



Neutral citation number: [2022] UKFTT 381 (GRC)

Case Reference: EA/2022/0084

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Heard by: remote video hearing (cloud video platform)

**Heard on: 20 September 2022
Decision given on: 18 October 2022**

Before

**TRIBUNAL JUDGE STEPHEN ROPER
TRIBUNAL MEMBER PAUL TAYLOR
TRIBUNAL MEMBER PIETER DE WAAL**

Between

MOHAMED MAHAMOOD ABDULLAH

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Representation:

The Appellant appeared in person

The Respondent did not attend and was not represented

Decision: The appeal is Dismissed

REASONS

Preliminary matters

1. In this decision, we use the following abbreviations to denote the meanings shown:

Case Management
Direction:

The Case Management Direction relating to this appeal
(EA/2022/0084) dated 5 September 2022.

Commissioner:	The Information Commissioner.
Decision Notice:	The Decision Notice of the Information Commissioner dated 28 March 2022, reference IC-142084-D8P9.
FOIA:	The Freedom of Information Act 2000.
Guidance Note:	The First-tier Tribunal (General Regulatory Chamber) Presidential Guidance Note: Number 1 of 2022 – Taking Oral Evidence From Abroad.
MOD:	The Ministry of Defence.
Previous Appeal:	The appeal before the First-tier Tribunal, under case reference EA/2020/0105.
Previous Decision:	The decision of the First-tier Tribunal in respect of the Previous Appeal, as more particularly described in paragraph 20.
Request:	The Appellant’s request to the MOD for information relating to his late father’s Royal Navy service record, made on 3 September 2019, as more particularly described in paragraphs 16 and 17.
Substituted Decision Notice:	The decision notice contained in the Previous Decision, as referred to in paragraph 21, which substituted the Commissioner’s decision notice reference FS50895606 dated 4 March 2020.
Territorial Decision:	The decision of the First-tier Tribunal relating to the territorial scope of FOIA, as more particularly described in paragraphs 10 to 12 (inclusive).
Tribunal Rules:	The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

2. We refer to the Information Commissioner as ‘he’ and ‘his’ to reflect the fact that the Information Commissioner was John Edwards at the time of the Decision Notice, whilst acknowledging that the Information Commissioner was Elizabeth Denham CBE at the time of the Request and the Previous Decision.
3. Unless the context otherwise requires (or as otherwise expressly stated), references to numbered paragraphs are to paragraphs of this decision so numbered.

Introduction

4. This is an appeal against the Decision Notice, in which the Commissioner concluded that on the balance of probabilities the MOD did not hold any information falling within the scope of the Request. The Decision Notice related to the response by the MOD to the Request pursuant to the Substituted Decision Notice.

5. The Decision Notice did not require the MOD to take any steps.

Mode of Hearing

6. The proceedings were held by the cloud video platform. The Tribunal panel and the Appellant all joined remotely.
7. The Appellant represented himself. The Respondent did not attend the hearing, having previously indicated that he was content for the hearing to be determined on the papers and would rely on his response to the appeal, which is outlined below. The Respondent elected not to participate in the hearing despite being informed that the Appellant would be attending the hearing in person.
8. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
9. The Appellant is currently resident in Ethiopia and, in accordance with the procedure set out in the Guidance Note, a referral was made to the Taking of Evidence Unit on the Appellant's behalf to seek permission for him to give oral evidence from abroad at the hearing. That permission was refused and accordingly the Appellant was precluded from giving oral evidence at the hearing. In connection with this, the Case Management Direction gave the Appellant the opportunity to provide any further written evidence that he may wish to rely on. The Case Management Direction provided that such further written evidence must be submitted to the Tribunal by no later than 13 September 2022.

Decision on Preliminary Issue

10. Prior to the Previous Appeal being heard by the First-tier Tribunal, it was one of a number of cases designated as lead cases pursuant to rule 18 of the Tribunal Rules relating to a preliminary issue of the First-tier Tribunal's jurisdiction to determine the appeals. That preliminary issue (under case reference EA/2020/0105 and others) was heard by the First-tier Tribunal on 26 and 27 January 2021, resulting in the Tribunal's decision dated 19 February 2021 (promulgated on 24 February 2021).
11. Insofar as is material for current purposes, that preliminary issue related to the scope of FOIA in respect of: (a) a public authority's duties regarding a request for information made by a person who was not resident in the United Kingdom; (b) the rights of such a person to apply for a decision notice from the Commissioner; and (c) the right of such a person or a public authority to appeal to the Tribunal against such a decision notice.
12. We do not consider it necessary to set out the Tribunal's reasoning in the Territorial Decision. For current purposes, it is sufficient to say that the First-tier Tribunal determined that there was no territorial limitation in FOIA in respect of the issues outlined in paragraph 11. Whilst the Tribunal is not bound by the Territorial Decision (it being made by a First-tier Tribunal), we note the authorities and reasoning which were relied on in it and we concur with the conclusions and decision reached.
13. It therefore follows that we considered that the Tribunal had jurisdiction for the purposes of the current appeal. Further, neither the Commissioner nor the Appellant

raised any objections in the current appeal based on jurisdiction or territorial issues or the residency status of the Appellant.

