



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

Case No. EA/2012/0257

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50436500 and
FS50413563 dated 6 November 2012

Appellant: RICHARD P DUNNE

First Respondent: INFORMATION COMMISSIONER

Second Respondent: THE FOREIGN AND COMMONWEALTH OFFICE

Date of decision: 26 September 2013

Before

Andrew Bartlett QC (Judge)
Andrew Whetnall
David Wilkinson

Representation:

For the Appellant: In person

For the 1st Respondent: Richard Bailey

For the 2nd Respondent: Martin Chamberlain QC, Julian Blake

Subject matter:

Environmental Information Regulations – reg 3(2) - whether information held on behalf of public authority

Cases:

Chagos Refugees Group v IC and FCO, EA/2011/0300, 4 September 2012

R (Quark Fishing) v Secretary of State for Foreign and Commonwealth Affairs [2006] 1 AC 529

University of Newcastle v IC and BUAV [2011] UKUT 185 (AAC), [2011] 2 Info LR 54

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The appellant, Mr Dunne, requested certain environmental information relating to the British Indian Ocean Territory (“BIOT”). The question for decision is whether a private contractor holds some of the requested information on behalf of the Foreign and Commonwealth Office (“FCO”).

The request

2. The request which is the subject of this appeal was made to the FCO on 29 April 2011. It was for a number of items of information relating to the activities of the BIOT fishery protection and patrol vessel for each financial year from 1 April 1994 to 31 March 2011.
3. On 25 May 2011 the FCO refused the request. The grounds of refusal included that information relating to the activities of the vessel was held not by the FCO but by the BIOT Administration.

The complaint to the Information Commissioner

4. Mr Dunne complained to the Information Commissioner. The Information Commissioner accepted that the BIOT Government was constitutionally distinct from the United Kingdom Government, but also accepted that where information concerning the BIOT was held in London by staff who had dual roles (that is, as both BIOT government officials and FCO officials), it was held by them on behalf of both governments, even if primarily for the BIOT Government. The Commissioner identified the information held in London which fell within the request. In his Decision Notice of 6 November 2012 he ordered that the FCO should either provide it to Mr Dunne or issue a valid refusal notice indicating why it was exempt from disclosure.
5. Pursuant to the Decision Notice, the FCO provided 12 items of information to Mr Dunne on 13 December 2012.

The appeal to the Tribunal

6. Mr Dunne was dissatisfied with the extent of information provided. He appealed to the Tribunal on several grounds, one of which remains live. The live ground is that (he says) the Commissioner did not consider whether Marine Resources Assessment Group Ltd (“MRAG”) held information within the scope of the request on behalf of the FCO. MRAG is a London-based company which is contracted to the BIOT Government to provide a range of services relating to fisheries protection and allied matters.
7. MRAG is not mentioned in the Decision Notice. However, it is clear to us (and is undisputed) that as a matter of fact the Information Commissioner during the course of his investigation did give some consideration to the question whether MRAG held relevant information on behalf of the FCO.
8. The first ground of Mr Dunne’s appeal was that the Commissioner erred in his conclusion that the governments of the BIOT and the United Kingdom are constitutionally separate. He withdrew this ground of appeal. We have therefore proceeded on the assumption of constitutional separation and that it should be applied in this case in the way put forward by the FCO. Our willingness to proceed on this basis reflects the parties’ lack of dispute on this aspect and should not be taken to imply any independent view of ours on whether it is correct, on the legal conclusions properly to be drawn from *R (Quark Fishing) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, HL, or on subsequent analyses of that decision, such as by Twomey in her November 2008 paper “Responsible Government and the Divisibility of the Crown”.

The questions for the Tribunal

9. The FCO submits that, on the basis of the wording of the ground of appeal, the only question for the Tribunal is whether the Commissioner gave consideration to whether MRAG held relevant information on behalf of the FCO; the appeal is not concerned with whether such consideration was adequate or whether the Commissioner arrived at the correct view of MRAG's role.
10. We are unable to accept this submission, which in our view rests on too legalistic a reading of Mr Dunne's ground of appeal. In our view the evident purpose of questioning the Commissioner's consideration of MRAG's role includes seeing whether the Commissioner arrived at the right answer, and in particular whether he should have concluded that further information within the scope of the request was held by MRAG on behalf of the FCO.

