



Appeal number: EA/2019/0073

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

PROFESSOR TIM CROOK

Appellant

- and -

THE INFORMATION COMMISSIONER

**First
Respondent**

- and -

THE HOME OFFICE

**Second
Respondent**

**TRIBUNAL: JUDGE ALEXANDRA MARKS CBE
SUZANNE COSGRAVE
HENRY FITZHUGH**

SITTING IN FIELD HOUSE, LONDON EC4 on 10 JULY 2019

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DECISION

For the reasons set out below, the Tribunal dismisses the appeal.

REASONS

Introduction

1. This appeal concerns a request to the Home Office ('HO') made by the appellant under the Freedom of Information Act 2000 ('FOIA').
2. The appellant is an academic at Goldsmiths, University of London. He is pursuing an historical project about the political affiliations and activities of students and staff at the institution. He understands that the Security Service ('MI5') has historical files (pre-1989 when MI5 became a statutory body) about its surveillance of such students and staff¹.

Issues for this Tribunal to decide

3. We consider that the issues which the Tribunal has to decide in this case are:

Question 1: Was the Commissioner correct in law to find that HO held no information relevant to the request?

Question 2: Was the Commissioner correct in law to determine that the relevant time for HO holding the information was the time of the request?

Question 3: Was the Commissioner correct in law to conclude that Article 10 of the European Convention on Human Rights (Freedom of Expression) was not engaged in this case?

Request, Decision Notice and appeal

4. On 25 January 2018, the appellant wrote to HO², extracts of which (relevant to this appeal) read as follows:

I have three separate applications to make under the Freedom of Information Act for files under the legal control and responsibility of The Home Office:

....

My third, separate and specification (sic) application concerns any information and files held by the Security Service, otherwise known as MI5, concerning anything to do with the University of London, Goldsmiths' College, the activities of staff and students, relations with the Soviet Union, membership and activities of staff and students who were members of the Communist Party, and during the 1930s any members of the British Union of Fascists. I am seeking information and files concerning the period between 1911 and 1989. I respectfully submit that the HO is the relevant public body to apply to for this information for this period because prior

¹ Grounds of Appeal – Open Bundle (OB) p.16

² OB p.62-63

to the Security Service Act 1989, the Security Service did not have a separate legal statutory existence as a security body defined by section 23 of the FOI legislation. MI5/Security Service was legally part of the Home Office jurisdiction and responsibility and, therefore, the public interest balancing exercise is engaged. Any information held by MI5/Security Service prior to the enactment of the Security Service Act 1989 is, therefore, the legal responsibility of the Home Office. Any such information concerning Goldsmiths' College, its students and staff, and relations with the Soviet Union and the activities of student and staff members of (sic) the Communist Party will be of intense historical and public interest in relation to my project to research and write the history of the College.

5. On 20 February 2018, HO responded that, as regards the third and final part of the request (the subject of this appeal), “...it does not hold information on behalf of the Security Service and, as you are aware, the Security Service are not subject to FOIA.”³
6. On 19 April 2018, the appellant requested an internal review of the HO’s decision.

Complaint to Information Commissioner, and Decision Notice

7. The appellant initially contacted the Information Commissioner (‘Commissioner’) on 23 September 2018 to complain about the way his request for information had been handled. At that time, HO had not responded to his request for an internal review.
8. The Commissioner pursued HO for a response, and on 22 October 2018 HO replied maintaining its position.
9. The appellant submitted a further complaint to the Commission on 29 October 2018. He set out his views about the right to receive and impart information under the Charter of Fundamental Rights of the European Union, and said that there should be a ‘*public interest balancing act on information so old and historical.*’⁴ He also elaborated on his view that HO has statutory responsibility to deal with FOI requests relating to the operations of MI5 prior to its statutory constitution by legislation in 1989.
10. On 7 December 2018, HO provided a more detailed response⁵. It maintained that the information requested is not held by HO and explained:

“...whilst the Security Service Act 1989 (SSA) put the Security Service on a statutory footing, the Service existed as a separate entity under prerogative powers prior to commencement of the SSA...section 1(1) SSA...provides that ‘there shall continue to be a Security Service under the authority of the Secretary of State’. Therefore, the Security Service has continued in existence as a single and distinct entity for the duration of its history.