Background to the appeal

14. In order to set out the background to this appeal, it is pertinent to address the background to the Previous Appeal.

The background to the Previous Appeal

15. The background to the Previous Appeal was set out in paragraphs 6 to 12 (inclusive) of the Previous Decision, the material parts of which are replicated below:

“Before he died the Appellant’s father, Mr Mohamood Abdullah Hasan told his son that he served the British Crown in the conflicts in Korea, Suez and Aden where he was wounded in the neck and hand in the war at Little Aden in three days of fighting. The Appellant believed his father to be a “Royal Navy Soldier”.

The Appellant believes that his father began his military career at a young age before becoming a fully-fledged soldier as he reached his majority. He had told his son that as part of his service he had been sent to London to study the law of the Navy and fighting. His father said he was working in the Navy store alongside his studying and that after he passed the exam he was sent to Aden. He had worked at the Aden headquarters.

Mr Hasan was still serving in Aden when, in 1966, he travelled to Somalia to visit his ailing father, this Appellant’s grandfather. In Somalia he was arrested and put in jail where he was kept until 1991 by which time he was in poor health due to the conditions of his imprisonment. This Appellant believes that he was imprisoned because he was a serving member of the British forces and that his father had never resigned from his service. On his release he was unable to contact any authorities in Aden due to the change in government but during an interview with the British Embassy, once his documents had been examined, questions had been asked about why he ran away from the army.

The Appellant was born in 1994. His father died in 2013 aged 80, and his mother passed away in 2018 at the age of 48. The English version of the Appellant’s father’s name, Mohamood Abdullah Hasan, is a translation from the Arabic and so the Appellant could not be sure if there were other possible acceptable spellings such as a double ‘s’ in Hassan instead of a single letter. His father used both Mohamood Abdullah Hasan and Mohamood Abdullah but the Appellant did not know what name he had used when in the military.

The Appellant describes himself as a person without nationality for any country. He lives in Ethiopia. He has tried to establish a right to a British passport and has contacted the British Consulate and High Commission in Nairobi in that regard. As part of that process he was asked to obtain his father’s record of service to support his application for late registration of his birth.

This appeal is about the request for information that this Appellant made to the Ministry of Defence in an effort to obtain his father’s service record and the decision of the Information Commissioner in response to this Appellant’s complaint made under section 50 Freedom of Information Act 2000 [‘FOIA’].”

The request for information and subsequent response

16. The request which was the subject of the Previous Appeal (and which accordingly is also the subject of this appeal) was described in the Previous Decision. The original request was not included in the bundle before the First-tier Tribunal in the Previous Appeal, nor was it included in the bundle in the current appeal (although this contained other documents relating to requests for service record information relating to the Appellant's late father, prior to the date of the Request).
17. However, based on the other information before the Tribunal and in light of the Previous Decision, we understand that there is no dispute regarding the nature of the original request and that it is accepted by all parties that the Appellant made a request to the MOD on 3 September 2019 for his father's Royal Navy service record. Accordingly, having regard to the overriding objective set out in rule 2 of the Tribunal Rules, we considered it was in the interests of justice to proceed without needing a copy of the original request, as the appeal could be determined fairly and justly on the basis of the evidence before us (especially given the Previous Decision).
18. In response to the Request, the MOD responded by explaining that it could not locate the record that had been requested. The Appellant challenged this decision and the Commissioner issued a decision notice concluding that on the balance of probabilities no information was held.
19. The Appellant appealed that notice to the First-tier Tribunal.

The outcome of the Previous Appeal

20. Following that appeal, the First-tier Tribunal concluded, as set out in its decision dated 28 September 2021 (promulgated on 29 September 2021) that, in essence, the MOD: (a) had not conducted sufficient searches in order to locate the requested information; and (b) had not complied with its duty under section 16 of FOIA to provide reasonable advice and assistance to the Appellant in connection with the Request.
21. Pursuant to the Previous Decision, the First-tier Tribunal issued a substituted decision notice which required the MOD to issue a fresh response to the Request. The Previous Decision also required the MOD to take those steps within 35 calendar days of the date on which the Commissioner sent to the MOD notification of such substituted decision notice in accordance with the Direction contained in the Previous Decision.

The MOD's subsequent response

22. Pursuant to the Substituted Decision Notice, the MOD issued a fresh response to the Request on 22 November 2021. The MOD stated that it had conducted extensive further searches and had again concluded that it did not hold the requested information.
23. In that response, the MOD explained that, using the information which the Appellant had provided to the First-tier Tribunal in connection with the Previous Appeal, it had conducted further extensive searches to locate information falling within the scope of the Request. However, it explained that despite these searches it could find no record of the Appellant's late father having served in any branch of the British armed forces.

