IN THE FIRST-TIER TRIBUNAL

GENERAL REGULATORY CHAMBER (INFORMATION RIGHTS)

EA/2015/0154

CRUELTY FREE INTERNATIONAL

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

Hearing

Held on 23 November 2015 at Field House

Before Marion Saunders and Judge Claire Taylor.

Date of Decision: 28 December 2015

Date of Promulgation: 29 December 2015

Decision

The appeal is unanimously dismissed for the reasons set out below. There are no further steps to be taken by the Public Authority.

Reasons

Background

1. Cruelty Free International[1] (CFI) campaigns against animal experiments.

2. The Home Office issues licences to universities and their staff in relation to procedures that are carried out on protected animals for scientific or educational purposes. Procedures that are regulated include administering anesthetics, humane killing of protected animals and removing organs and blood.

3. The licences are presently granted under the Animals (Scientific Procedures) Act 1986 ('ASPA') as amended by the ASPA Amendment Regulations 2012 (ASPA Regulations)[2]. There is a three-level licensing system for the person, the project and the place:

    a. a '**personal licence'** for those carrying out regulated procedures
    b. a '**project licence'** to cover the regulated procedures to be carried out
    c. an '**establishment licence**', specifiying where the work may be carried out.

4. An establishment licence holder ('ELH') is expected to have been or be trained in relevant ethical and legislative knowledge.[3]

5. ASPA was amended by the ASPA regulations. There are transitional provisions covering project licences that were in existence at the time the regulations came into force in 1 January 2013, such that CFI explains that the ELH's duties are covered by separate rules relating to projects before and after that date.

The Request

6. On 11 September 2014, the Appellant requested from the University of Bristol ('the University'), as a 'public authority' for the purposes of the Freedom of Information Act 2000 ('FOIA' or the 'Act'):

    "Would you please let us have, under section 1(1)(a) of the Freedom of Information Act 2000, the following information pertaining to animal experiments under the Animals (Scientific Procedures) Act 1986 [ASPA] at your establishment: the number of animals used in scientific experiments in 2013, by (i) species, and (ii) purpose of research?"

7. On 2 October 2014, the University stated that it held the information but considered that compliance with the request would exceed the appropriate cost limit provided under s.12 FOIA such that it did not need to comply with the request.

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[1] Formerly British Union for the Abolition of Vivisection or BUAV.

[2] SI 2012/3039 regs 1(2), 2 and 6. (The background in this decision relates to the rules in England, Scotland and Wales.)

[3] Paragraphs 2 to 4 are derived from the *Guidance on the operation of The Animals (Scientific Procedures) Act 1986* produced by the Home Office in March 2014.

8. The Appellant progressed matters leading to an investigation by the Information Commissioner (the 'Commissioner'). He decided that the University was not obliged to provide the Appellant with the requested information because it would exceed the appropriate cost limit.[4] The reasoning in the Decision Notice included[5]:

    a. **Cost Estimate:** The way that the information was held meant that it would cost in excess of £450 to collate it, such that the University could properly rely on s.12 FOIA as a basis for refusal. This was because:

        i. No central record of the requested information was held such that it was not readily available. Therefore, the University would first need to contact each individual license holder and ask them to manually retrieve the relevant information from their licenses.

        ii. The University currently had approximately 60 license holders, and the figure would have been higher at the date of the request. The estimated 20 minutes for each license was a reasonable amount of time to check that the information was within the specified timeframe, to identify the number in species of animal and the purpose of the research. A previous Decision Notice[6] had found 20 to 30 minutes for each license to be a reasonable estimate, but in that case it was necessary to extract more information than presently.

        iii. Multiplying 20 minutes by 60 licenses, it would take a minimum of 20 hours to locate, retrieve and extract the requested information. This was in excess of £450.

    b. **Remit:** The Commissioner could only make a decision on whether the University was correct to apply section 12 for the request, and not whether the information should already have been collated and readily available under different legislation. It was not within the Commissioner's remit to assess the University's compliance with ASPA. Regardless of obligations under ASPA, if as a matter of fact, it would cost the University in excess of £450 to comply with the request, then it could rely on section 12 FOIA.

    c. **Requirements under ASPA:** The University had explained that the ASPA did not require it to hold the requested information in any particular format or require the University to ensure that the requested information was readily accessible. The University had explained that there was no requirement in any guidance to have the information readily collated and available at all times. Having noted that the ASPA Regulations required that records be maintained in a format acceptable to the Secretary of State and asked the University about this, the Commissioner understood that in the event of a request from the Secretary of State, the University would need to collate the required information from its existing locations with licence holders.

