



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

**Appeal Reference: EA/2019/0282**

**Heard at Field House, London  
On 21 January 2020**

**Before**

**JUDGE HAZEL OLIVER**

**Between**

**PROFESSOR TIM CROOK**

Appellant

**and**

**INFORMATION COMMISSIONER**

Respondent

**Appearances:**

Appellant – in person  
Information Commissioner – did not attend

**DECISION**

The appeal is dismissed.

**REASONS**

**Background to Appeal**

1. This appeal is against a decision of the Information Commissioner (the “Commissioner”) dated 17 July 2019 (FS50788441, the “Decision Notice”). It concerns information sought from the Home Office about information relating to Security Service files of BBC employees.
2. On 8 January 2018 the appellant made the following request for information (the “Request”):

*"I would like to make a Freedom of Information Request for the release of the Security Service Files on the following employees of the BBC:*

*[names redacted]*

*The absolute exemption provision in the FOI does not apply to these requests because prior to the legal constitution of the Security Service in 1989 by the Security Service Act, legal responsibility for all Security Service archives belonged to and still does belong to the Home Office under the Public Records Act 1958.*

*Under this legislation I submit there is no justification for continued retention of these files. All five subjects are no longer alive. The reasons for their surveillance relate to events between 60 and 85 years ago. Because all four made a significant contribution to writing, drama, and broadcasting, the public interest in their disclosure trumps any existing purpose in their concealment.*

*Notwithstanding any position the Home Office has on the above argument, would it be kind enough to pass on my request to the Security Service to consider releasing the content of files on these five people for the purposes of historical and academic research and in the spirit of the Service's generous and helpful release of files relating to key authors, writers and cultural figures of the 20th century."*

3. The Home Office responded on 1 February 2018. It stated that the National Archives may hold information relevant to the Request about one of the named individuals. It would neither confirm nor deny whether it holds the information in relation to the remainder of the Request, in accordance with the exemption in section 23(5) FOIA. The Home Office maintained this position following an internal review.

4. The appellant complained to the Commissioner on 23 September 2018. During the Commissioner's investigation, the Home Office changed its position as follows in a letter dated 16 July 2019, in light of another case involving the appellant:

*"...On reflection, we consider that in this case, as in the Tribunal case, the request is in fact seeking **files held by the Security Service** (i.e. the Security Service's **own** files), rather than simply **Security Service files/information** (i.e. any files/information held by the Home Office containing information received from the Security Service, which may or may not encompass information about the named individuals in the request).*

*Having now redefined the request to **files held by the Security Service**, the appropriate response in this case (as in the Tribunal case) is to confirm that we do not hold any information in scope of the request. The Home Office does not have, and never has had, 'ownership' of the Security Service. Consequently, it does not hold and did not hold at the time of the request, Security Service files (i.e. the Security Service's **own** files)".*

5. The Commissioner issued her Decision Notice on 17 July 2019. She found that, on the balance of probabilities, the Home Office did not hold any information within the scope of the Request. In light of the information provided to her during the investigation, she considered that the Home Office had contacted the relevant business areas, and they conducted searches using appropriate terminology to ascertain whether or not any information was held in respect of the request.

## The Appeal

6. The appellant appealed against the Commissioner's decision on 7 August 2019. The grounds can be summarised as follows:

- a. The information sought is held by the UK's Security Service, and dates from when the Security Service was an executive body operating from within the Home Office, meaning it should be retrieved by the Home Office to meet the Request.
- b. The information was held on behalf of the Home Office by the Security Service under section 3(2)(b) FOIA, as it was held under the legal, constitutional and executive control of the Home Office.
- c. The information sought is central to an academic project. The refusal to provide the information is in breach of the appellant's rights to freedom of expression under the European Convention on Human Rights ("ECHR") and Human Rights Act ("HRA"), and denial of a remedy is breach of Article 13 of the ECHR and HRA – with reference to the European Court of Human Rights ("ECtHR") decision in ***Magyar Helsinki v Hungary***.

7. The Commissioner's response maintains that, on the balance of probabilities, no information within the scope of the Request was held by the Home Office.

