THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: GIA/4267/2014

McInerney v Information Commissioner and the Department for Education
[2015] UKUT 0047 (AAC)

PARTIES

Laura McInerney v the Information Commissioner and the Department for Education

DECISION ON AN APPEAL AGAINST A DECISION OF A TRIBUNAL

UPPER TRIBUNAL JUDGE: EDWARD JACOBS

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GIA/4267/2014

DECISION OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference EA/2013/0270, made on 2 July 2014, did not involve the making of an error on a point of law.

REASONS FOR DECISION

A. Abbreviations

1. I have used these abbreviations:

FOIA	Freedom of Information Act 2000
the EIR	Environmental Information Regulations 2004 (SI No 3391)
the Freedom of Information Regulations	Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (SI No 3244)
the *APPGER* case	All Party Parliamentary Group on Extraordinary Rendition v the Information Commissioner and the Ministry of Defence [2011] UKUT 153 (AAC)
the *Birkett* case	Department for the Environment, Food and Rural Affairs v Information Commissioner and Birkett [2011] UKUT 39 (AAC)
the *Birkett* case in the Court of Appeal	Birkett v Department for the Environment, Food and Rural Affairs [2011] EWCA Civ 1606
the *Home Office* case	Information Commissioner v Home Office [2011] UKUT 17 (AAC)

B. What this case decides

2. The principal issue that arises in this case is whether a public authority may rely for the first time before the First-tier Tribunal on provisions of the Freedom of Information Act 2000, which is will call FOIA, other than the exemptions in Part II. I have decided that this is permissible, subject to the case management powers of that tribunal.

3. A further issue is whether a public authority is obliged to consider severing part of an otherwise vexatious request. I have decided that the 'request' for the purposes of section 14 has to be decided as a matter of substance, not form, and that the possibility for severing the request may fall to be considered under section 16 of FOIA.

C. The request for information

4. Ms McInerney was interested in Free Schools as part of her preparation of a PhD thesis. In order to obtain information about the applications that had been made to the Department for Education, she made a request on 1 October 2012 under FOIA:

> Please could you:
>
> (1) release the completed application forms for Free School applicants where the school is now either open or if the school did not proceed to the next stage (i.e. it is no longer still in planning); and
>
> (2) release the letters sent to all Free School applicants 2010-2012 informing them of the decision either to accept or reject their application and the reasons why.
>
> It will be entirely appropriate to redact the names and addresses of the applicants, receivers of the letters and/or remove other details that could identify individuals.
>
> I would also be happy to accept data where the school name has been removed although I would expect an explanation for why it was felt necessary to complete this step.

5. The Department did provide some standard form letters. However, on 5 November 2012, it replied refusing to provide any further information in reliance on the exemption in section 36(2)(c) of FOIA. This response was confirmed following an internal review.

D. The complaint to the Information Commissioner

6. Ms McInerney applied to the Information Commissioner for a decision under section 50 of FOIA. The Commissioner upheld her complaint, deciding that section 36(2)(c) did not apply as the balance of the public interest favoured disclosure. The Department was given 35 days in which:

> To disclose to the complainant:
>
> (i) copies of all the acceptance and rejection letters sent by the DfE between 1 January 2010 and 1 October 2012 in relation to applications to set up Free Schools;
>
> (ii) copies of all the expressions of interest which were successful in Wave One and the successful applications in Wave Two and Wave Three

except for the expressions of interest or applications where the school was not open by 1 October 2012; and

(iii) copies of all of the unsuccessful expressions of interest for Wave One and the unsuccessful application forms for Wave Two.

The DfE is not required to disclose the names, addresses or other personal data of individuals contained within any of the above documents where it believes that the information is exempt from disclosure under section 40(2).

Section 40(2) deals with personal data.

E. The appeal to the First-tier Tribunal

7. The Department exercised its right of appeal to the First-tier Tribunal under section 57 of FOIA. Before the tribunal, the Department relied on sections 12, 14 and 43. Section 12 deals with excessive cost of compliance, section 14 with vexatious requests and section 43 with commercial interests.

