The Information Commissioner's Response to the Ministry of Justice's Consultation on Further Fees Proposals

For ease of reference, the questions in respect of which the Information Commissioner makes observations are:

Question 14 - *"…Do you agree with the proposed fees for all proceedings in the General Regulatory Chamber: specifically £100 to start proceedings with a determination on the papers; and a further fee of £500 for a hearing? Please give reasons…."*
Question 15 - *"Are there any proceedings in the General Regulatory Chamber that should be exempt from fees? Please give reasons…"*

The Information Commissioner's Comments.

Prefatory Remarks

These comments are made only in respect of the General Regulatory Chamber (GRC)'s information rights jurisdiction, where appeals are heard against notices issued by the Information Commissioner. The First-tier Tribunal (Information Rights) deals with appeals against notices issued by the Commissioner under the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA), the Environmental Information Regulations 2004 (EIR) and the Privacy and Electronic Communication Regulations 2003 (PECR). The vast majority of those appeals are against Decision Notices issued under FOIA or EIR.

In relation to DPA complaints, the Information Commissioner understands the rationale for application fees and considers the proposals workable in practice without particular detriment to potential appellants or the overall regime of data protection. However, in relation to FOIA and EIR appeals he does have some concerns and reservations, particularly with regard to the practical operation and impact of the proposed fees. The remaining comments in this submission relate only to appeals under FOIA and EIR.

While the Information Commissioner, as an independent statutory office holder, does not consider it appropriate to express a policy view on the

fees proposals, he considers there are specific factors arising from the nature of FOIA and EIR appeals which need careful consideration but appear not to have been taken into account.

Public Interest Considerations

The First–tier Tribunal (Information Rights) is, unlike other Tribunals in the GRC, one of the very few genuinely inquisitorial tribunals in the English and Welsh system. A full merits review of the case often takes place. This flows from the nature of the cases which it is called upon to determine. Those cases involve questions of the wider public's rights to access information which is held by public authorities. As such, these cases do not usually involve private rights or interests; nor do they involve the prospect of an appellant ever recovering monies or securing a personal remedy for a private wrong. In the Commissioner's view, there is a real difference of type between such appeals and private interest litigation which is undertaken elsewhere in the General Regulatory Chamber. The principle referred to in paragraph 112 of the consultation paper, that users of tribunals should make a contribution to the costs of providing the service, does not have the same force in this context.

Very often it is consideration of the public interest, not a private interest, which determines the outcome of an appeal under FOIA or EIR. Many of the exemptions contained in FOIA and EIR are subject to the application of a public interest test. It is then for the Tribunal to determine whether or not the public interest favours disclosure of the requested information in a given appeal. This is a matter of judgement. On those occasions when the Tribunal reaches a different conclusion to the Commissioner on where the balance of the public interest lies, he consistently accepts the Tribunal's decision. This can be seen as an important check and balance in the operation of the legislation.

In the case of these public rights of access, where both the nature of the information being sought and the outcome of an appeal are inevitably uncertain, the introduction of a fee for an appeal is likely to give rise to a significant deterrent effect which may result in private citizens being dissuaded from pursuing a genuine and valid appeal.

The desirability of deterring unmeritorious appeals in order to reduce the overall numbers of appeals in Information Rights cases, and the burden on the GRC is acknowledged. However, it would be undesirable to introduce a fees regime which dissuaded individuals from exercising rights of access to information which are of benefit to the wider public. This would militate against the widely-recognised public good of transparency as an important means of achieving accountability and public participation in the affairs of public bodies.

In making this observation, the Commissioner notes that the public rights of access to information created by this legislation have been described by the Court of Appeal as "important statutory rights"[1]. The Upper Tribunal has described the Act itself as *"a* constitutionally important piece of legislation*".*[2]

Likewise, it may be the case that public authorities facing increasing constraints on their finances are dissuaded from appropriately testing what should or should not be disclosed in the public interest because a fee has become payable.

The consultation document envisages a system of remittal of fees for those individuals who are unable to pay. However, it is quite possible that a greater proportion of those individuals who pursue cases which lack substantial merit, and who tend to pursue such cases on a more frequent basis than other users, are also those individuals who would benefit from such a remission.

