pursued an interest in the enforced closure in March 2013 of the Paediatric Cardiac Unit at Leeds Teaching Hospitals NHS Trust ("LTHT") and its subsequent re-instatement a few days later. He has submitted a number of requests for information to NHS England. Each request fell to be considered under section 1 of the Freedom of Information Act 2000 ("FOIA"). That section imposes on the public authorities to which it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA.
2. On 8 June 2013 the Appellant submitted the following request to NHS England ("the June Request"):
"Please can I have copies of all the email messages and reports sent or received by Sir Bruce Keogh in connection with the Leeds Teaching Hospitals NHS Trust from 1 March 2013 to the present day?"

Sir Bruce Keogh was the National Medical Director for NHS England at the time.

3. There was some delay in processing the request and on 16 August 2013 the Appellant submitted a further request to NHS England (“the August Request”) in the following terms:

“...In view of the passage of time, please could I submit an additional Fol request for copies of all the email message and reports sent or received by Sir Bruce Keogh in connection with the Leeds Teaching Hospitals NHS Trust from 8 June 2013 to the present day.”

4. Subsequently a large number of emails were disclosed to the Appellant in response to the June Request, although there is an ongoing dispute about the extent to which individuals’ names had been redacted. However, in the case of the August Request NHS England refused to disclose anything. It said that it would rely on FOI Section 12, the relevant part of which reads:

“(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”

Under the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 the “appropriate limit”, in the case of a public authority such as NHS England, is £450, calculated on the basis that a flat rate of £25 per hour should be allocated to any staff member contributing to the task. The effect is to set the maximum time that may be spent before the cost limit is exceeded at 18 hours. Regulation 4(3) of the same regulations provides:

“...In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in –

- (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...”*

5. The Appellant complained to the Information Commissioner about the way in which the August Request had been handled. On 22 May 2014, at the end of an investigation, the Information Commissioner issued a decision notice setting out his conclusions (“the Decision Notice”).

6. The relevant part of the Decision Notice read as follows:

“12. NHS England said that to understand and estimate the time it would take to comply with this request, the office of Sir Bruce Keogh reviewed the email and filing accounts. It explained that Sir Bruce Keogh’s NHS England email account contains email correspondence from around February 2013 to the present day. It said that on average, based over 7 days, Sir Bruce Keogh receives 40 emails daily. Within Sir Bruce Keogh’s email account, and in the absence of a corporate electronic records management/filing system for NHS England, many emails received in the inbox are filed into a large series of sub-folders according to their subject matter. It explained that currently there are an inbox, sent folder and 36 sub-folders on different subject matters in Sir Bruce’s email account.

“13 NHS England acknowledged that it does hold information falling within the scope of the request. However, to ensure any emails in relation to Leeds Teaching Hospitals NHS Trust (LTHT), regarding any subject matter are captured, it said it is necessary to review all emails within the specified time frame, as the scope of the request does not allow sufficient narrowing down to focus on specific subject matter folders, as emails in relation to LTHT, regarding any subject matter could be located in any of the 36 sub-folders, inbox or sent folder.

“14 Whilst NHS England accepts the initial location as being Sir Bruce Keogh’s email account this is not sufficient in locating specific pieces of information which fall in scope of the request itself. NHS England said that to locate the information would involve a review of Sir Bruce Keogh’s entire email account for the time frame specified. It said that within the 36 sub-folders the number of emails in each one ranges from a small number in single figures to some having around 1,000+ in them.

“15 It said that it has reviewed the requested time period of 8 June to 16 August 2013. It confirmed that there are roughly 966 emails within this time period that would need to be reviewed. This is without understanding scope or relevancy of the request submitted. Using an approximate and average guide of it taking two minutes to review each email in the inbox over the specified period of time, it estimates that it would take:

(2 minutes) x (966 emails) = 1.938 minutes: 32 hours, 18 minutes.

“16 It said that this is before any sub-folders or the sent folder has been searched/reviewed for emails over the specified time period.

“17 Finally NHS England explained that a search function can be used to assist with narrowing the numbers of emails down, but this would not be a complete solution. It said that simply using a search function on ‘LTHT’, Leeds Teaching Hospitals NHS Trust”, or simply ‘Leeds’ is insufficient as some emails may not actually refer to these, neither in the email heading nor content of the email. For example, they may only refer to a named individual at the Trust, and therefore some relevant emails may not be captured.”

7. The Information Commissioner went on in the Decision Notice to accept the calculations underlying the NHS England’s costs estimate, as summarised above, and to conclude that the cost limit would have been exceeded.