- a. The Commissioner was satisfied that the Home Office had carried out a reasonable search, and entitled to accept the word of the Home Office, particularly where there is no evidence of an attempt to mislead.
- b. The relevant time to consider the holding of the information is the time of the response to the Request, and she was correct to conclude that the information was held by the Security Service at the relevant time.
- c. Article 10 is not engaged in this case because the Home Office was not denying the appellant access to information held. It did not hold the information at the relevant time.
- d. There is no evidence that the Security Service is holding the information on behalf of the Home Office.

## Applicable law

8. The relevant provisions of FOIA are as follows.

**1 General right of access to information held by public authorities.**

(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.*

....

(4) *The information -*

- (a) *in respect of which the applicant is to be informed under subsection (1)(a), or*
- (b) *which is to be communicated under subsection (1)(b), is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.*

.....

**3 Public authorities**

- (2) *For the purposes of this Act, information is held by a public authority if—*
  - (a) *it is held by the authority, otherwise than on behalf of another person, or*
  - (b) *it is held by another person on behalf of the authority.*

.....

**23 Information supplied by, or relating to, bodies dealing with security matters**

- (1) *Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).*

- (3) *The bodies referred to in subsections (1) and (2) are—*
  - (a) *the Security Service...*

.....

**58 Determination of appeals**

- (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.*
- (2) *On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.*

9. The bodies listed in section 23(3) are excluded from the definition of “public authority” in Schedule 1 FOIA. This means that the FOIA regime does not apply to the Security Service.

10. In determining whether or not information is held, the standard of proof is the balance of probabilities. It is rarely possible to be certain that information relevant to a FOIA request is not held somewhere in a large public authority’s records. The Tribunal should look at all of the circumstances of the case, including evidence about the public authority’s record-keeping systems and the searches that have been conducted for the information, in order to determine whether on the balance of probabilities further information is held by the public authority. In accordance with section 1(4), the information is that held at the time the request is received.

11. The relevant parts of Article 10 ECHR (freedom of expression) read as follows:
1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...*
  2. *The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security...*
12. Article 13 ECHR (right to an effective remedy) provides:  
*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*

## **Discussion and Conclusions**

13. In making my decision I have considered all submissions and evidence provided by the parties. There was an agreed bundle of open documents. The appellant attended the hearing and made oral submissions. He also provided a bundle of authorities and written submissions at the hearing.

14. In accordance with section 58 of FOIA, my role is to consider whether the Commissioner's Decision Notice was in accordance with the law. As set out in section 58(2), I may review any finding of fact on which the notice in question was based. This means that I can review all of the evidence provided to me and make my own decision.

15. ***Is the information held by the Home Office?*** This is essentially a factual question. FOIA is clear that this relates to information held at the time the request was received. A public authority cannot be required to disclose information that it does not hold. The Commissioner's position is quite simple – the Request is for Security Service files, the Home Office says that these would be held by the Security Service, and the Commissioner was satisfied that the Home Office has carried out a reasonable search at the time of the Request to check that it did not hold the requested information.

16. I have seen the information provided by the Home Office to the Commissioner about searches for the requested information. This shows that searches were conducted by the Historic Review Team ("HRT") and the Office for Security & Counter-Terrorism ("OSCT"). The HRT search involved an electronic search of the in-house file-tracking database for any paper records, including those that had been destroyed or transferred. The OSCT search also involved searching for paper records using an electronic database. In both cases the search was limited to paper records because of the historic dates involved, the years 1930 to 1960. The searches did not reveal any Security Service files that were held by the Home Office, either at the time of the Request or earlier. Having considered this information, I am satisfied that the Home Office had carried out a reasonable search, and on the balance of probabilities they did not hold any Security Service files containing the information sought by the appellant at the time of the Request.