24. The MOD also explained that it could not provide the Appellant with any specific advice and assistance which would assist him in locating his late father's records, but it did provide him with some general advice regarding records relating to the period during which the Appellant understood his father to have served with the British armed forces.
25. The Appellant contacted the Commissioner on 23 November 2021 to complain about the MOD's responses to the Request. The Appellant continued to dispute the MOD's position that no information was held. Rather, the Appellant's position was that his late father had served with the British armed forces and therefore the MOD would hold his service record.

The Decision Notice

26. By way of the Decision Notice, the Commissioner decided that, on the balance of probabilities, the MOD did not hold any information falling within the scope of the Request. The Commissioner accordingly accepted the MOD's position that no relevant records were held. The Commissioner also stated that he was satisfied that the MOD had provided all advice and assistance to the Appellant that it could be reasonably expected to do in the circumstances of the Request.

The appeal

27. The Appellant appealed the Decision Notice and accordingly this appeal is about the Request and the Decision Notice given in response to the Appellant's complaint made under section 50 of FOIA.
28. We feel that it is important to stress again (as was also stated in the Previous Decision) what this current appeal is not about. As we refer to below, the Appellant has made various assertions regarding the meaning and effect of the Previous Decision and his view of the associated implications of the Previous Decision. As was also the case in the Previous Appeal, this appeal is not about the Appellant's nationality, nor his rights to claim citizenship or any rights derived from his late father. This appeal (again, as was the case in the Previous Appeal) is also not about whether or not, or in what way, the Appellant's late father served the British Crown or whether or not, or in what way, the Appellant has any entitlements resulting from any such service. The Tribunal has no power to determine those issues and nothing we say should be interpreted as an expression of opinion on any of those issues.
29. We should also explain that this appeal does not relate to the Previous Decision (in that it is not an appeal of the Previous Decision), but only to the Decision Notice in respect of the response by the MOD to the Substituted Decision Notice.
30. For clarity, the role and powers which the Tribunal has in the current appeal are set out below. The Tribunal has no further powers for the purposes of the current appeal and this decision.

The grounds of appeal

31. The Appellant's grounds of appeal were set out in his appeal notice and restated in

different terms in response to the Commissioner's reply to the appeal and in further written and oral submissions made by the Appellant.

32. We have considered all of the grounds put forward by the Appellant in their different forms, but for current purposes we consider it helpful to set out:

a. the grounds of appeal as stated by the Appellant in response to the Commissioner's reply (page A42 of the Bundle, replicated as written):

"The Commissioner's decision notice 142084-D8P9 is against for the Tribunal's lead case decision dated 19 Feb 2021 and the Tribunal's Decision dated 28 Sep 2021.

The Commissioner failed to understand the Territoriality issue rule.

The Commissioner accepted the MOD's word without asked further questions.

The Commissioner has no power to ignore my father's blood.

The Commissioner has failed to conclude my complaint within 3 month under s166 Data Protection Act 1998."; and

b. the grounds of appeal as clarified and expanded on by the Appellant by way of subsequent written submissions (pages A47 and A48 of the Bundle, replicated as written):

"The first-tier Tribunal's decision EA/2020/0105 dated 28 September 2021, is substituted for the Commissioner's Decision FS50895606 dated 04 March 2020.

The Commissioner and the Ministry Of Defence "MOD" did not Appealed for the Tribunal's decision EA/2020/0105, dated 28 September 2021, in 28 days after the date of this decision because there is no error in the Law in the Tribunal's decision.

The commissioner made another decision noticed IC-142084-D8P9, dated 28 March 2022

This Commissioner's decision IC-142084-D8P9, dated 28 March 2022, set out that the Ministry Of Defence refused to comply for the Tribunal's Decision EA/2020/0105 , dated 28 September 2021, under section 12 freedom of Information Act 2000.

I sent My Appeal to the Tribunal on 06 April 2022 Against the Commissioner's Decision IC-142084-D8P9 , dated 28 March 2022.

The First-tier Tribunal's dedsion EA/2020/0105, dated 28 September 2021, allowed my appeal including the video hearing and the open bundle and further evidence document that I submitted to the Tribunal on 26 April 2021. This decision EA/2020/0105 approved my father's insurance rights.

The Ministry of Defence's email on 31 March 2022 set out that there is no dispute for the Tribunal's decision EA/2020/0105, dated 28 September 2021, so far so the "MOD" approved that my father was soldier in the First Battalion Own Queen Cameron Highlanders and he served the British Crown in the Conflicts in Korea, Sue and in Aden where he was wounded in the Neck and Hand in three days of fighting at little Aden, and he did not held his insurance right, and he did not resign from the British Army and his

rank is second lieutenant, because the Tribunal agreed my document on 26 April 2021 in her decision EA/2020/0105.

The commissioner's decision IC-142084-D8P9 dated 28 March 2022 set out that the "MOD" refused to comply for the Tribunal's decision EA/2020/0105 dated 28 September 2021 under section 12 Freedom of Information Act 2000, so far so the Commissioner failed to request from the "MOD" to charge the fee of exceeds appropriate limit from my father's insurance right Account under section 13 of the freedom Of Information Act 2000, to conclude my complaint in 3 month under section 166 Data Protection Act 1998, because my father did not held his insurance rights.

