



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

**EA/2011/0126**

**ON APPEAL FROM:**

**Information Commissioner's Decision Notice: FS50345860  
Dated: 5 May 2011**

**Appellant: ELAINE COLVILLE**

**Respondent: THE INFORMATION COMMISSIONER**

**Second Respondent: FOREIGN AND COMMONWEALTH OFFICE**

**On the papers**

**Date of hearing: 11 November 2011**

**Date of Decision: 21 December 2011**

**Before**

**Annabel Pilling (Judge)  
Suzanne Cosgrave  
and  
Andrew Whetnall**

**Subject matter:**

FOIA – Whether information held s.1  
FOIA – Request for information s.8

**Cases:**

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

**Representation:**

For the Appellant:	Elaine Colville
For the Respondent:	Richard Bailey
For the Second Respondent:	Rory Dunlop

## **Decision**

For the reasons given below, the Tribunal dismisses the appeal but substitutes the following for the decision notice dated 5 May 2011

### **SUBSTITUTED DECISION NOTICE**

Dated 21 December 2011

Public Authority:           FOREIGN AND COMMONWEALTH OFFICE  
Old Admiralty Building  
London SW1A 2PA

Complainant:                Ms Elaine Colville

### **The Substituted Decision**

For the reasons set out in the Tribunal's determination, the substituted decision is that the complainant's request did not amount to a valid request for information under the Freedom of Information Act 2000, and therefore the Foreign and Commonwealth Office was not under a duty to comply with the requirements of Part 1 of the Freedom of Information Act 2000.

Even if the request did amount to a valid request for information under the Freedom of Information Act 2000, on the balance of probabilities, the information requested in part (d) of the request was not held by the Foreign and Commonwealth Office.

No further action is required.

Signed:

Annabel Pilling  
Tribunal Judge

Dated: 21December 2011

## Reasons for Decision

### Introduction

1. This is an Appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 5 May 2011.
2. The Decision Notice relates to a request made by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to the Foreign and Commonwealth Office ('FCO') for information relating, broadly, to legal advice about alleged felonious misconduct by the World Bank Group (the 'WBG').
3. So far as is relevant to this Appeal, the FCO provided an answer to one question posed by the Appellant and otherwise advised that it did not hold the information requested.
4. The Appellant did not accept that the information she sought was not held by the FCO and complained to the Commissioner. The Commissioner concluded that, in respect of the majority of the information, on the balance of probabilities, the FCO did not hold the information requested and therefore it had complied with section 1(1)(a) of the FOIA in denying that it held the information.

### The request for information

5. The Appellant made a request under the FOIA on 10 February 2010 to the FCO:

*“Recognising 1) that the Foreign Office retains primary responsibility for relations with foreign governments and coordinates the relations of other Departments with them, directly or through international organisations; 2) that the Legal Adviser to the Foreign Office has the function of advising, in an international, legal regard, all central Departments; 3) that the Legal Adviser to the Foreign Office has also to apply to the Law*

*Officers of the Crown for opinions in a matter of international law; and 4) that the function of the Treasury Solicitor is of advising on litigation where Departments do not have a legal adviser; to ask for the following information:*

(a) – (c): not relevant)

(d) - *Recognising that in international law the Specialised Agencies Convention have provisions that emphasis the point that whilst the immunity from national jurisdiction of both organization and officials precludes that particular jurisdiction, the principle of liability remains and an alternative jurisdiction or procedure must be established so as to enable claims against the organization to be dealt with justly, whether the Foreign Office can take up a case with the International Court of Justice on behalf of a British citizen who has been the victim of serious (felonious) misconduct and denial of justice at the hands of an international organization? If not, what alternative jurisdiction procedure must be established?*

(e) – *not relevant.*

6. The FCO responded on 10 March 2010. In relation to (d) it explained:

*“It is not possible for the United Kingdom to bring a case against an international organisation in the International Court of Justice. Only States may be parties before the Court. As regards whether other alternative dispute settlement mechanisms might be available, the FCO holds no information. The government department which takes responsibility for issues relating to the World Bank is DFID. You may wish to refer your query on this matter to them.”*

7. The Appellant was informed that she had 40 days within which to make an application for an internal review of this decision if she was dissatisfied. She did not make any application until 22 July 2010. She asked the FCO to reconsider its response and appeared to argue that information relevant to her request must be held by the FCO as there must be a procedure by which claims against an international organisation can be dealt with justly. She suggested that as the WBG could apply to the International Court of Justice (the 'ICJ') for advisory opinions, it should also be able to be a party to proceedings brought before the ICJ.
  
8. The FCO replied to this on 20 August 2010. It reiterated that while the World Bank, as a specialised agency of the United Nations, could request an advisory opinion of the ICJ, the original response is accurate: the United Kingdom cannot bring a case against an international organisation in the ICJ, only States may be parties. It also repeated that the FCO holds no information in relation to alternative dispute settlement mechanisms.

