First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50860191

Appeal Reference: EA/2019/0460

Heard on the CVP platform
On 29 July 2021

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

RAZ EDWARDS & NAOMI MATTHEWS

Between

JULIA STONEHOUSE

Appellant

and

INFORMATION COMMISSIONER

First Respondent

THE ATTORNEY GENERAL'S OFFICE

Second Respondent

Appearances
Appellant: in person
First Respondent: did not appear
Second Respondent: Khatija Hafesji (instructed by Loris Swindell, Freya Claydon)

Case:
Hope and Glory Public House Ltd, R v City of Westminster Magistrates Court & Ors [2011] EWCA Civ 31

DECISION

The appeal is dismissed

REASONS

1. This case arises from a request by Ms Stonehouse for information about her father, a former Cabinet Minister who was imprisoned in the 1970s. The request was:

   "Under the Freedom of Information Act I am requesting to see the correspondence between the Attorney General and the Crown Prosecution Service relating to my father John Thompson Stonehouse between the dates 1st January 1975 and 28th February 1977.

   This correspondence will include information relating to the extradition of John Thompson Stonehouse from Australia up until July 1975, Committal Proceedings in October 1975, interim correspondence prior to the trial at the Old Bailey, during the trial itself between April and August 1976, the Appeal which took place between 24-27 January 1977, and correspondence thereafter."

2. The Attorney General's Office (AGO) replied pointing out that the Crown Prosecution Service (CPS) did not then exist and suggesting that the Director of Public Prosecutions (DPP) be substituted for CPS. A search was then carried out against the name "Stonehouse" which found nothing within the scope of the request. On 29 April 2019 AGO confirmed that it did not hold information within the scope of the request. On internal review on 9 May it upheld that position. AGO found a file from 1989. AGO provided advice to Ms Stonehouse on where else she might seek information:

   "Whilst we do not hold the information you have requested, you may wish to make a similar enquiry of the National Archives and/or the Crown Prosecution Service"

3. Ms Stonehouse complained to the ICO who investigated. As part of that investigation she sought the comments of AGO which on 6 November 2019 wrote setting out an account of the response to the request:

   "In the process of responding to Ms Stonehouse's FOi request. two officials in the Attorney General's Office undertook a search of the office's digital files using the search term "Stonehouse." The following digital locations were searched: shared electronic case files of the Attorney General's Office; electronic case files belonging to the Correspondence department of the Attorney General's Office; and. Ms Stonehouse's request related to information dated between 1 January 1975 and 28 February 1977. If the information were ever held by the Attorney General's Office, it would have originally been in hard copy format. The search of the Attorney General's Office's records management spreadsheet did not indicate a storage location for hard copy documents containing information that fell within the scope of the request.

   As part of the internal review a further official with appropriate security clearance carried out an electronic search of the Attorney General Office's highly classified files, using the search term "Stonehouse."

The searches carried out both in the process of responding to Ms Stonehouse's initial request under the FOIA and request for an internal review were unsuccessful in identifying any information falling within the scope of Ms Stonehouse's request.

The single key search term "Stonehouse" was considered to be appropriate. Any file containing correspondence between the Attorney General and the Director of Public Prosecutions' office relating to John Thomson Stonehouse would contain or be marked by the term "Stonehouse."

The Attorney General's Office's Retention Schedule ensures that information that may be required is retained by the office and that information that is no longer required is disposed of in a timely manner.

The Schedule provides that routinely, the office should retain and destroy records in line with this retention Schedule unless there is a business reason to retain the record for a longer period, or the record has a long term historic interest value and therefore should be retained for future transfer to the National Archives to become a public record.

Under the Retention Schedule, material of the type that is likely to fall within the scope of Ms Stonehouse's request would not be retained for more than 7 years. There is no clear business reason or long term historic interest that suggests that information falling within the scope of Ms Stonehouse's request would have been retained for any longer period.

In our response to Ms Stonehouse's request dated 29 April 2019 we advised Ms Stonehouse that she may wish to make a similar enquiry of the National Archives and/or the Crown Prosecution Service to request any information held by the Director of Public Prosecution's office at the relevant time.

We are satisfied that we have complied with the law and relevant guidance by carrying out a search in the areas most likely to hold the requested information and can therefore reasonably conclude that the information is not held."

