



**Tribunals Service**  
Information Tribunal

**Information Tribunal Appeal Number: EA/2008/0089**  
**Information Commissioner's Ref: FS50180545**

**Heard at Field House, London, EC4**  
**On 16 March 2009**

**Decision Promulgated**  
**On 20 April 2009**

**BEFORE**

**CHAIRMAN**

**ANNABEL PILLING**

**AND**

**LAY MEMBERS**

**PETER DIXON**  
**HENRY FITZHUGH**

**Between**

**DR NIGEL DUDLEY**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

**Subject matter:**

FOIA Whether information held s.1

**Cases:**

Bromley v Information Commissioner and The Environment Agency (EA/2006/0072)  
Billings v Information Commissioner (EA/2007/0076)

**Representation:**

For the Appellant: Dr Nigel Dudley  
For the Respondent: Michele Voznick

## **Decision**

The Tribunal upholds the Decision Notice dated 15 October 2008 and dismisses the Appeal.

## **Reasons for Decision**

### **Introduction**

1. This is an Appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 15 October 2008.
2. The Decision Notice relates to a series of requests for information made by the Appellant to the National Audit Office (the 'NAO') under the Freedom of Information Act 2000 (the 'FOIA'). The Appellant complained to the Commissioner that, inter alia, the NAO failed to respond to a number of these requests within 20 working days and that not all the information falling within the scope of his requests was disclosed.
3. The Commissioner concluded that the NAO had breached sections 1(1)(a), (1)(1)(b), 10(1) and 17(1) of FOIA in its dealings with the Appellant's requests. He also concluded that the NAO had now disclosed all of the information falling within the scope of the relevant requests.

### **Background**

4. The NAO audits public-sector bodies in the United Kingdom and produces value for money reports into the implementation of Government policies.
5. One such report, entitled "Reducing Brain Damage: Faster access to better stroke care", was published in November 2005 (the 'Report'). The purpose of the Report was to examine whether the NHS was providing effective and high quality stroke care services and whether

the Department of Health was managing the supporting stroke care programme well.

6. The Appellant is a Consultant in Elderly and Stroke Medicine at St James's University Hospital in Leeds. He is concerned that figures contained in the Report are not accurate.

#### The request for information

7. The Appellant made a total of ten separate requests for information to the NAO between 21 November 2005 and 29 July 2007. It is not necessary for the purpose of this Decision to set these out in detail at this stage. A Summary of those requests, numbered 1 to 10, and the NAO's responses are set out in Annex A of the Decision Notice and appended to this Decision for ease of reference. Certain of the requests are described in the following paragraphs.
8. He requested, inter alia, that the NAO provide him with information about the origins of the figures contained in the Report, including the details of the underpinning calculations for each and every figure.
9. There has been a considerable amount of correspondence between the NAO and the Appellant dealing with each of these requests and subsequent matters. We were assisted by the summary of correspondence prepared by the NAO and included in the Bundle of material provided to us.

#### The complaint to the Information Commissioner

10. The Appellant complained to the Commissioner on 3 October 2007 about the way in which the NAO had handled his requests. He complained that the NAO had failed to respond to a number of requests within 20 working days and, in addition, that in respect of some of his requests, he had not been provided with all the material he

requested. The Commissioner summarised the additional issues of complaint as Complaints (i) –(vi):

- (i) Although the NAO provided a number of spreadsheets in response to requests 1 and 3(a), not all of the information about how these calculations were made, and what assumptions were relied upon, has been disclosed.
- (ii) In request 3(e) the Appellant asked for email exchanges between Sir John Bourn’s office and others in the NAO in relation to the savings suggested in the Report being “not true and accurate”. The NAO responded to this request and explained it did not hold any such emails because it did not believe the savings to be “not true and accurate”. The Appellant argued that the request should have been considered more broadly and the NAO should have considered whether it held any emails between Sir John Bourn’s office and others in relation to the savings mentioned in the report.
- (iii) The Appellant had submitted a number of requests for the names of the stroke experts the NAO had previously referred to (requests 5 and 6). However, the NAO only disclosed the name of one expert. The Appellant believes that more than one expert had been consulted and therefore their names should have been disclosed.
- (iv) Request 10 asked for correspondence between the NAO and the Department of Health regarding the £20 million savings mentioned in the Report, but specifically asked for correspondence about the fact that such savings “were no longer agreed”. The NAO explained that there had not been a change in agreement and therefore no such correspondence was held. The Appellant argued that the NAO should have interpreted this request more

broadly and considered whether it held any correspondence with the Department of Health regarding the proposed savings.