#### The complaint to the Information Commissioner

9. The Appellant complained to the Commissioner on 24 August 2010.
  
10. The Commissioner commenced an investigation, requiring the FCO to answer additional questions in respect of the extent and quality of the search, in respect of policies for document retention and in respect of the practice of seeking legal opinions within the FCO.
  
11. The Decision Notice was issued on 5 May 2011.
  
12. In summary, the Commissioner concluded that, on the balance of probabilities, the FCO did not hold the requested information and was not in breach of s1(1)(a) of FOIA.

The Appeal to the Tribunal

13. By Notice of Appeal dated 31 May 2011, the Appellant appeals against the Commissioner's decision.

14. The Tribunal joined the FCO as Second Respondent.

15. The Appellant is not represented in these proceedings and has submitted detailed submissions supported by other material which she considers the Tribunal should take into account when deciding this Appeal.

16. The Ground of Appeal has been identified as follows:

*The IC erred in concluding, on the balance of probabilities, that the FCO did not hold the information requested in part (d).*

17. The FCO submits that the first issue that arises for consideration is whether there was any valid request for information under FOIA made in part (d). It submits that part (d) contains a request for an opinion on a question of international law and not a request for recorded information under FOIA.

18. The Appeal was determined at a hearing on the papers on 11 November 2011.

19. The Tribunal was provided in advance with an agreed Bundle of material, a bundle of authorities and written submissions from the parties. Although we do not refer to every document, we have had regard to all the material before us.

The Powers of the Tribunal

20. 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.*

21. 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.

### The Legal Framework

22. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.

23. Section 8(1) of FOIA provides that any reference in the Act to a “request for information” is a reference to such a request which-
- (a) is in writing,
  - (b) states the name of the applicant and an address for correspondence, and
  - (c) describes the information requested.

### Submissions and Analysis

#### *Did the Appellant make a request for information under FOIA?*

24. The FCO submits that part (d) [as set out in paragraph 5 above] does not amount to a request for information at all within the meaning of FOIA but amounts to a request for new information, that is, an opinion on a question of international law.
25. On an examination of part (d), it contains two separate questions, although the syntax of part (i) does not make it clear whether it is a statement of fact or a question:
- (i) can the FCO take up a case with the ICJ on behalf of a British citizen who has been the victim of serious (felonious) misconduct and denial of justice at the hands of an international organisation? (“the ICJ request”);
  - (ii) if not, what alternative jurisdiction or procedure must be established? (“the alternative jurisdiction request”)
26. The section 1(1) duty under FOIA extends only to recorded information that is held by a public authority at the time of the request; there is no obligation to answer questions generally or to create new information.
27. We agree with the FCO that part (i) of (d) was not a request for recorded information but was a request for an answer on an issue of



international law. The FCO answered this question even though it was not regarded at the time as a valid request for information. In doing so, it appears that the Appellant was given the impression that she had made a valid request for information under FOIA. A more appropriate course for the FCO may have been to explain that (d) was not a request for information and she should specify what recorded information she sought.

28. In respect of part (ii) the FCO submits that there are two possible interpretations:

(1) a literal interpretation requesting an opinion on the interpretation of what the Appellant refers to as the “Specialised Agencies Convention” and what the FCO believes to be the “Convention on Privilege and Immunities of Specialised Agencies”.

(2) A broader interpretation, focussing on the broader factual background that the Appellant was looking for redress against the WBG, as a request for information held by the FCO on alternative jurisdictions or procedures in which a complainant may establish a claim against the WBG.

29. The FCO adopted the broader interpretation and carried out relevant searches. During the course of this Appeal, the FCO, stating it acted out of courtesy and in the hope that the costs of litigation might be avoided, offered to search again for information that fell within this broader interpretation of part (ii). The Appellant regarded this as a “bizarre rewriting” of her request and holds to her original wording.

30. We agree with the FCO that part (ii) of (d) was not a request for recorded information but was a request for an answer on an issue of international law. The FCO searched for information that it might hold in relation to the broader interpretation of the request and in doing so, it appears that the Appellant was again given the impression that she had made a valid request for information under FOIA.

31. We do not consider (d) amounted to a request for information under FOIA and therefore the FCO was not obliged to comply with the section 1(1) duty. If we are wrong in that respect, we have gone on to consider the ground of appeal identified by the Appellant.

*Did the Commissioner err in concluding, on the balance of probabilities, that the FCO did not hold the information requested in part (d).*

32. There is no dispute that the duty under section 1(1) of FOIA, to disclose information upon request, extends only to recorded information. It does not place an obligation on a public authority to answer questions generally or to create information that is not held in recorded form at the time of the request.

