



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

Case No. EA/2013/0160

ON APPEAL FROM:

**Information Commissioner's
Decision Notice No: FS50477818
Dated: 10 July 2013**

Appellant: DONNIE MACKENZIE

First Respondent: THE INFORMATION COMMISSIONER

Second Respondent: THE MINISTRY OF DEFENCE

Heard at: Inverness

Date of hearing: 20 January 2014

Date of decision: 17 February 2014

**Before
CHRIS RYAN
(Judge)
and
MALCOLM CLARKE
JEAN NELSON**

Attendances:

The Appellant appeared in person

The First Respondent did not appear and was not represented

The Second Respondent was represented by Julian Blake of Counsel

Subject matter: Whether information held s.1

DECISION OF THE FIRST-TIER TRIBUNAL

The Appeal is dismissed.

REASONS FOR DECISION

1. We have decided that the Ministry of Defence was justifying in asserting that it did not hold any information about “directed energy” technology having been used on persons within the UK.

Background

2. The Appellant has a concern that governments around the world may have developed devices capable of affecting various functions of the central nervous system of humans by directing at them a beam of, for example, electromagnetic energy. He believes that he has credible evidence demonstrating that substantial work in this field was undertaken by the USA and USSR in the 1970s and/or 1980s designed to create devices that could affect the behaviour of an individual or group.
3. The Appellant had come across a document created by the Ministry of Defence in June 2002 called “Joint Warfare Publication 3-80: Information Operations”. We will refer to it as “JWP 3-80”. Although the front page of JWP3-80 states that it was intended to be released by the UK Government to recipient Governments for defence purposes (and to be disclosed only within the defence department of any recipient Government) at some stage it entered the public domain where it came to the attention of the Appellant.
4. JWP3-80 states that its purpose is to assist those planning and executing Information Campaigns. Such a campaign is defined within the document as the co-ordinated use of all or any military capability in order, typically, to undermine an adversary’s will to fight. Such a campaign will include Information Operations and Media Operations. Information Operations (“Info Ops”) are said to be intended to:

“...affect, degrade, disrupt, deceive, destroy or deny [the ability to] bolster, impose, apply and sustain [the target’s] Will and to exercise effective command.”

5. Info Ops are said to achieve this by using various tools to influence an adversary’s will and undermine its capacity to take action. A description of each of the available tools appears in Annex 2A of the document. Each tool is identified in a sub heading and is then described in the following text. The tools include “Psychological Operations”, “Deception”, “Electronic Warfare” and “Computer Network Operations”. Included in the subheadings, at paragraph 2A8, is “Emerging Technologies”, which is followed by this text:

“Emerging Technology includes the use of directed energy weapons such as Radio Frequency, Laser and acoustic and other non-lethal weapons. Their use may offer alternatives to the more direct use of physical force with the possibility of reduced collateral damage and thus greater public acceptability of any attack however, additional legal constraints may limit their availability”.

The Request for Information and the Information Commissioner’s investigation of the MOD’s response

6. On 4 August 2012 the Appellant wrote to the MOD in the following terms:

*“(i) With reference to section 2A8 ‘Emerging Technology’ of MOD document JWP3-80 (ics-www.leeds.ac.uk/papers/pmt/exhibits/2270/jwp3_80.pdf), can you confirm or deny that directed energy devices are being used on persons within the UK?
(ii) If the answer is in the affirmative; can you tell me if there is any specific policy or doctrine in place to instruct against misuse?
(iii) Could you please specify the name and nature of any such document?
(iv) Can you tell me the appropriate means, channel or method by which someone might complain if they believed that they were the subject of the misuse of such technology?”.*

7. The request was made under section 1 of the Freedom of Information Act 2000 (“FOIA”), which imposes on the public authorities to which it applies an obligation to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA.
8. The MOD’s initial response informed the Appellant that directed energy devices were not being used on people within the UK but later, on reflection, it decided that the correct response in circumstances where

no relevant activity had taken place was to provide a response confirming that no recorded information was held in respect of both the first part of the request quoted above and the contingent supplemental requests. The Appellant has characterised this adjustment of the MOD's position as betraying uncertainty as to whether or not it held the requested information. In our view it represents a sensible clarification in line with the definition of information ("information recorded in any form") contained in FOIA section 84.

9. The MOD also decided, on reflection, to disclose some recorded information it held regarding the deployment of a Long Range Acoustic Device during the 2012 Olympics, even though it was not operated. There was some discussion during the appeal hearing as to whether this information should have been disclosed at the outset but nothing turns on the point at this stage.
10. Following an internal review of the MOD's decision, which generated the same response, the Appellant complained to the Information Commissioner about the way his information request had been handled. Following an investigation the Information Commissioner issued a Decision Notice on 10 July 2013, in which he concluded that, on the balance of probabilities, the MOD did not hold any further information falling within the scope of the information request and that its response to the request for information had therefore been justified.

