



IN THE FIRST-TIER TRIBUNAL Joined Cases EA/2013/0195 & 0196

**GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

ON APPEAL FROM:

**The Information Commissioner's
Decision Notices No: FS50483752 and FS50486072
Dated: 13 August 2013**

Appellant: MYLES MEGARRY
Respondent: INFORMATION COMMISIONER
Heard at: SHEFFIELD COMBINED COURT CENTRE
Date of hearing: 27 NOVEMBER 2013
Date of decision: 15 DECEMBER 2013

Before

ROBIN CALLENDER SMITH

Judge

and

Suzanne Cosgrave and Paul Taylor

Tribunal Members

Representations and Attendances:

For the Appellant: Mr Myles Megarry represented himself throughout the appeals and at the hearing.

For the Respondent: Ms Michele Voznick, Solicitor for the Information Commissioner made written representations in the appeals.

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GENERAL REGULATORY CHAMBER
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Subject matter:

FOIA

Whether information held

- Section 1 (1) (a)

DECISIONS OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds both decision notices dated 13 August 2013 and dismisses the appeals.

REASONS FOR DECISIONS

Introduction

1. The Appellant made three related requests in respect of his personal information originally contained in his parents' divorce file. The requests were made in 2009 to the Northern Ireland Courts and Tribunal Service (NICTS). NICTS is the executive agency for the Department of Justice based at Stormont in Belfast.
2. His parents' divorce had been heard at a particular Court in 1986. NICTS referred the Appellant to the Public Records Office for Northern Ireland (PRONI).
3. The Appellant made a request to PRONI on 28 December 2009. PRONI told him on 19 January 2010 that it did not hold divorce files from the Court in question. It clarified that a transfer might take place in the future. It also advised him that, although it held other divorce files from 1988-1994, these had not been catalogued yet.

The requests for information

4. In respect of the first matter under appeal, on 11 October 2012 the Appellant requested the following information from the NICTS:

The information I wish the Northern Ireland Courts and Tribunals Service to provide me is information on the destruction of certain documents relating to a particular file that has already been delivered to the Public Record Office for Northern Ireland. The file is matrimonial file reference [specified reference] now at PRONI and includes decree nisi and decree absolute for example but does not include welfare report or legal aid documents.

Please would you provide me with a Schedule of documents that were destroyed on this file before it was delivered to the Public Record Office for Northern Ireland and if available what date the destruction took place. Other documents destroyed may include petition, marriage and birth certificates as well as proof of service. If the precise schedule of destruction is not available then please provide me with the date the documents were destroyed.

5. NICTS responded on 30 October 2012, and advised that records from 1986 would have been subject to the 1992 Northern Ireland Court Service Records Disposal Schedule. The NICTS provided the Appellant with a copy of the relevant disposal schedule 17/92, which stated that files should be held for 15 years and then transferred to PRONI.
6. Schedule 17/92 required that certain specified documents should be retained (Including the petitions, the decree nisi and decree absolute) but all other documents should be destroyed. The only exception was that in a census year a sample of entire files would be retained. 1986 was not, in fact, a census year, so when the file requested by the Appellant was transferred to PRONI, everything except the specified documents would have been destroyed. NICTS stated that it did not hold recorded information confirming exactly when any such destruction had taken place.
7. The Appellant was dissatisfied with this response and, on 13 November 2012, he requested an internal review. His view then – and throughout this appeal – was and is that NICTS should hold a schedule of the destroyed

information in any particular file in addition to the generic disposal schedule 17/92.

8. Following an internal review the NICTS wrote to him on 5 December 2012 clarifying its response of 30 October 2012. It stated it did not hold any information to suggest that any documents had been destroyed and the file was sifted. The NICTS also advised him that it could not release third party personal data to him.
9. In relation to the second matter under appeal, On 13 November 2012 the Appellant made a fresh request to NICTS. He referred to the Public Records Act (Northern Ireland) 1923 (PRANI), and requested the following information:

Section 8 requires that rules for the disposal of records shall be made with the approval of the Lord Chief Justice and shall have passed negative resolution of either Parliament or Assembly whichever structure was in place at the time. However I do not believe the schedule was approved in the first instance by the Lord Chief Justice because the Lord Chancellor produced a Code of Practice instead (Code of Practice dated 2002).

