

[2016] AACR 34

(Department of the Environment (Northern Ireland) v Information Commissioner
[2016] UKUT 83 (AAC))

Judge Stockman
2 December 2015

GIA/4319/2014

Freedom of information – meaning of information – whether distinction between “information” and the medium on which it was held

An application was made to the Department of the Environment (Northern Ireland) under the Freedom of Information Act 2000 (FOIA) for, among other things, copies of all the emails sent and received by two of its employees from 1 May 2012 to 31 May 2012 inclusive. The Department refused this application, arguing that the request was not valid under section 8(1)(c) of FOIA as it failed to describe the information requested. The Information Commissioner concluded that the applicant had described the requested information sufficiently clearly for the purposes of section 8(1)(c). The Department’s appeal against that decision was rejected by the First-tier Tribunal (F-tT); it decided that the crucial issue was whether the request described the information they required and held that the Department’s approach was too limited. The Department appealed to the Upper Tribunal (UT), arguing that the F-tT had erred in law by failing to give adequate reasons for its decision or to take account of the decision in *M L Johnson v Information Commissioner and Ministry of Justice* (EA/2006/0085) and had failed to distinguish between “information” and the medium on which information was held or by which it was communicated.

Held, disallowing the appeal, that:

1. the F-tT had clearly understood the dispute, had explained the reasons for its decision and had not erred by failing to take into account the decision in *M L Johnson v Information Commissioner and Ministry of Justice*. That decision was not binding on the F-tT and was of limited value as it involved a different issue: whether the cost of compliance involved in providing the requested information exceeded the appropriate limit (paragraphs 15 to 18);
2. the purpose of section 8(1)(c) was to enable the public authority to identify the requested information with sufficient precision that it could be ascertained whether the authority held the information, whether the information was exempt information under Part II of FOIA, whether it was exempt on cost of compliance grounds under section 12, or whether the request was vexatious under section 14. There was no requirement in the legislation to describe information by subject or topic (paragraphs 25 to 26);
3. the appellant submitted that the request was “for a medium upon which information is recorded”. However, there was no conceptual difference between a request for a particular e-mail and a particular piece of handwritten correspondence. Each involved a request for the information carried by the particular medium (paragraph 28);
4. under section 1(3) of FOIA, the statutory obligation to provide information was relieved when the information requested was described in such a way that the public authority could not reasonably identify what it was that the requester was asking for. In the present case the scope of the request for information was clear, and the F-tT’s finding that the request was valid had been reasonable (paragraphs 29 to 30).

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

Appellant: Department of the Environment (Northern Ireland)
Respondent: The Information Commissioner

First-tier Tribunal Case No EA/2013/0233
First-tier Tribunal Decision Date 6 June 2014

1. This appeal is from a decision of the First-tier Tribunal (General Regulatory Chamber) (the F-tT) given on 6 June 2014. The decision of the F-tT upheld the decision notice of the respondent given on 30 September 2013 under reference FS50489253.

2. The appeal is made under section 11(2) of the Tribunals, Courts and Enforcement Act 2007, leave to appeal having been granted by the F-tT on 24 July 2014. The question before me is whether the decision of the F-tT involved the making of an error of law.

3. For the reasons I give below, I hold that the decision of the F-tT did not involve the making of an error of law and I disallow the appeal.

Background

4. On 1 July 2012 the requester asked the Department of the Environment (Northern Ireland) (the appellant) for the following information:

- “1. A copy of your policy document stating all email correspondence is to be deleted after 3 months
2. A copy of your policy document stating that no notes or minutes are to be taken of group meeting – the purpose of the group meeting and the decision process linked to it
3. A list of all department supplied mobile phones in the Belfast planning office
4. Itemised lists of calls for each phone for May 2012 and costs/invoices
5. A copy of your mobile phone policy with specifics as to reimbursement of private use, etc.
6. A copy of all emails sent and received from 1 May 2012 to 31 May 2012 inclusive of [two named employees]”

5. The appellant responded to the request on 2 August 2012 in the following terms:

1. It provided explanatory information and a copy of a relevant memorandum.
2. It advised that it did not hold this information.
3. It confirmed that mobile phones had been supplied to five staff.
4. It provided the total cost of the five mobiles phoned during the time period specified. However the Department refused to provide any further detail, citing the exemption at section 40(2) of the Freedom of Information Act 2000 (FOIA).
5. It provided this information in full.
6. It refused this part of the request on the grounds that it was not a valid request under section 8(1)(c) of FOIA.