4. In her decision notice dated 20th November 2019 the ICO set out that her investigation sought to establish, whether, on the balance of probabilities any information was held. She explained:

5. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and the results the searches yielded. In addition, she will consider any other information or explanation offered by the public authority which is relevant to her determination.

5. She noted the response of the AGO that it had carried out searches of electronic and paper records including the locations and terms used, that the records would have been paper and that it included a search of:

an electronic records management spreadsheet that records the title, 'theme,' and storage location of all electronic and hard-copy files that are held by the office, or that have been held but have been destroyed

6. The IC noted the records retention policy of AGO which ensured that information no longer needed was disposed of, that the issue for her was not what information ought to be held but what information was held, and she concluded that information within the scope of the request was not held.

7. In Ms Stonehouse's appeal she drew attention to documentary evidence:

    - from the National Archives (FCO 53/433) showing that on 4 February 1975 there was a meeting at the House of Commons between the then Attorney General Sam Silkin and the DPP about Mr Stonehouse, and
    - an extract from the autobiography of Michael Sherrard QC who conducted an investigation for the Department of Trade and Industry into Mr Stonehouse's business dealings describing a meeting which he attended with Mr Silkin, his Parliamentary Private Secretary, the Solicitor General and the DPP at the House of Commons.

8. She explained the documents she was seeking, set out a chronology of events and argued that the Attorney General's pivotal role meant that much information came to him and was disseminated by him:

    "by communication I'm interested to see all communication with the letters, memos, telexes, compliment slips, notes, draft or reports relating to my father. During the relevant timeframe the AG communicated with the DPP (and Cabinet) regarding my father's extradition from Australia which finally occurred in July 1975, and communicated with the DPP and the Solicitor General about my father's committal proceedings in London in October 1975 as well as his trial at the Old Bailey between April and August 1976, and his appeal between 24 and 27 January 1977.

    It is inconceivable that the Attorney General's Office have no paperwork regarding this multitude of issues.
    …..
    I simply do not believe there is no paper record of any to type in the Attorney General's Office pertaining to 1) the extradition 2) the committal 3) the trial 4) the appeal and 5) the DTI report-dated March 1977 but published in November 1977. These five matters between them cross three entire years.

    They were additionally of interest to the Prime Minister and government at the time not to mention members of parliament, the Press and as such information would have moved up the line from the DPP to the Solicitor General to the Attorney General, through whom information is passed to Cabinet and others.
    ….

I can only assume they have not looked hard enough into the paperwork and now implore them to do so

9. It may be noted that the DTI report was published outside the timeframe laid down by the request which was limited to documents until 28 February 1977.

10. In resisting the appeal the ICO relied on the decision notice and observed that Ms Stonehouse was arguing that the information should be held, but had not advanced substantive reasons why it was held. She noted Ms Stonehouse's reliance on material from the National Archive to show that meetings took place but argued that what the National Archive held was distinct from the question of whether AGO held material. The AGO resisted the appeal.

11. In a communication of 20 July 2020 Ms Stonehouse set out her position. She detailed various points during the period in question when Mr Silkin was involved in her father's affairs and was incredulous that there was no record. She expressed her frustration with the response of various bodies from whom she had sought information under FOIA. The CPS on 8 April 2019 refused a request neither confirming nor denying that it held the information. She commented:

"Despite all these efforts over a very long period of time, I have not managed to extract a single piece of paper from any public agency relating to my father. If I did not know any better, I would think he never existed."

"Clearly I have examined fully all papers regarding my father that are available at TNA"

12. In a witness statement of 18 January 2021 on behalf of the AGO Balli Sandhu, Corporate Services team Manager for AGO set out in detail the methodology by which the search was conducted (noting that the cost impact of searching against a wide range of names beyond "Stonehouse" would have driven the costs over the £600 provided for by the regulations). She concluded:

18. For the reasons set out above, I am entirely satisfied that the AGO carried out an adequate search in the areas most likely to hold the information requested by Ms Stonehouse. In doing so we considered how best to identify any relevant files and then conducted a search involving multiple steps.

13. After a preliminary consideration, the tribunal wished to further explore the adequacy of searches and the extent of assistance provided to Ms Stonehouse noting the passage of time, the complexity of the Attorney-General's role, the issue of retention, destruction and transfer of records to the National Archive and in these circumstances the even more marked asymmetry of information than is usual between a public authority and an information requester.