9. The Appellant now appeals this decision.

[4] Decision Notice Ref: FS50569289

[5] For ease of reference we have added our own titles in bold print and arranged the arguments accordingly.

[6] Decision Notice Ref. FS 50449254

The Task of the Tribunal

10. Our task is to consider whether the decision made by the Commissioner is in accordance with the law or whether any discretion he exercised should have been exercised differently. The Tribunal is independent of the Commissioner, and considers afresh the Appellant's complaint. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner. In this case, our remit is limited to considering whether the University has correctly applied s12 FOIA in dealing with the Appellant's request.

11. We received a Decision Notice, the Appellant's grounds of appeal, response and skeleton argument, and the Commissioner's responses and subsequent letter as well as a bundle of documents and authorities. We have reviewed all of these documents, even if not specifically referred to below.

12. The Appellant appeared before us at an oral hearing providing additional argument and a substantial file of authorities and other material relied upon which it was not possible to read during the hearing and therefore needed to be considered by the panel afterwards. The Commissioner did not attend the hearing. CFI made extensive arguments generally. We have aspired to capture the essence of these here, and gave in any event we have considered them all.

The Law

13. A person making a request of a public authority for information is generally entitled to be informed in writing whether it holds the information requested, unless exemptions or exclusions set out in the FOIA apply. If it holds the information, the public authority is generally required to disclose it subject to exemptions. *(See S.1(1)(a)and(b)FOIA).*

14. Section 12 FOIA provides:

> '*(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 is such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.*
>
> *…(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.****' (Emphasis Added.)*

15. Therefore, a public authority is not required to comply with a request for information under the FOIA if the authority estimates that the cost of complying would exceed the 'appropriate limit'.

16. The "appropriate limit" is set by the *Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004* ('FIDP' or 'the fee regulations'). Regulation 3 FIDP provides that for a public authority listed under Part 1 of Schedule 1 of the Act (which includes government departments), the 'appropriate limit' is £450 for public authorities such as the University. This is regarded as 18 hours of the public authority's time (*See Regulation 4 FIDP*).

17. In making its estimate, a public authority may only take account the costs it reasonably expects to incur in relation to the request in -

    (a) determining whether it holds the information,
    (b) locating it, or a document which may contain the information,
    (c) retrieving it, or a document which may contain the information, and
    (d) extracting it from a document containing it.

    (See regulation 4(3) FIDP).

18. A public authority does not have to make a precise calculation of the costs of complying with a request. Instead, only an estimate is required. However, we accept the guidance in *Randall v Information Commissioner EA/2007/0004* that it must be a reasonable estimate, which is *'sensible, realistic, and supported by cogent evidence*'.

19. A public authority does not have to rely on s.12 FOIA and may decide 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 s.12 of FOIA, it is not required to make a precise calculation of the cost of complying.

20. Past decisions of this Tribunal have found that the estimate the authority is entitled to make is based on the factual estimate made by the authority in relation to the state of the records as they are and not as they should be. See for instance, in *Ian Fitzsimmons v the ICO and DCMS* (Appeal No.: EA/2007/0124), paragraph 60:

    "*We have already raised our concerns over the lack of a proper system; however, as this is the system that operated at the relevant time, we do not consider that it could be unreasonable to work out the estimate on that basis*."

21. Section 13 enables a public authority to charge fees for supplying the requested information where section 12 applies:

    '(1) A public authority may charge for the communication of any information whose communication -

    (a) is not required by section 1(1) because the cost of complying with the request for information exceeds the amount which is the appropriate limit for the purposes of section 12(1) and (2), and

    (b) is not otherwise required by law,

    such fee as may be determined by the public authority in accordance with regulations made by the Secretary of State…'

The Issues

22. CFI has not sought to dispute the University's estimate that it would cost the University in excess of £450 to comply with the request, or raise any arguments in relation to the public authority's duty to comply and assist it under s16 FOIA and these matters are outside the scope of this appeal.