The fact that the Service existed (and continues to exist) under the authority of the Secretary of State does not mean that the Service is (or at any time has been) part of any ministerial government department...

³ OB p.65

⁴ OB p.3

⁵ OB p.104-105

The Security Service is not a public authority as defined in section 3(1) and Schedule 1 of FOIA...In case of information held by other public authorities (including the HO), section 23(1) FOIA provides for an absolute exemption of information that was 'directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)'. Subsection (3) refers to the Security Service by name..."

11. When the Commissioner invited the appellant to comment on this response, he said that⁶:

"... the Secretary of State for the Home Office was legally responsible for the Security Service as it was up until 1989 and the administrative process and constitutional oversight and executive management had to be operated by the government department existing to service all Home Secretaries up until 1989..."

...the Security Service did not have statutory constitution and identity prior to SSA 1989. It was a different public body to the Security Service so constituted by that legislation."

12. During the course of the Commissioner's investigation, she asked HO what enquiries it had made in order to conclude that it did not hold the requested information⁷.

13. HO responded⁸ that it had enquired of two business areas: its Historic Review Team (HRT) which has responsibility for information and records management; and the Office for Security & Counter-Terrorism (OSCT). HO considered HRT the part of HO most likely to hold the information if it was held at all, but OSCT the closest policy area of HO most likely to hold it, again if it was held at all.

14. HO explained that because of the age and date range (1911-1989) of the information requested, it would be in manual/paper rather than electronic form. HO also set out the search terms HRT and OSCT had employed, and the methodology used for managing HO's in-house file-tracking database.

15. HO reported that, as a result of HRT and OSCT's searches, a number of matches had been found in terms of the titles of files, but none of the files were relevant to the subject-matter requested. Overall, HO advised the Commissioner, that *'no recorded information was ever held relevant to the scope of the [appellant's] request.'*⁹ Nor, the HO said, had any such information been deleted or destroyed.

16. In her Decision Notice dated 14 February 2019¹⁰, the Commissioner stated she was satisfied that HO had contacted the relevant business areas, that they had conducted searches using appropriate terminology, and that no recorded information within the scope of the request was held at the time of the request. She stated that – because it is seldom possible to prove with absolute certainty that relevant information is not held – she had applied instead the required test of the *'balance of probabilities'*.

⁶ Appellant's letter to the ICO dated 8 January 2019 – OB p.114-128 (at p.115)

⁷ ICO's email to HO dated 14 January 2019 – OB p.132

⁸ HO letter to ICO dated 11 February 2019 – OB p.135-137

⁹ Ibid – OB p.137

¹⁰ OB p.1-12

17. Overall, the Commissioner decided that, on the balance of probabilities, she was satisfied that HO had complied with the requirements of s.1 FOIA in this case¹¹.

Appeal to Tribunal

18. On 13 March 2019, the appellant appealed to the Tribunal.

19. In the appellant's grounds of appeal¹² he said, in summary, that the Commissioner had:

- a. Wrongly decided that the HO did not hold the information requested because "*...the historical documentation, files and information of the Security Service in its form prior to the SSA is the responsibility of the HO and is not subject to the absolute exemption sections in FOIA...*"¹³
- b. Wrongly concluded that the Commissioner "*...can only intervene and adjudicate in relation to the information held by a public body at the time a FOI application is made...It is not unreasonable for it to seek and retrieve the information it has previously passed onto another public body for the management of archiving...*"¹⁴
- c. Wrongly failed to take account of the ECtHR Grand Chamber decision in ***Magyar Helsinki Bizottsag v. Hungary (8 November 2016)***¹⁵ which said that "*...Article 10 did provide a right to obtain information from government...and that this right extended to any person seeking it who was acting in the role of a 'social watchdog' ...[which] applied to the media, journalists...and academics...communicating information to the public on a matter of public interest...provided that this information is readily available to the public authority.*"¹⁶

