



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2016/0314

**Heard at Fleetbank House, London EC4
On 26 September 2017**

**Before
CHRIS RYAN
JUDGE
ROGER CREEDON
DAVID WILKINSON
TRIBUNAL MEMBERS**

Between

MEHDI KHOSRAVI

Appellant

and

INFORMATION COMMISSIONER

First Respondent

and

DEPARTMENT FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Second Respondent

DECISION AND REASONS

Attendances:

The Appellant represented himself

The First Respondent did not attend and was not represented

For the Second Respondent: Jennifer Thelen of Counsel

Subject matter: FOIA: Whether information held s.1

GENERAL REGULATORY CHAMBER

DECISION OF THE FIRST-TIER TRIBUNAL

The appeal is dismissed

REASONS FOR DECISION

Introduction

1. We have decided that the Information Commissioner was right to conclude, in her Decision Notice dated 1 December 2016 (FS50639686), that the Second Respondent did not hold the information requested by the Appellant at the time of the request and that the Appeal should therefore be dismissed.

The Appellant's information request and the Decision Notice

2. On 18 April 2016, the Appellant wrote to the Department for Trade and Industry (now the Department for Business, Energy and Industrial Strategy and referred to in this decision as "the Department"), asking it to disclose a report on an investigation by the Companies Investigation Branch into allegations that British American Tobacco had been involved in cigarette smuggling ("the Report").
3. Under section 1 of the Freedom of Information Act 2000 ("FOIA"), the Department, as a public authority, is obliged to disclose requested information unless certain conditions apply or the information falls within one of a number of exemptions set out in FOIA.
4. On 23 May 2016, the Department wrote to the Appellant to inform him that it had searched its records in both electronic and hard copy format and did not hold the requested information. That position was maintained following an internal review carried out at the Appellant's request, leading to the Appellant complaining to the Information Commissioner about the way his information request had been handled.
5. The Information Commissioner, having investigated the matter, issued the Decision Notice, in which she decided that, on the balance of probabilities the Department did not hold the requested information at the time when it received the information request. She expressed herself satisfied, on the basis of information and explanations provided by the Department, that it had conducted a thorough search, based on a set of search terms that were appropriate in the circumstances, and had not succeeded in locating a copy of the report.
6. The Department's explanations, on which this assessment was based, had been set out in a single letter, written to the Information Commissioner on 24 October 2016 and responding to a number of questions which the Information Commissioner had posed. In answer to a question as to what searches had been carried out the Department stated:

"Searches were conducted across [the Department's] paper records, across the Department's electronic records management system, Alfresco, and older legacy electronic records. The Department's Records Management (RM) team also searched listings of SECRET and TOP SECRET records – these records are not held in Alfresco, which holds information classified below SECRET.

"[The Department] underwent a major IT transformation between 2012 and 2015. All of the shared drives across the department were closed and information was transferred into Alfresco, our new RM system, as were records from Matrix, the electronic RM system previously used by the Department. If the information was held electronically, it would now be held in Alfresco or as a legacy record."

The same letter set out the search terms that had been used to:

- (a) search metadata relating to paper files - the metadata was said to be held on Alfresco *"alongside fully electronic records"*;
- (b) *SECRET and TOP SECRET records; and*
- (c) *The electronic records held on Alfresco.*

7. The Department's letter went on to explain that the searches had led to the location of 5 paper files, which were searched manually without finding the withheld information. It also explained, in answer to a question by the Information Commissioner about its document retention policy and records, in the following terms:

"[The Department] reviewed records in accordance with the Public Records Act (1958), using the Grigg methodology (i.e. reviewing records manually at 8 and 18 years) to identify records for transfer to The National Archives (TNA) under the 20 year rule.

[The Department] reviewers completed reports on sets of files to be transferred to TNA and those decisions are verified and approved by TNA. Record review reports are stored in our electronic records management system and relevant information would have been identified by the searches described above had it existed."

8. The Information Commissioner accepted those explanations without challenge and proceeded to record her decision.

The Appeal to this Tribunal

Written submissions and the first scheduled hearing

9. On 23 December 2016, the Appellant filed an Appeal against the Decision Notice with this Tribunal.
10. 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, she 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.
11. The Appellant's Grounds of Appeal challenged the Information Commissioner's finding. He suggested that, as newspapers had reported in 2004 that the Government of the day had decided that the report should at that stage remain confidential and not be published, it must have existed and must remain in existence. He also stated that the report was important, had cost the tax payer substantial sums to produce and

the investigation behind it had taken 4 years to complete. In those circumstances, he said, it was not open to the Department simply to claim that it could not find it.