Section 14

8. The tribunal decided to allow the appeal under section 14. That is what it said in paragraph 6 of its reasons and what it then explained in paragraphs 7 to 17.

9. The tribunal concluded that the costs involved in retrieving, reading and redacting personal data from the relevant documents made the request

> vexatious because the scope and size of the requested material imposed a wholly disproportionate burden on the public authority. In our judgment, this is one of the many forms of request from which Parliament intended to protect public authorities when enacting Section 14 FOIA.

The Department's evidence was that locating and retrieving the documents would take 54 hours; the redaction would occupy 11 middle rank civil servants for three months, which was costed at £171,875. The Department had obtained an estimate of £343,620 from an outside organisation for undertaking the redaction. The tribunal considered whether individual applicants could be asked to consent to disclosure for themselves and others and whether applicants could be asked to redact any information they did not wish to be disclosed. But the tribunal decided that these would involve too much risk and would still place the burden on the Department of checking the suggested redactions.

Late reliance

10. The tribunal dealt in an appendix with the issue whether the Department could rely on section 14 for the first time before the First-tier Tribunal. The tribunal referred to my decisions in the *Home Office* and *Birkett* cases. The former involved FOIA; the latter involved the EIR. I decided that the public authorities were allowed to raise exemptions, or exclusions as they are called

under the EIR, that they had not relied on initially, subject to the case management powers of the First-tier Tribunal. The *Birkett* decision was upheld by the Court of Appeal.

11. The Information Commissioner submitted that my decisions did not apply to sections 12 and 14, as these were in Part I of FOIA and were not exemptions in Part II. The tribunal rejected that argument. On section 12, it noted the *APPGER* case, but remarked that there were practical arguments to the contrary:

> For example, what if a public authority mistakenly thinks it does not hold the information? Why should a public authority have to go through the effort and expense of preparing a costs estimate in every case? What happens to section 13?

12. On section 14, the tribunal noted that section 17(1) did not prevent late reliance on an exclusion, so why should section 17(5) prevent late reliance on section 14? Doing so, it said, would be contrary to the decision in the *Home Office* case.

F. The appeal to the Upper Tribunal

13. I gave Ms McInerney permission to appeal to the Upper Tribunal and directed an oral hearing of the appeal. The hearing took place before me on 22 January 2015. Ms McInerney attended and spoke on her own behalf. Robin Hopkins of counsel appeared for the Information Commissioner and Andrew Sharland of counsel appeared for the Department. I am grateful to all three for their contributions to the issues I have to decide.

14. Ms McInerney put forward three grounds of appeal:

- the late reliance issue: the First-tier Tribunal was not entitled to allow the Department to rely on sections 12 and 14;
- the vexatiousness issue: the tribunal did not have sufficient evidence to justify finding, and did not give sufficient reasons for deciding, that compliance would impose a disproportionate burden on the Department;
- the severance issue: the tribunal failed to consider whether the request could be severed so that compliance with at least the second part would not be disproportionate.

I will deal with those arguments in turn, but before I do so, I will set out the relevant legislation and summarise the relevant caselaw.

G. Relevant legislation

15. These are the relevant provisions of FOIA:

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.

(2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.

2 Effect of exemptions in Part II

(1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,

section 1(1)(a) does not apply.

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

8 Request for information

(1) In this Act any reference to a "request for information" is a reference to such a request which—

(a) is in writing,

(b) states the name of the applicant and an address for correspondence, and

(c) describes the information requested.

(2) For the purposes of subsection (1)(a), a request is to be treated as made in writing where the text of the request—

(a) is transmitted by electronic means,

(b) is received in legible form, and

(c) is capable of being used for subsequent reference.

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.

(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.

(3) In subsections (1) and (2) "the appropriate limit" means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

(4) The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority—

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

(5) The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated.

14 Vexatious or repeated requests

(1 Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

(2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.

