



**IN THE FIRST-TIER TRIBUNAL**  
**GENERAL REGULATORY CHAMBER**  
**INFORMATION RIGHTS**  
**ON APPEAL FROM:**

**Case No. EA/2009/0107**

**The Information Commissioner's DN FS 50213108 .**  
**Decision Notice**  
**Dated: 20 October 2009**

**BETWEEN:**

**MICHAEL GARRARD**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

**and**

**THE HOME OFFICE**

**Additional Party**

**Date of oral hearing: 25 June 2010**

**Date of paper hearing: 6 September 2010**

**Before**

**Melanie Carter**  
**(Judge)**

**and**

**Jacqueline Blake**

**Rosalind Tatam**

**Subject:**

FOIA, sections 1 and 16

**Cases:**

Linda Bromley v ICO & the Environment Agency EA/2006/0072

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal allows the appeal in part and substitutes the following Decision Notice in place of the Decision Notice dated 20 October 2009.

**Information Tribunal**

**Appeal Number: EA/2009/0107**

**SUBSTITUTED DECISION NOTICE**

**Dated 21 September 2010**

**Public authority: Home Office**

**Address of Public authority:**

**Seacole Building  
2 Marsham Street  
London SW1P 4DF**

**Name of Complainant: Michael Garrard**

## The Substituted Decision

For the reasons set out in the Tribunal's determination, the Decision Notice FS 50213108 is upheld save that:

1. the Tribunal finds a breach of section 1(1) b of the Freedom of Information Act 2000 in that the following information falling within the letter of request, dated 8 May 2008, was held by the Home Office and should, in accordance with Mr Garrard's rights under the Freedom of Information Act 2000 have been provided to him:
  - the extracts of the minutes of the ACPO Roads Policing Enforcement Technology Committee meetings dated November 2006 and April 2007.
2. the Tribunal finds a breach of section 16 of the Freedom of Information Act 2000 in that the Home Office ought, further to its duty to provide advice and assistance, first, to have clarified at the outset that the police and Her Majesty's Court Service were not subsidiaries of the Home Office (such that separate requests might be required) and second to have explained in more detail Mr Hall's relationship to the Home Office.

As Mr Garrard now has the above information, no steps are required of the public authority.

Dated this 21<sup>st</sup> day of September 2010

Signed

Melanie Carter

Judge

## **REASONS FOR DECISION**

### Introduction

1. This appeal arises from a letter of request from Mr Garrard, the Appellant, to the Home Office dated 8 May 2008. This asked for information in relation to a test conducted on 2<sup>nd</sup> December 2006 at Elvington Airfield on the accuracy of a laser speed meter used for detecting speeding offences (the Elvington Test). The test was required for evidential purposes during the course of court proceedings unrelated to the present appeal.
2. Mr Garrard requested the following information in relation to the Elvington Test:  
  
*“Please provide a copy of the test plan  
Please provide a copy of the results report  
Please provide a copy of the video test results  
Please confirm which operating procedures were used for the tests  
Please confirm that the P.C. in question was trained to operate the speed meter  
Please confirm that the speed meter was a UK type approved model  
Please state the method used to cross check the speed readings delivered by the speedmeter”*
3. The Home Office responded on 3 June 2008 that it did not hold any of the information requested, as it was not involved in the Elvington Test.
4. The Home Office internal review on 8 August 2008 stated that it had reviewed the position and that it had uncovered one relevant document. The Home Office had in fact been sent a copy of a draft review article on Laser Speed Meters which included a report on the Elvington Test, written and sent in by Mr Lee (the Lee Report). The Home Office emailed to Mr Garrard a link to an internet forum, which had posted to it, a version of the Lee Report.
5. The Home Office stated that other than the Lee Report, it did not hold any information falling within the request. The letter also referred to “Mr Hall’s attached report”, although subsequently the Home Office clarified that this

had been a typographical mistake and it had intended to refer to the Lee report. Mr Hall was a Chief Constable and senior member of Association of Chief Police Officers (“ACPO”) who had attended the Elvington Test. This mistake unquestionably caused significant confusion, compounded by the fact that the internal review letter made reference to page 7 of the report (for a particular entry), which on the version available via the internet forum was on page 8. It was understandable therefore that Mr Garrard would question whether the Home Office in fact held different information to that which had been disclosed.

6. It appears that the Home Office had been unable to cross check the versions of the Lee report as their staff were unable to look at the report on the internet forum website. The Tribunal was not aware however of any material differences between the versions of the Lee report held by the Home Office and that available via the internet forum.
7. The Appellant complained to the IC, who was told during the investigation that a search had been made of its Scientific and Development Branch (SDB) which has responsibility for approving the use of speed detection devices (the Type Approval Procedures).
8. This included a search of the Head of Unit, Dr Lewis’ email repository using “Elvington” as a title in the search. The IC was told further that, as the responsible individual within the SDB, any test conducted by or involving the Home Office would have been known to Dr Lewis and that SDB was the only section of the Home Office which might reasonably be expected to hold the information requested. The Home Office, it was said, would have no interest in the Elvington Test as it understood that it had not been carried out under the ACPO Code of Practice.
9. The IC decided, in its Decision Notice of 20 October 2009 that the Home Office did not, on the balance of probabilities, hold any further of the information requested by the Appellant. It was not, therefore, required to provide anything further in order to discharge its obligations under section 1(1)(b) FOIA.

