First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal Reference: EA/2019/0118

Determined without a hearing
Leeds Magistrates Court
On 29 October 2019

Before:
JUDGE HOLMES
JEAN NELSON
PAUL TAYLOR

Between:

JOHN SLATER

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE DEPARTMENT FOR WORK AND PENSIONS

Second Respondent

DECISION AND REASONS

DECISION

The Tribunal allows the appeal in part , and the Commissioner's Decision Notice is confirmed in respect of RFIs 1,2 ,3, 8, 10, 11, 16 and 17, but in respect of RFIs 4,5,6,7, 9 and 15 the Tribunal substitutes the following Decision Notice:

In relation to RFIs 4,5,6,7, 9 and 15 the Tribunal directs the second respondent within 35 days of this Decision to issue a fresh response to these requests by confirming whether the information is held and then, if held, either disclose the information or issue a refusal notice citing a reason to withhold the information.

REASONS

1. In this appeal the Appellant , John Slater, appeals against a Decision Notice issued by the Information Commissioner on 26 March 2019, in which she determined

that the public authority, the Department for Work and Pensions ("DWP") , had correctly applied s. 12 of the FOIA, in not providing the majority of the requested information, but required it to either disclose, or issue a refusal notice, in relation to some of the requested information.

2. The Appellant appealed the Decision Notice by a Notice of Appeal dated 3 April 2019. The Appellant indicated that he required a decision after a hearing.

3. The Commissioner filed her response to the appeal on 3 June 2019. She indicated that an oral hearing was not necessary, and, in any event, would not attend or be represented at any such hearing. By Directions made on 11 June 2019 the Tribunal made the DWP Second Respondent. Case management directions were also made on 11 June 2019. The DWP filed its response on 9 July 2019 . The Appellant filed a response to the responses dated 17 July 2019.

4. The parties subsequently agreed to the Tribunal determining the appeal without a hearing.

5. The Tribunal accordingly convened in Chambers on 29 October 2019. Before it was the Hearing Bundle , and references to page numbers are to pages in the Hearing Bundle. The DWP submitted two witness statements, one from Jo Kerrison, signed and dated 2 October 2019, and one from Teresa Thomas, signed and dated 30 September 2019. Neither witness, of course, gave live evidence. There was no closed bundle. The Tribunal apologises for the delay in promulgation of this Decision, due to pressure of judicial business.

The Background and the Facts.

6. The Appellant between 4 February 2018 and 18 February 2018 , in a series of seven communications , made a number of FOI requests of the DWP. They are set out, as summarised by the Commissioner, in Annexe 1 to this Decision. This is not the full text of the requests, which are in the bundle between pages 72 and 130, and are annexed to the Commissioner's Decision Notice. They were given the references RFI 1 to RFI 17 by the Appellant. The Appellant has been seeking information from the DWP in relation to the administration of contracts with the DWP for the assessment of claimants for various State benefits , such as Personal Independent Payments ("PIP") , and the implementation of the Universal Credit system. The Appellant had successfully obtained such information previously, despite the DWP's resistance, through previous Decisions of the IC.

7. In the case of these requests, however, the DWP had refused his requests, citing the provisions of s.12 of FOIA, whereby, if the cost of complying with the request would exceed the set figure of £600, the DWP is not obliged to do so. In doing so, the DWP applied s.12 of FOIA, and Reg. 5 of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations"),

under which the DWP had aggregated the costs of complying with the Appellant's requests to justify its refusal of the requests.

8. The Appellant's grounds of appeal contend that the DWP, and the IC in largely upholding the DWP's grounds for refusal of the majority of the requests, erred in aggregating the requests for the purpose of assessing the cost of complying with them.

9. The Appellant made 17 requests which are the subject of this appeal. He has helpfully given them reference numbers "RFI1", "RFI2", and so on. He made these requests on seven occasions between 4 and 18 February 2018. The requests made, adopting the Appellant's references, were made on these occasions:

RFI1, RFI2 and RFI3 : made on 4 February 2018 (pages 72 to 73 of the bundle)

RFI4, RFI5 , RFI6 and RFI7 : made on 6 February 2018 (pages 81 to 88 of the bundle)

RFI8 : made on 8 February 2018 (pages 89 to 96 of the bundle)

RFI9 : made on 9 February 2018 (pages 97 to 104 of the bundle)

RFI10, and RFI11 : made on 12 February 2018 (pages 105 to 113 of the bundle)

RFI12, RFI13, RFI14 and RFI 15 : made on 13 February 2018 (pages 114 to 121 of the bundle)

RFI16 and RFI17 : made on 18 February 2018 (pages 122 to 130 of the bundle)

The pages referred to contain not only the requests, but also the Appellant's requests for an internal review, and the DWP's responses thereto.

10. These requests are made in the context of the PIP Service Specification of two contracts that the DWP has, or had, with Capita and Atos. Having identified various terms in these contractual documents which suggested that there would be monthly meetings, strategic meetings, and other types of meetings, the first request (RFI 1) was, (after a preamble identifying the provisions of the contracts referred to):

"RFI 1 Please disclose the meeting minutes for the meetings specified in 47.1.1., 47.2.2, 47.2.3 , and 47.2.4 in respect of the 3PIP contracts with Capita and Atos (2 contracts) that took place in 2016. Any disclosure would be subject to redaction required to satisfy s.40 FOIA."

