



**Tribunals Service**  
Information Tribunal

**Information Tribunal Appeal Number: EA/2006/0088**  
**Information Commissioners Ref: FS50102437**

**Freedom of Information Act 2000**

**Heard at Procession House**  
**on 3 & 4 September 2007**

**Decision Promulgated**  
**on 2 October 2007**

**BEFORE**

**INFORMATION TRIBUNAL DEPUTY CHAIRMAN**

**Anisa Dhanji**

**and**

**LAY MEMBERS**

**Jenni Thomson and Roger Creedon**

**BETWEEN:**

**ROBERT ANDREW BROWN**

**Appellant**

**-and-**

**THE INFORMATION COMMISSIONER**

**Respondent**

**-and-**

**THE NATIONAL ARCHIVES**

**Additional Party**

**Representation:**

For the Appellant:

In person

For the Respondent:

Mr James Cornwell, Counsel

For the Additional Party:

Mr James Eadie, Counsel

*The parties are referred to in this determination as the Appellant, the Commissioner, and TNA, respectively.*

## **DECISION**

The Tribunal allows the appeal. The Decision Notice was not in accordance with the law, and TNA was not relieved from complying with the Appellant's request on the basis of sections 12 or 14 of the Freedom of Information Act 2000 (the "Act").

The Tribunal also finds that TNA was in breach of sections 10, 16 and 17 of the Act. However, the Tribunal does not issue a substituted decision notice, and, for the reasons set out in paragraphs 96 and 97, it does not require any steps to be undertaken by TNA.

## **REASONS FOR DECISION**

### **Introduction**

1. This is an appeal by the Appellant, against a Decision Notice issued by the Information Commissioner ("the Commissioner"), and dated 17 October 2006. The Decision Notice relates to a request for information made by the Appellant to TNA.
2. TNA is a government department and executive agency of the Ministry of Justice. It is the official archive for England, Wales and the United Kingdom and brings together the former Public Record Office, Historical Manuscripts Commission, the Office of Public Sector Information and Her Majesty's Stationery Office. It administers the public records system under the Public Records Acts of 1958 and 1967.

### **The Request for Information**

3. The information requested by the Appellant was set out in his email of 12 May 2005 to TNA in the following terms:  
  
*"I would wish to apply under freedom of information for any information in the areas and on the grounds as set out in the attached letter to Buckingham Palace held by the National archives in relation to the Princess Margaret Townsend Affair; and or any illegitimate child born on or about 05/01/55 to Princess Margaret".*
4. The letter to Buckingham Palace attached to the Appellant's request is dated 8 May 2005. In that letter, the Appellant makes a similar request in respect of records held by Buckingham Palace, Clarence House, Windsor Castle and other "centre of records" under the control of the Royal Household. The letter goes on to explain that he is making the

request on the grounds that he is claiming to be the illegitimate child of Princess Margaret.

5. TNA sent an automated reply on 12 May 2005. On 2 June 2005, they sent the Appellant an email, the key paragraph of which reads as follows:

*“Your letters to us and to the Privy Council and Buckingham Palace do not, in themselves, provide evidence to substantiate your claim. In the absence of this, and in the absence of further documentation that would back your claim, we cannot agree to carry out a search for records that may not exist, whether or not they are at present in the public domain.”*

6. On the same day, the Appellant replied by email, stating, *inter alia*:

*“If I had sufficient evidence to substantiate a claim I would not find myself in the frustrating position of having to search all possible archives including those abroad.*

*I do not understand your reference to records that may not exist.*

*Would it be possible to speak briefly at the telephone so I may better understand what is being said?”*

7. It appears that a telephone discussion then took place. On 3 June 2005, the Appellant sent a further email to TNA, referring to their telephone discussion, and stating, *inter alia*, :

*“I would surmise that any records of real pertinence to my search are likely to be closed.....*

*Is there no list of closed records maintained by yourselves with some sort of summary as to the content and dates, for the purposes of the statutory review? I would be very grateful for access to such a record if it exists. I believe it would be a great help in trying to resolve this issue”.*

8. Precisely what happened subsequently is not entirely clear, and certain facts are in dispute. Broadly however, it appears that the Appellant submitted a number of requests by reference to specific file numbers from TNA's online catalogue. Between 12 May and 9 August 2005, the Appellant made 637 requests on “grounds previously stated”.

9. A few of the Appellant's requests related to “open” records, ie, records which were open for public inspection. In respect of these, he went to TNA's offices in Kew to inspect the files himself. Other requests related to “closed” records which were not open to the public. Some of these were held by other government departments (albeit listed on TNA's on-line catalogue); about 350 were held by TNA.