33. There can never be certainty that a document might not be undiscovered within the records held by a public authority. It is accepted by the parties that the standard of proof to be applied is the civil standard, that is the balance of probabilities. A differently constituted Panel of this Tribunal in *Bromley v IC and Environment Agency*<sup>1</sup> (“*Bromley*”) rejected arguments that certainty was the test to be applied in determining whether information was held for the purposes of FOIA and described the balance of probabilities as the “normal standard of proof.” We are content that this is the correct standard of proof to be applied by this Tribunal.

34. 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,*

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<sup>1</sup> (EA/2006/0072)

*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.”*

35. In response to questions from the Commissioner during his investigation, the FCO set out the details of the searches that were carried out for information falling within the scope of the request.
36. The FCO submits that it carried out not one but two extensive searches in response to the alternative jurisdiction request, consulting with all relevant legal advisers and departments within the FCO. In the second search it uncovered one document, a UN General Assembly Report from 2007 in relation to the administration of justice for “staff and non-staff personnel” of UN organisations (including the WBG) (the “2007 UN Report”).
37. We have been provided with a witness statement from Nicholas Parkinson, at the material time Head of the Office Management and Registry Section within the Legal Advisers department of the FCO. In this role he was responsible for leading the team that provided administrative support to the Legal Advisers department.
38. Mr Parkinson explains that he was the principal person responsible for conducting the searches for the information requested by the Appellant; that part (i) was not considered to be a valid request for information under FOIA but was answered as a matter of courtesy and that part (ii) was interpreted as a valid request for information. He states that he initially:
  - Undertook a search of the Legal Advisers folder on both the Universal and Confidential tiers of the shared computer hard drive in respect of the whole of question (d). Although he did not keep a record of the search terms used, to the best of his

recollection this would have included terms such as “World Bank Group”, “felonious misconduct” and “alternative dispute mechanism”.

- Consulted with various legal advisers within the FCO who were asked to search for information about part (d), including the legal advisers responsible for advising Global Economic Group, the Department for International Development, the Consular Directorate, and the International Organisations Directorate.
- Contacted the Global Economic Group to search for any relevant information in regard to part (d) [and (e)].
- Contacted the Consular Directorate, mainly to seek views on part (i) of (d).

39. He says that he communicated the clear opinion of an FCO Legal Adviser that the FCO could not take up a case with the ICJ on behalf of a British citizen as only States could be a party before the Court, and that the FCO holds no information as regards whether other alternative dispute settlement mechanisms might be available. After receiving further correspondence from the Appellant he reiterated this initial response and emphasised that although the question was answered out of courtesy it was not a valid request for information under FOIA.

40. During this Appeal process, he explains that it was agreed out of courtesy and in the hope of avoiding further litigation to make a proposal to the Appellant for a further search to be carried out. The proposed search terms were sent to the Appellant for her comments on the scope, however, she mistyped the names of the recipients in her reply email and the search proceeded on the basis as proposed by the FCO.

41. Mr Parkinson carried out a second search using the search terms “World Bank”, “dispute” and “claim”.

- He reviewed the Legal Advisers folder on both the Universal and Confidential tiers of the shared hard drive.
- 54 documents were revealed on the Confidential tier but none relevant to the request.
- The Universal tier search was more onerous due to the volume of data stored and the fact it is a network drive. Having already spent several hours searching the folder with over 500 documents revealed, none of which appeared to be relevant on a quick perusal, Mr Parkinson formed the view that it would not be practicable to review the entire folder. Having consulted with others, it was decided that in order to quicken the process, the searches would be limited to the four relevant sub-folders: Consular (covering documents relating to assistance provided to members of the public), Globalisation (covering documents relating to the Global Economic Group, the team with lead responsibility for the World Bank within the FCO), International Organisations Department (covering any more general work about the UN and International Organisations) and Privileges and Immunities (covering any issues relating to the immunity of the World Bank). This revealed 27 documents, three of which were emails relating to the Appellant's request for information. Mr Parkinson reviewed the other 24 and established that only one contained information that was possibly relevant to alternative dispute mechanisms for complaints against the WBG. This was the 2007 UN report and was disclosed to the Appellant.

