



**Tribunals Service**  
Information Tribunal

**Information Tribunal Appeal Number: EA/2008/0072**  
**Information Commissioner's Ref: FS50179206**

**Heard at Procession House, London, EC4**  
**On 5 December 2008**

**Decision Promulgated**  
**19 December 2008**

**BEFORE**

**CHAIRMAN**

**CHRIS RYAN**

**and**

**LAY MEMBERS**

**MICHAEL HAKE**  
**ANDREW WHETNALL**

**Between**

**ANDREW MALCOLM**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**Respondent**

**Subject matter:** Whether information held s.1

**Cases:**

**Representation:**

The Appellant in person  
For the Respondent: Fiona Banks

### **Decision**

The Tribunal upholds the decision notice dated 29 July 2008 and dismisses the appeal.

### **Reasons for Decision**

#### **The request for information**

1. In June 2007 the University of Oxford (“the University”) responded to a request for information by the Appellant under the Freedom of Information Act 200 (“FOIA”) by providing him with copies of certain documents relating to a 1977 application for exemption from Corporation Tax made by Oxford University Press (“OUP”), which is a department of the University. The documents included a submission to the Inspector of Taxes signed by a Mr G B Richardson, the Secretary and Chief Executive of OUP at the time. It was dated 2<sup>nd</sup> August 1977 and included this section:

*“The possibility of exemption from U.K. Corporation Tax has been mooted on several occasions. The most recent was in 1952, when discussions with the Inland Revenue were informal. They concluded with the ruling that earnings accruing to OUP from ‘unrelated activities’ – i.e. income from investments other than in the publishing or printing business, and rental income from University properties administered by but not occupied by the Press – would be exempt, since those monies would be available for the general charitable purposes of the University. Capital gains are similarly exempted. The present application is made on the ground that the specific purposes of [OUP], as a Department of the University, are no less qualified for exemption”*

2. On 13 July 2007 the Appellant wrote to the University and, referring to that submission, made a further FOIA request in the following terms:

*"On page 12 of his application of 2<sup>nd</sup> August 1977 George Richardson writes.*

*'The possibility of exemption from U.K. Corporation Tax has been mooted on several occasions. The most recent was in 1952, when discussions with the Inland Revenue were informal. They concluded with the ruling that earnings accruing to the OUP from `unrelated activities'... would be exempt, since...'*

*"I should therefore be grateful if you would now also produce and send to me copies of all and any correspondence that passed between the University (Press) and the Inland Revenue relating to the OUP's application for tax-exemption made in 1952 (including `the ruling) and on the `several occasions' previously."*

3. The request was rejected in a letter from the University dated 13<sup>th</sup> August 2007. It contained the following reason for the rejection:

*"We have examined our archives and have found no correspondence between the Press and the Inland Revenue in or before 1952 relating to an application by the Press for tax-exemption. Despite a careful search we have been unable to locate the files between 1940 and 1951".*

Following an internal review requested by the Appellant the University maintained its refusal in a letter to the Appellant dated 10<sup>th</sup> September 2007 in which it said:

*"OUP has undertaken a further careful search of its archives but is unable to find any correspondence between it and the Inland Revenue over an application for tax exemption dating from 1952 or before.*

*"It is of course open to you to take this matter to the Information Commissioner, with whom we will be happy to co-operate in full."*

#### The complaint to the Information Commissioner

4. On 22<sup>nd</sup> September 2007 the Appellant complained to the Information Commissioner about the way in which the University had dealt with his request. It is clear from the language of his letter to the Information Commissioner of that date,

and the submissions that he has made during the course of this Appeal, that the substance of his complaint is that the University had either failed to carry out a sufficiently rigorous search for information falling within the scope of his request or had deliberately withheld it. It amounted to an allegation that the University had been in breach of FOIA section 1, which reads:

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

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

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

In other words, the Appellant claims that the University “holds” the information requested but has failed to communicate it to him.

5. On 29 July 2008 the Information Commissioner, having completed his investigation, issued a Decision Notice to the effect that, apart from one document which had come to light during the Investigation (and which we deal with in more detail later), the University did not hold any further information relevant to the Appellant’s request. In reaching that decision the Information Commissioner tacitly acknowledged that there could be no absolute certainty on this point but concluded that, taking into account the detailed searches carried out, the balance of probabilities was that the University did not hold further information within the scope of the request.
6. The Information Commissioner included, in both the Decision Notice and his submissions to us during this Appeal, a consideration of the possible impact of FOIA section 12 on the original request. However, that would only arise for consideration were we to decide that the University did hold relevant information at the time when the original request was made. In the light of our decision that it did not, the point does not require to be considered further.

