



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0110
Information Commissioner's Ref: FS50150319

Determined on papers at Procession House
Promulgated

8 April 2008
24 April 2008

BEFORE

CHAIRMAN

Murray Shanks

and

LAY MEMBERS

Paul Taylor and Marion Saunders

Between

CHRISTOPHER AMES

Appellant

and

INFORMATION COMMISSIONER

Respondent

and

CABINET OFFICE

Additional Party

Decision

The Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice dated 27 September 2007.

SUBSTITUTED DECISION NOTICE

Dated 24 April 2008

Public authority: Cabinet Office

Address of Public authority: 70 Whitehall, London SW1A 2AS

Name of Complainant: Christopher Ames

The Substituted Decision

For the reasons set out below, the substituted decision is that:

- (1) the Cabinet Office breached section 17(1) of the Freedom of Information Act 2000 by failing to provide a refusal notice within 20 working days of receiving the Complainant's request;
- (2) the Cabinet Office were not entitled to rely on the exemption in section 21 of Act as they purported to do;
- (3) the Cabinet Office did not otherwise breach Part I of the Act.

Action Required: None.

Dated this 24th day of April 2008

Signed

Murray Shanks
Deputy Chairman, Information Tribunal

Reasons for Decision

Introduction

1. On 19 December 2005 Mr Ames requested the Cabinet Office to provide him with information about the September 2002 “Iraq’s Weapons of Mass Destruction” dossier under section 1 of the Freedom of Information Act 2000. The exact terms of his request are significant; he stated:

I would like to know which official or officials re-drafted the dossier’s executive summary between the 10/11 September draft and that of the 16 September.

As you will know, it has been said publicly that the executive summary was drafted under the leadership of Julian Miller and the overall supervision of John Scarlett. So, to make my request as clear as possible, I would like to know who actually did the re-drafting at this stage. I appreciate that the Cabinet Office may be unwilling to disclose the identities of certain officials, particularly those (e.g. JIC assessments staff) whose identities are not in the public domain. So I accept that it may only be possible to indicate the designation of officials or their position within the structure. On the other hand, there would be no reason not to disclose the identity of (e.g.) an official based at the FCO press office.

If the answer to my inquiry is that officials from more than one part of government produced iterations of the executive summary during this time, I would like this to be set out as clearly as possible, with (e.g.) information as to the sequence of iterations.

2. The answer provided by the Cabinet Office on 9 March 2006 was in these terms

The drafting of the Iraq dossier, including the executive summary, is referred to in Cabinet Office evidence to the Hutton Inquiry and can be accessed at <http://www.the-hutton-inquiry.org.uk/content.evidence.htm>. The information held by the Cabinet Office that is published on this site is therefore exempt under the absolute exemption in section 21 of the Freedom of Information Act 2000 relating to information accessible by other means. The Cabinet Office does not hold any further information about which official or officials re-drafted the executive summary between 10/11 September draft and the 16 September draft.

3. Mr Ames asked for an internal review of that decision and on 29 June 2006 the Cabinet Office stated that following a further review of information held it could confirm that it did “...not hold a record of the officials who drafted the dossier’s

executive summary between 11 and 16 September”. It is notable that the decision on the review makes no mention of section 21 of the Act.

4. On 11 July 2006 Mr Ames complained to the Information Commissioner about the way his request had been dealt with. The Commissioner found in a decision notice dated 27 September 2007 that the Cabinet Office had dealt with the request in accordance with the Act and had applied section 21 correctly.
5. Mr Ames now appeals against that decision notice maintaining (a) that regardless of whether it held the information in question the Cabinet Office was in breach of its duty under section 1(1)(a) of the Act to “confirm or deny” (b) that the Cabinet Office were wrong to cite section 21 and that this was confusing and obstructive and (c) that the Cabinet Office does hold information within the terms of his request. We propose first to consider the scope of Mr Ames’s request and then to deal with these three points in reverse order.
6. Before we deal with the substance of the appeal we mention one point in relation to procedure. At the telephone directions hearing on 17 December 2007 the parties were agreed that the appeal should be determined on paper without an oral hearing. However, given the nature of the dispute the Chairman directed that if he or the Tribunal took the view on considering the papers that an oral hearing was necessary one would be arranged. In the event a meeting was arranged for 8 April 2008 for the Tribunal to determine the case on the papers without any further consideration being given to the question of an oral hearing. Shortly before the meeting Mr Ames invited the Tribunal by email to reconsider how it should proceed in the light of what he called “obvious inaccuracies” in the written evidence which had been put forward for the Cabinet Office by Christopher Wright, a very senior civil servant and its Director of Security and Intelligence. For reasons explained below the Tribunal came to the view that notwithstanding the points made in Mr Ames’s email an oral hearing was not necessary and we therefore proceeded to determine the appeal on the papers at our meeting on 8 April 2008.

