



Neutral Citation Number (pending)

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

Case No. EA/2010/0141

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50218726

Dated: 29 June 2010

Appellant: GANESH SITTAMPALAM

Respondents: (1) INFORMATION COMMISSIONER

(2) BRITISH BROADCASTING CORPORATION

Determined on documents on 30 June 2011

Decision promulgated on 4 July 2011

Before

Andrew Bartlett QC (Judge)

Alison Lowton

Andrew Whetnall

Subject matter:

Freedom of Information Act 2000 – s12 - cost of compliance and appropriate limit – authority’s late reliance on s12 – s16 – duty to advise and assist - existence and nature of Information Commissioner’s discretion where late reliance on s12 – interrelationship of s12 and s16 – discretion as to steps to be taken under s50(4)

Cases:

All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and Ministry of Defence [2011] UKUT 153 (AAC)

Brown v IC EA/2006/0088 (2 October 2007)

Chief Constable of Surrey Police EA/2009/0081 (8 July 2010)

DEFRA v Information Commissioner and Birkett [2011] UKUT 39 (AAC)

Gaskell v IC EA/2010/0090 (11 October 2010)

Guardian Newspapers and Brooke v IC and BBC EA/2006/0011 and 0013 (8 January 2007)

Information Commissioner v Home Office [2011] UKUT 17 (AAC)

Office of Government Commerce v IC [2008] EWHC 774 (Admin); [2010] QB 98

Randall v IC EA/2007/0004 (30 October 2007)

Roberts v IC EA/2008/0050 (4 December 2008)

Roberts v IC EA/2009/0035 (20 November 2009)

Student Loans Company Limited v IC EA/2008/0092 (17 July 2009)

University of Central Lancashire v IC EA/2009/0034 (8 December 2009)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal’s decision is:

- a. In the circumstances of the case the BBC was not entitled to rely on Freedom of Information Act 2000, s12 as of right.

- b. The Commissioner ought to have exercised his discretion so as to produce the result that the BBC was permitted to rely on or benefit from the s12 cost limit only as regards the information other than the schema for the LASSY database.

- c. A further hearing will be required to determine whether the BBC is entitled to rely on substantive exemptions for the schema for the LASSY database.

REASONS FOR DECISION

Introduction

1. This appeal is concerned with an information request made by Mr Sittampalam to the BBC relating to TV licensing. The BBC treated him as asking for a list of databases used for sending out letters to apparently unlicensed addresses or individuals, the schemas for such databases, and documentation for the schemas that was easily available. The issue is whether, as the Information Commissioner decided, the BBC was entitled to refuse to provide the information, on the basis of a late claim to rely on the costs limit provided for by s12 of the Freedom of Information Act 2000 ("FOIA").

The request for information and the BBC's response

2. On 25 March 2008 Mr Sittampalam made a widely worded request to the BBC seeking a list of all databases held on its behalf in relation to TV licensing, and the schema or schemas for each such database, together with any documentation that was easily available for those schemas. (A schema is essentially the detail, usually presented in the form of a table or diagram, of how a database is constructed; it defines the tables, fields and relationships between fields within the database.)
3. By FOIA s10(1) the statutory time for compliance with the request was 'promptly and in any event not later than the twentieth working day following the date of receipt', subject to any reasonable further time required for consideration of the public interest balance. Where any Part II exemption was relied on, it was the BBC's duty to give a notice under s17 within the same 20 day period giving details of any Part II exemption relied upon and, where applicable, an estimate of the date by which consideration of the public interest balance would be completed. If the BBC relied upon the s12 costs limit, it was required by s17(5) to give notice to Mr Sittampalam of that fact within the same 20 day period.
4. By letter of 21 April 2008 the BBC responded to this request, stating that the TV licensing system involved a very large number of interrelated databases, and that it estimated that to answer the request would exceed the appropriate costs limit. The relevant limit applicable to the BBC under the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004, SI 2004 No 3244 ("the Fees Regulations"), is £450, which equates to 18 hours of work at £25 per hour. The letter invited Mr Sittampalam to narrow his request, while warning him that much of the information he requested might be subject to other exemptions.

5. He replied by email of 2 May, requesting further details of the BBC's time estimate for producing a list of databases with schemas and documentation, so that he could consider how he might narrow his request to fit within the limit.
6. By FOIA s16 it was the duty of the BBC to provide advice and assistance to Mr Sittampalam in regard to his request, so far as was reasonable. The Code of Practice on the discharge of public authorities' functions under Part 1 of the Act¹ states in paragraph 14: 'Where an authority is not obliged to comply with a request for information because, under section 12(1) and regulations made under section 12, the cost of complying will exceed the "appropriate limit" (i.e. cost threshold) the authority should consider providing an indication of what, if any, information could be provided within the cost ceiling.'
7. The BBC responded to him on 4 June. It said that it was unsure as to the focus of his enquiry and, due to the large number of TV licensing databases, held by a variety of agencies, it was unable to provide realistic advice and assistance on how the request might be narrowed.
8. Mr Sittampalam replied by email on the same day, 4 June 2008, asking, 'If I restricted my query to the databases used for sending out letters to apparently unlicensed addresses or individuals, would that fit within the cost limit?' His email also made reference to an argument that he would deploy in relation to a possible Part II exemption 'if and when we reach the stage of finding a request that does fit under the cost limit'. In our view the natural interpretation of this email was that he was asking for advice on whether a request in those more limited terms could be answered within the cost limit. His email ended: 'I hope it will not take you another 4 weeks to respond to this email.'
9. The BBC responded on 26 June 2008. Instead of answering his question directly, it expressly treated his question as a new and narrowed information request under FOIA s1(1). After relating the history of the correspondence the BBC's policy adviser in the BBC TV Licensing Management Team stated:

'Turning now to your new request for [a list of all databases held on our behalf ... and the schema or schemas for each such database, together with any documentation that is easily available for those schemas, relating to] the databases used for sending out letters to apparently unlicensed addresses or individuals, [sic] I can confirm that the BBC does hold the information you requested. However, I am withholding this information under section 31(1)(a), (b), (d) and (g) of the Act.'

