



Tribunals Service

Information Tribunal

Information Tribunal Appeal Number: EA/2008/0095

Information Commissioner's Ref: FS50143101

**Heard at Audit House, London
On 12 June 2009**

**Decision Promulgated
On 3 July 2009**

BEFORE

CHAIRMAN

ANNABEL PILLING

and

LAY MEMBERS

MALCOLM CLARKE

GARETH JONES

Between

MRS RUTH REED

Appellant

and

INFORMATION COMMISSIONER

Respondent

Subject matter:

Information Tribunal (Enforcement Appeals) Rules 2005 – Application for striking out, Rule 9

Information Tribunal (Enforcement Appeals) Rules 2005 – Summary disposal of appeals, Rule 10

FOIA – right of access s.1

Cases:

Bennett v ICO (EA/2008/0033)
Tanner v ICO and HMRC (EA/2007/0106)
Bromley v Information Commissioner and the Environment Agency
(EA/2006/0072)
Bluck v IC and DWP (EA/2008/0056)
Malcolm v IC (EA/2008/0072)
Ames v IC and Cabinet Office (EA/2007/0110)
Fortune v IC and NPSA (EA/2008/0004)
Babar v Information Commissioner and the British Council (EA/2006/0092)
Carpenter v Information Commissioner and Stevenage Borough Council
(EA/2008/0046)
Barton v IC and MoJ (EA/2008/0066)

Representation:

For the Appellant: Mrs Ruth Reed
For the Respondent: Clare Nicholson, Solicitor

Decision

The Tribunal upholds the decision notice dated 25 November 2008 and dismisses the appeal.

Dated this 2nd day of July 2009

Signed

Annabel Pilling

Deputy Chairman, Information Tribunal

Reasons for Decision

Introduction

1. This is an Appeal by Mrs Ruth Reed against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 25 November 2008.
2. The Decision Notice relates to a request made by Mrs Reed under the Freedom of Information Act 2000 (the 'FOIA') to the Secretary of State for Foreign and Commonwealth Affairs for a particular book or register containing the signatures of 3000 British citizens remaining loyal to the Crown at the time of the Unilateral Declaration of Independence in Southern Rhodesia (now Zimbabwe) on 11 November 1965 (the 'Governor's Book'). The Foreign and Commonwealth Office (the 'FCO') advised that it had made an extensive search but had been unable to locate the Governor's Book.
3. Mrs Reed did not accept that the Governor's Book could not be located by the FCO and complained to the Commissioner. The Commissioner concluded that, having considered the steps taken by the FCO to locate it, on the balance of probabilities, the FCO did not hold the information requested.

The request for information

4. Mrs Reed has made several requests to the FCO for the Governor's Book over a number of years. In March 2006 Mrs Reed wrote to her MP to ask for assistance. The MP, Justine Greening, wrote to the Secretary of State for Foreign and Commonwealth Affairs on 31 March

2006 to enquire about the book. It is this letter that formed the request for Information under FOIA.

5. Lord Triesman of Tottenham, then Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, responded by letter dated 18 April 2006 explaining that *“as we have stated in previous correspondence to Mrs Reed, we have made an extensive search for a ‘register’. We have so far found no evidence that these books were returned to the UK for archiving.....The document could be located in the National Archive in Zimbabwe.”*
6. The Appellant continued to write to Lord Triesman and then Margaret Beckett, stressing the “significance” of the Governor’s Book and suggesting that “either it still exists and the intention is that it not be found or it has been deliberately destroyed”. The Appellant also referred to her understanding of the FCO’s obligations under FOIA.
7. By letter dated 28 July 2006, the FCO formally confirmed that it did not hold the information requested. It also explained to the Appellant that it does *“not believe that the register is lost/missing in the FCO, since it is our understanding that these documents were placed in the Zimbabwean National Archive before independence in 1980 and remain there as part of the national heritage of Zimbabwe. (The individual making enquiries] could have left it at that, but in order to be helpful, sought to find out if the Zimbabwean National Archive could confirm that they still had the register and could make it accessible. They have not yet done so. I think it would be more straightforward if you were to now pursue your inquiry directly with the Zimbabwean National Archive.”*
8. The Appellant asked for an internal review of this decision on 22 August 2006. She stated that the *“central issue here is that, regardless of whether or not the document was placed with the Zimbabwe*

National Archives and what the merits are of such a decision, the Foreign and Commonwealth Office should have known and be able to confirm the whereabouts of the document from its own records and this has not been the case.”

