



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
[INFORMATION RIGHTS]**

EA/2010/0189

ON APPEAL FROM:

Information Commissioner's

Decision Notice:

FS50296292

Dated:

25 October 2010

Appellant:

ELAINE COLVILLE

Respondent:

THE INFORMATION COMMISSIONER

Second Respondent:

**DEPARTMENT FOR INTERNATIONAL
DEVELOPMENT**

On the papers

Date of hearing:

16 May 2011

Date of Decision:

3 June 2011

Before:

Annabel Pilling (Judge)

Vivian Bown

And

Darryl Stephenson

Subject matter:

FOIA – Whether information held s.1

Cases:

Bromley v Information Commissioner and the Environment Agency
(EA/2006/0072)

Representation:

For the Appellant:

Elaine Colville

For the Respondent:

Richard Bailey

For the Second Respondent:

Alexander Ruck Keene, Sarah Townsend

Decision

For the reasons given below, the Tribunal upholds the decision notice dated 25 October 2010 and dismisses the appeal.

Reasons for Decision

Introduction

1. This is an Appeal by Ms Elaine Colville against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 25 October 2010.
2. The Decision Notice relates to a request made by Ms Colville under the Freedom of Information Act 2000 (the 'FOIA') to the Department for International Development ('DFID') for information relating, broadly, to the legal framework and policies governing World Bank Group administered trusts and trust funds.
3. DFID advised that it did not hold the information requested.
4. Ms Colville did not accept that the information she sought was not held by DFID and complained to the Commissioner. The Commissioner concluded that, having considered the steps taken by DFID to locate it, on the balance of probabilities, DFID did not hold the information requested and therefore it had complied with section 1(1)(a) of the FOIA in denying that it held the information.

Background

5. DFID is a central government department that promotes international development and the reduction of poverty. Its statutory basis is set out in the International Development Act 2002. DFID is headed by the Secretary of State for International Development. The UK Government, through DFID, donates funds to the World Bank Group ('WBG'), an international organisation which comprises the International Bank for Reconstruction and Development ('IBRD', more commonly known as the 'World Bank'), the International

Finance Corporation ('IFC') and the Multilateral Investment Guarantee Association ('MIGA').

6. Ms Colville is seeking information broadly relating to trust laws governing the relationship between DFID, the World Bank and its agencies. In particular, she has sought to find out from DFID the relevant legal provisions governing WBG administered trusts and trust funds to which DFID makes substantial annual contributions. In brief, DFID submits that it does not hold information falling within the scope of the requests; the UK is a donor or contributor to the Bank rather than a trustee. Although DFID contributes financially to Trust Funds, it does not act as a Trustee and Trust Funds are administered by the World Bank rather than by DFID. Ms Colville disputes this and has provided a detailed basis to support her assertion that DFID is a trustee or "de facto" trustee and should, therefore, hold the information she requested.

The request for information

7. Ms Colville made a request made under the FOIA on 3 December 2009 to DFID, phrased as follows:

What Trust Law governs Trusts established by each of:

- (i) *the International Bank for Reconstruction and Development (IBRD),*
- (ii) *the International Finance Corporation (IFC) and*
- (iii) *jointly by the World Bank and IFC (WB/IFC) and which are co-financed and administered by DFID as a trustee.*

What is the applicability of the Hague Convention on the Law Applicable to Trusts and on their Recognition which also regulates conflicts of trusts?

8. This was supplemented by a second set of requests made on 17 December 2009:

(iv) What Law of Trust governs Trusts administered by the WB and IFC, or any combination thereof? as the case may be, in which the UK (through DFID) and non-traditional donors (i.e. not member countries) including major foundations and corporations such as

ABM/AMRO (RBS) Bank, BP plc, Shell Int., Visa Int. Citigroup, Deutsche Bank etc, are co-contributors?

(v) What force and application does the Trustee Act 2000¹ confer in respect of UK contributions to Trusts administered by the WB and IFC, or any combination thereof?