23. CFI's main arguments centre on around three subjects that it describes as the substantive legal, factual, and jurisdictional issues:

The substantive legal issue

a. In relying on s12 FOIA, a public authority cannot bring into account time spent in locating, retrieving and collating information to the extent that it should already have collated under a pre-existing legal obligation such as that under ASPA and the amendment regulations.

b. It asserted that the proper interpretation of s.12(1) is that it only applies where the steps needed to comply with s1(1)(b)FOIA (here, collation in order to disclose) properly arise for the first time because of the request. Similarly, a public authority does not 'reasonably' expect to incur costs in (inter alia) locating and retrieving information within regulation 4(3) of the fees regulation where it is in breach of a separate, pre-existing legal duty to locate and retrieve the information. An authority would otherwise benefit from its own breach of the pre-existing legal duty, in this case under ASPA and the amendment regulations.

The jurisdictional issue

c. The Commissioner erred by holding that it is not within his remit to assess whether the University was in compliance with ASPA.

The factual issue

d. The University should already have collated the information requested under a pre-existing legal obligation, under ASPA or the amended ASPA. Accordingly, the Commissioner erred by holding that there was no obligation on the University to have collated the requested information.

The substantive legal issue

24. The Appellant's evidence and arguments include the following:

Witness statement

a. Dr Katy Taylor testified that:

   i. There is culture of secrecy around animal experiments in this country, including at universities, and the Home Office.

   ii. The request was identical to that made of all universities in the UK, and the University is the only one, out of two originally, which still relies on s.12 FOIA.

Submissions

a. CFI maintained in submissions that the University should have already collated the information under its duties under ASPA, such that it could not take advantage of a breach of those duties. Were it to be able to do so, it would, be placed in an unfair and advantageous position over universities which have complied with their ASPA duties and disclosed the requested information. It would also give the green light to other universities that they could take advantage of a failure to comply with their ASPA duties. A

public authority could not invoke the protection afforded by section 12 and the fee regulations in relation to a request that was too expensive to fulfil by its own fault.

b. The principles of statutory interpretation were fluid and overlapped such regardless of the mode of interpretation, it was important to arrive at the correct interpretation. (In *R (Noone) v Governor of HMP Drake Hall*,[7] Lord Saville, said: '*I have no doubt that by one route or another the legislation must be construed so as to avoid what would otherwise produce irrational and indefensible results that Parliament could not have intended.*')

c. A Purposive Construction of section 12:

   i. Legislation had to be interpreted in the context of what it is seeking to achieve. As a result, it may be necessary to prefer what is known as a 'strained' construction over the literal or grammatical meaning. It may also be necessary to imply words into legislation, for example to avoid the absurdity which would otherwise result. Lord Steyn stated in A-G's Reference (No 5 of 2002): [8]

      '*It is true, as Lord Bingham has pointed out, that the inclusion in section 17(2) of an offence under section 1(2) of the [Regulation of Investigatory Powers Act 2000] creates a linguistic difficulty given the language in which section 17(1) is expressed. In my view, however, this point is decisively outweighed by a purposive interpretation of the statute. No explanation for resorting to purposive interpretation of a statute is necessary. One can confidently assume that Parliament intends its legislation to be interpreted not in the way of a black letter lawyer, but in a meaningful and purposive way giving effect to the basic objectives of the legislation'. (Emphasis Added).*

   The purpose of the FOIA

   ii. The purpose of the FOIA is to create a right for members of the public to receive information held by public authorities, subject to a number of exemptions. The current *Call for Evidence* by the Independent Commission on Freedom of Information[9] summarised in its *Introduction* the objectives of FOIA:

      '*... The Act's intended objectives, on parliamentary introduction, were to: "transform the culture of Government from one of secrecy to one of openness"; "raise confidence in the processes of government, and enhance the quality of decision making by Government"; and to "secure a balance between the right to information…and the need for any organisation, including Government, to be able to formulate its collective policies in private".*

[7] [2010] UKSC 30

[8] [2004] UKHL 40, [2004] 2 All ER 901 at [31] http://www.bailii.org/uk/cases/UKHL/2004/40.html

[9] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/472007/ICFOI_call_for_evidence_paper_web281015.pdf (9 October 2015)

iii. FOIA enables informed debate which in turn leads to better decision-making. The right is not unqualified: it may have to give way to other interests in the carefully calibrated circumstances set out in the various exemptions, including section 12. A balance has to be struck. In *Kennedy v Charity Commission* [10] Lord Sumption, with whom Lord Neuberger and Lord Clarke agreed, said: [11]

