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

Case No. EA/2011/078

ON APPEAL FROM:

Information Commissioner's
Decision Notice No: FS50371018
Dated: 20 July 2011

Appellant:	David Whyte
First Respondent:	The Information Commissioner
Second Respondent:	The Ministry of Defence
Heard at:	Finance and Tax Tribunal, Bedford Square, London
Date of hearing:	16 February 2012
Date of decision:	2 April 2012

Before
CHRIS RYAN
(Judge)
and
JACQUELINE BLAKE
ROGER CREEDON

Attendances:

For the Appellant:	Mr Whyte appeared in person.
For the First Respondent:	The Respondent did not attend and was not represented.
For the Second Respondent:	Lisa Busch

Subject matter:

Whether information held s.1

Cases:

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

IN THE FIRST-TIER TRIBUNAL **Case No. EA/2011/0178**
GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal has formed the preliminary view that the public authority has not established that the information requested by Mr Whyte was not held by it at the time and directs that the evidence be supplemented and clarified so that a final determination may be made either at a further hearing or, if the parties are in agreement, on the papers.

REASONS FOR DECISION

Background

1. This Appeal arises out of a request for information under section 1 of the Freedom of Information Act 2000 ("FOIA"), which the Appellant, Mr Whyte, sent to the Second Respondent, the Ministry of Defence ("MOD"), on 22 May 2010. The request was refined and clarified during the course of correspondence,. Before us it was accepted by both sides that the information requested was the data that formed the basis for a graph, which Mr Whyte had obtained, showing the decay rate, in hours, of Gamma Radiation at ground zero during two Atomic Bomb tests (Pennant and Burgee) carried out by the UK authorities in the South Pacific in 1958 under the code name "Operation Grapple - Z". We will refer to this as "the Dose Rate Graph".

2. Section 1 of FOIA provides:

> "*(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."*

3. In this case the MOD informed Mr Whyte that it did not hold the information. Mr Whyte was not satisfied with that response and lodged a complaint with the Information Commissioner. At the end of his investigation into the matter the Information Commissioner concluded that the MOD did not hold the information and that, (apart from one procedural issue, with which we are not concerned on this Appeal) the MOD had handled Mr Whyte's request properly. The conclusion was recorded in a Decision Notice dated 20 July 2011 ("the Decision Notice").

The Appeal to this Tribunal

4. On 5 August 2011 Mr Whyte appealed against the Decision Notice. The Tribunal's role on such an appeal is to consider whether or not the Information Commissioner's decision was "in accordance with the law" (FOIA section 58(1)). If it considers that it was not, it may issue such other notice as it considers appropriate, in substitution for the Decision Notice. The Tribunal may review any finding of fact on which the Decision Notice was based.

5. The MOD was joined as a party to the appeal and directions were given for the determination of the appeal at a hearing. In the event the Information Commissioner opted not to appear at the hearing. Mr

Whyte conducted his own case and Ms Lisa Busch of counsel represented the MOD.

The issue to be determined

6. The only issue we have to consider is whether or not the MOD held the requested information at the time of the request. Although we are not bound by other decisions of the Tribunal, there have been a number of earlier cases dealing with the difficulty facing a public authority in cases where it asserts that it does not hold requested information: the difficulty, in effect, of having to prove a negative. In the case of *Bromley v Information Commissioner and the Environment Agency* (EA/2006/0072) a differently constituted panel of the Tribunal said:

> *"There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records. This is particularly the case with a large national organisation like the Environment Agency, whose records are inevitably spread across a number of departments in different locations. The Environment Agency properly conceded that it could not be certain that it holds no more information. However, it argued (and was supported in the argument by the Information Commissioner) that the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner's findings of fact are reviewed. We think that its application requires us 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 of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."

7. Although, as we have said, we are not bound by that decision it seems to us that it correctly identifies both the test that we should apply and some of the factors which we should take into account in deciding whether, on the facts of this case, we should conclude that the requested information was not held by the MOD at the time when the request was made.

Evidence

8. The analysis of the original request, as well as the scope and rigour of the resulting document search, may be assessed by reference to the Information Commissioner's own investigation (in the form of the correspondence between his office and the MOD, which has been made available to us), and the evidence given by the MOD's witness on the appeal, Mr Gareth Rowlands.