If the Northern Ireland Courts & Tribunals Service holds any evidence schedule 17/92 was passed by resolution of either Assembly or Parliament before the records were destroyed.

10. NICTS responded on 5 December 2012 stating that it did not hold the requested information. It advised that schedule 17/92 had been drawn up as required by the Public Records (Disposal of Documents) 1925 rules. Rule 6 provided that the Lord Chief Justice or a "chief official" could appoint a person to prepare a disposal schedule. Schedule 17/92 was such a schedule, and it was approved by the Lord Chief Justice as required by PRANI. On this basis NICTS's position was that Schedule 17/92 had not needed to be approved by Parliament or the Northern Ireland Assembly, therefore no record would have existed.
11. The Appellant remained dissatisfied and requested an internal review on 18 December 2012. He referred to the Public Records Act (Northern Ireland) 1923 (PRANI), which he interpreted as requiring public authorities to retain public records for 20 years before considering their disposal or

transfer to PRONI, rather than the 15 years indicated in schedule 17/92. His view was then - and is now - that Schedule 17/92 did not comply with the requirements of the PRANI, and that NICTS should hold information to explain this discrepancy.

12. On 14 January 2013 NICTS wrote to the Appellant to confirm that the internal review was complete and that it did not hold the requested information. In an effort to assist him NICTS further advised that the 1992 Northern Ireland Court Service Records Disposal Schedule set out separate schedules for classes of court documents, and that these had been approved by the Lord Chief Justice.

The complaint to the Information Commissioner

13. On 24 January 2013 the Appellant made his two complaints to the Commissioner. In relation to the first (FS50483752) he made it clear that he believed that NICTS ought to hold a record of the date on which the records were disposed. He suggested that NICTS had "altered and concealed" records relating to the destruction and location of records he was entitled to receive.

14. However the Information provided by the Appellant in support of that allegation dated from 2009 and 2010. The matter had been reviewed by the ICO's Criminal Investigation Team Manager who determined that there was insufficient evidence to pursue the matter further in line with FOIA Regulatory Action Policy.

15. As a result the Commissioner considered the scope of the case was whether or not NICTS held recorded information relating to the date of destruction of information contained in the divorce file in question.

16. In relation to the second (FS50486072) the Appellant summarised his complaint thus:

The grounds on which I wish the Information Commissioner's Office to assess the Northern Ireland Courts and Tribunals Service's response

to my Freedom of Information Act request are that having disposed of records before 20 years the Court Service ought to hold a record of the date records were disposed of and have legislative consent of the Northern Ireland Assembly.

17. He referred to section 8 of PRANI, interpreting it as requiring "approval from the Lord Chief Justice and a resolution of Parliament before any changes could be made to the rules on disposal". He did not specifically claim that such a resolution had taken place, but he was – and remains - of the view that it ought to have done, therefore relevant information ought to be held.

18. The Commissioner concluded that he could only consider whether the requested information was held. He was unable to consider whether NICTS ought to hold the requested information, or whether NICTS ought to have sought the kind of resolution mentioned above in [17].

The appeal to the Tribunal

19. The Appellant has maintained his dissatisfaction at the responses from NICTS, PRONI and the Commissioner throughout these appeals.

20. He presented comprehensive oral representation over two hours – on the basis of two written skeleton arguments (one for each appeal) - at the appeal hearing at the Sheffield Combined Court Centre.

21. In summary, in relation to the first appeal, he maintained that the business needs of a public authority “to restore the backup of electronic records in order to comply” with s.77 FOIA, Rule 17.12 (2) of the Family Proceedings Rules (NI) 1996 and s.3 PRANI taken together with “additional building blocks of information, the obviousness of the place to look....and the removal of records facilitating their destruction” meant that the Commissioner had reached the wrong decision that his requested information was not held under s.1 (1) (a) FOIA.