11. The references to 47.1.1 and so on are to the provisions in the PIP Service Specification document that the Appellant had accessed from publicly available sources. The second request was linked to the first, and was :

"RFI 2 Please disclose the change requests in respect of the 3 PIP contracts with Capita and Atos (2 contracts) that were created by any of the 3 parties in 2016. Any disclosure would be subject to redaction required to satisfy S.40 FOIA."

12. The third request relates to Annex 8 of the PIP Service Specification FINAL v2.0 which specified the management information that the contracting parties were required to provide to the DWP on a monthly basis, and was in these terms:

"RFI 3 – Have any changes been agreed with Capita or Atos that amend the contractual requirements set out in Annex 8 to the PIP Service Specification FINAL v2.0? If so please disclose the agreed changes"

13. The next requests, sent on 6 February 2018, relate to mandatory reconsideration ("MR") , which applications for ESA and PIP are required to seek before proceedings to an appeal, and they were

"RFI 4 – What type of data does the DWP currently hold about MR in respect of ESA and PIP? Please specify which IT systems the data is held on and if data is only held as part of the claimant's record.

RFI 5– What are the most current datasets held by the DWP about MR in respect of ESA & PIP. To clarify by "dataset" i.e. a collection of data resulting from querying/extracting data from IT systems and/or analysis by a human being.

RFI 6 – How frequently does the DWP extract data about MR from its IT systems for the purposes of managing and controlling the MR process?

RFI 7 – What query/extraction capabilities does the DWP have in respect of the IT systems that hold MR data? What is the process for interrogating IT systems that hold MR data?"

14. The next request was made on 8 February 2018, and was in the context of the contractual requirements for Capita and Atos to supply the DWP with management information ("MI") , in some cases on a monthly basis, and on this occasion there was single request, namely:

"RFI 8 - Please disclose the MI provided to the Department by Capita (Lot 2) and Atos (Lots 1 and 3) that covers the period January 2017 to December 2017. If any disclosure does not mirror the contractual requirements in Service Specification FINAL v2.0 and its 11 annexes he expects the Department to cite the relevant exemption or explain why this information is not held (e.g. changes to contract have been agreed)."

15. The next request was submitted on 9 February 2018, and is related to the assessment process, undertaken by a healthcare professional ("HCP") , as to whether a claimant has to attend a WCA (Work Capability Assessment). The preamble to this request (see page 97 of the bundle) refers to the WCA Handbook, and the process

whereby a decision is made whether a claimant is to have a face – to – face assessment. In this preamble, the Appellant says this:

"As the decision to call a person to attend a WCA involves considerable discretion by the HCP it is reasonable to assume that a record of the decision is made containing appropriate professional justification."

The ensuing request is in these terms:

"RFI 9 - Please disclose the type of information that is created/recorded by the healthcare professional who decides if a person is called to attend a WCA, or not, where this information is stored (i.e. which DWP IT System and against which record, e.g. claimant) and if a specific form is used (i.e. one with a specific code like the LT54) to record the decision."

16. The next requests were submitted on 10 February 2018, and relate to a contract between the DWP and a company, CHDA Limited, relating to Health and Disability Assessment Services ("HDAS") , which contains provisions that the Appellant referred to, for the monitoring of service levels, and performance, by means of the provision of various reports. There were two requests in this context, namely:

"RFI 10 – Please disclose the performance monitoring report (as defined in Part B section 1.1 (a) Performance Monitoring and Performance Review HDAS - Schedule 2.2 (Performance Levels) of the contract) supplied to the Department by CHDA Ltd each month for the period January to December 2016 and January to December 2017.

RFI 11 - Please disclose the "Balanced Scorecard" report (as defined in Part B section 1.1 (b) Performance Monitoring and Performance Review HDAS - Schedule 2.2 (Performance Levels) of the contract) supplied to the Department by CHDA Ltd each month for the period January to December 2016 and January to December 2017."

17. Also in this context, the Appellant , on 13 February 2018 , raised four more requests. The first three related to GPs, whether they were paid a fee for completing certain forms, and if so, how much, and whether there was a legal obligation upon GPs to provide such completed forms. This information was sought in RFI 12, RFI 13, and RFI 14, which the Commissioner did not find the DWP was exempt from providing, and ordered it to take the necessary steps to do so. These requests are therefore not part of this appeal.

18. A related request, RFI 15, however, is. This request relates to the CHDA contract, how GPs providing further medical evidence for assessments were monitored, and is in these terms:

"RFI 15 – Does the DWP or CHDA monitor the quality of evidence provided by GPs via the ESA113? For example GPs that fail to return the forms or those that do not

provide complete evidence (missing out relevant medication, conditions etc.).If so what monitoring is carried out and how is it documented?'"

19. The final two requests were made on 18 February 2018. They do relate to the CHDA contract. The Appellant recited provisions from Schedule 2.1 of that contract which relates to assessment assurance. There is provision for monthly, and other, audits of sample reports, for various purposes, including the monitoring of supplier performance against agreed contractual standards. This led the Appellant to make request 16, in these terms:

"RFI 16 – Please disclose all the reports arising out of the regular audits carried out by the internal assessment assurance team (including the raw data upon which the reports are based) for the 2016 and 2017."

20. Finally, and by reference to the provisions of section (but probably "clause") 40 of the contract which relates to the Supplier Quality Audit, the Appellant made this request:

"RFI 17 – Please disclose the "audit records" reference above in Section 40.5 for 2016 and 2017."

