

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 09 September 2010

Public Authority: Ministry of Defence
Address: Main Building
Whitehall
London
SW1A 2HB

Summary

The complainant made a request under the Freedom of Information Act 2000 (the 'Act') to the Ministry of Defence (the 'MOD') for information about the aircraft accident which resulted in the death of his grandfather in 1940.

The MOD provided a response in which it explained that apart from some basic casualty records and the originals of the aircraft accident card which it provided to the complainant, it did not hold any information in relation to the request in accordance with section 1(1)(a) of the Act.

The Commissioner has concluded on the balance of probabilities, that with the exception of the documentation provided to the complainant, the information requested was not held by the authority and therefore it complied with section 1(1)(a) in denying that it held any further information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the 'Act'). This Notice sets out his decision.

Background

2. The complainant's grandfather, an Air Observer in the Royal Air Force Volunteer Reserve, was unfortunately killed with four other crew when their aircraft crashed during 1940. The complainant has been researching the cause of this crash over the past ten years through various sources and organisations, and has secured other relevant documentation via these means. During this time, the MOD has provided him with copies of the information it holds, specifically a photocopy of a Flying Accident Card, basic casualty records and a copy of a letter dated 18 August 1940 containing preliminary findings about the crash.
3. The complainant specifically wished to secure a copy of the formal report into the crash, completed previously by the Court of Inquiry, and now known as the Board of Inquiry. His freedom of information request for this report, and for meteorological and wireless records pertaining to the crash, was made jointly to the MOD and Air Historical Branch of the RAF (the 'AHB'), on 28 May 2009, following significant earlier correspondence dating back to the year 2000. The initial response to the request was provided by the AHB. The request was then passed to the MOD at the internal review stage.

The Request

4. The request that serves as the basis of this notice was submitted jointly to the MOD and AHB on 28 May 2009 was for full information about the Whitley aircraft crash on 15 August 1940, in which the complainant's grandfather was killed, specifically for the Board of Inquiry report and the supporting meteorological and wireless records. The complete request can be found at Annex A attached to this Decision Notice.
5. The AHB provided a response on 3 June 2009 in which it confirmed that it did not hold any of the requested information apart from the basic casualty records and the originals of the aircraft accident card, copies of which it had provided to the complainant. The AHB suggested that the complainant may be able to obtain historical meteorological data from the Meteorological Office. In its response, the AHB explained that records not selected for permanent preservation with the National Archives would have been destroyed in line with the review period under the Public Records Act.

6. On 16 June 2009 the complainant requested an internal review of the AHB's decision.
7. On 4 August 2009 the MOD wrote to the complainant to confirm the outcome of its internal review upholding the original decision. It stated that a further search for the requested information was made as part of the review which also extended to MOD files transferred to TNT (a contractor used to store a number of records for the MOD) at the Swadlincote Archive.

The Investigation

Scope of the case

6. On 30 August 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the MOD held any additional requested information about the crash which it had not disclosed.

Chronology

7. The Commissioner wrote to the MOD on 9 November 2009 to obtain further information about the searches it had undertaken in relation to this request.
8. On 10 December 2009 the MOD replied to the Commissioner with details of the searches carried out.
9. On 29 January 2010 the complainant wrote to the Commissioner submitting some additional queries about the Board of Inquiry.
10. The Commissioner wrote further to the MOD on 15 February 2010 seeking clarification about the additional queries.
11. The MOD provided its response on 16 February 2010.
12. Following the Commissioner conveying his preliminary view on 16 March 2010 that no further information was held by the MOD, the complainant continued to submit documentation to him which he had gathered from other sources as part of his own research. Whilst the Commissioner has reviewed the additional documentation supplied by the complainant, it has not altered his judgement in this case.

Analysis

Substantive Procedural Matters

Section 1 – Is the requested information held?

13. Section 1(1) of the Act states that:

“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.”

The full text of section 1 can be found in the Legal Annex at the end of this Notice.

14. In this case, the Commissioner has considered whether the MOD has complied with section 1(1)(a) of the Act by stating that it did not hold any Board of Inquiry or meteorological and wireless records as per the request. In order to do this the Commissioner has considered whether any additional information is held by the MOD and whether, on the balance of probabilities, the MOD was correct to deny holding some of the requested information.
15. The Commissioner sought to establish whether any recorded information was ever held relevant to the scope of the request but was deleted or destroyed. The MOD stated the Board of Inquiry is referred to on the RAF Accident Records cards, but the fact that it cannot be found implies that it has been destroyed. Whilst the MOD confirmed it does not have a record of the document's destruction it has explained the records management policy which would have applied to documents in the 1940s. This policy stated that there should be a 50 year retention from the date of creation of the Board of Inquiries not selected for permanent preservation, where death or injury occurs. Under this rule any Board of Inquiry record which was created in 1940 would have been eligible for destruction from 1990 onwards. In the 1990s the MOD operated a system whereby the records of destruction of documents were required only to be kept for a period of five years. The MOD stated that unless the Board of Inquiry had survived until the late 1990s, which it views as unlikely given the destruction policy that