10. On 18 July 2005, TNA wrote to the Appellant offering to deal with his request in stages, at the rate of 50 requests per month. The Appellant agreed to the arrangement “*for the time being*”. However, it seems that the parties had a different understanding of the nature of the review TNA would carry out in respect of those 50 requests. TNA’s intention was to conduct a “Relevance Review”, whereas the Appellant wanted it to conduct an “Access Review” (these terms will be explained further in paragraphs 26 and 27 below). When this came to light, TNA said that it would conduct 50 Relevance Reviews or 15 Access Reviews per month, at the Appellant’s option. Numerous e mails then passed between the parties. TNA maintains that a decision from the Appellant was not forthcoming. In November 2005, the Appellant withdrew his agreement for the requests to be dealt with in stages, as he felt that TNA had not kept to the arrangement. He asked for all his requests to be dealt with immediately. He sent TNA an email on 23 November 2005 to this effect, in which he stated:

*“However to facilitate, for clarity, for the avoidance of further “misunderstandings”, for simplicity, and to try and achieve a more formal basis for compliance I suggest that we return to statute as a basis for continuation. I therefore ask that all requested files be considered strictly within the provisions of the Freedom of Information Act, and withdraw my voluntary and without acceptance for your convenience of staged consideration.”*

11. The Appellant then also made a formal complaint to TNA.
12. On 21 December 2005, TNA wrote to the Appellant stating that they were not obliged to respond further to his requests. They relied on section 12 of the Act (exemption where cost of compliance exceeds appropriate limit), and section 14 (repeated requests).

### **The Complaint to the Information Commissioner**

13. On 6 September 2005, the Appellant made a complaint to the Commissioner about the way in which his requests for information were being handled by TNA. His complaints were largely about TNA’s delays in responding to his requests, lack of clarity about the information on their website, and the large number of files for which no descriptions were available. The Commissioner sent him a standard acknowledgement on 8 November 2005, enclosing information on how to make a complaint. The Commissioner says that at that time, the nature of the Appellant’s application to the Commissioner under section 50 of the Act was not clear.
14. On 18 August 2006, the Commissioner wrote to the Appellant apologising for the length of time that it had taken to deal with his case, and stating that it would now be progressing the investigation. The Commissioner also stated that although the Appellant’s initial complaint had been submitted on 6 September 2005, he intended to concentrate his investigation on TNA’s refusal notice of 21 December 2005. (We

will comment further on the delays by the Commissioner in paragraph 94 below).

15. The Commissioner then undertook inquiries, following which he reached the following findings which are set out at paragraphs 26 to 31 of the Decision Notice:

*“TNA stated that from their experience of processing much of the initial 50 requests, they estimated that the cost of complying with the request would be over £600. The Commissioner is satisfied with this estimation.*

*The Commissioner is further satisfied that TNA provided reasonable advice and assistance to the complainant to enable them to handle his initial requests within the fees limit of £600.*

*The complainant requested a large number of files “on the grounds previously stated”. TNA considered that these subsequent requests all relate to information similar to that in his initial request for 50 files. Having reviewed the schedule of requests made by the complainant, the Commissioner agrees with this interpretation. As all these requests were submitted within a space of 60 consecutive working days, the Commissioner also believes that TNA was entitled to aggregate these requests as provided for in regulation 5 of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.*

*In view of the volume of information requested and because the complainant would not limit the scope of his request, the Commissioner agrees that it was appropriate to apply the cost limit and concludes that TNA were legitimately able to cease to process his requests.*

*Section 14(2) of the Act states that 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.*

*TNA also applied section 14(2) in relation to the complainant’s subsequent requests. The Commissioner agrees that section 14(2) has been correctly applied in relation to the complainant’s requests beyond the initial application for 50 files, which he considers to have been handled by TNA in accordance with the Act.”*

16. The Commissioner concluded that TNA had dealt with the request in accordance with Part I of the Act. The Decision Notice makes no reference to sections 10 or 17 of the Act.

### **The Appeal to the Tribunal**

17. By a Notice of Appeal dated 15 November 2006, the Appellant appealed to the Tribunal against the Decision Notice. The grounds of

appeal allege a number of failures on the part of the Commissioner including, *inter alia*, a failure to act sufficiently impartially, a failure to give due consideration to the facts, and a failure to determine the accuracy of the assertions by TNA.

18. On 7 February 2007, the Appellant submitted a “Particularised Statement of Claim” comprising some 6 pages. In brief, he says that:
- Had descriptors been provided, he could have reduced his application to less than 30 records. This approach was successfully adopted by the Foreign Office in respect of a list of 130 records which was reduced to 14 by provision of descriptors;
  - The Commissioner failed to consider most of the procedural aspects of his complaint about the TNA; including in particular, delays, and failure of TNA to provide progress reports and timelines.
  - Delays on the part of the Commissioner were unreasonable – the initial application took approximately 12 months to initial adjudication:
  - TNA had failed to inform him at the time of application, directly or through its website, as to its resource restrictions, ability to aggregate requests, and options available to him to refine or re-order his request;
  - The Tribunal and Commissioner had an obligation and power to consider and adjudicate on procedural matters, and there was an obligation to promote good practice and enforce codes of conduct;
  - The cost of locating the information requested in specific records selected is minimal. By virtue of an indexed system, record locations are presumed known to TNA. The cost of retrieving them is part of the day to day business of the TNA;
  - Since TNA provides a limit of 50 records a month to researchers, the same facilities should be offered to him;
  - Individual records cannot be described as identical or substantially similar for the purposes of section 14(2) of the Act;
  - His global application was refused by TNA who invited him to apply on a record by record basis from the catalogue; and
  - The Commissioner’s Decision Notice fails fairly to consider the claims of the parties or to question the accuracy of the allegations of TNA despite being on notice from him as to errors of fact, and instead simply reiterates the position of TNA.