6. On 19 June 2013 the requester confirmed to the respondent that he remained dissatisfied with the way his request for information had been handled. The requester specifically asked the respondent to consider the appellant’s response to parts 3, 4 and 6 of his request, as well as the time taken to conduct an internal review.

7. The respondent found that the appellant was entitled to rely on the exemption at section 40(2) of FOIA in respect of the information sought at parts 3 and 4 of the request. However, it disagreed that the request at part 6 was not a valid request. The respondent concluded that the

request described the requested information sufficiently clearly for the purposes of section 8(1)(c) and required the appellant to deal with the request in accordance with FOIA (while reserving comment on whether or not the information should actually be disclosed). The appellant appealed to the F-tT in relation to that part of the respondent's decision notice concerning part 6 of the request.

The F-tT's decision

8. The F-tT's decision was to uphold the respondent's decision notice. It accepted the respondent's argument that the purpose of section 8 was to enable a public authority to identify requested information rather than to prescribe how requested information must be described. It observed that the respondent had issued new guidance entitled "Recognising a request made under the Freedom of Information Act (Section 8)". The F-tT stated that, even without the respondent's guidance, it would have concluded that the requestor was interested in specific, identifiable information even though he did not – and could not be expected to – know the exact subject matter of that information. The F-tT decided that the request was a valid one.

Application for leave to appeal

9. The appellant sought leave to appeal from the F-tT on the grounds that it had erred in law in its interpretation of what was "information" for the purposes of FOIA. The F-tT granted leave to appeal on 24 July 2014. The appeal was received by the Upper Tribunal on 22 August 2014. The appellant requested an oral hearing of the appeal. However, the appeal involves a narrow point and I consider that the respective positions of the parties are clear from the written submissions. Having indicated that I did not intend to hold an oral hearing, I requested the parties to provide me with any further authorities which they wished me to consider. Neither party has been able to assist me with further relevant authority.

Legislation

Section 1(1) of FOIA states:

"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,
..."

Section 1(3) provides that:

"Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

Section 8(1) provides that:

“In this Act any reference to a “request for information” is a reference to such a request which –

- (a) is in writing,
- (b) states that name of the applicant and an address for correspondence, and
- (c) describes the information requested.”

Section 84 provides that:

“‘information’ (subject to sections 51(8) and 75(2)) means information recorded in any form;”

Submissions

10. The appellant submitted that the F-tT has erred in law in determining that part 6 of the request was a valid request under section 8(1)(c) of FOIA. Specifically, it was submitted that the request for “a copy of all e-mails sent and received from 1 May 2012 to 31 May 2012 inclusive of [two named employees]” was not a request for information of a particular description. It had no subject or fact at its centre and treating it as information was at odds with common experience and the ordinary use of the English language.

11. The appellant submitted that the F-tT had erred in failing to distinguish between “information” and the medium on which information is held or by which it is communicated. It was submitted that the F-tT had also erred by failing to take into account the earlier F-tT decision of *M L Johnson v The Information Commissioner and the Ministry of Justice* (EA/2006/0085) and by failing to give any or adequate reasons for its decision.

12. The respondent submitted that part 6 of the request had in fact described the information requested. The respondent submitted that the F-tT decision of *M L Johnson v The Information Commissioner and the Ministry of Justice* was a decision of a tribunal of equal jurisdiction and therefore not binding, and that it concerned a different point in any event. The respondent submitted that the reasons of the F-tT were entirely adequate.

13. On the issue of section 8(1)(c), the respondent submitted that the term “describe” did not connote a requirement for the description to be provided in a certain form or manner. He submitted that the purpose of section 8 was to place an obligation on requestors to specify the thing they are asking for with sufficient precision that the public authority can identify it. While accepting that there was a distinction to be maintained between information and documents for the purposes of FOIA, he submitted that a request for information can be adequately framed by reference to the document that contains the information. The respondent submitted that by requesting disclosure of a particular set of correspondence, identified by reference to (i) the identity of the author/recipient, (ii) the date range within which the correspondence was sent, and (iii) the form of the correspondence (ie e-mail), the requester had given sufficient description to enable the appellant to identify what information was requested.

14. In reply, the appellant submitted that it was correct that there was a distinction to be drawn between information and documents for the purposes of FOIA. However, it was submitted that the request in the particular case was wholly lacking in any description of the information requested and was a bare request for documents. The appellant submitted that he had asked the requestor to clarify the information he requested, but he did not respond. It was

submitted that this was not to impose an unreasonable burden on a requestor, but a plain requirement of FOIA. He submitted that the F-tT's decision in *M L Johnson v Information Commissioner and Ministry of Justice* supported his approach.

