



NCN: [2024] UKFTT 00866 (GRC)

Case Reference: EA/2023/0179

**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

**Decided without a hearing
Decision given on: 02 October 2024**

Before

**JUDGE SOPHIE BUCKLEY
MEMBER DAN PALMER-DUNK
MEMBER NAOMI MATTHEWS**

Between

JON AUSTIN

Appellant

and

**(1) THE INFORMATION COMMISSIONER
(2) THE CROWN PROSECUTION SERVICE**

Respondents

Decision: The appeal is Dismissed.

REASONS

Introduction

1. This is an appeal against the Commissioner's decision notice IC-208225-Z0G4 of 1 March 2023 which held that the Crown Prosecution Service (the CPS) was entitled to rely on section 12(2) of the Freedom of Information Act 2000 (FOIA) to refuse to

confirm or deny whether it held information within the scope of the request and that it had complied with its obligations under section 16 FOIA to offer advice and assistance.

2. The Commissioner did not require the public authority to take any steps.

Procedural background

3. This appeal was originally listed for determination on the papers in October 2023. The tribunal considered that it had insufficient evidence to determine the appeal and adjourned the appeal to be heard by any panel. The second respondent has since been joined to the appeal and has provided further evidence.

Background to the appeal

4. Mr. Austin made a previous request to the CPS on 30 July 2022 in the following terms ('the July request'):

"Under the Freedom of Information Act can the CPS please confirm if it holds a copy of the full transcript of the 1998 trial of Michael Steele and Jack Whomes at the Central Criminal Court for the murders of Pat Tate, Craig Rolfe and Tony Tucker."

5. The July request was refused on the basis that the cost of searching for the requested information would exceed the relevant limits for the purposes of section 12 FOIA.

The request

6. The appeal relates to the following request made by Mr. Austin on 17 November 2022:

"I received the FOIA response 01724 which confirmed that the CPS has some or all of the transcript of the trial of Jack Whomes and Michael Steele. Please now confirm if it holds the section of the transcript which includes the evidence of Barry Dorman (now deceased so no section 40 issues). Please also confirm the day or days that Barry Dorman gave evidence during the trial."

The CPS's reply

7. The CPS responded on 6 December 2023. They refused to confirm or deny whether they held the information sought on the basis that it would exceed the appropriate limit under section 12(2) of the Freedom of Information Act (FOIA). The CPS upheld its decision on internal review.
8. During the course of these proceedings the CPS conducted a search for the information on 7 and 14 November 2023 and informed Mr. Austin on 17 November

2023 that they did not hold the requested information. The CPS invited Mr. Austin to withdraw his appeal but he indicated that he wishes to proceed with the appeal.

The decision notice

9. In a decision notice dated 1 March 2023 the Commissioner decided that the CPS was entitled to rely on section 12(2) FOIA. The Commissioner found that the CPS had estimated reasonably that to confirm or deny whether it held the information would exceed the appropriate cost limit significantly. The Commissioner was satisfied that the public authority had met its obligations under section 16 in its initial response.

Notice of appeal

10. The grounds of appeal are, in summary, that:
 - 10.1. The Commissioner was wrong to conclude that the estimate was reasonable that that the CPS was entitled to rely on section 12(2).
 - 10.2. The Commissioner was wrong to conclude that the CPS had complied with its duties under section 16 to provide advice and assistance.
11. In particular Mr. Austin asserts:

Ground 1

- 11.1. The Commissioner has simply accepted what it has been told by the CPS.
- 11.2. The Commissioner has not properly considered his arguments that the CPS estimate is not credible i.e. that the CPS is unlikely to have the asserted 'shoddy' archive system for such an important case and it is likely that the transcript has been filed in the correct running order and is held in a certain number of boxes within which it would be simple to ascertain (a) if the full transcript was held and (b) pinpoint the sections of a particular witness against the running order.

Ground 2

- 11.3. The Commissioner was wrong to record in paragraph 13 that Mr. Austin had been redirected to the court to obtain the transcript, when Mr. Austin had informed the Commissioner and the public authority in his request for an internal review that this avenue had already been exhausted. The section 16 advice is therefore redundant.

The Commissioner's response

12. The Commissioner submitted that:
 - 12.1. The other decision notice mentioned by Mr. Austin is not under appeal.
 - 12.2. The significance of the criminal case is not relevant to section 12.

