



Tribunals Service
Information Tribunal

In The Information Tribunal

Appeal Number: EA/2006/003 – 2007/0007
Information Commissioners Ref: FS50090698, FS50090699, FS50131059, FS50131073

Freedom of Information Act 2000 (FOIA)

Heard at 45, Bedford Square, London, W.C.1

Decision Promulgated 25 September, 2007

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

David Farrer Q.C.

and

LAY MEMBERS

Suzanne Cosgrave

and

Henry Fitzhugh

B E T W E E N:

GERALD JAMES

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

DEPARTMENT OF TRADE AND INDUSTRY

First Additional Party

THE CABINET OFFICE

Second Additional Party

THE FOREIGN AND COMMONWEALTH OFFICE

Third Additional Party

THE MINISTRY OF DEFENCE

Fourth Additional Party

Representation:

The Appellant appeared in person

For the Commissioner: Timothy Pitt Payne

For all the Additional Parties: James Eadie

Decision

These appeals are dismissed. The Additional Parties are not required to take further steps.

This is a result which we regard as inevitable on the evidence but which on its face appears to do scant justice to the Appellant, who has, in a broad sense, been proved right and whose tenacity has been demonstrably justified.

Background

1 On 11th. November, 1992, the Prime Minister, the Right Honourable John Major M.P established an Inquiry, to be chaired by Sir Richard Scott, as he then was, to investigate and report on the export of defence equipment and dual – use goods to Iraq between 1984 and 1990, the extent to which relevant Government departments, agencies and ministers complied with government policy in that regard and the conduct of the prosecuting authority and ministers in relation to the Matrix Churchill case and similar prosecutions.

2 That Inquiry (“Scott”) received evidence until the start of 1996 and the Scott Report was submitted to Parliament in February, 1996. The archive, consisting of over a thousand files of documents and recorded evidence was then transferred to the Cabinet Office, initially to temporary accommodation for twelve months where it would be accessible to Sir Richard and his staff, then to other premises under Cabinet Office control. All this material was in hard copy and there were bulky hard copy indices, which indexed all evidence received by the Inquiry. That these indices were transferred is undisputed

3 The report and its appendices were deposited in the Public Records Office, as it then was, soon after publication. No reference was made in the report to evidence submitted by Sir Nicholas Bonsor and his name did not therefore appear in the index to the report. As was to be expected, a very large volume of material which did not feature in the report was held within the archive.

4 We were told by Mr. Muttukumar, the secretary to the Inquiry, that Sir Richard set great store by public access to the evidence submitted to the Inquiry, subject to the withholding or redaction, with his approval, of sensitive material relating to security, inter – governmental relations and other categories of information which continue to enjoy exemptions under FOIA

2000. The intention was clearly described in a document we were shown that the archive should be reviewed in the Cabinet Office and prepared for early transfer to the National Archive. We shall refer in more detail to the arrangements for the transfer and tracking of this mass of material when reviewing the evidence.

5 The appellant, Mr. Gerald James, a chartered accountant, was for many years Chairman of Astra Holdings PLC, which became during the 1980's, with its subsidiaries, a major manufacturer and supplier of a wide range of military equipment to Western governments and to the Middle East. To put the matter neutrally, his relations with the relevant departments of the United Kingdom government deteriorated very sharply from around 1990. The Department of Trade and Industry ("DTI") instituted an Inquiry into the conduct of most of the Astra directors (including Mr. James) relating to the acquisition of a subsidiary.

6 Mr. James holds very strong adverse views of the conduct of a wide range of government authorities and public officials relating to Astra and other arms suppliers and is highly critical of the conduct of inquiries into Astra and his role within the Astra group of companies. It was natural that he should wish to air his grievances when presenting evidence on these appeals. However, it was equally clear to the Tribunal that they had no bearing on the very narrow issues which we had to determine. It is greatly to Mr. James' credit that he accepted that view, whether he agreed with it or not, with a good grace. We wish to record our appreciation of the restraint, economy and eloquence with which he presented his case. We should add that, of course, we have formed no view either way as to any justification for Mr. James' mistrust and hostility towards the authorities which dealt with him and which investigated his affairs.