9. The FCO responded on 30 August 2006 confirming its view that it had fulfilled its requirements under FOIA. It added that verbal confirmation had been received from the Zimbabwean National Archive that it did hold the document and again advising that she should pursue the matter directly with it.

The complaint to the Information Commissioner

10. The Appellant complained to the Commissioner on 23 November 2006 about how her request for information had been handled. She also expressed the view that there were grounds for the Commissioner to conduct an investigation under section 77 of FOIA as she alleged that the FCO may have destroyed or concealed the Governor's Book.
11. During the course of the investigation, the Commissioner requested the FCO to provide information as to what specific searches had been carried out and whether or not the FCO had contacted other organisations to attempt to locate the Governor's Book.
12. The FCO explained in detail what steps it had taken following receipt of the request for information and why it considered that it did not hold the information requested.
13. A Decision Notice was issued on 25 November 2008. In summary, the Commissioner concluded that, having considered the steps taken to locate it, on the balance of probabilities the FCO did not hold the information requested. The Commissioner therefore concluded that the FCO dealt with the request in accordance with FOIA.

The Appeal to the Tribunal

14. By Notice of Appeal dated 17 December 2008, the Appellant appeals against the Commissioner's decision on the following Grounds:

- (1) The Commissioner erred in applying the balance of probabilities as the standard of proof in this particular case; and
- (2) The Commissioner erred in concluding that the FCO did not hold the requested information

15. The Commissioner served a Reply in which it was maintained that he applied the correct standard of proof, that he was entitled to find that the FCO had searched rigorously, sensibly and logically to ascertain whether it held the information requested and that he was entitled to conclude that the FCO did not hold the requested information. He submitted that the Appeal stands no reasonable prospect of success and he invited the Tribunal to strike out the Appeal under Rule 9 of the Information Tribunal (Enforcement Appeals) Rules 2005 (the 'Rules') or to dispose of it summarily under Rule 10 of the Rules.

16. The Appeal was determined at a hearing on the papers on 12 June 2009. The Tribunal was provided in advance with an agreed Bundle of material, written submissions and reply submissions from the parties and a bundle of authorities relied upon by the Commissioner. Although we may not refer to every document, we have had regard to all the material before us.

The Powers of the Tribunal

17. The Tribunal's powers in relation to appeals are set out in section 58 of FOIA, as follows:

- (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.

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

18. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether the applicable statutory framework has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, it will find that the Decision Notice was not in accordance with the law.

19. The questions raised in this Appeal are questions of law based upon an analysis of the facts. This is not a case where the Commissioner was required to exercise his discretion.

The questions for the Tribunal

20. The Tribunal has concluded that the relevant issues in this Appeal are as follows:

- (i) Should the Appeal be struck out under Rule 9 of the Rules?
- (ii) If not, should the Appeal be disposed of summarily under Rule 10 of the Rules?
- (iii) If not, what is the correct standard of proof that the Commissioner should have applied when deciding whether the FCO held the Governor's Book?
- (iv) Was the Commissioner correct to conclude that, at the time of the request, the FCO did not hold the Governor's Book?

Should the Appeal be struck out under Rule 9 of the Rules?

21. The Information Commissioner has applied for the appeal to be struck out under Rule 9 of the Information Tribunal (Enforcement Appeals) Rules 2005 on the basis that the Notice of Appeal discloses no reasonable grounds of appeal.

22. The material parts of Rule 9 provide as follows:

9. (1) where the Commissioner is of the opinion that an appeal does not lie to, or cannot be entertained by, the Tribunal,

or that the notice of appeal discloses no reasonable grounds of appeal, he may include in his reply under Rule 8(2) above a notice to that effect stating the grounds for such contention and applying for the appeal to be struck out.

(2) An application under this rule may be heard as a preliminary issue or at the beginning of the substantive appeal.

