



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

Appeal Reference: EA/2017/0105

**Heard at Fleetbank House, London
On 5 June 2018**

Before

**JUDGE
CHRIS RYAN
TRIBUNAL MEMBER
ANNE CHAFER
PAUL TAYLOR**

Between

CRUELTY FREE INTERNATIONAL

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

THE HOME OFFICE

Second Respondent

DECISION AND REASONS

Attendances:

For the Appellant: David Thomas
For the First Respondent: Elizabeth Kelsey
For the Second Respondent: Holly Stout

GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is allowed and the Decision Notice dated 24 April 2017 is substituted by a notice requiring the Home Office as public authority, within 35 days, to either disclose the information identified in the information request submitted by Cruelty Free International on 7 April 2016 or to identify any exemption on which it intends to rely as a ground for refusing disclosure, in whole or part.

REASONS FOR DECISION

Summary

1. We have decided that the Home Office was not entitled to rely on section 14(1) of the Freedom of Information Act 2000 ("FOIA") as the ground for refusing a request for information submitted to it by the Appellant ("CFI") on 7 April 2016 ("the Request"). Accordingly, we allow CFI's appeal from the Information Commissioner's decision notice FS50655799 dated 24 April 2017 ("the Decision Notice")

The Request and the Home Office response

2. The Request was in the following terms:

"Would you please disclose the information you hold in relation to the two cases, which according to p26 of the Animals In Science Unit Inspectorate Annual Report...were referred by you in 2014 to the Crown Prosecution Service."

The two cases related to infringements by individuals or organisations licensed by the Home Office under the Animals (Scientific Procedures) Act 1986 to conduct experiments on animals. The relevant passage of the Annual Report of the Animals in Science Unit ("ASRU") read:

"There were two cases in 2014 which were considered to be sufficiently serious to warrant referral to the prosecuting authorities. These cases were not concluded in 2014 and so will be reported at a later date. In neither case was it decided that prosecution was in the public interest and we are therefore reviewing our policy regarding such referrals."

3. The effect of FOIA section 1(1) is that the Home Office, as a public authority identified in Schedule 1 of FOIA, had an obligation to disclose the requested information unless certain conditions applied, or the information fell within one of a number of exemptions set out in FOIA.
4. Included among the provisions of the FOIA that may be relied on by a public authority to refuse an information request are sections 12 and 14. They are in the following terms:

“12 Exemption where cost of compliance exceeds appropriate limit.

(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.”

“14 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.”

5. The “appropriate limit” for the purpose of section 12(1) has been fixed by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (“the Regulation”). In the case of a Government Department the limit is fixed at £600. The same regulations provide, at regulation 4:

“(1) ...

(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. “

6. In its original response to the Request, a letter dated 6 May 2016, the Home Office relied on section 12. It stated that all incidents of compliance were thoroughly investigated and that a large number of documents therefore existed, which would take longer than 24 working hours to read through and appropriately redact personal or confidential information. The letter went on to say:

“May I suggest that you consider refining your request to be more specific about what you wish to see? For example, you may consider asking for documents reporting the final outcome of each of these cases. By so doing, your request is more likely to fall under the cost limit and we will be able to consider it again.”

7. On 9 May 2016 CFI responded by email challenging the cost estimate, in general language, and requesting an internal review of the decision to reject the Request. The email also responded to the invitation to refine the Request. It did so in these terms:

“Without knowing what the documents contain, it is not possible for us to refine the request. CFI wishes to understand the nature and detail of the infringements, the Home Office’s investigation, the decision to refer to the CPS, the CPS’s decision not to prosecute and the sanctions eventually imposed. We do not know which documents contain this information but it seems very unlikely that the final outcome documents (for example) will do so in such detail as to be useful.”