The law

11. By EIR regulation 5 the duty to make environmental information available on request applies to information which the public authority "holds". By regulation 3(2), environmental information is held by a public authority if (among other things) it "is held by another person on behalf of the authority".
12. The appropriate test for deciding under FOIA whether information is held by another party on behalf of a public authority was decided by the Upper Tribunal in *University of Newcastle v IC and BUAV* [2011] UKUT 185 (AAC), [2011] 2 Info LR 54. We draw attention to [23] and [27] of that judgment. We subsequently decided in *Chagos Refugees Group v IC and FCO*, EA/2011/0300, 4 September 2012, at [61], that the guidance given in the *University of Newcastle* case was appropriate to apply to a similar question under the EIR, despite some differences between the relevant wording of FOIA and of EIR regulation 3(2). We take the same view in the present case. No party has sought to persuade us to take a different approach.

Evidence and submissions

13. All parties consented to this appeal being determined on the papers, without an oral hearing.
14. BIOT is an overseas territory for which the United Kingdom has international responsibility, but it is not part of the United Kingdom. The FCO's position is that MRAG's role, properly understood, is such that it

holds information on behalf of the BIOT Government and not on behalf of the FCO.

15. The FCO has not actively contested the proposition that, if MRAG held information on behalf of the FCO, some of the information so held would probably fall within the scope of the information request. This would seem to follow from the nature of MRAG's duties.
16. The Commissioner's position on appeal is that, on the basis of the available evidence, on the balance of probabilities the FCO's position is justified, as regards the correct understanding of MRAG's role.
17. The FCO relies on a witness statement from Mr John McManus dated 24 May 2013. At the time of making the statement he was (as a UK official) the Head of the BIOT Section at the FCO and (as a BIOT official) the current BIOT Administrator. His statement explains his understanding of the relationship between the FCO and MRAG, and exhibits the contract for services made on 6 June 2006 between the BIOT Commissioner and MRAG, which was varied on 28 March 2013 between the BIOT Administration and MRAG¹. His statement says explicitly that MRAG does not hold information relevant to the request on behalf of the FCO, but this does not conclude the matter; our function involves looking at the facts more closely to see whether on applying the correct legal test his view is borne out.
18. It is clear from the terms of the contract that MRAG's contractual duties are performed for the BIOT Administration. From time to time Mr McManus seeks information from MRAG in his capacity as an FCO official, for a variety of reasons – for example, in order to assist with answers to a parliamentary question. It does not follow, from the mere fact that MRAG willingly answers such inquiries, that it holds information on behalf of the FCO.
19. Clause 28 of the contract acknowledges that the BIOT Administration is subject to FOIA and the EIR, and requires MRAG to assist with compliance with information disclosure requirements. Mr Dunne relies on this clause. The FCO says it was included in error. Whether it was included in error or not, it does not seem to us that it materially assists Mr Dunne on his appeal, since we do not regard it as shedding light on whether MRAG held information on behalf of the FCO at the time of Mr Dunne's information request.

¹¹ For the purposes of the present proceedings there is no relevant distinction to be drawn between the BIOT Commissioner, the BIOT Government, and the BIOT Administration: for present purposes these are all effectively the same.

20. Mr Dunne points to the fact that it is now accepted by both the Information Commissioner and the FCO that where information concerning the BIOT is held in London by staff who have dual roles (as both BIOT government officials and FCO officials), it is held by them on behalf of both governments. It follows, he says, that information held by MRAG in London on behalf of the BIOT Administration must similarly be considered to be held also on behalf of the FCO.

