



Neutral Citation Number:

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

Appeal No: EA/2015/0096

ON APPEAL FROM:

**The Information Commissioner's Decision Notice No: FS50559600
Dated: 7 April 2015**

Appellant: David Whyte

Respondent: The Information Commissioner

Heard at: Edinburgh Employment Tribunal

Date of Hearing: 11 August 2015

Before

Chris Hughes

Judge

and

Jean Nelson and John Randall

Tribunal Members

Date of Decision: 10 September 2015

Attendances:

For the Appellant: in person

For the Respondent: did not attend

Subject matter:

Freedom of Information Act 2000

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 7 April 2015 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. Mr Whyte is a retired serviceman whose duties included attending a number of nuclear tests in the Pacific in 1958. As a result of his service he considers that he sustained injury and he currently has proceedings before another tribunal to establish a right to receive a pension as a result of that injury. He has made a number of requests for information from the Ministry of Defence; some of which have been productive. Some of the records relating to his service have been found, however the Ministry of Defence (“MOD”) have been unable to retrieve the full set of records of his radiation exposure. He has therefore sought other information which he considers may assist him in demonstrating the level of radiation to which he was exposed.
2. On 29 September 2013 he wrote to the MOD:-

I refer to your reply to my FOI 11-03-2013-114455-007 dated 3 May 2013.

In the “Bunker” located at ground Zero, or “Steel Cubes” as they appear to be referred to, could you please inform me as to the purpose of the instruments located within this structure.

I counted at least five or six instruments prior to detonation of the devices detonated during “Grapple Z” but more may have been added after cessation of my duties within this structure.

(1) Could you please advise me of the total number of instruments located within the aforementioned structure on detonation for both Pennat and Burgee atomic detonations?

(2) Could you please advise me as to the information being monitored, and recorded, by each of these instruments during both Pennat and Burgee detonations?

3. Mr Whyte informed the Tribunal that he expected the second question to provide confirmation that the instruments were measuring gamma radiation.
4. There was correspondence between the MOD and Mr Whyte. On 25 October 2013 the MOD wrote to Mr Whyte stating that:-

“...This letter is to inform you that the MOD holds information related to your request, but that we consider that the information falls within the scope of the following qualified exemption: Section 24 (national Security). As such it is necessary for us to decide whether, in a all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure”

5. On 30 July 2014 the MOD provided its substantive reply confirming that it did not hold information within the scope of the first request and pointing him to a record in the national archive the *““Grapple Z Scientific Plan” describes the tasks required to be undertaken by the various groups involved during the Pennant and Burgee detonations.*” It confirmed that it held information in scope of the second request and provided certain redacted documents relating to Grapple Z. Mr Whyte responded the same day asking for an internal review stating that the information supplied did not answer his request for the number and purpose of the recording instruments at ground zero and that the information supplied related to other points in the area of the test but not ground zero.
6. After further correspondence Mr Whyte wrote on 29 August 2014 *“It comes as no surprise that you are still in the process of formulating an answer to my straightforward question (dated 9 September 2013)”How many instruments were in the Bunker and what were they recording?”*
7. The MOD responded explaining that FOI did not give a right to have questions answered directly:-

“officials can only answer on the basis of providing any relevant recorded information held by the Department (or on its behalf) that meets the description of the request; where relevant information is not held we simply have to state this to be the case.

...

In the case of your many information requests received by the MOD over the past nine years your enquiries are so particular that they involve considerable research by specialists. They are consequently burdensome and time-consuming. Nevertheless, we continue at all times to try and meet your requirements to the best of our ability, balancing these demands against those of other requesters.”

