



Tribunals Service
Information Tribunal

Information Tribunal

Appeal Number: EA/2007/0031

Freedom of Information Act 2000 (FOIA)

Determination made on the papers

Decision promulgated: 29/11/2007

BEFORE

INFORMATION TRIBUNAL
DEPUTY CHAIRMAN
David Marks

And

LAY MEMBERS
Michael Hake
David Sivers

Between

JAMES NISBET

Appellant

And

INFORMATION COMMISSIONER

Respondent

This Decision was made on the consideration of the papers alone.

Decision

The Tribunal dismisses the Appellant's appeal and upholds the Information Commissioner's Decision Notice dated 26 March 2007.

Reasons for the Decisions

A Introduction

1. The only issue in his appeal is whether the Information Commissioner ("the Commissioner") properly concluded in this Decision Notice which is dated 26 March 2007 that on the basis of the material and the evidence he had before him the National Audit Office ("NAO") did not hold the information requested by the Appellant.
2. Under section 59 of the Freedom of Information Act 2000 (FOIA) the Tribunal shall allow an appeal or substitute such other Notice as could have been served by the Commissioner if the Tribunal considers that one of two factors are made out. The first is that the Notice against which the appeal is brought is not in accordance with the law, or secondly, to the extent that the Notice involved an exercise of discretion by the Commissioner, then the Commissioner ought to have exercised it differently. If neither of these grounds is properly established, section 58 specifies that the Tribunal "shall" dismiss the appeal.
3. Under section 58(2) of FOIA the Tribunal may review any finding of fact on which the Notice is based. Often this will involve the Tribunal looking at materials and evidence which were neither put before, nor considered by the Commissioner, prior to his preparing and submitting the Notice. The present appeal is not such a case.

The Request

4. Before dealing with the specific request which is the subject of this appeal and which was addressed to the NAO, the Tribunal feels it important to set out the early history of the Appellant's attempts to obtain information which in due course did form the basis of that specific request. The Appellant made a written request by letter dated 14 February 2005 to HM Treasury (the Treasury) with regard to a passage in a Treasury report called "The Government's Approach to PFI". The passage occurs in a separate section at page 31 of the Report headed and entitled:

“Box 3.1 Addressing the weaknesses of past public procurement

The historical record of Government procurement shows that too often new assets have been delivered late and over budget. Furthermore, where projects experienced difficulties the financial costs have been borne by the tax payer.”

Five examples are then provided, eg the cost of the Trident submarine programme and the London Underground Jubilee Line. The report then goes on as follows, namely:

“A 1999 NAO study found that only 30 per cent of non-PFI major construction projects were delivered on time and only 27 per cent were within budget, whereas the NAO’s report on PFI construction performance show that over 70 per cent of PFI projects were delivered on time, and no construction cost overruns were borne by the public sector.”

5. By his letter of 14 February 2005 the Appellant referred to the 1999 NAO study stating that he had been unable to obtain or trace a study bearing reference to that year and which confirmed that statement. He added the following, namely:

“The NAO report “Modernising Construction” dated 11 January 2001 at page 4 includes a pie chart that shows that 70% of departments’ and agencies construction projects were delivered late and 73% were over Tender Price”.

He added that the source of the above percentages was attributed to a document called “Benchmarking the Government Client Stage Two Study December 1999” which he said he understood had been commissioned by the Treasury and undertaken by an entity called the “Agile Construction Initiative at Bath University” (“the Benchmarking Study”). He observed that the Executive Summary of the Benchmarking Study did not contain the percentages used in the NAO report entitled “Modernising Construction”. He, therefore, asked for the following, namely:

“... a copy of the study, research, survey or other document which contains the evidence that confirms the percentages given in Box 3.1 of the HM Treasury Report “PFI: Meeting Investment Challenge.”.

6. The Treasury answered by letter signed by a John Adams saying that having undertaken an investigation, reference to a Report in 1999 was erroneous and there should instead have been a reference to the NAO’s 2001 Report headed “Modernising Construction” which contained the numbers in question (“the 2001 Report”). The letter went on as follows, namely:

"The percentages used in Box 3.1 for the delivery performance of conventional performance to time and to budget were solely based on the use of these numbers in these NAO reports and the Treasury did not carry out any additional evidence gathering to support the NAO use of these figures". The letter added that the Benchmarking Study had been undertaken by "academics at Bath University".