'*The Freedom of Information Act 2000 was a landmark enactment of great constitutional significance for the United Kingdom. It introduced a new regime governing the disclosure of information held by public authorities. It created a prima facie right to the disclosure of all such information, save in so far as that right was qualified by the terms of the Act or the information in question was exempt. The qualifications and exemptions embody a careful balance between the public interest considerations militating for and against disclosure. The Act contains an administrative framework for striking that balance in cases where it is not determined by the Act itself. The whole scheme operates under judicial supervision, through a system of statutory appeals'.*

The purpose of section 12

iv. The purpose of section 12 is to balance the public's right to information and the interests of public authorities not to have their resources diverted to an unreasonable extent from their other duties, on the other. Public authorities should not have to spend more than a certain amount of time dealing with a request. However, the fees regulations only permit certain types of activity to be brought into account. The permissible time is limited to physical tasks, such as locating and retrieving the information and not 'thinking time'. Parliament has struck this particular balance in a restrictive way as far as public authorities are concerned and not all the time which it is anticipated will actually be spent dealing with a request can be brought into account.

v. It is inconceivable, that Parliament should have intended that the section 12 balance could permit a public authority to bring into account the time needed to comply with an entirely separate legal obligation. It would not have had to spend the time if it had met a pre-existing legal obligation.

d. Construing the Natural meaning of section 12

vi. The natural or literal meaning of section 12, viewed in context, is that a public authority can only bring into account the time properly attributable to dealing with the request, and not also to time spent in complying with a separate legal obligation with which the public authority should previously have complied.

vii. Section 12(1) refers to '*the cost of complying with the request*'. This is only to costs properly attributable to dealing with the request. In effect, the Commissioner wants to read words into the provision:

[10] [2014] 2 WLR 808
[11] At [153] http://www.bailii.org/uk/cases/UKSC/2014/20.html

'*the cost of complying with the request plus if necessary the cost of complying with a pre-existing legal obligation'*. There is no warrant for any such reading in. That would be to reward a public authority which was in breach of a pre-existing legal obligation and would be contrary to the purpose of FOIA.

viii. The correct position is that, in computing time, one has to assume that the public authority has complied with pre-existing legal obligations with regard to the manner in which it holds requested information and the collation of the requested information as a record. The time needed to comply with pre-existing ASPA duties has no relevance to FOIA and must be left out of account.

ix. The Commissioner relies on *Robin Williams v Information Commissioner and Cardiff & Vale NHS Trust*[12] that '*it is not open to the Tribunal to disallow reliance upon section 12 on the basis that the [public authority] could have organised its records more effectively*'. There was no suggestion in the *Robin Williams* case that the public authority was in breach of a separate statutory obligation and it has no relevance. CFI does not argue that the University should have organised its records more effectively but rather that it should have complied with its duties under ASPA to compile a record and that, had it done so, it would not need to spend any time in collating it for the purposes of dealing with the FOIA request.

e. Strained or purposive construction to be preferred to a literal construction:

x. If it is found that CFI's construction of section 12(1) is not the natural meaning of the section, CFI's construction is at least semantically possible, such that the Tribunal should resolve the ambiguity by choosing that construction that accords with the statutory purpose. This accords with the principles set out in '*Bennion on Statutory Interpretation' (6th edition, 2013) ('Bennion')* which explains that a strained construction may be appropriate where the consequences of a literal construction are so undesirable that Parliament cannot have intended them. *(See Section 158 of Bennion).*

f. Reading words into section 12(1):

xi. If, contrary to CFI's submission, its construction is neither appropriate as representing the natural meaning of section 12(1) nor as a strained construction, it is necessary to read into it words to the effect '(*but not the cost of complying with a separate legal obligation)*' after '*cost of complying with the request'*. This accords with Bennion's circumstances in which words may be implied into legislation. *(See Sections 172-179 of Bennion).*

'*The legislator is presumed to intend that the literal meaning of the express words of an enactment is to be treated as elaborated by*

[12] EA/2008/0042 at paragraph 28

taking into account all implications which, in accordance with the recognised guides to legislative intention, it is proper to treat the legislator as having intended'. (Section 172)

xii. An Ellipsis or device of leaving unsaid some portion of what the writer means, or must be taken to mean is according to Bennion, '*necessarily used to a large extent in the drafting of Acts of Parliament'*. So the fact that Parliament could have added the suggested words is not a reliable test. It is not obligatory that the implication is necessary or obvious; what matters is whether it is proper or legitimate in order to arrive at the legal meaning i.e. that intended by Parliament. *(See Section 174 of Bennion).*

xiii. Reading in words is particularly legitimate where a literal construction would lead to an absurdity.[13] *Bennion* explains:

> '*The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Here the courts give a very wide meaning to the concept of "absurdity", using it to include virtually any result which is unworkable or impracticable, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief*'[14] *(Section 312(1) of Bennion)*

xiv. Here, the absurdity of the construction for which the Commissioner contends is in particularly plain sight when section 13 FOIA, and regulation 7 of the fees regulations, are considered. If it were correct that a public authority could properly bring into account the costs of complying with a pre-existing legal obligation, it could literally profit from its default by charging a fee. In the present context, the University would thereby be recovering from CFI the cost of putting right its failure to collate the information as a record for ASPA. That would represent a clear abuse of power, susceptible to judicial review, which simply underlines why a public authority cannot bring into account the cost of putting right its failure to honour a pre-existing legal obligation.

g. The meaning of regulation 4(3) of the fees regulations

xv. Regulation 4(3) states: *'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 …' (emphasis added).* This means that a public authority cannot bring into account the costs it actually expects to incur in collating the requested information, but only the costs it reasonably expects to incur. The question is what costs would be reasonably incurred. It would not be reasonable to allow a public authority to bring into account the costs of meeting a separate, pre-existing legal obligation, for the reasons already discussed. Moreover, the costs which the University wishes to bring into

[13] The avoidance of absurdity may also require a strained rather than a literal construction

[14] See Lord Millett in *R(Edison First Power Ltd) v central Valuation Officer* [2003] UKHL 20, [2003] 4 All ER 209 at [116], [117]

account are not simply those 'in relation to the request' but also those in relation to complying with its duties under ASPA.

xvi. The true cost faced by the University in complying with CFI's request is nil, or close to nil. When it received the request, the University had failed to compile a record containing the information in question, as required by ASPA. It was under a continuing duty to do so. It is not 'reasonable', within regulation 4(3), to seek to pass on the costs of putting its house in ASPA order to CFI; moreover, those costs do not 'relate to' the CFI request.

xvii. This is the natural or literal meaning of regulation 4(3). If this is wrong, there is an ambiguity and CFI's construction is, to put it at its lowest, possible as a strained construction and should be preferred to the literal construction adopted by the Commissioner, for the policy reasons already discussed. If a strained construction is not possible, it is appropriate to imply words such as '(but not in complying with a pre-existing legal obligation)' after 'in relation to the request'.

25. The Commissioner's arguments on this point have included the following:

a. The relevant question is regardless of any legal obligation to hold the requested information in a specified manner, <u>given the manner in which the information was in fact held at the time of the request</u>, how long it would take the University to comply with the request.

b. That in *Urmenyi v Information Commissioner and London Borough of Sutton (EA/2006/0093),* the Information Tribunal stated:

> *'It is clear from the wording of section 12 that it is for the [public authority] to estimate whether the appropriate limit would be exceeded. The estimation is for the public authority to take based on the estimates of the times for the individual activities allowed to be included by the Regulation 4. The Commissioner and the Tribunal can enquire into whether the facts or assumptions underlying this estimation exist and have been taken into account by the public authority. The Commissioner and Tribunal can also enquire about whether the estimation has been made upon other facts or assumptions which ought not to have been taken into account. <u>Furthermore, the public authority's expectation of the time it would take to carry out the activities set out in Regulation 4(3) a-d must be reasonable</u>.'*
>
> *Emphasis Added*

c. Reference to the Upper Tribunal in *Commissioner of Police for the Metropolis v Information Commissioner & Donnie Mackenzie [2014] UKUT 0479 (AAC).* At paragraph 42, this stated:

> *'42. The moral of this case is perhaps this. The question of whether a request falls foul of the cost limit in section 12 is likely to be a function of two factors. The first is the breadth of the request itself, a matter over which the requestor has a considerable degree of control.*

By definition a carefully focussed FOIA request is less likely to be caught by the cost limit. The second factor concerns the record-keeping practices of the public authority, a matter over which the individual requestor obviously has no control. It may be more difficult to avoid the impact of the section 12 cap when making a request to a relatively decentralised public authority. However, the fact is that FOIA is about the citizen's right to information, subject to certain safeguards, checks and balances. It is not a statute that prescribes any particular organisational structure or record-keeping practice in public authorities.' (Emphasis added.)

