



**Appeal numbers: EA/2018/0228
& EA/2018/0231**

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

MR. DENNIS SPICER

Appellant

- and -

THE INFORMATION COMMISSIONER

Respondent

**TRIBUNAL: JUDGE ALEXANDRA MARKS CBE
(SITTING AS A FIRST TIER TRIBUNAL JUDGE)**

SITTING IN CHAMBERS ON 11 APRIL 2019

DECISION

1. The appeals are dismissed.

REASONS

Background to Appeal

2. By way of background, in June 2017, while sailing on the Norfolk Broads the Appellant experienced a “careless hit and run” collision with a racing rowing craft. He stated to the Information Commissioner (“the Commissioner”) that he had incurred £1300 of “damage costs” which had been “evaded” because the craft could not be identified. He said there had also been other near miss collisions with himself and others.

3. Some months after this incident, the Appellant sought information from the Broads Authority pursuant to the Freedom of Information Act 2000 (“FOIA”). The Appellant made his first FOIA request (“First Request”), comprising eight questions, on 10 December 2017.

4. The Appellant made his second FOIA request (“Second Request”), comprising three questions, on 4 January 2018:

“1. Copies of all records in whatever form of “on” or “adjacent to” the water safety incidents since 1 Jan 2013 to current date, including incident date, nature of occurrence, how reported, who investigated, investigation findings and any actions resulting.

2. Copies of any correspondence letter, email, notes of discussion or minutes between the BA (Broads Authority) & Rowing Clubs on matters relating to safety since 1 Jan 2013 to response supply date. Whilst I appreciate these might be redacted to remove names where this is justifiably appropriate I would expect to receive the otherwise complete original detailed document regardless on the basis it is Public Organisation to Organisation.

3. Copy of the original “Broads Control” incident Logs please since 1 Jan 2013 or earlier to current date.”

5. On 4 January 2018, in response to the First Request, the Broads Authority provided some information; identified one question as an interrogation rather than a request for information; and stated that it could not make sense of part of the Appellant’s First Request, namely question 8:

“8. I would like to receive a comprehensive copy of the Broads Authorities “index” of it’s own internal reference documents as in the organisations documents provided for procedural, policy, guidance, safety and any other purposes.”

6. On 10 January 2018, the Appellant sought an internal review of the Broads Authority's failure to supply information requested in response to question 8 (and question 4 which, by the date of this appeal, is no longer being pursued).
7. On 12 January 2018, the Broads Authority refused to provide the information sought by the Second Request, relying on section 12 FOIA that the cost of complying with the request would exceed the appropriate limit.
8. On 15 January 2018, the Appellant sought an internal review of the Broads Authority's decision in relation to the Second Request.
9. On 26 January 2018, as a result of internal review of the First Request, the Broads Authority emailed the Appellant, asking him to rephrase his question 8 "in plain English", noting that there is no single "index" which covers all the various documents mentioned.
10. On 31 January 2018, the Appellant complained to the Commissioner about the Broads Authority's response to the First Request questions 1, 2, 4 (which are no longer being pursued) and question 8, stating that:
 - (a) The response to question 8 had been "disrespectful" in describing it "as making no sense" and suggesting it was not "in plain English".
 - (b) In his view, the Broads Authority was intentionally not complying with FOIA.
11. On 13 February 2018, after internal review of its response to the Second Request, the Broads Authority emailed the Appellant certain information and links to various papers.
12. On 21 February 2018, the Appellant complained to the Commissioner about the Broads Authority's response to the Second Request, stating that:
 - (a) the response to question 1 (which sought copies of all records about water safety incidents since 1 January 2013) comprising an IRIS (Incident & Investigation Reporting System) summary was "poor";
 - (b) the Broads Authority had originally refused his request on the basis of excessive cost but, after review, found there was no information in response to his question 2 (which sought copies of any correspondence between the Broads Authority and Rowing Clubs on safety matters since 1 January 2013);
 - (c) the response was unsatisfactory in relation to his question 3 (which sought copies of the original "Broads Control" incident logs since 1 January 2013 or earlier); and
 - (d) the Broads Authority was not acting in compliance with FOIA.
13. After various exchanges of correspondence between the Commissioner and the Broads Authority, and separately with the Appellant, on 4 October 2018 the Commissioner issued Decision Notice FS50727518 in relation to the First Request and Decision Notice FS50727928 in relation to the Second Request.