16 Duty to provide advice and assistance

(1) 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.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is

to be taken to comply with the duty imposed by subsection (1) in relation to that case.

17 Refusal of request

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

...

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where—

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (1), (3) or (5) must—

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.

36 Prejudice to effective conduct of public affairs

...

(2) Information to which this section applies is exempt information if, in the reasonable opinion of the qualified person, disclosure of the information under this Act-

...

(c) would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs.

> **45 Issue of code of practice by Secretary of State**
>
> (1) The Secretary of State shall issue, and may from time to time revise, a code of practice providing guidance to public authorities as to the practice which it would, in his opinion, be desirable for them to follow in connection with the discharge of the authorities' functions under Part I.

16. The Freedom of Information Regulations were made under section 12. These are the relevant regulations:

> **3 The appropriate limit**
>
> (1) This regulation has effect to prescribe the appropriate limit referred to in section 9A(3) and (4) of the 1998 Act and the appropriate limit referred to in section 12(1) and (2) of the 2000 Act.
>
> (2) In the case of a public authority which is listed in Part I of Schedule 1 to the 2000 Act, the appropriate limit is £600.
>
> (3) In the case of any other public authority, the appropriate limit is £450.
>
> **5 Estimating the cost of complying with a request – aggregation of related requests**
>
> (1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply, are made to a public authority—
>
> (a) by one person, or
>
> (b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,
>
> the estimated cost of complying with any of the requests is to be taken to be the total costs which may be taken into account by the authority, under regulation 4, of complying with all of them.
>
> (2) This regulation applies in circumstances in which–
>
> (a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and
>
> (b) those requests are received by the public authority within any period of sixty consecutive working days.
>
> (3) In this regulation, "working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971(1) in any part of the United Kingdom.

H. The caselaw

17. In the *Home Office* case, I decided that late reliance by a public authority on a new exemption under FOIA was permissible, subject only to the First-tier

Tribunal's case management powers. That tribunal had allowed reliance as of right and had added that, if the matter was one of discretion, it would have exercised it to allow reliance.

18. That case was heard together with the *Birkett* case. This case concerned late reliance by a public authority on a new exception under the EIR. The First-tier Tribunal had decided that reliance was not permissible as of right, but that it was a matter of discretion, which is exercised to allow reliance. My approach to this case was to analyse the EIR, the Aarhus Convention and Directive 2003/4/EC to see if they required a different result to that under FOIA. As they did not, I decided that late reliance by a public authority on a new exception under the EIR was permissible and was not a matter of discretion.

19. My decisions in those cases were discussed by the Upper Tribunal in the *APPGER* case. The panel found merit in some of the points I had made, but although it was not necessary to reach a definite conclusion (paragraph 38), expressed the view that the Commissioner and the First-tier Tribunal should have a discretion to enforce the section 17 time limit (paragraph 44). The panel then turned to section 12, on which the Ministry had relied for the first time at its internal review stage, and said:

> 45. Whatever is the correct position in regard to late claiming of the substantive exemptions set out in Part II of the Act, we consider that the s.12 cost exemption is somewhat different and raises particular considerations of its own; and we note that this was not the kind of claim that was the subject of specific decision by Judge Jacobs in DEFRA. We adopt with the necessary adaptations the approach to statutory construction indicated in Reg. v Home Sec., Ex p. Jeyeanthan (Supra) at 358E-359D, 360C-362F, 366F, and in R v Soneji [2006] (Supra) at paragraphs 14-23.
>
> 46. Section 12 provides a notable derogation from the obligation of communicating information that may otherwise require to be disclosed Although it does not require a public authority to refuse to communicate information on cost grounds it enables it to do so where a reasonable estimate is made that the cost of obtaining the information would exceed the prescribed limit. We accept that where it is fully and fairly engaged it is just as much a defence to the s.1 duty as Part II exemptions would be, but whereas a substantive exemption under Part II would (where justified) definitively prevent disclosure, a s.12 exemption may result in no more than a period of delay while an imprecise request is clarified, or sequential applications made for parts of the available data without exceeding the cost limit. Repeat requests are contemplated by the scheme as long as they not vexatious. Where a cost limit might be exceeded in respect of a single compendious request it may not if the request is broken down into constituent parts.
>
> 47. We conclude that the effect of delay in claiming a s.12 exemption is different from delay in claiming a Part II exemption for the following reasons:-