- 12.3. The CPS has made clear that it does not have a record of what activity took place on each day of the trial. Furthermore the file is a manual record and the CPS does not have an index of the information held. The Commissioner submits that he was correct to accept that the CPS does not have a way to determine which box contains the requested information (if held) and therefore all 125 boxes would need to be reviewed to determine whether the requested information is held in this case.
- 12.4. The CPS has confirmed that the case file has not been digitised. Furthermore the Commissioner submits that it would not be proportionate for him to visit the CPS archive or to ask it to provide photographs of the boxes as the Commissioner was correct to rely upon the submissions provided to him by the CPS as to how the records are held.
- 12.5. The Commissioner submits that he was correct to make his decision on the application of section 12 FOIA based on how the records are actually held rather than how the Appellant considers they should be held
- 12.6. The Appellant's FOIA request to Essex Police is not relevant to this appeal.
- 12.7. The Commissioner submits that the CPS has provided a reasonable estimate.
- 12.8. The Commissioner submits that under the circumstances of this request, because of how the records are held, the CPS would be unable to provide the Appellant with meaningful advice and assistance as to how this request could be reframed to fall within the cost limit. Therefore the advice and assistance provided, whilst not strictly what is required under the Section 45 Code of Practice when a request exceeds the cost limit, appears to be the only practical advice the CPS could think to provide.

Mr. Austin's reply to the Commissioner

13. Mr. Austin submitted that the CPS would not need to manually review all the boxes. He submitted that due to the length and size of the transcript, there would be boxes that contained only transcript material. He submitted that all a CPS employee would have had to do was open each of the 100 plus boxes and check the first couple of pages to see if it contained transcript. This process would take less than one minute per box. So 125 boxes - 125 minutes. Once a box containing transcript was identified they could check forwards to isolate all boxes containing transcript and backwards if necessary to find the start of the transcript which he estimated would take an hour. He submitted that the transcript would be isolated with three hours - leaving 21 hours to find Mr Dorman's evidence within it.
14. Mr. Austin submitted that it was highly unlikely that the CPS would have split up the transcript and filed it randomly in and among other files across all the boxes.
15. Mr. Austin submitted that a newspaper clipping showed that Mr. Dorman gave evidence on 20 or 21 October 1997 which would help the CPS to locate the relevant transcript more easily.

16. Mr. Austin submitted that he had informed the CPS in his internal review that its advice to request the transcript from the Court was redundant because he had already tried that. The Commissioner ignored this and relied on the original redundant advice. The CPS had offered no advice on how to narrow the request.
17. Mr. Austin submitted that the Commissioner had ignored his arguments about being sent photographs of how the boxes were stored, if they were numbered and whether they had written on the outside what was on the inside.
18. Mr. Austin submitted that the significance of the criminal case is that it detracts from the credibility of the CPS's case. It is submitted that the Commissioner should have been more professionally curious as to whether the CPS would store the transcript for such a significant case in such a haphazard manner.
19. Mr. Austin submitted that an index is not required because the transcript would run in order along a number of boxes, unless the tribunal accepts that the transcript has been split up and randomly filed.
20. Mr Austin submitted that the fact that the case file had not been digitised did not prevent the search being carried out as he suggests. He submitted that there is no reason that the CPS could not have been asked to send photographs.
21. Mr. Austin submitted that the Commissioner should have taken action under the section 46 code of practice. He invited the tribunal to determine whether the CPS complied with its section 46 duties.

The response of the CPS

Section 12

22. The CPS submitted that it was entitled to refuse to comply with the request by reason of section 12 FOIA:
 - 22.1. The CPS made an estimate that it would take more than 24 hours to search all of the boxes and that the cost limit would be exceeded.
 - 22.2. The estimate was sensible, realistic and supported by cogent evidence. It was based on a search of a sample of 23 boxes.
 - 22.3. The fact that the search ultimately ended up taking less than 24 hours does not affect that position.
 - 22.4. In any event the exercise did exceed the cost limits because the search took 17.2 hours (a deemed cost of £430) and the total cost, including recalling and returning the boxes to off-site storage, was £748.52.