## The appeal to the Tribunal

7. The Appellant's Notice of Appeal was dated 27<sup>th</sup> August 2008 and included the following Grounds of Appeal:

*"The Commissioner has concluded... that 'on the balance of probabilities' Oxford University has somehow (unexplained) lost the sought important documents since 1977. (I find this implausible and/or reprehensible and I find the Commissioner's conclusion weak and unsatisfactory"*

The Notice of Appeal was accompanied by supplementary material which included the following passage:

*"It is therefore evident [from the terms of the 1977 submission] that the papers relating to OUP's rejected 1952 application, and in particular the Inland Revenue's ruling, were in their possession in 1977. However, Oxford is claiming that it is now unable to find these papers, papers that were so important that, by their own submission, the very viability of the OUP depended on them. Oxford has gone in great detail into the history of OUP's archiving procedures, but has also been unable to state how or when or why these papers should have been lost or destroyed."*

And later:

*"I do not understand what probabilities [the Decision Notice] can be balancing here. Avoiding convoluted logic, I would simply say that I find it highly implausible that the ancient university, one of whose chief claims to fame is its archiving prowess, should have lost these important, comparatively recent documents, and that it is far more likely that they are deliberately not finding and producing them because they contain ... submissions, arguments and rulings which might prove to be damaging if aired in OUP's current PR campaign to retain its tax-exemption privilege"*

It seems to us that those passages encapsulate the basis of the Appellant's complaint. During the hearing before us he put the same points in terms of a lack of rigour in both the Information Commissioner's investigation and the University's

document search, which he at times attributed to a deliberate intent to block his request.

8. Under a Directions Order dated 24 September 2008 the Appellant was ordered to file a witness statement setting out the evidence on which he wished to rely in support of his contention that the University continued to hold the information in dispute and/or was deliberately not finding and producing it. The witness statement filed in compliance with that direction provided a certain amount of background information on the tax status of OUP and the Appellant's own dealings with it over the years, (including litigation during the 1980s over a publishing agreement), as well as some perceived shortcomings in the Information Commissioner's handling of his investigation. Of greater relevance to the issue at the heart of this Appeal, it also recorded that the Appellant had searched the National Archives at Kew for information on OUP's dealings with the Revenue, and had discovered papers on failed attempts by OUP to obtain tax exemption in 1944 and 1950. He had found that the National Archives "*hold no documents relating to Oxford's attempt of 1952*" but drew the conclusion from his discovery of the 1944 and 1950 papers that it was inconceivable that the University had lost or destroyed its own copies. He commented:

*"Surely there must be accessible copies of these potentially momentous documents somewhere in Oxford. Alternatively, are we seriously to conclude that although the Inland Revenue thought it worth preserving their entire file on the subject, the OUP itself, whose very future, it was claimed, rested on their decision, did not?"*

It was evident from the Appellant's submissions during the hearing of the Appeal that the scepticism expressed in that passage applied equally to the 1952 application for relief.

9. Although the Appellant was troubled by the formalities of the Tribunal's procedures and its requirement for him to provide material in support of his assertion that the University did or must continue to hold relevant information, he rose to the challenge by exhibiting to his witness statements the transcript of part of two telephone conversations he had. One was with a former OUP executive called Bill

Andrewes, who had been the Finance Director of OUP for a period of years up to 1998. The other was Dr Martin Maw, an archivist employed by OUP. We should record that the Information Commissioner expressed grave concern about the way in which this evidence had been obtained and urged us to attribute little or no weight to it in view of the fact that the transcripts were incomplete, the gentlemen telephoned had not been told that their conversation was to be recorded, nor that it was intended to be used in evidence. However, no application was made to have this part of the Appellant's witness statement struck out and we have therefore taken it into consideration, giving due consideration to the criticism that the Information Commissioner made when considering the weight we should give it.

10. The Directions Order of 24 September 2008 also set out abbreviated procedures for preparing the Appeal for a hearing and directed that it should not exceed half a day. It was heard on 5<sup>th</sup> December 2008. The Appellant conducted his own case and also submitted himself to questions from the Tribunal on his witness statement. He was, understandably, unfamiliar with the process and prone at times to stray into other aspects of his relations with OUP and the justification for its current tax status. However, he presented parts of his case with great clarity and was open and honest in answering our questions, regardless of whether the answers strengthened or undermined his case. As we have said, the essence of his Appeal lay in his criticism of how the University conducted its search for the documents requested and of how the Information Commissioner investigated his complaint. Central to both elements of the criticism was a letter which the Information Commissioner wrote to the University on 12<sup>th</sup> February 2008 setting out five questions. The Appellant made it clear that he considered that the questions themselves were the right ones to ask. His criticism lay in the way that they were answered and the failure of the Information Commissioner to follow up in the manner that he would have considered appropriate. In the next section of this decision we therefore consider each of the criticisms. Some stem directly from the letter to which we have referred, others are more general.

