



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]**

EA/2010/0167

ON APPEAL FROM:

**Information Commissioner's Decision Notice: FS50267838
Dated: 9 September 2010**

Appellant: MARK HOOD

Respondent: THE INFORMATION COMMISSIONER

Second Respondent: MINISTRY OF DEFENCE

On the papers

Date of hearing: 28 February 2011

Date of Decision: 21 March 2011

Before

**Annabel Pilling (Judge)
Gareth Jones
and
Jean Nelson**

Subject matter:

FOIA – Whether information held s.1

Cases:

Bromley v Information Commissioner and the Environment Agency
(EA/2006/0072)

Representation:

For the Appellant:	Mark Hood
For the Respondent:	Michele Voznick
For the Second Respondent:	Sarah Townsend

Decision

For the reasons given below, the Tribunal upholds the decision notice dated 9 September 2010 and dismisses the appeal.

Reasons for Decision

Introduction

1. This is an Appeal by Mr Mark Hood against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 9 September 2010.
2. The Decision Notice relates to a request made by Mr Hood under the Freedom of Information Act 2000 (the 'FOIA') to the Ministry of Defence ('MoD') for information relating to the death of his grandfather, Sergeant Claude Lionel Geoffrey Hood, Observer, No.746840 who died in a Whitley bomber crash near Eastleigh on 15 August 1940.
3. The MoD advised that it did not hold the information requested.
4. Mr Hood did not accept that the information he sought could not be located by the MoD and complained to the Commissioner. The Commissioner concluded that, having considered the steps taken by the MoD to locate it, on the balance of probabilities, the MoD did not hold the information requested and therefore it had complied with section 1(1)(a) of the FOIA in denying that it held any further information.

The request for information

5. For approximately ten years Mr Hood has been researching the events surrounding the death of his grandfather. Mr Hood has been able to obtain a number of documents relating to the incident and his grandfather, both through his own research, conducted at The National

Archives and from other sources, and through correspondence with various MoD departments since 2000.

6. This case concerns a request made under the FOIA on 28 May 2009 to the Ministry of Defence Air Historical Branch (RAF) (the 'AHB')¹. The request contained a summary of the Appellant's research and made a request for full information about the accident, specifically requesting:

- (i) a copy of the Meteorological and Wireless Statements requested at the time this crash occurred; and
- (ii) a copy of the official Court of Inquiry Report A108115/40 (the 'Col')² into the crash.

7. By letter dated 3 June 2009 the AHB formally confirmed that it did not hold the information requested. It also explained to Mr Hood the background to Court of Inquiries:

"A Court of Inquiry (now known as a Board of Inquiry) was an internal fact-finding investigation undertaken by the Services for their own use. Its main purpose was to establish the facts concerning an accident or incident as quickly as possible and to make recommendations aimed at preventing a reoccurrence. Copies of Court of Inquiry Proceedings/reports were circulated to the appropriate authorities in the Air Ministry and RAF. Regrettably, very few such papers are still extant and, as you have already been informed, those concerning the loss of Whitley P5044 are amongst those which have not survived..."

The AHB also reiterated what it had told Mr Hood on "a number of previous occasions, both directly and through your local MP" in respect of documentation relating to the loss of Whitley P5044: "So that there

¹ The AHB was established in 1919 with the task of writing the official history of British air operations in the First World War. Today its aim is to maintain and preserve the historical memory of the RAF and to develop and encourage an informed understanding of the RAF and air power history by providing accurate and timely advice to Ministers, the RAF, other government departments and the general public.

² Now referred to as a Board of Inquiry

is no misunderstanding I repeat that, apart from the basic casualty records and the originals of the aircraft accident card, the Ministry of Defence holds no documentation relating to the loss of this aircraft. You have been provided with copies of all the relevant documentation from the casualty file relating to your relative and the circumstances of loss of the aircraft. Again, for the sake of absolute clarity, let me reiterate that Air Ministry File A.108115/40 (the relevant Col) is not held by the MoD and we believe it was destroyed during the normal review process and likewise no copy of the Court of Inquiry or its supporting paperwork is extant in the MoD....”

8. Mr Hood asked for an internal review of this decision on 16 June 2009.
9. Andrew Tranham of the MoD responded on 4 August 2009 confirming that the AHB had fulfilled its requirements under FOIA. He added that in conducting the review he had *“sought to confirm whether or not the information you requested is held in order to satisfy the obligations placed upon this Department by section 1 of [FOIA]”*.