The Information Commissioner's investigation

9. The Information Commissioner's investigation took the form of a letter to the MOD dated 10 June 2011, explaining the process of investigation and asking a total of 11 questions.. The MOD's letter in response of 8 July 2011 explained that the Dose Rate Graph was contained in a document entitled "Operation Grapple Z, Interim Report, Part XII 1958", which had been retrieved from Atomic Weapons Establishment ("AWE"), which operates the relevant Records Office for the MOD under delegated authority. The letter added that the Interim Report itself could be accessed in the National Archives, where it had previously been lodged at some date prior to 2005 although Mr

Whyte's evidence was that only 72 of the 192 pages of the report were accessible. It then said:

> *"The only other search that was made was for the original record (log book) but no information was found. There was no requirement to carry out additional searches as the information in scope is the Interim Report."*

In response to a later question it stated that no search had been made of any electronic data because:

> *"The information in scope is the Interim Report now held as a hard copy document/PDF by MOD but the information within it cannot be searched electronically as it is an image file."*

Still later it stated:

> *"It is believed that the graph was derived from manually recorded data. A search was made for the original record (log book) but no trace was found. It has been assumed that the manual record was either lost/destroyed at some time after generation of this Interim Report in 1958 containing* [the Dose Rate Graph]."

10. On the basis of those responses to its enquiries the Information Commissioner recorded the following conclusion in the Decision Notice:

> *"The Commissioner understands that the complainant may find it frustrating to be in possession of a piece of information, namely* [the Dose Rate Graph], *which the MOD cannot explain or clarify. However, the Commissioner is mindful that the existence of the graph alone does not guarantee that the MOD would necessarily hold further related information. The*

> *Commissioner accepts that no explanatory information was found in the Interim Report and that it is likely that the original log book data has been destroyed. Therefore, on the balance of probabilities, the Commissioner considers that the requested information is not held by the MOD."*

Mr Rowland's evidence

11. Mr Rowland is a Senior Executive Officer within the Defence Equipment and Support function of the MOD. He explained in his witness statement that the UK's nuclear warhead capability is managed and operated by the Atomic Weapons Establishment ("AWE") under a contract with the MOD. One result of that arrangement is that AWE holds and maintains extensive historical archives relating to the UK's nuclear weapons programme. When the MOD receives a freedom of information request relating to this area of activity it liaises with AWE to identify and retrieve potentially relevant information to be reviewed and considered for release.

12. Mr Whyte's original request generated some correspondence from one of Mr Rowland's colleagues attempting to explain the significance of some elements of the Dose Rate Graph. Mr Rowland's witness statement stated, without disclosing the source of his information, that none of the correspondence was based on any raw data used to compile the Dose Rate Graph but relied on general mathematical and scientific knowledge and principles.

13. Mr Rowland also explained in his witness statement that, in the course of carrying out an internal review of the refusal of the information request:

> *"…MOD attempted to identify the source of the information in the* [Dose Rate Graph] *and locate any raw data which was used to compile the graph. This is likely to have been obtained in an original record or 'log book' which, if held, would be stored in*

either the AWE archive or would have been transferred to [the National Archive]. *However, a search of the AWE archives confirmed that they did not hold it. This search was conducted on the two major databases at AWE that include records relating [sic] the UK's nuclear test programme, and on records held in microfiche form. These included searches based around the names of the nuclear tests and the year they took place."*

We comment, in passing, that Mr Rowland provided no basis for his belief as to the likely nature of the raw data and no identification of the source of his information about the way in which AWE had carried out the database searches. The omissions are particularly noticeable in light of what we would call the usual hearsay statement appearing earlier in his witness statement.

14. Mr Rowland explained that not all of the Interim Report had been lodged with the National Archive. It had taken the form of a collation of several stand-alone reports, some of which had been retained by AWE because they remained highly classified. He then concluded:

"A subsequent review of the retained parts by an MOD subject-matter expert has confirmed that they contain no relevant information"

We observe, again, that the expert in question is not identified as the source of Mr Rowland's information.