- (v) Request 7 was for all email and letter communications exchanged between the NAO and King's team between 14 December 2005 and 24 February 2006. Although this was initially refused on the basis of section 14 of FOIA as the NAO considered this request substantially similar to an earlier request, this decision was reversed at the internal review stage. The NAO indicated that it did not hold any further material falling within the scope of this request but the Appellant disagreed.
- (vi) The Appellant complained that the NAO failed to provide any response to request 9.

11. During the course of the investigation some further information was disclosed to the Appellant.

12. A Decision Notice was issued on 15 October 2008. The Commissioner found that, where held by the NAO, the information requested by the Appellant in the ten requests had now been provided to him. The Decision Notice details breaches of FOIA in relation to each and every request and complaint made by the Appellant. In summary, the Commissioner concluded that:

- (i) The NAO had now disclosed all of the information falling within the scope of requests numbered 1, 3(a), 4, 5, 6, 9 and 10;
- (ii) Information held by King's Collge that falls within the scope of requests 1, 3(a) and 4 is held on behalf of the NAO by virtue of section 3(2)(b) of FOIA;

- (iii) In respect of certain requests, the NAO had breached sections 1(1)(a) and/or (b) and 10(1) of FOIA in failing to provide information within 20 working days;
- (iv) The NAO had breached section 17(1) of FOIA by failing to provide a refusal notice citing section 33 of FOIA in response to request 3(e) and, as the exemption did not in fact apply, also breached section 1(1)(b) of FOIA by failing to disclose the information<sup>1</sup>.

13. The Commissioner also concluded that, on the balance of probabilities, no additional information was held by the NAO.

14. In light of the fact that the Appellant had been provided with the further information during the course of the investigation, the Commissioner did not require the NAO to take any further steps.

#### The Appeal to the Tribunal

15. By Notice of Appeal dated 4 November 2008 the Appellant appealed against the Commissioner's decision on a number of grounds, running to five typed pages. These have been largely withdrawn and, at a Directions Hearing on 7 January 2009, the following Grounds of Appeal confirmed:

- (i) The Commissioner reached incorrect findings of fact in relation to Complaint (i) in the Decision Notice; and
- (ii) The Commissioner reached incorrect findings of fact in relation to Complaint (vi) in the Decision Notice.

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<sup>1</sup> The Commissioner established that the NAO did hold some information falling within a broad reading of this particular request (three internal memos) and this information was disclosed to the Appellant.

16. The majority of the findings by the Commissioner in relation to the Appellant's complaints are not, therefore, subject to any appeal.

17. The Appeal was determined 16 March 2009 on the papers without an oral hearing. The Tribunal was provided with an agreed bundle of material. The parties provided written submissions and responses to the written submissions of the other party.

18. Although we may not refer to every document in this Decision, we have considered all the material placed before us.

### The Powers of the Tribunal

19. The Tribunal's powers in relation to appeals are set out in section 58 of FOIA, as follows:

*(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.*

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

20. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the

Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether the applicable statutory framework has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.

21. Whether the Commissioner reached correct findings of fact on which to reach the conclusions he did regarding complaints (i) and (vi) is a question of factual analysis. This is not a case where the Commissioner was required to exercise his discretion.

#### The questions for the Tribunal

22. The parties agree and the Tribunal has concluded that the relevant issues in this Appeal are as follows:

- a) whether the Commissioner reached the correct findings of fact in relation to Complaint (i) in the Decision Notice; and
- b) whether the Commissioner reached the correct findings of fact in relation to Complaint (vi) in the Decision Notice.

#### Evidence

23. We were provided with a statement from the Appellant dealing with a range of matters, including a helpful summary of the history of his dealings with the NAO.

#### *Did the Commissioner reach the correct findings of fact in relation to Complaint (i) in the Decision Notice?*

24. Complaint (i) relates to three separate requests for information made to the NAO on 21 November 2005, 1 March 2006 and 29 March 2006:



Request 1– “I would be interested in knowing how the figures in paragraphs 10 and 13 [of the Report] were arrived at.”

Request 3(a) – requesting correspondence between Gosford Hospital and NAO underpinning the details reproduced in Case Study 1.