12. The Information Commissioner submitted a written Response to the Appeal in which she said that the Grounds of Appeal did not set out any grounds for saying that the Decision Notice was not in accordance with the law. She argued that she had assessed the quality of the Department's initial analysis of the information request, the scope of the search that it made on the basis of that analysis and the rigour and efficiency with which the search had then been conducted.
13. The Appellant opted to have the Appeal heard at a hearing rather than on the papers, which he was entitled to do. However, the Information Commissioner, as the Respondent, decided not to attend, but to rely on the terms of her written Response.
14. In the event, the Appellant was unwell on the day of the hearing and did not attend. However, we took the opportunity to discuss a number of concerns arising from our pre-reading of the agreed bundle of relevant documents that had been supplied. We were surprised that a document as important as a report on serious allegations levelled at a major corporation should have apparently simply been lost or destroyed without any record of its fate having been retained. This led us to look again at the Department's explanation of the efforts made to locate the requested information and to conclude that, even had the Appellant been available, we would not have felt able to determine the Appeal without further information. Accordingly we adjourned the hearing and directed that the Department be joined as a party and should file evidence to explain the Department's policy on the archiving and destruction of documents. The Case Management Directions that included those provisions were made on 19 April 2017. It recorded the concerns we had about the Department's explanations (as summarised in paragraphs 6 and 7 above) in the following terms:

"4. The points arising are as follows:

4.1 The Department has stated that its "Alfresco" records management system was interrogated in an attempt to locate the report referred to in the information request, but that this would not include any document marked "secret" or "top secret". The Department informed the Information Commissioner that it "searched listings of SECRET and TOP SECRET records". However, it is not clear to the Tribunal what form those "listings" took, in particular whether they were in paper or electronic form. Nor is it clear to us how the search of those materials was structured and performed.

4.2 The emphasis of the explanation provided to the Information Commissioner was on structured electronic searches of the "Alfresco" system, based on a number of keywords. A significantly less detailed explanation was provided of:

4.2.1. what the "legacy electronic records" consisted of or how they were searched; and

4.2.2. the "paper records" that were searched.

4.3 It is not clear to us whether any attempt was made, particularly in relation to the search in paper records, to:

4.3.1. identify, by inquiry of relevant staff members, whether the material was likely to be under the control of any particular group or individual (such as the individuals involved in the investigation); or

4.3.2. focus the search (either as the result of such inquiries or otherwise) on the section of the Department responsible for Company Investigations or any members of staff known to have worked in that section at the time.

4.4 The Tribunal would like to know whether, at the relevant time, the Department operated a system under which any file or document that acquired prominence (because, for example, it had been mentioned on the floor of the House of Commons or in Committee) should be marked in any way to alert archivists and others to that status. In this case, of course, the investigation appears to have led to at least two requests for information under the Code of Practice that preceded the FOIA and at least one under FOIA itself, as well as having attracted considerable media attention. If any such "marking" was generally applied at the time, the Tribunal would like to have as much information as is still available about the system deployed and the impact it would be likely to have had on those considering retention of the BAT Report under the Public Records Act 1958.

4.5 It would assist the Tribunal to have more information on:

4.5.1. what is meant by the "Grigg methodology" apparently applied when considering documents under the Public Records Act;

4.5.2. the date on which the requested material was, or would have been, assessed;

4.5.3. what policy or general practice existed at the relevant time regarding the retention of section 447 reports generally;

4.5.4. what record was made, or would normally have been made, when a document as important as a Company Investigation Report was assessed for archiving or destruction;

4.5.5. the criteria applied when that assessment was carried out.

4.6 Would the possible need for information about a Company Investigation (which may presumably include the Report itself) to be made available to regulators and other, pursuant to section 449 of the Companies Act and the schedules referred to in it, have been taken into account on the occasion when archiving or destruction was under consideration and, if so, what is known about the impact of those criteria in this case?

4.7 Would it be normal for an Investigation Report involving a company of the size of BAT and allegations of criminality, which achieved some notoriety at the time (including potential impact on the selection of a Political Party leader), to be retained under the Public Records Act 1958 and, if so, can any explanation be provided for it having apparently disappeared in this case, with no record retained of its fate?

5. The Department should not feel itself constrained by the issues mentioned, but should review and expand on the information it provided to the Information Commissioner as it sees fit with a view to providing the Tribunal with the fullest explanation to enable it to determine the issue arising on this Appeal."