Section 16

23. It is submitted that the CPS advice to seek a transcript and/or record of when Mr. Dorman gave evidence was sensible and constructive even though Mr. Austin later stated that the court had indicated that this did not hold the information. This was sufficient to discharge the section 16 duty. It is hard to see what other advice and assistance the CPS could realistically have given.

Conclusion

24. Even if the appeal were to be allowed, the CPS submit that the CPS should not be directed to take any further action given that it has now undertaken a search of all the boxes and confirmed that it does not hold information within the scope of the request to the best of its knowledge and belief.

Mr. Austin's reply to the CPS

25. Mr. Austin requests that his reply is read in conjunction with the letter to the tribunal dated 22 November 2023 and the questions he sent to the CPS press office on 8 December 2023. They are in the bundle and have been read and taken into account by the tribunal.
26. Mr. Austin states that his appeal is based on the claim that the CPS would not operate such a storage system that meant in order to locate a transcript within a box of case files it would require a full search through every single box in the case file.
27. Mr. Austin submits that common sense dictates that an organisation such as the CPS would be required to file such material in a way that would make it possible to identify and isolate specific parts of the papers and that something like a transcript would be filed in chronological order. He submits that if a transcript ran over a number of boxes, the boxes would also run in order.
28. Mr Austin submits that the CPS assertions that the transcript was randomly filed in no particular order amongst other documents, in no particular order, should not be accepted. He submits that not enough information has been provided, including how many boxes in total contained transcript, whether they were in order and if the transcript was found in chronological order.
29. Mr Austin submits that as the case is classified as a 'Long Term Interest Case' (LTI) it has to be stored in a particular way under the CPS's policies. This, he submits, supports his submission as to how the documents would be stored.
30. Mr Austin submits that as it was ultimately possible to search all 131 boxes in under 24 hours, the original estimate was wrong and the exemption should not have been relied on.
31. Mr Austin makes a number of specific points about the CPS submissions, that the tribunal has taken into account. The most relevant are as follows.

32. Mr. Austin states that the CPS should have provided close up photographs of the boxes found to contain transcript during the two searches. He submits that it is worth considering why these were not provided rather than images of random boxes.
33. Mr. Austin notes that the image of the file continuation sheets shows that a fair amount of detail is provided of what is contained within the boxes. He submits that the CPS should have provided photographs for the boxes found to contain transcripts and it is worth considering why they did not.
34. Mr. Austin notes that the case is a 'Long Term Interest Case' (LTI). He submits that it would therefore have to be correctly catalogued and stored and that it is a matter of high public interest that the CPS appear not to have stored it correctly. He submits that the fact that there is no overall index to the contents of the boxes is significant because this is required by the CPS Records Management Manual for LTIs.
35. He submits that the files should be stored at the Records Management Unit of the CPS and not in external storage.
36. Mr. Austin questions why there was no mention of the costs for recalling the boxes from storage in relation to the first search.
37. Mr. Austin submits that the CPS should explain if the four boxes containing transcripts in the first search contained only transcript or not and whether it was in chronological order or not. He submits that only if the transcript was randomly inserted in no particular order across random boxes would a search of all the boxes be required.
38. Mr Austin submits that the appeal is not academic, even though the CPS now say that they do not hold the information, because FOIA is about whether the exemption was correctly applied at the time.
39. Mr. Austin highlights further information that the CPS should provide about the costs of off-site storage. He asks if it would have been more cost effective to send CPS staff to the off-sire storage unit.
40. Mr Austin submits that the costs of retrieval from storage should be discounted because of the issues he has highlighted. Further he submits that this cost, if necessary, is a cost with the benefit of hindsight and not one that was known as the time.
41. In relation to section 16 Mr. Austin submits that the advice given by the CPS ceased to be sensible advice by the time of the internal review response. Mr. Austin submits that the CPS should have sought to establish how much of the transcript it did hold to ensure that it was correctly preserved.

42. Mr Austin asks the tribunal to consider commenting on the wider public interest issues that he has raised.
43. Mr. Austin provides comments on the witness evidence of Mr. Cox, which the tribunal has considered and taken into account.

