Appeal number: EA/2016/0083

FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

THE CABINET OFFICE **Appellant**

- and -

THE INFORMATION COMMISSIONER **Respondent**

TRIBUNAL: JUDGE ALISON MCKENNA
Ms ANNE CHAFER
Mr PAUL TAYLOR

Determined on the papers, the Tribunal sitting in Chambers on 27 September 2016.

DECISION

1. The appeal is allowed.

REASONS

2. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended. The Tribunal considered an agreed open bundle, including submissions made by both parties, for which we were grateful. The Appellant filed witness evidence. The Respondent did not file witness evidence.

Background to the Appeal

3. An information request was made to the Appellant relating to all meetings between government ministers or their staff and representatives of the Duchy of Cornwall, including the Duke himself, for the period 27 February 2014 until 27 February 2015, which concerned legislation having implications for the Duke of Cornwall or Duchy of Cornwall estate, its holdings assets or employees. On 18 March 2015, the Appellant refused the request in reliance upon s. 12 (2) of the Freedom of Information Act 2000 ("FOIA")[i].

4. The Respondent issued Decision Notice FS50580558 on 7 March 2016. The Respondent's decision was that the Appellant had not sufficiently justified its reliance upon s. 12 (2) FOIA and required the Appellant to issue a substantive response to the complainant which did not rely on s. 12 (2) FOIA.

5. Section 12 of FOIA states:

> *(1) Section 1 (1) does not oblige a pubic 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.*

6. The "appropriate limit" is set by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. For central government bodies such as the Appellant, the limit is set at £600, applying a rate of £25 per hour for 24 hours' work including determining whether information is held, locating and retrieving documents which may contain the information, and extracting information from them. The Appellant estimated that in this case it would take 54 hours to determine whether the information requested was held. In doing so, it set out its proposed search strategy.

7. The Respondent concluded that the Appellant's proposed search strategy was not reasonable in the circumstances. He suggested an alternative search strategy to the Appellant, which he considered would be likely to enable the Appellant to identify whether relevant information was held within the appropriate limit. The Appellant did not accept that this alternative strategy was reasonable in all the circumstances.

Appeal to the Tribunal

8. The Appellant's Notice of Appeal, dated 4 April 2016, relies on grounds that (i) the Respondent has made an error of law in concluding that the Appellant had not provided sufficient evidence to support reliance on s. 12 (2) FOIA; and (ii) that the Appellant's proposed strategy was reasonable so that s. 12 (2) FOIA had been properly applied. In developing the grounds further the Appellant referred us to several decisions of differently-constituted Tribunals of the First-tier Tribunal, which turn on their own facts and do not create legal precedent.

9. The Respondent's Response, dated 17 May 2016, submits that the Appellant's approach to the law is wrong because its strategy sought to identify whether it held *all* the requested information rather than *any* of the requested information. Secondly, the Respondent submits that the Appellant has failed to demonstrate that its proposed search strategy is reasonable because it has declined to undertake a logical and common-sense search strategy, as suggested by the Respondent, which would enable it to establish within the relevant limit whether it holds any relevant information.

10. The Appellant filed a Reply dated 25 May 2016, as follows. Firstly, it submitted that s. 12 FOIA operates as a *guillotine* so that a pubic authority is not obliged to search for or compile some of the requested information before refusing a request that it estimates will exceed the appropriate limit. To the extent that the Respondent's Decision Notice and Response suggests otherwise, it was submitted that this was wrong in law. Secondly, it was submitted that the Appellant's strategy was a reasonable strategy and that, even if another reasonable strategy exists, the Respondent should only disturb the Appellant's own strategy if the proposed alternative was so obvious as to render it unreasonable to disregard it. In the circumstances of this case the Respondent's proposed strategy was not reasonable, and even if it were reasonable, it does not follow that the Appellant's proposed strategy was unreasonable.

11. The Appellant filed a witness statement dated 15 June 2016 from Guy Horsington, the Principal Private Secretary to the Minister with overall responsibility for the Cabinet Office. We note that this evidence was not available to the Respondent when he made his decision. Mr Horsington's evidence was that the Appellant's proposed search strategy involved making a search of the e-mail boxes and electronic calendars of all members of the ministerial team and the officials working in their private offices. At the relevant date, there were eight ministerial offices within the Cabinet Office, including the Prime Minister and Deputy Prime Minister, for whom each private office included a private secretary, diary secretary and other officials. In the Prime Minister's Office, there were ten private secretaries with responsibility for distinct areas of policy. His evidence was that each Minister (on a conservative estimate) receives between 50 and 100 e-mails a day. If it would take each of the Prime Minister's private secretaries 15 minutes to search one month's e-mails and calendar information, then it would take 1,800 minutes, or 30 hours, to search that information for the one year period of the information request. Adding to that the time taken for the other eight private secretaries to conduct the same search, the estimated time for determining whether information was held across the Cabinet Office as a whole was 54 hours.