7 Mr. James submitted a very considerable quantity of documents to the Scott Inquiry. He also met Sir Nicholas Bonsor, the chairman of the Defence Select Committee in 1992 and supplied documents to him. Evidently, Sir Nicholas submitted documents to the Scott Inquiry, some probably coming from Mr. James. There is no clear evidence as to what or how much material was involved. A letter dated 4th. April, 1996, from Sir Nicholas to Mr. John Taylor at the DTI, confirmed that unspecified documents had been submitted and expressed the view that some of the investigating authorities behaved extremely badly towards Mr. James and his associates. In correspondence with the Tribunal and Mr James, Sir Nicholas confirmed that he had sent some documents to Scott but we do not know the date of submission.

The Requests

All references to a section of a statute are to the provisions of FOIA 2000

8 On 24th. February, 2005, Mr. James made the following request for information to the DTI and, by a separate letter, to the Ministry of Defence ("MoD") :

“Please provide copies of the full information provided by Sir Nicholas (Bonsor) to Sir Richard, now Lord Scott and his Inquiry or provide me with the facility to see and copy the full information”.

On 18th March, 2005, he made a further request in identical terms to the Foreign and Commonwealth Office (“FCO”).

He directed his request to the DTI as the sponsoring department of the Scott Inquiry (though we were told by Mr. Muttukumar (see below) in evidence, that the Scott Inquiry operated entirely independently of any government department) and to the other departments because Sir Nicholas had served or he believed him to have served there as a minister.

On 15th. March, 2005, the MoD responded, implicitly stating in accordance with FOIA s.1(1)(a) that it had never held the information sought and referring him to the Openness Team at the Cabinet Office (the “CO”).

Following a further letter from Mr. James, dated 7th. April, 2005, the DTI replied that the information had not been revealed by a thorough search of DTI records. The implication was that it did not hold it. Again, he was referred to the C.O. Whether or not the DTI breached FOIA s.10 (1) by a delay in its reply, we do not have to determine.

On 18th. April, 2005, the FCO stated that a search of its archive had not produced the information and that it did not hold it.

On 29th. April, 2005, Mr. James requested the same information from the C.O.. On 9th. May, 2005, the CO. replied that:

“Following a search of our paper and electronic files we have been unable to trace the information you requested.”

9 Mr. James requested internal reviews from the C.O and DTI. In August and September, 2005. In each case the previous response to the request was upheld. However, additional searches had been undertaken and neither authority located the requested information. Much later, internal reviews were conducted by FCO and MoD so as to enable the I.C. to issue Decision Notices with regard to the Requests to them. Neither proved fruitful.

The Complaints and the Decision Notices

10 Mr. James complained to the I.C. as regards the DTI on 25th. April, 2005 and as to the C.O. on 18th. May, 2005. It is unnecessary to rehearse the content of subsequent correspondence. Suffice it to say that the I.C issued a Decision Notice in respect of the DTI complaint on 21st. December, 2005 and of the C.O. on 20th. April, 2006.

11 Decision Notices in relation to the FCO and MoD were issued on 18th. December, 2006, when the Tribunal had already been seized of appeals against the earlier notices for many months. This was to ensure that all

relevant government departments were parties to these proceedings. They upheld the claims of both authorities that they did not hold the information.

12 The Decision Notice relating to the DTI dealt first with the alleged breach of s.10 (1). The IC accepted the DTI assertion that it had received only the second letter from Mr. James so that s.10 had been complied with. As to the substantive complaint, the IC accepted that three searches had been undertaken and that, contrary to Mr. James` claim, the DTI did not hold the information.

13 The Decision Notice regarding the C.O. involved slightly different issues. The C.O. had received from the Inquiry the entire archive of evidence and documents submitted to the Inquiry, whether or not such material had been referred to in the Report or its appendices. The other Additional Parties, by contrast, could be expected to hold copies of only such material as had been submitted by or through them to Sir Richard Scott, in accordance with a Cabinet Office directive issued at the outset of the Inquiry.