21. The DWP gave the requests different reference numbers, effectively treating all requests made on one occasion as one request, so the numbering adopted by the DWP is a little different, in that there were seven requests made, although on occasion the Appellant had made more than one request. Rather confusingly, the Appellant and the DWP then gave the constituent elements of each such request "RFI" numbers, under each DWP reference number, so that there are several "RFI 1"s etc, which do not match the Appellant's subsequent simple and clear consecutive comprehensive numbering. Its response(s), for the same response was given in each instance, to the requests was dated 1 March 2018, and is at pages 131 to 136 of the bundle. It refused to provide the information requested, citing the fact that the cost of providing it would exceed the cost limit of £600. It was pointed out that the information requested in FOI 653 (the DWP classification of RFI 16 and RFI 17) alone would exceed the cost limit, as the Appellant had requested all audit reports for 2016 and 2017, of which there was a significant volume.

22. The Appellant sought a review on 2 March 2018 (*pages 75 to 78 of the bundle). In his application he argued that the DWP had been wrong to aggregate his requests, and cited regulation 5 of the relevant regulations. He went through the requests, and contended that no reasonable person could conclude that the information being requested was "the same" or "similar".

23. The DWP carried out its internal review, and the result was sent to the Appellant on 29 March 2018 (pages 138 to 142 of the bundle). The response is set out at pages 141 to 142 of the bundle, wherein the DWP stands by the previous conclusion that it was

correct to aggregate the requests. In particular, the (unidentified author on behalf of the) DWP said this (pages 141/142):

"As all of the requests relate to contracted health assessments, the performance of those assessments and the benefit outcome from those assessments, I agree with the original decision, in that it is a same or similar area; particularly as the same team, with a particular area of responsibility within the whole of DWP would be required to answer six out of seventh of the requests; the seventh being a statistical one on the same subject , which would require information from DWP statisticians.

With regard to FOI 6563 which would singularly exceed the cost limit; this is due to the fact that you have requested all audit reports for 2016 and 2017 which would amount to at least 17,000 reports."

The complaint to the Commissioner, and her Decision Notice.

24. The Appellant complained to the Commissioner on 30 March 2018 (pages 143 to 155 of the bundle) . His complaint set out the requests that he had made, and on pages 1 and 2 of 8 (pages 148 and 149 of the bundle) he set out in a table seven brief descriptions of the information that he had requested. He complained of the aggregation that the DWP had applied, contending that it was not entitled to aggregate the requests as it had done. He cited FTT decisions, and argued that the Commissioner should require disclosure.

25. The Commissioner investigated the matter with the DWP. This took some time, but on or about 18 October 2018 the DWP sent to the Commissioner a lengthy document setting out the DWP's position, to which was attached some 18 Annexes (pages 176 to 234 of the bundle). The first two pages set out useful background to the requests. The DWP rationale for its stance is explained, and reiterated. Two previous ICO decisions where aggregation was upheld were also included.

26. There was further correspondence between the ICO and the DWP on 26 February 2019 (pages 241 and 242 of the bundle), in which the Case Officer sought further information, indicating that there appeared to be merit in the DWP's reliance upon s.12. The DWP responded on 14 March 2019 (pages 249 to 252 of the bundle). More details were provided, and the Commissioner was invited to uphold aggregation, on the basis that there was an "overarching theme" of performance delivery of the contracts in all the requests made. The DWP, however, did indicate that information in three requests relating to GPs could be released, as this was in a different category.

27. In her Decision Notice of 26 March 2019, the Commissioner focussed upon RFI 16, as the response of the DWP had invited her to. She accepted that to provide the information sought in that request alone would involve approximately 700 audit reports per month, some 17,000 for the period to which the request related. She accepted that it would take more than five working days to obtain and collate the information requested, and would place a considerable burden upon the team carrying it out. Further, as the Appellant's request included a request for "raw data", this would

be likely to include personal and highly sensitive information relating to claimants, which would be justifiably withheld pursuant to s.40(2) of FOIA.

28. In relation to the request under RFI 17, the Commissioner noted that this covered the same two years, and she had been told that this would involve 270 and 674 audit reports.

29. The Commissioner therefore concluded (par. 30 of her Decision Notice) that to comply with this request alone would vastly exceed the cost limit stipulated under s.12 of FOIA.

30. She considered the Appellant's submissions that there was no overarching theme or common thread running through his requests, and that the DWP had constructed this argument to avoid providing the information sought. He argued that the DWP had to show that the information sought was the same or similar, and could not rely simply upon aggregating the requests.

31. The Commissioner rejected those arguments. For the reasons set out in paras. 34 to 41 of her Decision Notice, she considered that the bulk (i.e all save RFI 12, RFI 13 and RFI 14) of the requests were indeed requests for the same or similar type of information, and that the DWP was accordingly entitled to decline the requests made.

The Appeal.

32. The Appellant appealed by notice of appeal dated 3 April 2019. His Grounds are set out at pages 27 to 38 of the bundle. By way of background he set out a history of previous FOIA requests he has made to the DWP, their initial refusal to provide the requested information, and his subsequent successful appeals. He contends that the DWP, and the Commissioner, have made a flawed interpretation of his request RFI 16. In para. 11 (page 29 of the bundle) he accepts that based on that interpretation, the cost of compliance would exceed the statutory cost limit.