## **Evidence and Submissions**

19. We have considered all the documents received from the parties, even if not specifically referred to in this determination, including in particular the documents in the eight lever arch files marked ICO 1 & 2, PRO 1, 2 & 3, Appeal Documents, Evidence, Joint Bundle of Authorities, the separate bundle submitted at the hearing labelled "Appellant's Authorities", and the parties' written submissions and replies.
20. There was only one witness who it had been indicated would be giving oral evidence at the hearing, namely, Ms Jacqueline Shepherd, on behalf of TNA. She was examined, and cross-examined by the Commissioner and the Appellant. We also asked her a number of questions. Her evidence is summarised at paragraphs 22 to 46, below.
21. Prior to the hearing, the Appellant had informed the Tribunal that he would be happy to give evidence, although he had not submitted a witness statement. We indicated to him at the start of the hearing that there might well be some matters which he could clarify. The Commissioner and TNA confirmed that they had no objection to the Appellant giving oral evidence, notwithstanding the absence of a witness statement. On conclusion of Ms Shepherd's evidence, we invited the Appellant to answer some questions. He was cross examined by the other parties. The evidence given by the Appellant at the hearing is summarised at paragraphs 47 to 52 below.

### **Ms. Shepherd's Evidence**

22. She is employed by TNA as the Freedom of Information Manager. She has held this position since August 2004. She is responsible for the overall freedom of information service management at TNA and deals specifically with complex cases. She has been involved in the management of the Appellant's enquiries from the outset.
23. TNA's records are either "open" or "closed". Closed records are not publicly available because, prior to the implementation of the Freedom of Information Act in 2005, they were closed under the Public Record Act 1958, and have not yet been cleared to show that no exemptions under the Act apply. Open records are those already open to the public, which people can inspect by visiting TNA, or they can order a copy of the document. In the case of a closed record, a member of the public can ask for a review of the document as described in paragraphs 25 to 27, below.
24. TNA maintains an online catalogue which is a data-base of record references, often with a summary description of the record, although in some cases, where the record is closed, the descriptors may also be closed. This occurs when, at the time of the record's transfer to TNA by the originating government department, it was determined that along with the record itself, the descriptors should not be made public, because it reveals information contained within the closed record. The

decision to designate a record or description as closed was made prior to the Act coming into force. Prior to the Act coming into force, TNA held 285,000 closed records. Some 50,000 were opened in 2005. It is not practical to go through each record to consider whether it contains anything that would be exempt under the Act. Instead, the closed records are reviewed for release when the original closure period expires (usually after 30 years), or when an Access Request is made under the Act. In either case, if it is found that no exemptions are relevant, then the record is opened, and is available for public inspection in the usual way.

25. For closed records, individuals using the online catalogue can request a review of the document. The review can be either (1) an Access Review; or (2) a Relevance Review.
26. A request for an Access Review is a request for access to the whole record or parts of it. This requires TNA to scrutinise the record and determine whether any exemptions under the Act may apply. TNA writes a report on the exemptions that might apply. TNA then has a duty, under s.66 of the Freedom of Information Act, to consult with the government department from whom the record originated and provide them with access to the material in question. Where a public interest test is applicable, it is conducted by the originating department. Once a decision is made, TNA notifies the applicant.
27. A Relevance Review involves researching individual records to establish whether or not they contain specific information e.g. to determine whether or not they contain information about Princess Margaret or Group Captain Townsend. This is a relatively straightforward way of establishing whether or not there is any information in a particular record that comes within the terms of a specific request. An Access Review, where the information is considered against the exemptions under the Act, is a significantly bigger task than a Relevance Review.
28. Each record on the online catalogue has a code which indicates the originating government department. Sometimes, the code contains a date and sometimes it does not.
29. Between 12 May and 9 August 2005, the Appellant made some 637 requests, many asking for a review of individual closed records or closed descriptors referred to in TNA's online catalogue. His requests were in relation to records created by the following government departments: Cabinet Office, Home Office, Privy Council, General Register Office, Prime Minister's Office, Foreign and Commonwealth Office, Ministry of Defence, and the Attorney General's Office.
30. Of the total number of records and descriptors cited by the Appellant in his requests, about 350 requests were in relation to closed records or descriptors held by TNA. Of the rest:



- some 255 were held by the originating government department, retained by them under s.3(4) of the Public Record Act 1958. Although they appear on TNA's online catalogue, they are not physically held by TNA. At that time, the catalogue did not specify that they were held elsewhere. Now, TNA's online catalogue provides a link to relevant department's websites;
  - 4 were already open to the public;
  - 19 were duplicates of his previous enquiries; and
  - a small number were general enquiries about TNA systems and processes. Most of these evolved into longer discussions as opposed to specific requests for information and these were handled outside of the freedom of information service.
31. As regards the time required by TNA to conduct reviews of closed records:
- the process of determining whether or not TNA holds certain information within a record involves a page by page scrutiny. Each record may contain between 1 - 15 individual files of varying sizes. On average, these records would take between 30 minutes to 1 hour to determine whether TNA holds the information. In some cases it would take much longer;
  - the process of locating the record is generally straightforward as TNA holds an electronic database of all record locations, which allows staff to order that a particular record be produced. This would take around 5 minutes per record;
  - TNA is housed in a large building containing in excess of 10 million records housed on over 180 km of shelving. The organisational target production time for retrieving a record is 30 minutes; and
  - The time taken for extracting/redacting information within a record varies greatly on a case-by-case basis, taking into account to extent and complexity of the requirement and the size of the record. However the organisational target time per Freedom of Information request to complete redaction work is 2 working days.
32. The number of requests made by the Appellant was putting a strain on TNA's resources. On 18 July 2005, TNA offered to deal with the records he had requested in stages, and suggested he should select 50 records per month. The Appellant agreed to this proposal and TNA proceeded on the basis that the information he was looking for was any information relating to Princess Margaret, Group Captain Townsend, and any issues relating to illegitimacy and succession to the throne.
33. Initially, when the Appellant requested any records to be reviewed, TNA conducted Relevance Reviews. Of the initial 50 records reviewed,

few contained anything of relevance. If they did, Access Reviews were undertaken. If they did not, the Appellant was informed. He responded that he considered that the agreement was that all records should be fully reviewed, i.e., that TNA should carry out an Access Review, (although these terms were not used), regardless of content, on the basis that they "might be pertinent to my wider researches".