(3)

23. The definition of what amounts to a reasonable ground of appeal was established in *Bennett v ICO* (EA/2008/0033):

“A reasonable ground of appeal is one that is readily identifiable from the Notice of Appeal, relates to an issue the Tribunal has jurisdiction to decide and is realistic not fanciful.”

24. This means that if there is no reasonable ground of appeal, we are required to grant the application of the Information Commissioner for the appeal to be struck out under Rule 9; if there is a reasonable ground of appeal we need to go on to consider whether, in each case, the appeal has a realistic prospect of success under Rule 10.

25. We therefore considered whether there were any reasonable grounds of appeal contained within the Notice of Appeal. It seems to us that there are 2 separate grounds of appeal that fall within the definition of a reasonable ground of appeal, namely, that:

1) The Commissioner applied the incorrect standard of proof,
and

2) The Commissioner wrongly concluded that the FCO did not hold the requested information

26. We therefore refuse the Commissioner's application for the Appeal to be struck out under Rule 9 of the Rules.

Should the Appeal be disposed of summarily under Rule 10 of the Rules?

27. Having found that there are reasonable grounds of appeal, we have to consider whether the Appeal should be disposed of summarily under Rule 10 of the Rules.

28. Rule 10 of the Rules provides that:

10 (1) Where, having considered-

(a) the notice of appeal, and

(b) the reply to the notice of appeal,

the Tribunal is of the opinion that the appeal is of such a nature that it can properly be determined by dismissing it forthwith it may, subject to the provisions of this rule, so determine the appeal.

29. The test used by the Tribunal to decide whether an appeal should be dismissed summarily is akin to that found in Part 24 of the Civil Procedure Rules; it must be decided whether there is a "realistic" as opposed to "fanciful" prospect of success: *Tanner v ICO and HMRC* (EA/2007/0106). In that case, the Appellant did not challenge the substance of the Commissioner's Decision Notice but effectively asked

the Tribunal to review all the administrative acts by various public bodies about which he complained.

30. We must consider this test in light of the Notice of Appeal and the Commissioner's Reply only. That is, the evidence and submissions of the parties are irrelevant at this stage. In doing so, however, we have taken account of the fact that the Governor's Book is an identifiable document and that all parties acknowledge that such a document was created on 11 November 1965.

31. We are not of the opinion that the appeal is of such a nature that it can properly be determined by dismissing it forthwith; the Appellant has challenged not only the decision of the Commissioner but also the legal basis on which he reached that decision.

Ground 1 - What is the correct standard of proof that the Commissioner should have applied when deciding whether the FCO held the Governor's Book?

32. The Commissioner concluded that, on the balance of probabilities, the FCO did not hold the requested information.

33. The Appellant submits that the Commissioner should have applied a higher standard of proof rather than "on the balance of probabilities" when considering whether the FCO held the Governor's Book. She submits that this is the case because, inter alia, the Governor's Book is a significant document, it should have been retained by the FCO, and the FCO can be said to have a motive for concealing the whereabouts of it. The Appellant has not suggested what higher standard of proof should have been applied.

34. The Commissioner submits that he applied the correct standard of proof, that is, the civil standard of proof, as derived from the decision of a differently constituted Panel of this Tribunal in *Bromley v IC and*

Environment Agency (EA/2006/0072) which rejected arguments that certainty was the test to be applied in determining whether information was held for the purposes of FOIA.

35. This approach has been followed in a number of other decisions¹ from this Tribunal and there is nothing in any decision to indicate that the standard of proof would shift – either to an enhanced *or* a lowered standard – depending on the circumstances of an individual case.

36. The Commissioner submits that the significance of the Governor's Book or the Appellant's allegations of motive for the FCO to conceal have no bearing on the standard of proof to be applied in this case, although they may be taken into account by the Commissioner when considering the rigour and seriousness of the search to locate it.

37. We agree with these submissions. We can see no legal basis for applying a higher standard of proof in this case and consider that it would be both impractical and undesirable for there to be differing standards of proof to be applied depending on the subject matter of the Appeal. It seems to us that there would be considerable difficulties in defining the differing standards and how it would be decided which cases should have a higher or lower standard applied to them. The question of whether a particular piece of information or case is "important" or "significant" is highly subjective and it would not be possible to provide an exhaustive test.