¹ issued by the Secretary of State for Constitutional Affairs pursuant to FOIA section 45 in November 2004

The letter then continued with two pages of explanation of why the s31 exemption (prejudice to law enforcement activities) applied, of the possibility that s43(2) (prejudice to commercial interests) also applied, and of why the BBC considered under s2(2)(b) that the public interest in maintaining the s31 exemption outweighed the public interest in disclosing the information.

10. This response did not directly answer Mr Sittampalam's question: 'If I restricted my query to the databases used for sending out letters to apparently unlicensed addresses or individuals, would that fit within the cost limit?' The response implied that the BBC had decided not to rely on the cost limit but to rely on substantive Part II exemptions instead. This could be either because the provision of the more limited information requested was estimated not to exceed the cost limit or because the BBC had simply decided not to rely on the cost limit. The response was a notice under FOIA s17(1), which relates to substantive exemptions, and was not a notice under FOIA s17(5), which relates to reliance on the s12 cost limit.
11. The BBC's letter of 26 June 2008 invited Mr Sittampalam to seek internal review if he was not satisfied. Internal review is the complaints procedure envisaged by FOIA ss17(7)(a), 45(2)(e), 47(1) and 50(2)(a). By email of 4 July Mr Sittampalam took up the invitation, requesting an internal review and putting forward arguments against the application of the Part II exemptions referred to in the BBC's response. Mr Sittampalam thereby accepted the BBC's treatment of his email of 4 June 2008 as a new and narrowed information request made under s1.
12. The Information Commissioner has published Good Practice Guidance No. 5, 'Time limits on carrying out internal reviews following requests for information under the Freedom of Information Act 2000'.² This advises that, save in exceptional cases, a reasonable time for completing an internal review is 20 working days. According to its current website, the BBC aims to deal with the majority of reviews within that period. In this case Mr Sittampalam was initially told that the review would be dealt with in 30 working days. After that time expired Mr Sittampalam chased for a response and was given a target date of 15 September. That date was also missed, and he sent another chaser, to which there was no reply until the review was completed on 25 September.
13. The only issue considered in the review was the application of parts of FOIA s31(1) and of the public interest test under s2(2)(b). The review concluded that the requested information was exempt pursuant to

² Version 1.0, 22 February 2007

FOIA s31(1)(a), (b), (d) and (g)³, and that the public interest in maintaining the exemption outweighed the public interest in disclosure. The review placed no reliance on the cost limit. This was some 16 weeks after Mr Sittampalam's email of 4 June 2008.

The complaint to the Information Commissioner

14. FOIA s50(1) provides:

'Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.'

(Part I includes ss1, 2, 12, 16 and 17.)

15. The appellant complained to the Commissioner on 19 October 2008. The four respects that he specified as his matters of complaint were:

- a. Failure to provide advice and assistance in that the BBC did not respond to the 2 May inquiry about its cost estimate until 4 June 2008 (s16(1));
- b. The refusal notice of 26 June 2008 gave inadequate explanation of why disclosure of the schemas would put the security of the databases at risk (s17(1)(c));
- c. Unacceptable delays in the internal review, which took from 4 July to 25 September 2008;
- d. Disagreement with the result of the internal review regarding the s31 exemption and the public interest balance under s2(2)(b).

16. The Commissioner, like the BBC and Mr Sittampalam, treated Mr Sittampalam's query of 4 June 2008 as a new information request. During the course of the Commissioner's investigation the BBC made available to Mr Sittampalam a list of the relevant databases, so that aspect of the narrowed request was not further considered by the Commissioner. The Commissioner reached a further conclusion that the BBC did not hold documentation for the schemas that was easily

³ The review referred in its conclusion to s31(1)(e), where s31(1)(g) was evidently intended.

available, within the meaning of the request. That left outstanding the question of the provision of the requested schemas themselves.

17. The Commissioner issued his Decision Notice on 29 June 2010. At the end of the Notice the Commissioner commented on the BBC's delays: 'During the course of his investigation, the Commissioner has encountered considerable delay on account of the BBC's reluctance to meet the timescales for response set out in his letters. The delays were such that the Commissioner was forced to issue an Information Notice in order to obtain details relevant to his investigation.' He also commented adversely on the delays in the BBC's internal review (complaint c). There had also been delay on the part of the Commissioner, who, having received Mr Sittampalam's complaint on 19 October 2008, did not commence his investigation until 14 December 2009. We have not investigated the reasons for those delays. We note that they occurred, and that there is no suggestion that any part of them was attributable to Mr Sittampalam.
18. As regards Mr Sittampalam's first point of complaint (complaint a), the Commissioner decided that the BBC had been in breach of s16(1), albeit not quite in the way complained of by Mr Sittampalam. Instead, the Commissioner stated:

'... had the request of 4 June 2008 been refused by the BBC under section 12(1) of the Act, it would have been possible to provide the complainant with advice and assistance to help him narrow or refine his request in order to bring the time for compliance within the appropriate limit. In particular, the Commissioner notes that the BBC's costs estimate for retrieving the schema for the LASSY database is 0.5 days. In view of the above, the Commissioner finds that the BBC breached section 16(1) of the Act.'

