ON APPEAL FROM

THE INFORMATION COMMISSIONER'S DECISION NOTICE NO:FER0592270

Dated: 16th. February, 2016

Appeal No. EA/2016/00054

Appellant: [redacted]

First Respondent: The Information Commissioner ("the ICO")

Second Respondent Merseyside Fire and Rescue Authority("MFRA")

Before

David Farrer Q.C.

Judge

and

Michael Hake

and

Malcolm Clarke

Tribunal Members

Date of Decision: 31st. October, 2016

Ruling on an Application for Costs by MFRA

1. On any reasonable view of the matter, this appeal has involved costs to the public quite disproportionate to its significance or the matters in issue. Accordingly, I intend to give our reasons with the least possible elaboration consistent with doing justice to both parties to this application.

2. On 22nd. September, 2016, following a hearing attended by [redacted] and Ms. Janet Henshaw, solicitor, on behalf of MFRA, the appeal was withdrawn by consent and an order was made giving effect to that outcome. Ms. Henshaw immediately submitted a schedule of MFRA's costs and an application that they be paid by [redacted]. The Tribunal adjourned the application so that it might be submitted in fuller form and that [redacted] should have an opportunity of submitting evidence and argument to support his resistance to such an order and information as to his financial means. It was agreed that the determination should be made on the papers and directions were given as to service. I indicated that the determination would be by the full panel.

The Background to this application

3. On 14th. June, 2015 [redacted] requested from MFRA appendices to two reports presented to MFRA meetings in October, 2014 and January, 2015 respectively. MFRA replied that the requested information was refused in reliance on the exceptions contained in EIR 12(5)(d) and (e) and the ICO, by a DN dated 16th. February, 2016, upheld such reliance and the public interest arguments advanced. [redacted] appealed.

4. On 4th. August, 2016, by email and posted letter, Ms. Henshaw, on behalf of MFRA, informed [redacted] that she had discovered that, following the appointment of a new Treasurer, a report, open to the public and including the withheld information, had been approved by an MFRA committee on 17th. September, 2015. The report, which, she stated, was available on the MFRA website was attached to the email and also sent to [redacted] by post. She asked him to withdraw his appeal, having received this information.

5. Although he communicated regarding the bundle for a (contested) hearing, [redacted] did not respond to that email nor to a letter of 11th. August, 2016 nor a further letter dated 19th. August, 2016 indicating that the appendices from the original reports were now on the MFRA website.

6. [redacted] rejected the Registrar's proposal in a CMN of 16th. August, 2016 that the appeal be "ended by consent", stating by letter of 22nd. August, 2016 that he would accept "all of the information (4 A4 pages)". That is, we believe, the first suggestion that [redacted] believed he had received less information than he requested.

7. The requested information in each appendix filled a single page. Each contained a spreadsheet and was accompanied by a blank page, as [redacted] would have found out on 4th. or 19th. August, had he accessed the website. (He claimed that he could not obtain access due to an error in the website address but made no attempt to check it with MFRA over a three week period.) Hence the "4 A4 pages".

8. A letter from [redacted] to MFRA dated 19th. September, 2016, following reception (on or about 16/9/16) of hard copies of the two original appendices, disclosed that he had seen the two blank pages on the website

but still insisted on receiving four A4 pages, if the appeal was to be ended by consent.

9. So the appeal proceeded to a hearing. [redacted] advanced a new argument to the effect that the original pages of the appendices would have been stamped "not for publication", which was true, whereas, unsurprisingly, the pages now on the website were not. He was, however, unable to identify any information in the original form in which the information was held which added anything to the information disclosed in August, 2016. He consented to withdraw the appeal after some questioning by the Tribunal as to what information had not been provided and why he had failed to respond to MFRA's letters/emails.

10. MFRA's application set out the chronology of the matter, most of which is set out here and is evidenced by documents – or the absence of them – in a bundle prepared for the purpose. It submitted that [redacted] conduct of this appeal had been unreasonable since his receipt of the letter of 4th. August, 2016 and the attached information. A schedule of costs amounting to £1261.50 was submitted. This was reduced to £1192.23 in a later detailed breakdown, as a result of a slight reduction in the solicitor charging rate.

11. [redacted] made a lengthy and diffuse written submission and presented a brief summary of his income, totaling about £16,500 p.a. from various sources. His tax credits were said to be awarded jointly - we assume with one other, though detail was lacking. In the interests of brevity, the Tribunal will state its response to those points which require one, point by point.

12. He submitted –

- His request must be construed as a request that the information be provided as "4 A4 pages" (see EIR 6(1)) and MFRA had complied, if at all, only at the hearing.

  **The Tribunal** finds that there was no such implication in the wording of the request and it is notable that such a claim was not made in response to MFRA's August letters. In any case, Reg.6 and FOIA s.11 are concerned with the medium of provision (the "form or format"), not the extent of the information provided.

- The removal of non – publication markings after posting to the website involved a change in the content of the information, indeed the commission of an offence under EIR 19 (alteration of records with intent to prevent disclosure).