For these reasons the Commissioner's decision Noticed IC-142084-D8P9 dated 28 March 2022 is not accordance with the Law and the notice involoed an exercise of discretion by the Commissioner, that she ought to have exercised differently."

33. We discuss the Appellant's grounds of appeal in more detail below.

The Commissioner's response

34. The Commissioner relied on the Decision Notice as setting out his findings and the reasons for those findings, repeating the matters stated in the Decision Notice.

35. In short, the Commissioner's position is that he is satisfied that:

- a. the MOD had conducted adequate searches for the requested information following the Substituted Decision Notice and that, on the balance of probabilities, the MOD did not hold the requested information; and
- b. the MOD had provided reasonable advice and assistance to the Appellant in connection with the Request.

36. Accordingly, the Commissioner maintains that the Decision Notice was in accordance with the law and that he had appropriately exercised his discretion in respect of the Decision Notice.

37. The Commissioner's position was also that the Appellant had failed to set out in his grounds of appeal why the Decision Notice was not in accordance with the law or why the Commissioner ought to have exercised his discretion differently in respect of the Decision Notice.

The Appellant's reply

38. The Appellant's reply was as stated in paragraph 32.

The Tribunal's powers and role

39. The powers of the Tribunal in determining this appeal 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.

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

40. In summary, therefore, the Tribunal's remit is to consider whether the Decision Notice was in accordance with the law, or whether any applicable exercise of discretion by the Commissioner in respect of the Decision Notice should have been exercised differently. In reaching its decision, the Tribunal may review any findings of fact on which the Decision Notice was based and the Tribunal may come to a different decision regarding those facts.
41. Accordingly, the issue for the Tribunal to determine in this appeal is essentially whether or not the Commissioner was correct to determine, in the Decision Notice, that: (a) the MOD did not hold the information which was the subject of the Request; and (b) the MOD had discharged its duty to provide reasonable advice and assistance to the Appellant in connection with the Request.

The law

Section 1(1) of FOIA

42. Section 1(1) of FOIA provides individuals with a general right of access to information held by public authorities. It provides:

"(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."

43. Accordingly, under section 1(1) of FOIA, a person who has made a request to a 'public authority' (such as the MOD) for information is entitled to be informed in writing whether it holds the information requested. If the public authority does hold the information, that person is entitled to have that information communicated to him. However, these entitlements are subject to the other provisions of FOIA, including certain exemptions which may apply even if the requested information is held by the public authority.
44. It is important to note that, notwithstanding section 1(1) of FOIA, it is not the role of either the Commissioner or the Tribunal to determine conclusively (or, in other words, with certainty), whether or not information is actually held by a public authority for the purposes of that section. In the case of *Bromley v Information Commissioner & the Environment Agency* (EA/2006/0072), the First-tier Tribunal held that when deciding

whether information is held by a public authority for the purposes of section 1 FOIA:

“the test to be applied [by the Commissioner and the Tribunal] was not certainty but the balance of probabilities.” [paragraph 13]

45. In simple terms, the ‘balance of probabilities’ means that something is more likely than not to be the case. The decision in *Bromley* is not binding on this Tribunal, but we note that this test has become established and a similar approach has been taken in numerous Tribunal decisions since. We see no reason to depart from that view.
46. In accordance with the test in *Bromley*, when a public authority claims the requested information is not held, the Commissioner decides whether this is the case on the balance of probabilities and will reach a decision based on its assessment of the adequacy of the public authority’s search for the information and any other reasons explaining why the information is not held.
47. In the case of *Oates v Information Commissioner* (EA/2011/0138), another decision of the First-tier Tribunal, it was concluded that:

“As a general principle, the IC was ... entitled to accept the word of the public authority and not to investigate further in circumstances where there was no evidence as to an inadequate search, any reluctance to carry out a proper search or as to motive to withhold information actually in its possession. Were this to be otherwise, the IC, with its limited resources and its national remit, would be required to carry out a full scale investigation possibly onsite, in every case in which a public authority is simply not believed by a requester.” [paragraph 11] (emphasis added)

48. Again, that decision is not binding on this Tribunal, but we note that this principle has become established and a similar approach has been taken in numerous Tribunal decisions since. Again, we see no reason to depart from that view.

Section 16 of FOIA

49. Section 16 of FOIA imposes a duty on public authorities to provide reasonable advice and assistance in connection with requests for information made under FOIA. That section provides:

“(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.”

Evidence

50. The Tribunal read and took account of an open bundle of evidence comprising a total of 226 pages (excluding contents and index pages).
51. The Tribunal also read and took account of further documents submitted by the

Appellant in accordance with the Case Management Direction.

52. The Tribunal also received further documents and correspondence from the Appellant after the deadline set out in the Case Management Direction. These were essentially duplications of previous submissions and documentation. We did not take these into account on the basis that they were submitted late and, in any event, did not constitute any new additional evidence.
53. As we have referred to, pursuant to the Case Management Direction the Appellant was precluded from giving oral evidence at the hearing. Accordingly, the Tribunal did not receive any further evidence from the Appellant during the hearing but relied only on the evidence contained in the open bundle and the additional written evidence provided by the Appellant which we have referred to.