The complaint to the Information Commissioner

10. Mr Hood complained to the Commissioner on 30 August 2009, setting out the reasons why, in his opinion, the MoD had not carried out sufficient searches and that further information about the crash should be disclosed to him.
11. The Commissioner commenced an investigation, requiring the MoD to provide information about the searches that it had undertaken in relation to this request. He also received further correspondence from Mr Hood with additional enquiries about the Col. The MoD provided a detailed explanation of the steps it had taken following receipt of the request for information and why it considered that it did not hold the information requested.

12. The Commissioner conveyed his preliminary view on 16 March 2010 that no further information was held by the MoD. However, Mr Hood submitted further documentation to the Commissioner which was reviewed and, as a result, a further response sought from the MoD. This was not a desirable state of affairs as it resulted in no formal decision being taken until over a year after the complaint had been made.
13. A Decision Notice was issued on 9 September 2010. In summary, the Commissioner concluded that, having considered the steps taken to locate it, on the balance of probabilities the MoD did not hold the information requested. The Commissioner therefore concluded that the MoD dealt with the request in accordance with the FOIA.

The Appeal to the Tribunal

14. By Notice of Appeal dated 5 October 2010, Mr Hood appeals against the Commissioner's decision.
15. The Tribunal joined the MoD as Second Respondent.
16. Mr Hood is not represented in these proceedings and has submitted all the material he considers relevant that the Tribunal should take into account when deciding this Appeal. The lengthy document submitted by Mr Hood setting out the grounds of appeal does not contain a numbered list of the points in issue and it has been necessary to identify the actual grounds upon which Mr Hood challenges the conclusion reached by the Commissioner that, on the balance of probabilities, the information requested is not held. Mr Hood submits that he does not consider the rewording of his appeal into points or case management to be fair or just.
17. While we commend the thoroughness with which Mr Hood has conducted his research and the tenacity he has shown, he has provided extensive material to the Tribunal and it was necessary for us

to identify the relevant grounds of appeal to ensure that we considered the arguments he advances for challenging the Commissioner's conclusion. This is essential case management, in line with the overriding objective of the Tribunal's procedural rules (The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 as amended) (the 'Rules') to enable the Tribunal to deal with cases fairly and justly. It would not be possible to deal with the case in the way Mr Hood implies, with each party and the Tribunal working through every document submitted by Mr Hood to respond to each point that he makes.

18. In Directions issued by the Tribunal, the grounds of appeal were set out and have been agreed as follows:

Ground 1 – The Commissioner erred in concluding that the MoD were unable to supply a record of destruction of the requested information; the information had survived several Public Records Acts and the claim that they were destroyed in the 1990s is surprising.

Ground 2 – The Commissioner erred in concluding that the MoD did not hold the disputed information; due to the transfer of millions of records to the TNT archive in Swadlincote, Board of Inquiry files have been separated from the main file, with no chance of marrying them up to the main file. It is not possible to trace documents simply by headings.

Ground 3 – The Commissioner erred in concluding that the MoD did not hold the disputed information; the Board of Inquiry information was likely to have been subject to the Official Secrets Act and it is presumed there would be a reference regarding unauthorised destruction.

Ground 4 – The Commissioner erred in concluding that the MoD did not hold the disputed information; he should have taken into account that Board of Inquiry reports have been located in files the title of which would not indicate such documents were contained in that file.

Ground 5 – The Commissioner erred in concluding that the MoD did not hold the disputed information; it was likely that the Board of Inquiry report was retained as Board of Inquiry investigations are important historical documents.

Ground 6 – The Commissioner erred in concluding that the MoD did not hold the disputed information; a letter recently seen from October 1941 (concerning the burial of the airplane crew) suggests that the requested information may be held on another file.

19. An original Ground 6 (that the Commissioner should have directed that if at any future time any further documents relating to the crash exist or can be found these be shown to the Appellant) was the subject of an application by the Respondent to be struck out under Rule 8(3)(c) of the Rules on the basis that it is not a matter within the jurisdiction of the Tribunal, or the Commissioner. The Appellant subsequently gave notice under Rule 17(1)(a) of the Rules that he withdrew that part of his case.

20. We note that no submissions have been made regarding the MoD's assertion that it does not hold any meteorological records and wireless records and the advice it gave Mr Hood to contact the Meteorological Office. The submissions all concern the Col and it is the Col that is the requested information at the centre of this Appeal.

21. The Appeal was determined at a hearing on the papers on 28 February 2011.

22. The Tribunal was provided in advance with an agreed Bundle of material, written submissions from the parties (although the MoD adopted the Commissioner's submissions and did not provide any further written submissions) 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

23. 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.

24. 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.