14. In response Astrid Goodman who is Acting Head of Corporate Services, with a wide range of responsibilities made a statement on behalf of the AGO. This

went into further detail about the searches and record-keeping. She noted that AGO is a very small department and did not have an archivist. The non-lawyer staff of the AGO worked there a relatively short period of time before being transferred to other parts of the Civil Service. She explained:

"…when the AGO is required to locate historic material it will conduct a search of its electronic records which includes an excel spreadsheet record of archive material …

The Corporate Services Team maintain the aforementioned excel spreadsheet which records all archive files, numbering over 40,000, which are either held on site, held by the third party storage provider Iron Mountain, or which were previously held and have now been destroyed.

Files are identified if a specific search term appears in the title of the file. If the FOI request in question specified a date range for the information, the files are then split into those within and outside that range. They are split again into material that the AGO still holds (either on site or on Iron Mountain premises) and material that has been destroyed. If a file has been destroyed this will be recorded in the 'Last Action', 'Current Status' and/or' Date Destroyed' columns of the spreadsheet. All of this information is then sent back to both the person leading on the request and the lead FOI Officer. The former will then decide which of the material that the AGO still holds needs to be retrieved and reviewed..

31.As you would expect of a Government department, the AGO currently has very comprehensive filing practices and document retention policies in place. For information, I exhibit the current version of both policies to this statement at Exhibit Band Exhibit C. The latter includes, for example, that the AGO currently retains information about the Attorney General's diary for 5 years. The length of time any minutes of his/her meetings would be kept would depend on the subject of the meeting. For example, if the minutes related to a meeting about a piece of legislation it would be kept for 5years as it would be categorised as 'Legal'.

32.The retention policy also sets out the criteria the AGO uses to decide whether material has historical significance, and so should be retained for a longer period of time, and when material should be sent to The National Archives. Additionally, I exhibit to this witness statement guidance from The National Archives to the AGO on the same subject at Exhibit D. Unfortunately I have not been able to locate any such AGO polices from the period falling within the scope of this request, or any time in the 1970s (the oldest retention policy we have on file is from 2015). As such, it is not possible for me to comment on what AGO files from the relevant period generally contained …

This also means that I cannot specifically account for why the file that we identified does not contain any" day-book, journal, or minute of the Attorney-General's meetings" for the relevant period.33.Whilst I was not able to identify any AGO-specific document retention policies from the 1970s, the Cabinet Office's 'Head of Knowledge and Information Management and Departmental Records Officer' was able to locate for me a document called "A Guide for Departmental Record Officers, Third Edition" from 1971…

One other aspect of our search which is important to note is that, in the course of preparing this evidence, the AGO identified that the File Ref: "400|89|264" was opened in 1989 but the documents contained within are dated 1980. Unfortunately we are not able to say why this is the case. We can only assume that the administrative task of creating the file was completed some time after the date of the relevant documents. The file does not contain any minute sheet or record to elaborate on the reason behind the apparent delay. In the majority of cases, the file and the dates of the documents will be consistent.

35. In the context of this case, the implications of the archiving practices and search methods I have identified above is that if the term 'Stonehouse', or an equivalent search term which identified Mr Stonehouse, was not recorded in the title of a file concerning Mr Stonehouse, our search would not be capable of identifying any documents concerning Mr Stonehouse. I therefore believe that the search term 'Stonehouse' was entirely proportionate in this case given the manner in which our archived files are organised and labelled. It is perhaps also worth noting that throughout our searches we have found nothing which indicates that the AGO might have at some time held documents within scope of Ms Stonehouse's request under appeal (or indeed whether such documents ever existed).

15. She exhibited to her statement:

    - the contemporaneous records of the steps taken in response to Ms Stonehouse's request
    - the current AGO records management policy
    - the AGO retention schedule
    - the National Archives document *Operational Selection Policy OSP 56 Attorney General's Office (AGO): Paper Records 1987 – 2012 September 2012*
    - A Public Record Office Publication *Guide for Departmental Record Officers Third Edition 1971*

16. OSP56 lists transfers from AGO to the National Archives:

    Section 2: Material transferred to The National Archives in the past
    The Attorney General's Office (and predecessors) has transferred records to The National Archives, within the following series:
    LO 1 Law Officers' Department: Patents for inventions (1839-1885)
    LO 2 Law Officers' Department: Registered files (1885-1979)
    LO 3 Law Officers' Department: Law Officers' opinions (1889-1993)
    LO 4 Law Officers' Department: Patents appeal files and registers (1906-1933)

17. Appendix A of the 1971 guide is entitled GUIDELINES FOR SELECTION OF RECORDS FOR PERMANENT PRESERVATION and within that section is listed:

10. Papers relating to a well-known public or international event or cause célèbre, or to other events which gave rise to interest or controversy on the national plane.

