



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

Case No. EA/2013/0146

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50494773
Dated: 3 July 2013**

Appellant: STEVE NICOLL

Respondent: INFORMATION COMMISSIONER

On the papers at: FIELD HOUSE

Date of meeting: 13 NOVEMBER 2013

Date of decision: 4 DECEMBER 2013

Before

ROBIN CALLENDER SMITH
Judge

and

DR HENRY FITZHUGH and DAVID WILKINSON
Tribunal Members

Representations:

For the Appellant: Mr Steve Nicoll.

For the Respondent: Ms Michele Voznick, Solicitor for the Information
Commissioner.

**Subject matter:
FOIA 2000**

Whether information held

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 3 July 2013 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. The Appellant asked the University of Sheffield for information about a request made in May 1987 by the Head of Forensic Pathology at the University of Sheffield to the Prison Governor at Lincoln Prison about the removal of bone samples from the remains of executed felons.
2. The Professor's original request in 1987 was made at a time when he acted as a consultant Pathologist for the Home Office for South Yorkshire and East Midlands. During this period, it sometimes happened that skeletal remains were found in the course of motorway road works, or the laying of new building foundations. Such remains would be passed to the police who would need the help of forensic pathology experts to determine their age and hence the length of time that the individual or individuals in question had been deceased. If the bones were found to be more than 80 years old, then the police would likely determine that there would be no one alive to charge with any offence, and hence the availability of a reliable dating process saved police time and resources. The Professor's 1987 letter explained that - with carbon-dating - it would possible to date skeletons which are thousands of years old, but more research was being conducted on the dating of bones that were less than 100 years old. As the prisoner remains were within that time period and the exact date of death was known, they were a very good match for the Professor's research.

3. Home Office Licence Number 16316 dated 8 July 1988 granted the Professor's request. The Licence provided for the removal remains in "grave spaces 1-20". The conditions of the Licence provided that

(iii)...remains may be examined, without delay, by the staff of Department of Forensic Pathology of the University of Sheffield under the direction of Professor Usher. If required, a small amount of bony material may be removed...and retained for the purpose of scientific examination...

(iv). On completion of such examination the rest of the remains shall be placed in suitable containers ... conveyed to a burial ground....

The request for information

4. On 20 December 2012, the Appellant wrote to the University and requested information in the following terms:

I am seeking Information about a request made by Prof Usher, Head of Forensic Pathology of Sheffield University, on 1 May 1987 to the Prison Governor at Lincoln Prison to remove bone samples from the remains of executed felons...

My request for information is:

A. To be made fully aware of how many bone samples were removed, how they were removed, what quantity of bones(s) were removed and from which executed felons. (I have a list of all 25 remains and their names).

B. What was the nature and outcomes of the scientific examination of the bone samples and what has been done with the bone samples on completion of the examination.

1. On 7 January 2013 the University informed the Appellant that it did not hold the information requested and that it no longer held any records for the Department of Forensic Pathology because they had been passed to the National Forensic Archive (NFA) in 2006.

2. On 1 February 2013 the Appellant made the same request to the NFA. The NFA explained that the requested case file would still be held by the University and that the NFA only held records from 2006 onwards. On 12 March 2013 the NFA confirmed that the University had conducted further searches and did not hold either the requested files or records.

3. On 13 March 2013 the University clarified matters to the Appellant:

- It held case files relating to the work of Forensic Pathologists based at the University when it had a Department of Forensic Pathology (before 2006).

- That Department was transferred to the Forensic Science Service (FSS) in 2006.
- The case files for 1988 had been inspected and none of them related to the Professor.
- The University did not hold any files or correspondence relating to the work of the Professor.
- The University did not hold any records relating to the retention of human tissue or bone samples or the management of such samples.
- The University's School of Medicine did not hold any such records.
- The School of Medicine contacted the Medico-Legal Service who suggested contacting the NFA.
- The NFA only held records post-2006.

The complaint to the Information Commissioner

1. The Appellant contacted the Information Commissioner on 2 April 2013. He did not believe his request had been fully answered. His complaint was that the University had not provided information for which it was the custodian in 1987/1988.
2. He considered there was compelling external evidence to suggest that was the case. He did not believe that the University had provided a consistent or balanced response in respect of the information requests relating to the work carried out by its Department of Forensic Pathology.

The appeal to the Tribunal

3. In his appeal to the Tribunal the Appellant stated that the Information Commissioner had not fully considered whether the University of Sheffield had ever held records of the Head of Forensic Pathology.
4. He was not satisfied that the search for files relating to the work of Professor Usher in his capacity as Head of the University Pathology Department had been conducted properly. The University stated that it held no case files or correspondence files relating to the Professor's work. The Appellant believed that an eminent Professor who worked for 29 years at the University would have generated case files or correspondence which would still exist unless the University had

disposed of them. If the University knew it held no case files or correspondence then that should have been the basis of its first response.

5. In applying the balance of probabilities test in the Decision Notice, the Information Commissioner had not given sufficient weight the Appellant's evidence – the only evidence provided – that Professor Usher was acting on behalf of his employer, the University, when bone samples were removed. Professor Usher had stated that he was carrying out that work as part of wider research activity. The Appellant believed that the Professor was acting in his capacity as a University employee and not on behalf of a third party.

6. The matter of the end-disposal of human bone samples had not been given sufficient weight. The Appellant accepted that the Human Tissue Act 2006 did not cover the period in question but believed the University would have had a disposal procedure for such human remains and it was reasonable for the University to disclose what the procedure was in 1987/1988.

7. The University should have addressed the emotive issue in respect of the information request with some "words of comfort" for the surviving relatives of one of the executed felons. Those relatives were known to the Appellant.

The question for the Tribunal

8. In this appeal the question for the Tribunal is whether the information requested was held by the University at the time of the request.

Conclusion and remedy

9. As the Information Commissioner's response to the Grounds of Appeal points out, the University explained that there was a large amount of independence for Professor Usher to conduct his research and other work.

10. The University had provided an example of Professor Usher using the University letterhead, but asking to be paid for the work he had undertaken personally.

11. Therefore, while it is clear that the University letterhead was used and University staff under the Professor's guidance were given permission for the

examination of the remains and , if required, to take bone samples, there was no evidence provided that the research was specifically and only University departmental research.

12. The documents provided by the Appellant indicate only that the request for the examination of the human remains was made by the Professor and that there was a Licence granting that request which permitted, if required, bone samples to be taken.

13. That was not evidence that leads the Tribunal to doubt the reasonable explanations provided by the University about the nature of the Professor's employment, the age of the information, the requirements at the time of the information concerning records and the detailed explanation of the department closure and the searches undertaken.

14. The University explained how the record system changed in 2006, how it contacted the departments where such information might be held, including the School of Medicine, Department of Neuroscience and the Medico-Legal Centre operated by Sheffield City Council. The Tribunal is satisfied that this demonstrates a diligent, reasonable and adequate search for the information.

15. The Licence itself refers to samples being taken "if required". No evidence has been provided that any samples were in fact taken following examination of the skeletal remains. There was no legal obligation for records to be kept regarding the disposal of human remains until 2006.

16. The Tribunal is satisfied on the balance of probabilities that – given the rigour of the searches made by the University and the range of the enquiries that it made of other relevant bodies – the requested information is not held and that this Appeal must fail.

17. Our decision is unanimous.

18. There is no order as to costs.

Robin Callender Smith

Judge: 4 December 2013