The BBC has not challenged this finding.

19. Complaints b and d were concerned with the BBC's reliance on s31. The Commissioner inquired into them during his investigation but did not deal with them in his Decision Notice.
20. During the course of the investigation the BBC complained to the Commissioner about how long it would take to assemble the disputed information for the Commissioner to look at. As a result, he invited the BBC to say whether s12 applied and, if so, to provide a detailed and reasonable costs estimate for the Commissioner to consider. The BBC then sought to rely on s12 and provided an estimate that provision of the requested information would involve 70.5 days work. The Commissioner, while sceptical about some elements of the estimate,

decided that on any view a reasonable estimate exceeded the cost limit, which was equivalent to 2.5 days work. In his Decision Notice he held that the BBC was entitled to refuse to comply with the request for schemas on the basis of s12.

21. Mr Sittampalam knew nothing of the BBC's reliance on s12 until the Commissioner's investigation was on the point of being completed. In response to an inquiry as to progress, he was told on 14 June 2010 that the Commissioner was awaiting information relating to the BBC's application of s12 during the course of the investigation. He responded:

'If the BBC are trying to introduce the costs limit at this late stage, I would consider this completely unreasonable. They had ample opportunity to quote this exemption in their initial response two years ago – as they did with my previous request before I refined it – and had they done so then I would have been able to refine my request further at that stage, and possibly request further information over the intervening time, having regard to the 60 working day period for aggregation of requests.

In addition I would have been able to challenge their calculation of the cost limit at internal review and again in my submission to the ICO. If you are considering allowing them to claim the exemption, then I would appreciate getting a chance to inspect and query the details of their estimate first.'

22. The reference to a 60 day period arises from the terms of regulation 5(2) of the Fees Regulations. Under this regulation aggregation of costs takes place where the requester seeks, to any extent, the same or similar information within any period of 60 working days.

23. The day before the Decision Notice was issued, the Commissioner's office replied to Mr Sittampalam telling him that the Decision Notice would uphold s12 for the request as a whole. The letter stated:

'I appreciate that you will be disappointed and frustrated by this outcome to your complaint. However, during the course of the ICO's investigation it has become clear that the BBC would have been entitled to refuse the request of 4 June 2008 under section 12(1).'

24. In compliance with the Commissioner's decision concerning what s16 required, the BBC wrote to Mr Sittampalam on 13 July 2010 advising him that the LASSY database schema could be retrieved within the

appropriate cost limit, but that the exemptions in s31(1)(a), (b), (d) and (g) and s43(2) would be relied on.

The appeal to the Tribunal

25. Mr Sittampalam appealed against the Decision Notice, pursuant to FOIA s57(1). He advanced four grounds of appeal, three of which related to the BBC's reliance on s12. The other challenged the BBC's reliance on s31. The Tribunal joined the BBC as a party. By an order made on 6 October 2010 the Tribunal gave directions for the determination of the first three grounds. This was on the basis that, in the event that the Tribunal decided that the BBC was not entitled to rely upon s12, the parties would be invited to make further submissions on how, if at all, the fourth ground of appeal (entitlement to rely on FOIA s31) should be dealt with.

26. Mr Sittampalam's grounds of appeal relating to s12 are:

- a. Section 12 cannot be engaged at the time of the Commissioner's investigation.
- b. If the Commissioner had a discretion to allow the BBC to introduce reliance upon s12 at the investigation stage, he should have exercised it differently.
- c. The BBC's s12 estimate is not valid.

27. The Commissioner's position is that he stands by his Decision Notice. The BBC contests all three grounds.

28. Section 58 provides:

'(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.'

29. As regards the nature of the Tribunal's jurisdiction under s58, the BBC referred us to paragraph 14 of the Tribunal's decision in Guardian Newspapers and Brooke v IC and BBC EA/2006/0011 and 0013 (8 January 2007), which we need not repeat here. The Tribunal's task involves consideration of each of the three grounds of appeal which Mr Sittampalam has identified.
30. It appears to us that Mr Sittampalam's email of 4 June 2008 would have been more accurately understood as seeking advice on how to formulate a request within the cost limit, rather than as a new and narrowed request for information. However, it was possible to read it as expressly seeking advice on whether a narrowed information request concerning the databases used for sending out letters to unlicensed addresses or individuals would fall within the cost limit and, if it would, as impliedly requesting the narrowed information. Since the BBC chose to treat the email as a new information request, Mr Sittampalam afterwards accepted that characterisation of it, the Commissioner did the same, and no party has argued before us that it was not a valid information request, we proceed on the basis that it is right to regard it as a valid information request in the sense in which the BBC interpreted it.
31. The Tribunal met on 22 December 2010 with a view to determining the issue concerning FOIA s12 on the basis of the evidence and submissions provided by the parties. However, it came to the panel's attention that the Upper Tribunal was about to consider two appeals on the subject of late claiming of exemptions. Given that there were conflicting First-tier decisions on that topic, the panel considered that it would be appropriate to await the outcome of the Upper Tribunal cases. On 8 February 2011 the decision of the Upper Tribunal in the two cases (Information Commissioner v Home Office [2011] UKUT 17 (AAC); DEFRA v Information Commissioner and Birkett [2011] UKUT 39 (AAC)) was sent to the parties in the present case, and they were informed that the issue of late claiming of s12 had arisen in a further case in the Upper Tribunal which had been heard and in which a decision was currently awaited. The parties agreed to await the latter decision. The decision in All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and Ministry of Defence [2011] UKUT 153 (AAC) was published on 18 April 2011. (We will refer to this case as "APPGER"). The parties were invited to make

further submissions by 16 May 2011. The parties in due course did so, and the Tribunal met again on 29 June 2011 to determine the present issue.⁴

32. We are aware that the decision of the Upper Tribunal in the DEFRA case is the subject of a further appeal to the Court of Appeal. We do not consider that this fact necessarily requires us to postpone our decision to await the outcome of that appeal; we are conscious that there has already been considerable delay in this case, and no party submitted to us that we should await the decision of the Court of Appeal in that case.