The hearing

54. The Tribunal heard from the Appellant during the hearing. His first language is not English but the Appellant confirmed to the Tribunal that his language skills were sufficient to enable him to fully participate in the proceedings. As the Tribunal was also aware that the Appellant had participated in previous hearings (namely, the Previous Appeal and the case giving rise to the Territorial Decision), it was satisfied that the Appellant's language skills were sufficient and that it would be fair and just to continue the hearing.
55. The Appellant initially had various difficulties trying to connect to the hearing by remote video connection. He could connect but, whilst we understand that he was able to see and hear the Tribunal panel, we were unable to see or hear him. Various connection attempts were made, but with the same difficulties. We considered whether to adjourn but decided to try one further attempt by way of the Appellant joining by telephone rather than video connection. That final attempt was successful, in that the Appellant was able to join the hearing by way of telephone connection.
56. The telephone connection was stable during each period of its continuance but the connection was periodically lost (approximately every 10 minutes or so). The Appellant explained that he was using international calling cards and was running out of credit, resulting in the telephone connection being lost. Each time the connection was lost there was a short period, typically around a few minutes, when the Tribunal had to wait for the Appellant to reconnect to the hearing. As no other parties were participating in the hearing, each such interruption purely operated as a pause in the proceedings whilst the Tribunal waited for the Appellant to reconnect. After each reconnection, the hearing resumed from the point prior to the interruption. The Tribunal was satisfied that the conduct of the hearing was not adversely affected in any material way as a result of these interruptions and that they did not preclude the Appellant from full and fair participation in the proceedings. There were no other issues with the hearing.

Submissions

57. We heard various submissions from the Appellant during the course of the hearing,

some of which he stated more than once. The Appellant's primary submission was that the Decision Notice was not in accordance with the law and his grounds for this were as referred to in paragraph 32. The Appellant's submissions in respect of these grounds were essentially the same as those set out in that paragraph.

58. The Tribunal also received further documents and correspondence from the Appellant after the hearing and before the date of this decision. That correspondence relates to further submissions reflecting those already made by the Appellant but we have not taken such correspondence into account on the basis that it arrived after we had determined the appeal (although before completing this decision). However, as they reflect the Appellant's previous submissions, our disregarding of those has no material impact in any event.

Discussion and conclusions

59. A useful starting point for our discussions is the Previous Decision. The Appellant has stated that, by way of the Previous Decision, the First-tier Tribunal had "*accepted his Father's words*" and he has argued that the Tribunal had effectively concluded that the MOD held his father's service record. As we have referred to (paragraph 28), that was not the conclusion of the First-tier Tribunal following the Previous Appeal. Indeed, the First-tier Tribunal in the Previous Appeal did not determine whether or not the MOD held the information which the Appellant had requested. Rather, as the First-tier Tribunal stated in the Previous Decision: "*We make it clear that we are not deciding that the MOD does hold the information requested...*" [paragraph 53].
60. We reminded the Appellant of this during the hearing and explained to him that the effect of the Previous Decision was, essentially, that the First-tier Tribunal had previously determined that the MOD had not conducted sufficient searches in order to satisfy its duties under FOIA (aside from the issue of advice and assistance under section 16 of FOIA).
61. Accordingly, the effect of the Previous Decision was essentially that the MOD was required to conduct further searches, sufficient to comply with its duty under FOIA, in order to determine whether or not it held the information which was the subject of the Request. Having conducted those searches, if the MOD did hold the requested information then it would (subject to other provisions of FOIA) be required to inform the Appellant that it held the information and provide it to him. However, if the MOD (having conducted those searches) concluded that it did not hold the requested information, then (aside from the duty to provide advice and assistance under section 16 of FOIA) it would only be required to inform the Appellant that it did not hold the information.
62. As we have stated, the law does not require the Commissioner to determine conclusively (or, in other words, with certainty), whether or not the requested information was held by the MOD. The law only requires the Commissioner to decide this 'on the balance of probabilities', following an assessment of the adequacy of the searches which the MOD undertook.
63. Therefore in our consideration of the lawfulness of the Decision Notice, the primary

question before us (before we turn to the issue of section 16 of FOIA) is whether we are satisfied that adequate searches were undertaken in order for the MOD to have discharged its duty under FOIA and accordingly for the Decision Notice to be correct in law in concluding that the MOD did not hold the relevant information.