(vi) Under the authority, duties and powers conferred on the Trustees of a WB and IFC Trust, or any combination thereof, to carry out the Trust purposes as set forth in the Agreement and applicable law, rules and regulations, upon becoming aware of facts, developments, events, circumstances, conditions, occurrences or effects that could reasonably be expected to result in the occurrence of: (i) a breach of the duties of the Trustee/s set forth in the Agreement or under any applicable Law governing the Trust; (ii) any misconduct, fraud, misappropriation, embezzlement or unjustified enrichment by the Trustee/s; or (iii) any other material compliance event that results in the failure of any of the Trustees to adhere to their respective commitments in any material respect, what action must the Board of Trustees take to commence a review of such facts, developments, events, circumstances, conditions, occurrences or effects to make a determination of whether or not a breach or material compliance event has occurred?

1. By letters dated 5 January 2010, DFID responded and explained that it did not hold the information requested.
2. Ms Colville asked for an internal review of this decision on 5 January 2010. She set out the reasons why she rejected the answer that the information in respect of the law governing WBG/DFID trusts was not held. At the end of that request letter she posed an additional question:

“The question is this: Did DFID (i) intend to make an outright gift of UK funds to the WBG, coupled with a recommendation as to how the

¹ Originally referred to as the Trustee Act 2002 but the error corrected by the Appellant by email on 18 December 2009.

funds should be applied, but ultimately leaving it up to the WBG as to what it chose to do with the property – in which case no trust is created – or (ii) intend to bind the WBG to apply UK funds to specified purposes, thus creating a trust?”

3. Eilidh Simpson, Head of Openness Unit of DFID, responded on 28 January 2010 having carried out an internal review and upheld the original decision that the requested information was not held.
4. This response regarding the internal review also purported to give further assistance to the Appellant :

“some of the information you provided in support of your request for a review dealt with Trust Funds as opposed to Trusts. DFID acts as a donor or contributor to these Trust Funds and not as a trustee. The Trust Funds are governed by administrative arrangements between the multilateral organisation and DFID. Despite the wording you have quoted from World Bank literature, these arrangements are not viewed by DFID as being legal agreements. DFID Trust Fund arrangements follow FCO guidance on the wording of Memoranda of Understanding, which are designed to be non legally binding – you may find the following note on the FCO website informative on this point (attached). I am also attaching a link to the World Bank website where you can find copies of the Articles of Agreement and to the ICSID convention for dispute resolution which you may find helpful (attached).

Your remaining questions are framed around the applicability of laws to and governance of WB/IFC Trust Funds. I can confirm after a second check that DFID does not hold any information on any of these points. DFID would only be likely to hold the information you requested on our records if we had sought specific legal advice on these precise issues. You should note that under the terms of the FOI Act 200, DFID is not obliged to obtain information from a third party if it does not already hold it.

“In answer to your new questions (i.e. those ending the letter of 5 January 2010) the detailed administrative arrangements for contributions to Trust Funds can vary according to the type of Trust Fund, but each Trust Fund Arrangement specifies the activities or project for which the donor contribution is to be used.”

The complaint to the Information Commissioner

5. The Appellant initially complained to the Commissioner on 22 January 2010, that is, before the result of the internal review was communicated to her. Her complaint was formally accepted as a valid case on 16 February 2010, following the Commissioner having been notified that DFID had completed its internal review.
6. The Commissioner commenced an investigation, requiring DFID to provide information about the searches that it had undertaken in relation to this request. He also received further correspondence from Ms Colville. DFID provided a detailed explanation of the steps it had taken following receipt of the request for information and why it considered that it did not hold the information requested.
7. A Decision Notice was issued on 25 October 2010. In summary, the Commissioner concluded that, having considered the steps taken to locate it, on the balance of probabilities, it was reasonable for DFID to conclude that it did not hold the information requested. The Commissioner therefore concluded that DFID dealt with the request in accordance with the FOIA.