In consequence of that reply the Appellant by a letter dated 24 July 2005 again asked for a copy of the "... report, study, investigation, memorandum or other original document that contains, concludes or recommends the percentages shown in the pie charts at figure 2." For all practical purposes, the request made in the letter of 24 July 2005 therefore reflected and repeated the earlier request in the letter of 14 February 2005. The Appellant further commented that the Benchmarking Study did not contain the percentages shown on the pie charts in the 2001 Report. He then drew a distinction between the percentages shown in the pie charts shown in the Benchmarking Study on the one hand and in the 2001 Report on the other pointing out the respective differences. The Tribunal feels that there is no need to refer to the particular figures and percentages in question.

7. The Appellant had meanwhile made a separate FOIA request to the NAO itself for background information relating to Figure 2 on page 4 of the NAO 2001 Report. This is the request which is the subject of this appeal. For the sake of convenience the Tribunal will refer to the pie charts as Figure 2. The NAO replied by email dated 17 August 2005 following an investigation which it conducted and attached a spreadsheet which was the source for Figure 2. The email stated:

"Please find attached a spreadsheet which was the source for Figure 2. The percentages were translated from this spreadsheet to Figure 2 after some extra work was carried out with Bath University to include the most up-to-date information at the time, which had not been captured in the spreadsheet."

The Appellant responded by letter dated 20 August 2005 to the NAO expressing his disappointment that the spreadsheet did not "contain, conclude or recommend the percentages shown in the pie chart in figure 2" of the 2001 Report and moreover that the spreadsheet which the NAO provided did not contain "any indication of its source and date of preparation."

8. The NAO by its Director of Corporate Affairs in a letter dated 19 September 2005 sent a lengthy reply to the Appellant. It confirmed that it could not provide any further information

over that already supplied under its email of 17 August. It stated that the percentages in the pie charts were “translated” from a spreadsheet supplied by the Agile Construction Initiative at Bath University and that in preparing the 2001 Report the study team carried out “extra work” with Bath University and it was this additional work which explained the differences in the reported data. Overall the NAO contended that the data in Figure 2 in the 2001 Report had its source in the Benchmarking Study and that the data in the spreadsheet supplied to the Appellant were “consistent with the conclusions reached by Bath University.” What is most significant in this letter is that the NAO stated in terms that in preparing the 2001 Report for publication “the study team carried out extra work with Bath University in order to ensure the inclusion of the most up to date information” and it was this “additional work” which explained the small differences in the reported data which are set out in the letter. The letter, therefore, confirmed that the data in the spreadsheets supplied by the Appellant were “consistent with the conclusions reached by Bath University”. The letter went on to refer to the NAO’s more recent report entitled “Improving Public Services through better construction” published it seems in 2005 where again reference is made to the broad conclusions reached in the Benchmarking Study. The letter also invited the Appellant to contact a Hugh O’Farrell described as the manager responsible for this last mentioned 2005 Report if he had “any further enquiries on the use of the data in our constructions reports”. The Tribunal is not aware that the Appellant ever took advantage of this offer. The Tribunal feels that on any basis this represented a very full and totally reasonable explanation of the discrepancy which had apparently worried the Appellant.

9. However, after the Appellant further protested that he was no further forward in receiving the information he had requested, the NAO sent him an email dated 11 November 2005 itself restating that it was unable to provide him with any further information relating to the source for Figure 2 in the 2001 Report. It repeated its contention that the difference between the figures on the spreadsheet and those in Figure 2 of the 2001 Report was “the result of extra work carried out by the team to obtain the most up to date information.” It went on to make it clear that this extra work “involved conversations with the Bath University project lead, who also sat on the expert panel for our report” but that “unfortunately we do not have any separate documentation that supports this additional work”. However, overall the NAO in this email agreed with the Appellant’s assessment that it should have been made clear that the source for the data in Figure 2 was the team involved in the ongoing project at Bath University rather than what was stated in the published report, ie the Benchmarking Study itself.
10. The Appellant then formulated a formal complaint against the NAO addressed to its information centre manager under cover of his letter of 14 December 2005. That complaint

is a six page document also dated 14 December 2005 in which the Appellant set out in detail the differences he claimed existed between the information given at Figure 2 of the 2001 Report on the one hand and the information given in the Benchmarking Study. He concluded, perhaps not surprisingly, that the information given at Figure 2 of the 2001 Report “was not taken from the spreadsheet” supplied by the NAO on 17 August 2005. He went on to claim further than there was “no indication on the spreadsheet” that it had been prepared by Bath University or of the date on which it had been prepared.

