Tribunals Service
Information Tribunal

Information Tribunal **Appeal Number: EA/2006/0010**

Freedom of Information Act 2000 (FOIA)

Heard at Procession House, London **Decision Promulgated**

6th September 2006 **15th day of November 2006**

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

Fiona Henderson

And

LAY MEMBERS

David Wilkinson and Ivan Wilson

Between

PETER QUINN

Appellant

And

INFORMATION COMMISSIONER
Respondent

And

THE HOME OFFICE
Additional Party

Representation:

For the Appellant: **In person**
For the Respondent: **Ms. H Stout**
For the Home Office: **Mr J. Coppel**

Decision

The Tribunal has decided to substitute the following decision notice in place of the decision notice dated 8th February 2006 and allows the Appeal. No action is required in light of the decision that has been reached.

FREEDOM OF INFORMATION ACT 2000 (SECTION 50 and 58(1))

SUBSTITUTED DECISION NOTICE

Dated 13th November 2006

Name of Public authority: The Home Office
Address of Public authority: 2 Marsham Street, London SW1P 4DF

Name of Complainant: Mr P. Quinn

The Decision Notice of the Information Commissioner dated 8th February 2006 shall be substituted as follows:

Nature of Complaint

The Information Commissioner (the "Commissioner") received a complaint from the above person ("the complainant") which stated that on 4th January 2005 the following information was requested from the Home Office under section 1 of the Freedom of Information Act 2000 (the 'Act').

"A Copy of the Dunbar Report of July 1989"

The Home Office informed the complainant that it does not hold a copy of the Dunbar Report ("the Report"). It is alleged that by not providing the Report to the complainant, the Home Office is in breach of the Act.

The Information Tribunal adopts the Commissioner's statement of the facts as set out in the Commissioner's decision notice, up to and including the synopsis of the letter dated 11th November 2005.

The Information Tribunal has concluded that the Information Commissioner wrongly accepted that since neither the report nor evidence of its destruction could be found by the Home Office, this suggested that the Dunbar Report was not held by the Home Office and consequently, it could not be provided to the Complainant. Further that the Commissioner was wrong to decide on this basis that the Home Office is not in breach of section 1(1).

The Information Tribunal therefore issues this Decision Notice as follows:

The Tribunal having considered all the evidence is satisfied that the Home Office hold a copy of the Dunbar Report, however, the Tribunal is satisfied that the Home Office are entitled to rely upon s.12 of the Freedom of Information Act which states:

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

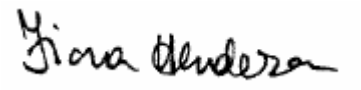
(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.
(3) In subsections (1) and (2) "the appropriate limit" means such amount as may be prescribed..

Having regard to *The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 S1 2004/3244* made under section 12(5) FOIA (which sets the appropriate limit at £600) regulation 4.4 states:
[Costs that may be counted] are to be estimated at a rate of £25 per person per hour.; the Tribunal is satisfied that the costs limit has been reached in this case and that in consequence there is no obligation on the Home Office to comply with the provisions of 1.1 of FOIA

Action Required

No action is required in light of the decision that has been reached.

Dated this 15th day of November 2006



Fiona Henderson

Deputy Chairman

Reasons for Decision

1. This is an appeal against a Decision Notice of the Information Commissioner dated 8th February 2006, by which he upheld the refusal of the Home Office to provide information contained in "the Dunbar Report" to the Appellant on the grounds that it was not held as defined in section 1 (1) of the Freedom of Information Act 2000.

The request for information

2. On 4th January 2005 Peter Quinn (the Appellant) made a request under the Freedom of Information Act 2000 (FOIA) to the Freedom of Information Officer, Open Government Section, Home Office, for a copy of "The Dunbar Report". In his request he explained that he had been Deputy Governor (Head of Custody) at HM Remand Centre, Risley at the time of the serious riot of 30th April – 3rd May 1989, and that as a consequence of this riot an inquiry was conducted by Ian Dunbar (the then Director of the Prison Department's South West Region) upon the instructions of the then Secretary of State (Rt. Hon Douglas Hurd). This report was submitted to Ministers in July 1989 but never published in its entirety, only a summary was made public.

3. In a letter dated 27th January 2005, Michael Achow, an Information Manager with the National Offender Management Service (NOMS), replied offering a copy of the summary and stating that:

> "Despite an exhaustive search of our records, we were unable to find a copy of the "Report proper"… I am sorry that we were unable to help you on this occasion.."