22. In relation to his second appeal he maintained that, because of the records management policy of the Department of Justice, the lack of any outstanding effects to the Public Records legislation, the requirement for annulment of Paragraph 6.6 of the draft legislation (he believed that the relevant warrant issued by the Department of Culture Arts & Leisure was “fictitious as it was not enacted in law”) and the requirement that rules made in respect of s.8 PRANI be made subject to negative procedure it followed that the Tribunal should overturn the Commissioner’s decision and require the public authority to disclose the information held.

The questions for the Tribunal

23. The Tribunal considered that the issue in both of these appeals was whether the separately requested information was held for the purposes of the FOIA requests.

Conclusion and remedy

24. Both the Commissioner and the Tribunal approach the standard of proof in the same fashion. Both use the civil standard of proof, the balance of probabilities, and that means assessing - on the balance of probabilities - whether something is more or less likely. The burden of proof in these appeals rests on the Appellant.

25. In respect of the first appeal, Section 3 (c) of the Public Records Act (Northern Ireland) 1923 (PRANI), allows for public records to be transferred before 20 years with the approval of relevant persons. NICTS confirmed that schedule 17/92 was approved by the Lord Chief Justice and the then Secretary of the Department of the Environment for Northern Ireland. NICTS provided the Commissioner with a copy of the schedule, signed by these individuals.

26. The Appellant referred to the Lord Chancellor's Code of Practice on records management issued under section 46 of the FOIA creating, he argued, a statutory obligation on NICTS to hold the information requested.

NICTS did not accept this view and told the Commissioner that schedule 17/92 required the following in relation to matrimonial files:

Preserve permanently the petition, decree nisi, decree absolute, all Judges' / District Judges' applications and orders and registration of maintenance order file. Transfer to PRONI after 15 years. Destroy remainder of documents after 15 years. However a sample of files in their entirety to be taken every census year for transfer to PRONI. The samples should include (if applicable) petition, marriage and birth certificates, proof of service, welfare report, legal aid documents.

27. On 29 August 2012 the divorce file in question had been transferred to PRONI as it was more than 15 years old the matter concluded in 1990 (it would have been due to be transferred to PRONI in 2005 in accordance with para 6.9 Disposal schedule "In general the period of time before destruction should be calculated from the completion date of the case/action...") and the file was not a census year file. NICTS recalled the divorce file for examination, and found that it contained the following information:

- Decree nisi and associated order
- Decree absolute
- Petition
- Miscellaneous administrative correspondence

28. The Tribunal accepts that the Appellant had specifically mentioned welfare reports and legal aid documents as examples of the types of information he expected to be not to be held. NICTS confirmed that welfare documents were routinely returned to the provider at the end of the court hearing. There was no indication that legal aid had been granted in the case. Therefore the NICTS concluded that this information had never been held. There was no evidence that it had ever been "sifted" or documents within it destroyed.

29. The Tribunal finds, on the evidence before it in respect of the first appeal, that NICTS conducted a rigorous and robust search for the information requested. There is nothing to suggest concealment or bad faith on the part of NICTS and the Appellant has produced no evidence to challenge that conclusion. The Tribunal finds, as did the Commissioner, that NICTS

did not hold a record of destruction relating specifically to the divorce file in question.

30. In respect of the second appeal NICTS stated, and the Commissioner found, that it did not hold any evidence of a resolution of the Northern Ireland Assembly or Parliament because there was no requirement to obtain such a resolution.

31. The Tribunal finds, on the balance of probabilities, that the information has never existed and therefore it was not held. Again, there is no evidence that NICTS has concealed information or acted in bad faith.

32. The Tribunal is unanimous in dismissing both of these appeals.

33. There is no order as to costs.

Robin Callender Smith

Judge

14 December 2013

Promulgated 23rd January 2014