i) The statutory scheme read as a whole, and reinforced by the Code of Practice issued pursuant to s.45, indicates that prompt decision making has particular relevance for cost exemptions where the modest cost limit can yield to repeat requests in 60 day periods for discrete parts of the available material that the request seeks. Here the twelve months' delay in raising the exemption denied APG the opportunity of using that time to break down its request into five or six distinct phases.

ii) The cost exemption only has meaning if the point is taken early on in the process, before substantial costs are incurred in searching for or collating the information. It relates to an estimate of whether future events "would exceed" the limit and not whether past ones have. Thus, if material has been gathered together for some purpose including analysis for substantive exemptions such as international relations, it is no longer open to the authority to claim it.

iii) The scheme as a whole suggests that where the request for information is not an abuse or frivolous, dialogue is contemplated between requester and public authority to refine the request to what is realistically available within cost. Only the public authority knows what information it holds, where it holds it, and how an overbroad request can sensibly be broken down into distinct separate chunks.

iv) If there is uncertainty about the scope of a request, dialogue about the extent of the request may be able to clarify it and tease out what can be supplied within the cost limit.

48. Our jurisdiction is to examine whether the notice of the Commissioner's decision given under s.50 is in accordance with the law or any discretion should have been exercised differently (FOIA s.58). It is not a general judicial review of the exercise of discretion by the MOD. We cannot accept APG's broadest submission that our function is to examine generally the overall reasonableness of the MOD's response to this request for information. However the more extended the failure to comply with s.17(4) and the later the s.12 claim the more likely it is that prejudice would be caused to the applicant and the statutory scheme distorted.

Although it is not spelt out in those paragraphs, it is clear from paragraphs 84-86 that the panel decided that late reliance on section 12 was permissible provided this did not give rise to prejudice or material unfairness.

20. Subsequently, my decision was confirmed by *Birkett* in the Court of Appeal. The Court did not follow my approach of comparing the EIR with FOIA. Instead, it undertook its own analysis under European law. Sullivan LJ's remarks on tribunal procedure are particularly relevant to Mr Hopkins's argument that the tribunal should have a discretion to allow reliance on section 12. I have italicised the key passage:

> 27. An appeal to the Tribunal is governed by The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the Rules"). A notice of appeal must be received by the Tribunal within 28 days of the Commissioner's decision notice: rule 28(1). The notice of appeal must include the grounds on which the appellant relies: rule 22(2)(g). If the person seeking the information is appealing against a decision by the Commissioner that the information should not be released, the public authority's response must be received within 28 days after the date when it receives notice of the appeal, and that response must include any grounds for its opposition to the appeal which are not contained in another document provided with the response: rule 23(1) and (3).
>
> 28. Thus, whether the public authority is the appellant or the respondent in an appeal to the Tribunal, the Rules ensure that any new exception, if it is to be relied upon, is identified at the outset of the appeal, and within a relatively short time. Any application by the public authority to rely upon a new exception made after the time limit for its grounds of appeal/response would be subject to the Tribunal's case management powers under rule 5; see also rules 22(4) and 23(5) which deal with the submission of notices of appeal and responses out of time. The Tribunal is a creature of statute. *Not only is there no need for a non-statutory discretion such as that purportedly exercised by the Tribunal in the present case; there is no scope for the exercise of such a discretion* in a statutory scheme which requires the public authority to set out its grounds of appeal, or grounds of opposition in response to an appeal, within a particular timescale, and which expressly envisages in the case of the latter that those grounds may not be contained in another document provided with the response, i.e. that they may contain new reasoning.