18. In oral evidence Ms Goodwin explained that AGO had relied on the information in the request and had only used the search term Stonehouse. This was effective and appropriate since it had identified a file relating to Mr Stonehouse which was however dated 1989 (and contained one paper from 1980) and therefore fell outside the terms of the request. In later requests from Ms Stonehouse more search terms had been used, which had included 'DPP'. At the time of the first request AGO had not been aware of the name of the company with whom Mr Stonehouse was involved.

19. Administrative staff in AGO were usually seconded from other departments for about two years, during lockdown over half of them had been replaced. She could not confirm that all staff would be aware of issues around the transfer of records to the National Archive. She explained that each government department provided its own material to the National Archive, which meant their deposits could include material originating in the AGO, which would not necessarily be consulted on what was lodged there.

20. She was often asked to review files for transfer to the National Archive and consider material which needed to be redacted. The file which had been found by the search appeared to have been prepared for transfer in 2016, but had not been sent.

21. She confirmed that files were usually destroyed a few years after they had been completed. There was a subsequent sensitivity review to identify material worth preserving. When the 20 year period approached a further cull of material would occur and a consideration of material which could be sent to the National Archive and would remain closed to public inspection for an extended period of time. She agreed with the tribunal's suggestion that that could involve such issues as the Royal Family, Foreign Relations, national security, section 23 (information supplied by, or relating to, bodies dealing with security matters). The advice of the Law Officers would be considered for withholding. The AGO only selected for preservation material where there was a significant AGO input.

22. With respect to the meeting with the DTI Inspector (Mr Sherrard QC) she explained that from the published account the meeting took place at the House of Commons in a small room with one chair and from Mr Sherrard's account there was no civil servant to take a minute, the Parliamentary Private Secretary who was present was an MP. She agreed that it appeared to be more a meeting of the Attorney-General for which there would be no government record.

23. Ms Stonehouse explained that she thought she had made a broad request which she hoped would "scoop up" such things as discussions in No.10 about a select committee to look at her father's continuing as an MP. She explained that she

had found some material in the British Library. "What I was interested in was the Attorney-General advising the Prime Minister about the pros and cons of a motion to expel" her father from Parliament. She felt that "there must have been preliminary discussions". She was interested in the background to the advice and there did not appear to be anything in the archives she had examined.

24. She sought assurance from the witness that relevant papers were not still in storage and wanted to know "how do we know if they have been destroyed or transferred?". Ms Goodwin relied on the explanations in her statement, the exhibits showing the search carried out of the database which AGO relied upon and agreed that there was no accounting for human error. She also clarified that the database detailed where a record had been transferred or destroyed once it has been apprised and confirmed that there was no record of any transfer or destruction of any record pertaining to 'Stonehouse', supporting no file existed within Ms Stonehouse's search parameters.

Consideration

25. Ms Stonehouse has conducted a significant amount of research and explored various sources for information about the final stages of her father's public career. While Ms Stonehouse has raised a number of issues surrounding her father's history and the handling of other requests for information, whether by AGO or other entities, the jurisdiction of this tribunal is set out in s58 FOIA "Determination of Appeals":

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

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

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

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

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

26. Although Ms Stonehouse in the hearing had expressed the hope that she would "scoop up" a wide variety of information including communications between Mr Silkin and Mr Wilson, the request was tightly focussed on correspondence between the Attorney General Sam Silkin and the prosecuting authority responsible for the prosecution of Mr John Stonehouse between the dates 1 January 1975 and 28 February 1977. While AGO interpreted the request more

broadly the decision notice in question found that on the balance of probabilities no information within the scope of the request was held.