8. In its internal review (letter 17 October 2014 bundle pages 47-50) the MOD set out a history of its handling of the request and confirmed that it had fallen short of the standards expected of it. It treated the request for review as a questioning of the relevance of the information provided. It gave an explanation with respect to the instruments at ground zero (reproduced at DN paragraph 8):-

“although it did not hold any information on the numbers of instruments located during the detonations in ground zero it was confident that such instruments were monitors not recording equipment. The MOD suggested that it was possible that recorders may have been located in ground zero for pre-detonation checks but these would have been removed prior to detonation as they would not have survived the blast. Furthermore, the MOD explained that if any recording instruments remained in close proximity to ground zero at the time of the detonation they would have been completely destroyed by the subsequent blast along with any recorded data.”

9. It went onto explain that “readings were taken during detonation but not by recording instruments located in the area specified in your request”. The letter explained that the four documents he had been supplied with;-

“contained monitoring information from sites within close proximity of the detonation points for Pennant and Bungee (sic) and that you questioned in your appeal why you were sent these documents. I have established as part of this review that the reason why you were provided with them is because it is reasonable to assume they contain data from the sensors in ground zero and recorded by the remotely located instruments. However this has required an amount of interpretation of the extant data on the part of subject matter experts and it might be helpful if the request had been clarified with you in the first place. It is possible to argue that a narrow interpretation of your request would require us to state that no actual information exists in scope of your request. This is because although information is held about readings taken during detonation this was not recorded by instruments sited as described in your request; the information provided was from readings recorded by other instruments nearby.”

10. Mr Whyte remained dissatisfied and complained to the First Respondent, (“the Commissioner”). The Commissioner investigated and considered whether the MOD held information falling within the scope of either the narrow or broad interpretation

of the request. Having reviewed the explanations provided by MOD the Commissioner concluded that the information provided fell outside the second request. He then considered whether reasonable steps had been taken to information falling within request 2. He considered the basic question Mr Whyte articulated in his letter of 29 August 2014 (paragraph 5 above) and the MOD's response.

11. The MOD relied on experts from the Atomic Weapons Establishment (AWE) to search and interpret the contents of the archives containing information from Britain's nuclear test programme of 1958. Two AWE databases were relevant, the Corporate Knowledge Base ("CKB") and the Merlin database, which held material collected for the purpose of the extensive litigation conducted by veterans of the tests over recent years. While most of Merlin is digitised, but due to the poor quality of the original documents the pdf files have legibility problems and may not be searchable, only 4% of CKB is digitised and searching requires documents to be opened and examined. Searches of relevant terms were conducted, files identified and the more likely files retrieved and examined. The Commissioner accepted the MOD's explanation that contrary to Mr Whyte's claim "meticulous records" of the trials were not kept (DN paragraph 37-38:-

"in general the records are those that were made at the time in a variety of formats and styles that suited the circumstances. Many of these may have been handwritten and were considered to be of a temporary nature with the aim of transferring relevant data to a permanent scientific record at a later date. Once such reports had been compiled/published there would have been little requirement to preserve the original data and so much of it would have been legitimately disposed of as part of routine business at MOD and AWE with the passage of time...."

In some instances gaps and shortfalls in the information were clear. For example AWE did not hold a final Grapple Z report, just an interim report. However it explained that it was not possible to say whether the final report was written or not, simply that such a report is not held. In summary the MOD explained that it considered the information held on nuclear tests to be an accumulation of documents, rather than a systematic collection within which the survival of data can vary greatly"

12. In the light of these explanations the Commissioner concluded that information held was piecemeal and not meticulous and the searches were sufficient to satisfy him that on the balance of probabilities no information with respect to either request was held.
13. In his appeal Mr Whyte submitted arguments based on his missing records. He argued that the MOD statements that the tests were meticulously planned and with proper safety standards were not true. He gave an account of some of his requests for information from MOD and made reference to the code of medical ethics used at the Nuremberg Trials. He stated (grounds of appeal page 2):-
- “In view of all the lies I have been told over the years by the Ministry of Defence it is my belief that the information requested is available. If this information has been destroyed then this must be referred to as criminal negligence”.*
14. The Commissioner resisted the appeal relying on the decision notice. He argued that the MOD had demonstrated that it had carefully considered the request and conducted appropriate searches for the information in the light of the circumstances. He considered that meticulous planning of the tests was irrelevant to the holding of data about them 65 years later and the circumstances of Mr Whyte’s deployment to the test site were also irrelevant to the question of whether the information was held.