Lloyd and Carnwath LLJ agreed. Those paragraphs are of general application. They cannot be limited to exceptions or exemptions.

I. The late reliance issue

21. I first set out the parties' arguments and then give my analysis.

Ms McInerney's argument

22. Ms McInerney argued that the First-tier Tribunal had been wrong to allow late reliance on sections 12 and 14. She acknowledged that she was not able to contribute to the legal analysis, but drew attention to a blog that mentioned a conflict of authorities on the issue. She pointed out that allowing late reliance undermined section 16. At the hearing, she told me that the tribunal had not involved her in any discussion of the case management powers that might have prevented the Department from relying on sections 12 and 14.

The Information Commissioner's argument

23. Mr Hopkins argued that a public authority could rely late on section 14, but reliance on section 12 was subject to the tribunal's discretion. The discretion was sufficient to allow the First-tier Tribunal to deal with cases where there had been some accident or omission in the application of the section. He identified five features of section 12 that supported this conclusion, the first two of which apply equally to section 14. In summary, these are the features that are said to distinguish section 12 from the exemptions:

- Section 12 is not in Part II of FOIA.
- Section 12 only protects the public authority from a resource burden; it does not involve any protection of a public or third party interest.
- Section 12 does not depend on an objectively correct outcome. It is merely an estimate by the public authority. The Information Commissioner only checks to see if the estimate was reasonable. In contrast, the Commissioner has to decide whether the exemptions have been correctly applied.
- Section 12 does not involve a balancing exercise.
- Section 12, by virtue of the Code of Practice section 45, is bound up with the duty to advise and assist under section 16. In particular, Mr Hopkins referred me to this passage in the Code:

  > Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying would exceed the 'appropriate limit' (i.e. cost threshold) the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant by reforming and re-focussing their request, information may be able to be supplied for a lower, or no, fee.

24. Mr Hopkins then took me through the caselaw. Some were decisions of the First-tier Tribunal, which he accepted were not binding on me. I need only set out his argument on the decisions of the Upper Tribunal and the Court of Appeal:

- On the *APPGER* case, he accepted that strictly the discussion of section 12 was not necessary as the panel dealt with the issues on other grounds, but it was nonetheless detailed and reasoned.
- On the *Home Office* case, this did not address section 12 and its rationale did not apply to that section.
- On the *Birkett* case in the Court of Appeal, this did not follow my approach and contains only an analysis of the position under the EIR.

The Department's argument

25. Mr Sharland argued that a public authority could rely on either section 12 or section 14. In neither case was there any discretion.

26. On section 12, he argued that, in any event, the tribunal had based its decision exclusively on section 14, so no issue relating to section 12 arose.

Addressing Mr Hopkins' argument, he argued that the existence of a discretion was inconsistent with the *Birkett* case in the Court of Appeal. He also pointed out that Mr Hopkins' argument failed to take account of the existence of absolute exemptions, which operated in the same way as section 14 in the sense that no balancing exercise was required.

27. On section 14, my decision in the *Home Office* case decided that a public authority could rely on a new exemption. The Court of Appeal in *Birkett* confirmed this approach in respect of the EIR and there is no distinction between those Regulations and FOIA. The reasoning in those cases does not depend upon the public authority relying on an exclusion or exemption. The reasoning applies equally to section 14.

Analysis

28. It is tempting to accept Mr Sharland's argument that the First-tier Tribunal based its decision on section 14 only and that section 12 is, therefore, irrelevant on this appeal. However, both counsel argued that late reliance on section 14 was permissible. There is no decision of the Upper Tribunal to that effect. I can only accept that concession if I am satisfied that it is sound, but if Mr Hopkins' argument on section 12 is right, I will need to be satisfied that the position of section 14 is distinguishable. I cannot, therefore, avoid considering section 12.