21. We do not see how this follows. The holding of information by officials who have dual roles in two governments is not the same thing as the holding of information by an independent third party contracted to one government. We agree, of course, that it would be possible for MRAG to hold information both on behalf of the BIOT Administration and on behalf of the FCO, but the question is whether MRAG in fact does so. Since MRAG's only relevant contractual relationship is with the BIOT Administration, and not with the FCO, there would need to be some other positive evidence to demonstrate that in fact, notwithstanding the contract, MRAG holds information also on behalf of the FCO.

22. Mr Dunne contends that there is such positive evidence. He submits that, notwithstanding the lack of a contract between the FCO and MRAG, MRAG in fact conducts both 'BIOT business' and business which is properly that of the United Kingdom, and it should be inferred from this that MRAG holds (and at the material time held) information both on behalf of the BIOT Administration and on behalf of the FCO. In outline, this contention rests on the following matters:
 - a. IOTC is the Indian Ocean Tuna Commission. A witness statement made by Mr McManus in other proceedings refers to MRAG's role in scientific representation of BIOT at international conferences such as IOTC meetings, participation in the scientific bodies of the IOTC, provision of technical advice about requirements of regional inter-governmental bodies such as IOTC, and attendance at Commission meetings.

 - b. BIOT is not entitled to be a member of the IOTC. It is the United Kingdom which is a member, and which as such member represents the interests of BIOT in IOTC matters.

 - c. It follows that, when attending to IOTC matters, MRAG is acting on behalf of the United Kingdom rather than on behalf of the BIOT Government.

 - d. From the reports made by MRAG to the IOTC it is apparent that MRAG holds information within the scope of the information request.

- e. Accordingly, the information held by MRAG for the purpose of IOTC matters includes information within the scope of the request which is held on behalf of the United Kingdom (and therefore on behalf of the FCO in particular).
23. The FCO counters that this contention rests on a misunderstanding of the United Kingdom's representation on and membership of the IOTC. So far as concerns the interests of the United Kingdom itself, the relevant member of the IOTC is the European Union. The UK's individual membership is limited to representation of the BIOT. The UK's terms of acceptance of the agreement establishing the IOTC stated:
- “NOW THEREFORE the Government of the United Kingdom of Great Britain and Northern Ireland, having considered the Agreement aforesaid, hereby confirm and accept the same in respect of the British Indian Ocean Territory only and undertake faithfully to perform and carry out all the stipulations therein contained.” [emphasis supplied]
24. Mr Dunne particularly relies upon a letter dated 12 February 2010, signed by Dr Mees of MRAG as “Head of UK Delegation to IOTC” and sent to the IOTC. However, it seems to us that the terms of this letter support the FCO's argument rather than Mr Dunne's. The letter expressly refers to MRAG's correspondence with the IOTC being on behalf of the BIOT Administration, and refers to actions taken by the UK Government (making representations to another Government concerning illegal fishing) “on behalf of the BIOT Administration”. When this is viewed in the light of the terms of the contract for services made between MRAG and the BIOT Administration, it seems to us to be reasonably clear that the information is held by MRAG on behalf of the BIOT Administration and not on behalf of the FCO.
25. Given the relevant legal framework, the facts that in practice the FCO is able to obtain information from MRAG when it wants it, simply by asking for it, and that some correspondence and other information is copied by MRAG to the FCO from time to time, does not require the conclusion that MRAG holds information on behalf of the FCO. In our view on the evidence currently before us, when such information comes into FCO hands, the FCO holds it, but not before then.
26. The FCO also puts forward an additional contention that in such matters the Secretary of State acts on behalf of Her Majesty the Queen in right of the overseas territory, not in right of the United Kingdom, as explained by the majority reasoning in a case concerning South Georgia: *R (Quark Fishing) v Secretary of State for Foreign and Commonwealth Affairs* [2006] 1 AC 529, HL. This contention does not

seem to us to take the matter any further, and we do not find it necessary to consider it.

Conclusions and remedy

27. For the reasons set out above we conclude that the appeal must be dismissed.

28. Our decision is unanimous.

Andrew Bartlett QC

Tribunal Judge

/signed on original/