Evidence and findings of fact

33. The parties supplied to us a bundle of relevant documentation. Mr Sittampalam provided a witness statement, as did Ms Pipa Doubtfire, the BBC's Head of Revenue Management. In addition we received a closed witness statement of Ms Doubtfire (which referred to some of the disputed information and was therefore not made available to Mr Sittampalam). We were also able to view in confidence some of the disputed information. All parties requested or agreed that we should proceed without an oral hearing.

34. We derived from Mr Sittampalam's statement-

- a. From his prior experience of databases he was surprised that provision of the schemas required anything more, for each database, than a short command to the computer to dump the schema into a file.
- b. When he received the BBC's response of 26 June 2008, which treated his question about restricting his query as an information request, and answered it with a refusal notice which did not mention s12, he believed that he had succeeded in identifying a request which could be answered within the cost limit.
- c. If the BBC had provided advice and assistance under s16 to enable him to know what he could ask for within the cost limit, his priority in 2008 would have been to ask for the LASSY schema, with certain

⁴ We should also explain that our study of the parties' latest written submissions led us into consideration of lines of argument that were not fully addressed by the parties in those submissions. As these further arguments were matters of law rather than fact, and the matter had already been subject to substantial delay awaiting guidance from other cases, we did not consider it proportionate to delay the matter still further by requesting a yet further round of written submissions from the parties. The parties drew our attention to all the previous decisions which we considered material, other than Gaskell.

other items of information to follow, depending on what fitted within the limit. Alternatively, if the BBC had out of date schemas already available, not requiring further work to extract, he would have asked for those. He would probably have used the ability to make one or more further requests after the relevant 60 working day period had elapsed.

35. We derived from Ms Doubtfire's evidence and the related documentation-

- a. There are five databases relevant to Mr Sittampalam's narrowed request, LASSY, FLOSSY, CMDW, CMS and CADH. These are all held by Capita Business Services Ltd on the BBC's behalf.
- b. The schemas are complex, bespoke data structures. Employees of Capita who work with the schemas do so without reference to external documentation. The schemas are not held in a documented format. To retrieve them into such a format involves a series of steps of a technical nature. The structure of some of the databases is such that they have more than one schema (for example, CMS has six).
- c. Capita's time estimates for producing the schemas in a readable form were LASSY 0.5 days, FLOSSY 5 days, CMS 30 days, CMDW 30 days, CADH 5 days.
- d. The essential reason why production of schemas for the databases other than LASSY would take significant time is that the databases have been amended or customised since schemas were last documented. Out of date schemas are held for CMS, CMDW and CADH. No current or historical schema for FLOSSY is currently held in a readily accessible form.

36. Ms Doubtfire's statements provided no explanation of

- a. why the BBC did not comply with FOIA s16 and answer directly Mr Sittampalam's question in his email of 4 June 2008 ('If I restricted my query to the databases used for sending out letters to apparently unlicensed addresses or individuals, would that fit within the cost limit?')
- b. why the BBC decided to treat the email of 4 June 2008 as a new and narrowed request

- c. why the BBC, having previously relied on s12 in relation to the original request of 25 March 2008, did not rely on s12 in its refusal of the narrowed request
 - d. why the BBC did not rely on s12 upon internal review of its handling of the narrowed request.
37. In regard to the lack of explanation of the BBC's conduct, we should make clear that there is no suggestion of bad faith on the part of the BBC.

38. While, like the Commissioner, we view some parts of the BBC's time estimates with considerable scepticism, having reviewed the evidence we accept and endorse the Commissioner's findings that (1) the narrowed information request of 4 June 2008, taken as a whole, cannot reasonably be satisfied within the cost limit, but that (2) the LASSY database schema on its own could be provided within the cost limit.

Legal submissions and analysis

First ground of appeal: Can s12 be raised later than the time of internal review?

39. Mr Sittampalam's first contention is that s12 cannot be engaged for the first time during the Commissioner's investigation.

40. Section 12(1) provides:

'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.'

41. Mr Sittampalam draws an analogy with s36(2). Under that subsection, information is exempt if in the reasonable opinion of a qualified person its disclosure would or would be likely to have certain prejudicial effects. He relied on Student Loans Company Limited v IC EA/2008/0092 (17 July 2009), where the Tribunal held that the opinion of the qualified person needed to be in existence at the time when the request was dealt with by the public authority. Cases under s36(2) differed from other cases where late reliance on exemptions had been permitted, because in those cases the facts which engaged the exemption had been in existence at the time the request was dealt with by the public authority, even though the authority had failed to specify

at the proper time that it wished to rely on the exemption. The same view as in the Student Loans case was taken in Roberts v IC EA/2009/0035 (20 November 2009) and in Chief Constable of Surrey Police EA/2009/0081 (8 July 2010), but was doubted in a footnote in University of Central Lancashire v IC EA/2009/0034 (8 December 2009).

42. By contrast, the Commissioner and the BBC submitted that

- a. Whatever the position was under s36(2), it did not govern the position under s12, which was in different terms
- b. The BBC was entitled as of right to raise and rely upon s12 at the stage of the Commissioner's investigation.