8. It is common ground between the parties that this exchange was followed by a telephone call made by William Reynolds of the Home Office to Edie Bowles of CFI on 18 May 2016. However, there is no agreement as to what was said. Mr Reynolds says that he repeated the suggestion that CFI might find it helpful to make a new request, narrowing the scope to specific documents. Ms Bowles recalls that Mr Reynolds said that conducting an internal review of the original response would be lengthy and that he suggested that if it was dropped he could provide a document that he felt contained the information CFI required. Ms Bowles says that her recollection was that the document was not identified and that she responded that she would need to discuss the matter with others within CFI.

9. On the same day, 18 May 2016 Ms Bowles sent an email to Mr Reynolds, thanking him for his call and adding that, having spoken with a colleague:

“...we both feel that while we appreciate what you have said and do understand your position, we are unable to drop the review at this stage. We are not convinced that the section 12 exemption applies.

We would be grateful if you could send us the document you mentioned, which you feel provides the information we are after. We will read this document in good faith and if satisfied will drop the review at that point.”

Within an hour Mr Reynolds sent an email back, which read:

“Thanks for the email. I understand the position and will be back with you soon.”

10. The next communication between the parties was a letter from the Home Office, signed by Mr Reynolds and dated 30 June 2016. The opening two paragraphs read:

“Thank you for your email of 18 May 2016 as follow up to your original Freedom of Information request on 7 April 2016 (to which we replied on 6 May 2016). We have dealt with your e-mail as a request for information under the Freedom of Information Act 2000 (FOI).

We spoke by telephone on 18 May where we discussed your 7 April request in broad terms. Your subsequent email does not specify the information you are seeking with any further specificity than your original request (7 April).

Section 8(1) of the Freedom of Information Act 2000 requires that a request for information must describe the information requested. As it stands, your e-mail does not do this in a way which enables us to identify the information and assess whether we hold it. We are therefore refusing your request because it does not meet the requirements for a request for information under the Act.”

11. By a letter dated 4 July 2016, Ms Bowles summarised the communications that had taken place and complained that her email of 18 June 2016 was being treated as a new request for information. She wrote:

“It was clear in my email that the request for the Document [that is, the document that she believes was referred to over the telephone] was in good faith and not in exchange of the internal review. At no time was the internal review request withdrawn. We did not describe the Document as you did not provide any details during the earlier call. Your reply to my email on the same day showed no indication that you did not know what document I was referring to...”

The letter went on to refer to the 30 June letter and added:

“Very strangely, the letter states that you cannot disclose the Document due to my failure to identify it. There was no mention of the internal review, which was and is still pending.”

The letter of 4 July 2016 received neither reply nor acknowledgement from the Home Office.

12. On the same day Ms Bowles sent an email to the Home Office formally repeating her earlier request for an internal review and received an acknowledgement that both requests had been received. The outcome of the review was communicated to her by letter from the Home Office dated 26 July 2016. It would appear that by that stage the Home Office had realised that the task it faced in reviewing materials falling within the scope of the Request and identifying any information within them that should be treated as exempt from disclosure under other provisions of the FOIA was:
- a. likely to be substantial; but
 - b. would fall outside the scope of the activities which regulation 3 of the Regulations allows be taken into account when estimating the cost of compliance for the purposes of FOIA section 12.

It therefore changed tack and told CFI that it maintained its refusal to disclose, but intended to rely on FOIA section 14(1) instead of section 12. This was because:

"...in order to fully comply with your request, the responding unit would have to manually review and check an estimated 6,000 pages of documents to see which parts could theoretically be disclosed to you (and which parts would need to be redacted under exemptions of the Act). Furthermore, due to the sensitivity of the subject-matter, the responding unit also has real concerns about potentially exempt information; and such potentially exempt information cannot be easily isolated because it is scattered throughout the 6,000 pages of documents.

I am satisfied that to complete this task would clearly be a huge burden upon the department, and therefore the exemption at section 14(1) would apply.

The letter continued:

"... even if you were to refine your request, because of the sheer volume of material in scope, it is quite possible that section 14(1) would still apply, or other relevant exemptions such as section 44(1)(a) Prohibitions on Disclosure."