34. TNA wrote to the Appellant on the 18 August 2005. It explained that it was likely that the majority of the records he had requested would not contain any information on his topic of interest, and that it had to keep the staff time spent on his requests at a level that would not disrupt the service to other enquirers. It offered him two alternatives: either Relevance Reviews in batches of 50 records per month, or Access Reviews of 15 records per month. Although the Appellant initially responded saying he would consider these options, in TNA's view, a clear decision from him was not forthcoming.
35. Subsequently, the Appellant wrote a number of emails to TNA, suggesting he was still expecting 50 files per month to be fully reviewed. TNA replied, explaining that they were waiting for his decision in response to the email of 18 August 2005 and could not progress his enquiry until he had advised them of his preferred course of action. On 22 November 2005, in a telephone discussion with TNA, the Appellant withdrew any agreement to process the records in a managed fashion and instead requested that they all be dealt with immediately. He then confirmed this in writing.
36. TNA considers that it attempted to come to a mutually acceptable arrangement with the Appellant for processing his requests, even though this was beyond its obligations under the Act. This was not successful since he did not feel able to refine or limit the scope of his request in a way that would have allowed it to process the requests within the limitations of its resources. On 21 December 2005, TNA wrote to the Appellant and advised him it would not continue to process his requests.
37. Ms. Shepherd clarified a number of matters at the hearing:
38. TNA holds the file titles for all closed files. Some of the file titles are held on a data base to which TNA staff have access so it is quite quick to search for those file titles.
39. If a Relevance Review is conducted and any relevant material is found, TNA must then still conduct an Access Review to see whether that record can be opened and that information provided to the applicant.
40. In response to the Appellant's questions, Ms. Shepherd confirmed that if the request had been split and made in smaller batches, 60 or more days apart, that might have removed TNA's objections under section 12. She also confirmed that there was nothing on TNA's website to explain the difference between Relevance Reviews and Access

Reviews. As to whether TNA had ever written to the Appellant to explain to him how better to structure his request, Ms. Shepherd says that this information is provided in various parts of the TNA's website. She confirmed, however, that there was nothing on the website to explain that if the request was too large, TNA might need to restrict the request in some way. As to whether TNA accepts that the process of meeting the Appellant's requests could have been speeded up if file descriptors had been provided, Ms. Shepherd said that some descriptors had in fact been provided.

41. Ms. Shepherd accepted that TNA's assertion that it had responded to 184 of the Appellant's enquiries did not actually mean that 184 requests were dealt with by conducting Access Reviews or Relevance Reviews. The figure of 184 included other responses, such as finding that the files were duplicates, as well as informing the Appellant that the records were retained by another government department.
42. She was not able to say exactly how many Access Reviews or Relevance Reviews were conducted, nor how much time was spent in dealing with his requests, but she thinks that possibly 62 Relevance Reviews were conducted. As to whether the Appellant had asked for Access Reviews or Relevance Reviews when he had agreed to the requests being dealt with in batches of 50, she says that this had not been specified, but on the basis that he was asking for particular information, TNA understood his requests to be for Relevance Reviews. At first, Ms. Shepherd was not able to indicate the number of file descriptors that the TNA had actually provided to the Appellant, but after being given an opportunity overnight to ascertain this, she said, that she thought that the Appellant had requested 150 descriptors of which TNA had provided 15. As to why the entire list of descriptors were not sent to the relevant government departments in one go, to see whether they would be prepared to disclose them, Ms. Shepherd said that this was done as the Appellant's requests came in.
43. In response to questions from the panel, Ms. Shepherd agreed that TNA's response of 2 June 2005 was inappropriate. As to why TNA had refused to deal with the Appellant's request at that stage, Ms. Shepherd said that in fact, before replying to the Appellant, TNA undertook a search of its catalogue against the three obvious terms (Princess Margaret, Townshend, illegitimate child). She had no record of precisely what was done, but says that the search terms used individually would have resulted in thousands of "hits", but that linking the search terms would not have produced any hits. She could not explain why the Appellant was not informed that a search was undertaken. As to whether the search terms could have been usefully narrowed, she says that at the time, for the most part, searches could only be conducted against descriptors and that these are usually simply titles, although some may contain a summary of contents. Since June 2006, TNA has had the facility to also search against content in most cases. As to whether the Appellant was given assistance to help to

narrow the search terms, she said that assistance had been given in the telephone conversation that had taken place between TNA and the Appellant following the refusal of his request.