14. By the date of the Decision Notice on the First Request, the Commissioner's focus for consideration was question 8. By then, the Broads Authority wished to aggregate the cost of replying to that question with the cost of compliance with the Second Request.

15. The Commissioner found the Broads Authority was entitled to rely on section 12 FOIA for question 8. However, the Commissioner also found that the Broads Authority had breached section 17 FOIA (by its failure to respond to question 8 within 20 working days of receipt, and by its late reliance on section 12). Further, the Commissioner found that the Broads Authority had breached section 16 FOIA by failing in its duty to provide to the Appellant advice and assistance in refining his request. The Commissioner required the Broads Authority to provide to the Appellant further advice and assistance to allow him to reformulate question 8 (taking into account questions 1 and 3 of the First Request) which could be answered within the appropriate limit.

16. As for the Second Request, the Commissioner found that the Broads Authority was entitled to rely on section 12 FOIA for questions 1 and 3. For question 2, she was satisfied on the balance of probabilities that the Broads Authority did not hold any further recorded information. However, she considered that the Broads Authority had breached section 16 FOIA, and required it to provide to the Appellant further advice and assistance to allow him to reformulate questions 1 and 3 (taking into account question 8 of the First Request) which could be answered within the appropriate limit.

17. On 4 October 2018, the Appellant appealed to the Tribunal against both the Commissioner's Decisions.

18. On 1 November 2018, the Broads Authority emailed the Appellant with alternative formulations of question 8 of the First Request, and questions 1 and 3 of the Second Request. The Broads Authority stated that it would be able to answer such reformulated questions, depending which were chosen by the Appellant, within the costs limit (an estimated 14 hours of time remaining after time spent on the original requests pre-complaint).

Appeal to the Tribunal

19. The Appellant's Notice of Appeal dated 4 October 2018 against the Commissioner's Decision on the First Request:

- (a) sought amendment of various factual matters which were "misleading";
- (b) stated that question 8 sought "a copy" of the Broads Authority's index, not "an index" which suggested something might need to be generated;
- (c) expressed doubt that a public authority would not possess a searchable reference index of its policy and procedural documents;

(d) challenged retrospective aggregation under section 12 FOIA due to the undue delay of circa 360 days; and

(e) asked for the Decision to record the Commissioner's finding that question 8 was clearly put and could not be subject to misinterpretation.

20. In relation to the Second Request, the Appellant's Notice of Appeal dated 4 October 2018 challenged the Commissioner's Decision on the basis:

(a) various factual matters were incorrect or omitted;

(b) aggregation under section 12 FOIA normally only applies within 60 days but the Broads Authority had retrospectively claimed that exemption (on an aggregated basis with question 8) and unlawfully frustrated due supply for circa 330 days;

(c) the Appellant disagreed with the Broads Authority's cost assessment in answering question 1 (copies of all records relating to water safety incidents since 1 January 2013): the authority should demonstrate where the additional three pages for each of the 513 incidents identified on the IRIS log contain any "absolutely exempt" information, or otherwise just provide those pages "as is" – or simply provide an active link to IRIS – thus minimising costs;

(d) if any absolute exemptions can be demonstrated in respect of those three pages, the Broads Authority should not charge for any redactions when relying on section 12 FOIA;

(e) the original 18 hours limit should therefore apply in which to respond to the outstanding requests;

(f) any well-structured public authority would have no difficulty in meeting the FOIA requests within budget;

(g) it was "beyond belief" that the Broads Authority had no information in response to question 2 (seeking communications with Rowing Clubs on matters of safety), especially when it had initially responded that there was *too much* information and hence relied on section 12 FOIA; and

(h) the same individual at the Broads Authority reviewed his own original refusal which is procedurally bad practice.

21. The Commissioner's Response dated 27 November 2018 maintained the analysis set out in the Decision Notices.

22. The parties and the Tribunal agreed that this matter is suitable for determination on the papers in accordance with rule 32 of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended.

23. The Tribunal has considered all the evidence and submissions made by both parties. These were contained in two Bundles (one for each of the two appeals, which are both dealt with in this Decision) together comprising a total of 230 pages, and an Additional Bundle comprising three further documents sent by the Appellant to both

the Tribunal and the Commissioner. I shall refer to all these Bundles collectively as “the Bundle”.

24. The Bundle included an undated three page document entitled “Appellants Case” attaching as Exhibit 1 a local newspaper article reporting “widespread concerns” about the Broads Authority; and as Exhibit 2 an internal report within the Broads Authority showing “considerable internal infighting” and “member against member” complaints.