14 This Notice therefore assumed that if, as was probable, the information requested had been supplied to the Inquiry, it was somewhere in the archive. However, it was estimated that there were around four hundred files and the indexing generated by the CO review team enabled a searcher to identify only the likely, not the precise location of a particular document. The Inquiry`s detailed indices were no longer available. The IC`s representative had visited the archive to verify the position. He estimated that there were six hundred files. A search of likely locations had not unearthed the information. A full search of the files would incur costs in excess of the £600 maximum currently prescribed for the purpose of s.12 (1). The CO could therefore rely on s.12 (1) and had therefore complied with its obligations under s.1 (1).

15 It is to be noted that, apparently, neither during the internal review, nor the IC`s investigation, did any participant in these searches raise the question whether a paper index to all documents or some kind of electronic index might be available, despite the reference in the original reply to “electronic files” (see paragraph 7 above). We shall consider the response of the Openness Team to the original request later in this judgment.

16 The IC further concluded that the CO was in breach of s.1(1) in that it had not specified, as required by s.17(5), that the cost of searching for the requested information would exceed the £600 limit. He also suggested that a breakdown of the costs should have been supplied.. The breach is not disputed and we understand the I.C. to accept that the breakdown of costs is not required by the statute but may be thought good practice. Nothing now turns on the resolution of those issues.

The appeals

17 Mr. James appealed all the Decision Notices, stating his incredulity as to the answers that he had received borne of his knowledge that Sir Nicholas was unequivocal that he had submitted documents.

18 The Additional Parties were joined by two separate orders of joinder.

The issues

19 It had appeared that there were two :

- (i) Did any of the Additional Parties hold the requested information?
- (ii) As to each such Party, could it properly invoke the exemption as to the cost of complying with the request provided by s. 12(1)

20 However, it became apparent, though the point was not conceded by Mr. James, that there was really one issue for the Tribunal to determine, namely whether the CO could bring itself within s.12. On the one hand, the history of the Scott Inquiry strongly indicated that the other government departments were unlikely ever to have held the information. On the other, it was more probable than not that the information had been submitted, hence lay within the archive held by the CO.

The evidence

21 Mr. James submitted a full witness statement on which he was not cross examined. It included a history of Astra and his involvement and a vivid account of his dealings with Government departments and the Scott Inquiry. He made very clear his scepticism as to the bona fides of those who had carried out the searches, arguing that such procedures were just another example of self – serving governmental suppression of information. He called upon us to enforce the Act.

22 He called as a witness Mr. Kevin Cahill who gave oral evidence and was briefly cross examined. Much of his evidence related to the Scott Inquiry and his role in it. He supported Mr. James in his stance towards the relevant government departments. He asserted expertise in the field of computer systems and expressed disbelief as to claims made by the CO as to the costs of interrogating an obsolete computer hard drive. He reiterated the cardinal importance to Lord Justice Scott of public access to all the Inquiry material.

23 We also received evidence from Professor Mark Phythian and Mr. John Sartain on background matters involving Astra and Mr. James.

24 The IC called no evidence.

We heard evidence from Mr. Muttukumar, who appeared at the instance of the Tribunal. He was, in fact, the first witness to appear .and gave invaluable

insights into several aspects of the Scott Inquiry and the preservation and indexing of evidence and documents. We wish to acknowledge our gratitude to him for the careful preparation of his evidence, particularly in the light of the very short notice that we gave him and for the most helpful oral outline which he gave us. We gained from it an appreciation of the working of the Inquiry and the recording of proceedings, which no other witness could offer.

25 He explained that all information received, by whatever route or medium, was logged and filed in the archive. Whilst that information was all filed and indexed as hard copy, an electronic document tracking system was maintained. A removable hard drive was used in conjunction with a file server and an independent workstation enabling :

“searches of a vast amount of information based on the minimum of known detail (i.e., reference numbers, dates, names, authors, destinations or simple descriptive key words and any combination thereof)”.

- Paragraph 3.14 of the “Note for Cabinet Office Review Staff” (see below).

26 The material submitted by Sir Nicholas Bonsor to Scott, should have been traceable on the system and, once traced, its location in the archive could be determined.