4. The Appellant responded by letter dated 8th February 2005 providing suggestions of places where copies of the report might be found, including the Private Office of the Secretary of State, the regional offices, the Deputy Directory General's Office and the Director of Prison Medical Services.

5. Mr Achow confirmed (by letter dated 9th February) that the original search had been carried out across HM Prison Service including HMP Risley, the Area Office and the Director General and Deputy Director General's Offices. He then referred the original request back to the main Home Office to see if they held anything.

6. Mr. Achow wrote on 2nd March 2006 stating that:

> "Unfortunately, despite a full search conducted by their [the Home Office's] Record Management Services that included the Minister's Office, we have been unable to find a copy of the Dunbar Report.
> Once again, I am sorry that we were unable to assist you with your query".

7. The Appellant asked for an internal review of the decision on 30th March and such a review was conducted by Russell Yates, Head of the Open Government and Relocation Unit, part of the National Offender Management Service (NOMS). Mr Yates wrote to the Appellant on 7th April 2005 to notify the Appellant of the outcome of the review. In this letter he reiterated the searches that had been

undertaken and stated that "it may well be that copies of the investigation report are no longer held in the Home Office or Prison Service Headquarters". He then went on to rely upon s.12 FOIA noting that the Section 12 FOIA, "appropriate limit" cost of £600 had been exceeded and that he intended to take no further action.

The complaint to the Information Commissioner

8. On 15th April 2005, the Appellant made a complaint to the Information Commissioner as provided for in section 50.1 FOIA asking for a decision whether his request for information had been dealt with in accordance with the requirements of Part 1 of the Act. The case was allocated to Emma Webb, an Assistant Complaints Resolution Manager at the Information Commissioner's Office. Throughout her investigation she was under the misapprehension that s.12 FOIA could not be relied upon once a public authority had made the decision to try to comply with the request and had already embarked upon a search for the requested material. As a result of this misunderstanding the investigation did not address s12 FOIA and no analysis of the work done in terms of whether the cost limit had in fact been reached was undertaken.

9. As a result of this misunderstanding Ms Webb wrote to the Home Office on 12th August 2005 requiring them to "inform Mr Quinn whether or not you hold the information requested… In order to comply with the Act this should be a statement of fact rather than of supposition".

10. Mr Achow responded by telephone on 16th August in which he indicated that: "he was not willing to state as a matter of fact that the information was not held, although there was no record of it, in case it one day appeared.".

11. This was confirmed in writing by Mr Achow on the same date. He stated that the Home Office had been unable to locate a copy of the information, despite extensive searches covering: the Prison Service, the Home Office and the National Archives catalogue. To the best of his knowledge the document no longer existed. He then recited factors in support of this namely:
    - the incident it refers to took place a long time ago,
    - the Service has been through several reorganizations in the meantime,
    - most if not all of the principals involved will have retired,
    - the document retention policy at the time was that registered files were kept for ten years before review,
    - he assumed any other non-file copies of the report, were destroyed by the holders when they were no longer required.

12. Ms Webb wrote to Mr Achow on 2nd September 2005 noting that the age of the report made it not unreasonable to suppose it had been destroyed, and asking for a disposal schedule to demonstrate this. Mr Achow spoke to Ms Webb on 6th September 2005 confirming that he did not have a disposal schedule for this document and that the current records management policy was different from the records management policy that would have had effect previously. He also sent a copy of the current NOMS (National Offender Management Service) disposal schedule at Chapter 5 of PSO (Prison Service Order) 9020.

13. Having been unable to gain a clear assurance that the information was not, as a matter of fact, held, Ms Webb contacted Susan Chrisfield the Deputy Data Retention Officer and Freedom of Information Compliance Manager at the Home Office who stated in her letter of 11th November 2005:

> "A thorough search has been completed and the report has not been found. The immediate assumption therefore is that the report has been destroyed, however, the Home Office has been unable to locate any evidence of such destruction. In the circumstances I can only surmise that either:
>
> - The report was destroyed but a record of destruction was not logged in any way, or
> - The report was destroyed, a record of destruction was logged but contrary to PSO 9020 Para 5.9.2 the record of destruction was not kept for 20 years, or
> - The full report was never correctly placed on a registered file and is therefore not logged in any searchable database and its location is unknown."