33. He goes on, however, to argue that, read in context i.e. with the preamble which sets out the extract from Schedule 2.1 to the Agreement Relating to Health and Disability Assessment Services that precedes this request, it should be clear that, by "raw data", he did not mean what the DWP and the Commissioner have taken him to have meant. He cites definitions and his use of the term, and contends that what he was seeking were the monthly audit reports produced by the IAAT (the Internal Assessment Assurance Team) and CHDA. He considered that this would be a summary of information, not information obtained from lower level activities. The DWP interpretation of his request did not stand scrutiny.

34. He did, however, accept (para.16) that, in hindsight, the wording of this particular RFI may have been ambiguous. If there was ambiguity, the Commissioner, however, should have addressed this in her Decision Notice. He cites her own

published guidance. The DWP and the Commissioner should have sought clarification from him.

35. Further, the Appellant makes the point that the DWP was in breach of s.16 of FOIA, which requires a public authority to provide assistance to a requester to bring his request within the cost limits. The DWP did not do so, he contends, citing the generic advice given to him, and the absence, until later in the process of any reference to the numbers of the audit reports that would be involved in answering his request.

36. In his Grounds of Appeal the Appellant also complains that the Commissioner has exceeded her remit, by replacing the DWP grounds for rejection of his requests with her own. She has done so by adding a further ground for aggregation based upon an "overarching theme or common thread", referring to para. 20 of the Decision Notice. He says this is impermissible, and she has gone outside the wording of the legislation. He cites ***Benson v the IC and the Governing Body of Buckinghamshire New University EA2011/0016*** in which the FTT rejected the Commissioner's argument that an "overarching theme" could be read into the provisions of the legislation.

37. The Appellant goes on to suggest that the DWP and the Commissioner are relying upon "metadata", and then seeks to undermine an approach on any such basis. He again cites ***Benson*** **,** and refers to the fact that the Tribunal in that case emphasised how it was important to look at the information actually requested. He refers also to ***Fitzsimmons v the IC and DCMS EA/2007/0124]*** , where the finding in fact was that the requested information was the same, or similar, but he seeks to distinguish that case on its facts.

38. In conclusion, the Appellant rehearses his argument that the information sought was not, and could not reasonably be considered to be, the same or similar. He sets out arguments as to how the terms "same or similar" should be understood, and how this must be judged objectively, not subjectively. At para. 57 he states that information is not the same or similar just because of the nine bullet points that he therein sets out.

The response of the Information Commissioner.

39. In her response (pages 39 to 47 of the bundle), drafted by Christopher Parkin of Counsel, the Commissioner relies upon Regulation 5 of the Fees Regulations, and contends that she has correctly interpreted and applied that provision. Emphasis was placed upon the words "to any extent" and "or similar" in the wording of the Regulation.

40. Whilst the Commissioner accepted that the words "overarching theme or common thread" do not appear in the Regulations, accepting the point to that effect made in ***Benson***, she nonetheless contended, citing ***Fitzsimmons*** as the Appellant had done, that the test for Reg. 5 was "very wide". She referred also to ***IPCC v Information Commissioner 2002] EA/2011/0222*** wherein the Tribunal held that only a very loose

connection between the two sets of information was required by the wording of the regulation.

41. Addressing the grounds of appeal, the Commissioner contended that there was nothing ambiguous about RFI 16. It was pointed out that the Appellant himself had accepted that this request alone may have breached the cost limit. His contention was that this request was, and should have been understood to have been, in narrower terms, so as to at least give rise to the need to seek clarification. The Commissioner did not agree, and there was no need for the DWP to seek clarification of a perfectly clear request.

42. Dealing with the Appellant's reliance upon breach of s.16 on the part of the DWP in not providing advice and assistance as to how he might bring his request within the cost limits, the Commissioner accepts that this issue is not addressed in the Decision Notice. She accepts that it is relevant, however, and invites this Tribunal to consider it. She points out, however, the invitation made in the DWP refusal letter to focus upon what information was of particular importance, the lack of specific identification of cost of providing particular pieces of information, and the lack of any attempt by the Appellant, in the internal review, to take the opportunity to narrow his requests.

43. Finally, on the issue of aggregation, the Commissioner did not find that the requests could be aggregated for the purposes of s.12 on precisely the same basis relied upon by the DWP. The term "overarching theme" was used by the DWP. The Commissioner, however, formed the view that many of the requests sought managerial information, and were accordingly requests for the same or similar information for the purposes of aggregation under the Regulations. Reference was made to ***South Lanarkshire Council v Scottish Information Commissioner 2013] WLR 2421*** as authority for the proposition that the Commissioner is not bound by the manner in which a public authority has relied upon an exemption, but may rely upon alternative grounds of his/her own.

The response of the second respondent.

44. The second respondent, the DWP, submitted its Response, drafted by Kate Wilson of Counsel, dated 9 July 2019 (pages 48 to 55 of the bundle). It initially sets out some background (rather as the DWP's submission to the ICO did) about the context of the Appellant's requests, and the relevant contracts to which they related.

45. At para. 12 of the Response, the DWP characterises the Appellant's requests as concerning these contracts and "in particular the monitoring and performance of the services provided under them including regular meetings which are held to review performance of the contracts, consequential changes to those contracts in order to improve delivery, management information and datasets held and used for that monitoring, and information about audits of the assessments undertaken by the provider for the Health and Disability Assessment Service."

46. After setting out what are understood to be the two grounds of appeal, the Response goes on to submit that the Tribunal has power (referring to ***Willow v Information Commissioner [2017] EWCA Civ 1876***) to make a decision *de novo* (i.e "afresh") on the merits whether the decision of the Commissioner was in accordance with the law.