29. I begin with four propositions that are clear on the authorities.

30. First, the *Birkett* case in the Court of Appeal is authority that late reliance on an exception is permissible under the EIR. It is also authority that there is no scope under the First-tier Tribunal's rules of procedure for the exercise of a non-statutory discretion over the scope of an appeal.

31. Second, my decision in the *Home Office* case is authority that late reliance on an exemption is permissible under FOIA subject to the First-tier Tribunal's case management powers. For convenience, I repeat what I said in that case about those powers:

> 13. Nothing in this decision affects the First-tier Tribunal's powers under the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI No 1976). The tribunal may, in particular and as appropriate in a particular case, exercise its powers to regulate its own procedure (rule 5), to strike out cases and bar participation (rule 8), and to limit the evidence and submissions that it will receive (rule 15). Nor does it affect its power to award costs under rule 10. No one argued to the contrary and could not realistically do so.

I notice that in counsel's arguments and in some of the First-tier Tribunal decisions that I was shown the expression 'as of right' has been used. In so far as it emphasises that it is not a matter of discretion, that expression is unobjectionable. But it is dangerous if it leads tribunals to overlook the possible exercise of their case management powers to control late reliance.

32. Third, there is no Upper Tribunal *decision* that disagrees with my conclusion or my reasoning in the *Home Office* case. My understanding is that it is now generally accepted as correct and that the Court of Appeal's decision on the EIR is treated as supporting my decision on FOIA.

33. Fourth, in so far as the panel in the *APPGER* case considered that the First-tier Tribunal had a discretion to allow late reliance on an exemption, that is now inconsistent with the Court of Appeal's decision. In so far as the case is authority that my reasoning does not apply to section 12, it involves the exercise of a judgment whether doing so would give rise to prejudice or material unfairness. Sullivan LJ's explanation of why there is no scope for an non-statutory discretion applies equally to this sort of judgment. To that extent, the reasoning is no longer valid.

34. It follows that late reliance on section 12 cannot be discretionary. There are only two possibilities: either a public authority is not entitled to rely late on section 12 or it is entitled to do so subject only to the tribunal's case management powers.

35. That leaves two questions. Is there any distinction between sections 12 and 14 that justifies or requires a different result? Is late reliance on section 14 permissible? It is convenient to take those two questions together.

36. There is certainly scope for late reliance, even under section 12. As Mr Hopkins recognised, some provision is required in order to provide for accidents or omissions in applying that section.

37. Mr Hopkins is also right that the purpose of sections 12 and 14 is different from the purpose of exemptions in that the former protect the resources of the public authority whilst the latter protect the public interest. But the difference is not as great as he suggests. First, the difference is not so clear on the face of FOIA. It is right that sections 12 and 14 are not in Part II. However, the heading to section 12 calls it an exemption. And both sections operate in the same way as exemptions operate by virtue of section 2 in that they disapply the duty to provide information under section 1. Second, the difference is not a distinction. It does not explain why late reliance should not be allowed.

38. The issue in this case concerns the power of the First-tier Tribunal and, in other cases, will concern the power of the Information Commissioner. My reasoning in the *Home Office* case only referred to exemptions under Part II. Counsel did not address sections 12 and 14; nor did I have them in mind when I developed my analysis. That does not mean that the reasoning is of no relevance to those sections. Much of what I said, especially about the nature of the role of the Commissioner and the jurisdiction of the First-tier Tribunal, is generally applicable to their powers. Mr Hopkins' argument confuses the basis of my analysis with its application in the particular context of the case.

39. As I explained in the *Home Office* case and as the tribunal noted in this case, section 17(1) does not prevent late reliance. It is concerned with the position when the request is being considered by the public authority, not when the case

is before the Commissioner or the tribunal. The same is true of section 17(5)-(7), which refer to section 12 and 14. And the same reasoning applies to section 16 and the Code of Practice, both of which are concerned (like section 17) with the time the request is before the public authority.