14. At this point Ms Webb concluded her investigation. In the decision Notice dated 8th February 2006 the Commissioner went on to find that:

> "The Commissioner accepts that neither the report nor evidence of its destruction can be found by the Home Office. He accepts that this suggests that the Dunbar Report is not held by the Home Office and consequently, it could not be provided to the complainant. He has noted that the age of the document is such that the likelihood it (*sic*) being retained is less. Therefore, the Commissioner has decided that the Home Office is not in breach of section 1(1). … In view of these matters the Commissioner hereby gives notice that he does not require any remedial steps to be taken by the Home Office. The Commissioner is pleased to note that the Home Office has initiated an internal audit into its records management procedures".

15. The Tribunal were impressed with the persistence that Ms Webb had shown in seeking to reach a resolution and felt that whilst there had been inconsistencies in the expression of the Home Office response (the initial "exhaustive search" not having included the Core Home Office to whom the original request was addressed), she had sought further evidence on a number of occasions until the Home Office were unable to provide any more information beyond surmise.

16. During the currency of the Information Commissioner's investigation, the Appellant made separate enquiries of The National Archive and Treasury Solicitor (because there were numerous criminal prosecutions resulting from the riot) both of whom confirmed that they did not hold a copy of the Dunbar report.

The Appeal to the Tribunal

17. The Appellant appealed to the Tribunal on 1st March 2006. His grounds of appeal could be summarised as follows:
    - The Commissioner was wrong to find that the Home Office did not hold a copy of the Dunbar Report,
    - The Commissioner should have required the Home Office to search further,
    - The Commissioner should have issued guidance relating to the Home Office document management policies.

- Mr Quinn also sought a formal apology.

18. In support of his grounds Mr Quinn relied upon :
    - The importance and political sensitivity of the report and its implications for HM Remand Centre Risley as evidence that the report would not have been destroyed.
    - That the Prison Service was aware at the time of its obligations under the Public Records Acts to preserve permanently all its records of historical or public interest (as evidenced by Prison Service Instructions to Governors 38/1995).
    - That the Prison Service was not exhaustive in their original searches, he felt they had taken a reactive rather than proactive approach to the search.

19. The Tribunal would like to record their gratitude to the Appellant who although unrepresented, presented his appeal concisely, clearly and after what was obviously a great deal of preparation. His extensive knowledge of Prison Service record keeping procedures was of great assistance.

20. The Home Office were joined as an additional party and both they and the Information Commissioner opposed the appeal as set out in their replies, their arguments were expanded in skeleton arguments submitted to the hearing and in oral submissions, which can be summarised as follows:
    - The age of the document was a relevant fact in determining the likelihood of it still being retained. In light of the assurances from the Home Office the Information Commissioner was entitled to find that the information was not held.
    - The Home Office have searched extensively and no copy of the report has been found, therefore to the best of its knowledge, it does not hold the information.
    - All additional searches suggested by the Appellant had in fact been undertaken
    - In any event the Home Office were entitled to rely upon s.12 FOIA in that the costs limit had already been reached.
    - Any failings with regard to good records management practice, are not matters that fall within the scope of Part I and not justiciable by the Tribunal.

Searches subsequent to the Information Commissioner's Decision

21. The Appellant suggested in his grounds of Appeal and the accompanying documentation that a search should be made of the Directorate of Prison Medical Services and the Prison Board. The Home Office contacted the present Director of the Prison Medical Services who informed the Home Office that they had no trace of the report. This enquiry was made despite the Prison Medical Services now being the responsibility of the Department of Health. The Minutes of the Prison Board referred to the Report but no copy was included.

Evidence

22. Mr Quinn provided a witness statement reiterating his understanding of the circulation of the report at the time. He was not required to add to this evidence at the hearing. Both Ms Webb the Assistant Complaints Resolution Manager at the

Information Commissioner's Office who conducted the investigation of the complaint, and Mr Yates the Head of the Open Government and Relocation Unit at NOMS gave evidence in addition to witness statements. Their evidence is rehearsed below.

The Questions for the Tribunal.

23. The hearing was adjourned to a paper hearing to enable all parties to submit legal arguments upon the question of:

> "Should the Tribunal consider the decision that was made on the basis of the evidence then before the Information Commissioner or on the basis of the whole of the evidence as it now stands"?

24. Having received submissions from all the parties, we note the following:
Section 58 of the Act provides 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, ..
>
> 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."