44. In re-examination, Ms. Shepherd says that even where the Appellant was provided with descriptors which did not indicate that the records would be relevant, the Appellant still asked for the records in question to be reviewed. Also, where TNA notified the Appellant that the record did not contain anything of relevance, he would still ask for an Access Review to be conducted.
45. As to the costs for the purpose of section 12, in conducting a Relevance Review, Ms. Shepherd confirmed that identifying the record and locating the record are both very quick processes. However, retrieving the record can take up to 30 minutes. TNA then has to update its data base to show which staff member has the file. The file is then delivered to a special room. Each page then has to be reviewed to be certain that it does not contain information of relevance.
46. As to whether there were any records in respect of which exemptions under the Act were claimed, Ms. Shepherd was not sure, except for one which involved personal data and was therefore exempt under section 40 of the Act.

#### The Appellant's Evidence

47. The Appellant says that after his initial request was refused, he was left to do his own research of the online catalogue, although when he asked for advice from the TNA by phone, they did provide it. He says that he presented his requests in stages because identifying records that might be of interest involved a huge amount of work, and that he is not an expert in such matters.
48. He understood that TNA had resource constraints and this is why he agreed that they could respond at the rate of 50 requests per month. He was not made aware that TNA could impose restrictions on how many requests he could make. TNA had never alerted him to the cost limit under section 12. Their letter of 21 December 2005 therefore came as a shock.
49. He could have reduced the number of his requests significantly had he been provided with descriptors. This is precisely what happened when he made requests from other government departments. He has had no difficulty obtaining descriptors from other government departments. He was provided with very few descriptors by TNA. He is not sure of the exact number, but thinks it was between 13 to 15. It is incorrect to say that where the descriptor was of no interest, he still asked TNA to review the record.
50. When TNA said that they would review only 50 records a month, he accepted only reluctantly. He would have preferred that the records be

opened. TNA had not explained that there were two types of reviews, namely a Relevance Review and an Access Review and that only an Access Review was a review as to whether the record could be opened.

51. In his view, TNA ought to provide clear information from the outset about how complex queries are dealt with. They should have explained the difference between an Access Review and a Relevance Review. They should also have made descriptors available and should have kept him better informed. Had he been properly informed from the outset, he would have split his requests and submitted them in smaller numbers, 60 days apart. When he made a request for information to the Foreign Office, he was already aware of the £600 limit and was able to have discussions with them about how many requests they could deal with and was able to submit his requests accordingly. He should have had the same opportunity with TNA.
52. The Appellant accepts that he did call a halt to the staged approach. He felt TNA had not complied with the agreement. He wanted the files to be opened and TNA were now proposing to do this at the rate of only 15 files per month. This would have taken years.

#### **Questions for the Tribunal and the Tribunal's Jurisdiction**

53. The scope of the Tribunal's jurisdiction in dealing with an appeal from a Decision Notice is set out in section 58(1) of the Act. If the Tribunal considers that the notice is not in accordance with the law, or to the extent the notice involved an exercise of discretion by the Commissioner, the Tribunal considers that he ought to have exercised the discretion differently; the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
54. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, the Tribunal will often receive evidence that was not before the Commissioner.
55. At a directions hearing on 27 February 2007, the parties agreed that the questions for the Tribunal were as follows:
  - (a) *Did TNA properly apply section 12 of the Act, because, in particular:*
    - (i) *TNA was not entitled to aggregate the Appellant's requests;*
    - (ii) *TNA was not entitled to rely on section 12 retrospectively after it had started processing the Appellant's requests; and*
    - (iii) *TNA incorrectly took account of certain costs in determining*

*whether the appropriate limit would be exceeded (eg. costs of locating and retrieving information, costs connected with exempt material, costs of labelling “no description” files)?*

*(b) Could TNA rely upon section 14(2) of the Act, because, in particular:*

*(i) the individual files requested were not identical or substantially similar; and*

*(ii) TNA had not complied with the Appellant’s request in relation to the first 50 files?*

*(c) Did TNA provide advice and assistance as required by section 16 of the Act, because, in particular:*

*(i) TNA failed to provide progress reports;*

*(ii) TNA failed to assist the Appellant to narrow his requests; and*

*(iii) TNA did not provide file descriptors?*

*(d) Did TNA fail to comply with sections 10(1) and/or 17 of the Act by failing to provide the requested information and/or a refusal notice within 20 working days of the Appellant’s requests?*

56. The Appellant also said that he wished to raise issues relating to various procedural failings on the part of the TNA and the Commissioner, in particular, in relation to:

*“Delay ICO*

*A lack of robust accurate sufficient consideration and decision making by the ICO*

*Unreasonable delay by the TNA in making the public interest consideration*

*Record keeping TNA*

*Fair allocation of resources”*

It was clear that he was raising similar issues to those set out in his Particularised Statement of Claim (see paragraph 18, above).

57. Following written submissions from the parties, the Tribunal issued a Ruling dated 2 April 2007 as to the scope of its jurisdiction to deal with procedural failings on the part of a public authority or the Commissioner. The Appellant’s submissions and the authorities he provided indicated that he believed the Tribunal’s jurisdiction to be that of or akin to that of a Court on an application for judicial review. That is not the case; the Tribunal is a statutory tribunal and the scope of its jurisdiction is specified and limited by statute. Where procedural failings of a public authority constitute a breach of its obligations under Part 1 of the Act, for example, under section 10 (time of compliance with a

request), or section 16 (duty to provide assistance and advice), these are failings over which the Tribunal has jurisdiction. However, the Tribunal's jurisdiction does not extend to other procedural failings not covered by the Act, albeit that the Tribunal may consider it appropriate, sometimes, to make observations or recommendations in relation to such failings.