40. The nature of section 12 does not justify or require a different analysis. It is true that it depends on an estimate and that the issue for the Commissioner is whether that estimate was reasonable. If a public authority relies on the section before the tribunal, it will take the same approach as the Commissioner would. Its powers are governed and limited by the terms of the section, just as much as his are.

41. As a practical matter, late reliance may effectively be forced on a public authority by the course of events. This case is a good example. The Department refused the request on the ground that it was covered by an exemption, which was sufficient to dispose of the case without investigating the amount of the information it held or the costs of providing it. The Commissioner decided that the Department was not entitled to rely on that exemption. It was then, for the first time, that the Department had to confront the amount of work involved in complying with the request, which led it to rely on sections 12 and 14 before the tribunal. If late reliance were not permitted, a public authority would be obliged to incur the cost of identifying, retrieving, reading and redacting the information. The only way to avoid that would be for public authorities to investigate the resource implications of compliance in every case. That would be a strange result when the purpose of sections 12 and 14 is to protect the public authority's resources.

42. I come finally to Ms McInerney's concern that she had not been involved in a discussion of the tribunal's case management powers. The nature of those powers is such that, if the tribunal is considering applying them, all the parties should be involved. If the tribunal is not considering applying them, it should be mindful that an unrepresented party may not be aware of them and, therefore, may be deprived of a chance to invite the tribunal to exercise them to prevent late reliance. In this case, however, I am satisfied that there was no basis for exercising any of those powers. There was nothing to suggest that the Department was abusing the system. It did not consider it necessary to rely on section 14 initially and raised it only in response to the decision of the Information Commissioner, which no doubt concentrated the minds of officials on the amount of work that would be involved in implementing it.

J. The vexatiousness issue

43. I first set out the parties' arguments and then give my analysis.

Ms McInerney's argument

44. This ground of appeal raises two issues. It combines an argument that the tribunal did not have sufficient evidence to justify its decision and an argument

that it did not explain adequately how the evidence supported its decision. Ms McInerney pointed out that the cost would only represent 0.015% of the overall Free Schools budget and only 0.7% of the administration budget taken over the three years of the project.

The Information Commissioner's argument

45. Mr Hopkins argued that the tribunal's reasons were clear and did not need to be longer. He also argued that the tribunal had evidence before it of the cost of compliance that Ms McInerney did not challenge and it was entitled to accept it.

The Department's argument

46. Mr Sharland argued that in so far as this ground was a reasons challenge, paragraphs 8-16 of the tribunal's reasons gave a clear explanation of how it had made its decision. In so far as it was a rationality challenge, the comparison of the cost of compliance and the total budget was not sufficient to show that no tribunal could properly have made the decision that this tribunal had. Objectively and financially the cost was huge and there was in addition the effect of diverting so many officials for so long from their other duties. The Upper Tribunal should show restraint in finding fault with the assessment of the First-tier Tribunal and this was not a case in which it should interfere with the finding of that tribunal.

Analysis

47. I accept counsel's arguments.

48. The tribunal had evidence from the Department of the effects of compliance. Those effects were identified in both financial terms and in the consequences of diverting officials from other duties. Ms McInerney sought to put that evidence in perspective, but did not challenge it. In view of the total impact of compliance, the tribunal was entitled to find on the evidence that compliance would be troublesome to the Department to the point where the request could properly be characterised as vexatious. The tribunal's explanation of that conclusion was relatively succinct but perfectly clear.

K. The severance issue

49. I first set out the parties' arguments and then give my analysis.

Ms McInerney's argument

50. This ground of appeal raises two issues. One is that her request should have been treated as two. Second, regulation 5 of the Freedom of Information Regulations was relevant to section 14 as it was to section 12. As the two parts of the request related to different information, they should have been treated separately. If they had been, the cost of replying to the second part would have cost less than the £600 figure set by regulation 3.

51. At the hearing, Ms McInerney told me that the Department had since provided some of the information she had requested voluntarily and more information in response to new requests.