10. Mr Garrard appealed this decision to the First Tier Tribunal (Information Rights) (“the Tribunal”).

### The Appeal

11. Mr Garrard’s appeal was on the basis that the Decision Notice was not in accordance in law in finding that the Home Office did not hold information which fell within his request. This assertion was essentially on the following grounds:

- the Home Office was not to be believed when it stated that it does not hold any information as:
  - a) the Elvington Test would have been of very considerable interest to them as it concerned an alleged failure of a Home Office Type Approved machine;
  - b) Mr Hall who attended the test was the main person liaising between the Home Office and ACPO on Home Office Type Approval;
  - c) the statement that the test was not in accordance with ACPO guidelines must be based on some documentation.
  
- the police were directly involved as were the Her Majesty’s Court Service (“HMCS”). Either the police and HMCS held relevant information on behalf of the Home Office, as the lead department for these two entities, or they would have passed relevant information to the Department.

12. The Tribunal had before it a bundle of documents and a witness statement from Dr Lewis, the Head of the SDB. Dr Lewis gave oral evidence before the Tribunal. The Tribunal was provided with a significant amount of information as to the ACPO guidelines, the two versions of the Lee Report, a report by Dr. Michael Clark on the Elvington test and court cases considering Home Office Type Approval. The Tribunal clarified with the Appellant, that as to whether

the Elvington Test had been carried out in accordance with the ACPO guidelines, was beyond its jurisdiction. It was not, moreover, within the remit of the Tribunal to consider whether the Home Office *should* have been interested in the Elvington Test. Its sole purpose in this inquiry was to ascertain whether, on the balance of probabilities, the Home Office had held any relevant information and whether therefore the IC had been correct in law in upholding the Home Office's decision.

### The Tribunal's jurisdiction

13. This Tribunal's jurisdiction in relation to appeals is pursuant to section 58 of Freedom of Information Act 2000 ("FOIA"). For the purposes of this appeal, the Tribunal must consider whether the Decision Notice is in accordance with law. The starting point is the Decision Notice itself but the Tribunal is free to review findings of fact made by the IC and to receive and hear evidence which is not limited to that before the IC. If the Tribunal comes to a different conclusion on the same or differently decided facts, that will lead to a finding that the Decision Notice was not in accordance with the law.

### The relevant law

14. Section 1(1) provides:

*"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."*

15. The Tribunal reminded itself that in order to be satisfied that particular information is not held, it is not necessary for the public authority to prove to a point of certainty that this is so, rather the matter is to be determined on the balance of probabilities (*Linda Bromley v ICO & the Environment Agency EA/2006/0072*). Thus, the Tribunal must ask itself is it more likely than not that the information is held. Of particular interest therefore to the Tribunal was the evidence before it of the efforts the Home Office had made to locate

any such information.

16. Also relevant to this appeal was section 16 of FOIA, which places a duty on public authorities:

*“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”.*

### The search

17. During the oral hearing on 25<sup>th</sup> June 2010, it became apparent from questioning of the witness, Dr Lewis, that the search for information conducted by the Home Office had been inadequate. In particular, the Home Office had not searched any hard copy files or the electronic files of certain named officers within the Road Safety Division (a separate team to the SDB within the Home Office).
18. Also during the oral hearing, the Tribunal called for and the Home Office provided minutes of the ACPO Roads Policing Enforcement Technology Committee meetings dated November 2006 and April 2007 at which Mr Hall, who had attended the Elvington Test, had given a report back on the test. These minutes had come to the Tribunal's attention by reason of a mention in the witness statement of Dr Lewis. The relevant extracts of the minutes which were held by the Home Office in hard copy were provided to Mr Garrard at the hearing.
19. The Home Office and the IC accepted at the oral hearing that further searches were required and the case was adjourned for these to be carried out. The IC's position had originally been that it was reasonable for it to rely upon the Home Office's assertion that it had carried out a sufficient search. The IC, it was said, could not be expected to investigate and in effect repeat each and every search by a public authority referred to him. The critical point was whether there was anything to indicate from the papers that the search may have been inadequate. The Tribunal accepted that this was a rational



position for the IC to take but disagreed in that, in this case, the IC should have been on notice from early on in the investigation that insufficient steps had been taken by the Home Office. It should have been apparent that no search of any hard copy files had been carried out and that the Road Safety Division (whose files had not been searched) had been involved. Also, the IC would have been aware from at least the time that Dr Lewis' statement was served on him, that the particular minutes were held.