The scope of the request

7. We do not propose to recite again the background to and history of the creation of the dossier. Reference can be made to the Hutton Report and the decision of a

differently constituted Information Tribunal which also concerned a request by Mr Ames for information relating to the dossier (see: *Foreign and Commonwealth Office v Information Commissioner EA/2007/0047 22.1.08*).

8. This appeal concerns the drafts of the executive summary to the dossier produced on 10/11 and 16 September 2002 respectively. We have been provided with copies of the two drafts and with copies of memos dated 10 and 11 September 2002 from John Scarlett to Alastair Campbell and the Joint Intelligence Committee members respectively which circulated the earlier draft. It is clear from these documents that comments and advice on the earlier draft were indeed sought from “across government” (as Mr Wright puts it in his statement) and that substantial changes were made to the executive summary between 10/11 and 16 September. It is the Cabinet Office’s case, as Mr Wright puts it, reflecting the evidence given by John Scarlett to the Hutton Inquiry, that “*the actual work of drafting, i.e. incorporating comments and views from across government and writing the versions of the dossier, was carried out by a small team in the JIC Assessments Staff...led by Julian Miller [who] reported to John Scarlett*”. Mr Ames does not accept this case and says in his submissions to the Tribunal that the dossier was produced by others, in particular government communications officials.
9. It seems to us that the point Mr Ames is seeking to make may simply be that other people within government outside the “small team” had an input into the draft, and that that input may have gone as far as proposing particular forms of words. We doubt that such a proposition would be disputed by the Cabinet Office, but, whatever the precise nature of the factual dispute between the parties in this respect, we think it is perfectly clear that the information Mr Ames requested on 19 December 2005 was not information as to the identity of all those who may have contributed to the drafting process but information as to the identity of those who actually amended the 10/11 September draft of the executive summary so as to create the 16 September draft. That would no doubt include the identity of an official who instructed a typist to amend or add specific text to the earlier draft as well as an official who himself physically typed amendments or additions into the draft, but it would not in our view include all officials who commented on the earlier draft or proposed amendments to it.

Did Cabinet Office hold the requested information?

10. The issue we must decide is therefore whether as a matter of fact at the time of Mr Ames's request the Cabinet Office held *recorded* information as to which official(s) amended the draft of the executive summary (in the sense we have explained) between the relevant dates. The proper approach to an issue of this nature has been considered by the Tribunal in the case of *Bromley v Information Commissioner* (EA/2006/0072 31.8.07) and we would adopt the approach of the Tribunal in that case. The issue must be decided on the balance of probabilities and in considering the balance of probabilities the Tribunal must consider all relevant factors, which would include in particular the quality of the public authority's analysis of the request, the scope of any search for the information requested and the rigour and efficiency with which it was conducted. This Tribunal would also add that in considering the probabilities and in particular the quality of any search carried out it may on occasion be relevant to bear in mind the Tribunal's comments in relation to deleted data in the case of *Harper v Information Commissioner* (EA/2005/0001 15.11.05), the contents of the Code of Practice issued by the Lord Chancellor under section 46 of the Act, the normal time for compliance with an information request under section 10 of the Act and the "appropriate limit" and the hourly rate provided for by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (SI 2004/3244).
11. We turn therefore to consider Mr Wright's evidence as to how the Cabinet Office dealt with Mr Ames's request for information in this case. Mr Wright says in his statement that following Mr Ames's original request for information and his request for a review searches were carried out by his staff to see if the Cabinet Office held any information within the scope of his request. He then describes these searches in more detail.
12. Mr Wright says that in response to Mr Ames's request he sought to establish whether there was information of two categories, namely information which would identify those who had provided drafting comments on the executive summary and information which would identify who in the Assessments Staff actually formulated the words on the page of the executive summary during the relevant period. We would observe that on our reading of the request he need only have been

concerned with the second category, subject to the proviso that the limitation to the Assessments Staff may not have been appropriate. He goes on to say this:

The information searched included hard copy and soft copy records. The hard copy information searched included all printed emails, written drafting comments and meeting notes dated between 11 and 16 September inclusive. The hard copy of the draft dossier dated 16 September was also read. The hard copy information searched is the Cabinet Office's official record of its work for the purposes of the Public Records Act.

Electronic information searched also included saved emails, drafting comments between 11 September and 16 September 2002 inclusive and the soft copy of the draft dossier dated 16 September. Electronic searches included searches of the metadata held upon the draft of the dossier produced on 16 September i.e. the draft produced immediately after the time frame of Mr Ames' request. Soft copy searches were assisted by the staff of LogicaCMG, who are contracted to support the relevant IT system".

He then gives the results of the search:

The result of this work is that no information within the scope of Mr Ames' request is held i.e. there are no hard or soft copy records of drafting comments, emails or meeting notes referring to the Executive Summary between the dates in question. Additionally there is no written record of the name, or names, of those who drafted the Summary or parts of it, between the dates in question.

Finally he states that the name of the person who last saved the electronic copy of the draft of the executive summary on 16 September is recorded but that she was a PA in the Assessments Staff who would only have been responsible for typing and would have had no "substantive drafting...input".

13. There are, unfortunately, some unsatisfactory features to the section of Mr Wright's statement dealing with the results of the search. First, the important conclusion in the second sentence is expressed in rather categorical terms (as observed by the Tribunal in the *Bromley* case at para 13 there can seldom be absolute certainty that information answering a request does not remain undiscovered somewhere within a public authority's records); second, strictly speaking, it is in the wrong tense (the relevant time was not the date of the statement but shortly after the date of the request, i.e. early 2006); and third, as Mr Ames has pointed out in his email to the Tribunal dated 2 April 2008, the conclusion in the first sentence that "*there are no ... records of drafting comments ... referring to the Executive Summary between the dates in question*" cannot be correct in the light of two emails containing just such

drafting comments from a Mr Sedwill at the Foreign Office which were supplied to the Hutton Inquiry by the Cabinet Office.

14. We have considered whether the Tribunal should hold an oral hearing in view of this latter point as Mr Ames has invited us to do. The only justification for holding such a hearing at this stage would be to enable Mr Wright to be cross-examined about the evidence in his statement. We have decided not to hold a hearing for that purpose for the following reasons: (a) the “obvious inaccuracies” which Mr Ames relies on do not in fact relate to the real issue as we have defined it (i.e. those providing drafting comments are not the same as those who actually did the drafting); (b) there has been no attack on Mr Wright’s honesty and we can see no basis for such an attack; (c) Mr Wright has put in a corrective supplemental statement and has had a further opportunity to consider the position and has repeated that the Cabinet Office does not hold information within the scope of the request other than the record of the evidence given by John Scarlett to the Hutton inquiry; and (d) further delay and expense would be caused whilst the outcome of the appeal is most unlikely to be influenced.
15. Taking account of all the evidence now before it (and in particular Mr Wright’s written evidence, notwithstanding the shortcomings in it which we have identified) and considering all relevant factors, the Tribunal has come firmly to the view that on the balance of probabilities the Cabinet Office did not hold any information within the scope of the request made on 19 December 2005. The most obvious and important search in the Tribunal’s view was that of the “metadata” held on the 16 September draft of the dossier: that apparently did not reveal who was responsible for any changes to the draft of the executive summary (save that it revealed that the last person to save the copy was a PA in the Assessments Staff who would only have been responsible for typing). Written drafting comments, emails and meeting notes were also searched and apparently did not reveal the identity of those responsible for amending the draft executive summary. The Tribunal regards the scope of this search as reasonable on the face of it and is not aware of any other material that ought to have been searched. While we are not very impressed by the quality of the record keeping revealed by the search (this was on any view an extremely important document and we would have expected, or hoped for, some

audit trail revealing who had drafted what), we do not think that it is so inherently unlikely that there is no such audit trail that we would be forced to conclude that there is one in spite of the evidence put forward by the Cabinet Office.