25. The approach accepted by the Tribunal in *Hemsley v The Information Commissioner* (EA/2005/0026), was that in deciding whether the Decision Notice was in accordance with the law under section 58(1)(a), the Tribunal was entitled to consider all the evidence by way of rehearing and was not restricted to a form of judicial review.

26. We are satisfied that this Appeal also relates to a question of mixed fact and law, (the Tribunal here addressing s 58(1)(a) of the Act as to whether the notice against which the appeal is brought is not in accordance with the law). Consequently on a proper, purposive reading of s 58, this Tribunal has full jurisdiction over issues of pure fact and may take into account all evidence before it.

27. As regards any fact review, the Tribunal can substitute its own findings and if in the light of that decision it finds the Information Commissioner's decision cannot stand, the Appeal should be allowed or a new notice substituted. Equally if the Tribunal finds that the facts relied on by the Information Commissioner cannot be supported by the evidence, the Tribunal may review them.

Did the Home Office inform the Appellant whether the information was held?

28. Ms Webb in her investigation points to the letter of 2nd March 2005 as the date that the Home Office notified the Appellant that they did not hold the information. Whilst it is clear that the phraseology is not explicit (and indeed the Home Office

were unwilling to state that they don't hold it as a matter of fact), we are satisfied that this notification was sufficient to trigger the internal review procedure by Mr Yates and that for this to take place the Home Office had intended to convey in that letter that they did not "hold" the report.

29. None of the parties challenge this finding, neither does anyone take a point upon the timing of the section 1(1)(a) notification. The 2nd March 2005 was outside the 20 working day time limit set out in Section 10, however, it is clear that Mr Achow's initial response of 27th January 2005 (which was within time) purported to be such notification. In the Appellant's letter of 8th February 2005 in which he suggested further avenues for the Home Office to follow, he indicated that he was not concerned with the timing of any response, being "more concerned about access to the Report than the extra few days it may take after all this time." It is clear from the papers before us that the Home Office have sought to act promptly at all stages of the searching process, responding in timely fashion to each of the Appellant's letters. At the date of the hearing all the searches that the Appellant wished to be undertaken had been completed, consequently the Tribunal did not address this point.

Whether the Home Office held the information at the date of the request

30. The principal question for the Tribunal is whether the Home Office held the information requested at the date of the request. In considering this question, the Tribunal is entitled to take into consideration all the evidence that it has heard in relation to the status of the copies of the reports (as set out above). Mr Yates, in the open and well briefed answers he gave in oral evidence, was most helpful to the Tribunal in confirming that the Home Office had searched thoroughly and sensibly.

31. The central question of whether the Home Office held the information at the date of the request can be sub-divided as follows:
    - Has the information been destroyed?
    - Was the information no longer on any Home Office premises?
    - Did the information still exist on Home Office premises but can it no longer be located?
    - What is the definition of "hold"?
    - If the Tribunal are not satisfied that the Home Office did not hold the information were the Home Office entitled to invoke s. 12 FOIA?
    - Has the cost limit been reached?

32. The burden of establishing that the report was not held at the time of the Information Commissioner's investigation rested with the Home Office. The Appellant bears the burden under rule 26 of the *Information Tribunal (Enforcement Appeals) Rules 2005* of satisfying the Tribunal that the disputed decision should not be upheld. In discharging this burden, the Appellant is of course entitled to pray in aid the evidence submitted by the Home Office.

Has the Information Been Destroyed?

33. It is clear that the Home Office held at least 6 copies of the report in 1989 and they have been unable to provide any evidence of what has happened to any one of them. Their searches of the files failed to find any original submission to Ministers or senior officials in the Home Office or the Prison Service dealing with the handling, presentation or follow-up to the Dunbar Report to which a copy of the Report was attached. Such references as were found to the report on file were checked to confirm that they did not add anything of substance beyond the contents of the summary placed in the Library of the House of Commons. These references also provided no lead on what might have happened to each copy of the report referred to.

34. The Home Office was unable to provide any evidence of the destruction of any of the copies of the report, despite having a system to record file destruction. When a file was destroyed the card at the central registry would be marked as destroyed and retained. This record would mean the whole file contents were destroyed, and did not itemise any documents contained within or attached to the file. Files are reviewed before destruction, and in light of the Home Office and National Archive now accepting that the Dunbar Report is among the class of document that should have been preserved for posterity, if any of the file copies of these reports were destroyed and no record kept this would point to a disregard for the procedures in place at the time.