Submissions and Analysis

25. The Commissioner concluded that, on the balance of probabilities, the MoD did not hold the requested information.
26. There is no dispute that this is the correct standard of proof, that is, the civil standard of proof. A differently constituted Panel of this Tribunal in *Bromley v IC and Environment Agency*³ (“*Bromley*”) rejected arguments that certainty was the test to be applied in determining whether information was held for the purposes of FOIA and described this as the “normal standard of proof.” We are content that this is the correct standard of proof to be applied by this Tribunal.
27. While the MoD does not accept with any certainty that the Col ever existed, it appears to us that a Col (A108115/40) was created following the incident in which Mr Hood’s grandfather died; it had been entered in manuscript on the Flying Accident Card which has been referenced several times in Mr Hood’s correspondence.
28. The fundamental issue for us to decide is whether the Commissioner was correct to conclude that the MoD did not hold the requested information at the time of the request. The six identified grounds of appeal are the basis upon which the Appellant challenges that conclusion.

Ground 1 – The Commissioner erred in concluding that the MoD were unable to supply a record of destruction of the requested information; the information had survived several Public Records Acts and the claim that they were destroyed in the 1990s is surprising.

³ (EA/2006/0072)

29. The relevant MoD policy was for a 50 year retention period from date of creation⁴, therefore the Col would have been eligible for destruction in 1990. Under the terms of the Public Records Act, all government departments are required to review their records, selecting those thought suitable for preservation in The National Archives (or elsewhere); records not selected for preservation may be destroyed and The National Archives estimates that only 5% of government records are preserved.
30. The relevant policy for the retention of destruction certificates was for a 5 year period⁵.
31. The MoD submits that against this background, unless the Col survived until the late 1990s, which it considers unlikely given the destruction policy that would have applied to a document of this age, it is not surprising that the MoD has no record of its destruction.
32. The MoD does not submit with any certainty that the Col was destroyed since it has no record of its destruction; all it can state is that an extensive search was conducted in accordance with the Department's obligations under the FOIA and it was found not to be held and that the result was not surprising given the relevant policies for the destruction of government documents.
33. Mr Hood submits that it is surprising that the MoD's policy would have been as set out but there is no evidential basis upon which we could conclude that this was not the policy at the time. Although we might share Mr Hood's surprise if this was the current policy of the MoD, it would still not follow that we would find that the Col was *not* destroyed under such a policy. We do not make any specific comment on the MoD's policies, past or present, as there was no material before us as to the reasons behind or the matters that would have been taken into account when devising those policies.

⁴ For a period of 100 years from date of birth since 2002.

⁵ For a period of 30 years since 2003

34. As the parties agree, there can be no certainty about the fate of the Col. We do not find this surprising given that it was one of many records relating to the injury or death of servicemen during World War II and that there must have been a vast amount of documentary information that might have been destroyed in a number of circumstances beyond the control of the MoD or that could not be preserved indefinitely.
35. There is no evidential basis upon which we could conclude that the MoD did not apply the policy as outlined above to the Col, that the Col was not destroyed in, or around, 1990 or that the destruction certificate itself was not destroyed in or around 1995.

Ground 2 – The Commissioner erred in concluding that the MoD did not hold the disputed information; due to the transfer of millions of records to the TNT archive in Swadlincote, Board of Inquiry files have been separated from the main file, with no chance of marrying them up to the main file. It is not possible to trace documents simply by headings.

36. Mr Hood's submissions under this ground appear to be based upon comments made during a Parliamentary Debate on 20 October 2004 regarding the relocation of millions of files being prepared for transfer from the Military Record Office at Hayes to the TNT Archives at Swadlincote; he has provided extracts from Hansard to support this. He relies on comments that "Aircraft board of inquiry files have been separated from the main file, and there will be no chance of marrying them up to the main file" and concerns that were raised about the indexing of files and the security of the storage arrangements.
37. The MoD submits that in this regard Mr Hood is labouring under a misapprehension in respect of this Debate and that the statements made did not necessarily accurately reflect the facts. In particular, there was no specific exercise to separate Board of Inquiry reports from files during the transfer and while a number of Boards of Inquiry were held at Hayes, that did not alter the fact that the Hayes archive

did not contain records of *all* previous Board (or Court) of Inquiry reports. It reiterated that prior to the transfer of files to TNT at Swadlincote it checked the finding aids at Hayes and established that there was no trace of the Col. It also stated that as part of the contract transferring custody of the files to TNT all the files were subsequently indexed onto a database; that database has been searched and contains no records relating to the loss of Mr Hood's grandfather's aircraft except the casualty file that Mr Hood is already aware of.