27 That system was delivered to the CO when the archive was transferred in September, 1996. The archive remained for a year in temporary accommodation during which time it was accessible to the Scott team. It was then moved to another site. From then on the Archive and its review was the responsibility of the CO Review Team. A letter to Mr. Muttukumaru dated 3rd. March, 1998, confirmed that Mr. Ron Lawrence was to undertake the review.

28 Evidence was adduced on behalf of each of the Additional Parties as to the manner in which the department`s records relating to the Scott Inquiry were stored. As to the DTI, FCO and MoD it is unnecessary to review the content of that evidence, save to say that each indicated that searches had taken place and readily permitted the inference that the requested information was not and never had been held by the department concerned. The position of the C.O. was quite different.

29 A statement dated 18th. May, 2007 made by Mr. Kevin Nicholls, Head of the Openness Team in the Histories, Openness and Records Unit (“HORU”) of the CO was served. He had been a member of HORU for seven years and had handled Mr. James` request from the start.

30 He had allocated the search to Mr. Ron Lawrence, a reviewer in HORU who had been involved in the preparation of the Scott material for transfer to the National Archive since its transfer to the CO in 1997. Mr. Lawrence, using his knowledge of the structure of the archive, had searched for the Bonsor material in the three most likely areas but, as he reported, without success.

31 The internal review, which Mr. James requested had involved discussions with Mr. Lawrence and a fuller memorandum from him as to what the search had entailed. Mr. Colin Balmer, the reviewing officer, was satisfied with the process and wrote to Mr. James to tell him so and to indicate that the CO invoked s.12, given the cost of further searches.

32 With the archive came a document entitled “The “Scott Inquiry” Archive – a Note for Cabinet Office Review staff”, a copy of which was exhibited to Mr. Muttukumar’s statement. Mr. Muttukumar drew our attention to several important passages within it.

It set out the Annexes in which lists or indices of files were recorded.

33 At paragraphs 3.14 – 3.17, it gave details of the document tracking system and how to access it. An italicised note pointed out that it might be of use to CO Review staff and that it should be destroyed at the end of its useful life, a point it has evidently still not reached.

34 Under the heading “Disclosure of unpublished documents”, it emphasised Sir Richard Scott’s concern :

“to make as much material available to the public as possible(subject to overriding security considerations).

It reinforced that concern by a reference to Sir Richard’s reluctance to accept any redaction of documents submitted, save where serious harm to the public interest would be caused. Mr. Muttukumar reminded us that such concern reflected the fact that the Inquiry had been set up in the first place against a background of public anxiety as to possible wrongful suppression of information by central government.

35 The Note made clear that the only other electronic records were CD ROMs and word processing disks. The disks contained working papers of the Inquiry team and were due for destruction in 1997.

36 Mr. Muttukumar told us, “I was never unable to find information which I needed to find”.

37 Mr. Nicholls submitted a supplemental statement dated 7th. June, 2007. He now put the number of files at 1056. Much more important, he revealed the very recent discovery of a hard drive for a stand – alone computer which was probably that which had been handed over by the Scott Inquiry Team to the CO with the archive. He understood that the database contained brief descriptions of and reference numbers for all the documents submitted to Scott. He had not known of the database at the time of the Request – nor, evidently, when he made his first witness statement. A letter dated 26th. April, 1996 from the Inquiry to the CO was discovered. It described the structure of the paper files and the manual indices. It also referred in clear terms to an electronic document tracking system which was to be transferred to the CO. The archive at the CO includes a hard disk which seems likely to be the tracking system since there is no other hard disk. Efforts had been made to

access the information on the disk, using internal expertise. External retrieval of the information was estimated to cost thousands of pounds. Whether the database includes a reference to Sir Nicholas Bonsor`s submission, nobody can say but it should.

38 Mr. Nicholls insisted that the electronic system was not useful to the reviewers in the C.O. and that there was therefore no obvious need to ensure that it could continue to be accessed. It contained entries referring to sensitive material. It could not have been used by researchers, once the archive was transferred from the C.O. to the National Archive.

A fresh Development

39 Such was the state of the evidence at the close of the hearing when we reserved our judgment. The picture then changed quite significantly.