47. The Response of the DWP then deals, after setting out the law in the Regulations as to cost limit and aggregation, with the issue as the meaning of RFI 16, and how it should have been responded to. It is submitted that the Tribunal must interpret the request , which is a question of fact, or at least, a mixed question of law and fact. The terms of RFI 16 are set out and examined. The point is made that the Appellant did not limit this request in the manner that he now says it should be read. His understanding of the term "raw data" is an idiosyncratic and subjective one, which would not be the understanding of anyone reasonably reading this request. The Appellant's case was undermined by the fact that he had to rephrase his request in order to "clarify" it. His request was not so limited, nor was it ambiguous.

48. In relation to s.16, the DWP's argument is that there was no failure to comply with s.16. In the alternative, advice and assistance was provided, the Appellant was advised to reduce the scope of his request. Alternatively, any such breach is irrelevant, as the request was not ambiguous. Finally, breach of s.16 does not afford the Appellant any remedy. Reference is made to ***Mason v The Information Commissioner and London Borough of Barnet EA/2018/ 044]*** where this point was made.

49. Turning to the aggregation point, the DWP submission also refers to the cases of ***IPCC v IC*** , and ***Fitzsimmons v IC and DCMS*** referred to above. The DWP position is that all the requested information was sufficiently similar or related so as to be aggregated for the purposes of s.12. As submitted at para 40.:

"All information requested relates to the monitoring or performance of contracts managed centrally by DWP's Contracted Health and Employment Services and/or the activities undertaken by the providers in carrying out health assessments, specifically for the delivery of Work Capability Assessments for ESA/UC by the Health and Disability Assessment Service operated by CHDA and for the delivery of PIP Assessments delivered by IAS and Capita."

50. Finally, it is submitted by the DWP that the Appellant's arguments for not aggregating this information are misconceived.

The Appellant's response to the Respondents' responses.

51. The Appellant submitted a response to the Respondents' responses dated 17 July 2019 (pages 58 to 67 of the bundle). In it the Appellant covers the three main issues in the appeal.

52. Starting with the s.16 point, the Appellant sets out the arguments, and cites previous Decisions of the FTT (or its predecessor, the Information Tribunal) in which s.16 is considered in the context of s.12. These are ***Commissioner of the Metropolitan Police v ICO and Donnie Mackenzie (2014/UKUT 0479)*** , ***Brown v ICO (EA/2006/0088)*** and ***Roberts v ICO (EA/2008/0050)***. The Appellant argues that ***Mason***, despite discussing the effect of breach of s.16 did not hold that the first-tier Tribunal could not require a public authority to comply with its s.16 obligations. He cites a passage from ***Brown*** in which the Tribunal did hold that failure to comply with s.16 did invalidate the public authority's s.12 estimate of the cost of complying with a request. Finally, he very fairly refers to ***Roberts***, another first-tier decision , in which a different view was taken, and that Tribunal reached the opposite conclusion, that a failure to comply with s.16 did not invalidate a s.12 costs estimate.

53. It appears, however, that the Appellant has omitted a vital word – "not" – in para. 10 of his response document (page 59 of the bundle), in arguing that the Tribunal should not follow or adopt the approach in ***Roberts*** in terms of what effect a breach of s.16 should have upon the validity of a s.12 determination by a public authority.

54. He goes on to complain of the failure of the Commissioner to address the s.16 issue in her Decision Notice. He contends that her failure to do so vitiates her decision. He points out that the DWP did not follow its own FOI guidance. The reference to there being 17,000 reports was because of his request for an internal review of 2 March 2018, in which made reference to expecting a detailed estimate of the DWP's costs of providing the information requested under RFI 16 alone. He goes on to cite the Commissioner's own guidance on s.12, and how a public authority should approach the provision of an estimate under s.12.

55. The aggregation question is discussed further. The Appellant complains that the Commissioner has relied upon new grounds, not relied upon by the DWP, which he did not have an opportunity to respond before she made her Decision. He argues that the Commissioner has diverged from the DWP's arguments, and introduced new ones which he had not seen. He contends at para. 47 of this document, that , whilst his own arguments about metadata have been dismissed, the DWP have used metadata to support its position . By that, he appears to mean that by relying upon the way the information is to be used, or how it was related to something else, the DWP was itself relying upon "metadata", because the dictionary definition of that term is "information that is given to describe or help you use other information". He then goes on to argue that the application of metadata to information is subjective and varies over time.

56. He concludes by stating that the law on the application of s.16 and s.12 is not settled, and cites Judge Jacobs in the Upper Tribunal case of ***DEFRA v ICO and Birkett GIA/1694/2010*** saying that "Legislation has to be interpreted so that it is workable."He argues that to reject the appeal would permit the public authority and the Commissioner to aggregate the requests using subjective terms, and to interpret requests so as to maximise the costs, and to fail to offer advice and assistance that would help bring requests within s.12.

Discussion and Findings.

a)RFI16.

57. The first issue, the second respondent contends, and the Tribunal agrees, to be determined relates to RFI16, the penultimate request made by the Appellant as part of his last request made on 18 February 2018. The reason for this is that the respondents' case is that the cost of responding to this request alone would considerably exceed the £600 limit, so if any of the other 16 requests were correctly aggregated with it, the cost of complying with the aggregated requests would be bound to exceed the cost limit. In any event, it is a distinct and separate ground of appeal that the IC was wrong in her approach to request RFI16, misinterpreting it, when the cost of compliance with it, properly understood was not likely to exceed the relevant limit.