The Commissioner's response

20. The Commissioner's response dated 29 March 2019¹⁷ submitted, in summary:

- a. She had correctly applied the test set out in ***Bromley v. ICO & the Environment Agency (EA/2006/0072)***¹⁸ when deciding whether a public authority holds information, namely '*...not certainty but the balance of probabilities*'¹⁹;
- b. On this basis, the Commissioner had reached a decision based on the adequacy of the public authority's search for the information, and its explanation why the information is not held. The Commissioner is not obliged to carry out her own search.²⁰

¹¹ OB p.10

¹² OB p.16-31

¹³ OB p.22

¹⁴ OB p.16

¹⁵ Authorities Bundle (AB) Tab 7

¹⁶ OB p.17

¹⁷ OB p.33-44

¹⁸ AB Tab 11

¹⁹ OB p. 35

²⁰ OB p.35-36

- c. The relevant time for holding the requested information is the time of the request.²¹
- d. Under FOIA, a public authority is not required to ask another body for information. The question is whether the public authority to whom the request is made itself holds the information.²²
- e. The Commissioner is satisfied that HO carried out a reasonable search, and she is entitled to accept the word of the HO (see *Oates v. ICO EA/2011/0138*)²³, especially where there is no evidence of an attempt to mislead the Commissioner.²⁴
- f. *Magyar* does not afford a free-standing right of access to information held by public authorities but, even if it does, such right is not enforceable through FOIA²⁵.
- g. In any event, Article 10 does not assist in this case because HO is not holding (nor therefore withholding) any requested information from the appellant. The appellant's Article 10 rights have therefore not been infringed.²⁶

The appellant's response

21. On 15 April 2019²⁷, the appellant responded to the Commissioner's written submissions. In summary, he submitted:

- a. It is incompatible with the Human Rights Act and ECHR to deny a public interest balancing exercise remedy for the release of this information.²⁸
- b. In *Kenedi v. Hungary [2009] ECHR 786*²⁹, the Court specifically said that the '*change in the physical whereabouts of the document did not exempt the Ministry from its obligation to grant the applicant access.*'³⁰
- c. In the light of *Magyar*, '*...the new obligation to give access to requests for historical information from academic researchers would be properly accommodated within the FOIA system.*'³¹
- d. Physical and temporal matters are irrelevant: "*Holding information and documents is not a buildings matter. It is not even a time matter... The issue relates wholly to legal responsibility... The fact that physically the current Security*

²¹ OB p.36

²² OB p.36

²³ AB Tab 12

²⁴ OB p.41

²⁵ OB p.42-43

²⁶ OB p.43

²⁷ OB p. 47-51

²⁸ OB p.47

²⁹ AB Tab 10

³⁰ OB p.47

³¹ OB p.49

Service is the custodian of the resource is not the relevant factor. The HO is legally responsible for holding the information...knows where it is and how it can commission relevant and effective searching for the information requested.”³²

- e. That the HO has not found the information does not undermine his argument: “*I do not challenge the ICO position that on the balance of probabilities, HO ‘in relation to its searches’ has not found the information requested at the time the request was made. It is and always was the case that the information requested will be physically and virtually present in the registries and archives currently managed by the Security Service...[but] HO has a legal and archival responsibility for [it].”*

HO’s submissions

22. HO was made a party to this appeal by the Tribunal’s case management directions on 25 April 2019³³. HO responded on 24 May 2019³⁴ in summary as follows:

- a. The appellant’s position that HO should be taken to ‘hold’ the information as a result of its relationship with MI5 prior to SSA 1989 fails to take account of the definition of ‘held’ in s.3(2) FOIA.³⁵
- b. s.1(4) FOIA limits a public authority’s duty of disclosure to information held at the time of the request.³⁶
- c. MI5 was not part of HO prior to 1989 nor was it ‘indivisible’ from the HO, nor does MI5 now hold pre-1989 material on behalf of HO.³⁷
- d. Article 10 is not engaged because no reliance has been placed on any exemption under FOIA (such as the absolute exemption in s23 FOIA from disclosure of material relating to MI5).³⁸
- e. This is simply a case where the initial ‘gateway’ under FOIA has been invoked, namely the information requested is not held by the public authority from which it has been sought.³⁹

Oral submissions

23. At the hearing, the appellant recapped his written submissions. He added that:

- a. SSA did not reform MI5 but *transformed* it (from an executive function of HO to a separate statutory body).