38. We are satisfied that there is no legal basis for applying a higher standard in this case and conclude that the Commissioner was correct

¹ For example, *Bluck v IC and DWP* (EA/2008/0056), *Malcolm v IC* (EA/2008/0072), *Ames v IC and Cabinet Office* (EA/2007/0110), *Fortune v IC and NPSA* (EA/2008/0004)

to apply the balance of probabilities as the standard of proof when deciding whether the FCO held the requested information.

Ground 2 - Was the Commissioner correct to conclude that, at the time of the request, the FCO did not hold the Governor's Book?

39. The Appellant submits that the Commissioner should have concluded that the FCO either did hold the Governor's Book or had destroyed it. The belief of Mrs Reed that the FCO either has it, and is deliberately concealing it, or has lost it on purpose is at the heart of this appeal.

40. The Commissioner submits that he was entitled to rely upon the explanation of the searches carried out by the FCO to satisfy himself, on the balance of probabilities, that reasonable searches had been carried out by the FCO and that the information was not held.

41. In *Bromley (supra)* the Tribunal said that in reviewing the conclusion reached by the Commissioner as to whether the public authority, on the balance of probabilities, held the requested information. It was required

"...to consider a number of factors, including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere, whose existence or content point to the existence of further information within the public authority, which had not been brought to light. Our task is to decide, on the basis of our review of all these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."

42. In *Babar v Information Commissioner and the British Council* (EA/2006/0092) another Panel of the Tribunal confirmed that the search carried out by the public authority should be a reasonable one:

“There may be circumstances which indicate a significant chance of information being in existence, which will be relevant to the reasonableness of any searches undertaken.”

43. The Governor’s Book has been referred to in different terms but clearly was created on 11 November 1965 and was signed by 3000 people who remained loyal to the Crown. It is unclear what happened to it subsequently. The FCO have maintained that it would have remained in Zimbabwe as part of the heritage of that country. The Appellant submits that it was such a significant document that it would have remained the responsibility of and within the care of the FCO.

44. As part of his investigation into the Appellant’s complaint, the Commissioner asked the FCO for information about what specific searches the FCO had carried out and whether or not the FCO had contacted other organisations to attempt to locate the Governor’s Book.

45. The FCO responded by letter dated 15 February 2008 and stated that:

(a) Following the Appellant’s request for information via her MP in March 2006, the FCO conducted searches for the Governor’s Book on 11 April 2006, searching both archived FCO files and the file list for The National Archives;

(b) The embassy in Harare had written to the Zimbabwean National Archive on 11 July 2006. It had confirmed by telephone on 21 August 2006 that they held the Governor’s Book. The FCO received written confirmation via e-mail on 7 September 2006;

- (c) Before receiving that confirmation, the embassy in Harare had attempted to make further enquiries with the family of the former Governor of Southern Rhodesia and with his former school to which he had bequeathed some documentation;
- (d) Once the FCO had been made aware that the Zimbabwean National Archive could not locate the Governor's Book, the embassy indicated that it would undertake further local enquiries;
- (e) The FCO has also repeated searches of its own archives, checked its own library, FCO historians and other government departments.
- (f) The FCO advised that it could not comment on what procedures were in place for transferring information from Southern Rhodesia to The Crown in 1965. The FCO also advised that it had been unable to locate any information provided by the then Governor of Southern Rhodesia that might relate to the Governor's Book.

46. The Appellant submits that the Commissioner was wrong to rely on the information provided by the FCO. She submits that the FCO should have been required to provide evidence that it should have been Lord Triesman who carried out the searches. She also submits that the fact the Zimbabwean National Archive suspects there is another book which it does not have is of significance.

47. We note from the evidence that the Zimbabwean National Archive does hold and can locate the Governor's Visitors Books for the periods immediately prior to and immediately after 11 November 1965. It seems to us that, in this situation, the prima facie assumption would be that this Governor's Book was also left as part of the heritage of the country. We consider that there is no reason for the FCO to have the Governor's Book but every reason for it to have been retained in Zimbabwe. There is no suggestion by the FCO that the Governor's

Book is not a significant or important document and we consider that the contrary is demonstrated by the efforts put into trying to locate it.