40 According to a Second Supplementary statement from Mr. Nicholls, a further examination of the Scott archive took place, prompted by the references in written and oral evidence to the Bonsor submission having been made in his role as Chairman of the Defence Select Committee.

41 He caused the five “Parliamentary “ files to be retrieved from the archive. It seems that file one had been misplaced at some time. It was retrieved on 27th. June, 2007 and Mr. Nicholls found a letter from Sir Nicholas Bonsor to Lord Scott with a series of letters attached, most, if not all, written or supplied by the Appellant, Mr. James.

42 This Tribunal and the other Parties were notified of this discovery and the hearing was reconvened at our direction. The I.C. made a further written submission but, with the agreement of the Tribunal, did not attend. Mr. James made further written and oral submissions

43 The only further evidence adduced at the reconvened hearing was that of Mr. Nicholls who answered questions about the further search and progress with seeking to identify the contents of the hard disk. It became apparent that the C.O. perceived a security problem in the use of outside consultants to access its data, quite apart from cost considerations.

Our Decisions

44 Section 12, so far as material, provides

“(1) Section 1(1)¹ does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

(2) Subsection 1 does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1)² unless the

¹ The right to know whether information is held and, if it is, to have it communicated.

estimated cost of complying with that paragraph alone would exceed the appropriate limit.

The appropriate limit, as defined in subsection 3 is £600.

45 What is required is an estimate, not a search. If the estimate is such that s.12 can properly be invoked, there is no requirement for a pointless exercise at a cost of £599.

46 The I.C.'s Decision Notice in relation to the CO proceeded on the basis that the CO held the information requested but could not provide it within the appropriate cost limit. The CO must therefore be treated as having fulfilled its obligation under s.1 (1) (a).

47 The exemption under s.12 (1) requires that the public authority "estimates" that the cost will exceed the limit. An estimate is a bona fide estimate because any other estimate would not be an estimate at all.

48 What about an estimate which, whilst undertaken in good faith, proceeds on a mistaken basis or involves honest errors? We do not think that it is any the less an estimate. The statute assumes, we suppose, that, whilst a public authority may err in an estimate, it is highly unlikely that it will do so quite irrationally. In our judgment, it does not require the IC, or the Tribunal on appeal, to investigate the procedures adopted by the authority to see whether any pebble was left unturned.

49 That does not mean that a public authority can pursue a policy of simply "going through the motions" when estimating the cost of complying with an unwelcome request. That would not produce a bona fide estimate. It would not justify the exemption.

50 Applying that principle, we judge that the CO's estimate was made in good faith. It may be that it was correct. Perhaps the cost of producing the requested information would have exceeded the £600 limit. That is enough to dispose of the appeal against the IC's Decision Notice in relation to the C.O.

51 Whether an earlier decision to consult the Parliamentary files should have been made is uncertain. On the evidence as it finally emerged, it seems likely that the Bonsor material would have been located fairly quickly, had the "Parliamentary" files been retrieved.

52 It follows from what we have already said that we see no reason to disagree with the IC's judgment in the other appeals that the Department concerned did not hold the information. That means that those appeals also must be dismissed.

53 However, given the function of this Tribunal and the evidence that we have received on this appeal, we think it right to add a few further

² The obligation to inform whether it holds the information.

observations. They are prompted by the particular features of this appeal and by broader considerations of the public interest in information which are the *raison d'être* of this jurisdiction.

Further Observations

54 Given the importance of the Scott Inquiry to the history of government in the late 20th century and more specifically, to Sir Richard Scott's expressed concern for public access to the whole archive, subject to vital security considerations, we are troubled by the CO's treatment of that archive since 1997, as it has emerged in the evidence.

55 Nearly ten years after transfer for CO Review, we understand that not a single file of the archive has reached the National Archive. Of course, the report and appendices have been available to the public since 1996 but that is not the same thing.

A document tracking system was handed over but has been ignored and has become obsolete. Nobody at the CO mentioned it to Mr. Nicholls in 2005. Nobody thought of it during the internal review. Nobody remembered it when showing the IC's representative the six hundred files. It was to be destroyed at the end of the review process, in accordance with Lord Scott's instructions. The reviewers saw no purpose in modifying it and by that means preserving non – sensitive entries on the ground that the National Archive would adopt its own methods of searching. As we understand it, there is, therefore, no means of tracking individual documents, since the hard drive cannot be interrogated nor the manual indices consulted.