35. Distribution was very limited. Mr Yates explained that the original submission of the report to the Home Secretary was copied primarily to senior officials within the Prison Service. Within the mainstream Home Office, only the Ministers' Private Secretaries received copies of the submission. Mr Yates gave evidence that senior officials may have destroyed their own working papers without recording that fact, on the working assumption that the top copy of the papers would be kept on a registered file. However, there is no direct evidence of this. In any event in order for the Home Office to meet the requirements of the Public Records Acts, there should have been a central registered file kept initially for working reference and ultimately for the National Archives. We find it very surprising that, in a central government department reliant on records and subject to the provisions of the Public Records Act, on at least six occasions a sensitive and important document would have been unilaterally destroyed without those responsible first having it confirmed that a copy was safely held on a central registered file.

36. The Dunbar Report was clearly a sensitive document with a restricted circulation which was considered very important within the Prison Service . The Home Office had been unable to find a written instruction relating to document retention before 1995, but the general policy was to review documents every 10 years. Mr Yates' evidence was that the Home Office has now discussed the report with the National Archive, and on the basis of the summary both organisations confirmed that it is likely that the report should have been selected for permanent preservation. The Tribunal are satisfied that had it been considered under the

Public Records Acts (as the Home Office is bound to) and as was the practice at the time, it would have been retained for the National Archive.

37. During the hearing it was confirmed that the report had not been destroyed during a recent Core Home Office move as those papers were weeded before destruction and the report was not found.

38. The Information Commissioner found that the age of the document made it more probable that it would have been destroyed, but that was not to give sufficient weight to the practices in place at the time, the sensitivity and importance of the document to the issue of handling people on remand and its historical importance.

39. The only evidence beyond surmise that the Home Office rely upon to support their assertion that the document is not held, is their failure to locate it. Conversely despite having held at least 6 copies of the report at one time, they do not rely upon their failure to locate evidence of its destruction as evidence that it hasn't been destroyed and is still held somewhere.

40. The Tribunal is not satisfied on a balance of probabilities that each copy of the report that was held by the Home Office has been destroyed.

Is the Information no longer on any Home Office premises?

41. Whilst this issue was raised in argument during the hearing, again beyond the failure to locate any of the copies of the document, there is no evidence before the Tribunal that the Home Office copies of the report have been moved from their premises without record to premises that are beyond the control of the Home Office. The Tribunal reminds itself that the relocation of files within the registries and departments of the Home Office, even their warehousing in storage facilities, are not what is meant here, and whilst there is clearly confusion as to what has happened to some files (such as all the policy files of the NW and SW regional Offices prior to their reorganisation which cannot be located in their entirety) there is no evidence beyond speculation that they have been moved from Home Office premises.

Did the information still exist on Home Office premises but it cannot be located?

42. The Tribunal finds that this is the most probable course of events. In doing so we give particular weight to the nature of the filing system used at the Home Office Registries. The Tribunal heard that there are in excess of 250,000 files at the central registry at Branston, they are recorded on a manual card index, hence the possibility of human error is considerable. The compilation of the files is not systematic, the contents appearing to vary depending upon the individual who compiled a particular file. There is no consistent policy of attaching documents to a file, and no method of recording on the card index that which is contained in each file. A search of the system boils down to the educated pursuit of trails suggested by the professional experience of the staff working in the Central Registry, in this case complemented by suggestions made by Mr Quinn, based on his long experience of the records systems of the Prison Service. The exhaustive

search referred to by Mr Achow in correspondence, was in fact an exhaustive search of the places identified through this process.

43. The limitations of the system are such that:
    - If a document is attached to a file, the only way of establishing this is to look in the file,
    - If a document is misfiled, or filed under an unexpected name there is no way of tracing it,
    - If a file is destroyed, there is no way of knowing what was in it.

44. The system for keeping regional records (which were not stored in the Central Registry) is even less satisfactory. The system exhibits similar weaknesses to those found in the Central Registry arising out of the filing system being manual, using file names which do not describe which documents are included in or attached to any particular file. Further its operation appears to be less systematic, with records of destruction not being created habitually. It should be noted that these files should still have been subject to the review procedures that were in force at the time.