Final written submissions by Mr. Austin

44. Mr. Austin submits that when the CPS initially chose to rely on section 12 in relation to his July request, it would have known that the case was an LTI case which should have been filed in date order and there should have been an index to the case file contents. Therefore when the CPS responded to the July request it should not have expected to have been able to rely on section 12. The CPS does not appear to have checked for an index and instead appears to have chosen to search a sample of 23 boxes. He submits that we do not know how these boxes were selected or where they were held at the time.
45. Mr. Austin submits that the CPS has not provided any detail on whether the four boxes containing transcripts ran in a continuous order, or whether they contained just transcripts or a mix of other documents. When the 131 boxes were searched it appears that the 23 boxes were searched again.
46. Mr. Austin submits that Mr. Cox's evidence shows that of the boxes in those 23 boxes that contained transcript, some them only contained transcript and some of them contained other documents. He submits that this shows that there was a large amount of transcript. From this Mr. Austin submits that it should have been obvious to the person that carried out the initial sample search that it would be relatively quick to open a box and flick through to see if any transcript were contained and put it to one side. This could be used to isolate any boxes with transcript in and then to search all those boxes for evidence from Mr. Dorman. He submits that this clearly would have been possible within the section 12 limit.
47. The second search shows that it as possible to go through all 131 boxes to look for transcripts within the cost exemption.
48. Mr. Austin submits that it is likely that the boxes containing transcripts may have indicated this on the outside of the boxes or at least in the frontsheets. The CPS have not provided photographs of the boxes found to contain transcript.
49. The CPS did not originally factor in the cost of retrieving the files from storage. Mr Austin submits that it would be helpful for the tribunal to know why.
50. Mr. Austin submits that the retrieval costs should be discounted because they were not a factor when it made its original estimate.

51. Mr Austin submits that the CPS should not be allowed to include the costs of locating, retrieving and transporting information in the estimate, because the Commissioner's guidance on section 12 states that it will depend on the terms of the contract as to whether those costs can be included. Mr. Austin submits that the Commissioner was not considering offsite storage costs and so did not ask to see the contract. Without sight of the relevant contract the tribunal should not allow the costs. The case is up for review in 2025, so the costs of retrieval should not be included because it would have been incurred in 2025 in any event.
52. Mr Austin submits that the issue of off-site storage costs has only been introduced because the CPS's argument about staff time costs fell away.
53. It is submitted that the case has not been stored in accordance with the CPS's own rules on the storing of LTIs. If the case had been adequately stored it would have been possible to identify a trial transcript in under 24 hours.
54. The Commissioner should have considered the section 46 Code of Practice in relation to adequate storage methods and given advice to the CPS in its decision notice. The tribunal should pass judgment on the CPS's breaches of the Section 46 Code and the fact that the Commissioner should have given advice on this in the decision notice. This is important and in the public interest given that the Court has lost the transcript, the audio file has been destroyed, the CPS do not hold an entire transcript and Essex Police also claim that they cannot confirm or deny that the entire transcript is held within the appropriate limit.
55. Mr Austin submits that the fact that the CPS have not addressed the LTI policies shows that this is how the files should have been stored.
56. Mr. Austin submits that the case of Commissioner of Police for the Metropolis v Information Commissioner and Mackenzie [2014] UKUT 479 can be distinguished because in that case the request was for a broad spectrum of material stored across multiple platforms. This appeal relates to one case filed together with a defined policy on how it should be stored (LTI) and part of one specific document from within it was sought.
57. Mr. Austin submits that the manner in which the files should have been stored is relevant here due to the section 46 code and because whoever responded to the July request should have expected the files to be stored in line with the LTI policy.
58. He submits that the estimate was not reasonable because this was an LTI with a clear storage policy and anyone who knew that would have concluded that the transcript could be located within the relevant limit.
59. It is not necessary to set out Mr. Austin's submissions in relation to the CPS's application for an extension of time earlier in the proceedings.