d. The Commissioner does not argue for words to be read into section 12 as the Appellant asserts and rejects that Parliament intended section 12 to be interpreted as the Appellant submits. The Commissioner accepts that it will take a public authority longer to find the requested information where the relevant records are poorly organised or filed. This may mean that the public authority needs to address any records management issues in accordance with guidance issued under s.46 FOIA but it is not a reason to prevent a public authority from relying on s.12 FOIA. Section 12 is silent on the manner in which a public authority holds information. The focus when applying it is on how a public authority's records are held at the time an information request is received, rather than how they should be held under separate legislation.

e. The Information Tribunal has confirmed (in the case of *Robin Williams v Information Commissioner and Cardiff & Vale NHS Trust* at paragraph 28 that it is '*not open to the Tribunal to disallow reliance upon section 12 on the basis that the [public authority] could have organised its records more effectively*'; the relevant question is whether information is held at the time of the request and, if so, how long it would take to comply with the request.

Our Findings on the substantive legal issue

26. In brief, we accept all points made by the Commissioner set out at paragraphs 25 above.

27. Looking at section 12, CFI seeks to argue that the public authority may not rely on section 12 and the fee regulations because it is their own fault that the cost of complying with the request exceeds the limit set by the regulations. When looking at the plain or natural meaning of s.12(1)FOIA, CFI asserts that '*the cost of complying with the request*' means the costs properly attributable to dealing with the request and not '*the cost of complying with the request plus if necessary the cost of complying with a pre-existing legal obligation'*.

28. However, it seems clear to us when construing section 12 that the cost properly attributable to dealing with the request are those costs that it would take the University to comply with the request, and not, as the Appellant infers, '*the cost of complying with the request minus any necessary cost of complying with a pre-existing legal obligation'*. We see no authority for subtracting costs in this way based on the plain or literal or grammatical meaning of the legislation or fee regulation which makes no reference to discounting such costs. The Appellant is instead seeking to read words into the text.

29. The Appellant asserts that the records are poor and breach pre-existing legislation. However, it seems clear that the cost estimate under FIDP is based on (a) the records system operating at the relevant time; and (b) the costs attributable to complying with the request. On the facts, there is no suggestion that the University factored into their estimate costs they intended to incur for some purpose in addition to complying with the request. This seems self-evident since in reality the University was not seeking to expend costs to comply with ASPA or at all, but rather to provide an estimate to ascertain whether it needs to spend the time to comply with FOIA, and it has asserted that it does not.

30. We have been referred to the *Robin Williams* case that states '*it is not open to the Tribunal to disallow reliance upon section 12 on the basis that the [public authority] could have organised its records more effectively'*[15], and other Tribunals have made similarly findings. In *Metropolis v Information Commissioner & Donnie Mackenzie [2014] UKUT 0479 (AAC),* the Upper Tribunal have recognised that the recordkeeping practices of the public authority are something the requestor obviously has no control over such that it may be more difficult to avoid the impact of the section 12 cap when making a request to a relatively de-centralised public authority. Nevertheless, it made clear that *'statute does not prescribes any particular organisational structure or record-keeping practice in public authorities.'*

31. Whilst the cases indicate that the integrity of section 12 is maintained regardless of poor recordkeeping practices, the Appellant asserted at the oral hearing that there is a distinction between poor records and a breach of separate statutory obligations. We do not think this is necessarily so. It is known that poor recordkeeping in itself creates a risk of non-compliance with statutory or regulatory requirements. In *James v The Information Commissioner and DTI et al, (EA/2006/003),* the Tribunal found section 12 to have been properly invoked, but questioned whether the public authority had complied with the *Lord Chancellor's Code of Practice on the management of records under section 46 of the Freedom of Information Act 2000.* Page 5 of that code states:

> "*(viii) Authorities should note that if they fail to comply with the Code, they may also fail to comply with legislation relating to the creation, management, disposal, use and re-use of records and information, for example the Public Records Act 1958, the Data Protection Act 1998, and the Re-use of Public Sector Information Regulations 2005, and they may consequently be in breach of their statutory obligations*."

32. In short, we are also not persuaded that section 12 and FIDP can be disregarded or words read into these where there is a breach of legislation.