Assessment

15. The appellant has submitted that the F-tT has not given adequate, or any, reasons for its decision. In its decision the F-tT sets out the arguments of the parties in a manner which demonstrates that it has understood the dispute in the appeal. At paragraphs 24–27 it states its conclusions. It found the appellant's approach, set out in earlier paragraphs, to be "too limited" and agreed with the respondent that the correct question at the heart of the issue is whether the request "describes the information requested". The F-tT concluded that "the request in Part 6 indicated that the requestor was interested in specific, identifiable information, even though he did not – and could not be expected to – know the exact subject matter of that information".

16. A basic purpose of reasons is to enable the parties to understand why they have won or lost a case. Whether or not the F-tT was correct as a matter of law in the decision it reached, it is nevertheless abundantly clear why it decided the appeal as it did. I do not consider that there is merit in this ground of appeal.

17. The appellant submits that the F-tT has erred in law by failing to take into account the case of *M L Johnson v Information Commissioner and Ministry of Justice*. That decision is a decision of the former information tribunal dated 13 July 2007. The jurisdiction of the former information tribunal is now that of the F-tT. As the decision in *M L Johnson v Information Commissioner and Ministry of Justice* was the decision of an information tribunal, it has equal status to that of the F-tT. It is not binding on the F-tT. Therefore, the F-tT has not erred in law by failing to take it into account.

18. Previous decisions of the information tribunal or the F-tT may help the F-tT to determine an appeal, even if not binding. However, it appears to me that the decision in *M L Johnson v Information Commissioner and Ministry of Justice* was of limited assistance. That appeal concerned a request for information as to the numbers of cases allocated to individual High Court Queens Bench Masters and the number of instances of disposal by striking out by each Master over a particular time period. This information could only be obtained by a process of reviewing the relevant case files within the period, of which there were 17,642. An issue in the appeal was the cost of compliance exemption under section 12 of FOIA. Another issue was whether the information requested was "held" by the public authority. The F-tT found that the raw data was information held by the public authority, albeit that the cost of compliance involved in processing it in order to provide the requested information exceeded the appropriate limit. The question in the present case is a different one – namely whether the request at part 6 "describes the information requested". I consider that the F-tT has not erred in law by not relying upon *M L Johnson v Information Commissioner and Ministry of Justice*.

19. The principal ground of appeal is the question of how section 8(1)(c) of FOIA is to be interpreted. The appellant submits that it is a condition of the validity of the request for information that it describes the information requested. The appellant submits that the particular request is not valid as it contains "no specificity whatever on the information being requested". He submits that the F-tT has erred in law by failing to distinguish between "information" and the medium on which information is held or by which it is communicated.

The appellant submits that the request has no subject or fact at its centre. “Information” is defined by section 84 as “... information recorded in any form”. The appellant submits that “information” is an ordinary word of the English language and that the F-tT’s decision is at odds with common experience and the ordinary use of the English language.

20. The respondent submits that although FOIA provides a right of access to information, rather than to copies of documents, requests may refer to specific documents as a way to describe the information requested. He gives the example of a request to “please provide the minutes of the Planning Committee meeting held on 1 January 2000”. He submits that, in such a case, the requester’s right is to be given the information contained in those minutes and that the information he seeks is “adequately described by a request that is framed by reference to the document that contains the information”. The request, in substance, is for the information contained in the minutes of the Planning Committee meeting. The respondent submits that a request for a particular document, such as an email, should generally (unless the context makes clear that this is not the case) be interpreted as a request for all of the information that may be recorded in that document.

21. The respondent referred to his own guidance issued under the heading “Recognising a request made under the Freedom of Information Act (Section 8)”. This suggests at paragraphs 51 to 55 that:

“It is important to recognise that most requesters are unlikely to know what exact information is held by the authority or have an appreciation of how its records are stored.

This means that they cannot always reasonably be expected to be specific about details such as the titles, contents and location of documents.

It also follows that they will not always provide enough detail to enable the authority to identify the information from the description provided.

For these reasons, we are of the view that there has to be a low test for a description to meet the requirements of Section 8(1)(c).

Authorities should therefore treat any description that allows the requested information to be distinguished from other information held by the authority as valid under Section 8(1)(c).”

22. He gives a further example in his guidance of requests framed by electronic locations. At paragraphs 63 to 66 it is suggested that:

“There will often be a direct link between an electronic location (such as an email inbox) and the nature of the information requested there.

This means that it is sometimes possible to infer the recorded characteristics of electronically held information from its location alone.

It follows, therefore, that there will be instances where a request defined solely by an electronic location will reveal enough about the distinguishing characteristics of the information to be valid.

Example

A public authority receives a request for;

‘all the information in your chief executive’s email account’.