Mr. Nicholls stated that the system was of little importance to the task which the CO was performing. We do not entirely understand why, since that task was the preparation of the archive for release to the public, following redaction or removal of material, disclosure of which involved serious damage to the public interest. The preservation of the sole electronic means of effective navigation through this vast archive until the review was complete seems to us a sensible precaution.

56 The member of staff who was charged with compliance with Mr. James' request was the same official who undertook the review of the archive when received in 1997. It is apparent either that he had quite forgotten the existence of the tracking system or that, knowing that he could no longer access it, he thought it pointless to mention it to Mr. Nicholls or to the IC when his representative inspected the archive. Mr. Nicholls' evidence contained no reference to the important Note produced by Mr. Muttukumar.

57 Furthermore, we are surprised that, faced with these requests, nobody thought it worthwhile to contact Mr. Muttukumar for assistance. He was and is still a distinguished senior civil servant and therefore readily accessible..

The result might have been the same but the failure suggests a certain lack of constructive thinking about compliance.

58 Section 46 requires the Lord Chancellor to issue a Code of Practice on the keeping, management and destruction of records. The requisite code was issued in November 2002. The CO may wish to consider whether its management of the Scott archive complied or indeed complies with the guidance as to record – keeping contained in paragraphs 8.4 – 8.6. We put the matter in that way because we did not hear argument on the point and further because the Scott archive and its tools for document management predate the Code. There may be limits as to the retrospective application of the Code`s provisions, though the preservation of an existing document retrieval system seems to us to involve no more than reasonable compliance with paragraph 8.5.

59 In proffering these comments we emphasise that we do not question the good faith of those involved but have some concerns as to the efficiency of the record keeping and the response to Mr. James` request. Where a public authority is charged with the preservation and management of the archive of a major independent inquiry, it is important that the external origin of such important material does not weaken the sense of responsibility or lower the standards of management practised by that authority.

60 Our task is to judge the lawfulness of the Decision Notice, not whether the IC`s investigation is open to criticism. Nevertheless, it surprises us that no question of the availability of an electronic tracking system was raised on his behalf before or on the visit to the archive, the more so given the reference to “our electronic files” in the CO`s reply to Mr. James` request. That said, we acknowledge that, as matters stood, discovery of the electronic database would have achieved nothing. We are also mildly surprised that no question was asked as to any guidance to the structure of the archive received from Lord Scott or his staff.

Conclusions

61 It is unfortunate that the hard drive was discovered late in the day, shortly before the hearing and the Bonsor material still later, after its conclusion. Despite Mr. James sinister interpretation of these developments, we are satisfied that there has been no kind of cover – up by the C.O. to delay scrutiny of the evidence. Indeed, it is hard to see why Mr. Nicholls would renew the search after the hearing, unless motivated by a sincere desire to find these documents, if at all possible. For the same reasons, we do not doubt that the C.O. has now produced all the Bonsor material that it believes it holds. It seems unlikely anyway, that Sir Nicholas` submission (and we know of only one) should be scattered all over the archive.

62 However, as indicated at the outset, we have considerable sympathy with Mr. James and recognise that enduring frustration when seeking

information from a large public authority is likely to breed the suspicions which he harbours, even though we, as dispassionate observers, consider them unjustified. It is not surprising that he feels that he should have received the material he requested at the outset. We have made no finding as to whether the C.O.'s search methodology was flawed and cannot therefore say whether such a conviction is right or not. We do believe, however, that the need for strict compliance with the Lord Chancellor's Code is amply demonstrated, in the interests both of requesters of information and public authorities anxious to discharge their obligations under FOIA.

63 Nonetheless, given our findings that the Decision Notices were in accordance with law and our dismissal of the appeals, we do not require any step to be taken by any of the Additional Parties.

64 We wish to add that this judgment, in its original form, would have been published in mid – June, 2007 but for the need to reconvene the hearing.

David Farrer Q.C.
Deputy Chairman
25th September, 2007