58. This requires a close examination of RFI16. Its terms are as follows:

RFI 16 – Please disclose all the reports arising out of the regular audits carried out by the internal assessment assurance team (including the raw data upon which the reports are based) for the 2016 and 2017.

59. The response of the second respondent, and accepted by the IC, is that this was a request for information that would involve producing some 17,000 audit reports, together with an amount of raw data.

60. The limit of £600 has the effect of excluding requests which would require work to be carried out, at the rate of £25 per hour per person (prescribed in reg4(4) of the Regulations), in excess of 3.5 working days.

61. The Appellant did concede (he used the term "suspect") in his submission to the ICO of 31 March 2018 (page 154 of the bundle) that this request, if disaggregated, might breach the cost limit, but this was because of the interpretation of the request by the DWP. He sought, he has continued to argue, by this request only to obtain "high level" reports, and "high level" summaries of raw data that the audit reports were based upon. He contended that this limited scope of his request was reflected in his RFI1.

62. The point made by both respondents is that the request must be read objectively, as it would be reasonably understood by any public authority receiving it.

63. The Appellant, in his response, argues, from his engineering background that this is not what he meant by "metadata", and the DWP and the Commissioner should have read his request in the sense in which he meant it. He was only seeking "high level" summaries of data, not the substantial amount of original data that would have been collected. He criticises the respondents for not seeking clarification of his request from him.

64. The Tribunal agrees with the respondents. There is no basis for the restrictive, idiosyncratic and subjective reading of RFI16 that the Appellant contends for. It is wide ranging, and the Appellant, having made such a request, has to accept the consequences. The Tribunal has difficulty, in any event, in seeing how the allegedly more restrictive reading of the request he made would bring the work required to comply with it to within the limit. The reference to "raw data" was likely to add to, not reduce the amount of information requested, and hence the work required to produce it.

65. In addition to what had been stated in the course of the internal review carried out by the second respondent, and in the course of the investigation by the ICO, the Tribunal also had the benefit of the evidence of the Teresa Thomas, in the form of her witness statement of 2 October 2019. She deals with this issue at paras. 26 to 31. She explains how to comply with the request would require production of 700 audit reports per month, a total of 17,000 for the two years to which the request related.

66. The Tribunal therefore finds that providing the information requested under RFI 16 would alone substantially breach the cost limit imposed by the Regulations, and the Commissioner was right to so find, and to uphold the second respondent's refusal to provide it.

b)The s.16 issue.

67. Turning to this issue, the first consideration is whether, in fact the DWP did fail in its s.16 duty to assist the requester with his request no. RFI 16. Reference is made to the terms of the refusal notice (pages 131 to 136 of the bundle), and the final page wherein the DWP FOI team says this:

"Under Section 16 of the Act we should help you narrow your request so that it may fall beneath the cost limit.

The majority of the requests would individually take a considerable amount of time to locate, retrieve and extract the requested information and for this reason you should decide which information is particularly of importance to you bearing in mind that FOIA 653 [i.e RFI 16 and RFI 17] would singularly exceed the cost limit due to the fact that you have requested all audit reports for 2016 and 2017. During this time there were [sic] a significant volume of reports and to extract each one would take a disproportionate amount of time."

68. Did the DWP fail in its s.16 duty by this advice? The Appellant points out that it did not tell him, as has subsequently been disclosed, that some 17,000 audit reports , or 270 or 674 such reports, would be involved.

69. The duty under s.16 is to provide such advice and assistance "so far as it would be reasonable to expect the authority to do so." That duty, in this context, the Tribunal considers, is to advise and assist in the formulation of a request that meets the requirements of the FOIA. The DWP told the requester that there was a significant

volume of reports. That put him on notice of the need to considerably reduce the scope of his request. He was advised to make a more focussed request. He did not do so, he did not make any enquiries of the DWP as to the likely cost of retrieval of, say, one monthly report or any "high level" summary. The Tribunal does not consider that the s.16 obligation requires a public authority to provide a requester with a menu, or a price list, for retrieval of the various types of information it may hold. Rather, as is suggested in the Decision of the FTT in ***Roberts v ICO (EA/2008/0050***, discussed further below, at para. 19, the obligation is to initiate a dialogue:

"19. It is certainly the case that public authorities are encouraged to explore the scope of the request and to enter into a dialogue with the person who has made a broad request to see if it could be narrowed to the stage where it can be complied with."

The Appellant did not take up the DWP's invitation. For that purpose it does not matter if there were 17,000 reports, or 17. He was invited to have a further discussion in the course of which these issues could be further explored. The Tribunal is therefore not satisfied there was in fact any such breach.

70. If, however, the Tribunal is wrong on that point, the second respondent contends that breach of s.16 is of no consequence to the Tribunal's decision. ***Mason v The Information Commissioner and the London Borough of Barnet EA/2018/044*** is cited as authority for the proposition that breach of s.16 affords the Appellant no remedy. Further, in ***Roberts v ICO (EA/2008/0050*** , the issue was considered in some detail (at paras. 19 to 22 of the Decision). The FTT Decision in ***Brown v ICO (EA/2006/0088),*** relied upon by the Appellant was cited to the FTT in ***Roberts*** . That FTT gave this first – tier decision due consideration, but, as upon us, it was not binding. The FTT in ***Roberts***, gave its full reasons for disagreeing with Brown, with which we agree. The Decision in ***Roberts*** is, we find highly persuasive, and we agree with it. As it is, the highest that ***Brown*** puts failure to comply with s.16 in the context of s.12 is that such a failure may invalidate a s.12 estimate. In this case, there was no question of any fine margin, any possibility that a revised request may bring the request to within the relevant cost limit. It was so extensive that it would take major revision to bring it anywhere near the relevant limit.

c)The aggregation issue.