- would have applied to a record from 1940, it does not consider it surprising that there is no record of its destruction.
16. The Commissioner has noted that as part of the internal review, the MOD explained to the complainant that meteorological and wireless records would once have been held, but would have been subject to the normal review period under the Public Records Act and found unsuitable for permanent preservation in the National Archives.
 17. During the investigation, the MOD explained that the Board of Inquiry is an internal fact-finding investigation undertaken by the Services for their own use, with its main purpose being to establish the facts about an incident/accident as quickly as possible and make recommendations aimed at preventing a reoccurrence. The AHB stated in its initial response to the complainant that such Boards of Inquiry were circulated to the appropriate authorities in the Air Ministry and RAF. The MOD confirmed that the business importance of these documents is heavily reduced when an aircraft type goes out of service and explained that in the past, the majority of the older records were destroyed as a result and therefore very few such papers are still extant. It stated that until recently the MOD did not, for legal reasons, place copies of the Boards of Inquiry in the public domain i.e. deposit them in the National Archives as historic documents worthy of preservation.
 18. Against this background, the MOD provided details of the search for the requested information. It explained that a search of the casualty file index produced a casualty file for Whitley P5044 and that a search of RAF Accident Cards (indexed by aircraft type and date) identified a reference which refers to a Court of Inquiry, now known as a Board of Inquiry. The MOD confirmed that all the AHB indexes which relate to all Air Ministry/RAF files that passed through AHB since the 1920s were searched for this reference and no trace was found. It explained it had made a number of further searches of the AHB indexes using key words provided by the AHB and file references supplied by the complainant. The MOD clarified that all records/indexes searched are paper based and that the only electronic index search was of the National Archives online catalogue.
 19. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency* (EA/2006/0072) in which it was stated that "there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records". It was clarified in that case that the test to be applied as to whether or not information is held was not certainty but the balance of

probabilities. This is therefore the test the Commissioner will apply in this case.

20. In discussing the application of the balance of probabilities test in the above case, the Tribunal stated that, "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." The Commissioner has therefore taken this into account in determining whether or not the requested information is held on the balance of probabilities.
21. The Commissioner is also mindful of the case of *Ames v the Information Commissioner and the Cabinet Office* (EA/2007/0110). In this case Mr Ames had requested information relating to the September 2002 "Iraq's Weapons of Mass Destruction" dossier. The Tribunal stated that the Iraq dossier was "...on any view an extremely important document and we would have expected, or hoped for, some audit trail revealing who had drafted what..." However, the Tribunal stated that the evidence of the Cabinet Office was such that it could nonetheless conclude that it did not "...think that it is so inherently unlikely that there is no such audit trail that we would be forced to conclude that there is one..." Therefore the Commissioner is mindful that even where the public may reasonably expect that information should be held this does not necessitate that information is held.
22. In coming to a conclusion upon this case the Commissioner has taken into account the explanations provided by the AHB and MOD as well as the Tribunal decisions highlighted above. He is also mindful of the significant exchanges of correspondence between the AHB/MOD and the complainant on this issue over a ten year period, in which the AHB/MOD have reiterated that the complainant has been provided with copies of everything held and has been informed that no further information is held. The Commissioner considers that on the balance of probabilities the requested information is not held by the MOD.

The Decision

23. The Commissioner's decision is that on the balance of probabilities that apart from the information disclosed to the complainant, no further information is held that is relevant to the request and therefore it complied with section 1(1)(a) in this case.

Steps Required

24. The Commissioner requires no steps to be taken.

Right of Appeal

25. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 09 day of September 2010

Signed

**Gerrard Tracey
Principal Policy Advisor
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Annex A

The complainant submitted his request via a detailed letter addressed jointly to the Ministry of Defence and the Air Historical Branch. The extracts pertaining to his request are detailed below:

"... I have acquired some copies of family correspondence from 23rd August 1940 until 24th February 1950 relating to the death of my grandfather [name redacted] who died in the [*detail redacted*] bomber crash near Eastleigh on [*date redacted*]...

... However the correspondence released by the MOD to date is not the formal Report into the crash, the recommendations made by the Air Ministry or the amendments, but only the initial preliminary findings based upon presumption before even the time and other details were known...

... I am not happy or satisfied with the scant information supplied by the MOD to date and I am therefore requesting full disclosure please by the MOD, its Branches and storage...

...Under the FOI Act, I am requesting a copy of the Meteorological and Wireless Statements requested at the time this crash occurred please?"

Legal Annex

The Act - General Right of Access

Section 1(1) provides that -

"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."

Section 1(2) provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Section 1(3) provides that –

"Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

Section 1(4) provides that –

"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."

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”