The Appeal to this Tribunal

11. The Appellant filed an appeal against the Decision Notice on 5 August 2013. His Grounds of Appeal, supported by a document called "Support Information" filed a little later, challenged the MOD's approach on two bases. First, it had wrongly limited the scope of its search for information by failing to include information about electronic warfare, despite the fact that directed energy technology fell within the meaning of that phrase, and had confused directed energy devices with directed energy weapons. The second broad ground of appeal was that the MOD's search for information had, in any event, been inadequate and/or incomplete.
12. In support of the first ground the Appellant drew attention to a number of published items suggesting that his broad definition was to be preferred over what he described as the MOD's "private document definitions". He drew attention, too, to elements of correspondence emanating from the MOD, which he said supported his case that the MOD had failed to take account of the difference between directed energy devices and directed energy weapons. In support of the second ground of appeal the Appellant raised a number of criticisms of the MOD's written communications to himself or the Information Commissioner. His argument, in effect, was that the cumulative effect of those criticisms undermined the credibility of the MOD's assertion that, having carried out a wide ranging and thorough search, it was

justified in asserting that it did not hold any information falling within the scope of the information request.

13. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, he ought to have exercised his discretion differently. We may, in the process, review any finding of fact on which the notice in question was based. Frequently, as in this case, we find ourselves making our decision on the basis of evidence that is more extensive than that submitted to the Information Commissioner.
14. The additional information in this case took the form of a witness statement signed by Andrew Tranham, the Deputy Head of the Information Rights Team at the MOD. He described the scope of the search for information that was carried out on receipt of the original information request and the, more extensive, search carried out at the internal review stage. Copies of the email exchanges created at the first stage were provided as part of the bundle assembled for the purpose of the Appeal and Mr Tranham exhibited to his witness statement those coming into existence during the course of the second stage. Mr Tranham made clear that some of the enquiries had been pursued by telephone and so were not evidenced by written communications. He also made clear that the searches covered only the area of directed energy technology and had not extended to broader subject matter, such as Information Operations as a whole or other tools available to Information Operations (in particular, Electronic Warfare). Mr Tranham stressed the other limitation on the searches he supervised, which was that it focused on the use of directed energy technology on persons within the UK, in line with the limitation imposed by the information request itself.
15. The witness statement anticipated an argument that consumed quite a lot of time during the hearing, namely, the previously mentioned distinction between Directed Energy Devices and Directed Energy Weapons. Mr Tranham confirmed in his witness statement that the MOD held no information on either category (beyond the LRAD device mentioned above). He pointed out that the copy emails provided to us, created during the course of the searching process, set out the exact wording of the original information request and that although this mentioned Directed Energy Devices the paragraph from JWP3-80 to which it referred spoke of Directed Energy Weapons.
16. Although an earlier direction issued by the Tribunal had stated that it would not expect oral evidence on behalf of the MOD, Mr Tranham attended the hearing and answered questions put to him by the Appellant and the Tribunal panel. In the process he clarified the degree to which he had personally directed and monitored the

searching process. He also explained that his approach had been to treat Directed Energy Devices as falling within the narrower class of Directed Energy Weapons if they were designed to harm or kill a human.

Analysis

17. In light of Mr Tranham's evidence we have concluded that there is nothing in the Appellant's argument that the MOD's search had been flawed due to a misunderstanding about the distinction between a Directed Energy Device and a Directed Energy Weapon. The search had covered both and had produced no information about the use of either on any person within the UK.
18. We have carefully reviewed the materials presented by the Appellant in support of his argument that his information request should have been interpreted as covering more extensive categories of technology than it did. We are satisfied that, while it is clear that others may have drawn the boundaries of directed energy technology more broadly than did the authors of JWP3-80, the scope of the Appellant's information request is fixed to the definitions set out in that document. The Appellant chose to couch his request in terms that adopted paragraph 2A8 and the MOD was justified in basing its information search on the categories of technology referred to there and not any others identified in other sections of the document under other sub-headings.
19. We are also satisfied, on the basis of the materials made available to us, including the evidence of Mr Tranham, that the Appellant's more general criticisms of the approach adopted by the MOD and the thoroughness of the Information Commissioner's investigation are without foundation. The evidence of Mr Tranham, supported by the copy emails referred to, satisfy us that the parameters set for the information search were entirely appropriate and we were presented with credible evidence that the searches had been conducted with appropriate care and rigour. The Appellant produced no evidence to undermine the result of the information search reported by the MOD, although he clearly believes that there is, as he said in his skeleton argument, "an untold history" of experimentation by the MOD in this field. There is certainly evidence, which he had presented during the course of the Information Commissioner's investigation, that:
 - a. People in military circles have talked publicly about the scope for technology to influence the behaviour of adversaries and others (although, even then, it was not clear that directed energy was included among the categories of technology being discussed);
 - b. The Defence Science and Technology Laboratory (the MOD's "in house" science and technology organisation) has expressed the view that the electromagnetic spectrum is capable of being used to cause physical destruction and other, unspecified, effects on an enemy; and

- c. When answering other requests under FOIA the MOD has accepted that it does hold information on directed energy technology,

However, none of this evidence assists the Appellant. His request for information was not concerned with the MOD's possible capability in respect of this form of technology, but its application of that technology to people within the UK.

Conclusion

20. We are satisfied that, in the absence of evidence undermining the apparent rigour and focus of the MOD's information search, the fact that no relevant information came to light clearly justifies the conclusion, on the balance of probabilities, that the MOD was correct in asserting that it did not hold any information falling within the scope of the Appellant's request for information. The Information Commissioner did not therefore fall into error in reaching the conclusion recorded in his Decision Notice. The appeal against that Decision Notice should therefore be dismissed.

21. Our conclusion is unanimous.

Chris Ryan

Judge
17 February 2014