17. The appellant argues that the Home Office was responsible for the Security Service prior to 1989, on the basis that the Security Service was a covert executive body which operated as part of the Home Office. All of the information sought relates to matters and people prior to 1989, and so it is relevant to make his FOIA request to the Home Office. The Security Service

was “of” the Home Office. It is not clear to me that this is a correct analysis of the relationship pre-1989, although the argument was not explored in detail during the hearing. However, in any event, the relevant test is whether information is held at the time of the Request. The test is not whether information may have been held during the time period the Request relates to. As explained above, I have found that the Home Office did not hold any Security Service files containing the information sought by the appellant at the time of the Request – or any Security Service files at all.

18. The Security Service Act 1989 created a separate statutory basis for the Security Service (MI5), confirming that it would continue to operate under the control of a Director-General appointed by the Secretary of State. The appellant argues that the Security Service remains as part of the Home Office, because the Home Secretary is constitutionally and legally responsible for the Security Service. This means that the Home Office is the correct department to answer his Request. I do not agree with this argument. The Security Service is a separate public body from the Home Office. FOIA requires each individual public authority to provide information that it holds in response to a request. It does not require a public authority to obtain information from another public body in order to answer a request. The appellant has asked for specific Security Service files, and I am satisfied on the balance of probabilities that the Home Office does not hold these files. The Home Office does not have any obligation to request these files (if they exist) from the Security Service, which is a separate public body on a statutory basis under the 1989 Act.

19. The appellant also argues that the state/government as a whole has an obligation to answer his Request – if he has made a request to one government department, the state should ensure that this is answered using information available across all departments. Again, I do not agree that this is a correct analysis. FOIA requires each individual public authority to provide information that it holds in response to a request – it does not require a public authority to collate information from elsewhere.

20. The appellant supports his arguments with reference to the ECtHR case of ***Kenedi v Hungary*** (Application no. 31475/05, 26 May 2009). He refers to a domestic court finding in this case that, “*a change in the physical whereabouts of the document did not exempt the Ministry from its obligation to grant the applicant access*”. I do not agree that this is a parallel with the current case, for the following reasons.

21. The applicant in ***Kenedi*** was seeking access to certain documents concerning the functioning of the Hungarian State Security Service. This access was refused, the applicant obtained a court judgment which authorised access for the purpose of research, and there was then a lengthy dispute about the extent of that access. The ECtHR found that there had been a violation of Articles 6, 10 and 13 of the ECHR, caused by the length of the enforcement proceedings and the relevant Ministry’s reluctance to comply with court orders. There was no dispute that the relevant Ministry had originally held these documents. During the enforcement proceedings, the Ministry argued that a document had been transferred to the Archives of the Ministry of Defence and so was no longer under its control. This resulted in the domestic court ruling (referred to in the “circumstances of the case” section in the judgment) that the change in whereabouts did not exempt the Ministry from its obligations. This issue of a change in location is not expressly considered by the ECtHR in its decision. In addition, the document in this case had been moved after the Ministry had been ordered by a court to grant access. This is very different from the current case, where the Home Office simply did not hold the information sought by the appellant at the time of the Request.

22. ***Is the information held on behalf of the Home Office?*** This issue was not pursued as a separate argument by the appellant at the hearing, but I have considered it as part of his general argument that the Home Office was and still is responsible for the Security Service, and so is responsible for responding to his Request. I find no evidence that files are held by the Security Service on behalf of the Home Office. As explained above, they are separate public bodies, and the Security Service was placed on a separate statutory footing in 1989. The fact that the Minister with overall responsibility for the Security Service is the Home Secretary does not mean that the Security Service holds its files on behalf of the Home Office.

23. ***Freedom of expression under Article 10 ECHR.*** The appellant argues that his right to freedom of expression is infringed by his inability to obtain the requested information. He is seeking the information for the purposes of serious historical research. He relies in particular to the case of ***Magyar Helsinki Bizottsag v Hungary*** (Application no. 18030/11, 8 November 2016), in which the ECtHR found that there had been a violation of Article 10 when the applicant NGO was refused access to the names of appointed defence counsel for the purposes of a research project. The appellant also refers to the First-Tier Tribunal decision in ***Kennedy v The Charity Commission*** (EA/2008/0083), in which the Tribunal limited the exemption in section 32(2) FOIA in order to comply with Article 10.