Request 4 – a subsequent complaint to the NAO that not all the information falling within request 1 had been provided.

25. The Appellant complained to the Commissioner that although the NAO had provided a number of spreadsheets in response to requests 1 and 3(a) [containing raw data upon which the figures were based], not all the information about how these calculations were made, and what assumptions were relied upon, had been disclosed. During the lengthy correspondence with the NAO, he asked for detailed explanations and to be shown the workings of how the various figures in the Report were derived. The NAO provided much assistance and detailed explanations, although the Appellant did not accept that the accuracy of the figures had been explained.

26. The Commissioner had to reach a decision not on the accuracy of the information provided, but on whether the NAO held any recorded information about those figures that had not been disclosed already. In order to reach that decision, the Commissioner concluded that:

- (a) he had to make some judgment as to whether the information disclosed.....provides a reasoned and logical explanation of the origin of the figures contained in the Report; and
- (b) if it appears there is no direct link between the figures disclosed by the NAO and the figures in the Report, he accepts it may be logical to conclude that the NAO had at some point held further information.

27. Information that falls within the scope of these requests could have been held by the NAO itself, or by King's College which had undertaken the economic modelling work for the Report. The Commissioner concluded that information held by King's College that would fall within the scope of requests 1, 3(a) and 4 was held by the NAO by virtue of section 3(2)(b) of FOIA<sup>2</sup>.

28. Section 3(2) provides as follows:

*'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.'*

29. If more detailed information was held in relation to the origin of the figures, the parties agree that these would be in the physical possession of King's College rather than the NAO.

30. Therefore, the Commissioner had to consider whether King's College actually held any further information falling within the scope of requests 1, 3(a) and 4.

31. We agree with the Commissioner that the test of establishing whether information is held by a public authority is not certainty but rather whether, on the balance of probabilities, the information is held; Bromley v Information Commissioner and The Environment Agency (EA/2006/0072).

32. The Appellant submits that the Commissioner was wrong to accept the assertion that King's College did not hold any further information. He

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<sup>2</sup> Prior to the issue of the Decision Notice, the Senior Complaints officer indicated that he reached the provisional conclusion that section 3(2)(b) did not apply. As that view was not maintained in the Decision Notice which is the subject of this Appeal and as the parties agree on the true position we see no merit in examining this point in more detail.

submits that would mean that the team at King's College would have to have disposed of all the paper and electronic records of the various medical publications and other sources of information that provided the figures for the cells in the research model contained in the spreadsheet. That would mean that their methodology and validity of assumptions would not be able to be checked and audited. It would mean they had disregarded their duties as laid down by the GMC in relation to carrying out and recording such research. It would mean that, contrary to the assertion in the evidence, the team would not have been able to look in detail at the concerns and questions raised by the Appellant in June 2006. If no further information about the figures and their origin was held after November 2005, that would prevent the verification exercise referred to in the letter dated 24 January 2007 to Appellant's MP, copied to the Chairman of the Committee of Public Accounts, taking place. This stated that the "consensus of expert opinion is that the NAO's modelling was appropriately designed to yield conservative estimates of value for money estimates and it has done so".

33. The Appellant concludes that it is "more likely than not" that King's College still holds one or more papers showing the actual origin of the assumptions used to produce the figures for the model that have not been disclosed.

34. We were referred to the King's College Records Management Toolkit and extracts from the GMC research booklet for the requirements and guidance on document retention and disposal policy.

35. In general terms, without doubting the competence of the relevant team at King's College, we must be realistic and, although ideally this guidance would be adhered to, we are aware that record keeping and the subsequent storage of documents would not necessarily be a priority. Academics do not necessarily write everything down and keep every document or working note, regardless of what policy documents

require them to do. It may be that there was a failure to comply with internal policy but that is not a matter for this Tribunal.

36. We have been told that two separate searches were carried out by the team at King's College during the relevant period, one during the Commissioner's investigation, and no further relevant material was found.

37. The Appellant maintains that this cannot be correct and that further information falling within the scope of his requests is held. He draws support from the fact that further material was provided during the Commissioner's investigation that must have existed at the time of his requests. He goes so far as to allege that attempts have been made to deny him access to material illegally.