25. The Bundle also included the Appellant’s “Statement of Truth” dated 25 February 2019 with Annexes 1-5.

The Law

Section 1(1) FOIA: general right of access to information held by public authorities

26. The duty of a public authority to disclose requested information is set out in s.1(1) FOIA as follows:

“(1) Any person making a request for information to a public authority is entitled—

(a) To be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) If that is the case, to have that information communicated to him.”

Section 12 FOIA: exemption where cost of compliance exceeds appropriate limit

27. 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” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

(4) The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority-

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

(5) The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated.

The Fees Regulations

28. The regulations which define the appropriate limit for the purposes of section 12(4) FOIA are The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulation 2004 SI 2004 No 3244 (the “Fees Regulations”).

29. Regulation 3 of the Fees Regulations provides that the appropriate limit for central government, government departments, legislative bodies and the armed forces (i.e. those bodies covered by Part 1 of Schedule 1 of the Act) is £600. For all other public authorities, the appropriate limit is £450.

30. Regulation 4(3) of the Fees Regulations states that 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:

- determining whether it holds the information;
- locating the information, or a document which may contain the information;
- retrieving the information, or a document which may contain the information;
- and
- extracting the information from a document containing it.

31. All public authorities must calculate the time spent on the above activities at the flat rate of £25 per person, per hour. Hence the appropriate limit will be exceeded if it would require more than 24 hours work for central government, government departments, legislative bodies and the armed forces, and 18 hours work for all other public authorities.

32. Staff time taken, or likely to be taken, in removing any exempt information in order to leave the information that is to be disclosed - or ‘redaction’ - cannot be included as part of the costs of extracting the requested information.

33. This approach was confirmed by the Information Tribunal in the case of *The Chief Constable of South Yorkshire Police v the Information Commissioner* (EA/2009/0029, 14 December 2009) and also by the High Court on appeal ([2011] EWHC44 (Admin)).

34. Regulation 5(2) provides that where two or more requests are made by one person, and relate, to any extent, to the same or similar information and are received by the public authority within any period of 60 consecutive working days, the

estimated cost of complying with any of the requests is to be taken to be the total costs which may be taken into account by the authority of complying with all of them. This is known as “aggregation”.

35. Section 12 FOIA is not subject to any public interest test.

The powers of the Tribunal

36. The powers of the Tribunal to determine appeals are set out in section 58 FOIA:

58. *Determination of appeals*

(1) If on an appeal under section 57 the Tribunal considers -

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

The burden of proof

37. The burden of proof rests with the Appellant in satisfying the Tribunal that the Commissioner’s decision was wrong in law or involved an inappropriate exercise of discretion.

Submissions

38. The Commissioner’s submissions are, in summary:

(1) read as a whole, the Decision Notices are clear and, in any event, the actual phrasing of a Decision Notice does not fall to the Tribunal;

(2) there is no reason to doubt the Broads Authority’s assertion that it does not hold the information requested in the form of an “index” (and thus it would not be possible simply to provide a copy of it);

(3) question 8 was not limited to an index of policies and procedures but was more wide-ranging;

(4) a public authority may rely on section 12 FOIA “late” according to the Upper Tribunal in the case of *McInerney v Information Commission & Department for Education [2015] UKUT 0047*;

(5) the Upper Tribunal ruled (in *Commissioner of Police for the Metropolis v. The Information Commissioner & DM [2014] UKUT 479 (AAC)*) that “FOIA is not a means of reviewing a public authority’s record-keeping and in some way testing it against best practice”. Thus the Appellant’s complaint about the Broads Authority not being well-structured is not a legitimate ground of appeal;

(6) as permitted by the Fees Regulations, the Broads Authority estimated the cost of compliance with the actual request made - and on an aggregated basis. It is open to the Appellant to decide whether he wishes to submit a differently phrased request;

(7) it is “perfectly plausible” for a public authority to refuse a request on the basis of section 12 FOIA but then, on further review, to seek to provide information to a requester and then find no information is held. There is no reason to doubt what the Broads Authority had said about the searches it had undertaken, and why it did not hold the requested information; and

(8) the Appellant has advanced no arguments of substance which challenge the Commissioner’s findings, and thus the appeals should be dismissed.