24. The ECtHR found in ***Magyar*** that Article 10 included a right of access to information, as part of the freedom of expression right to receive and impart information. The information sought by the NGO was necessary for completion of a survey which would contribute to a discussion on an issue of obvious public interest. The Hungarian courts' failure to order disclosure of this information interfered with the applicant's Article 10 rights, and was not justified in the circumstances.

25. I agree with the appellant that a request for information for the purposes of academic historical research may engage Article 10, which can include a right of access to information in order to further the right to freedom of expression. However, Article 10 is not engaged in this case because the Home Office does not hold the information that he has requested. This is not a case where a public authority is refusing to provide information which it actually holds, where Article 10 may be relevant to whether this refusal is lawful. I have found on the balance of probabilities that the Home Office does not hold any Security Service files containing the information requested by the appellant. Article 10 cannot require a public authority to disclose information that it does not hold.

26. The appellant also argues that ***Magyar*** simply requires the information to be held by the state – the ruling does not say that the right is qualified on the basis that a specific government department has to hold the information at the time of the request. The ECtHR decision does refer a number of times to “State-held information”. However, the actual request in the case was made to a specific police department. There is no suggestion in the decision that a general request for information to the state or government should be answered by a department or public authority that does not hold the information.

27. The appellant argues that his Article 10 rights are effectively strangled by the fact that the Security Service and its information are exempt from FOIA. The regime means that there is never a balancing test applied to whether such information should be disclosed. He says that this means FOIA should be interpreted to allow him to obtain the information through the Home Office. The Home Office's position on not holding the information at the time of the Request

limits and sets bounds on his right of access, and so breaches his Article 10 rights. The Tribunal should adopt an “elastic” approach in order to avoid incompatibility with Article 10.

28. I understand the appellant’s argument that the absolute exemption from FOIA for the Security Service and its information might breach his Article 10 rights. He says that he can never obtain information from them under FOIA, even if this is for research of significant public interest, and he would get no reply if he made a FOIA request to the Security Service directly. However, this does not mean that Article 10 can be used to circumvent the exemptions by requiring the Home Office to obtain and disclose information from the Security Service instead. The appellant is aiming at the wrong target. If the appellant believes that the Security Service exemptions breach Article 10, he should challenge the actual application of these exemptions. Article 10 arguments in relation to the Home Office do not assist the appellant, because the Home Office is not relying on section 23 FOIA – it simply does not hold the information sought. As explained above, I have found that the Home Office and the Security Service are separate bodies. Article 10 does not require this Tribunal to interpret FOIA as requiring a public authority to obtain and disclose information that it does not hold.

29. ***Denial of an effective remedy under Article 13 ECHR.*** The appellant argues that he has no effective remedy for breach of his Article 10 rights. The Security Service is not subject to FOIA and will not answer a FOIA request. Although he could request information under the common law and then seek judicial review of any refusal, this would be very expensive. This is a reason for seeking the information through the Home Office instead.

30. I do not agree that Article 13 requires this Tribunal to interpret FOIA as requiring the Home Office to obtain and disclose information that it does not hold. Article 13 is not included in the list of Articles in Schedule 1 of the Human Rights Act 1998 – the right to an effective domestic remedy is satisfied by the existence of the Act itself. In addition, Article 13 is only engaged if there is a violation of another right under the ECHR, and I have found no such violation in this case. In any event, the appellant does have the remedy of judicial review if he requests information directly from the Security Service. This is potentially more expensive than this type of appeal, but nevertheless an available and effective remedy. The appellant can also complain to the Information Commissioner if a public authority relies on section 23 FOIA, and raise human rights arguments about the application of that exemption. He may also be able to complain using human rights arguments about a refusal by the Security Service to engage with a FOIA request. Again, the appellant is aiming at the wrong target in this appeal. This is not a case where a public authority’s use of an exemption to withhold information can be challenged by way of human rights arguments. The Home Office does not hold the information sought.

31. Having considered carefully the arguments put forward by the appellant, for the reasons explained above I dismiss the appeal and uphold the decision of the Commissioner.

Signed: Hazel Oliver  
Judge of the First-tier Tribunal

Date: 17 February 2020