43. The arguments that the BBC was entitled to rely on s12 as of right appeared to be based on the following elements-

- a. Section 12 was first relied upon in the BBC's response of 21 April 2008 to Mr Sittampalam's original request of 25 March 2008.
- b. The Upper Tribunal's decision in DEFRA was that a public authority had a right to rely on exemptions, however late they were raised, subject only to the Tribunal's powers of proper case management. The DEFRA decision was binding on the present Tribunal.
- c. The decision in APPGER, in so far as it doubted the decision in DEFRA and suggested that there was a statutory discretion to permit or deny late reliance upon exemptions, was obiter, and not binding on the present Tribunal. (All we need to say about this argument is that in our view it is a correct analysis, as far as it goes, of the relationship between the two decisions, but that it does not affect what we have to decide in relation to s12.)
- d. The decision in APPGER, in so far as it decided that the position under s12 was not governed by the decision in DEFRA and that late reliance upon s12 was subject to a statutory discretion, was obiter, because reliance on s12 was rejected in that case for reasons other than the exercise of such a discretion.

44. In our judgment the BBC's reliance on s12 in relation to the original request of 25 March 2008 does not assist the BBC in relation to the narrowed request. The question before us is concerned with the BBC's

attempted reliance on s12 in relation to the narrowed request. It cannot be inferred from the reliance on s12 in relation to the original request that the BBC also intended to rely on it in relation to the narrowed request. If any inference is to be drawn about the BBC's intention at the time of responding to the narrowed request, it is to the opposite effect. The BBC had earlier had s12 in mind, but apparently chose not to rely on it when responding to the narrowed request or upon internal review.

45. In APPGER the Upper Tribunal stated that, irrespective of the correctness or otherwise of the DEFRA decision as regards substantive Part II exemptions, the position was different under s12 (paragraph 45). We therefore reject the argument that the DEFRA case is binding on us as regards late reliance on s12.

46. We do not agree that the view adopted by the Upper Tribunal in APPGER as regards late reliance on s12 was merely obiter. The Upper Tribunal expressed a definite view that it was necessary to have regard to the statutory purpose of s12, and that the statutory scheme was likely to be distorted if an authority were allowed to rely belatedly on s12 after making a suitable search, or after a long delay during which the requester could have received assistance in dialogue with the public authority and could have made multiple requests for parts of the information (see paragraphs 46-47).

47. In that case there were four information requests. In regard to the first request, the MOD raised s12 at the internal review stage. The internal review was concluded more than a year after the request. The Upper Tribunal accepted that in a suitable case reliance on s12 for the first time at the internal review stage could be upheld, but rejected it on the facts, because the estimate under s12 was not a reasonable estimate (paragraph 49). In regard to the third request, the Upper Tribunal upheld the raising of s12 at the internal review stage, on the footing that it gave rise to no prejudice or material unfairness and that a reasonable estimate exceeded the cost limit (paragraph 86). In regard to the fourth request, the s12 exemption was raised for the first time before the Tribunal. The Upper Tribunal rejected it. One ground for rejection was that belated reliance on it was inconsistent with the statutory purpose in the circumstances of the case (paragraph 96).

48. We conclude, therefore, that in the present case the BBC was not entitled to raise s12 as of right during the Commissioner's investigation. The proper time for raising reliance on s12 is the time required by s17(5), ie, promptly and in any event not later than the twentieth working day after receipt of the request. Later reliance – at least up to the conclusion of an internal review - is not a matter of right but is to be controlled by reference to the scheme and purposes of the Act, the particular statutory purpose of s12, and the circumstances of the case.

The relevant considerations include the function of an internal review as noted in APPGER at paragraph 40.

49. In APPGER the Upper Tribunal did not go so far as to say that s12 could never be entertained if it had not been raised at internal review stage or earlier. It was not necessary for the decision in that case for the Upper Tribunal to decide whether that was the case or not, and the Tribunal expressed no view upon it. However, given the nature of the argument advanced by Mr Sittampalam, it is necessary for us now to address this question.
50. We have considered the decisions on s36(2), but in our view the purpose and the statutory wording of s12 are so different from s36(2) that detailed consideration of the decisions on s36(2) does not materially assist us in reaching a conclusion on the latest time at which it is possible to raise reliance upon s12.
51. In regard to the present problem we note the following considerations which seem to us to be relevant:
- a. The relevant time for assessing the existence or scope of the duty to disclose under s1 is the time when the request is dealt with rather than the time of the Commissioner's decision: see APPGER at paragraph 9 iii).
 - b. By s50(1)(2) the Commissioner's primary task was to decide whether Mr Sittampalam's information request had been dealt with by the BBC in accordance with the requirements of Part I of the Act. Inevitably, therefore, he was required to look back to see how it was handled by the BBC. Such handling took place from the time the relevant request was received (4 June 2008) to the time when the conclusion of the internal review was published (25 September 2008).
 - c. From the evidence which we have, during the period 4 June to 25 September 2008 the BBC did not make an estimate that the cost of complying with the narrowed request would exceed the appropriate limit.
 - d. On the wording of s12, it seems to us that in order to rely on the cost limit the public authority needs to estimate that the cost of complying with the request would exceed the appropriate limit. We do not see how it can be said, in the absence of such an estimate, that the BBC was entitled at any time from 4 June to 25 September 2008 to rely on s12 to decline the request.

52. Accordingly, we conclude that it was not open to the Commissioner to decide that the BBC had been entitled to rely upon the s12 cost limit when dealing with the request pursuant to Part I of the Act.