The Appeal to the Tribunal

8. By Notice of Appeal dated 21 October 2010, Ms Colville appeals against the Commissioner's decision.
9. The Tribunal joined DFID as Second Respondent.

10. Ms Colville is not represented in these proceedings and has submitted detailed submissions supported by other material which she considers the Tribunal should take into account when deciding this Appeal.
11. The Appeal was determined at a hearing on the papers on 16 May 2011.
12. The Tribunal was provided in advance with an agreed Bundle of material, written submissions from the parties and an agreed bundle of authorities relied upon by the parties. Although we do not refer to every document, we have had regard to all the material before us.

The Powers of the Tribunal

13. The Tribunal's powers in relation to appeals 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.

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

14. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider

whether the applicable statutory framework has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, it will find that the Decision Notice was not in accordance with the law.

Submissions and Analysis

15. The Commissioner concluded that, on the balance of probabilities, DFID did not hold the requested information and it is against that decision that Ms Colville appeals.
16. DFID, however, submits that a preliminary point arises to be decided by the Tribunal, that is, whether the requests of 3 and 17 December 2009 were valid requests for information under FOIA. It is submitted on behalf of DFID that, on a proper construction of the requests, they amounted to requests for answers about the applicable trust law and their application. As that amounts, in effect, to requests for DFID's understanding of the relevant legal position, these could only be valid requests under FOIA if that information was held at the time; there is no obligation under FOIA to obtain or create such information in recorded form. DFID accepts that if the request had been for legal advice that had been received by it in respect of the particular point, the position would be different; the information is held and a decision would then have to be made whether to disclose it, or whether the exemption under section 42 of FOIA would apply².
17. Ms Colville rejects this submission:

"I did not request information relating to the public authority's understanding of the relevant legal position. That assertion is clearly a misrepresentation and misinterpretation. Had I made a request asking for the public authority's "understanding" I would have explicitly stated so. I made a straightforward request for information presumed to be held, in whatever, form by the public authority."

² Section 42 provides an exemption from the duty to disclose under section 1(1)(b) in respect of information which is subject to legal professional privilege. This is a qualified privilege; information will only be exempt from disclosure if in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

18. The Commissioner considered this issue in his Decision Notice and before us. He submits that, on the wording of the requests, it is not clearly obvious Ms Colville was seeking a legal opinion and therefore he was correct to conclude it was a valid request for information.
19. There is no dispute that the duty under section 1(1) of FOIA, to disclose information upon request, extends only to recorded information. It does not place an obligation on a public authority to answer questions generally or to create information that is not held in recorded form at the time of the request.
20. DFID treated the requests of 5 and 17 December 2009 as valid requests for information under FOIA and responded accordingly. We consider that, as part of the duty to provide advice and assistance under section 16 of FOIA, if DFID had considered these requests not to be valid requests for information, it should have clarified what was being requested with Ms Colville. That was not done as it appears that DFID chose to deal with the requests as valid requests for information under FOIA.
21. We have looked carefully at the wording of the requests of 3 December 2009 (paragraph 7 above), 17 December 2009 (paragraph 8 above) and 5 January 2010 (paragraph 10 above). It appears to us that although the wording could be regarded as ambiguous and could have been phrased in a different way, for example, as a request for all information held concerning the legal framework governing the administration of World Bank funds to which DFID contributes, rather than the series of questions which Ms Colville intended to be able to answer from that information, it is clear what information was being requested. However, a differently phrased request may have elicited a different response from DFID.
22. We are satisfied that the requests of 3 and 17 December 2009 were valid requests for information, albeit that they could have been phrased in a different manner. The question posed in the letter of 5 January 2010 was not a separate request for information but a re-iteration of the point that Ms Colville has pursued as to DFID's responsibilities in respect of funds granted to the World Bank Group.