71. The finding in relation to RFI 16 is, in fact, sufficient to dispose of this appeal in relation to that request, but if to comply with any one of the requests made within the stipulated time scale would exceed the cost limit, it matters not that the cost of complying with the others would not exceed the limit. That is the effect of aggregation. It is, however, a major ground of the Appellant's grounds of appeal that the DWP, and the IC, have wrongly approached and applied the aggregation provisions of the Regulations. They are, of course, to be found at reg.5, which provides:

5. *- (1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply, 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 total costs which may be taken into account by the authority, under regulation 4, of complying with all of them.

(2) This regulation applies in circumstances in which-

(a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and

(b) those requests are received by the public authority within any period of sixty consecutive working days.

72. The issue, therefore, is whether these requests fall within Reg.5(2)(a) . Do they relate to any extent to the same or similar information? The Appellant's argument is that they did not. In so arguing, he seeks to dismiss the DWP's and the Commissioner's reasoning, but fails to identify any points of difference.

73. The Commissioner and the DWP, however, take the view that all but three of the 17 requests made by the Appellant do indeed fall within the definition, for the reasons set out above. The Tribunal agrees, in respect of eight of them, RFI nos. 1,2 ,3, 8, 10, 11, 16 and 17. The wording of the Regulation is very clear, and very wide – if the request relates to information which is to any extent the same or similar. These requests were for just such information. Whilst the Appellant is right that there is no requirement in the text of the Regulation for there to be an overarching theme, and that the DWP's reference to this concept is something of a gloss upon the legislation, that does not vitiate the Commissioner's decision. The Tribunal does not consider that her decision was based solely upon that consideration. The view that these requests did indeed relate to information which was, to any extent, the same or similar was not based upon there being an overarching theme, such a conclusion is quite sustainable without there being such a theme. It seems to us that the real relevance of the "overarching theme" concept is probably no more than as a tool to assist the determination of whether there was the requisite similarity in the information requested. It may be useful in cases where the similarity is not immediately apparent. That is not, however, the case here. As the DWP contends all the information requested in these specific requests related to the monitoring or performance of contracts managed centrally by DWP's Contracted Health and Employment Services and/or the activities undertaken by the providers in carrying out health assessments, specifically for the delivery of Work Capability Assessments for ESA/UC by the Health and Disability Assessment Service operated by CHDA and for the delivery of PIP

Assessments delivered by IAS and Capita. The Commissioner similarly found that the requests mainly sought managerial information, and were accordingly requests for the same or similar information.

74. The Appellant's arguments to the contrary are, with respect, specious and sophistic. Indeed, his submission at para. 57 of his Grounds of Appeal (pages 37 and 38 of the bundle) rather undermines his own argument, as he therein sets out nine points of similarity, but highlights none of differentiation. He is right that there is no need for any overarching theme, or common thread, and that the identity of the team that deals with such requests within the DWP is not a factor which, *per se*, renders the information the same or similar, but his bullet points 1, 3, 4 and 8 are indeed points of similarity.

75. The Appellant's Grounds of Appeal on this issue (paras. 38 to 58) raise an argument, at para. 42 , that the Commissioner and the DWP are "actually relying upon metadata (sometimes called meta-information) about the requested information to justify the engagement of s.12." With respect to the Appellant, the Tribunal does not understand this argument, and cannot see how the respondents' aggregation approach can be said to be based on metadata, as that term is commonly understood. The Appellant seems to base this argument upon the proposition (page 66 , para. 47 of his response to the responses) that "*If information is related to something else or is used in a particular way, then any relationship or use made of the information is classed as metadata.*"

76. With respect , that is a tortuous argument. "Relationship or use" is not data, or metadata. In this context, it is the purpose for which the information has been obtained. It is true that the DWP had relied upon that purpose or those purposes, in asserting that the requests are to be aggregated. We agree that this factor does not, of itself, mean that the requests related to information which was the same or similar information, any more than the fact that the same team of persons would be involved in its retrieval. Whether, however, the information to which the requests related was to any extent the same or similar is, in our view, a simple matter of examining the terms, and the context of, the requests themselves. It is, in essence, a question of recognition. It is easier to say if something is the same, or similar, when one can see it all, in context, rather than trying to prescribe what will or will not be the same or similar. The DWP, and the Commissioner considered that these eight requests did relate to information that was to some extent (in our view, quite an extent) the same or similar information., i.e. managerial or organisational information collected and used to measure performance in given areas of the organisation. One need only read the preamble to the requests RFI 1 to RFI 3, which is an extract from Part M of the contract in question, which is headed "Ongoing Contract and Performance Management", to see that the ensuing three requests which relate to these provisions, and how they have been operated during the currency of the contract, must be for the same or similar information, as they all relate to these provisions.

77. The same, the Tribunal considers, is true of the subject matter of the other requests, RFI 8, RFI 10, RFI 11, RFI 16 and 17 RFI 7. They are requests for management

information which fell to be provided under the performance management provisions of the relevant contracts. The preamble to these requests similarly makes reference to the contractual provisions for performance monitoring and management.