The appeal to the Tribunal

15. During the course of the hearing Mr Whyte was critical of the MOD he considered that the MOD had committed perjury and that various pieces of information had come from the MOD as a result of his requests. He had received as a result of one request a copy of a notebook used by a Major McDougall to make notes of the readings from some instruments during one of the tests. He acknowledged that it was “probably a bit haphazard what they were keeping”. He was concerned at the doses of radiation he and other servicemen had received and the possible long-term genetic effects. He estimated the number of his requests at between 100-200 he had received some information and had had to re-word his requests in different ways. He felt that the MOD did not want to give anything out and that because some information had come out there was probably more, although given the length of time it was likely to “take a bit of finding”. He expected that the answer to his second question would be gamma radiation. He had seen five or six instruments at the place which he thought was

ground zero before the tests. He did not think that the MOD had looked in all the right places for the information.

The question for the Tribunal

16. The issue for the tribunal is whether the Commissioner's notice was in accordance with the law. In considering that the tribunal has also reviewed the facts upon which it is based and the evidence and submissions of Mr Whyte.
17. The British nuclear test programme in the 1950s is now nearly 60 years old. It was part of the effort to develop nuclear fusion weapons for the UK and some of the tests caused explosions in excess of 1 megaton TNT equivalent. Clearly it was important, for the effective conduct of the tests, to gather and analyse data as to the course of the explosions and the energy produced by them. The purpose of such data collection was to evaluate the performance of the device under test with a view to producing a better device. Once the data had been collected, analysed and conclusions drawn from it, there was no need to retain that information any further. Indeed even the conclusions of the tests became largely irrelevant since very shortly thereafter a treaty with the US meant that the UK was supplied with US fusion devices and the UK did not conduct further independent tests.
18. In 1958/early 1959 therefore there will have been a lot of raw records of the series of nuclear tests, however these raw records had served their purpose. The military need to retain a high level of detail of the lay out of the monitoring equipment simply did not exist. It would have been inconceivable to those responsible for the records of the tests in 1958 that some 60 years later information relating to the number and type of recording instruments might have been of use, or wanted in connection with a claim for compensation. The MOD expended significant effort searching for information and has explained the searches it has carried out. In the process of this it found certain documents and disclosed them (in redacted form) to Mr Whyte. On balance it is clear that such documents were not within the scope of the request however it is testimony to the thoroughness with which the MOD has carried out its search and the care it has taken to assist Mr Whyte. The Commissioner has reviewed the MODs actions and satisfied himself that a proportionate search has been carried out of the archives by those with knowledge of them and the sorts of documents that they contain.

19. Mr Whyte expressed somewhat inconsistent views – on the one hand claiming the MOD committed perjury and calling them liars, on the other hand acknowledging that the retention of information was haphazard and suggesting that junior staff may have made errors. While his frustration is understandable in that, despite his best efforts and efforts by the MOD some records relating to his personal exposure to radiation and his medical treatment while in the army are untraceable, that is a very different thing from demonstrating that the MOD has deliberately destroyed or suppressed information or failed to search properly. Indeed, given what Mr Whyte knows about the nuclear tests he was involved in, it would seem very strange for the MOD to deliberately suppress the information that he seeks – the number of instruments and what they were measuring is not in reality, useful information about Mr. Whyte’s exposure to radiation; indeed the MOD already has disclosed to him such information that it has found relating to actual measurements of radiation during one of the tests. There is simply no reason for the MOD to act as Mr Whyte has alleged and all the evidence points rather to a conscientious attempt to assist him.

Conclusion and remedy

20. The tribunal is therefore satisfied that the decision of the Commissioner is correct in law and dismisses the appeal.
21. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 10 September 2015

Promulgated 11 September 2015