23. We turn now to the main point in this appeal, that is, whether the Commissioner erred in accepting, on the balance of probabilities, the evidence from DFID that DFID did not hold information within the scope of the Appellant's requests.
24. There can never be certainty that a document might not be undiscovered within the records held by a public authority. It is accepted by the parties that the standard of proof to be applied is the civil standard, that is the balance of probabilities. A differently constituted Panel of this Tribunal in *Bromley v IC and Environment Agency*³ ("*Bromley*") rejected arguments that certainty was the test to be applied in determining whether information was held for the purposes of FOIA and described the balance of probabilities as the "normal standard of proof." We are content that this is the correct standard of proof to be applied by this Tribunal.
25. In *Bromley* the Tribunal said that in reviewing the conclusion reached by the Commissioner as to whether the public authority, on the balance of probabilities, held the requested information. It was required
- "...to consider a number of factors, including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."*
26. In response to questions from the Commissioner during his investigation, DFID set out the details of the searches that were carried out for information falling within the scope of the request.

³ (EA/2006/0072)

27. We have been provided with a witness statement from Eilidh Simpson, Head of Openness Unit in DFID's Business Solutions Division, who has worked in various departments of DFID for a total of thirty years. Ms Simpson is responsible for the team of ten staff that responds to requests for information from the general public, including formal requests which are handled under FOIA. A FOI manager and assistant have core responsibility for the FOIA requests. Ms Simpson carried out the internal review in relation to Ms Colville's requests and also corresponded with the Commissioner during his investigation of Ms Colville's subsequent complaint. The witness statement deals with (i) the filing system DFID has in place for storing documents and the way in which FOIA requests are processed and (ii) the searches which have been carried out by DFID in this particular case to locate the information requested by Ms Colville.
28. DFID's current system for storing core documents and records with a corporate value is the Electronic Document Records Management System ('EDRMS'). This was introduced in 2005 and now contains around two million documents. Documents are stored within electronic folders in the EDRMS and may be viewed by opening the relevant departmental folder or by searching the system using a suitable word or phrase.
29. Pre-2006 paper records are held in an off-site repository and in a basement in DFID's East Kilbride office. File titles are held in an electronic index that is searchable using words or phrases. Files may be recalled from the repository or basement upon request.
30. Ms Simpson explains that FOIA requests in DFID are routed to and answered by her team. The team will carry out whatever searches are appropriate in relation to a particular request; this usually consists of a combination of asking the appropriate country office or policy team if they hold information and a general search of EDRMS for other relevant information. The country or policy team will usually look for the information in the appropriate EDRMS folder. If the country or policy team cannot locate the relevant information or the FOI team feel that additional information may exist, the FOI team will carry out a further general search of the EDRMS. If the terms of the FOI request suggest that information is likely to be held in paper files, the FOI

team will ask the Records Management Unit to carry out a key word search of the paper file index. Any files that seem likely to hold the information are ordered from the basement or file repository and manually searched by the FOI team.

31. In relation to Ms Colville's requests of 3 and 17 December 2009, Ms Simpson sets out the details of the searches carried out:

- On 3 December, the FOI team referred the first request to staff in the International Financial Institutions Department ('IFID') of DFID as it was believed that they would be most likely to hold such information or know where it would be located.
- On 14 December the IFID team responded, noting that Ms Colville appeared to be posing legal questions rather than requesting information. The Head of IFID noted that there were no Trust Funds administered by DFID as a trustee. On the second question, IFID were not aware of any information held by DFID in relation to the applicability of the Hague Convention to Trust Fund arrangements.
- On 18 December the supplementary requests were referred to IFID. IFID considered that these were legal questions, the answers to which would only be held had legal advice been sought. IFID confirmed on 18 December that they had not sought any such legal advice and held no such information.