15. Mr Rowland attended the hearing in order to be cross examined. He also answered questions put to him by the Tribunal panel. He answered all questions fully and, as far as we could see, truthfully. We felt that he was trying to assist us in our deliberations. However, there were a number of aspects of the evidence proffered by the MOD which caused us concern. Those concerns informed the questions we put to Mr Rowland. They generated the following additional information:

(a) The team that Mr Rowland supervised was responsible for the initial responses to the information request. He was therefore able to confirm, from his own direct knowledge, that a decision

was made, in consultation with his colleagues and his contact at AWE, that the response should take the form of an explanation of the scientific notation appearing on the Dose Rate Graph and that it should not be treated as the kind of question that could be answered by recorded information.

(b) It was only when Mr Rowland's colleague, who was undertaking the internal review, suggested that a search for raw data might provide something useful, that the focus changed to the possible existence of recorded information. The search was carried out by AWE but Mr Rowland was not sure if his team was involved in giving the instruction or whether this was done by the internal review team. He thought it likely that his team did not take an active part in the process at that stage.

(c) Mr Rowland had a degree of knowledge about AWE's records and processes from previous dealings and had used this as the basis for the statements in his witness statement about the nature of the material that may have been retained (an "original record or 'log book'") and the structure of the AWE archives. He told us that AWE had two databases. One was called Merlin. He could not recall the name of the other. He believed that paper documents had been scanned but was not sure of the precise structure of the resulting database or what search techniques it could accommodate.

(d) The MOD's contact at AWE was a Marjorie Wilson, who was in charge of the team of people responsible for the archives. Mr Rowland believed that Ms Wilson would have organised the database search. He thought that she searched against the two terms "1958" and "grapple", but could not be certain and did not know if Ms Wilson would have tried other search terms or techniques. He had not instructed her to do so and had received no report from her as to exactly how she carried out the task.

(e) Mr Rowland did not regard the request for a search as imposing a particularly onerous task on AWE and he had confidence that

Ms Wilson would have carried out a “sufficient search” because she and her team had developed a degree of expertise in this area. AWE had a contractual relationship with the MOD and was required to carry out searches for other purposes, such as Parliamentary questions. He considered that it was a professional organisation and that it was part of the relationship for AWE to have carried out the requested search correctly and professionally.

(f) Mr Rowland thought that Ms Wilson reported back to him by email. His recollection was that the message simply stated that nothing had been found. Neither then, nor at any other time, did Ms Wilson provide him with any detail about the searches she had carried out. That was not the normal way in which search results were communicated and Mr Rowland did not ask for more information on this occasion. Although he had some communication with Ms Wilson before he finalised his witness statement he did not seek more detail at that stage as to the way in which the search had been conducted and none was volunteered by Ms Wilson.

(g) Mr Rowland was not able to help us as to whether either of the relevant databases could be searched by reference, for example, to the name of the author of the relevant part of the Interim Report, or the nature of the data (possibly distinguishing hand written log books from machine generated print outs), or by any broad subject matter. When pressed he replied that he simply believed that the search had encompassed everything it needed to.

(h) No search had been made of the MOD’s own records because Mr Rowland believed that there would be nothing outside the archive that had been transferred to AWE. He did not think that any records maintained for the purposes of handling claims brought by veterans who had been present at the tests would include information which was not also in the AWE archives. He

had confidence that any radiation level materials would be held within those archives and nowhere else.

(i) Mr Rowland explained that parts of the Interim Report, which had previously been classified as secret, had subsequently been de-classified, with the result that they had been released to the National Archive. The de-classified elements included the part of the Interim Report containing the Dose Rate Graph. He did not believe that the retained parts contained anything relevant, although he accepted that a list of documentary material released in response to another freedom of information request did include some documents that appeared from their titles to refer to radioactivity sampling in relation to Project Grapple even though they were not recorded as being available in the National Archive.

(j) The "subject matter expert" who, according to the witness statement, had reviewed the retained parts of the Interim Report and advised Mr Rowland that they did not contain any relevant information was a Ms Kirsten Greest, who had both the security clearance to inspect the material and the expertise in nuclear technology to make the assessment.

Submissions on whether documents held by the MOD

16. Mr Whyte informed us that, as a young service man in 1958, he was ordered to enter ground zero two hours after detonation of the bombs in Operation Grapple to clear debris. He worked there for two hours, wearing no special protective clothing. He had, he said, a 'film badge' for monitoring radiation levels which went missing. When he returned his vehicle to base, bearing the materials he had collected, a second person, who he believed was one of the scientists working on the project appeared in full protective clothing and took over his vehicle and its contents. Mr Whyte believes that meticulous measurements were taken at the time and that his exposure on that occasion to the radiation levels which must therefore have been recorded has put his

long term health at risk. He has a number of suspicions about the way he has been treated, both in relation to the loss of radiation measuring equipment issued to him at the time and what he believes have been manoeuvres to prevent him from subsequently discovering the truth of the contamination to which he believes he was exposed.