Final written submissions by the CPS

60. As to Mr. Austin's argument about the manner in which the CPS's records relating to the trial are organised, the CPS submits:
- 60.1. Mr. Cox explains in his witness statement that there is no overall index; the file sheets do not necessarily give a reliable or comprehensive description of everything in the box; the parts of transcripts were not found in boxes that formed any continuous numerical sequence. In the light of this all 131 boxes had to be searched.
- 60.2. It is irrelevant that the search might have been quicker if the records were organised in another way.
61. As to Mr. Austin's argument that the CPS's original estimate is invalidated by the fact that the search ended up taking only 17.2 hours, the CPS submits:
- 61.1. A time estimate is necessarily predictive and is not invalidated merely because the actual time taken was more or less than the estimate.
- 61.2. The estimate was reasonable given how long it had taken to search a sample of 23 boxes.
- 61.3. Even if the actual costs incurred are relevant, the £600 threshold is exceeded once retrieval costs are taken into account. The total cost in the CPS's response should be reduced by £19.65 as a result of the error explained in Cox 2, but that does not affect the overall point.
- 61.4. The threshold would also have been exceeded if CPS staff had travelled to the storage facility, because at least an additional 4 hours of travel time would have been needed to travel to Belvedere, it would have been necessary to hire a room for £110 and there would have been staff travel costs and retrieval and put away costs.

Issues

62. The issues for the tribunal to determine are:
- 62.1. whether or not the public authority was entitled to rely on section 12
- 62.2. whether or not the public authority was in breach of its obligations under section 16

Legal framework

Section 12 Costs Limit

63. Under section 12(1) FOIA a public authority is not obliged to comply with a request for information where:
- “the authority estimates that the costs of complying with the request would exceed the appropriate limit. “

64. Subsection (1) does not exempt the public authority from its obligation to inform the requestor whether it holds the requested information unless the estimated cost of complying with that obligation alone would exceed the appropriate limit.
65. The relevant appropriate limit, prescribed by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations') is £600.
66. 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 3).
67. The 2004 Regulations specify that where costs are attributable to the time which persons are expected to spend on the above activities the costs are to be estimated at a rate of £25 per person per hour.
68. The estimate must be sensible, realistic, and supported by cogent evidence (McInerny v IC and Department for Education [2015] UKUT 0047 (AAT) para 39-41).
69. The test is not a purely objective one of what costs it would be reasonable to incur or reasonable to expect to incur. It is a test that is subjective to the authority but qualified by an objective element. It allows the Commissioner and the tribunal to remove from the estimate any amount that the authority could not reasonably expect to incur either on account of the nature of the activity to which the cost relates or its amount. (Reuben Kirkham v Information Commissioner [2018] UKUT 126 (AAC)).

The role of the tribunal

70. The tribunal's remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether he should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Evidence

71. We read and took account of an open bundle and written submissions from the CPS and Mr Austin.

72. This included two witness statements with exhibits from Mr. Anthony Cox, Head of the Information Access Team at the CPS.

Findings of fact

73. We make the following findings of fact based on the evidence before us on the balance of probabilities.
74. The CPS has no digital records relation to the case in question. The case file is stored in 131 box files. We have been provided with photographs of the boxes which show that the outside of the boxes are labelled with a serial number but they do not give detailed description of what is inside the box.
75. Many but not all of the boxes have a file sheet at the start. We have been provided with photographs of examples of these file sheets. We find that they generally contain brief entries giving a high-level description of the contents of the file. There is no overall index to the 131 box files. Most of the boxes are shoe box size and others are larger.
76. Documentary records of cases that fall under CPS Long Term Interest criteria are the responsibility of the Records Management Team (RTM) which is based in a room in 102 Petty France. They are responsible for managing and transferring their records to off-site storage.
77. The boxes in this case are held in off-site storage provided by a third-party external contractor, Iron Mountain. The main storage facility is on a site in Belvedere. The CPS has to pay retrieval, transportation and handling costs if it recalls the boxes to the CPS premises.
78. At the Belvedere site there is a room that can be hired at a cost of £110 per day (excluding VAT) to view records held on site. If records are searched on site, the CPS still has to pay for retrieval and put away costs. They would also have to pay travel costs for the CPS staff.
79. Transcripts of trials are not routinely held by the CPS as part of the prosecution case file. They are sometimes held in high profile cases and those that are appealed, but not always as a complete record.
80. The CPS carried out the following searches.
81. On 11 August 2022 one of the CPS's Information Management Advisors (IMA) recalled 23 of the boxes and searched all of them to locate transcripts of the trial. He located transcripts of some parts of the trial in four of the boxes. The search of the 23 boxes took 6.5 hours.