The Information Commissioner's Investigation and Decision Notice

13. CFI's response to the outcome of the internal review was to complain to the Information Commissioner about the way the Request had been handled. Having completed her investigation into that complaint, the Information Commissioner issued a decision notice on 24 April 2017. She accepted that there might be cases where the term "vexatious" could be applied to an information request because the amount of time required to review and prepare the information for disclosure would impose a "grossly oppressive burden on the public authority" but considered that "there is a high threshold for refusing a request on such grounds." She recorded that guidance issued by her office provided that a public authority:

"...is most likely to have a viable case where:

- the requester has asked for a substantial volume of information **and***
- the authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the ICO, **and***
- any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material."*

14. The Information Commissioner accepted the Home Office's evidence that it held a significant volume of information falling within the scope of the Request (6,000 documents, at least) and that, in light of the subject matter, the Home Office was justified in believing that the relevant documentation would need to be reviewed in order to assess whether one or more of the exemptions provided for under the FOIA would apply to parts of it. The Information Commissioner also accepted the Home Office's estimate of the time that would be required to locate potentially sensitive information, which was likely to be scattered throughout the materials, and having it reviewed by an appropriately knowledgeable executive. She concluded that the three criteria listed above were met and that complying with the Request would therefore

“place a grossly excessive burden on the Home Office.” She reached that conclusion taking into account the purpose and value of the Request and added:

“The Commissioner recognised that disclosure of the information could provide the public with an insight into non-compliance cases and potentially lead to greater transparency in relation to the Home Office’s role in relation to allegations of licence infringements. However, the Commissioner was satisfied that despite the potential benefits of disclosure, given the very significant burden which complying with the request would place on the Home Office, section 14(1) FOIA should be upheld.

The Appeal to this Tribunal

15. CFI lodged an appeal against the Decision Notice on 19 May 2017. The Notice of Appeal was accompanied by detailed grounds of appeal and the Information Commissioner filed an equally detailed written Response on 31 July 2017. CFI declined the Tribunal’s invitation to file a Reply, but it did file a lengthy witness statement signed by its Director of Science and Regulatory Affairs, Dr Katy Taylor on 27 September 2017. That witness statement, with other agreed documents, was included in a hearing bundle provided to us in advance of the hearing.
16. The Tribunal Registrar issued a Case Management Direction on 4 August 2017, the effect of which was to invite, but not require, the Home Office to be joined as a party to the Appeal. The Home Office declined, even though it had been made clear to it by the Information Commissioner that she felt unable to assist the Tribunal on the factual background to her assessment of the burden of work likely to be involved in complying with the Request, beyond her assessment of the information provided to her by the Home Office.
17. On 28 January 2018 a further Case Management Direction was issued, following the filing of a second witness statement signed by Dr Taylor and CFI’s skeleton argument. This Direction ordered that the hearing of the Appeal should be adjourned until the Home Office could be joined as a Second Respondent and that arrangements should be made permitting all parties to file evidence. The reason for issuing the Case Management Direction was that the documents filed indicated the nature of CFI’s challenge to the Home Office’s estimate of costs, which it said was seriously overstated.
18. The Home Office filed a written Response to the Appeal and, subsequently, a witness statement of William Reynolds, who by this stage had become the Head of its Animals in Science Regulation Unit. CFI filed a third witness statement by Dr Taylor and one by Edie Bowles, a solicitor on its staff.
19. The Appeal was heard on 5 June 2018 when CFI was represented by David Thomas,

the Information Commissioner by Elizabeth Kelsey and the Home Office by Holly Stout.