17. This information was given to us in the original Grounds of Appeal and during Mr Whyte's oral submissions during the hearing. It was not presented as evidence and was not tested in cross examination. Much of what he told us was also irrelevant to the very narrow issue under consideration in this appeal. It is not our role to consider how other enquiries or information requests have been handled. We are limited, quite properly, to deciding whether the Ministry of Defence was justified in refusing this particular information request on the basis that at the time it did not hold the specific information requested. We nevertheless feel that we should record our disappointment at the relaxed attitude displayed by the MOD in providing us with information about the steps that it took to search for the information. As we have indicated in our summary of Mr Rowland's evidence, including his answers to our questions, the MOD proffered a witness who did not have sufficient direct knowledge of the facts to provide the level of detail that we believe we needed in order to determine the issue. Nor did he provide us with sufficient information as to what he was informed by those who may have had that knowledge. It matters not whether Mr Whyte's suspicions are justified. Just the fact that he may have been exposed to serious contamination at a time when its impact on long term health was not so well understood as it is today means that he was, in our view, entitled to expect a more rigorous approach to the document search than was apparent from the incomplete and imprecise evidence that was placed before us. We think that he was also entitled to expect the Information Commissioner to have done more than to accept, without any further testing, the answers he was given to his questions by the MOD.

18. Counsel for the MOD argued that Mr Whyte had not adduced any evidence to show that the requested information was still in existence and that it was entirely plausible that it had been lost or destroyed some time after the Interim Report had been completed some 50 years ago. She suggested that, if the raw data on which the Dose Rate Graph had been based had existed, it would have been released to the National Archives, and made available for public inspection, at the same time as the Interim Report in which that graph appeared. The fact that it did not appear in the National Archives gave rise to an inference, she said, that it no longer exists. In response to our concern that we had not received evidence from the person who actually conducted the search, or been provided with either instructions or a written report of the searches conducted and the results achieved, counsel for the MOD reminded us that AWE was contractually bound to perform an effective search and we should not lightly conclude that it had failed to do so. In our view that submission gives insufficient weight to the importance of the instruction that AWE received; instructions on which we received very limited evidence indeed.

19. In a written submission sent to the Tribunal after the hearing, at the Tribunal's request, to deal with two points of detail that had not been fully addressed at the time, the MOD volunteered the information that the other documents concerning Operation Grapple had been sent by AWE to the MOD, which had satisfied itself that they did not contain any information on radiological measurements at Ground Zero after the Pennant and Burgee explosions. Counsel for the MOD submitted that it should not be necessary for it to incur further expense to the public purse by being required to confirm this in a witness statement, since the inference which the Tribunal is invited to draw is self-evidently a sound one, given what its counsel described as the "entirely adequate" search that had been conducted.

Our conclusion

20. The document search may have been adequate. It may even have been comprehensive, as counsel for the MOD had previously argued in her skeleton argument. Our difficulty is that we have not been provided with sufficient evidence to be satisfied whether it was or not. For the reasons indicated in our summary of the answers Mr Rowland provided to us, we consider that the witness proffered by the MOD was too distant from the search to provide a reliable account of it from his own knowledge and that his evidence on the information received from those who were closer was too imprecise and incomplete to demonstrate that the search had been conducted with the rigour and precision which we believe (adopting the test set out in *Bromley)* is required before we could consider concluding that, on a balance of probabilities, the recorded information no longer existed.

21. In the light of that conclusion we propose that this decision be treated as preliminary and that the MOD be given an opportunity to remedy the defects and omissions in its evidence, which we have indicated. We believe that it should be possible to provide that evidence within 28 days and that the parties should then seek agreement as to whether the appeal should be determined in a further hearing or on the papers. However, we will entertain any alternative proposals the parties may wish to make, provided they are presented to the Tribunal in writing within 14 days of the date of this decision.

Chris Ryan
Judge

2 April 2012