45. The Tribunal took into consideration that other avenues of search had met with dead ends. In particular following the reorganisation of the regional offices, the policy files for the NW and SW could not be located in their entirety. A copy of the full report had been sent in June 1990 to the liaison officer assisting with Lord Woolf's Enquiry into riots at Strangeways and other prison establishments, but the paper trail was lost at that point. A file had been found containing a copy of a submission that stated that its purpose was to submit the full report, but no copy of the actual report was attached. All of this suggested to the Tribunal that this was a flawed filing system which, whilst organised, had serious weaknesses. In light of this the Tribunal found on a balance of probabilities that the failure to trace any of the copies of the Report despite diligent searching was indicative that the original or one or more copies of the report were somewhere within the filing system, but their location was not currently known.

<u>What is the definition of "hold"</u>

46. Section 1 of FOIA provides as follows:

    (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.

47. The FOIA does not define what is meant by "held", however, we are satisfied that guidance can be found in s.1(2) which provides as follows:

…

    (2) Subsection 1) has effect subject to the following provisions of this section and to the provisions of sections.. 12..

48. Section 12 provides:

…

(1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) **unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.**

(4) In subsections (1) and (2) "the appropriate limit" means such amount as may be prescribed..

(our emphasis)

49. Thus a public authority is relieved of the duty to notify an applicant whether they hold a piece of information if the estimated (or in this case actual) time spent searching for the information would exceed the appropriate limit.

50. The Information Commissioner argued in front of us that "held" has a restricted meaning which denotes "possession and control". The Tribunal finds no basis for restricting the meaning of "held" in this way. The fact that the rules drafted pursuant to s.12 have the effect of defining what is a reasonable search and the amount of time and money that a public authority are expected to expend in order to fulfil their obligations under the Act, serves as a guillotine which prevents the burden on the public authority from becoming too onerous under the Act.

51. The Home Office pointed to the absurdity of a situation where the Information Commissioner was not satisfied that a public authority did not "hold" a document, which could in theory lead to a decision notice requiring a document (that could not be found) to be disclosed to an applicant. The Tribunal is satisfied that the provisions of s.12 are such that this situation should never arise. A decision notice could require a public authority to continue searching, until either the document was located or the s.12 cost limit had been reached.

52. There is nothing in the provisions which prevents a public authority (as here) searching beyond the £600 limit, however, if the document cannot be located notwithstanding their best efforts, the s.12 provisions remove from them the obligation of searching any further.

53. In light of the provisions of s.12 we are therefore satisfied that s.12 does obviate the need for a restrictive definition of "held", and can be construed in laymen's terms as "have they got it?" implicit in that being that a document is still held even if a public authority cannot find it and do not know where it is likely to be found.

<u>If the Tribunal are not satisfied that the Home Office did not hold the information were they entitled to invoke s. 12 FOIA?</u>

54. When conducting her investigation, Miss Webb had construed this provision to mean that an estimate could only be carried out before a search was conducted, and once the search had commenced it must be completed and s.12 could no longer be relied upon. The Information Commissioner accepts that this is not a proper construction of s.12 and that there is no time bar specified within the statute

that prevents an estimate being provided after significant time has already been spent searching. Indeed it may be that in many cases some searching will be required to provide the foundation of a subsequent estimate.

55. The Tribunal is satisfied that despite purporting to comply with s1.1 of FOIA in the letter of 2nd March 2005, the Home Office has not complied, since they have been unable to locate the Dunbar report or to satisfy the Tribunal that they do not hold it. The Tribunal is satisfied that if the appropriate cost limit has been reached, the Home Office would be entitled to rely upon it.

Has the cost limit been reached?

56. *The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 S1 2004/3244* made under section 12.5 provides as follows:

…

3(2) In the case of a public authority which is listed in Part 1 of Schedule 1 to the 2000 Act, the appropriate limit is £600.

…

4(3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in –

a) determining whether it holds the information,
b) locating the information, or a document which may contain the information,
c) retrieving the information, or a document which may contain the information, and
d) extracting the information from a document containing it.

57. *The Department of Constitutional Affairs Guidance on the application of the Freedom of Information and Data Protection (appropriate limit and fees) regulations 2004* states at paragraph 2.3.4:

> "In order to achieve consistency, all Public Authorities should use the same hourly rate when estimating staff-time costs, regardless of the actual costs. The hourly rate is set at £25 per person per hour".

The hourly rate is set in *The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 S1 2004/3244* :

…

4(4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour.