### **Findings**

58. As the facts set out above show, there were in fact two requests for information by the Appellant and two corresponding refusals by TNA. The first request was that contained in the Appellant's e mail of 12 May 2005. This was a request for information "*held by the National archives in relation to the Princess Margaret Townsend Affair; and or any illegitimate child born on or about 05/01/55 to Princess Margaret*" ("the Global Request"). TNA refused this request on 2 June 2005, in the following terms:

*"Your letters to us and to the Privy Council and Buckingham Palace do not, in themselves, provide evidence to substantiate your claim. In the absence of this, and in the absence of further documentation that would back your claim, we cannot agree to carry out a search for records that may not exist, whether or not they are at present in the public domain."*

59. The Tribunal has not been asked to make a finding as to whether TNA's refusal of the Appellant's Global Request, put it in breach of its obligations under section 1(1). This was not an issue addressed by the Commissioner in his Decision Notice, and it does not form part of the Grounds of Appeal.
60. However, we feel obliged to say that TNA's refusal of 2 June 2005 betrays a worrying lack of understanding, at that time at least, of the obligations of a public authority under the Act. This is all the more surprising given Ms Shepherd's evidence (at paragraph 7 of her witness statement), that TNA recognised, following the implementation of the Act, that there would be a lot of interest in the millions of closed records that they hold. We also note that TNA had a Freedom of Information Manager since August 2004.
61. TNA has now accepted (albeit only at the hearing, and only in response to concerns from the Panel), that its response to the Global Request was completely inappropriate in light of its obligations under section 1(1) of the Act. TNA's view as to the lack of evidence that the Appellant is the illegitimate child of Princess Margaret was not a ground on which his request could be refused. That is even leaving aside the principle that requests under the Act must be dealt in a way that is motive-blind. The contents of TNA's e mail must give some justification to the Appellant's apprehension that TNA refused his request because it had taken the view that his request was for a purpose that was not well-founded.

62. We note that Ms Shepherd's evidence is that although TNA told the Appellant that they would not deal with his Global Request, it did in fact carry out a preliminary search using key terms. We find it is surprising that TNA did not mention this in its letter to the Appellant. No explanation has been given for this. In any event, the fact that any such search may have been carried out does not justify TNA's refusal.
63. We turn now to the second refusal. The Appellant says that because TNA had refused his Global Request, he set about trying to identify, from TNA's online catalogue, which closed records might be relevant to his search. It appears that he did this by considering the originating government department, the date of the record, and the descriptors where this information was available on the online catalogue. He then put forward, over several weeks, a number of individual requests, for the same information as the Global Request, but in relation to specific codes for records or descriptors, which he obtained from TNA's online catalogue. TNA says that between 12 May and 9 August 2005, the Appellant made some 637 requests.
64. On 21 December 2005, after having responded to a number of the Appellant's individual requests, TNA issued a letter refusing to process the Appellant's requests.
65. Under section 1(1) of the Act, any person making a request for information to a public authority is entitled to be informed if the public authority holds that information and if so, to have that information communicated to him. This obligation on the part of a public authority is subject only to sections 2, 9, 12 and 14 of the Act. In other words, TNA's refusals of the Appellant's requests can only be lawful if sections 2, 9, 12 or 14 apply. In support of its refusal, TNA has relied on the grounds contained in sections 12 and 14. The arguments have focused on section 12 as the key provision in this appeal, so we will address that first.

### Section 12

66. Section 12 does not provide an exemption as such. Its effect is to render inapplicable the general right of access to information contained in section 1(1), if a public authority estimates that the cost of complying with the request would exceed the appropriate limit. The first question before us, therefore, is whether section 12 relieved TNA of its obligation to comply with the Appellant's requests.
67. Section 12 provides as follows:
- (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.*

68. The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Regulations"), prescribe the appropriate limits referred to in section 12. In the case of a public authority which is listed in Part 1 of Schedule 1 to the Act, the appropriate limit is £600. In the case of any other public authority, the appropriate limit is £450. All government departments are included in Part 1 of Schedule 1, so the appropriate limit in the present case is £600.

69. Regulations 4 and 5, to the extent that they are relevant to this appeal, provide as follows:

Regulation 4

*(1) This regulation has effect in any case in which a public authority proposes to estimate whether the cost of complying with a relevant request would exceed the appropriate limit.*

*(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in-*

*(a) determining whether it holds the information,*

*(b) locating the information, or a document which may contain the information,*

*(c) retrieving the information, or a document which may contain the information, and*

*(d) extracting the information from a document containing it.*

*(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.*

**Regulation 5**

*(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 circumstance 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.*

70. Since the time cost is to be estimated at the rate of £25 per person per hour, this allows for 24 hours of time before the £600 limit is reached. The Regulations are not concerned with the actual time cost incurred by the public authority; they simply provide a notional rate for calculating the time cost for the purposes of section 12. However, a public authority is only entitled to take into account the time spent on those activities set out in Regulation 4(3).