#### The Appellant's criticisms

11. Inherent credibility. As will be apparent from the Grounds of Appeal and the Appellant's witness statement, he has invited us to conclude that the University's

statement that it no longer holds the information in question lacks credibility, because of the quality of its archiving and the importance of the 1952 application. We do not find it in the least bit incredible that papers created 55 years before the request was made can no longer be traced, particularly as they concern an application for exemption that failed. Had it succeeded then it might have been more likely that at least the successful ruling would have been retained in order to deal with any future challenge to the entitlement to exemption. We also note, in reference to the 1952 application for relief, that this did not appear even in the records of the Inland Revenue, which the Appellant discovered at the National Archives.

12. In the course of answering questions from the panel on this issue the Appellant very fairly conceded that there had been many changes to tax law since the application was made, and that many Finance Directors at OUP had come and gone during the intervening years. Any papers that did exist would therefore have been of less significance as the years past and we do not find it surprising in the least that at some stage they may have been destroyed or treated as no longer having sufficient relevance to justify being separately identified in any filing system. We therefore approach the Appellant's other criticisms with an open mind and not with any predisposition in respect of the credibility of the information provided by the Information Commissioner and, indirectly, by the University.
13. Quality of the University's archive search. The Information Commissioner asked the University for information about how information was normally filed and the steps that were taken in searching for the information requested by the Appellant. The University replied that, to the extent old correspondence is retained, it is held in OUP's archive. However, the archive was said to be far from complete and the OUP did not have a designated archivist until the 1950s. Systematic listing and preservation of the collection of materials by professionally trained staff did not begin until the 1980s. An archive database had been set up in about 1990 but there was still a backlog of documents created before that date which had not been incorporated. The University had also provided a copy of the guidelines that were to be followed for depositing material in the archives. These recorded that the University collected and stored documents falling within the category of



*“Secretary/Printer/Publisher’s correspondence”* but that it did not store *“systematic runs of”* among other categories *“Invoice material”* which was said to be *“stored by Finance under Customs and Excise rules”*. The Appellant suggested that he would have expected the information he was seeking to fall within the first of those categories, but not the second. We did not find the guidelines particularly helpful to either party’s case. They do not include any specific reference to correspondence with the revenue authorities and we are not convinced that it would be an obvious candidate for either of the two categories mentioned.

14. The University informed the Information Commissioner that the information requested by the Appellant had been searched for in two ways. First, a database search was performed using keywords from the Appellant’s request. Second, when this generated no evidence of relevant documents, a check was made among the backlog.

15. The nature of that manual search was explained in more detail in a letter from Ms Joanne Marks, the Group Legal Director of OUP, which was written to the Information Commissioner’s office on 3 December 2008 in order to answer a number of questions which had apparently been put to her during a telephone conversation on the same day. We were very concerned that this very informal form of evidence should be presented to a litigant in person just a day before the hearing, particularly as the Tribunal had put forward the possibility of evidence from a representative of the University being adduced some weeks before the hearing. However, the Appellant did not object, and in fact indicated that he wished to rely on some parts of the letter, which he considered helped his case. We therefore allowed the evidence in, provided it was appropriately verified, which it subsequently was. The additional information it provided was that that so-far uncatalogued material occupied approximately 300 metres of shelf space and that the manual search had taken the form of a file-level search based on relevant keywords appearing in file labels.

16. The Appellant expressed scepticism about the adequacy of the search. He drew attention, in particular, to the fact that during the course of the Information Commissioner’s investigation the University disclosed a letter dated 25<sup>th</sup> July 1950 from the Inland Revenue to a Mr Veale at the University which clearly relates to an

earlier conversation during which the question of exemption had been raised. The University told the Information Commissioner that during an unrelated exercise an OUP archivist had located it in a file named "System of Finance" in the backlog of material not yet incorporated into the database. The Appellant raised some doubt about the letter as it appeared to be different from a copy of one having the same text which he had traced through the National Archives. We do not think that anything turns on that point as the difference probably lies in the methods adopted in pre-photocopier days to create spare copies. However, we do think that the Appellant was justified in querying whether other relevant material was found, or searched for in the same file and whether the "file level" search referred to in the previous paragraph had included any other files entitled "System of Finance" or other similar expressions. Against that Miss Brook, counsel for the Information Commissioner, made the point that the disclosure of this additional document as soon as it came to light demonstrated that the University took its obligations seriously and the fact that it stated in its letter of 13<sup>th</sup> March 2008 that it had located the one document and did not mention other documents or files at the time created a clear inference that none existed. We were content that the inference is one that it is appropriate for us to draw in all the circumstances.