39. In addition to the Appellant’s grounds of appeal (summarised in paragraphs 19 and 20 above), the Appellant made submissions by email to the Tribunal dated 9 December 2018 (see pages 35-36 of the Bundle). In summary:

(1) the Commissioner herself has undermined the fundamental information rights enshrined within FOIA;

(2) the information requested has been confirmed as existing but has not yet been provided, some 12 months later;

(3) the Broads Authority has only used a total of four of the available 18 hours yet the information requested has still not been provided;

(4) the Commissioner’s Decision Notices, and response to the Notices of Appeal, include “material misinformation” hence the Commissioner’s evidence is “unreliable”; and

(4) the Appellant’s email to the Commissioner dated 16 November 2018 set out the above points, but has not been taken into account.

40. The Appellant further argued in his undated response (see pages 42-47 of the Bundle) that:

(a) the Commissioner omitted from her response to the Appeal Notices, and thus hid, “material facts” which thereby totally misinforms the Tribunal process;

- (b) there is no cogent “true evidence” of the cost which validates the application of section 12 FOIA;
- (c) aggregation should not apply at over 60 days;
- (d) the Broads Authority’s questionable attitude to reasonably providing requested information is demonstrated, for example, by its original failure to supply information in response to question 7 then eventually supplying it, and also its “entirely wrong” response to question 4;
- (e) the Commissioner should have given in its Decision Notice the authority’s “actual wording” of its reasons for rejecting question 8;
- (f) the Commissioner should “demonstrate/prove” that the authority ever indicated – prior to the Appellant’s complaint to the Commissioner - that the information requested does not exist: ALL the information requested in both requests “does very clearly exist”;
- (g) the authority’s initial response to the Second Request was a “flat refusal” based on section 12 FOIA but after internal review the authority contradicted itself by claiming there was *no* information in relation to question 2;
- (h) no responses have been given to questions 8, 1 and 3 though they could easily be met within the 14 hours remaining of the 18 hours time limit (or 32 hours had aggregation not wrongly been applied);
- (i) the Commissioner’s findings of the authority’s breaches of sections 16 & 17 FOIA do not assist with any outstanding requests for information: the authority has not taken the required steps to provide the requested information;
- (j) the Commissioner is encouraging “future belligerent disregard” of FOIA by resisting these appeals;
- (k) if the authority does not have an index of its policies, procedures and guidance documents, how does it ensure its staff know their obligations?
- (l) the Commissioner is denying a FOIA request when there are 14 hours remaining after 12 months’ delay;
- (m) *no* link was ever provided to the Appellant of the authority’s policies and procedures, only to the authority’s Publication Scheme which did not provide any further access to any information;
- (n) the Decision Notices are considerably factually incorrect and need to be re-written; and
- (o) time taken to redact information falls outside the costs limit yet the authority appears to include it in its costs assessment.

41. In a “Statement of Truth” dated 25 February 2019, the Appellant additionally argues that:

- (a) the Broads Authority is an “unreliable witness”, for example frustrating the supply of information, and retrospectively and opportunistically misusing section 12 FOIA despite 14 of 18 hours remaining to supply the requested information;
- (b) if the additional three sheets per incident on the IRIS log were supplied, this would largely remove the obstructive costs being suggested, yet the authority has not responded to this suggestion;
- (c) the authority *twice* refused to respond to question 8 on the basis it could not be understood but the Commissioner disagreed and was able to interpret the request. Still, however, the information has not been supplied although the authority confirms it “does exist”;
- (d) the authority misinformed the Commissioner: the IRIS log it provided to the Appellant did not include the “nature of occurrence” but only the date and imprecise location;
- (e) as can be seen from the Broads Control Operator Job Description, the authority collects and records much of the information requested which could, on the balance of probabilities, be supplied inexpensively;
- (f) aggregation should not be introduced when there have been clear issues of non-compliance, non-assistance and even abuse responding to a FOIA request;
- (g) a comprehensive copy of the index (of policies and procedures etc.) was “generically” requested so the authority could not “use pedantics” to deny it exists;
- (h) a web-link could be provided to the IRIS reports which would enable the requested information to be provided at nil cost: and
- (i) the authority’s CEO ideally should be required to produce a statement of truth outlining any real difficulty in meeting the long overdue outstanding requests.