53. However, that is not the end of the story. In addition to his task of deciding whether Mr Sittampalam's information request had been dealt with by the BBC in accordance with the requirements of Part I of the Act, it was also the Commissioner's task under s50(4) to specify the steps to be taken by the BBC for the purpose of complying with those requirements. Stanley Burnton J (as he then was) in Office of Government Commerce v IC [2008] EWHC 774 (Admin); [2010] QB 98; at [98] regarded it as arguable that the Commissioner's decision as to the steps required to be taken by the authority might take account of subsequent changes of circumstances. In our view, that is not merely arguable but is correct, and flows from the nature of the Commissioner's jurisdiction and its subject matter, and from the wording of the Act.

54. The Commissioner, when acting under s50, is not merely deciding whether an information requester was or was not entitled to information at the time when the request was dealt with. He must also decide what is to be done. The Commissioner has a role both as guardian of the public interest in the appropriate disclosure of information held by public authorities and as a guardian of data protection rights. In our view the statute leaves to him a measure of discretion over what is the appropriate enforcement of information rights in a particular case. It would be perverse, in our view, if he were wholly debarred from taking into account fresh circumstances, not in existence at the date when the request was originally dealt with. The example given by Stanley Burnton J was:

'Take a case in which the information requested is relevant to criminal proceedings that are begun after the date of the request, and the disclosure of that information would prejudice the fairness of the trial. In that case, the information was not exempt when requested, but became so under section 31 subsequently. It would be undesirable for the Commissioner to be obliged to require disclosure in such a case.'

55. Other examples might be-

- a. where disclosure would have been lawful at the time when the request was dealt with but by reason of a change of law or circumstances, by the time of the decision notice disclosure would be unlawful, contrary to the statutory bar in FOIA s44(1)

- b. where a change of circumstances has made it unfair to reveal personal data so that disclosure would involve a breach of the data protection principles.

56. It is necessary here to consider the precise wording of s50(4):

‘Where the Commissioner decides that a public authority-
(a) has failed to communicate information, or to provide confirmation or denial, in a case where it is required to do so by section 1(1), or
(b) has failed to comply with any of the requirements of sections 11 and 17,
the decision notice must specify the steps which must be taken by the authority for complying with the requirement and the period within which they must be taken.’

57. The question is whether this subsection must be read as necessarily requiring something to be done in every case where there has been a breach of s1, s11 or s17, or whether its purpose is to ensure that the Commissioner’s decision notice says clearly what, if anything, is to be done, to comply with the requirement of the relevant section. Consideration of the practical effects leads us to the conclusion that the latter is intended. Two examples will suffice to illustrate this.

58. Section 11 requires the public authority to give effect to a preference expressed by the information requester as regards the method of communication of the information. In a case where the Commissioner finds that by the time of the issue of his decision notice the requested information has been provided to the extent required under s1(1), albeit in a non-preferred format, it would be surprising if the statutory intention were that the Commissioner must order the authority to provide it a second time in the preferred format, and even where the requester may have said he did not want to receive a second copy. But that would be the effect if s50(4) necessarily required steps to be ordered in every case of breach.

59. Section s17(2) requires the public authority, in a case where it needs more than 20 working days to consider the balance of public interest, to say in its s17 notice that it has not yet reached a decision and to give an estimate of when its decision will be reached. Suppose on day 20 the authority gives a notice which says that the public interest balance is still under consideration but fails to give an estimated date when the decision will be reached. A few days later the authority issues its decision to the requester. Months later the Information Commissioner in his decision notice finds that there was a breach of s17(2) because of the failure to give advance notice of when the public authority estimated that it would reach its decision. We do not think it can

sensibly be contended that s17(2) requires the Commissioner to order the public authority to send a notice to the requester stating retrospectively the date on which it expected to issue its decision. This would be a pointless and empty exercise.

60. A contrary view of the meaning of s50(4) was taken in Gaskell v IC EA/2010/0090 (11 October 2010). The Tribunal in that case gave permission to appeal because of the difficulty and importance of the point. So far as we can tell from the reasoning of the Tribunal, it was not assisted in argument by any such illustrations as we have given above. The Tribunal expressed a concern that the existence of what we may call a 'steps discretion' under s50(4) would require the Commissioner in every case to consider first whether there had been a breach of FOIA at the time of the request and then to reconsider whether there would be a breach if the request were resubmitted at the date of the decision notice; this would undermine the Act by giving every reluctant public authority two bites at the cherry in every case. This is not our understanding of the situation under s50(4). The Commissioner's general function is to enforce the Act. In our view his steps discretion will only result in his declining to order disclosure, where disclosure was originally required under s1 but not given, in exceptional cases.

61. In the result, while we are of the view that it was not open to the Commissioner to decide that the BBC had been entitled to rely upon the s12 cost limit when dealing with the request pursuant to Part I of the Act, we nevertheless hold that it was open to him, under his steps discretion, to consider whether, in view of his findings as to the expense that would have to be incurred by the public authority, he would insist on ordering full disclosure if the BBC's defence under s31 (or s43, if that is in play) were not upheld.

(2) Second ground of appeal: Discretion

62. The view we have expressed above is that a public authority cannot raise reliance upon the s12 cost limit on the basis of an estimate made for the first time after the conclusion of its internal review. If that is wrong, and there is no fixed limit upon the time at which s12 can first be raised as a defence to the requester's claim under s1, then it is necessary for us to consider the exercise of the discretion to permit late reliance. This is the discretion that was principally discussed by the Upper Tribunal in the APPGER case.

63. Alternatively, if we are correct as to the latest time that s12 can be raised, and correct also in holding that the Commissioner has a steps

discretion under s50(4), then it is necessary for us to consider how that discretion ought to have been exercised.