33. The Appellant seeks to argue, that it is legitimate to read words into the legislation in this instance, where, (quoting Bennion), a literal construction would lead to an absurdity. Here, he contends the absurdity would be that s.13 FOIA, and regulation 7 of the fees regulations, would otherwise allow a public authority to bring into account the costs of complying with a pre-existing legal obligation, such that it could profit from its default by charging a fee. We do not accept this. First, the scenario is not relevant to this case because the University was not offering to provide the information on the basis of charging for it. Second, the requester is

[15] EA/2008/0042 at paragraph 28

not required to make a payment - it is their choice. It does not seem unreasonable to allow for a bargain to be made whereby an authority offers to provide information at the cost estimated for complying with a request, if this helps the requestor. The concern about poor records or poor compliance is separate and the two parties must operate within the reality of the situation.

34. Looking at the fee regulations, the Appellant asserts that regulation 4(3) FIDP means that a public authority cannot bring into account the costs it actually expects to incur in collating the requested information, but only the costs it reasonably expects to incur. CFI maintains that it would not be reasonable to allow a public authority to bring into account the costs of meeting a separate pre-existing legal obligation. We do not agree. Regulation 4(3) FIDP provides that '*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 …'* We consider that reasonable in this context relates to the factual expectation as to what the amount of time the process of determining, locating retrieving and extracting is likely to take, in other words, whether it is a sensible estimate.[16]

35. Had the legislature wished us to consider in construing 'reasonably' the normative issues as to what 'ought' to be included in costs, it would have made section 12 what is known as a qualified exemption for the purposes of the Act. Instead, section 12 is not classified as an exemption, such that there is also no need to measure the weight of public interest in relying on the section. Instead, it operates as a guillotine applying for all requests before we even consider exemptions and matters of public interest.[17]

36. Looking at the purposive construction of the Act, the Appellant provides various purposes for the FOIA, all of which we accept. CFI then seeks to argue that not construing section 12 and the regulation in the way suggested would be contrary to the purpose of FOIA. We do not agree. The Act enables informed debate and benefits transparency, but does so through a framework that reflects the tension of balancing competing objectives and interests. It is within that context that the legislature has placed section 12 as an initial guillotine, valuing in all cases the need for the burden on authorities not to be excessive.[18]

37. The Appellant notes that not all anticipated time will be brought into account, including 'thinking time', and that it is inconceivable that it would have intended that the section to include time needed to comply with an entirely separate legal obligation. Since the FIDP sets out and limits the list of factors that can be taken into account in computing the estimate, we think it clear that those drafting the FIDP considered carefully and intended not to include what has been omitted. It is

[16] In any event, we note that on the facts as already stated, the University is not bringing into account costs of meeting a separate legal obligation. There is no indication of an expectation to incur costs to comply with ASPA within the estimate, the only reason that the University would have incurred costs would have been to comply with the request.
We also note that CFI has not sought to suggest that 'reasonable' here relates to a standard used for judicial review of 'Wednesbury unreasonableness', and we do not think that it does. Wednesbury unreasonableness has its own particular meaning, which is distinct from that of 'reasonably' in this context.

[17] See Quinn v The Information Commissioner and The Home Office EA/2006/0010.

[18] We note that there is nothing in the Act requiring the public authority to rely on section 12, such that its decision may be susceptible to judicial review by the High Court in appropriate circumstances.

also feasible to speculate good reasons for excluding 'thinking time', or making allowances in the way the Appellant argues for statutory breaches the FOIA and section12 are not intended to be interpreted in a punitive way if an authority has not complied with some separate legislation.

38. The Appellant maintains that a public authority should not be rewarded or in a better position than those who have complied with statutory obligations, and if they were this would give others the green light for similar behavior. We do not see a 'normative' reading of the regulations to be the correct construction of regulation 4(3) FIDP and it instead addresses the factual estimate of the expected costs based on the system that operated at the time of the request.

39. To conclude, regardless of the mode of interpretation, we do not accept that any 'correct interpretation' allows for what the Appellant maintains.

The jurisdictional issue

40. The Appellant asserts that the Commissioner erred by holding that it is not within his remit to assess whether the University was in compliance with ASPA. CFI argues that there are occasions where the remit will include determining whether an authority has complied with separate legislation. *(See s.44(1)(a) FOIA-information prohibited by or under any enactment)*. If correct on the substantive issue, then the Respondent was also obliged to consider whether the University should already have collated the requested information under ASPA.

41. The Respondent maintained that he considered it a relevant factual issue whether the University had been obliged to collate and hold the requested information. He did not reach an authoritative decision on those obligations. Section 12 did not require an authoritative determination on the University's obligations under ASPA.