The Information Commissioner's argument

52. Mr Hopkins argued that regulation 5 was not relevant to section 14. He did not go so far as to argue that the tribunal was wrong to treat Ms McInerney's request as a whole, but he did argue that the tribunal should have explained why it had not treated the two parts separately as they were clearly severable.

The Department's argument

53. Mr Sharland argued that the tribunal decided the case under section 14, which applies to 'a request for information', which is defined in section 8. The tribunal correctly set out Ms McInerney's request. The only issue was whether that request was vexatious. There is no statutory justification for splitting a request for the purposes of section 14.

Analysis

54. With the benefit of hindsight and in the light of the subsequent developments that Ms McInerney outlined, it is possible that the request could have been handled differently from the outset. The Department's initial response was to deal with the request, as presented and as a whole, under section 36. That was a sensible approach under that section. If instead the Department had considered the effects of compliance, it might have exercised its power under section 16 to assist Ms McInerney to redefine her request. However, that is not what happened and it is now too late to rewrite history. As the Information Commissioner upheld her complaint, there was no need for him to consider whether the request should be split. And by the time the appeal came to the First-tier Tribunal, it had to focus on the Commissioner's decision notice.

55. The policy of section 14 is clear: it is to free public authorities from the obligation that would otherwise exist under section 1 to provide information in circumstances that would, in the broadest sense, be troublesome. If the section is to be effective in achieving that objective, it must be interpreted and applied broadly to the substance of the circumstances rather than the form of the request. The form in which a request is presented should not dictate how the section is applied. A series of requests could each be considered vexatious when viewed in the context of the series as a whole. Likewise, when presented with what on its face is a single request, the public authority should not be obliged to dissect it to see whether it could be severed. The public authority, and the First-tier Tribunal on appeal, should take an overall view of the circumstances as a whole to decide whether what is before it, whether presented as a series of requests or a single request, is vexatious.

56. This does not mean that a public authority is entitled to ignore section 16. It is possible that, even in what appears to be a most vexatious request, the circumstances might allow a public authority to extract one part to create a non-vexatious request. Assume that a public authority receives a request from someone who has no 'previous'. It asks for a long list of information that will obvious take considerable time and effort to assemble and redact, but one item refers merely to a standard letter used by the authority. The authority should be able to identify readily that the letter could be provided with little cost or effort. In such a case, it might be appropriate to discuss the matter under section 16. Such cases may well be exceptional, as the duty imposed by that section only applies 'so far as it would be reasonable to expect the authority to do so'. It is possible in this case that, if the public authority had considered section 14 right away, it might have seen that the information sought in second part of the request would cost substantially less to provide than that sought in the first part. But even then it would have been necessary to undertake work to provide costing for the purpose of applying section 12. So, looked at overall, it might not have been reasonable to apply section 16.

57. Coming to the circumstances of this case, the First-tier Tribunal was right to treat the request as a whole. It was too late to apply section 16, which imposes a duty on the public authority, not the tribunal, and operates when the request is before the authority, not on appeal. The request had been presented as a single one and the information sought in the two parts of the request formed a cohesive package. The request, by its form and content, dealt with two different types of information, but the process of deciding whether to sever the request would, as I have said, itself have imposed a burden on the Department, which formed part of the overall calculus involved in assessing whether the request was vexatious.

58. Ms McInerney told me that she had suggested severing the request, but that was not until the case was before the Information Commissioner. The section 16 duty does not apply to the First-tier Tribunal and that tribunal was considering for the first time whether section 14 applied.

59. I therefore, accept Mr Sharland's argument that there was no error of law and reject the arguments of Ms McInerney and Mr Hopkins.

60. As to section 12 and the Freedom of Information Regulations, I accept the concurring arguments of counsel. These are separate provisions from section 14 and they reflect different policies. There is no reason or justification for applying regulation 5 to section 14. Whether or not a request is vexatious is not just a matter of the financial cost of compliance. It depends on the circumstances as a whole.

Signed on original
on 29 January 2015

Edward Jacobs
Upper Tribunal Judge