  **The Tribunal** rejects both legs of this argument. The markings were not environmental, indeed any kind of, information. Assuming in his favour that these points are made in good faith, [redacted] wholly misunderstands the nature of "information". Plainly, MRFA could not maintain a "not for publication" stamp on a document on its website. The Reg. 19 point is simply absurd; no information was altered and there was clearly no intention to conceal anything.

- The Tribunal joined MFRA as a party, not [redacted]. He did not want joinder, so (we assume) should not have to meet MFRA's costs.

  **The Tribunal** regards this as quite irrelevant. The joinder was entirely proper and MFRA is entitled to its costs if the strict requirements for an order are met.

- [redacted] was entitled to the full four pages in original form.

  **The Tribunal** rejects that claim as a matter of commonsense but, more importantly, because that is not the law (see below).

The remaining submissions and the appended documents do not touch the issues. For example, the contract between MFRA and its IT supplier has nothing to do with [redacted] and is quite irrelevant to any question before the Tribunal

13. We turn to the Tribunal's general findings and its decision.

14. The information to which a requester is entitled is information recorded in whatever form (FOIA s.184). However, the public authority is not under a duty to provide the information in its original form because –

*" Put shortly, the Act provides a right of access to information, not documentation."* – see IPSA v ICO [2015] 1 WLR 2879.

The specific appearance and layout of a document may provide information additional to its content, as in IPSA, but nobody suggests that is so in this case. The IPSA case reinforces what any reasonable person would regard as a sensible interpretation of the rights conferred by FOIA s.1 or EIR 5(1). The original documents given to [redacted] at the hearing provided nothing that he could not get from the website or the information sent to him. If he could not access the website, he made no attempt to seek assistance from MFRA. Any suggestion that he would have breached a Tribunal direction by doing so is ridiculous. He could write, telephone or obtain the registrar's consent to use email.

15. From 4th. August onwards, [redacted] had no sensible reason to doubt that MFRA was providing him with the full information that he had requested. Ms. Henshaw had, very properly, taken the initiative in alerting him to the change in MFRA's stance. To do so whilst attempting to hide the appendices would make no sense whatever.

16. We do not repeat the points made above in response to [redacted] further submissions.

17. Rule 10(1)(b) of the The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 ("the 2009 Rules"), so far as material, prevents the Tribunal from ordering costs against [redacted] unless it finds that he conducted these proceedings unreasonably (Clearly, his bringing of the proceedings was perfectly reasonable). What is unreasonable is a matter of fact for assessment by the Tribunal. His own view of what is reasonable is neither here nor there. Obviously, an important question is whether there was any practical value in what he claimed to be seeking in relation to the time and costs that he was causing others to commit and incur. [redacted] had a duty to assist the Tribunal in achieving the overriding objective of prompt justice at a reasonable cost (Rule 2(4)). Although the Tribunal has not initiated proceedings for a wasted costs order under Rule 10(1)(a), it is entitled to take into account [redacted] disregard for the Tribunal costs resulting from three panel members being required to read the voluminous papers (albeit mainly after the hearing since they received them on arrival), travel to and attend the hearing.

18. The Tribunal noted his failure to respond to the CMN of 16th. September, 2016 which provided a last clear opportunity to terminate this appeal, having obtained the whole substance of the information requested.

19. We find that he conducted these proceedings unreasonably. However, it is necessary to make a finding as to when his conduct became

unreasonable because MFRA's costs were incurred over a period of about seven weeks.

20. The majority of the Tribunal find that [redacted] conduct was unreasonable as from 22nd. August, 2016, when he rejected the Registrar's invitation (CMN 18/8/16 §3) to agree a consent order to end the appeal, continuing to insist on delivery of the original four pages, despite the availability of the original appendices on the website.

21. The third member of the Tribunal panel assesses [redacted] conduct of the appeal as unreasonable as from the time he received but did not acknowledge the MFRA letter of 4th. August, 2016.

22. Referring to the Schedule of Costs and the ancillary document detailing the dates of those costs, we calculate that the costs incurred on and after the date identified by the majority as the start of the unreasonable conduct amount to £967.57. The charging rate for Ms. Henshaw's work (£59.12) and the hours claimed are perfectly reasonable. [redacted] complaints on this account are groundless.

23. Rule 10(5)(b) of the 2009 Rules requires us to consider [redacted] financial means in deciding whether to make an order for costs and, if so, in what amount. Those means are plainly very modest. On the other hand, his conduct of this appeal caused a very considerable waste of public money in circumstances suggesting that he had become more concerned

about pursuing a worthless and misconceived technicality rather than legitimately obtaining information.

24. Rule 10(6)(c) empowers the Tribunal to assess the whole or a specified part of the costs or expenses incurred by the receiving person. The Tribunal has no doubt that this is an appropriate case for an order for costs for the reasons given. We take as our starting point for the whole of the costs incurred as a result of the unreasonable conduct the modified figure submitted by MFRA, less the costs arising before 22nd. August, 2016, namely £967.57.

25. Having regard to [redacted] means, we order him to pay the costs of MFRA in the sum of £500.

26. Awards of costs are rare in tribunal proceedings because the requirement of unreasonableness is very seldom satisfied. This is, however, one of those rare cases.

David Farrer Q.C.,
Tribunal Judge
31st. October, 2016