The evidence on the Appeal

20. Dr Taylor's first witness statement described CFI and its work, particularly in respect of the regulation by the Home Office of animal experiments and the reasons for the Request in that context. Much of the rest of the witness statement took the form of argument as to why CFI found it difficult to accept the Home Office's cost estimate by reference to both the number of documents estimated to exist and the time that each would take to be examined before disclosure.
21. Dr Taylor also explained that, before submitting the Request, CFI had sought the same information from the Crown Prosecution Service ("CPS"), which initially indicated that it could not identify the requested information. However, in a later communication, dated 11 August 2016, it indicated that the information it held referred to "initial contact" in relation to the two cases referred to in the Request but that it "...contains no request for the CPS to consider whether or not to charge any person or entity" and no evidence of the CPS taking any decision on either case. Although the CPS declined to disclose the information sought it did provide the following summary of the two cases:

"Case 1. An animal died approximately two weeks after being taken into captivity. It had been health checked and its condition described as 'indicates various old injuries, poor/lost teeth, body condition fair to poor, described as very old. Blood results unremarkable. Not subjected to treatment, enhanced monitoring or specific vet advice'. The post mortem result is described as '(it) suggests the animal was not eating and was very thin, despite having access to food. I consider starvation is not the correct term. The anorexia observed is unlikely to be the primary health issue, but it will likely not be possible to saying anything more definite'. It was suggested that the main issue was a failure to conduct and monitor effectively daily checks on the animals and to act on the information that would have been obtained had that been done.

Case 2. An animal was put to sleep because a brainstem lesion made the day before had resulted in effects that were unexpectedly severe, resulting in complete paralysis. It is not clear whether the animal was awake or asleep during the night after the issue was discovered. It is possible that the animal should have been put to sleep earlier."

22. The witness statement went on to explain that the 2015 Annual Report of the ASRU made no mention of the two cases and that, against that background, CFI submitted the Request because of its concern that the sanctions regime operated by the Home Office was not as effective as CFI believes it should be.
23. Dr Taylor's second witness statement described attempts by CFI to resolve the dispute regarding the Request and stated that the Home Office had not responded. In particular, it was said, the Home Office had not explained why, in October 2017 and without reference to the CFI, it had posted on its website a report on the incident described above as "Case 1" but had given no indication as to whether it intended to publish a similar report in relation to "Case 2". The report itself set out a fuller version of the facts, as summarised previously by the CPS, and recorded the sanctions that had been imposed. It concluded:

“Failures in basic animal care and inadequate communications between staff had serious animal welfare consequences in this case. The failings were regarded as serious non-compliance.”

24. Dr. Taylor also recorded that the published report said this about the contact between the Home Office and the CPS:

“The details of this incident were referred to the [CPS] for consideration of prosecution action. The CPS declined to take action on the case. Our decision to refer a case to the CPS is one that is infrequently taken and was an indication of the seriousness with which the Secretary of State viewed this matter.”

She pointed out that this gave a different impression of the communications between the Home Office and the CPS from that given by the CPS letter to CFI dated 11 August 2016 referred to in paragraph 21 above.

25. The rest of Dr Taylor’s second witness statement updated CFI’s reasons for scepticism about the cost estimate, in light of the further information emerging from the published report.
26. The witness statement of Ms Bowles provided her first-hand account of communications between CFI and the Home Office after the Request had been submitted. The bare facts have been summarised in paragraphs 6 to 12 above. In relation to the telephone conversation on 18 May 2016, Ms Bowles said this:

“On 18 May 2016 I received a call from Will Reynolds, then the deputy head of ASRU. I recall him saying that the review would be lengthy and suggested that if it was dropped he could provide a document that he felt contained the information CFI required. He did not specify what the document was. I informed Mr Reynolds that I would need to discuss this with my colleague David Thomas, legal consultant for CFI, and my client.”

27. Mr Reynolds’ witness statement described ASRU and the role it performs. It focused, in particular on the care which it must take in balancing the requirements of robust and open regulatory procedures with the protection of individuals from animal rights activists who, unlike CFI, may be tempted to adopt unlawful tactics against those conducting animal experiments. This includes the need to comply with a statutory provision imposing criminal sanctions for disclosing confidential information obtained during investigations. As a consequence, requests for information need careful handling and information that is disclosed must be carefully checked to redact all information that might directly or indirectly enable an individual or institution to be identified.
28. Mr Reynolds went on to describe the exchanges between the parties after the Request had been submitted. On the telephone conversation on 18 May 2016 he said:

“31. In order to resolve the matter, I spoke to Edie Bowles by telephone on 18 May 2016 to discuss the original FOIA. As I recall, I reiterated what we had said in the 6 May 2016 letter that HO could not accede to the breadth of the FOIA request that had previously been submitted by the Appellant, and that a s12 exemption applied. I repeated the suggestion that they might find it helpful to make a new request, narrowing it down to specific documents. I subsequently communicated to a

colleague, via email...that I believed we would receive a revised request. In expectation of the revised request I instructed my colleague to begin redacting relevant reports. My understanding of that phone call was that the Appellant understood what they would need to do to narrow their request.

32. Later on the same day I instead received an informal email ... saying that whilst the Appellant appreciated what I had said, they were unable to drop their requested review as they did not believe the s.12 exemption applied. I replied, very briefly, also on 18 May... I failed then to understand or acknowledge a peculiar request in the Appellant's email for 'the Document'. The Appellant repeated this request for 'the Document' in a further email, and again, I did not understand or acknowledge. A formal letter was sent to the Appellant on 30 June 2016..., which observed that as the original request had not been narrowed down, therefore ASRU could not assist further.

33. Subsequently, it has become apparent to me that the Appellant interpreted my repeated suggestion that they should re-submit their request, and ask for a more specific document (i.e. by name, or subject) to mean that I had said I had a 'specific document' that I was able to send. This was never the case or my intention and I am afraid I simply did not realise at the time that there had been this misunderstanding.

34. The Appellant wrote to me again on the 4 July 2016..., in response to the letter of 30 June 2016, indicating there was likely some confusion on my part. The email erroneously suggests that I 'offered to provide CFI with a document that [I] felt contained the information it was really interested in.' I can confirm that my intention in that conversation was to indicate we had a range of information on the cases the Appellant had submitted an FOIA on, but that without narrowing the terms of their request I would be unable to assist further."

29. Mr Reynolds also explained how the Home Office had arrived at its cost estimate. For Case 1 the electronic documents held amounted to 65.2MB of data covering preliminary email exchanges with the licence holder and between Inspectors discussing the potential infringement and investigative reports by both Inspectors and the Establishment. It also included emails to the CPS, a review of the licence and discussions with the Compliance team. On the basis that a single page of text was likely to amount to 0.1MB of data, the Home Office had estimated that it held approximately 650 pages of text. Case 2 accounted for 685.3MB of data, which was calculated, on the same basis, to represent 6,800 pages of text. This was said to:

"... include emails detailing the non-compliance investigation and discussions between Inspectors and ASRU colleagues, legal advisers and individuals at the establishment, including the licence-holders. It also includes email conversations on the licensing side to review the terms and conditions of the licence and whether or not they should be amended, and the paperwork for the final decision to amend. It may also include submissions/advice to the Minister. It also includes our emails with the CPS and some of their questions in response clarifying points."

30. These calculations led to an estimate of 7450 pages of data, each one of which would take at least 3 minutes to read and redact information that should be withheld in order to apply relevant exemptions. This included consideration of the exemptions set out in the following provisions of the FOIA:
- a. Section 30 (investigations and proceedings conducted by public authorities);