64. Further, as stated in paragraph 47 regarding *Oates*, we consider that the Commissioner is also entitled to accept the word of the public authority and not to investigate further in circumstances where there was no evidence as to an inadequate search.
65. In the Decision Notice, the Commissioner set out (in paragraphs 28 to 36 inclusive) details of the various searches which had been undertaken by the MOD in response to the Request. Given the relevance of those searches to our considerations, we think it is valuable to set those out (omitting, for ease of reference, the paragraph numbers and footnotes):

“Searches by name – Royal Navy

The MOD noted that, as explained above, when this request was first processed searches were undertaken using the name stated by the Appellant on his application form, ie ‘Mohamood Abdullah Hasan’. The MOD explained that it had now conducted searches of Royal Navy records against the following name variations:

Mohamood Abdullah Hassan

Mohamood Abdulla Hasan

Mohamood Abdaullah Hasan

Mohamood Abdallah Hasan

Mohamood Abdallah Hassan

Mohamood Abdullah

Mohamed Mohamood

The MOD explained that searches were also conducted using ‘Mohamed’, ‘Mohamad’ and ‘Mahmoed’ as alternative spellings of the complainant’s forename. No records were located. The MOD explained that a wider search, for any and all records relating to people who had served under the surname ‘Hasan’ or ‘Abdullah’ and their variations, was also conducted. Again, no records were found that matched the details provided by the complainant about his father (such as his date of birth, place of birth and dates of service).

The MOD noted that the complainant had described his father as a ‘soldier’ in the Royal Navy. The MOD explained that that the Royal Navy does not call its members ‘soldiers’. However, the MOD considered whether this could have been a reference to the complainant’s father having served as a member of the Royal Marines, the Navy’s infantry land fighting element. The above searches were therefore extended to cover the records that the MOD holds for service in the Royal Marines and the Royal Navy Reserve. Again, no service records relating to the complainant’s father had been located.

Searches by name – British Army

The MOD noted that in his submissions to the Tribunal, the complainant had stated that his father had told him that he was a 'Member In The Royal Navy (First battalion On Queen Comoro Highland)'.

As per footnote 5 above, the MOD advised the complainant that the Royal Navy is not divided into battalions, but this is a term used within the British Army. The MOD assumed that the battalion name was passed on to the complainant orally and may have been transcribed incorrectly. After some consideration of possible variations of battalion names, the MOD explained that it believed that this is most likely a reference to 'The Queens Own Cameron Highlanders'. The MOD explained that this regiment was part of the United Nations forces stationed in Korea after the Korean War and was deployed to Aden in 1956. The MOD explained that as the complainant's father advised him that he was also in these places at these times, the MOD asked for fresh searches of Army Personnel records to be conducted. The MOD explained that it had conducted searches using the same name combinations outlined above for searches of the Army records. Again, no records were found under the complainant's father's name, or its variations.

Searches by name – RAF

The MOD noted that the complainant had not made any references to the RAF, or any of its divisions, in his submissions to either the MOD or the Tribunal. However, it was aware that there were RAF units in Aden at the time the complainant's said his father lived there. Therefore, to be thorough, the MOD conducted searches of RAF records using the same name combinations set out above. Again, as with the other two Services, no trace of any records relating to the complainant's late father were found.

Searches by name - Defence Business Services (DBS)

The MOD noted that the information the complainant had provided to the Tribunal included a document that appeared to be a membership card for a trade union. The MOD explained that members of the British armed forces were not allowed to be members of trade unions. However, it noted that the card relates to 'The Forces & Associated Organisations Local Employees Union'. The MOD suggested that if the complainant's father was a member of this union, he would have been engaged as a 'Locally Employed Civilian'.

The MOD explained that the Royal Navy dockyards in Aden engaged 'local employees'. It therefore considered the possibility that the complainant's father served 'with' the Royal Navy as a civilian dockyard worker, rather than serving 'in' the Royal Navy. As DBS manage the MOD civilian records, the MOD asked it to search their records. The MOD explained that while records for persons with names similar to the complainant's father were found, these did not match the other details he had provided (date of birth and date of service).

Searches by Service Number

The MOD explained that the application form which the complainant had submitted to the Royal Navy Disclosures Branch stated that his father's 'Official Service Number' was 'ARP.008809'. However, the MOD explained that there is no record of any service number being issued to any member of the British armed forces that started with the letters 'ARP'. The MOD explained that the document the complainant had provided to the Tribunal on which this

number is written was issued by the Immigration Office in Aden in 1958. The MOD explained that there is no evidence in the documents provided by the complainant, or from information it had examined as part of its review of the case following the Tribunal decision, that confirms that this number was related to any military service."

66. In summary, therefore, the Decision Notice refers to searches which the MOD undertook regarding records held by the Royal Navy, the British Army, the RAF and Defence Business Services. It also refers to the nature of the searches which the MOD undertook, including with regard to various alternative spellings of the name of the Appellant's late father and with regard to a Service Number which had been provided by the Appellant.
67. The Appellant did not put forward any arguments (even when asked specifically during the hearing) as to why those searches may not have been adequate, or regarding what other searches (including of any other locations or branches of the British armed forces) he considered could or should have been undertaken.
68. Given the nature and extent of the searches which the MOD has undertaken and the absence of any evidence regarding any additional searches that could have been undertaken, we are of the opinion that the Commissioner was correct to conclude that, on the balance of probabilities, the MOD does not hold the requested information.
69. We turn now to the issue of the MOD's duties under section 16 of FOIA regarding the provision of reasonable advice and assistance to the Appellant in connection with the Request.
70. As explained in more detail in the Decision Notice, the MOD has provided advice and information to the Appellant regarding:
 - a. the structure and divisions of the British armed forces and some of the terminology used within those, including by reference to the term 'soldier', having regard to the information provided by the Appellant;
 - b. its assessment of some of the information which the Appellant provided in connection with the Request - including the possibility of one document being a trade union membership card, its view of the 'Official Service Number' provided by the Appellant and the document which was issued by the Immigration Office in Aden;
 - a. some historical information relating to the operations and locations of the British armed forces (for example, regarding Aden) and its opinion on the potential links to the information which the Appellant had provided in connection with the Request;
 - b. its view of the possibility of the Appellant's late father's role working in a civilian capacity, together with its reasons for that view; and
 - c. additional sources of potential information which the MOD considered may help the Appellant in securing some of the information he is looking for.