The Appeal to this Tribunal

8. The Appellant challenged the correctness of the Decision Notice in his Grounds of Appeal, which accompanied a Notice of Appeal filed with this Tribunal on 18 June 2014. In a Response document filed by the Information Commissioner on 17 July 2014 he reiterated the evidence and arguments which had convinced him to find in favour of NHS England in the Decision Notice. He also provided the following additional information, which he had obtained from NHS England after the Appeal process had commenced:
 - a. The figure of 966 emails in Sir Bruce Keogh’s inbox had not been arrived at by counting those transmitted within the two month period covered by the August Request but had been calculated by dividing the total number received in the inbox over a 15 month period (7,250) by the number of months, to provide a monthly average, and then doubling that figure.
 - b. Using the same calculation method it was estimated that:
 - i. the sent folder would have contained 188 emails created during the period covered by the August Request; and
 - ii. the 36 sub folders would have contained 750 such emails.
9. The Appellant opted to have the Appeal determined at a hearing, which took place in Leeds on 6 October 2014. The Appellant appeared in person but the Information Commissioner opted to rely on his written submissions and not to be represented.

10. The basis of the Appellant's case was that the estimate made by NHS England had exaggerated the difficulty of identifying relevant emails and the time that this would take. He presented a detailed written submission (which was sent to the Information Commissioner after the hearing) on various searching and filtering facilities available in the Microsoft Outlook emailing system which demonstrated, he said, that a response could have been made to the August Request using far less time than NHS England had estimated.

Our Conclusions

11. We cannot be certain that NHS England uses the same email system as that used by the Appellant to demonstrate the speed at which keyword searches could identify relevant documentation. The Appellant believes that it does and presented evidence to that effect. NHS England has not disclosed which system it uses. Nor has it provided any information about the speed and sophistication of any search function incorporated in it. It clearly had such facilities available, however, as it previously informed the Information Commissioner during his investigation that a search function could have been used to assist in narrowing down the number of emails that were relevant to an information request. Its case to the Information Commissioner, however, was, not that the cost limit would still have been exceeded, but that some relevant emails might not be captured by this means. The Information Commissioner reiterated the argument in his Response document in this appeal, explaining that he was persuaded that not all emails would be caught by a simple search using obvious search terms. Consequently, he said, "*NHS England would be required to retrieve all emails within the relevant time period to review the same to ascertain whether such emails fell within the scope of the request*".
12. We are conscious that a section 12 refusal is required to be based on an estimate and that it would be inappropriate for the Information Commissioner or this Tribunal to subject such estimates to an over-detailed analysis. However, in this case we consider that both NHS England and the Information Commissioner set too rigorous a test for the process of searching for information falling within the scope of the August Request. This Tribunal has made it clear in a number of cases that, provided a public authority can demonstrate that it has formulated an appropriate method for seeking out information, and has then followed that method with reasonable rigour, it will be likely to have satisfied its obligation to identify requested information. The established test on whether or not relevant information is deemed to have been held by a public authority at the relevant time is based, not on absolute certainty, but

on the balance of probabilities. It was therefore open to NHS England to formulate one or more search terms, to be applied across all folders in Sir Bruce Keogh's email files, and to use that as the basis of its disclosure. Doubtless it would still have been necessary for a member of the NHS England staff to review the search results in order to ensure that irrelevant items had not been included, but this would have taken very much less time than the two minutes per email estimated for the purpose of the manual search system on which NHS England based its estimate.

13. We would regard it as a very unsatisfactory outcome if a public authority could avoid giving any disclosure, simply because there was a possibility that some items of information would not be brought to light by a search.
14. The Appellant argued, in addition, that the method of assessing the number of potentially relevant emails by averaging over a 15 month period was misguided because it took no account of the variation in quantity between the period covered by the August Request and the number which (he could see from the outcome of previous information requests), had been sent and received when concern about LTHT had been at its highest. We think the criticism is justified although we are not able to say how great the reduction in email traffic was.
15. In summary, therefore, we are not satisfied that NHS England made out its case to the Information Commissioner that the cost of complying with the August Request would have exceeded the statutory maximum. We direct that NHS England, within 35 days of this decision, either disclose the requested information to the Appellant or identify any exemption it intends to rely on in order to resist disclosure of some or all of it.

Postscript

16. The Decision Notice included a criticism of NHS England for its failure to provide the Appellant with advice and assistance, pursuant to its obligations under FOIA section 16. It was said that this might have enabled the scope of the request to have been limited in order to avoid the section 12 cost limit being exceeded. The Information Commissioner focussed his criticism on a perceived failure by NHS England to draw the Appellant's attention to the title of a sub-folder in Sir Bruce Keogh's email system which suggested that it might contain emails that were relevant to the information request. Neither party appealed that aspect of the Decision Notice and it does not form part of this appeal. We comment, however, that the advice and assistance provided by a public authority in

this type of case may equally well extend to the formulation of one or more search terms which (particularly if agreed between the parties) might lead to the identification of a body of material satisfying the test for the scope of information held for the purposes of FOIA section 1.

Chris Ryan
Judge

31 October 2014