82. On the basis of that search the CPS refused the request on that basis that they estimated that a search of all the boxes would take over 24 hours.
83. On 6 and 14 November 2023 Mr. Cox and the Departmental Records Officer (DRO) conducted a search of all 131 box files returned from storage for transcripts of Barry Dorman's evidence and information concerning the day or days that Barry Dorman gave evidence. This search took 17 hours and 10 minutes. The cost of retrieval handling and transportation to recall the boxes from storage was £156.51 (excluding VAT) and the cost of returning them to storage was £142.36 (excluding VAT).
84. Parts of the transcript were found in a number of different boxes. Although witness statements for Mr. Dorman were found, no transcripts of his evidence were found. The transcripts found related to people other than Barry Dorman. Some of the boxes containing transcripts also contained other materials. Although Mr. Cox did not keep a precise record of all the boxes he searched, he recorded that he found transcripts from people other than Barry Dorman in the following 11 boxes: "6158", "6161", "8873", "8838", "8856", "8837", "8884", "8891", "8853", "8845" and "04/FA/18501/16". The DRO kept a record in a spreadsheet of the boxes in which she found transcripts. On this basis we find that the boxes in which transcripts were found did not form any continuous numerical sequence.
85. The three main file boxes did not contain any record of the dates on which Barry Dorman gave evidence.

Discussion and conclusions

Further information

86. Throughout this appeal Mr. Austin has identified further information that the CPS could or should provide to the tribunal. Much of that information has been provided by the CPS in its two witness statements from Mr. Cox. Not all the information identified by Mr. Cox has been provided, and he has highlighted additional information in his final written submissions which would be 'helpful' or 'best evidence'. We are satisfied that we have sufficient information before us to dispose of the issues that we have to determine, and that it would not be proportionate or necessary to order the CPS to provide further information.

Matters outside our remit

87. Mr. Austin criticises the Commissioner for failing to give consideration to his arguments and simply accepting the CPS's assertions about storage. As the tribunal carries out a full merits review it stands in the shoes of the Commissioner and it is not necessary for us to make findings on whether or not the Commissioner took into account certain arguments or in relation to the Commissioner's approach to the evidence. We have evidence before us from Mr. Cox that was not before the Commissioner and we have considered all of Mr. Austin's arguments.

88. Mr. Austin asks to us to make a ruling on whether or not the CPS's storage requirements are in breach of the section 46 Code of Practice on records management and on whether or not this should have been considered by the Commissioner in the decision notice. The Upper Tribunal made clear in **Cruelty Free International v Information Commissioner** [2017] UKIT 0318 (AAC) at paragraph 28 that:

Parliament has chosen to address good record-keeping practice by making provision for a Code under section 46 and empowering the Information Commissioner to promote conformity with the Code by means of recommendations under section 48. As set out above, in some cases this will in practice incorporate compliance with legal obligations under other legislation. There is no basis for concluding that Parliament also intended that there should be a separate assessment of compliance with such obligations where section 12 FOIA is in play."

89. This is not an appeal against a refusal by the Commissioner to make a recommendation under section 48. The tribunal has no jurisdiction to deal with such an appeal. The issue before the tribunal today is whether the public authority was entitled to rely on section 12. Compliance with the obligations under the section 46 code of practice play no part in that. Neither the Commissioner nor the tribunal is obliged to give advice in relation to the section 46 code of practice in a section 12 appeal.

90. The tribunal declines Mr Austin's invitation to consider commenting on the wider public interest issues that he has raised or on the CPS's record keeping practices.

Section 12 FOIA - was there an estimate which was reasonable and supported by cogent evidence?

91. The CPS made an estimate, namely that it would take 24 hours to search the boxes for the transcripts given the way in which the file was stored.

92. The case law is clear that FOIA is not a means of reviewing a public authority's record-keeping and testing it against best practice (**Mackenzie** paragraph 37). As the Upper Tribunal stated in **Cruelty Free** "The requestor has to take the public authority's record keeping practices as they are, even if they are defective. That holds true whether the defect is poor administration or breach of a legal obligation."

93. The tribunal and the Commissioner do not consider what the cost of compliance would be if things had been done differently by the authority, whether in compliance with good practice, internal policies or legal obligations.