78. RFI 12, RFI 13, and RFI 14, of course, were not included in the Commissioner's findings that the DWP did not have to confirm whether the information was held, and hence she did not consider these were requests that fell within the s.12 exception.

79. That leaves, however, RFI 4, RFI 5, RFI 6 , RFI 7 , RFI 9 and RFI 15. These it will be recalled, do not ask for "management information". RFI 4 to RFI 7 relate to the mandatory reconsideration process. This is not, the Tribunal considers, management information. It does not relate, unlike many of the other requests, to the performance management of any contract, it relates to the operation of the ESA and PIP schemes, and the process of mandatory reconsideration. No reference is made to performance management, nor to this being "management information". Rather it appears to be information as to mandatory reconsideration process, not the performance of any contractor. Similarly, RFI 9, which is a request for the disclosure of the type of information that is created or recorded by a healthcare professional for the purposes of deciding whether a claimant is called to a Work Capability Assessment, relates to process, not to management information for performance management. The contract may be the source of the obligation to provide the service that gives rise to this process, but that, the Tribunal considers is a tenuous connection, and is merely the background against which the information is held (if it is).

80. The Tribunal thus considers that this is not management information, and is not collected for the purposes of performance management. The preamble to the requests, all made on 6 February 2018 (page 81 of the bundle) makes no reference to the contractual provisions, or any performance management indicators. The requests relate to the mandatory reconsideration process, and how that is operated, and not to performance management. This is not the same or similar, to any extent, information to that requested in the other requests.

82. Turning to RFI 8, that clearly is a request for management information. In the preamble to the request (page 89 of the bundle) the Appellant again refers to the PIP contracts, and the requirements therein for the contractors to supply the DWP with regular management information, in respect of various periods. This request is indeed, therefore, rightly to be aggregated with others made in this two week period.

83. RFI 9, however, is a stand-alone request, in which the Appellant in the preamble (page 97) refers to the Work Capability Assessment handbook, and how a decision is made by a Healthcare Professional whether a claimant is to be required to undergo such an assessment. He points out how this suggests an element of discretion on the part of the HCA, and he makes the not unreasonable suggestion that a record of such decision would be made. His request therefore was for disclosure of the type of information (note - not copies of each such record that may have been made) that was

created or recorded as part of this process, where such information was stored, and whether a specific form was used to record the information.

84. Again, on proper analysis, the Tribunal does not consider this to be a request for "management information", and it has no connection with performance management. The contractual provisions are not referred to, and again it is the process, the operation of the claims assessment system to which the request relates. The Tribunal accordingly does not consider that this request can properly be aggregated with the rest.

85. That leaves RFI 15, which the Commissioner considered should be aggregated under s.12. It was made, however, on 13 February 2018 (page 114 of the bundle), along with RFI 12, RFI 13 and RFI 14. The short preamble to this request recites the process whereby CHDA Ltd can, in carrying out the ESA WCA assessment process request further medical evidence from the claimant's GP via an ESA113 form.

86. The three requests FRI 12 to RFI 14 asked about fees payable to the GP, and whether they were obliged by law to provide completed ESA113 forms. The Commissioner did not regard these requests as falling within the aggregation provisions, as they were not requests for management information (para. 42 of the Decision Notice, page 11 of the bundle).

87. With respect, the Tribunal does not consider that RFI 15 either is in fact a request for management information. Again, it differs from the other, rightly aggregated requests, in that it makes no reference to any contractual provisions, and, importantly, the monitoring that is referred to is not to monitoring of performance of any contracting party with the DWP, but of the quality of the evidence provided by the GPs in question. The Tribunal cannot see a valid distinction between the information requested under RFI 12 to RFI 14, and this request, and it is not to be aggregated.

88. In all other respects, however, the Tribunal agrees with the DWP, and the Commissioner, on the correctness of aggregation of the other requests. We do not agree that there has been a subjective approach, nor have we taken one, to the issue of similarity of the information requested. In relation to those requests where the Tribunal is allowing the appeal, the DWP, and perhaps the Commissioner have taken a slightly superficial approach to all these requests. The information requested does have superficial similarities, but as the Commissioner's own analysis of RFIs 12 to RFI 15 shows, these are only skin deep. The second respondent's witnesses, similarly, do not address or consider the differences between the subject matter, and the terms of these requests, which are not for management information provided pursuant to quoted contractual terms, for the express purpose of performance management of these contracts. Nothing is said, for example, specifically about the work that would be involved in answering RFI nos. 4 to 7, 9, and 15.

89. As the DWP has not formally confirmed whether it holds the requested information the Tribunal directs the second respondent to issue a fresh response to these requests by confirming whether the information is held and then, if held, either

disclose the information or issue a refusal notice citing a reason to withhold the information.

Tribunal Judge Paul Holmes

Judge of the First-tier Tribunal
Dated: 31 March 2020.
Date Promulgated: 9 April 2020.

ANNEXE A – THE RELEVANT STATUTORY PROVISIONS

Freedom of Information Act 2000

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.

(4) The [Minister for the Cabinet Office] 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 [Minister for the Cabinet Office] 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 Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004

5. - (1) In circumstances in which this regulation applies, where two or more requests for information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply, 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 total costs which may be taken into account by the authority, under regulation 4, of complying with all of them.

(2) This regulation applies in circumstances in which-

(a) the two or more requests referred to in paragraph (1) relate, to any extent, to the same or similar information, and

(b) those requests are received by the public authority within any period of sixty consecutive working days.