48. Although the Appellant makes allegations about potential financial motives on the part of the Government for concealing the existence of or destroying the Governor's Book, we consider that there is no evidential basis for them.

49. Under section 1(1) of FOIA, an individual making a request for information is entitled to be informed in writing whether the public authority holds the information and, if that is the case, to have that information communicated to him.

50. The Appellant submits that FOIA states that "not being able to find a document is not an acceptable excuse for refusing access". With respect to the Appellant, we consider that is misconceived. It is possible for a public authority to hold the information without holding a particular document; the obligation is to release information. In this case, the information and the document amount to the same thing. If the Governor's Book is not held by the FCO, whether for good reason or not, it clearly cannot provide the information it contains. Any submissions that the FCO are at fault for not transferring the Governor's Book to the United Kingdom in 1965 and safeguarding it for 40 years are irrelevant in the context of an application now under FOIA.

51. In her submissions, the Appellant suggests that the vigorousness of the Commissioner's investigation into the thoroughness of the search by the FCO went no further than asking:

"Do you have the document?"

"No?"

“Sorry to have bothered you.”

52. We disagree with that analysis. It is clear from the evidence that the Commissioner’s investigation went much further than that and that he clearly tested the thoroughness of the searches. In addition to requiring a written explanation setting out the details of all the searches carried out, both within the FCO and other organisations, the Commissioner made a follow up telephone call to the FCO to clarify certain matters. We regard this as further evidence of the Commissioner pursuing the matter and satisfying himself of the quality and thoroughness of the search.

53. It is clear from the evidence that the FCO has been attempting to locate the Governor’s Book for the Appellant for several years. There is no evidence as to what happened to the Governor’s Book after 11 November 1965 or in the subsequent 40 years. The FCO has searched extensively and pursued many different avenues; in 40 years many things could have happened to the Governor’s Book that has resulted in its whereabouts being unknown. We consider that the search was beyond what was required under FOIA and that the FCO might properly have refused to carry out any further search once the request for information was made under FOIA in March 2006 on the basis of section 12 of FOIA, that is, that it estimated that the cost of complying with it would exceed the appropriate limit².

54. We therefore are satisfied that there is no basis for concluding on the balance of probabilities that the FCO held the Governor’s Book at the time of the request and we are satisfied that the Commissioner was entitled to reach the decision he did.

² For a central government department such as the FCO, the cost limit is £600, which equates to 24 hours’ work – Regulations 3 and 4, Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.

55. We also record that we consider the FCO complied with its duty under section 16 of FOIA to advise and assist the Appellant by carrying out repeated searches and communicating with her over an extended period of time and by providing the contact details of the Zimbabwean National Archives which was likely to hold the information.

56. We can appreciate the Appellant's frustration that the Governor's Book has not been located but we are satisfied that it is not held by the FCO. It appears to us that the FCO, and the Appellant, have exhausted all possible avenues to locate it.

Other Matters

57. In the written submissions, the Appellant indicates that she is now asking for the Tribunal to uphold her assertion that there are grounds for an investigation under section 77 FOIA that the FCO has intentionally blocked or destroyed or concealed the Governor's Book.

58. The Commissioner draws our attention to the remarks made in *Barton v IC and MoJ* (EA/2008/0066) that "there is no power within FOIA for the Tribunal to interfere with the Commissioner's decision to invoke section 77 or otherwise."

59. It is important to note that section 77 of FOIA provides for the offence and its penalty and specifies that proceedings shall not be instituted except by the Commissioner or by or with the consent of the DPP; it does not give power for an investigation to be ordered by the Tribunal if there is a suspicion or request for one. The offence cannot be committed by a government department but can be committed by (named) civil servants.

60. We therefore consider that we have no power to, and would have no reason to, interfere with the Commissioner's decision regarding section 77 of FOIA.

Conclusion and remedy

61. For the reasons set out in detail above, we have concluded that the Commissioner applied the correct standard of proof and that he was entitled to reach the decision that, on the balance of probabilities, the FCO did not hold the information at the time of the request.

62. Our decision is unanimous

Signed

Annabel Pilling

Deputy Chairman, Information Tribunal

Date 2nd July 2009