- b. Section 32 (matters relating to court proceedings);
 - c. Section 38 (health and safety);
 - d. Section 40 (third party personal information);
 - e. Section 41 (confidential information obtained from a third party);
 - f. Section 44 (information whose disclosure is prohibited, as referred to in paragraph 27 above).
31. At least one member of staff would then have to review the redactions, following a “second pair of eyes” process followed by the Home Office – a total of approximately 500 hours of staff effort. This, Mr Reynolds suggested, represented a disproportionate burden of time to the detriment of the ASRU’s other obligations, even if the information sought was of great public interest. However, his impression was that the substantive information that would be released would be “fairly minimal”.
32. Mr Reynolds filed a Confidential Annex to his witness statement that provided additional information about one of the two cases, which the Home Office argued should not be placed in the public domain. That argument was accepted by the Registrar to the Tribunal who permitted it to be submitted on a closed basis under Rule 14 of Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (“the Rules”), although a part of it was made available to CFI on terms of confidentiality. The Annex provided additional information explaining why the material held by the Home Office was said to be so extensive.
33. Dr Taylor filed a third witness statement in response to the Home Office evidence providing more information about communications between CFI and the Home Office since the Appeal was launched and commenting on the exemptions which Mr Reynolds had suggested would need to be considered at document redaction stage.
34. All of the witnesses attended the hearing and answered questions put to them by other parties and by members of the Tribunal panel. On the factual issue as to what was said during the telephone conversation on 18 May 2016 we found ourselves faced with the conflicting statements quoted in paragraphs 26 and 28 above. We have concluded that Ms Bowles’ recollection on the point is more reliable than that of Mr Reynolds. It is consistent with the contemporaneous correspondence and Mr Reynolds was really unable to explain why, if he had not referred to a particular document, he did not react when Ms Bowles made reference to it in her email of the same day. Nor did he explain why he would feel it necessary to simply repeat over the telephone a general encouragement to refine the Request when he must have known that a lawyer working for an organisation which made such regular use of the freedom of information regime would have clearly understood what had been said about that in the original rejection letter. Finally, neither Mr Reynolds nor anyone else at the Home Office, reacted to the very clear summary of events, as seen through the eyes of CFI, set out in Ms Bowles’ letter of 4 July 2016. Under questioning, Mr Reynolds spoke in general terms about the Home Office’s wish to work cooperatively with organisations such as CFI but proffered no detailed explanation of the written communications he authored at the time. He did, however, acknowledge that in this case it would be hard for the requester to anticipate the extent of the documentation which was held on the matter. He referred to the Information Commissioner’s guidance on ‘scattergun or fishing requests’ and stated that it is not appropriate for a public authority to enter into discussions with a requester regarding what documents they want.

35. We are left to conclude that a trade-off of a single, unspecified, document against the threat of an internal review was proposed, but that the Home Office subsequently backed away from the idea and reverted to the position of inviting CFI to see if it could find a way of narrowing the scope of the Request. It adopted that position without offering any information about the scope, nature or organisation of the materials that it held or any other guidance on how a new request might be formulated.
36. Mr Reynolds was also questioned regarding his failure to reply to an email from Dr Taylor (Dated 20 October 2017 after a first hearing scheduled for 25th October 2017 had been adjourned. This referred to the Home Office claims that dealing with the request would represent a ‘grossly oppressive burden’ and stated that ‘CFI would still be willing to enter into discussions with it about what kind of documents would satisfy its needs’ in an attempt to resolve the current dispute. Mr Reynolds response was ‘That is ‘fishing...’. He continued that they are proactive in providing advice and assistance but did not respond to the challenge that this appeared to be limited to telling the requestor in general terms to refine the request.

The issues arising on the Appeal

37. CFI raised two main criticisms of the conclusion in the Decision Notice that disclosure was not required. In the reverse order to how they appeared in the Grounds of Appeal they were:
- a. the Information Commissioner had applied the wrong legal test for determining whether an information request fell within the scope of FOIA section 14; and
 - b. the Information Commissioner did not review, with sufficient rigour, the evidence submitted to her by the Home Office in support of the relevant legal test and did not take into account the failure by the Home Office to provide advice and assistance that would have helped CFI to refine the Request in order to overcome any section 14 objection.
38. We will deal with the parties’ arguments on each of those complaints in the same order.

The legal basis for assessing whether section 14 was engaged in a case of this kind.