32. Following the request for an internal review, Ms Simpson carried out the following enquiries:

- She consulted DFID's internal guidance on working with the World Bank. Its content suggested that Trust Funds were not intended to be legally binding arrangements and it appeared therefore that the question of which Law of Trust applied might not arise.
- She referred the internal review request to IFID (who hold the policy for the World Bank) and to the Effective Programmes team (who are responsible for policy on general administrative arrangements for

Memoranda Of Understanding ('MOUs') and Trust Funds) asking whether they had on record any legal advice which answered any of the questions asked by Ms Colville. She also asked them to confirm her view that Trust Funds were not intended to be legally binding agreements.

- The Effective Programmes Team confirmed that all MOUs and Trust Fund arrangements with the World Bank were intended to be non-legal documents. They cautioned against confusing Trusts with WB Trust Funds and pointed to the separate, specific DFID guidance covering the establishment of Trusts. They equated WB Trust Funds on the other hand with MOUs and referred Ms Simpson to the FCO guidance on Treaties which is available on the FCO website, verifying that this was the principle to which DFID worked in managing WB Trust Fund arrangements. They also confirmed that had any legal advice been sought on this issue, it would have been commissioned by IFID or Effective Programmes. They said that they did not hold any information on the issues raised by Ms Colville.
 - IFID responded that they had felt that Ms Colville was really asking under what legislation redress could be sought if things went wrong with a Trust Fund and reiterated that they felt these were legal questions to which DFID did not have a ready answer.
33. As part of his investigation, the Commissioner recommended that additional enquiries and searches be carried out regarding any information which was held at the time of the request in relation to Ms Colville's request regarding the applicability of the Hague Convention.
34. Following receipt of this, Ms Simpson undertook the following searches:
- A search of the EDRMS using the phrase, "Hague Convention on the Law Applicable to Trusts" and on the coinciding phrases "Hague Convention" and "Trusts". The search identified only the documents received from Ms Colville herself in connection with the FOI requests.

- A search of the EDRMS using only the term “Hague Convention”, which yielded 133 documents, all of which she read.
- A search of the EDRMS using the term “Trustee Act” which yielded about 20 documents, all of which she read.
- A search of the EDRMS using the term “Law of Trust”, which yielded about 70 documents, all of which she read.
- A search of the EDRMS using the coinciding terms “Trust Law” and “Trust Funds” yielded no results. A search using only the term “Trust Law” yielded about 300 documents. Although she did not read through every document on the list, it was clear from most of the titles that they did not relate to the World Bank. In a few cases the document titles were unclear and she opened and read these documents to check their content: *“[G]iven my long experience of working in DFID and of the types of documents stored, I do not consider it likely that I missed any relevant documents using this approach.”*
- A search of the EDRMS using the term “Trust Funds” yielded more than 22,000 documents. “Trust Fund” yielded over 80,000 documents. These terms proved too general in her opinion and it was not possible to read every document.
- The EDRMS searches took about a day in total.
- She also commissioned a keyword search by DFID’s Records Management Unit of the paper file index using the following terms: “Trust Law”, “Trustee Act 2000”, “Trust Policy”, “World Bank Trustee”, “Hague Convention on Law Applicable to Trusts”, “law Applicable to World Bank Trust Funds”, “Law Applicable to IFC Trust Funds.” There were no exact matches.
- The Records Management Team suggested a series of files which might contain relevant information and she ordered the “most likely” files from DFID’s file repository. These were mostly general files

dating between 1998 and 2005. Most concerned World Bank Group Trust Funds, including files relating to IFC Trust Funds, IFC Trust Policy, Review of IFC and EBRD Trust Funds etc. A few were more general including Trusts and Trustees, Trust Funds General and Global Trust Funds. In all, she read through the contents of thirty three paper files. The paper file index searches and the process of ordering the files took about half a day. The process of reading through the files took a day and a half.

- Having carried out inquiries and searches she found no information that was relevant to any of Ms Colville's requests, other than the documents received from Ms Colville herself in connection with the requests.