71. We agree with the Commissioner's conclusions that it is difficult to see what further advice and assistance could be provided to the Appellant. Again, the Appellant did not put forward any arguments regarding any additional advice or assistance that he considers the MOD could or should have provided. We are therefore of the opinion that the Commissioner was correct in his view that the MOD has satisfied its duty to provide reasonable advice and assistance to the Appellant in connection with the Request.

72. We turn now to the Appellant's grounds of appeal as referred to in paragraph 32. Taking each in turn:

- a. *"The Commissioner's decision notice 142084-D8P9 is against for the Tribunal's lead case decision dated 19 Feb 2021 and the Tribunal's Decision dated 28 Sep 2021."*

These two references to the Tribunal's decisions are to the Territorial Decision and the Previous Decision, respectively. As we have stated in paragraphs 12 and 13, the effect of the Territorial Decision was that there was no territorial limitation in FOIA and accordingly the Appellant was entitled to request information from the MOD under FOIA. The Tribunal therefore has jurisdiction for the purposes of the current appeal and the Commissioner raised no objections to this (whether in the course of this appeal or in the Decision Notice itself).

As we have already referred to, the effect of the Previous Decision was essentially that the MOD was required to conduct further searches. Following the Appellant's complaint regarding the outcome of those further searches, the Commissioner was then required to separately assess whether or not those further searches were sufficient for the purposes of FOIA. For the reasons we have given, we conclude that those further searches were sufficient and therefore that the Decision Notice was correct in its findings in that regard.

It follows that we do not accept this ground of appeal.

- b. *"The Commissioner failed to understand the Territoriality issue rule."*

We have covered this point above.

- c. *"The Commissioner accepted the MOD's word without asked further questions."*

The duty of the Commissioner was to determine whether or not the MOD, on the balance of probabilities, held the requested information. The Commissioner was not required to determine conclusively that the requested information was not held. Also, we consider that the Commissioner was not obliged to ask the MOD further questions, nor undertake further investigations, in circumstances where there was sufficient evidence of adequate searches having been undertaken by the MOD. We have stated previously our reasons for all of these views.

It follows that we do not accept this ground of appeal.

- d. *"The Commissioner has no power to ignore my father's blood."*

We have set out above the law relevant to the Request and to the duties of the MOD and the Commissioner under FOIA. We have also set out the role of powers of this Tribunal in determining the appeal.

Accordingly, this submission has no relevance for the purposes of the current appeal. It follows that we do not accept this ground of appeal.

- e. *"The Commissioner has failed to conclude my complaint within 3 month under s166 Data Protection Act 1998."*

We understand that this is intended to be a reference to the Data Protection Act 2018, rather than to the Data Protection Act 1998.

Section 166 of the Data Protection Act 2018 deals with the Tribunal's powers to order the Commissioner to progress a complaint if the complaint has not been progressed (or the complainant has not been provided with relevant information relating to the complaint) within a period of three months from the Commissioner's receipt of that complaint. The Tribunal can only consider or make any such order if the complainant has made an application to the Tribunal under that section.

We are not aware that any such application was made by the Appellant. In any event, it is not relevant for the purposes of the current appeal, which is limited to the issues we have identified above.

Accordingly, this submission has no relevance for the purposes of the current appeal. It follows that we do not accept this ground of appeal.

- f. *"The first-tier Tribunal's decision EA/2020/0105 dated 28 September 2021, is substituted for the Commissioner's Decision FS50895606 dated 04 March 2020.*

"The Commissioner and the Ministry Of Defence "MOD" did not Appealed for the Tribunal's decision EA/2020/0105, dated 28 September 2021, in 28 days after the date of this decision because there is no error in the Law in the Tribunal's decision."

It is correct that there was no appeal of the Previous Decision and accordingly it was binding on the Commissioner and the Substituted Decision Notice therefore took effect. However, as we have explained, this essentially meant that the MOD was directed to undertake further searches and provide advice and assistance to the Appellant on the basis we have outlined.

We accept the submissions of the Appellant regarding these grounds, on the basis that they are factually accurate. However, these are undisputed points which merely set out the established background to this appeal. These points therefore do not constitute valid grounds of appeal and accordingly do not advance the Appellant's arguments.