38. The Commissioner concluded in paragraph 50 of the Decision Notice that by the time of the request in November 2005, although King's College still held the spreadsheets, on the balance of probabilities it did not hold any further information detailing how the figures contained in the spreadsheets were created.

39. The Commissioner concluded that the information already disclosed to the Appellant provides a logical explanation as to how the figures were arrived at and therefore it was reasonable to conclude that further information would not necessarily be needed in order to generate the figures in the report.

40. We agree with those findings.

41. We have examined in detail the explanations for the origins of the figures that were provided to the Appellant by the NAO. In particular we have regard to the email from Karen Taylor at the NAO to the Appellant sent on 24 February 2006, said to be its "definitive and final

response” to the Appellant’s concerns, although she did offer an opportunity to meet with him and discuss it further:

*“I would like to take this opportunity to reiterate what we have already told you in response to earlier emails, namely that the entire report was prepared with advice and support from the Intercollegiate Stroke Working Party, who acted as our external reference panel. The report was agreed with the Department of Health pre-publication, and with all third parties involved. Several other renowned experts also provided us with editorial and expert advice on the draft report, including (names provided). I therefore remain extremely concerned at your suggestion that the report is “littered with errors”. As I have shown above, your evidence for this assertion is completely flawed.”*

42. There may be a dispute between statisticians as to the underpinning calculations of figures used in the Report but that is not a matter for this Tribunal. The parties agree that it is not for the Commissioner or the Tribunal to verify the accuracy of the figures. The fact that the Appellant is of the opinion that the NAO should not have used certain figures in the Report is not a matter for us. We are concerned with whether the decision reached by the Commissioner was in accordance with the law.

43. Having read the extensive correspondence between the Appellant and the NAO, we consider it important to note that on more than one occasion the team at the NAO offered to meet with the Appellant to demonstrate and explain the workings of the statistical model that was used to generate the Report’s findings. The NAO indicated that “[s]uch an approach was suggested as a potential way of resolving the clear differences of interpretation of the data that continue to form the basis of your concerns.” At no stage did the Appellant accept this offer.

44. There is no requirement in FOIA for a public authority to respond to requests for information or to queries arising from such requests by creating information or providing additional explanations. We consider that, in its dealings with the Appellant, the NAO, although it had breached some of the requirements of FOIA, produced detailed explanations and specially created information in order to assist the Appellant understand the figures used in the Report.
45. In reviewing the Commissioner's findings of fact, we accept the evidence that the NAO asked King's College to conduct two separate searches in order to locate any further information that may be held that falls within the request. One of these searches was carried out in or about August 2008 during the Commissioner's investigation, and King's College explained that it holds nothing further.
46. The Appellant makes reference in his witness statement to documentary evidence showing that the Commissioner's findings of fact in relation to Complaints (i) were incorrect. We are not satisfied that the evidence does show that and on the evidence before us, we are satisfied that the information disclosed by the NAO, including the detailed explanations given during the course of correspondence, provides an explanation as to how the figures contained in the Report were arrived at. On that basis we agree with the Commissioner's conclusion that it is reasonable to conclude that the NAO, or King's College on its behalf, would not need to have held any further information in order to generate those figures.
47. In light of our findings above, we are satisfied that the Commissioner reached the correct findings of fact in respect of Complaint (i). Further, we are satisfied that no further information falling within the scope of requests 1, 3(a) and 4 was or is held by either the NAO or King's College on behalf of the NAO.

*Did the Commissioner reach the correct findings of fact in relation to Complaint (vi) in the Decision Notice?*

48. Complaint (vi) relates to Request 9 on Annex A made on 29 July 2007 for the exact origin of the 0.3 assumption in box B6, the 0.8 and 0.22 assumptions in box B7 shown on the spreadsheets that had been disclosed by the NAO to the Appellant . The Appellant complained that the NAO had failed to respond to this request.
49. The NAO explained to the Commissioner that it had not dealt with this as request under FOIA; because it was substantially a repeat of an earlier request it was regarded as a request for an explanation. By this time the NAO had terminated non-FOIA correspondence with the Appellant in light of the volume and time spent dealing with his various letters and emails.
50. The Commissioner concluded that this was, in fact, a fresh request for discrete information. The NAO provided the Commissioner with the explanation for the origins of the three figures, which had been derived from publications in *The Lancet* and *Stroke* and indicated that it held no further information on the source of the spreadsheet figure. This information was communicated to the Appellant by the Commissioner by letter dated 1 March 2008. The Commissioner therefore asserts that the information requested has now been provided<sup>3</sup>.
51. The Appellant now appeals on the basis that the Commissioner was wrong to conclude that this information had been located during his investigation, particularly in the absence of any evidence as to how it was located, who located it, exactly when it was located and how it had been overlooked despite numerous requests for its disclosure in 2005 and 2006. He submits that “[g]iven the totality of the evidence in this case, it is more likely than not that [this information] had been held at all times since 2005 and [was] simply produced by the NAO during the