42. The Appellant submits that this report does not "address the questions" she posed to the FCO and has suggested a series of different search terms should have been used. She submits that the keyword search should have included the following (non-exhaustive) "search terms":

- "international law" [pertaining to] the "Specialised Agencies"

- “immunity(ies)” [appertaining to criminal (felonial) or other serious misconduct or wrongdoing by international organisations]
- “international jurisdiction” and “alternative jurisdiction” and “procedure” [for criminal (felonial) acts and other serious wrongdoing committed by an international organisation]
- “international organization(s)” [responsibility and liability for criminal (felonial) acts under international law]
- “denial of justice” [by an international organisation under international law]
- “espousal of claim” [though] “diplomatic protection” or other “legal protection”
- “state responsibility”[for] “international illegality” or “international wrong [wrong-doing]”
- “obligation(s) of states” [under international law for criminal (felonial) and other wrongful acts]

43. Although this point does not arise in this Appeal, we note that the search proposed by the Appellant encompassing such wide and varied terms could have resulted in the FCO relying on the exemption from complying with a valid request for information under FOIA provided in section 12 of FOIA where the cost of complying would exceed the relevant appropriate limit. Mr Parkinson addresses this point in his witness statement and estimates that searching the Confidential and Universal tiers of the shared hard drive alone would take over 26 hours, exceeding the costs limit, even without taking the time already spent into account.

44. In respect of the quality of the search, the Appellant submits that the FCO failed to carry out a reasonable search for the information requested. In her final written submissions, the Appellant deals solely

with a new issue, identified as “diplomatic protection”. She concludes by submitting that the “FCO must be presumed to hold recorded information on ‘diplomatic protection’ under the law of State responsibility which responds to the request for information.” This is not the same as the request made in (d) and we do not consider that these submissions give us much assistance in respect of the issue whether the Commissioner erred in concluding, on the balance of probabilities, that the FCO did not hold the information requested in part (d).

45. The Appellant has provided her own witness statement which runs to 48 pages and deals in the main with her allegations about misconduct of the WBG. We have read this statement carefully but again do not consider that it gives us much assistance or provides any support to her submission that the FCO must be presumed to hold relevant information.
46. We have also been provided with a statement and lengthy supporting documentation from a former employee of the WBG. This witness states that the Foreign Office *“possessed documents responsive to [the Appellant’s] request for information concerning “felonious misconduct” committed by officials of the World Bank Group and subject to Appeal number EA/2011/0126 because I provided such documents to the Foreign Office.”* The witness does not however provide any further details of what those documents contained, when they were supplied nor to whom and the witness statement makes no further reference to the FCO. The witness appears to have misunderstood the subject matter of this Appeal which is concerned only with part (d) of a request made on 10 February 2010 and we are therefore not able to draw any assistance or support from this witness’s statement. The statement relates mainly to wholly different matters concerning that witness and her own allegations against the WBG.
47. Even if we were to conclude that the FCO should hold the information that the Appellant requested, it does not follow that the FCO does, in

fact, hold that information. Our task is to consider whether the Commissioner was correct to conclude on the balance of probabilities that the information requested was not held.

48. We are satisfied on the evidence we have seen – both from correspondence in the bundle of material provided to us and from Mr Parkinson’s statement - that the FCO carried out an extensive search for information that might fall within the scope of part (d), on a generous rather than literal interpretation. In our opinion it properly analysed the requests and thereafter undertook a reasonable search, and that the scope of the search that it made was more rigorous and efficient than could have been expected.
49. It is clear from the evidence that the Commissioner’s investigation went much further than merely accepting bald assertions from the FCO that it did not hold the information requested and he required further details that were provided by the FCO in respect of the extent and quality of the search, in respect of policies for document retention and in respect of the practice of seeking legal opinions within the FCO.

#### Conclusion and remedy

50. For the reasons set out in detail above, we have concluded that part (d) did not amount to a valid request for information under the FOIA s 8 and specifically s. 8 (1) (c) and that the FCO was not obliged to comply with the section 1(1) duty.
51. If we are wrong about that, we are satisfied that the Commissioner applied the correct standard of proof and that he was both entitled and correct to reach the decision that, on the balance of probabilities, the FCO did not hold information falling within part (d) of the request. Accordingly, we dismiss this appeal.
52. Our decision is unanimous.



Other matters

53. We have been referred to previous decisions of this Tribunal involving the same Appellant. The Appellant has made serious allegations concerning the WBG. She has brought these matters to the attention of numerous relevant bodies and individuals and remains dissatisfied with the responses. While the Appellant has a genuinely held grievance, this Tribunal does not have any jurisdiction in respect of these matters.

54. We would observe that in our opinion the Appellant obfuscates the core of her arguments by providing voluminous and irrelevant material to the Tribunal, often without identifying which part or parts of lengthy documents she is relying upon. In particular, in relation to this Appeal, the Appellant confirmed the scope of the case to the Commissioner at an early stage of his investigation, yet has continued to add to and extend the issues she submits are relevant. The Appellant is a litigant in person and has now had her attention drawn on several occasions to The Tribunal Procedure (First-tier) Tribunal (General Regulatory Chamber) Rules 2009 (the 'Rules'), and in particular to the overriding objective of those Rules and the obligations of each party, and to the limits of this Tribunal's jurisdiction.

Signed:

Annabel Pilling

Tribunal Judge

Dated 21 December 2011