38. Mr Hood himself observed in his letter requesting an internal review: *"...from what I am hearing and noticing in files already at Kew, then I can see items have been moved off the original file to other files and then moved again making research difficult, although I have been lucky to find the odd items by accident."* He did not go so far as to say that the MoD was deliberately withholding information *"as it would have been impossible to number every piece in the 13 million files that were indexed. I expect there are also files which contain a number of Reports which were not indexed due to the volume of indexing work required."*
39. As we indicated above, there can never be certainty that a document might not be lying undiscovered within the records held by a public authority. Mr Hood may be correct in labelling the storage arrangements as less than perfect and commenting that with no central indexing or computerised database every piece of information would have to be examined manually in order to be certain that the Col is not held. He concedes that cannot be done.
40. In *Bromley* 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.”

41. In response to questions from the Commissioner during his investigation, the MoD set out the details of the searches that were carried out for information falling within the scope of the request:

- A search of the casualty file produced evidence of a casualty file for Whitley P5044.
- A search of RAF Accident Cards (indexed by aircraft type and date) identified Col reference A108115/40.
- All the AHB indexes which relate to all Air Ministry/RAF files that passed through AHB since 1920s were searched for reference A108115/40 and no trace was found.
- Searches of the AHB indexes were made several times using key words identified by AHB as well as all the Air Ministry/RAF file references supplied by Mr Hood.
- AHB also searched The National Archive catalogue, Bomber Command Loss Cards by date and aircraft type, and the Operations Record Book for 77Sqn. Words used in searching were WHITLEY; P5044 (the aircraft serial number); Flying accident; place of accident; date; crew names.
- It indicated that no other indexes or sources exist which logically might provide a trace of the information requested.

- A search of the archive files where some RAF officer and other rank non-air accident reports are held from 1939 - 1977 are held at Heywood was undertaken; a sample of records confirmed that these were injury reports rather than relating to death.
- A search of the AHB film records; no film relating to this request exists.

42. The Commissioner submits that the fact that other information has been located is evidence of the thoroughness and diligence of the search. We agree with that analysis. We also consider that the material provided to us in the Bundle is evidence of the extensive assistance that the MoD has given to Mr Hood over the years and in particular with regard to this request for information.

43. It may be that the Col was separated from the file where it should have been retained, and that it was not destroyed in the 1990s in line with the relevant MoD policy because it has been stored somewhere else; there is no evidence however to that effect upon which we could be satisfied that was the case. Additionally, there is no evidence before us that would lead us to conclude that the Col was held by the MoD when the files were transferred to Swadlincote, that it was held by the MoD at the time of the request nor that it is held now.

Ground 3 – The Commissioner erred in concluding that the MoD did not hold the disputed information; the Board of Inquiry information was likely to have been subject to the Official Secrets Act and it is presumed there would be a reference regarding unauthorised destruction.

44. Mr Hood has not made detailed submissions relating to this ground of appeal, although he has pointed to a file released from The National Archive around 1995 and titled “*Statistical Reports on Flying Accidents (RAF) 12/1939-12/1942*”. This contains Mr Hood’s grandfather’s type of accident in the statistics table. The Statistics, according to the

cover, were subject to the Official Secrets Act, which has reference to unauthorised retention and unauthorised destruction.

45. The Commissioner submits that while not specifically referred to in the Decision Notice, he did consider this as part of his investigation and concluded that the destruction of a document pursuant to the MoD's policy in force at the time would be likely to have been in line with the Official Secrets Act. We consider that this was an appropriate conclusion and there is no basis before us to find any differently.

Ground 4 – The Commissioner erred in concluding that the MoD did not hold the disputed information; he should have taken into account that Board of Inquiry reports have been located in files the title of which would not indicate such documents were contained in that file.

46. Mr Hood has drawn attention to the material that he has located over the years through his own perseverance and painstaking research.

47. This ground relates to the quality of the searches undertaken by the MoD in respect of this request which has been dealt with above.

48. We are satisfied that the searches undertaken by the MoD were as thorough and diligent as could be hoped for.

Ground 5 – The Commissioner erred in concluding that the MoD did not hold the disputed information; it was likely that Board of Inquiry report was retained as Board of Inquiry investigations are important historical documents.

49. While Mr Hood submits that every Board/Court of Inquiry report is an important historical document, and refers to practices in some other countries, the MoD submits that the importance of these reports is heavily reduced when the type of aircraft concerned is taken out of service. The policy of other countries may be of interest but it is not of material assistance to the Tribunal in reaching a decision on the facts of this case. The MoD also stated to the Commissioner during his

investigation that until recently the MoD did not, for legal reasons, place copies of the Boards of Inquiry in the public domain, that is, deposit them in The National Archive as historic documents worthy of preservation.