11. In the wake of this complaint the NAO conducted what was in effect an internal review. One of its directors, a Mr Jeremy Lonsdale, informed the Appellant in the NAO’s letter of 6 March 2006 that the NAO in effect admitted that the information in Figure 2 “was not supported by an adequate audit trail and that the work clearly fell short of what is expected from our teams ...”. Mr Lonsdale, therefore, admitted that in the matter raised by the Appellant the normal constituents of an audit trail “clearly did not happen” and constituted “a lapse of the standards expected”. He added that the importance of “robust record keeping” had been “reinforced in a number of ways” since the 2001 Report.
12. The Tribunal notes that in another exchange sent by the NAO to the Appellant of 12 May 2006 it confirmed that it had accepted that the Appellant had raised valid concerns about the lack of documentation but that “this did not compromise the accuracy of the work carried out on the final figures”.

The Appellant’s complaint to the Commissioner

13. The Appellant’s formal complaint to the Information Commissioner (the Commissioner) is dated 9 June 2006. It was lodged on 12 June 2006. The Tribunal feels it important to note that in his letter to the Commissioner, the Appellant stated that the “importance of identifying the genuine and true source of the information in Figure 2 Page 4 and of the methodology used cannot be overstated.” In the Commissioner’s reply of 16 October 2006, it was pointed out that whatever concerns the Appellant had along the above lines were “outside the remit” of the Commissioner. The Tribunal entirely accepts the Commissioner’s submissions that nowhere in his complaint does the Appellant set out any reason why the NAO’s account of the original and true source of Figure 2 should not be accepted.
14. The Commissioner duly contacted the NAO. In a letter to the Commissioner dated 4 December 2006, the NAO confirmed all the steps that it had taken as regards the Appellant’s request. It further confirmed that in spite of what it called a “systematic search of the documentary evidence” in support of the 2001 Report, the information requested by

the Appellant had not been found. The NAO also stated that its team had also contacted persons they called “colleagues who had been involved in the field work undertaken on this study including liaising with the researchers at Bath University” who had confirmed that to the best of their knowledge, the National Audit Office had never held any documentary evidence in support in the change in the figure referred to by the Appellant.

15. The NAO added that the reason for the differences between the figures stated in Figure 2 and the spreadsheets supplied to the NAO by Bath University was because that University’s work evolved over the lifetime of the NAO’s study. The NAO confirmed that the changes in the figures to those indicated on the spreadsheet were “notified” to the NAO by Bath University when the NAO discussed the draft report with Bath University shortly before its publication. That process was known as “clearance” and reflected a long established Parliamentary protocol whereby the Comptroller and Auditor General’s reports are agreed as to the facts with the relevant party in this case, Bath University. As a result of such “clearance” the content of the report may change where the evidence provided supports such a change. No record of the relevant conversation or conversations was made. The Tribunal recognises that it is possible that there may not have been a totally consistent, or even wholly accurate, use of the term “Bath University” to describe those persons or parties responsible for the research project and/or the spreadsheet; equally, the Tribunal has not been provided with any clear evidence about these matters. However, as is clear from this judgment, these matters are not in any way material to the issues on this Appeal.
16. The NAO, therefore, formally confirmed that it did not hold nor had it ever held any supporting documentation other than that already disclosed to the Appellant. The NAO added it was possible that “Bath University may hold records that would show how this change in their evolving findings was calculated, but no such records were passed to the National Audit Office, either at the time of our field work or subsequently.”
17. The above conclusions were duly relayed by the Commissioner to the Appellant by a letter dated 14 December 2006. The Commissioner, therefore, expressed his satisfaction that no information had been withheld from the Appellant by the NAO. The Commissioner ended by saying that if he did not hear from the Appellant within the next 20 working days he would assume the Appellant had decided to withdraw his complaint.
18. The Appellant, however, did respond by a letter dated 20 December 2006 to the effect that his complaint did not “limit information to that held by the NAO” the implication being that he wanted to uncover an audit trail that led back to wherever there might be located the underlying information which eventually found expression in the 2001 Report. He agreed

that the NAO itself held no record of the source and could not itself verify the information in the report. He went on to say:

“It therefore seems almost inconceivable that the NAO would publish such important information as that in Fig 2 without such searching investigations and without retaining a proper record. The information in Fig 2 must have a source even if not held by the NAO”.

He, therefore, declined the Commissioner’s invitation to withdraw his complaint. In a subsequent letter to the Commissioner dated 12 January 2007, the Appellant reiterated the contents of the passage quoted above by contending and concluding that “(i) the source of the published information is held by another person. Or (ii) the source of the information does not exist.” Again, the Appellant did not identify any evidential basis for challenging the NAO’s account. Moreover, the Tribunal agrees with, and accepts the submissions of the Commissioner in finding that with regard to the former possibility, the Appellant is effectively inviting the NAO as the relevant public authority to take steps which form no part of a public authority’s obligations under FOIA. With regard to the second possibility, the Appellant ignores the fact that a public authority has no obligation to disclose information under FOIA when such information simply does not exist, or is not held by it.

The Decision Notice

19. The Decision Notice is dated 26 March 2007. In it the Commissioner made three findings of fact set out at paragraph 16 and following in the following terms:

- “16. The spreadsheet was supplied to the public authority by Bath University.
17. Bath University was responsible for the Benchmarking the [sic] Government Study.
18. The public authority had previously supplied the complainant with a copy of the Benchmarking the [sic] Government Study”.

The Commissioner therefore accepted that any difference between the figures and the spreadsheet and those in Fig 2 was as a result of extra information having been imparted by Bath University.

In consequence paragraph 18 (which should properly have been numbered 19) and following of the Notice stated:

"Procedural matters

18. Section 1(1) of the Act states that:

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.

19. The Commissioner recognises that the source for figure 2 was the Benchmarking Government Study produced by Bath University and that the spreadsheet that was disclosed to the complainant formed part of this study.

20. The complainant has alleged that the percentages in the spreadsheet do not reflect the percentages included within figure 2 of the report. However, the Commissioner accepts that any difference between these two sets of percentages is a result of extra information provided by Bath University to ensure that the report included the most up-to-date information.

21. The public authority has claimed that this information was passed to the public authority orally. The Commissioner is satisfied with the public authority's explanation that this [sic] such practices are not uncommon and accepts that, without any evidence to the contrary, a record of the conversation with Bath University was not made.

22. The Commissioner is satisfied that the complaint has been supplied with all the information that falls within the scope of his request. "

20. The Commissioner, therefore, decided that the NAO dealt with the request for information in accordance with FOIA and that no steps needed to be taken. The Commissioner added in his Decision Notice that although no audit trail existed recording the additional work the NAO had carried out with Bath University, the NAO had nonetheless acknowledged that Bath University may hold or may have held records to show how up to date information was calculated. However, such records had not been passed to the NAO. Finally, the Commissioner added in the Notice that it may have helped the Appellant better to understand the NAO's response if it had explained that extra information falling within the

scope of the request might be held by Bath University. The Tribunal respectfully agrees that that was a suitable observation for the Commissioner to make.

The grounds of appeal

21. The Notice of Appeal is dated 11 April 2007 and is a lengthy document. Without any discourtesy to the Appellant it can perhaps be summarised as in effect claiming the following, namely:

- (i) the Commissioner had given no reason for recognising that the source for Figure 2 was the Benchmarking Study;
- (ii) equally the Commissioner had given no reason for stating that the spreadsheet formed part of the Benchmarking Study;
- (iii) the Commissioner should not have been satisfied with an explanation that the percentages in Figure 2 were based on information which was not confirmed in writing; and
- (iv) the Commissioner failed to take into account the fact that the explanations for the source of the percentages in Figure 2 were contradictory, ie with regard to the Benchmarking Study, spreadsheets, extra work and the so called "study team".