17. Failure to make enquiries of staff members. As previously mentioned the Appellant spoke to two current or former members of the University. He criticised the University for having failed to take the same steps as a follow up to its unsuccessful searches. He also wanted to know why no one at the University had spoken to Mr Richardson, the apparent author of the 1977 submission referred to in paragraph 1 above. The Information Commissioner explained that it is not his normal practice to approach third parties and that he had established that the University had not done so either. In the course of his evidence to us the Appellant told us that he had himself telephoned the gentleman who, although now aged 85 and retired for 20 years, had recollected the attempt to obtain tax exemption. However, he had not been able to contribute any information about the 1952 application or about where the papers relating to it might be located beyond a suggestion that the Finance Director's office would be an obvious place to look. He had apparently conceded, also, that there had been three Finance Directors since he retired and many administrative reorganisations over the years. It is evident, therefore, that

even if the University or Information Commissioner had pursued this particular line of enquiry proposed by the Appellant it would not have led to the missing information. We ought to add that the evidence of Ms Marks included confirmation that she had personally taken steps at the time of the original request to satisfy herself that the requested information was not held in the office of the Finance Director (as well, incidentally, as the office of the Secretary to the Delegates).

18. As to the two individual's, the record of whose conversations were included in the Appellant's evidence, we do not think that anything they were recorded as saying to the Appellant gives rise to any serious doubt as to the adequacy of the University's search. In the case of Mr Andrewes he confirmed that he had seen a large file of papers which went back to well before the 1939/45 war and included the 1952 application. He expressed surprise that it could not now be found because, during his time, the papers had been regarded as very important. However, he thought that he would have seen the file between 10 and 15 years previously and he could not remember some of the detailed points put to him by the Appellant as to where the file might have been located. He volunteered that the 1952 application was relatively informal, comprising no more, possibly, than an exchange of correspondence.
19. The only assistance that this provides to the Appellant is that a file appears to have existed at some time. However, given the passage of time it provides no useful information on where it might be searched for now and Mr Andrewes' reference to the informality with which the matter was handled seems to increase the possibility that no papers were retained. The conversation provides no information about the earlier applications of 1944 and 1950.
20. In the case of Dr Maws he appears to have stated that he had not been involved in the original search for the information requested by the Appellant but stated that he did not know if the legal department had been dealing with that. Beyond that the transcript records a number of fairly non-committal responses to a series of questions and statements made by the Appellant, concluding the conversation by stating that he did not have any direct knowledge of the particular file *"for the simple reason that I preside over millions of files here. But in terms of things generally having gone missing, it isn't any legal policy of ours to dispose of things, certainly"*.

Given the context of being posed a number of questions during a surprise telephone conversation, with someone he did not know, about a subject on which he evidently had little direct knowledge, we do not think Dr Maw's comments provide any significant assistance to the Appellant's case.

21. Failure to search beyond the archive. The Appellant suggested that the University's formal archive system was not the most appropriate place in which to search for the information requested. He considered that the most suitable "targets" for enquiry would have been the Finance Director of the OUP or the Secretary to the Delegates. As we have mentioned in paragraph 17 above, we have received credible evidence from Ms Marks that searches had been made in the offices of both those executives.

22. Previous litigation. As mentioned in paragraph 8 above, the Appellant was involved in litigation with the University in the past. The matter was apparently finally resolved in the Appellant's favour in a Court of Appeal decision in 1990. The Appellant drew our attention to an article he had written about the litigation, which was published in the Times Literary Supplement in April 1999. This contains some information about the litigation and a number of allegations about the manner in which it had been conducted by the University. It was suggested to us during the hearing that some of the allegations were supported by statements made in court by the judges involved at first instance and on appeal but we were not provided with any detailed evidence on the point. Its relevance seemed to be that the Appellant considered that it undermined the credibility of those who had handled his request for information in this case. Even if the judges' criticisms had been substantiated we fail to see how they could have any relevance to the honesty and competence of those involved in archive management and freedom of information processes some 17 years later. We do not believe that this part of the Appellant's case carries any significant weight.

23. We should add that the Appellant made a number of other criticisms of what he characterised as carelessness on the part of the Information Commissioner in the conduct of his investigation and the manner in which material had been made available both at that stage and during the course of this Appeal. We did not find,

on examination, that any of those criticisms (to the extent that they had any justification) undermined the credibility of the various explanations provided to us.

Conclusion

24. Although there will seldom be absolute certainty that documents of the age of those sought by the Appellant are no longer held by a public authority, we are satisfied that we should test this by applying the normal civil proceedings test. In other words we should ask ourselves whether, on a balance of probabilities, we are satisfied that these particular documents were no longer held by the University at the time of the Appellant's request. We are so satisfied and accordingly agree with the Information Commissioner's conclusion, to the effect that the University did deal with the Appellant's request in compliance with FOIA section 1.

25. We accordingly dismiss the Appeal.

Signed:

Chris Ryan

Deputy Chairman

Date: 19 December 2008