- g. *"The commissioner made another decision noticed IC-142084-D8P9, dated 28 March 2022.*

This Commissioner's decision IC-142084-D8P9, dated 28 March 2022, set out that the Ministry Of Defence refused to comply for the Tribunal's Decision EA/2020/0105 , dated 28 September 2021, under section 12 freedom of Information Act 2000.

I sent My Appeal to the Tribunal on 06 April 2022 Against the Commissioner's Decision IC-142084-D8P9 , dated 28 March 2022.

The First-tier Tribunal's dedsion EA/2020/0105, dated 28 September 2021, allowed my appeal including the video hearing and the open bundle and further evidence document that I submitted to the Tribunal on 26 April 2021. This decision EA/2020/0105 approved my father's insurance rights.

The Ministry of Defence's email on 31 March 2022 set out that there is no dispute for the Tribunal's decision EA/2020/0105, dated 28 September 2021, so far so the "MOD" approved that my father was soldier in the First Battalion Own Queen Cameron Highlanders and he served the British Crown in the Conflicts in Korea, Sue and in Aden where he was wounded in the Neck and Hand in three days of fighting at little Aden, and he did not held his insurance right, and he did not resign from the British Army and his rank is second lieutenant, because the Tribunal agreed my document on 26 April 2021 in her decision EA/2020/0105.

The commissioner's decision IC-142084-D8P9 dated 28 March 2022 set out that the "MOD" refused to comply for the Tribunal's decision EA/2020/0105 dated 28 September 2021 under section 12 Freedom of Information Act 2000, so far so the Commissioner failed to request from the "MOD" to charge the fee of exceeds appropriate limit from my father's insurance right Account under section 13 of the freedom Of Information Act 2000, to conclude my complaint in 3 month under section 166 Data Protection Act 1998, because my father did not held his insurance rights.

For these reasons the Commissioner's decision Noticed IC-142084-D8P9 dated 28 March 2022 is not accordance with the Law and the notice involoed an exercise of discretion by the Commissioner, that she ought to have exercised differently."

We have grouped these grounds together as they all relate to the Appellant's submissions to the effect that the Decision Notice was wrong in law and that the Commissioner should have exercised his discretion differently.

It is, of course, correct that the Commissioner issued the Decision Notice (that being the subject to the current appeal) following the Appellant's complaint regarding the MOD's response to the Substituted Decision Notice. However, for the reasons we have already given, it is not correct that the Previous Decision made any determination of the Appellant's father's background, status, position, insurance rights or any associated issues. It is also not correct that the MOD or the Commissioner approved or accepted any of those things.

The Appellant appears to be mistaken regarding the application of sections 12 and 13 of FOIA. In essence, section 12 of FOIA allows a public authority to refuse to comply with a request for information under FOIA if the estimated cost of doing so exceeds the appropriate limit. The appropriate limit is determined by reference to Regulations made pursuant to section 12(5) of FOIA (namely, the

Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004) and, for the MOD, the limit is the equivalent of 24 hours' work. Whilst the Commissioner referred to section 12 in the Decision Notice (paragraph 42), this was merely in the context of explaining how much time the MOD had spent undertaking searches for information in connection with the Request. This was pointing out that the MOD had explained that the searches it had undertaken took staff more than 50 hours and that this was more than double the appropriate limit for the MOD under section 12 of FOIA. It is important to note that the MOD did not rely on section 12 of FOIA in its response to the Request and, accordingly, that the Decision Notice did not make any findings based on that section.

In simple terms, section 13 of FOIA allows a public authority to levy charges for supplying information which has been requested under FOIA if that information was not required to be supplied because of section 12 of FOIA. The MOD has not sought to levy any charges in connection with the Request, nor was this a factor in the Decision Notice.

We therefore do not understand the relevance of the Appellant's assertion that *"the Commissioner failed to request from the "MOD" to charge the fee of exceeds appropriate limit from my father's insurance right Account under section 13 of the freedom Of Information Act 2000"*. We sought to clarify this point during the hearing but the Appellant again linked the reference to fees to his father's alleged insurance rights and asserted that this meant that there was an entitlement to armed forces compensation.

We have explained the nature and effect of sections 12 and 13 of FOIA and the relevance of those for this appeal. For those reasons, there is no legal basis for challenging the lawfulness of the Decision Notice with regard to those sections.

73. In summary, we consider that most of the Appellant's various submissions were, unfortunately, based on his misunderstanding of the law or of the effect of the Previous Decision.
74. For all of the above reasons, we conclude that the Decision Notice was in accordance with the law. We also do not consider that the exercise of discretion by the Commissioner in respect of the Decision Notice should have been exercised differently.
75. We turn now briefly to deal with any other submissions of the Appellant regarding his grounds of appeal, if and to the extent that we have not already expressly referred to them. As we have outlined, the Tribunal's powers in respect of this appeal are limited. The Tribunal has no power to determine any of these other grounds of appeal, nor are they relevant to the issues which the Tribunal is required to determine in this appeal.
76. For all of the reasons given, we therefore dismiss the appeal.

Signed: Stephen Roper
Judge of the First-tier Tribunal

Date: 18 October 2022