64. These two discretions are different. While some of the same or similar considerations may arise under each, such matters will not necessarily have the same weight for one purpose as for the other.

65. Factually the present case is very different from the circumstances of the APPGER case, where the requested information had largely been collated before s12 was relied upon, so that s12 could not fulfil its statutory purpose of limiting public expenditure on freedom of information.

66. In paragraph 25 of the Decision Notice the Commissioner's reasoning for allowing late reliance on s12 was:

'The Commissioner acknowledges that he has discretion about whether or not to consider exemptions that are cited late by public authorities. However section 12(1) is not an exemption and given the potential impact on the public authority's resources, he considers it appropriate to consider the late reliance on section 12(1).'

67. The Commissioner did not specify how much of the BBC's estimate of 70.5 days he accepted. The headroom of this estimate over the cost limit was very large. The Commissioner did not need to express a view on precisely how much was reasonably justified, because he identified elements that in his view went over the cost limit, so that consideration of the remainder became otiose.

68. While in exercising his discretion the Commissioner evidently had regard to the purpose of s12 in controlling public expenditure, we are unsure what exactly the Commissioner had in mind in observing that s12(1) was not an exemption. Plainly it is an exemption, albeit not of the same kind as the substantive exemptions in Part II of the Act: see APPGER at paragraph 46. Reliance upon it does not necessarily prevent information being disclosed: that depends upon the nature of the information. Where a request cannot sensibly be subdivided, it prevents disclosure. But if the request can be broken down into manageable segments and no substantive exemption applies, a persistent requester can by repeated requests obtain the whole of the information. In such circumstances the impact on an authority's resources is limited to the extent of expenditure within a particular time period rather than the extent of total expenditure. Where a substantive exemption applies, and can be shown to apply without having to collate

the full information in order to do so, reliance on s12 is unnecessary in any event.

69. In addition to the purpose of s12 in controlling public expenditure, the following matters seem to us to be particularly pertinent to an exercise of discretion on the facts of this case, whether it be a discretion to allow late reliance on s12 as a defence to the s1 duty or a discretion over what steps to order under s50(4):

- a. There is as yet no decision by the Commissioner or the Tribunal on whether a substantive exemption applies, so it is necessary to consider the possibility that none is applicable. Prompt decision making has particular relevance for cost exemptions where the modest cost limit can yield to repeat requests in 60 day periods for discrete parts of the available material that the request seeks: APPGER at paragraph 47 i).⁵
- b. Where the request is not vexatious, dialogue is contemplated between requester and public authority, which may be able to clarify or refine it to identify what could be supplied under the cost limit: APPGER at paragraph 47 iii)-iv).
- c. In the present case it is undisputed that the LASSY database schema on its own could be provided within the cost limit.
- d. The Commissioner has found, and the BBC has not challenged, that the BBC failed to comply with its duty under s16 to give reasonable advice and assistance. Had it complied, it would have informed Mr Sittampalam in or soon after June 2008 that the provision of the LASSY database schema on its own would fall under the cost limit. He would have known where he stood and could have pursued more effectively his challenge to the BBC's reliance on substantive exemptions. As it is, the Commissioner made no findings on the application of substantive exemptions, and the period of nearly a year from commencement of this appeal on 26 July 2010 to the present time has been focused on the s12 issue.
- e. It would be unfair to Mr Sittampalam, and would tend to undermine the s16 duty, if his interests as a requester were to be substantially prejudiced by and the BBC were to benefit from its failure to comply with s16.

⁵ Mr Sittampalam helpfully pointed out an error in APPGER paragraph 47 i). The 60 day period is based on working days. The expression "five or six" distinct phases should have read "four".

- f. Reliance by the BBC on s12 is particularly unfair in circumstances where Mr Sittampalam reasonably believed, based on the BBC's response of 26 June 2008 to his email of 4 June 2008, that he had hit upon a narrowed scope of request which fell under the limit, and pursued his request on that basis.
- g. The unfairness to Mr Sittampalam is reinforced by the BBC's non-reliance on s12 at internal review and by the Commissioner's failure to engage meaningfully with Mr Sittampalam on the s12 issue before the issue of the Decision Notice.⁶

70. Under FOIA s58(1)(b) the Tribunal's duty is to consider how the Commissioner ought to have exercised his discretion. In the circumstances which we have identified we do not consider that the Commissioner should have allowed reliance on s12 as a total defence to the s1 duty (if that course was open to him) or should have decided that in view of the cost of collating the information he would in any event order no steps to be taken (ie, irrespective of whether a substantive exemption applied). The proper choices in our view were one of the following:

- a. to decline to allow any reliance upon s12 by the BBC (whether as a defence or as affecting the steps to be taken) or
- b. to permit the BBC to benefit from s12 only as regards the information other than the schema for the LASSY database.

71. The attraction of the latter course is that, aside from the detriment of delay, it puts Mr Sittampalam approximately in the position he would have been in if the BBC had complied with s16, ie, being able to pursue his request for the LASSY schema before the Commissioner and in the Tribunal without having to face an issue under s12, while at the same time it avoids the risk of forcing the BBC (which is funded by the public) to incur a very substantial expenditure on collating information relating to the other databases.⁷

72. There is a question mark over whether the latter choice is a lawful option. In Randall v IC EA/2007/0004 (30 October 2007) the Tribunal

⁶ Lest this be misunderstood, we are not here saying that the Commissioner is obliged to conduct his inquisitorial investigation in compliance with the rules of natural justice. But he must in our view act fairly. If a new exemption is raised by a public authority during the investigation, which the Commissioner is minded to uphold, fairness requires him to give the requester a proper opportunity to comment. See APPGER paragraph 43.