20. Where the critical issue is whether information is held, it is incumbent on the IC to analyse very carefully the searches the public authority report that they have undertaken. Where it is apparent that the public authority have only searched electronically and not included within that all those individuals who from the papers sent to the IC appear to have been key, there will almost certainly be a question as to the adequacy of the search. It is only where no such issues arise, that the IC should rely upon the assertion of the public authority that the search taken was adequate.
21. At the reconvened, but this time, paper hearing on the 6 September 2010 the Tribunal considered the results of this further search and further submissions from all parties.

### Analysis

22. The Tribunal accepted that the Home Office's further searches were comprehensive and that the authority did not hold any information that had not, by then, been disclosed. It was argued by Mr Garrard, at this stage, that the Home Office was in breach of section 1(1) FOIA in that the following information had been held at the relevant time, but not disclosed:
  - a. the extracts of the minutes of the ACPO Roads Policing Enforcement Technology Committee meetings dated November 2006 and April 2007.

- b. the version of the Lee report that had been included in the hearing bundle, that is, the one actually held by the Home Office which was in certain ways different to the version available via the internet forum link.
23. Thus, Mr Garrard's submissions, following the further searches, had moved on from his grounds of appeal set out in paragraph 11 above. The Tribunal had, in any event, formed the view that the relevant question for it was not what the Home Office should have held, but what it had held. Moreover, there was no evidence before it to question the good faith of the officers involved in the search. Whilst the Tribunal had found it somewhat surprising that the Home Office would not, as claimed, be interested at all in the Elvington test or had had a business case for holding this information, it accepted that, as a matter of fact, information beyond that listed above had not been held by the Home Office.
24. Mr Garrard had originally argued (although this was not pursued at the oral hearing or the further submissions) that the HMCS, ACPO and the police should be treated as either part of the Home Office or as holding relevant information on the Department's behalf. The Tribunal noted that the HMCS and the police were separate entities in law and were both subject to FOIA in their own right. ACPO was also a separate entity to the Home Office but was not subject to FOIA. There was no evidence before the Tribunal that these bodies held any information on behalf of the Home Office, indeed, such evidence as there was indicated that they did hold relevant information but in their own right. Mr Garrard had in fact made a subsequent FOIA request to the Humberside police and this had provided him on 23 February 2010 with some relevant information.
25. Albeit Mr Garrard now had the extracts of the minutes mentioned above at paragraph 22(a), that did not absolve the Home Office of the legal responsibility to have provided them at the relevant time. Mr Garrard had, in the letter of request, asked for a copy of the Elvington report – the information in the minutes did not constitute a copy of the report. These minutes did however, in the Tribunal's view, fall within the scope of the letter of request. It

was accepted that the extracts, respectively fell within paragraphs f. and d of the letter of request, in that there was mention of the type of device used in the Elvington test and also (vis the reference to Mr Clark having unrestricted access) information as to the operating procedures used. The Tribunal did not accept that the information in the extracts were relevant to any other head of the letter of request.

26. Thus, the Tribunal found that the information in the extracts of the minutes had been held by the Home Office and that it had failed to disclose this in accordance with its obligations under section 1(1) FOIA. In this way, the Decision Notice was not in accordance with law.
27. With regard to Mr Garrard's submission as to the version of the Lee report contained within the hearing bundle, the Tribunal did not find this to be information held but not disclosed. This was on the basis that there did not appear to be a material difference between the two versions of the report. The different page numbering, whilst a cause of the confusion that originally surrounded this letter of request, did not in itself indicate a breach of section 1(1). The Home Office had disclosed a version of the Lee report to Mr Garrard that was not materially different to the one held at the relevant time.
28. It was further alleged by Mr Garrard that the Home Office had been in breach of its duty under section 16 FOIA (advice and assistance) in that the authority had failed to tell Mr Garrard of the possibility that the HMCS and/or the police might hold information within the terms of his letter of request and that separate requests were necessary to those public authorities.
29. The Tribunal found that there had been a breach of section 16 on the basis that the Home Office ought to have explained the relationship between the HMCS, the police, ACPO and the Department in this regard. In addition, it was of the view that, given the slip in the internal review letter dated 8 August 2008 (the mistaken reference to a report by Mr Hall, rather than Mr Lee), the Home Office could have been expected further to its duty under section 16 to have explained in some detail the relationship of Mr Hall to the Home Office. The Tribunal had some sympathy for Mr Garrard's view, albeit ultimately

incorrect, that Mr Hall should be seen as acting on behalf of the Home Office. This misimpression could more easily have been dispelled and the appeal perhaps avoided, if this had been explained and of course the above information been provided at the relevant time.

## **Conclusion**

30. The Tribunal upheld the appeal in part and substituted the Decision Notice at the beginning of this document. The Tribunal expressed a wish that if further information does come to light which might be said to have fallen properly within the letter of request, and had been held at the relevant time, that this be provided to Mr Garrard.
  
31. Our decision is unanimous.

Signed

Melanie Carter

Judge

Date 21 September 2010