71. A public authority does not of course have to rely on section 12; it is free to comply with a request even if it estimates that the cost of doing so will exceed the appropriate limit. If it does rely on section 12, it is not required to make a precise calculation of the time costs of complying with the request. What is required is simply an estimate. We take it as implied, however, that the estimate must be arrived at on a reasonable basis. This was also the view expressed by a differently constituted Tribunal in **Urmenyi v The Information Commissioner EA/2006/0093**, at paragraph 16. If that were not so, a public authority

could make its estimate on an unreasonable basis and still invoke section 12. We consider that that could not have been Parliament's intention in enacting section 12.

72. There are several issues that arise in relation to the application of section 12 on the facts of the present case. Key amongst these has to do with the relationship between sections 12 and 16.

73. Section 16 provides as follows:

*(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.*

74. A code of practice ("the Code") has been issued by the Secretary of State under section 45 of the Act. Pursuant to section 16(2) of the Act, where a public authority has complied with the Code, they will be taken to have complied with section 16 (although it does not of course follow that failure to comply with the Code means that the public authority is in breach of section 16).

75. The Code provides, in paragraph 14, that:

*"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. the cost threshold) the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling."*

76. We consider that in this case, like in many others, section 12 cannot be regarded independently of section 16. This is a view which we indicated to the parties at the hearing, and indeed, TNA expressly accepted in its submissions that sections 12 and 16 must be viewed together. We consider that before the Tribunal can find that a given public authority is not obliged to comply with a request for information because it estimates that the cost of doing so would exceed the appropriate limit, it may need to consider whether, with assistance and advice that it would have been reasonable for the public authority to provide pursuant to section 16, the applicant could have narrowed, or re-defined his request such that it could be dealt with without exceeding the cost limits in section 12. If so, it may mean that the public authority's estimate that the cost of complying with the request would exceed the appropriate limit has not been made on a reasonable basis. To hold otherwise could allow section 12 to be used in a way that significantly undermines the effect of section 16.

77. One way in which an applicant, in some cases, may be able to narrow or re-define his request to come within the cost limit, is to split up the request and to present it in phases. Under Regulation 5(2)(b), requests for the same or similar information may only be aggregated for the purposes of the section 12 cost limit where the requests are received by the public authority within a period of 60 consecutive working days. In our view, one of the intentions of this provision is to allow for the phasing of a request as a means of striking a balance between enabling an applicant to have his request met on the one hand, and not allowing one applicant's request to over-burden a public authority on the other.
78. The duty on a public authority to provide assistance and advice under section 16 is expressly qualified by the words "*only in so far as it would be reasonable to expect the authority to do so*". It is clear from this that the advice and assistance that it would be reasonable to expect depends on the particular public authority in question. The issue is about what is reasonable for "*the*" public authority in question to do. Unlike most other public authorities, searches are a core function of TNA. We find that it would have been clear to TNA, from the outset of the Appellant's individual requests, and particularly given the background of the Global Request and the telephone discussions between them in June 2005, that the Appellant would be making numerous individual requests, which, by their nature, were going to involve searching through a large number of records. We also find that it would have been clear to TNA that this would exceed the section 12 cost limits.
79. The Appellant's requests were demanding, but primarily in terms of the number of records that would have to be searched. The task lent itself, quite obviously and logically, to being dealt with in phases, each phase being subject to the section 12 cost limit. In these circumstances, we find that it would have been reasonable to expect TNA to advise the Appellant to phase his request in intervals of more than 60 days, and to assist him to do so in a manner that was logical, took account of his priorities and the nature of the searches that TNA could offer, as well as TNA's knowledge of the time that would be involved. We find that its failure to do so means that its estimate under section 12, made on the basis of the request just as originally presented, and not on the basis of the request as it may have been phased (or otherwise narrowed or re-defined), was not an estimate made on a reasonable basis. We find that TNA cannot rely on that estimate to relieve it of its obligation to comply with the Appellant's requests.
80. It appears that TNA gave no consideration to section 12 when it received the Appellant's requests. It is only some time after its arrangement with the Appellant that it would deal with 50 requests per month fell apart (which we find was primarily because TNA had not explained the type of review that it would carry out), that it invoked section 12 and notified the Appellant that it would not continue to

process his requests. Up to that point, there is nothing in TNA's communications to the Appellant to suggest that his request would be subject to the section 12 constraints. There is also no evidence from TNA to indicate that there was anything on its website in this regard, and we note that the Appellant asserts that there was not. It seems likely that TNA only became alive to the possibility of relying on section 12 much later, after it reached a stage when it found the correspondence that was being generated, and the difficulty in reaching agreement with the Appellant, to be unmanageable.

81. We have been referred to the Tribunal's decision in **Quinn v Information Commissioner and the Home Office, EA/2006/0010**, for the proposition that a public authority can rely on section 12 partway through a search. However, the present case does not turn on that issue. The issue in this case has to do with whether TNA can rely on section 12 in circumstances where, had they complied with their obligations under section 16, there may have been no basis to refuse the request under section 12.
82. We have not overlooked the considerable amount of time that TNA no doubt did spend in meeting a number of the Appellant's request (albeit that we do not have evidence before us as to how long they did spend), and in dealing with numerous related enquiries from him. We have also not overlooked the fact that TNA did in fact offer to deal with the Appellant's request in phases, even if not by reference to the section 12 cost limits. However, we consider that this does not mean that any breach of the Act by TNA is simply a technical matter. We find that the Appellant did not have any meaningful opportunity to present and have his individual requests dealt with in terms of his priorities, and the type of review he wanted, in the knowledge of the limits to which his requests would be subject. We also note that between May and December 2005, there would have been at least 3 opportunities to make use of the £600 limit. Furthermore, we consider that it was TNA's flawed approach to the requests that led to their refusal in December 2005, bringing all further requests to an end.