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<sup>3</sup> Although the Commissioner also found that the NAO was in breach of FOIA by failing to respond to the request within 20 days.

Commissioner's investigation as to hold them back any longer was not an option open to the NAO under all the circumstances of the case."

52. It also appears that the Appellant disagrees with the Commissioner's finding, in his favour, that this was a fresh request under FOIA and he submits that in his request of 1 March 2006 (request 3) to be shown "exactly" the assumptions used in the model.

53. As the Commissioner had decided this issue in the Appellant's favour and as the Appellant has been provided with the information, we see no merit in considering further whether this was a fresh request or not.

54. Reference has been made to section 14 of FOIA (vexatious or repeated requests for information). The Commissioner did not reach any decision regarding the use of section 14 of FOIA by the NAO as an initial decision to refuse a request on that basis had been reversed internally before the complaint was made to the Commissioner. Although this has not been pursued as a ground of appeal, the Appellant submits that it is relevant in the following context.

55. The Appellant has made other requests for information to King's College directly but no information has been disclosed; instead King's College has cited section 14 of FOIA. As King's College holds information on behalf of NAO, the Appellant submits, in effect, that any arguments deployed to justify non-disclosure by King's College are, in fact, arguments deployed by the NAO. He invites the Tribunal to redraft paragraph 103 of Decision Notice in light of this. Our preliminary view is that one public authority dealing with a request for information under FOIA cannot be responsible for the approach taken by a different public authority in relation to a request made directly to it for information under FOIA, albeit that the second public authority holds the information on behalf of the first. This question is not relevant to this Appeal and we have not received any detailed submissions on the



point. We do not consider that this is a matter we need to resolve in order to answer the questions we have identified to decide this Appeal.

56. Request 9 was a single request relating to three specific figures contained within the spreadsheets that the NAO had disclosed to the Appellant pursuant to earlier requests under FOIA. The origins of those figures have now been provided to the Appellant, albeit late and therefore in breach of sections 1(1)(a) and (b) and 10(1) of FOIA.

57. The Appellant asserts that this information must have been held at the time of his original request and was either overlooked or deliberately withheld. This is not a matter for us in light of the fact that the information has now been disclosed and the Commissioner found that the NAO had breached requirements of FOIA when dealing with this request for information.

58. We do not consider that it is necessary to speculate as to how the information came to be disclosed to the Appellant. We have also taken note of the Decision of a differently constituted Tribunal in Billings v Information Commissioner (EA/2007/0076) in which it was stated that an Appeal is not intended to develop into a joint drafting session but only to provide relief if the Decision Notice is found not to be in accordance with the law. The request was for the exact origin of the three specified figures. That information has now been disclosed. The Commissioner found that in dealing with the request the NAO had breached a number of requirements under FOIA. That the Appellant requires the reasoning of the Commissioner to be expressed in a different way or to include other matters is not a matter for us.

59. The Appellant also made a suggestion in correspondence with the Tribunal, but not repeated in his submissions, that the Tribunal should require Commissioner to issue a recommendation as to good practice under section 48 of FOIA. That is a matter within the remit of the

Commissioner and this Tribunal has no jurisdiction to do so or to require the Commissioner to do so.

60. In light of these conclusions, we are satisfied that the Commissioner reached the correct findings of fact in respect of Complaint (vi).

Conclusion and remedy

61. Having reviewed the evidence, we conclude that all information held by the NAO, or by King's College on its behalf, falling within the scope of the requests, has now been disclosed.

62. We are satisfied that the Commissioner reached not only decisions he was entitled to reach, but correct decisions on the evidence. We conclude that he reached the correct findings of facts in relation to both complaints (i) and (vi) and therefore we dismiss this Appeal.

63. Our decision is unanimous.

Signed:

Annabel Pilling

Deputy Chairman

Date: 17 April 2009