By nature, an email account contains copies of electronic correspondence sent and received by the account holder, which effectively makes this a request for all email correspondence sent and received by the chief executive.

The request does, therefore, reveal distinguishing characteristics about the information, such as the identity of the sender of the correspondence and the type of communication, despite only being defined in terms of an electronic location.

By their nature, requests based on an electronic location can often be very broad in scope. If an authority is concerned that a request is unreasonably broad then it should consider refusing the request under Section 12 of the Act (cost limits) and offer the requester advice and assistance to help them refine the request. ...”

23. The guidance issued by the respondent carries no particular legal authority, but it is helpful in addressing the practical problems which can arise in particular cases.

24. Section 1(1)(a) of FOIA requires a public authority to inform a person who makes a request for information if it holds the information and, if it does, to communicate the information to him. Section 1(3) of FOIA provides that the public authority may reasonably require further information from the requester in order to identify and locate the information requested. Further, section 16(1) of FOIA provides that “it shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”. The appellant submits that the requester was invited to submit a new request specifying the information he was seeking and that the opportunity to submit a more specific request was also afforded to him at internal review. However, he submits, this offer was not taken up by the requester on either occasion.

25. Section 8 of FOIA prescribes the form in which a request for information must be made – namely that it shall be in writing, state the name of the requester and an address for correspondence and describe the information requested. It appears to me that the purpose of section 8(1)(c) is to enable the public authority to identify the requested information with sufficient precision that it can be ascertained whether the authority holds the information, whether the information is exempt information under Part II of FOIA, whether it is exempt on cost of compliance grounds under section 12, or whether the request is vexatious under section 14.

26. FOIA provides a mechanism for a public authority to require further information from the requester in order to identify and locate the information requested. Where such information is reasonably required, the public authority is relieved of its duty under section 1(1) until supplied with that further information. Here the requester seeks copies of all e-mails sent and received in the month of May 2012 by two named individuals. The appellant submits

that the request “*did not describe identifiable information by subject or topic, but was for a medium upon which information is recorded*”. I observe that there is no requirement in the legislation to describe information by subject or topic.

27. As far as the question of the medium upon which information is recorded is concerned, I observe that the case of *Evans v Information Commissioner* [2012] UKUT 313 (AAC); [2015] AACR 38 involved a request to be provided with the “advocacy correspondence” of the Prince of Wales. The information requested was described in the following terms:

“(1) A list of all correspondence sent by Prince Charles to each minister in the department, identifying the recipient, sender, and date, for each item of correspondence.

(2) A similar list of correspondence sent by each minister in the department to Prince Charles;

(3) Complete copies of each piece of correspondence listed;

(4) A schedule giving a brief description of each document relevant to the request, including the nature of the document, its date, and whether it was being released or not.”

28. It can be seen that this request did not describe the information contained in the correspondence by subject or topic, but rather defined the information requested in terms of the identity or office of the individuals involved in the correspondence. There was no objection taken to the broad nature of the request, and I do not consider that any objection could have properly been raised, by reason of any lack of certainty as to what was being requested. In this case, the appellant submits that the request was “for a medium upon which information is recorded”. However, there is no conceptual difference between a request for a particular e-mail and a particular piece of handwritten correspondence. Each involves a request for the information carried by the particular medium.

29. The question of whether a requester “describes the information requested” in section 8(1)(c) involves ordinary English words. It was not a question of law but a question of fact for the tribunal whether the request described the information requested. To the extent that the words in question were ambiguous in scope, I consider that they must be construed in terms of the overall purpose of the statute. The purpose of FOIA is to provide a general right of access to information held by public authorities. As can be seen from section 1(3) of FOIA, the statutory obligation to provide information is relieved where the information requested is described in such a way that the public authority cannot reasonably identify what it is that the requester asks for.

30. In the present case the tribunal found that the requester described the information requested. He had requested a copy of all e-mails sent and received from 1 May 2012 to 31 May 2012 inclusive of [two named employees]. The scope of the request was clear, and it is difficult to see how it might have been made any clearer without already knowing the actual information contained in the e-mail correspondence. It does not appear to me that this was a situation in which the appellant could properly point to section 1(3) of FOIA and say that further information was required in order to identify and locate the information requested.

31. The F-tT made a finding that the requester had described the information requested as required by section 8(1)(c). I consider that this was a reasonable finding of fact. I further consider that the F-tT's construction of section 8(1)(c) was consistent with a proper interpretation of FOIA. For these reasons I disallow the appeal.

32. I uphold the decision of the F-tT to the effect that the requester has made a valid request for information. The appellant is required to respond to the application.