#### Section 14

83. As already noted, TNA has relied, in support of its refusal, on the grounds contained in sections 12 and 14 of the Act. Having addressed section 12, we now turn to deal with section 14.
84. Section 14 provides as follows:

#### *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.*

85. TNA relies on section 14(2) to assert that all the Appellant's individual requests were identical or substantially similar requests, and that therefore, it was not obliged to comply with them. In our view this misconstrues section 14(2). The Appellant's requests were for information about "*Princess Margaret Townsend Affair; and or any illegitimate child born on or about 05/01/55 to Princess Margaret*" from specific records. If TNA had complied with the request in relation to one specific record and the Appellant had then repeated the request for the information from the same record, section 14(2) would apply.
86. There is nothing on the evidence to suggest that except in rare cases, the content of different records would be identical or substantially similar. That being the case, we find that a request for information relating to the same subject from another record is not an identical or substantially similar request for the purposes of section 14(2). If it were, it would lead to the surprising result that applicants wishing to search for information about a particular subject in TNA's archives, could find themselves only able to make that request in relation to a single record. It would also lead to the anomalous result that TNA could not have invoked section 14(2) in respect of the Global Request since that was a single request (even though requiring a search of numerous records), but could invoke it in respect of the series of individual requests made by the Appellant to obtain the same information as the Global Request. Section 14(2) is not the safeguard against the burden of a large volume of requests. That safeguard is section 12 (albeit that in the present case, we find that TNA cannot rely on section 12).

#### Other issues

87. The appeal raises a number of other issues, in relation *inter alia* to section 10, 12, 16 and 17. Given the above findings, some of these issues are likely now to be of only peripheral relevance. There are certain issues, however, that may merit being addressed, at least briefly.

#### Section 10 – time for compliance with requests

88. The Appellant says that there were a number of instances when TNA did not comply with his individual requests within the time period required by section 10(1).
89. A review of the evidence shows that is clearly the case. This is even allowing for the fact that pursuant to The Freedom of Information (Time for Compliance) Regulations 2004, made under section 10(4) of the Act, where the information is contained in a transferred public record and has not been designated as open information for the purposes of section 66 of the Act, the time for compliance is 30 days rather than 20.

90. We find that TNA is in breach of section 10(1). Indeed, we note that the Commissioner acknowledged at the hearing that the Decision Notice is defective in not finding TNA to have been in breach of section 10(1).

#### Section 17 – refusal of request

91. The Appellant says that TNA is in breach of section 17(5). This provides as follows:

*(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.*

92. As already noted, the time for complying with section 1(1) is 20 days, or in the case of section 10(4), 30 days. TNA's notice in which it invoked sections 12 and 14 was its letter of 21 December 2005. This was outside the 20 day period by several months. Accordingly, we find that TNA was in breach of section 17(5).

#### Observations

93. The Tribunal is concerned that in considering the Appellant's application, the Commissioner seems to have undertaken his inquiries without any real rigour. He appears to have largely, if not entirely, simply accepted the facts and assertions put forward by TNA. We are also concerned that the Commissioner made no reference, in the Decision Notice, to TNA's refusal of the Global Request, nor considered whether that refusal was in breach of TNA's obligations under section 1(1). The Commissioner also made no reference to TNA's procedural failures under sections 10 and 17, notwithstanding that these issues were clearly raised by the Appellant, even in his complaint of 6 September 2005.
94. Although we are aware of, and have sympathy for, the backlog of work that the Commissioner was then experiencing, we do not agree that lack of clarity in the Appellant's complaint of 6 September 2005 was a justification for the Commissioner's failure to deal with it. We also note that there was a delay of almost ten months before the Commissioner initiated inquiries following TNA's refusal. In these circumstances, we consider that the Appellant's concerns about the Commissioner's delay in dealing with his application are well-founded.

#### Decision

95. For all the reasons set out above, we find that the Decision Notice against which the appeal is brought is not in accordance with the law. In particular we find that TNA:

- was in breach of sections 10(1), 16(1), and 17(5) of the Act; and

- was not relieved from complying with the Appellant's request on the basis of sections 12(1) or 14(2).
96. Although we allow this appeal, we do not require any steps to be taken by TNA. A considerable period of time has passed since TNA's refusal of 21 December 2005. We are not satisfied that there is anything resembling a clear or comprehensive list of which or how many individual requests were outstanding as at that date. The Appellant's evidence at the hearing also indicated that many of those requests have since been met by other government departments. Moreover, it is clear from the evidence that in many cases, the Appellant was simply making the best guess he could as to which records might be relevant. TNA has said that its online search functionality has been considerably improved since 2005. This may mean that the Appellant will no longer consider it necessary to have certain of his 2005 requests met.
97. In these circumstances, we consider that it would not be appropriate to require TNA to undertake any specific steps by reference to the requests made in 2005. The Appellant is of course free to submit a fresh request for information under the Act, which may include any previous individual requests which he still wishes to pursue. Any such request would of course be subject to all the provisions of the Act, including section 12.

**Signed**

**Date 2 October 2007**

**Anisa Dhanji**

**Deputy Chairman**