³² OB p.50

³³ OB p.52-53

³⁴ OB p.54-61

³⁵ OB p.56

³⁶ OB p.56

³⁷ OB p.58

³⁸ OB p.59-60

³⁹ OB p. 59-60

- b. Though MI5 was not *'part of'* the HO, it was *'of'* HO.
- c. HO is the responsible state government body that should provide access to the information requested.
- d. Because of the public interest of his academic historical research project, the *'standing information right'* determined by **Magyar** fits this case *'like a glove'*.
- e. The Tribunal has the opportunity – for the first time – to decide that Article 10 rights apply to FOIA. The *'parallel'* route – namely seeking information from a public body under the common law and, if access to such information is denied, applying for judicial review - is neither preferable nor necessary. It is also a burdensomely expensive course for an academic historian;
- f. HO's position of *'closing the gate'* to FOIA by saying it does not hold the information is not sustainable after **Magyar**. That case changed the jurisprudential environment by recognising a standing right to state information, thus serving democratic accountability and academic research.

24. The Commissioner neither attended nor was represented at the hearing.

25. Ms Ventham, for the HO as Second Respondent, submitted as follows:

- a. The scope of this appeal is much narrower than the appellant contends.
- b. The questions for the Tribunal are whether the Commissioner correctly concluded that HO could lawfully refuse the appellant's request for information on the basis that the information is not held by HO.
- c. Article 10 ECHR is not engaged here because the Commissioner's Decision Notice does not rely on any FOIA exemptions.
- d. The appellant is not being denied *access* to information: he has simply been informed in accordance with s.1(1)(a) FOIA that HO does not hold the information.
- e. **Magyar** does not apply here because that case was about *access* to information, not whether the information is held.
- f. The appellant implicitly relies on s.3(2)(b) namely that MI5 is holding pre-1989 materials on behalf of HO. However, that depends on finding that MI5:
 - i. was indivisible from HO pre-1989;
 - ii. was part of or *'of'* HO pre-1989;
 - iii. while physically possessing pre-1989 material, HO has *'legal and archival'* responsibility for such material.

The appellant's submissions in this respect are misconceived.

- g. The Maxwell Fyfe directions of 1952 (set out in *Attorney General v. Observer Ltd.* [1990 1 A.C. 109 (1988) on p116⁴⁰) from the then Home Secretary to the Director General of MI5, expressly stated that MI5 is *not* a part of HO. It also stated at paragraph 6:

'You (the Director General) and your staff will maintain the well-established convention whereby ministers do not concern themselves with the detailed information which may be obtained by [MI5] in particular cases, but are furnished with such information only as may be necessary for the determination of any issue on which guidance is sought'.

- h. As SSA s1(1)(a) makes clear, the statutory footing of MI5 post-1989 was a *continuation* of the pre-1989 Security Service, not creation of a new one.
- i. In any event, HO did not *'hold'* the requested information at the time of the request which is the relevant time under s.1(4) FOIA.

26. In response, the appellant submitted that:

- a. SSA s1(1)(a) refers to *'a'* Security Service, not *'the'* Security Service' and its statutory remit does not include the pre-1989 function of *'defence of the realm'*. This supports his contention that, prior to 1989, MI5 was an executive function of HO, utterly different from the statutory body created in 1989 by SSA.
- b. It is understandable that MI5 holds the pre-1989 files not just in practical terms but also because SSA made it *'the'* Security Service post-1989 and thus it might need access to its archives. However, that does not affect his argument that HO is the public authority which vectors access to that information.