Discussion and reasons

42. The Appellant does not suggest that the Commissioner should have exercised her discretion differently.

43. The Appellant was correct not to challenge the Commissioner’s exercise of discretion, because this is not a case where the Commissioner’s discretion was engaged. The exercise of discretion does not apply to exemption from disclosure under section 12 FOIA, nor where the Commissioner finds as a matter of fact on the balance of probabilities that the information sought does not exist.

44. For the reasons below, I am not satisfied by the Appellant’s evidence and submissions that the Commissioner’s Decision Notices are wrong in law (the only other basis - apart from wrongful exercise of discretion - upon which the Tribunal has power under section 58 FOIA allow these appeals).

45. I do not accept the Appellant's arguments that the Commissioner's Decisions were wrong because, he argues, the information he sought (a) exists and (b) could be provided by the Broads Authority within the 14 hours of staff time still remaining in accordance with the Fees Regulations.

46. I find that the Commissioner was entitled to accept the Broads Authority's evidence that question 8 of the First Request was too widely drafted, and that no index, or indexes, exist of *all* the Broads Authority's internal reference documents. As the Broads Authority pointed out in its email to the Commissioner dated 30 August 2018 (see page 178 of the Bundle), the request was far wider than a request for policies and procedures: "*internal reference documents across the entire authority 'for any other purpose' ...could include draft letters, and report templates and any reference guide...such as a fire evacuation procedure...committee timetables...legal precedents...training materials, draft tender documents...a telephone guide...*"

47. The Broads Authority attempted to respond to question 8 by providing, via the Commissioner's email to the Appellant dated 16 August 2018, a link to the Broads Authority's Publication Scheme (which includes in section 5 of its Appendix a list of its policies and procedures). However, the Appellant regarded that as insufficient response to his request.

48. The Appellant asserts (in his email dated 23 August 2018 – at page 173 of the Bundle) that it is "*highly irregular and extremely unlikely that a Public Authority with wide duties to public and staff could function as suggested seemingly on an 'ad hoc' basis without even an available searchable index or index's of its policy and procedural documents... they must have some form of document management system involving an index or index's*". However, the Appellant provides no evidence in support of this assertion – and fails to acknowledge that his question 8 asked for a copy index (or indexes) not *just* of policy and procedural documents but also of the Broads Authority's "*internal reference documents...provided for...any other purposes.*" (emphasis added)

49. In my judgement, in relation to question 8, the Commissioner was not wrong in law to decide that - on the basis of all the evidence and submissions before her:

- (a) the Broads Authority's initial concerns related to the extent of the request, what it would cover, the work involved in responding, and whether the Appellant really wanted all that information;
- (b) albeit belatedly (and thus in breach of section 17 FOIA), the Broads Authority was entitled to rely on section 12 FOIA;
- (c) the Broads Authority had, however, breached section 16 FOIA by failing in its duty to provide advice and assistance to the Appellant in refining his request;
- (d) had the Broads Authority applied section 12 FOIA within the time limit, it could have explained to the Appellant how in practice his request as currently worded covered a vast amount of information and time, and what information it could provide within this cost limit; and

(e) in the circumstances, it was appropriate to require the Broads Authority to take steps set out in the Decision Notice FS50727518 in relation to section 16 FOIA including - if not possible for the request to be reformulated - to explain to the Appellant why it was not possible.

50. By email to the Appellant dated 1 November 2018, the Broads Authority complied with the Commissioner's requirement by explaining to the Appellant that question 8 as originally triggered the section 12 FOIA exemption, and suggesting a possible reformulation of the question which it would be able to answer within the costs limit.

51. As for question 1, in my judgement, the Broads Authority *has* demonstrated that each of the additional pages for the 513 incidents would include "absolutely exempt" information, namely personal data of third parties which is protected under the Data Protection Acts (see page 96 of the Bundle). Hence the additional three pages per incident - or web-link to the IRIS log - could not lawfully be disclosed in response to an FOIA request: instead, the information requested by the Appellant would have to be *extracted* from those three pages. There is no evidence that the Broads Authority included in its estimate of costs any time for redaction (as opposed to extraction) of information when relying on section 12 FOIA.

52. In my judgement, on proper interpretation of the Fees Regulations:

(a) the 60 day time limit for aggregation applies to the respective dates of *receipt* by the authority of two or more requests, not the time taken by the public authority to respond to those requests or to claim exemptions from disclosure under FOIA;

(b) in respect of the time/costs limit, there is no requirement for a public authority to spend 18 hours responding to a request when – by reason of its wide range, and despite advice and assistance to the requester to refine the request – the request remains as originally drafted, and the public authority estimates that the time required to respond to that request would exceed the limit; and

(c) the authority is entitled to *estimate* the cost of complying with a request for information. In this case, the Broads Authority made such an estimate.