16. Accordingly we are satisfied, as we say, that the Cabinet Office did not hold the information in question.

Section 21

17. Section 21 of the Act provides an absolute exemption in respect of information “*which is reasonably accessible to the applicant [i.e. Mr Ames] otherwise than under section 1*”. The Commissioner’s decision on section 21 was that the Hutton Inquiry evidence about the drafting of the dossier to which we refer to at para 8 above was “*relevant to [Mr Ames’s] request*”, that the evidence was available on the Hutton Inquiry website and that it was therefore “*...not unreasonable for the [Cabinet Office] to cite section 21*” and section 21 was applied correctly
18. There has been no suggestion that there is in fact any information which answers Mr Ames’s request (as properly understood) on the Hutton Inquiry website. In those circumstances the Tribunal cannot support the Commissioner’s conclusion that section 21 was applied correctly in this case or the reasoning leading to it. Section 21 (read with sections 1 and 2) requires that the information *requested* is accessible by other means; it is not sufficient that there is other information (or evidence) accessible which is “*relevant to the request*”. Section 21 was, in our view, a confusing “red herring.” We have not seen any basis, however, for Mr Ames’s implied suggestion that it was deliberately obstructive.
19. We would also make the point that, even if there was material on the Hutton Inquiry website which did answer Mr Ames’s request, it would not necessarily follow that the material was reasonably accessible to Mr Ames so as to allow the Cabinet Office to rely on section 21. We are not at all sure that, in a case where a public authority is asked for a very specific piece of information which (*ex hypothesi*) it holds, it would be legitimate for the public authority to say to the applicant that the information is somewhere to be found on a large website like that of the Hutton Inquiry, even if the applicant is someone as well informed as Mr Ames no doubt is.

It may be different if the public authority were to provide a link or some other direct reference to where the requested information can actually be found.

20. In any event, for the reasons given in paras 17 and 18, we are of the view that the Commissioner's decision notice was "*not in accordance with the law*" (to adopt the words of section 58(1)(a)), when it stated that the Cabinet Office had applied section 21 of the Act correctly.

Section 1(1)(a)

21. Mr Ames makes the point that, whether or not the Cabinet Office held the information requested and even if section 21 had applied, the Cabinet Office was still under an obligation to "confirm or deny" whether it held the information under section 1(1)(a) and he complains that the Cabinet Office were in breach of the Act in failing to do so.

22. Mr Ames is certainly correct in his premise that the Cabinet Office was under an obligation to "confirm or deny". However, on a fair reading of the Cabinet Office letters of 9 March and 29 June 2006 we think it is clear that they were denying that they held any information coming within the scope of the request. We accordingly reject this ground of appeal.

Invitation to withdraw

23. Mr Ames also complains that the Commissioner invited him to withdraw his appeal in a letter dated 24 July 2007. The Tribunal has no jurisdiction to rule on this complaint. But in any event we would observe that reading the letter as a whole and bearing in mind (a) that Mr Ames was contending that his request in this case covered those responsible for drafting comments (a contention we reject) and (b) that he had two other complaints covering similar ground which were being investigated by the Commissioner, we do not think that there was anything remotely improper about the Commissioner's suggestion or "invitation".

Conclusions

24. For the above reasons we conclude:

- (1) that on the balance of probabilities the Cabinet Office did not hold information coming within the scope of Mr Ames's request; but
- (2) that the Cabinet Office were not entitled to rely on section 21 of the Act and that the Commissioner was wrong in law to decide that they were so entitled.

25. Our decision is unanimous.

Signed

Murray Shanks

Deputy Chairman, Information Tribunal

Date: 24 April 2008

Signed

Murray Shanks

Deputy Chairman, Information Tribunal

Corrected on 28 April 2008