The Law

Section 1 FOIA: general right of access to information held by public authorities

27. The relevant parts of s.1 FOIA, setting out the duty of a public authority to disclose requested information, are as follows:

- (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...*

⁴⁰ AB Tab 16 at p.532

Section 3 FOIA: public authorities

28. FOIA describes the meaning of ‘held’ as follows in s.3(2):

- ... (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.

Article 10 ECHR

29. 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...*

Security Service Act 1989 (‘SSA’)

30. Relevant extracts of the Act read:

s.1 (1) *There shall continue to be a Security Service...under the authority of the Secretary of State.*

...

s.2 (1) *The operations of the Service shall continue to be under the control of a Director-General appointed by the Secretary of State.*

The role of the Tribunal in FOIA

31. The Tribunal’s remit is governed by s.58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner’s decision involved exercising discretion, whether she should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

Discussion

32. There is no suggestion in this case that the Commissioner’s decision involved exercising discretion. However, the appellant challenges whether the Commissioner’s decision was made in accordance with the law in three respects:

1. Was the requested information ‘held’ by HO?

33. We consider the Commissioner was correct in law to conclude that the information requested by the appellant was not held by HO.

34. The Commissioner correctly enquired of HO the searches it had made, and was entitled to conclude – in accordance with *Bromley* – that on the balance of probabilities, the information was not held by HO.

35. Indeed, the appellant concedes that the information was not physically held by HO (see paragraph 21e above), at least at the date of his request. His argument really depends on timing of the holding of the material.

2. *Was the relevant time the date of receipt the request?*

36. We consider that the Commissioner was correct in law to find that the relevant time for the holding of the information was the date of receipt of the request in accordance with s.1(4) FOIA.

37. The appellant's argument for a different interpretation depends on the nature of the relationship between HO and MI5 pre-1989; the contention that HO has '*legal and archival responsibility*' for MI5's historic information; and that HO could therefore ask MI5 to provide that information.

38. We do not accept the appellant's claim that MI5 was '*of*' (albeit not '*part of*') HO pre-1989.

39. On the contrary, the Maxwell Fyfe directive states that MI5's Director-General was '*responsible to the Home Secretary personally*' and explicitly states that MI5 was not part of HO. We do not infer from this that MI5 was therefore '*of*' HO: rather that the Director-General was responsible to the Home Secretary as an individual, not the Home Office, and was to seek guidance from the Home Secretary (or by direct access to the Prime Minister).

40. The provisions of paragraph 6 of that directive (set out in paragraph 25g above) expressly states that '*detailed information*' is not the concern of ministers. From this we infer that, far from HO having '*legal and archival responsibility*' for MI5 material – even pre-1989 – given the secrecy and confidential nature of MI5's activities, such material was deliberately kept away from the Home Secretary, let alone his ministry and staff.

41. There is no provision in FOIA, nor any case authority cited to us, which enables or requires any public authority, in response to a FOIA request, to seek information from another public body. On the contrary, we consider that the statutory scheme deliberately limits public bodies' duties to respond to requests for information to that held by **it** at the time of receipt of the request.

3. *Was Article 10 engaged?*

42. We consider that the Commissioner was correct in law to find that Article 10 was not engaged in this case.

43. We do not accept the appellant's contention that the decision in *Magyar* fits his case 'like a glove'. On the contrary, we note that *Magyar* was a case where the public authority held the material but denied the requester access to it. This is not such a case. Here the

public authority – HO – does not hold the material (as the appellant himself accepts) so there is no question of HO denying him *access* to it.

44. We accept HO’s submission that arguments based on Article 10 do not arise at all in this case because no exemptions in FOIA were relied on by HO in its response, nor by the Commissioner in her Decision Notice. Instead, HO simply responded – in our view correctly, as the Commissioner stated in her Decision Notice – that it did not hold the information. Consequently, HO owed the appellant no further duties under FOIA in respect of his request.

Conclusions

45. For the above reasons, our answers to the questions posed at paragraph 3 above are all affirmative.

46. We therefore find the Commissioner was correct in law in all respects challenged by the appellant.

47. This appeal is dismissed.

(Signed)

ALEXANDRA MARKS CBE
(sitting as a First Tier Tribunal Judge)

DATE: 19 July 2019