The Commissioner's reply

22. The Commissioner's reply is dated 14 May 2007. The Commissioner contended:

- (1) the NAO had made it clear to the Appellant even before he lodged his complaint with the Commissioner that the updating occurred because of the receipt of further figures from Bath University;
- (2) the Commissioner was reasonably entitled to accept the NAO's explanation; and
- (3) the Commissioner was satisfied that the NAO had conducted a reasonable and reasonably thorough investigation and there was no evidence to indicate that the NAO's explanations was untruthful or misleading, and indeed those explanation appear to be "consistent with what the NAO had consistently told Mr Nisbet in the period prior to the lodging of his complaint."

The Appellant's contentions

23. The Appellant's contentions are set out in effect in two documents. These are his Notice of Appeal and a statement provided by him and dated 9 November 2007. To be fair to the Appellant, he has characterised this latter statement as a submission, and the Tribunal accepts this. However, there is much overlap and repetition between the two documents. For clarity and to ensure the Tribunal could follow the points being made, it would have been preferable if the Appellant had attempted either to set out his contentions in short and separate paragraphs, preferably in the Notice of Appeal, or even in the later document making it clear that that later document represented the entirety of his contentions. In future cases where litigants act in person or act without the benefit of proper independent legal advice, it might be advisable for the Commissioner to be sensitive to this possibility and to urge upon the party in question that in the absence of any factual material which might be unearthed, any submissions or statements in the wake of the Notice of Appeal should not in any way attempt to repeat matters which have already been canvassed in the Notice of Appeal itself.
24. In any event, the Tribunal will follow as best it can what it sees as the various points being made by the Appellant.
25. First, he claims that it is "inconceivable" that the figures in the spreadsheets could have been the source of the percentages in Figure 2. The Tribunal finds that at an early stage and indeed prior to the Appellant lodging his complaint with the Commissioner, the Appellant was told that Figure 2 represented further updated figures orally relayed by those based at Bath University. This ground does nothing to dispel the clear inference that such was the position.
26. Next, the Appellant claims that the extra work which resulted in changes to the figures had not been adequately described. The Tribunal agrees with the Commissioner in his conclusion that what the Appellant sought in his request was documents relating to the 2001 Report. The Tribunal finds that the Commissioner was entirely correct in finding that there were no such documents. There has been, and is, no evidence at all that any such documents ever existed.
27. Next, the Appellant claims that the Commissioner made an error because he was concerned only with whether the NAO supplied the Appellant with the documents it held and also relied without investigation on the NAO's explanations. The Tribunal finds that the Commissioner did make proper enquiry into how Figure 2 came to be compiled, mindful of

the fact that the Appellant had asked for documents. Moreover, the Tribunal has found that the Commissioner did conduct a proper investigation. This ground is therefore also rejected.

28. Next, the Appellant maintains the Commissioner accepted that the difference in the figures was the result of extra information arising from further work at Bath University. This is in effect the same point as those raised above, and again is rejected.
29. Next, it is said that the Commissioner failed to give sufficient weight to the fact that no evidence existed to justify the nature, extent and effect of the extra work. The answer to this argument has already been given with regard to the preceding contentions. There simply was no evidence before the Commissioner to enable him to find that there was a documented audit trail. In the circumstances, he was entirely justified as the Tribunal now finds in concluding that no documents existed with regard to the so called "extra work". In particular the Tribunal finds that the Commissioner was entirely justified in relying on the conclusions of the NAO's own letter of 4 December 2006.
30. Next, the Appellant maintains that the Commissioner failed to have regard to the fact that documents supplied by the NAO did not represent the documents or types of documents requested. The Tribunal again agrees with the Commissioner's contention that this ground is totally misconceived. The only issue is whether the Commissioner made an error in ignoring cogent evidence to the effect that the documents requested were in fact held. For the reasons already given, the Tribunal finds that he did not commit any such error.
31. Next, it is said that explanations given by the Commissioner were contradictory. The Commissioner did not accept that and the Tribunal again agrees.
32. Next, the fact that the NAO admitted it had no documentary records is, of course, correct. However, this does not in any way mean that the NAO failed to provide the documents which were requested and which in fact were held by the NAO.
33. The above in the Tribunal's view summarises as best as can be done the grounds set out in the Appellant's Notice of Appeal. In his most recent statement which he has understandably recharacterised as submissions he largely repeats them. However, again, out of courtesy to the obvious concern the Appellant feels about this matter, the Tribunal will attempt to deal with what it regards as possible variations on the contentions already dealt with above.