58. In applying these regulations and guidance to this case, it was not in dispute that to rely upon s.12 the Home Office would have had to spend at least 24 hours to fulfil their obligations. In evidence Mr Yates went through a schedule of the hours

expended prior to the internal review that he had conducted. He also gave evidence explaining what work was undertaken during those hours. The Tribunal is satisfied that the appropriate limit had been reached by the time the Home Office sought to rely upon it. It is also clear from the evidence that substantial time has been expended since this point was reached in following up other avenues of enquiry in an effort to locate the report.

59. The Tribunal accepts that the core Home Office and the Prison Service have undertaken a substantial search and have followed up every avenue suggested by the Appellant for this document and have been unable to find it; indeed the evidence of Mr Yates conveyed some of the frustration that he and his Officers experienced in being unable to locate any of what were known to be at least 6 copies of this sensitive and important report.

Evidence submitted after the oral hearing

60. The oral hearing having been adjourned to a paper hearing for the provisions of further legal arguments (see paragraph 22 referred to above), further witness statements were submitted after the hearing. These related to an exchange between Mr Yates and the Appellant, whilst papers were being cleared from the Tribunal room. They can be summarised as the Appellant suggesting that:

> "the worst outcome for him [Mr Yates] would be to return to his office and discover someone had found the Dunbar report"

Mr Yates replying:

> "It came to the point when I told them to stop searching"

A difference in recollection arose from whether Mr Yates said this was "in case they found it" or whether he said his staff "had other work to do". We are satisfied that the Appellant's recollection is accurate. He has provided us with his memory refreshing note which he wrote down immediately after the conversation, and we note that Mr Yates whilst having a different recollection, does not take serious issue with the Appellant's account.

61. Mr Yates explains this was a jocular remark intended to release the tension and both parties agree that in the same conversation Mr Yates reiterated that his staff had searched diligently for the report.

62. Both the Home Office and the Appellant ask us to take these statements into consideration and we are satisfied that the hearing being adjourned and not concluded we are able to admit them. However, having considered this evidence, we are satisfied that notwithstanding Mr Yates' unfortunate phraseology, these statements do not alter the evidence that we have already heard. It is not in dispute that the Home Office accept that the report (or its copies) may still exist and may still be on their premises, but that if this is the case, they have been unable to locate it, despite a thorough and reasonable search in which they have expended more money and man hours than statute requires. We are satisfied that the conversation referred to merely reflects that state of affairs.

Remedies

63. The primary remedy that the Appellant seeks is a copy of the Dunbar Report. We pause at this point to note that whilst the term the "Dunbar Report" has been used throughout this decision, at all times the Tribunal has had in mind that it is the contents of the report (the information) over which we have jurisdiction and not the physical document itself. It is unfortunate that despite what the Appellant himself concedes is now a thorough search, it has not been located and since the s. 12 limit been reached, no further searching is required. However, we are pleased to note that in his letter of 7th September 2006 to the Appellant, Mr Yates has promised:

> "Should the report turn up we would of course immediately inform you and begin vetting it for disclosure against the criteria in the Act… if it does turn up, we will let you know immediately".

64. In light of our observations above (that these proceedings have concerned the search for information rather than the physical document itself, a fact that Mr Yates satisfied us during his evidence that he had had in mind throughout his searching) we observe that we would expect Mr Yates' undertaking to notify the Appellant would apply if any **information** from the report that has not previously been made public is found.

65. In the Appellant's grounds of appeal there was implicit a request that the Home Office search further. From the evidence we have heard, we are satisfied that the Home Office have now undertaken extra searches at the request of the Appellant, and that in light of the applicability of s.12 there is no legal requirement for them to search further.

66. The Appellant felt that the Commissioner should have issued guidance in relation to the best practice of their document management polices. Whilst the Information Commissioner is at liberty to make such directions under s. 48 FOIA this power is separate from those relating to decision notices. As such we accept that the failure or otherwise of the Commissioner to make such a practice direction is not justiciable by this Tribunal.

67. The Appellant also sought a formal apology from the Home Office. Again this is not within the gift of the Tribunal, however, we note from the exchange of letters that accompanied the recent post hearing witness statements, that Mr Yates did apologise on behalf of NOMS:
"we are very sorry that we were unsuccessful in tracing it; my staff in Branston in particular were quite upset. I can only offer you an apology on behalf of NOMS for our failure to trace it so far..".
The Appellant finds that this is sufficient.

Fiona Henderson
Deputy Chairman

15th day of November 2006