Practical Concerns

Practical issues around time limits for lodging an appeal may also arise.

For example, it is not uncommon for the Commissioner to allow an appeal in part, ordering the disclosure of some, but not all, of the information requested. The complainant in those circumstances cannot make a judgement as to whether to appeal in those circumstances until he/she has sight of what the public authority has been ordered to disclose. However, by virtue of section 50(6) of FOIA the Commissioner cannot specify a time limit for disclosure which expires before the period in which an appeal can be brought. This is because the public authority also has a right of appeal against the Commissioner's decision Notice, not just the complainant. The complainant is then in an invidious position. Their best option is to make a holding appeal, which they can subsequently withdraw if satisfied with the disclosure made pursuant to the Commissioner's Decision Notice.

Under the fees proposals, a "holding appeal", which ought to be considered entirely valid in the circumstances, would attract a substantial fee. Whilst reimbursement might be allowed in the event of the withdrawal of an appeal in certain circumstances, the lack of detail in the current proposals to cater for all the variations in appeals in this jurisdiction of the GRC makes it difficult for any responsible office-holder to endorse what has been put forward in such very general terms.

[1] Arden LJ in *Dransfield v ICO & Devon County Council; Craven v ICO & Department for Energy and Climate Change* [2015] EWCA Civ 454*) at §61.*
[2] Wikeley J in *UCAS v IC and The Lord Lucas (GIA/1646/2014) at §39.*

Oral Hearings

The current General Regulatory Chamber Rules, which came into force in 2010, introduced the right of any party to insist on an oral hearing. The Commissioner understands that the impetus behind this change was to permit a greater degree of access to justice for citizens who were unrepresented litigants in person. However, the right applies equally to public authorities who are parties to an appeal and to the Commissioner, who is always the respondent.

It seems to the Commissioner that there is a dissonance between the absolute right to an oral hearing and the introduction of a £500 fee, which must be seen as a deterrent to exercise it. The Commissioner's experience is that the right to an oral hearing has resulted in a measurable increase in the total number of oral hearings since 2010. The vast majority of these hearings are at the instigation of litigants in person. A more proportionate and efficient use of the Tribunal's limited resources may be to return the ultimate decision regarding the mode hearing to the Judge hearing the case. The Commissioner would encourage the Tribunal to fully exercise its case management powers in such cases.

On a similar point, the Commissioner has observed a sharp increase in onward appeals from the FTT, following the creation of the Upper Tribunal. Previously, appeals were to the High Court, with the fee and costs implications that entailed. Currently, appeals to the Upper Tribunal do not incur a fee. The Commissioner considers that one alternative worthy of careful consideration may be to maintain the current free right of appeal to the First–tier Tribunal (Information Rights), but to impose a fee for any onward appeal to the Upper Tribunal.

With regard to practical considerations, the Commissioner is first respondent to every appeal in the First–tier Tribunal (Information Rights). He anticipates that successful appellants are likely to seek to recover any fees payable from the Commissioner. Whilst a significant majority of appeals are successfully defended by the Commissioner, he anticipates that this liability may have an appreciable impact on his own limited budget for the performance of his statutory duties under FOIA and EIR, the entirety of which is currently funded from grant-in-aid.

The Commissioner also notes that whilst not common, there have been recent cases in the First–tier Tribunal (Information Rights), where the parties have agreed on a paper hearing but the Tribunal has directed an oral hearing. The question arises in such case as to which party, if any, will be liable to pay the listing fee. Likewise, those cases arise where an

Appellant is content with a paper hearing, but the public authority, as second respondent, seeks an oral hearing. In such cases, the question to be asked is who would be responsible for the listing fee?

Again, whilst these points could potentially be resolved in the detail of a fees regime, the Commissioner's main thrust in making this response to the consultation is to point out that this particular jurisdiction is not straightforward, in terms of both the procedural issues and the substance of the subject matter. If these matters were to be addressed, the arguments in favour of fees for such cases might be significantly eroded.

15 September 2015