39. We have concluded that we are bound by authority to accept that, when determining whether a Public Authority may refuse disclosure under FOIA section 14, it is permissible to take into account the cost burden of complying with an information request, even when cost is the sole factor relied on and the information requester’s conduct is not otherwise open to criticism. In *Craven v Information Commissioner and DECC* [2012] UKUT 442 (ACC) the Upper Tribunal decided that it would be inconsistent with the underlying purpose of the freedom of information legislation to interpret section 14 as preventing a public authority from relying on excessive costs alone. Upper Tribunal Judge Wikeley went on to say, at paragraph 29:

“There are two other reasons why I conclude that a one-off FOIA request can be adjudged to be vexatious purely on the grounds of cost, irrespective of the possibility of section 12 applying. First, sections 12 and 14 of FOIA are both discretionary provisions. There is no obligation on a public authority to apply them. Parliament has vested public authorities with a broad margin of judgement on such matters, and it would be inappropriate to fetter the exercise of that discretion in any way. Second, of course,

Parliament has studiously avoided defining what is meant by a 'vexatious request'. Adopting an exclusive construction of section 12 would necessarily involve cutting down the very wide words used by the legislators. Moreover, if section 12 were intended to be an exclusive code, section 14(1) could easily have been prefaced with the phrase 'Where section 12 does not apply....' "

40. In the face of that clear statement of principle we are unable to accept CFI's argument that it was inconceivable that Parliament would have clearly calibrated the types of activity which could be taken into account for the purposes of FOIA section 12 (which expressly excluded the cost of considering the possible application of exemptions) but then permitted that factor to be taken into account for the purposes of section 14.

The application of the relevant legal test to the facts of the case

41. CFI argued that the estimate of costs, put forward by the Home Office and accepted by the Information Commissioner in her Decision Notice, did not in fact demonstrate that the cost of complying with the Request would impose an unreasonable financial burden. The Home Office and Information Commissioner argued that the costs burden described in the Decision Notice was fully supported by Mr Reynolds' evidence and that the value of any information that might be disclosed in response to an information request as broad as that submitted by CFI was likely to be minimal.
42. CFI made a number of criticisms of the Home Office approach both in its original written submissions and during the hearing after Mr Reynolds had given his evidence. One such criticism arose as a result of Mr Reynolds' evidence that a Document Management System was available. No explanation was given as to why, in those circumstances, the entire email records of a number of relevant members of staff were searched in order to identify the messages and trace documents attached to them. Nor were we satisfied that the Home Office had made any serious attempt to isolate information relating to the investigations under Case 1 and Case 2 from information on the research activities of those investigated (which CFI made clear it was not seeking).
43. In these circumstances we have serious reservations about the reasonableness and accuracy of the cost estimate. It seems to us that the information requested could have been searched for in a much more straightforward manner with a consequential reduction in the quantity of material needing to be reviewed for possible exempted information. Our concerns are not alleviated by the information about the withheld information set out in the Confidential Annex to Mr Reynolds' witness statement. It described various categories of document which, even if they all fell within the scope of the Request, could have been searched in a more efficient manner than the Home Office adopted. The careful review process, as described by Mr Reynolds, could then have been carried out on a much-reduced body of material.
44. That outcome could certainly have been achieved had the Home Office complied with its obligation to provide advice and assistance to CFI under FOIA section 16.
45. Section 16 is in the following terms:

"(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."

46. Section 16 acts as a counterweight to the right of a public authority to rely on excessive costs to refuse an information request (see *Kirkham v Information Commissioner* [2018] UKUT 126 (AAC) at paragraph 12). That case concerned a section 12 estimate, but it must follow that section 16 performs the same role in cases where section 14 is relied on and cost of compliance is the sole ground asserted to justify refusing an information request.
47. The Information Commissioner argued that section 16 was beyond the scope of the Appeal as the investigation that led to the Decision Notice under appeal covered only section 14. However, the Decision Notice included a review of the communications between the parties, including the Home Office's purported attempt to provide assistance, and for the reasons we have given, based on Upper Tribunal authority, an investigation of a public authority's cost burden should include the possible application of the section 16 counterweight.
48. The Home Office went further and argued that CFI could not rely on section 16 because a public authority is deemed to have complied with its obligation where it has conformed with the Code of Practice. CFI, it argued, had not identified any respect in which it alleged the Home Office had failed to comply with that Code. We reject that argument. It is inherent in a complaint of breach of section 16(1) that no defence is available to the public authority under section 16(2). It is for the public authority to make good a defence, if it is able to do so. In this case, for the reasons we have given, it cannot.
49. Guidance on what is to be expected of a public authority under section 16 may be obtained from The Freedom of Information Code of Practice. The version in force at the time¹ provided, at Paragraphs 10 and 11, as follows:

10. Appropriate assistance in this instance might include:

- providing an outline of the different kinds of information which might meet the terms of the request;*
- providing access to detailed catalogues and indexes, where these are available, to help the applicant ascertain the nature and extent of the information held by the authority;*
- providing a general response to the request setting out options for further information which could be provided on request.*

This list is not exhaustive, and public authorities should be flexible in offering advice and assistance most appropriate to the circumstances of the applicant.

11. In seeking to clarify what is sought, public authorities should bear in mind that applicants cannot reasonably be expected to possess identifiers such as a file reference number, or a description of a particular record, unless this information is made available by the authority for the use of applicants.

¹ <http://webarchive.nationalarchives.gov.uk/+/http://www.justice.gov.uk/guidance/foi-code-of-practice.htm>

50. The Code clearly anticipates that the obligation to provide advice and assistance extends beyond simply informing a requester that he or she may reformulate an information request to see if this reduces the cost of compliance to an acceptable level. Individuals, with no knowledge of how the public authority in question maintains its records and what facilities exist for searching them, are at a very considerable disadvantage. They should be provided with that information in sufficient detail to enable them to see how their original request might be refined. In the present case the Home Office could have provided basic information as to the way in which its investigation records were maintained (including the availability of a Document Management System), which would have enabled a search to be conducted that focused on the information sought.
51. Assistance at that level of detail need not open public authorities to the cost or disruption of having to provide detailed instruction to a requester on the operation of the search facilities, as the Home Office submitted. Nor would it require them to either maintain a dialogue over the detail of the records and facilities or to undertake a series of sample searches in order to refine an information request in stages. Once appropriate advice and assistance has been provided, the requester will be expected to settle upon a new formulation and submit that as a new information request.
52. As an example of the assistance that could have been given, it was acknowledged by Mr Reynolds during the hearing that material would have been prepared for submission to the person responsible for deciding to refer the cases to the CPS. In other words, individual pieces of information recorded in email or otherwise would have been brought together to enable an assessment to be made.
53. In fact, as we have found on the evidence, Mr Reynolds did edge towards providing useful advice (in the telephone conversation of 18 May 2016) but then backed away from doing so and caused the Home Office to adopt the singularly obstructive approach evident from its letter of 30 June 2016.
54. We have no doubt that, had the Home Office complied with its obligation under section 16, the Request could have been handled at modest cost.
55. The reduced burden imposed by the cost figure that would have emerged, had the Home Office approached the initial search process in a more effective manner and had complied with its section 16 obligation, must be set against the importance of the information likely to have emerged. In that connection, we place considerable weight on the discrepancy between the Home Office's public statements about its communications with the CPS and the information provided by the CPS itself. The withheld information would throw valuable light on exactly what the CPS was presented with, what it was asked to do in relation to that information and what decision it made and communicated to the Home Office. It would also have value in demonstrating, at a more general level, the operation of an important aspect of the regulation of animal experiments.

Conclusions

56. In light of the findings set out above we conclude that the Home Office is not entitled to rely on FOIA section 14 because the cost estimate on which it relies exaggerates the

likely cost of complying with the Request and the cost burden that it would in fact have to bear (had it adopted a more efficient search process and/or given the appropriate level of advice and assistance to CFI) would not have been disproportionate, given the value of having the requested information disclosed. The Home Office should, within 35 days, either disclose the requested information or identify any exemption on which it intends to rely as a ground for refusing disclosure, in whole or part.

57. Our decision is unanimous

Signed

Judge C Ryan

Judge of the First-tier Tribunal

Date: 12/10/2018