27. This is a somewhat unusual case. The majority of cases before the tribunal relate to recent events where a request is received by a public body and the officers who created the records are approached to provide them. It is relatively rare for records this old to be sought and such records, if they survive, will usually have been transferred to the Public Record Office many years before. The current practices described by the AGO witnesses are consistent with the standard practices advised by the National Archive and which have been in place (with some variations due to the reducing time periods before transfer to the National Archives) since the commencement of the Public Record Act 1958. After a period of five years of inactivity on a file the file is closed and unless kept for possible permanent retention, it is usually destroyed. The National Archive document OSP 56 lists transfers of files from AGO to National Archives prior to 2012. Of most significant is the series "LO 2 Law Officers' Department: Registered files (1885-1979)". From Ms Stonehouse's statements it is clear that her inquiries of the National Archive have not resulted in any AGO files being disclosed. The searches conducted by AGO as a result of this request have been systematic and have examined the available records without finding anything, the search included an:

"excel spreadsheet which records all archive files, numbering over 40,000, which are either held on site, held by the third party storage provider Iron Mountain, or which were previously held and have now been destroyed."

28. These two pieces of information, from the National Archive and the AGO strongly point to the conclusion that no file which was considered worthy of retention relating to Mr Stonehouse was created by the AGO during this period. This is entirely consistent with the records which are available elsewhere: the file FCO 53/433 with a record of a meeting in February 1975 would appear to be a file from the Foreign and Commonwealth Office which was responsible for obtaining his extradition from Australia. The memoirs of Michael Sherrard record a meeting about the emerging conclusions of his report for the DTI, that report is a document for the National Archive. Ms Stonehouse has complained that she has found 4 files relating to the prosecution case against her father and nothing relating to the defence. The four files are the prosecution files – the prosecution would not have access to the defence case save as it was presented orally in court. With respect to the extradition, committal or trial, whatever involvement Mr Silkin or Mr Archer (Solicitor-General) had in the discussions around the case they were not responsible for collecting the information and carrying out the work, that was the responsibility of the FCO, DTI and the prosecution. It is their records which become part of the National Archive because they relate to a cause celebre , not any notes of the day to day meetings or routine correspondence of Law Officers.

29. In this case the ICO has relied upon the searches conducted by the AGO in coming to her conclusion and reference has been made to tribunal decisions touching on the adequacy of searches. It seems to this tribunal that a more analytical approach to questions such as this may be constructive. The common-sense starting point in any search is to apply prior knowledge to identify places where an object may be. In Tom Stoppard's Hapgood the protagonist helps her schoolboy son find what he has lost by thinking through all the places he has been. This eliminated searching in places where the item could not be and focused attention on places where it might be found. That is essentially Bayesian reasoning, applying prior knowledge to determine what is more or less likely, establishing new evidence and determining probability in the light of that. In this case the starting point is that old files of government departments, if they exist, are retained in the National Archive. OSP56 is evidence that files from the relevant period were transferred from AGO to the National Archive. Ms Stonehouse has confirmed that she has not found any files in the National Archive from AGO which are relevant to this specific request. That is significant evidence that there would not be a file in AGO meeting the request. The search with negative results of the excel spreadsheet which records all archive files, numbering over 40,000, which are either held on site, held by the third party storage provider Iron Mountain, or which were previously held and have now been destroyed, may be seen as confirmation that no such record exists.

30. Although there is an asymmetry of knowledge between Ms Stonehouse and AGO it is clear that Ms Stonehouse used her knowledge of her father's history to find a large amount of material from different sources. The individuals dealing with her request would have had no knowledge of him and also relatively little understanding of the underlying rules relating to the creation and retention of material which one day will become public records. If they had had that knowledge, in addition to helping with the suggestion relating to the DPP, they could at an early stage have given an explanation about the selection, retention and transfer of documents which could have assisted Ms Stonehouse in recognising that the material she sought was unlikely to be held by AGO.

31. The Court of Appeal in *Hope and Glory* indicated that in an appeal against the decision of a regulator the burden lies with the Appellant to show that the regulator was wrong and some weight (depending on the quality of the reasoning and the evidence) should be given to the conclusions of the regulator. In this case the Information Commissioner has decision notice which properly explores the evidence and legal issue in coming to her conclusion. There has been nothing to shake the robustness of that decision notice; there are no grounds of substance to cause the tribunal to have any doubt as to the correctness of that decision.

32. In closing comments to the tribunal Ms Stonehouse considered that the hearing was a very useful exercise and it was helpful to hear the efforts by the Attorney

General to find very old documents. She had been annoyed to receive a "neither confirm nor deny response" from the CPS with respect to another request and was "still not convinced that paperwork had not been produced by the Attorney General and sent to the DPP" however she felt that one day her grandchildren would have to go to the National Archive to find out.

Signed C Hughes
Judge of the First-tier Tribunal

Date of Decision: 29 July 2021
Date Promulgated: 30 July 2021