IN THE MATTER OF AN APPEAL TO THE INFORMATION TRIBUNAL UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

EA/2011/0166

BETWEEN:

Dr. C POUNDER **Appellant**

-and-

THE INFORMATION COMMISSIONER

First Respondent

-and-

THE MINISTRY OF JUSTICE

Second Respondent

Comments by Dr C. N. M. Pounder on the Open Witness Statement of Kevin John Fraser (MoJ).

---

1. I would like to make a few comments on the statement of Mr Kevin John Fraser from the Ministry of Justice (MoJ).

2. Paragraph 4 of the Witness Statement states:

> "4 At the time of the Appellant's request, MOJ had not yet received the Reasoned Opinion from the European Commission setting out those Articles the Commission at the time intended to pursue in infraction proceedings. That document was only dated **24 June 2010**. For that reason, at the time of the request the information requested in (iv) could not have existed and did not exist." (My emphasis as my original request was made on **1 October 2009**).

3. I note that if the requested information only existed on **24th June 2010**, it follows that my request of **1 October 2009** should have been refused (without any delay) by the **29th October 2009**.

4. I also note that my request for an internal review was dated the **2nd February 2010**. I am very puzzled as what the internal review could be looking at, if the relevant information did not exist until **24th June 2010,** or why it took so long to communicate the outcome of a review where no information was held.

5. The Witness Statement shows that the MoJ are arguing (very late in the day) that it didn't hold the "Reasoned Opinion" (i.e. making a claim that this is the requested information) at the time of my request. According to this approach, my Appeal should be rejected on these grounds. I think this view can be dismissed using a very simply argument: because my FOI request did not refer to the "Reasoned Opinion", it is clear that my request could relate to some earlier account of the EC's objections to the UK arrangement held by the MoJ.

6. However, I note that in many circumstances, the Tribunal has treated the relevant date in relation to a FOI request to be the date on which internal review was completed (i.e. in my case, around **25th August 2010**). This is relevant because if "the Reasoned Opinion" was not held at the time of the request it was, as Mr Fraser's statement acknowledges, held by the time internal review was completed.

7. ***I therefore argue below, that because of the MoJ delays in handling my request, the "Reasoned Opinion" falls within the ambit of my request.*** This is because the Tribunal has held that that the completion of internal review can be the 'relevant time' for the purpose of decisions concerning the application of exemptions and the public interest test. See, for example:

   - *Thackeray & IC and The Common Council of the City of London (EA/2009/0095)*, paragraph 9;
   - *Department of Culture, Media and Sport & IC (EA/2009/0038),* paragraph 26(1);
   - *Mark Watts & IC (EA/2007/0022)*, paragraph 5;
   - *Freebury & IC & Devon and Cornwall Constabulary (EA/2009/0012)*, paragraph 23;
   - *Plumbe & IC & Hampshire County Council (EA/2009/0117),* paragraph 21; and
   - *O'Brien & IC & Department for Business, Enterprise and Regulatory Reform (EA/2008/0011)* paragraph 19 of the second decision of 20 July 2009.

8. In most of these cases, the question to be determined by reference to the "relevant time" is the public interest test. However, that is not invariably the case. In *Campaign Against the Arms Trade & IC & Ministry of Defence (EA/2006/0040)*, the Tribunal ruled on this matter in significantly wider terms

> 43 "In our view the authority should consider its response including the application of any exemption at the time at which it is required to respond. The provisions requiring the authority to consider and comply with the request are all expressed in the present tense. ***There is nothing in the language which requires the authority to confine its consideration to the time of the making of the request as such."*** (My emphasis)
>
> 53 "We [The Tribunal] accordingly conclude that the proper approach of the IC and in turn the Tribunal should be to have regard to the ***whole of the***

dealing with the request by the authority under Part I and that the time for the consideration whether there should be disclosure of the information, including the public interest balance, ***should include the whole of that process, including, where applicable, any reconsideration on review".*** (My emphasis again)

9. The specific issue of whether documents obtained after the date on which the original request was made were held at the relevant time arose in *Department for Business, Enterprise and Regulatory Reform & IC & Friends of the Earth (EA/2007/0072.* The Tribunal noted at paragraph 16 that some of the disputed documents:

> 16. "....are dated shortly after the date of the Request but BERR and the Commissioner nevertheless elected to treat them as part of the Request. The Tribunal considers this is the right approach...."

10. The fact that at least part of material needed to answer the request is said to have arisen after the request was made, but before internal review was completed, ***should therefore not, in my view, prevent that material from being regarded as held by the department at the relevant time***.

11. I also suggest that my position is consistent with the view of the Upper Tribunal in *All Party Parliamentary Group on Extraordinary Rendition & IC & Ministry of Defence, [2011] UKUT 153 (AAC)* which held that the late claiming of section 12 as the basis for withholding information should not be permitted. At paragraph 47 of its decision the Upper Tribunal explained in four sub-paragraphs why a section 12 (s.12) refusal differed from a refusal on grounds of an exemption. It then concluded, at the end of paragraph 48, that:

> 48 .... "...the more extended the failure to comply with s.17(4) and the later the s.12 claim the more likely it is that prejudice would be caused to the applicant and the statutory scheme distorted".

12. That argument was partly based on the fact that, had s.12 been cited promptly, the requester would have been able to make several narrower requests for information at 60 day intervals by the time that s.12 was in fact cited. The late claiming of s.12 prevented this from being done.

13. I suggest that a similar line of argument (i.e. "more extended the failure ...statutory scheme distorted") applies in relation this extremely delayed claim that the requested information was not held. Had I been informed at the time of the initial refusal in late October 2009 that the information was not held it would have been a simple matter for me to wait until the "Reasoned Opinion" had been issued (these are press released by the

EC[1] and repeat my request. Had I made a request on the date of the "Reasoned Opinion", **June 24 2010** and the MOJ had responded to it in line with the Act's time limits (i.e. by **23 July 2010**) and gone on to complete its internal review within the ICO's recommended 20 day period (i.e. by **August 20 2010**) the review would have been completed before the date of completion of the actual internal review. My appeal into any refusal to release a summary of information derived from the "Reasoned Opinion" would now be taking place.

14. In that sense, the MoJ's Witness Statement can be viewed as raising an academic point over timing. If the MoJ had acted properly in relation to my request, this Appeal would still be occurring in the same format, discussing the same points with respect to the same information, at the same time.

15. I also suggest that analysis of the dates associated with my request bears eloquent testament to the wholly inadequate FOI procedures adopted by the MoJ, which the MoJ are now attempting to exploit in order to gain what I consider to be an opportunist (and unfair) advantage. The main consequence of accepting the MoJ position – depending on what other information is held – requires me to repeat my request and repeat the long march through the institutions, back to the Tribunal.

16. I conclude that to exclude information derived from the "Reasoned Opinion" from the current appeal would be to allow the MoJ to profit from its own failure to deal with the request in accordance with the Act. This is especially the case as every party to this Appeal, including the Tribunal itself, has expended a great deal of time, effort and resources considering the requested information which the MoJ is now claiming did not exist at the relevant time of the request.

Dr C. N. M. Pounder; **17th September 2011**

[1] For the announcement of the Reasoned Opinion referred to in this case see: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/811