Our Findings on the jurisdictional issue

42. We do not accept the Appellant was correct on the substantive issue. In relation to ascertaining whether an estimate is reasonable, it seems to us that it may be part of the Commissioner's role in relevant cases to determine for itself whether there is legislation that the public authority needs to comply with where this may suggest that the authority is likely to be holding records in a manner different to that it claims such that it might not take as long to comply with the request. However, the Appellant did not seek to question whether the actual estimate was sensible or reasonable in this case, and this ground of appeal fails.

The factual issue

43. Finally, the Appellant argues that the University should already have collated the information requested under a pre-existing legal obligation, under ASPA or the amended ASPA. Accordingly, the Commissioner erred by holding that there was no obligation on the University to have collated the requested information. This argument is only relevant for our purposes if we accept the Appellant's substantive issue, which we have not.

44. In brief, the Appellant's arguments include the following:

    a. The witness statement stating:

i. There is a tripartite system of licensing under ASPA which must be in place before animal experiments can take place. This includes the ELH who is in overall charge of animal experiments at the establishment. Paragraph 3.1.3.2 of guidance issued by the Secretary of State for the Home Department under section 21 ASPA [19] says that the ELH '…should be representative of the governing authority of the establishment..'. The ELH acts on behalf of the establishment. It appears that the University's is the Deputy Vice-Chancellor.

ii. The ELH has a duty under ASPA, under both the transitional provisions and the new rules, to hold a record of (inter alia) the number of animals and species used in experiments and the projects for which they are used. That corresponds to the information we have sought of the University.

iii. An ELH has to hold the requested information because:

'This accords with common sense. It would be extraordinary if a public authority such as the university did not know the number and purpose of animal experiments conducted on its premises. Apart from anything else, how can the ELH comply with his duty, under both ASPA and the transitional provisions, to ensure that there are sufficient trained staff and suitable installations and equipment if he does not know the number and species of the animals or the purpose for which they are used?'

iv. Paragraph 8 of part 2 of schedule 3 to the Animals (Scientific Procedures) Act 1986 Amendment Regulations 2012 ('the amendment regulations') in respect of project licences authorising procedures on animals granted prior to 1 January 2013; and paragraph 8(a) of schedule 2C to Animals (Scientific Procedures) Act 1986 (ASPA) (as amended on 1 January 2013 to transpose Directive 2010/63/EU) – in respect of project licences granted from 1 January 2013 onwards both require an ELH, to maintain a record of (inter alia) the number and species of animals used in procedures and the projects in which they are used. That necessarily obliges an ELH first to have compiled the information. The obligation does not, as the Respondent held in paragraph 32, only arise in the event of a request by the Secretary of State of the ELH for the information.

b. Submissions that under ASPA, an ELH, representing the establishment, is under a duty to hold certain information (including that covered by the request) in a record. A record cannot be kept in 60 or more places (the number of project licences the University says are held by its employees). The ELH needs ready access to the information so that (i) he can comply with other duties under ASPA (including ensuring the appropriate housing and care of animals at the establishment) and (ii) provide it on demand to the Secretary of State for the Home Department.

[19] *Guidance on the Operation of the Animals (Scientific Procedures) Act 1986* (March 2014): https://www.gov.uk/government/publications/operation-of-aspa

Our Findings on the factual issue

45. We are not persuaded here that there has been actual non-compliance with a statutory or regulatory obligation by the University in this case. The ELH is under a duty to hold certain information in a record. We do not accept that a record cannot be held if maintained in separate locations and there is nothing that we have been shown that suggests that the records must be held centrally or just in one place (though presumably it may be better to do so.) The meaning of record in the Oxford English Dictionary supports this, defining record as 'set *down in writing or some other permanent form for later reference'.*

46. Further, given that the ELH is required to be someone extremely senior within the organisation, we consider it highly unlikely that it is expected that he or she will personally maintain the records. It is more likely that he or she is to be accountable or responsible to ensure that it is done. Accordingly, provided the appropriate records are held, it would seem these can be delegated to more than one individual.

47. To conclude, the appeal is unanimously dismissed.

Other

48. One of the two panel members due to hear this appeal was unable to attend the hearing. The Appellant consented to the appeal being heard by the available panel member and judge.[20] The Commissioner was not present at the hearing, but gave consent retrospectively.

Judge Taylor

28 December 2015

[20] This is consistent with Paragraph 15(6) of Schedule 4 of the *Tribunal Courts and Enforcement Act 2007*