53. In my judgement, on the basis of all the evidence and submissions before her, the Commissioner was not wrong in law to decide that:

(a) the Broads Authority's estimate appeared reasonable as regards the time it would take to examine three additional sheets of data for each of the 513 incidents falling within the scope of the request in question 1, and that this time would exceed the appropriate limit;

(b) section 12 FOIA applies to question 3 on an aggregated basis because both question 1 and question 3 seek similar information relating to an overarching theme and were made within the same communication to the

same authority, thus satisfying the requirement for the requests to have been made within 60 consecutive working days;

(c) as the Commissioner had already accepted that the cost limit would be exceeded if the authority was to comply with question 1 alone, it follows that it would exceed the cost limit further if it was to comply with question 3;

(d) the Broads Authority was therefore entitled to rely on section 12 FOIA to refuse to respond to questions 1 *and* 3; and

(e) in the circumstances, however, it was appropriate to require the Broads Authority to take steps set out in the Decision Notice FS50727928 pursuant to section 16 FOIA including providing to the Appellant further advice and assistance to formulate a request seeking the information in questions 1 and 3 which could be answered within the appropriate limit.

54. It is notable that, by its email to the Appellant dated 1 November 2018, the Broads Authority complied with the Commissioner's requirement to provide advice and assistance to the Appellant to formulate his outstanding requests (questions 1 and 3) which could be answered within the appropriate costs limit. However, the Appellant did not accept that advice and assistance, nor adopt the Broads Authority's suggested possible alternative reformulations of his requests for information.

55. In respect of question 2 of the Second Request, the Appellant argues that the Broads Authority was willing to misuse section 12 FOIA to defeat the supply of information by initially dismissing his request (claiming there was so much information that to respond would exceed the spend limit) yet later alleging that it held *no* such information.

56. In my judgement, on the basis of all the evidence and submissions in relation to question 2, the Commissioner was not wrong in law to decide that:

(a) the Broads Authority having initially applied section 12 FOIA, at the internal review stage disclosed various documents to the Appellant but claimed it held no further recorded information;

(b) in response to the Appellant's dissatisfaction with the information provided, the Commissioner was entitled to ask the Broads Authority to explain its position and what searches it had undertaken, and to carry out fresh searches for further recorded information;

(c) as a result of the Broads Authority's response, the Commissioner was satisfied, on the balance of probabilities, that all relevant enquiries and searches had been made and that the Broads Authority does not hold any further recorded information falling within the scope of the request; and

(d) the Broads Authority nevertheless breached section 16 FOIA by failing to explain to the Appellant what further information *could* be provided within the cost limit if the request was refined.

57. I accept the Commissioner's submissions that:

(a) it is “perfectly plausible” for a public authority to refuse a request on the basis of section 12 FOIA but then, on further review, to seek to provide information to a requester; and

(b) in this case, the Commissioner had no reason to doubt what the Broads Authority said about the searches it had undertaken and why it did not hold the requested information.

58. I therefore reject the Appellant’s assertion – for which he has provided no supporting evidence – that “*it is beyond belief the Broads Authority [has]...no knowledge or records*”. I also reject his argument that the Broads Authority “misused” section 12 FOIA to avoid responding to the request, and that this was demonstrated by its later claim that it held no further information in relation to question 2.

59. I note that the Commissioner considered that the Broads Authority would also have been entitled to rely on section 12 FOIA for question 2 as well as questions 1 and 3, bearing in mind an authority’s entitlement to aggregate requests in accordance with Regulation 5 of the Fees Regulations.

60. For the reasons set out above, the Appellant has not satisfied me that the Commissioner’s Decision Notices were wrong in law.

Conclusion

61. I uphold the Commissioner’s Decision Notices and dismiss the appeal.

62. I refuse the Appellant’s request to amend the Decision Notices, or to direct the Commissioner to do so, because - even if I have power to do so under section 58(2) FOIA, having dismissed the appeals - I do not regard the alleged errors, inaccuracies and omissions to which the Appellant refers as being findings of fact on which the Commissioner’s Decisions were based in any material respect.

(Signed)

ALEXANDRA MARKS CBE

DATE: 24 April 2019
Promulgation date: 25 April 2019