⁷ We use the word "approximately" because Mr Sittampalam does not have the benefit of an investigation and determination by the Commissioner of the substantive exemption issues; those issues will have to be investigated for the first time in the Tribunal.

held that the effect of section 12 is not to impose a limit, leaving the authority obliged to carry out work up to that limit; it is to remove the information from the scope of the section 1 duty to disclose altogether. We agree with that construction of s12. Where it is relied on at the proper time, and the estimate is properly arrived at for the activities specified in the Fees Regulations,⁸ it is an all or nothing defence. The questions that now arise are as to the courses available in the exercise of a discretion, in particular-

- a. in a case where the Commissioner (or the Tribunal in his place) is exercising a discretion to permit late reliance on s12, whether the Commissioner is entitled to allow the late reliance on terms as to disaggregation of the request, so as to prevent reliance on s12 in relation to information that can be provided under the cost limit, and
- b. in a case where the Commissioner (or the Tribunal in his place) is exercising a discretion as to the steps to be taken, whether the Commissioner is entitled to frame the steps to be taken so as to put the requester in the position that he would have been in if the public authority had complied with s16, so that the request would have been resubmitted in a narrower form to which s12 would not have been a defence.

73. With some hesitation, we consider that the first of these two courses is permissible. If during the Commissioner's investigation the public authority is to be allowed to change its response to the request with retrospective effect, so as to raise a defence which should have been raised earlier, it does not seem unreasonable or out of line with the statutory scheme to say that the requester might also in a suitable case be allowed to refine or clarify the terms of the request retrospectively. In effect, the Commissioner would say to the public authority: 'I will permit you to raise s12 late but, for fairness' sake, only on terms that you agree to permit the requester to narrow his request and that you agree to treat the narrowed request as validly made.'

74. With more confidence, we consider that the second of these two courses is also permissible. If a public authority is asking for an indulgence by way of exercise of discretion in its favour under s50(4) for non-enforcement, because by inadvertence it irretrievably lost the right to raise a defence to disclosure that it could have had, we consider that, where relevant on the facts, it is proper for the Commissioner to take into account whether the authority has fulfilled its duty under s16 and, if the authority has not, what the position would have been if s16 had been complied with.

⁸ Ie, the reasonably expected costs for determining whether the information is held, locating it, retrieving it and extracting it: regulation 4(3).

75. The interrelationship of s16 and s12 was discussed in Roberts v IC EA/2008/0050 (4 December 2008) at paragraphs 16-22, where the Tribunal differed from the approach adopted in Brown v IC EA/2006/0088 (2 October 2007). We agree with the Tribunal in Roberts that *entitlement* to rely on s12 is not conditional upon compliance with s16, but in our view compliance with s16 may be taken into account where the question is one not of entitlement but of discretion. If this is correct, it should enable the Commissioner to give greater practical effect to s16 than hitherto.⁹
76. For the above reasons, we consider that the proper exercise of discretion in this case, whether in regard to late reliance on s12 as a defence or in regard to deciding upon the steps to be taken, was to exercise it in such a way as would have resulted in permitting the BBC to benefit from s12 only as regards the information other than the schema for the LASSY database.
77. If this is not an approach that we are legally entitled to adopt, then our view would be that the proper exercise of discretion was to refuse permission for late reliance on s12 or (as the case may be) to refuse to take into account the cost of compliance when deciding upon the steps to be taken. If required to choose between allowing full reliance on s12 or none at all, on the facts of the present case the proper choice in our view would have been to choose the course which would produce the least detriment to Mr Sittampalam by reason of the BBC's failure to comply with s16 and the BBC's failure to rely on s12 at the proper time.

Third ground of appeal: validity of the cost estimate

78. Our scepticism in regard to the estimate relates to a number of features of it, including the inclusion of work which pursuant to regulation 4(3) of the Fees Regulations should not be counted, and what appears to us to be an overstatement of the difficulties of extracting the schemas and of the time that would be taken to do so. Nevertheless, our conclusion in relation to the estimate is as indicated in paragraph 38 above, with the result that we do not uphold this ground of appeal.

⁹ In this context we consider it right to observe that s16 does not require the public authority to do more than give such advice and assistance as is reasonable to expect. In assessing what is reasonably to be expected it is relevant to keep in mind both the comparison with s12 and the nature of any substantive exemptions relied on. It would be wrong to turn compliance with s16 into an onerous and costly exercise, or an exercise which risked undermining a validly claimed substantive exemption by revealing too much.

Conclusion and remedy

79. We determine as follows:

- a. In the circumstances of the case the BBC was not entitled to rely on s12 as of right.
- b. The Commissioner ought to have exercised his discretion so as to produce the result that the BBC was permitted to rely upon or benefit from the s12 cost limit only as regards the information other than the schema for the LASSY database.
- c. A further hearing will be required to determine whether the BBC is entitled to rely on substantive exemptions for the schema for the LASSY database.

80. The parties shall submit within 21 days a draft order containing directions leading to the determination of the outstanding issues in the appeal. The parties' agreed or rival directions are to be submitted to the Tribunal within that time.

81. The directions should include provision for the BBC to make clear, in a further statement of its case, precisely which substantive exemptions it claims to rely upon, and why, for the Commissioner to have the opportunity of considering them and then setting out his position, and for Mr Sittampalam to respond. We comment that it presently appears to us that an oral hearing is likely to be required. The parties should promptly consult with each other concerning a time estimate and with the Tribunal Office concerning possible dates for a hearing or other determination.

Signed:

Andrew Bartlett QC
Tribunal Judge

Date: 4 July 2011