34. At pages 3 and 4 of his submissions the Appellant in effect addresses the same issues as those canvassed above by contending that the Commissioner improperly exercised his discretion in his acceptance of the NAO's explanation. The Tribunal finds that in coming to his decision the Commissioner does not appear to have exercised any discretion.
35. The Appellant goes on to make detailed submissions to the effect that the information in Figure 2 would necessarily have included or reflected detailed further information. These matters were never put to the NAO by the Appellant and it would have been wrong for the Commissioner to have accepted what remain no more than speculative contentions without the benefit of a response to such contentions from the NAO itself.
36. Although the Tribunal is sympathetic to the Appellant in his attempt to demonstrate that an audit trail should have existed, it finds the Commissioner was fully entitled to conclude that there was none, and indeed the NAO have acknowledged shortcomings in this regard.
37. The Appellant contends that there was "no evidence to confirm that Bath University had any responsibility for the provision of information or data to the NAO" for inclusion in the 2001 Report. The Tribunal agrees with the Commissioner in finding that this assertion is simply unsound. Moreover, as indicated above, the Appellant has never produced evidence whether obtained from Bath University or indeed from any other source which puts or might put the NAO's version in any form of doubt.
38. Later, the Appellant contends that the Commissioner should have advised the NAO to follow recommended procedures in notifying applicants that it did not hold the requested information: this is pointed out in page 4 of his submissions. The Tribunal agrees with the Commissioner that it is difficult to understand this contention. There can be no doubt that the NAO did tell the Appellant it did not hold the information. It could not have done any more in all the circumstances, and the Tribunal so finds.
39. At page 5 of his submissions, the Appellant alleges that the Commissioner was more concerned with having the complaint withdrawn than with assisting with the supply of specific information requested on 24 July 2005. The Tribunal finds there are no grounds for imputing any failure on the part of the Commissioner to fulfil his statutory obligations and functions let alone (if the same be insinuated) any element of bad faith.
40. The Appellant finally invokes the Code of Practice in alleging that the Commissioner did not undertake his duties in a manner which complied with FOIA as well as with the Codes of Practice issued under section 45 and 46 of FOIA. It is difficult to see what arguments this ground seeks to make. In paragraph 26 of his Decision Notice, the Commissioner

expressly made the point that it might have helped the Appellant better to understand the NAO's response to his request if the NAO had explained that "extra information, falling within the scope of his request, may be held by Bath University". The Commissioner added that in raising this matter, the Commissioner had considered paragraph 16 to 24 of the Code of Practice and the section 45 of the Act. The Tribunal respectfully agrees, and indeed has already indicated in this judgment, the Appellant seems not to have taken up the offer made to him to discuss his concerns with the NAO or to have sought further information from Bath University.

41. The Tribunal is conscious of the observations made by the Tribunal in *Simmons v Information Commissioner* (EA/2005/0003) at para 21. In that case, the Appellant was provided with some of the information he requested but then required more information. The Tribunal stated:

"So far as we can determine Mr Simmons' real quarrel is over the quality of the information and of the reasoning contained within it, not over whether the information actually held by the Inland Revenue has been communicated to him. Whether the content of the information held is truly adequate, in fact and in law to justify the banding as a separate questions, and one we have no legal power to adjudicate, even supposing it to be wholly inadequate, Mr Simmons' s complaint that he has been taxed unjustly and unlawfully is not a complaint that we have any jurisdiction to deal with."

As the Tribunal noted in yet another of its decision, namely *Prior v Information Commissioner* (EA/2005/0017) at para 22:

"The fact a complaint does not accept the substance of the information provided is not a matter for consideration under the Act. The only obligation under the Act is for the public authority to provide the information it holds of the descriptions specified in the request."

42. For all the above reasons the Tribunal dismisses this appeal.

Signed

David Marks
Deputy Chairman

Date 29/11/2007