50. We consider that in the context of events in 1940 and the following years of the War, the accident in which Mr Hood's grandfather was killed would have been perceived as one among many consequences of wartime and the retention of records may not have been seen as being of sufficiently high priority. Regardless of Mr Hood's own personal opinion, or that held by others, and regrettable though it is, it does not follow that the Col was retained, that it survived beyond 1990, that it was held at the time of the request nor that it is held now.

Ground 6 – The Commissioner erred in concluding that the MoD did not hold the disputed information; a letter recently seen from October 1941 (concerning the burial of the airplane crew) suggests that the requested information may be held on another file.

51. This ground of appeal relates to the discovery of a letter from the War Office dated 21 October 1941 which left Mr Hood wondering if "*all the Accident Reports and Investigation*" might be on another file. This submission appears to be based on a line in that brief letter: "*The question with regard to the burial of the crew of the aircraft in which your brother was killed is being looked into and I will write to you again on the subject as soon as possible.*" Mr Hood appears to have assumed that this line means that some sort of formal inquiry was underway and that the Col would or could have been requested. There is no evidential basis to support this assumption.

52. This ground again relates to the quality of the searches undertaken by the MoD in respect of this request which has been dealt with above. There is nothing in this letter that amounts to even a suggestion that the Col had been provided to the War Office. We are satisfied that the searches undertaken by the MoD were so thorough that if any further

file could have been found within the MoD (including the War Office) it would have come to light already.

Other Matters

53. Mr Hood has referred us to an extract from the Keeper's Report 1999-2000 Advisory Council on Public Records. This concerned a successful appeal to allow an individual access to a report of an official internal inquiry into an accident he had suffered more than 50 years previously which had been preserved on his personal file. The decision was to allow that individual access, with certain information relating to witnesses removed, but made it clear that access to the report would not be given to the general public. The relevant extract concluded with the words; *"Even if selected for permanent preservation, we should expect the file to remain closed during the individual's lifetime."*

54. We do not readily understand the conclusion that Mr Hood wishes us to draw from this extract. This extract relates to an application by an individual to view his own personal file. It was not decided under the FOIA or the Data Protection Act. It makes explicit reference to the issue of permanent preservation, implying this record would not necessarily be selected for permanent preservation, and the relevant policy for public access. We do not consider that it provides any weight to support Mr Hood's assertion that the Col is held by the MoD.

Conclusion and remedy

55. 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 MoD did not hold the information at the time of the request.

56. It is clear from the evidence that the MoD has been attempting to locate the Col and any further information about the crash or about Mr Hood's grandfather for Mr Hood for several years. There is no

evidence as to what happened to the Col at any stage after it was allocated a numbered reference; whether it was in fact completed, whether it was filed, whether copies were passed on to the required departments etc. or what might have occurred to it in the following 50 years. The MoD has searched extensively and pursued many different avenues. In his submissions, Mr Hood criticises the quality of the Commissioner's investigation into the thoroughness of the search by the MoD. It is clear from the evidence that the Commissioner's investigation went much further than merely accepting a bald assertion from the MoD and he required details of the thoroughness of the searches. In addition to requiring a written explanation setting out the details of all the searches carried out, in answer to a series of pertinent questions, the Commissioner made further enquiries upon receipt of additional material from Mr Hood. We regard this as further evidence of the Commissioner pursuing the matter and satisfying himself of the quality and thoroughness of the search. We consider that the search was beyond what was required under the FOIA and that the MoD might properly have refused to carry out further searches on the basis of section 12 of the FOIA, that is, that it estimated that the cost of complying with it would exceed the appropriate limit⁶.

57. We are therefore satisfied that there is no basis for concluding that, on the balance of probabilities, at the time of the request, the MoD held the Col requested by Mr Hood and we are satisfied that the Commissioner was entitled to reach the decision he did.

58. We also record that we consider the MoD complied with its duty under section 16 of the FOIA to advise and assist Mr Hood by carrying out the thorough searches and communicating with him, often in great detail, over an extended period of time.

⁶ 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.

59. We can appreciate Mr Hood's frustration that the Col has not been located but we are satisfied that it is not held by the MoD. It appears to us that the MoD, and Mr Hood, have exhausted all possible avenues to locate it and that Mr Hood has been provided with all information that the MoD holds in relation to his grandfather.

60. Our decision is unanimous

Signed

Annabel Pilling

Judge

21 March 2011