The joinder of the Department and the filing of evidence

15. After the Department had been joined as a party it arranged for two witness statements to be filed, one by Mr Paul Welch, the Department's Records Officer and another by Mr Jonathan McGurk, the Head of the Technical Team within the Investigation and Enforcement Services division of the Insolvency Service.

16. Mr Welch explained that in 2006 responsibility for Companies Investigation was transferred to the Insolvency Service. Although the Insolvency Service is an Executive Agency of the Department it has its own information and communication technology systems that are not accessible by officials in the Department who are not part of the Insolvency Service. These facts had been overlooked when the Appellant submitted his information request, with the result that no search was carried out in the records of the Insolvency Service at that time. However, after the Department heard that an appeal to this Tribunal had been launched, it decided, in January 2017, to establish whether it was possible that relevant information was held by the Insolvency Service. The enquiries nevertheless appear to have progressed at a leisurely pace, because the Department had not informed the Information Commissioner or the Appellant of the inadequacy of its original research by the date of the first scheduled hearing of the Appeal or the issuing of the Tribunals Case Management Directions. Nor had the Department disclosed that it had by that time established that in the past the Insolvency Service had held 53 boxes of physical case records which appeared to have had some relevance to the Report, but that they had been destroyed in stages from 2007 onwards.
17. Mr Welch also described the steps taken by the Department to investigate the transfer to the Insolvency Service and/or destruction of all 53 boxes. Neither the Department nor the Insolvency Service had been able to confirm whether the requested information was contained within the boxes. Mr Welch also clarified the searches it had conducted in order to locate the requested information, in response to the issues raised by us in the Case Management Directions. However, it is apparent that the searches were bound to have ended in failure, given what is now known about the location of any relevant information within the records held by the Insolvency Service.
18. Mr McGurk described the records management system maintained by the Insolvency Service since the boxes referred to above were first archived in 2005. It recorded the archiving of the boxes, the fact that the Report was contained in them, their periodic review for destruction and final destruction some years before the Appellant submitted his information request. Mr McGurk also explained that none of the individuals who conducted the investigation into BAT were still employed within the Insolvency Service and therefore available to throw any further light on the possible retention of any copies of the Report outside the official records management system. He did, however, provide explanations in response to the points raised in paragraphs 4.3 to 4.6 of the Case Management Directions. The Appellant raised no more objection or challenge to those explanations than he did to any other element of the either witness statement. In light of the clear explanation given about the fate of all 53 boxes, we accept Mr McGurk's evidence on those points also.

The Second Hearing

19. The Department was represented at the re-convened hearing on 26 September 2017 by Jennifer Thelen of counsel. Mr Khosravi represented himself and both he and members of the panel were provided with the opportunity to ask the witnesses questions. As mentioned, Mr Khosravi did not challenge the veracity of what either witness said in either his questioning or his oral submissions during the hearing. Instead, he simply explained his belief that he had been a victim of corruption in respect of BAT's activities and stressed the importance of the Report being made

public. He did not wish to make any point about the manner in which searches had been carried out but simply reiterated that, against the background of corrupt practice it should not be permissible for the government to claim that no copy of the Report could be found. He believed that it still existed.

20. Ms Thelen for the Department argued that a fair review of the steps taken to locate a copy of the Report should lead us to conclude that, on the balance of probabilities the Department no longer held a copy of it. There was, she said, no evidence pointing the other way and the evidence on the attempts to locate the Report was clear, consistent and unchallenged.

Our Decision

21. We share the Appellant's surprise that no copy of a document, having the importance and notoriety of the Report, should have been retained. It was for this reason that we made arrangements to be provided with more information than the one letter of explanation on which the Information Commissioner relied. In the event, we have been provided with a considerable body of evidence which demonstrates the shallowness of the information set out in that letter. However, the evidence also demonstrates that a thorough and properly targeted search was conducted, once it had become apparent that it was the Insolvency Service and not the Department that was likely to hold the information. The evidence also demonstrates to our satisfaction that no copy of the Report was located. This leads us to conclude that, on the balance of probabilities, the Department did not hold a copy of the Report at the date when the Appellant submitted his request for information.
22. It follows that the Information Commissioner was entitled to conclude as she did in her Decision Notice, (even though it is now apparent that she reached her decision on the basis of inaccurate and incomplete evidence) and that the Appeal should therefore be dismissed.
23. Our decision is unanimous.

Signed

Judge Chris Ryan
Date: 08 January 2018