94. For that reasons we do not need to make any findings on whether or not the material was stored in accordance with the CPS policies on the storage of LTI cases, or whether or not the material was stored in accordance with the section 46 Code

of Practice, because that makes no difference to whether or not the estimate was reasonable.

95. We accept that if the CPS held a full transcript of the trial then a sensible way to store it would be in chronological order, and that if it had to be stored in more than one box, it would be sensible to store it in adjacent boxes.
96. We also accept that it would be sensible and logical to store material from a trial in such a way that it would be possible to identify and isolate specific parts of the material without searching through every box.
97. However, we have been provided with evidence from Mr. Cox, in two witness statements supported by a statement of truth, that describe in detail how the information relating to this trial is in fact held by the CPS. The CPS do not hold the entire transcript, and so the points about how a full transcript would logically be stored do not assist.
98. Further, the fact that there is a more sensible or common-sense way of storing the information does not mean that that is the approach that the CPS must have, as a matter of fact, adopted.
99. Nor does the existence of a more logical storage system and the fact that there are CPS policies on how 'Long Term Interest Cases' *should* be stored persuade us that Mr. Cox is lying about how the information *is* stored. The detail provided in that evidence is convincing, and it is consistent with photographs of the boxes and their labels. He has recorded and reported a time of less than 24 hours for the entire search in November 2023, which suggests an honest approach, rather than one intended to exaggerate or mislead to prevent disclosure. The fact that the CPS has provided photographs of randomly selected boxes rather than photographs of the boxes that contained transcript does not persuade us that Mr. Cox's evidence is fabricated. We accept that Mr. Cox is telling the truth and have made our findings of fact on that basis.
100. We are considering the estimate made in response to this request, not in response to the July request. At that stage the CPS had already recalled 23 boxes and had carried out a sampling exercise. It knew how the file was in fact stored. We do not accept Mr. Austin's submission that the CPS should instead have based its estimate on the assumption that the file had been stored differently because of something required in the LTI storage policy. Whether or not there should have been an overall index, there was no overall index.
101. In the light of the time taken to carry out the sampling exercise on 23 boxes, we accept that 24 hours was a reasonable estimate. The transcript was not contained in one continuous section over consecutive boxes. The file sheets generally contained brief entries giving a high-level description of the contents of the file. It was therefore reasonable to assume that each box would need to be searched. In our

view it was reasonable to base the estimate for how long it would take to search each box on the amount of time it actually took to search the boxes in the sampling exercise. That was a reasonable indicator of how long a full search would take.

102. We find that the estimate that it would take over 24 hours to confirm or deny if the information was held was reasonable in the sense that it was sensible, realistic and based on cogent evidence.
103. In our view, it is irrelevant that the search in fact ultimately took 17 hours ten minutes. That does not, in our view, mean that the estimate of 24 hours was not reasonable in the sense that it was sensible, realistic and based on cogent evidence. For those reasons we conclude that the CPS was entitled to rely on section 12.
104. We note that as the amount of hours that the CPS estimated it would take to confirm or deny if the information was held exceeded the appropriate limit, there was no need for the CPS to consider any other costs that would be incurred. That does not mean that there were no additional costs, such as the cost of retrieving the boxes from storage, but the CPS did not need to rely on them for the purposes of that estimate.

Section 16 FOIA

105. Given that the CPS knew that the Court would usually, unlike the CPS, hold a copy of the full transcript, it would in our view have been in breach of section 16 if it did not inform Mr. Austin of that when he made his request. It was not aware until his request for an internal review that that route had already been exhausted.
106. Having been told that Mr. Austin had already tried that alternative route we do not accept that there is any other useful advice and assistance that the CPS could have provided in the internal review, given our findings above on how the file was stored. There was no meaningful way in which the request could have been reframed to avoid the need to search every box.
107. We do not accept Mr. Austin's submission that there was any duty on the CPS under section 16, once it had been told that the Court did not have a transcript, to seek to establish how much of the transcript it did hold, to ensure that it was correctly preserved.

Conclusion

108. The tribunal finds that the CPS was entitled to rely on section 12 FOIA to refuse to confirm or deny whether the information was held and that it complied with its obligations under section 16 FOIA.

Signed Sophie Buckley

Date: 26 September 2024

Judge of the First-tier Tribunal

Promulgated:

Date: 02 October 2024