35. The Commissioner submits that this is evidence of the reasonable enquiries carried out by DFID as to whether it held the information and upon which he was satisfied that a reasonable search had been carried out. On that basis, he submits that he was correct to conclude that, on the balance of probabilities, the information requested was not held.
36. Ms Colville submits that DFID's responses to her requests have been "less than virtuous" and that, on the balance of probabilities, DFID is withholding information in breach of FOIA. She has accused DFID of showing "an intentional disregard of a known duty to disclose information necessary to recognise and uphold the internal law of a public institutional organisation, such as exhibits a conscious indifference to consequences through fraudulent concealment of information." In effect she submits that the evidence provided by DFID is untrue and that it is deliberately withholding information from her.
37. Ms Colville submits that this case *"raises questions of interpretation where there is indeterminacy in respect of the applicable "law" governing Trusts created or supported by the UK through DFID and put under the administration of the World Bank and/or its affiliates to provide professional trusteeship services, and indeterminacy through unclear linguistic meaning of "trustee".* She maintains her assertion that DFID acts as a trustee in respect of Trusts administered by the WBG to which the UK makes

contributions, but, in her written submissions, now concedes that some of her initial arguments were misplaced and that any “trusteeship” role for DFID would be conferred by virtue of the specific arrangements entered into between DFID and the WBG.

38. Without rehearsing the very detailed submissions, we accept that Ms Colville has advanced compelling arguments as to why DFID’s role is, or could be said to be, that of trustee and why, therefore, it should hold the information sought as to the relevant legal provisions governing WBG administered trusts and trust funds to which it contributes substantial sums of public money. This is however denied by DFID. It is clear from the source material relied upon by Ms Colville that this is an area of no little uncertainty. It is no part of our jurisdiction to reach a decision on these complex questions of international law.
39. Ms Colville has provided extensive material to support her submission that DFID ought to or must hold the information sought. Even if we were to conclude that DFID should hold the information that Ms Colville requested, it does not follow that DFID does, in fact, hold that information. Our task is to consider whether the Commissioner was correct to conclude on the balance of probabilities that the information requested was not held.
40. We are satisfied on the evidence we have seen – both from correspondence in the bundle of material provided to us and from Ms Simpson’s statement - that DFID carried out a thorough and diligent search for information that might fall within the scope of Ms Colville’s requests. In our opinion it properly analysed the requests and thereafter undertook an appropriate search. It is clear from the extent of the enquiries with different departments within DFID and the search of both the EDRMS and the paper file index that the scope of the search that it made was rigorous and efficient. In particular, we were impressed with the investigation carried out by Ms Simpson as part of both the internal review process and during the Commissioner’s investigation which we consider went significantly beyond what would have been expected. During this exhaustive search no additional material or other avenues of investigation have come to light.

41. Ms Colville argues, in effect, that DFID has engaged in deception and fraudulent concealment. We have found no basis to support this argument or to conclude that DFID is likely to be holding relevant information beyond that which has already been disclosed in the course of correspondence.
42. It is clear from the evidence that the Commissioner's investigation went much further than merely accepting a bald assertion from DFID that it did not hold the information requested and he required details of the thoroughness of the searches. We regard this as further evidence of the Commissioner pursuing the matter and satisfying himself of the quality and thoroughness of the search.

Conclusion and remedy

43. For the reasons set out in detail above, we have concluded that the Commissioner applied the correct standard of proof and that he was both entitled and correct to reach the decision that, on the balance of probabilities, DFID did not hold the information at the time of the request. Accordingly, we dismiss this appeal.
44. We can appreciate Ms Colville's frustration that, on her analysis of DFID's role and responsibilities in relation to the WBG administered funds to which it contributes, she would have expected the information requested to have been held by DFID and disclosed to her. However, as we have indicated above, this is a complex and uncertain area and her analysis, while compellingly argued and painstakingly researched, may not correctly or adequately describe the reality of WBG fund administration. It is, of course, beyond the remit of this Tribunal to rule on such matters.
45. Our decision is unanimous

Signed

Annabel Pilling
Tribunal Judge

3 June 2011