12. Mr Horsington noted the breadth of the information request, referring as it does to "any member of staff" from a Minister's private office. His evidence was that this could involve searching the e-mails and calendars of 25 officials. He also noted that the search to be conducted was particularly broad in policy terms so that bespoke search terms would have to be used in order to identify the particular officials involved and the subject matter of any meeting or correspondence.

13. The Respondent's alternative suggestion was that the Appellant could simply ask relevant staff if they recalled any meetings taking place before conducting a more focussed search. In taking this approach, the Respondent suggested that a meeting with a high profile figure such as the Duke of Cornwall would be memorable and that it would be possible to search for particular e-mail addresses once staff recollection had been tested.

14. Mr Horsington's evidence about this was, firstly, that diary secretaries would not generally attend meetings themselves so the searches would have to be conducted in any event. Secondly, he stated that many of the private office staff in post at the relevant time had since moved to other roles, as staff turnover in the private office team was high (it had been 47% in the 2014/15 period). He explained that when a member of staff moved on, their e mail account was deleted but certain correspondence would have been saved in an electronic filing system. Additional time would be needed to search this system which had not been included in the Appellant's original estimate. Thirdly, he was concerned that relying on staff recollection would not meet the Appellant's legal obligations under FOIA, as any response based on a member of staff's recollections only could prove inaccurate. Fourthly, the Respondent's suggestion of searching for e-mail addresses linked to the Royal Household or the Duchy of Cornwall would not significantly narrow the search because they would yield correspondence unrelated to the information request, for example in respect of the honours system. Finally, even if the Respondent's approach were adopted, there would then need to be an assessment of the information retrieved in order to assess whether it was relevant to this information request which would potentially also breach the costs limit.

The Law

15. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

> *"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.*

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based."

16. We note that the burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant.

17. We have considered the Information Commissioner's Office Guidance on Requests where the costs of compliance exceeds the appropriate limit. We note in particular paragraphs 23 to 27, which provide that a public authority's calculation of costs does not have to be precise but it must be reasonable. What amounts to a reasonable estimate must be considered on a case-by-case basis, but a reasonable estimate is likely to be one which is *sensible, realistic and supported by cogent evidence.* An estimate is unlikely to be reasonable where an authority has failed to consider an absolutely obvious and quick means of locating, retrieving or extracting the information.

Conclusion

18. We note that the difference between the appropriate limit and the Appellant's own estimate of costs is a significant one in this case. It may be that a differently worded request would have produced a different costs estimate, and that the Appellant could have provided advice to achieve this effect. We note that the Appellant asked the requester to refine the information request but that this was not done.

19. We note that the applicability of s. 12 FOIA is highly fact-specific and that different prevailing circumstances in different public authorities can lead to a different response to identical requests. That is the case here, where we understand that other Government Departments responded differently to an identical information request. We note the particularly complex structure of the Cabinet Office, including as it does the Prime Minister's Office.

20. We found Mr Horsington's detailed witness statement particularly helpful in understanding why the Appellant had reached the costs estimate that it had, and declined to adopt the Respondent's suggested alternative search strategy. His evidence is significantly more detailed than the correspondence which passed between the parties on the same issue and we find that it puts the Tribunal in a better position to assess the reasonableness of the Appellant's search strategy than the Respondent was when making his decision.

21. Referring to the Respondent's own guidance on this issue, we note that his approach is to reject the public authority's approach to quantifying costs only if it is unreasonable, including by reference to *absolutely obvious and quick* alternatives. In reliance upon Mr Horsington's evidence, we conclude that the Appellant's proposed search strategy was sensible, realistic and supported by cogent evidence as to the particular circumstances of this case. We are not satisfied, for the reasons given by Mr Horsington and set out at [14] above, that the Respondent's alternative strategy was such an *absolutely obvious and quick* alternative that it should be preferred to the Appellant's strategy. We find that it failed to take into account important local factors affecting the reliability of an initial search based on staff recollection - such as high staff turnover and the unlikeliness of involvement of diary

staff in face-to-face meetings. The Respondent has not asserted that the Appellant's approach was unreasonable other than by reference to his own suggested alternative.

22. We agree with the Appellant that s. 12 FOIA operates as a *guillotine* so that, once it formed the view that confirming or denying that it held the information would exceed the appropriate limit, it was not required to undertake a partial search. To the extent that the Respondent's Decision Notice suggests otherwise (it is not entirely clear from the Decision Notice, but the point has been addressed by both parties in submissions to the Tribunal) we prefer the Appellant's approach to the law.

23. We also conclude that the Respondent's discretion in respect of his assessment of the reasonableness of the Appellant's proposed search strategy should have been exercised differently.

24. For all these reasons we now allow this appeal. The Appellant is entitled to rely on s. 12 (2) FOIA in respect of the information request.

(Signed on the original)
ALISON MCKENNA
PRINCIPAL JUDGE

DATE: 17 October 2016
DATE PROMULGATED: 17 October 2016

[i] The request was in fact made under EIR but both the Appellant and the Respondent dealt with it under FOIA.