



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

Case No. EA/2010/0151

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50260727

Dated: 21 July 2010

Appellant: Stephen Gradwick

Respondent: Information Commissioner

Additional Party: The Foreign & Commonwealth Office

On the papers

Heard at: Field House London

Date of hearing: 10 August 2011

Date of decision: 23 August 2011

Before

Angus Hamilton

Judge

and

Melanie Howard

and

Steve Shaw

Subject matter: s 27(1)(a) and (b) and s.40(2) Freedom of Information Act 2000

Cases considered:

All Party Parliamentary Group on Extraordinary Rendition v IC & MOD [2011] UKUT 153 (AAC)
R (Mohammed) v SSFCA [2010] EWCA Civ 65, [2011] QB 218
Campaign Against the Arms Trade v IC & MOJ (EW/2006/0040) 26/08/08
John Connor Press Associates Ltd v IC (EA/2005/0005) 25/01/06
R (Lord) v SSHD [2003] EWHC 2073 (Admin)
OGC v IC [2008] EWHC 774 (Admin), [2010] QB 98
FCO v IC & Friends of the Earth (EA/2006/0065) 29/06/07
Gilby v IC & FCO (EA/2007/007, 0071 & 0079) 22/10/08
Home Office v IC & Habibi [2011] UKUT 17 (AAC)
Corporate Officer of the House of Commons v IC & Brooke [2008] EWHC 1084 (Admin), [2009] 3 All ER 403 (DC)
Corporate Officer of the House of Commons v IC & Brooke (EA/2007/060) 26/02/08
Gibson v IC (EA/2009/0054) 22/01/10
Dun v IC & NAO (EA/2010/0060) 18/01/11
Hogan and Oxford City Council v Information Commissioner
EA/2005/0026, EA/200510030,

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal on one issue only and substitutes the following decision notice in place of the decision notice dated 21 July 2010. Additionally the Tribunal requests that the Foreign and Commonwealth Office further reviews its redactions in light of the matters set out in paragraphs 33-34 of this judgement with a view to applying consistent principles of disclosure.

SUBSTITUTED DECISION NOTICE

Dated : 23 August 2011

Public authority: Foreign & Commonwealth Office

Address of Public authority: Old Admiralty Building, London SW1A 2PA

Name of Complainant: Stephen Gradwick

The Substituted Decision

For the reasons set out in the Tribunal's determination, the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 21 July 2010.

Action Required

In addition to the information disclosed to Mr Gradwick prior to and during the course of the appeal proceedings the Foreign & Commonwealth Office are also to disclose (remove the redaction of) the security markings on all documents so far disclosed to Mr Gradwick by 30 September 2011.

Dated this 23 day of August 2011

Signed

Angus Hamilton DJ(MC)
Judge

REASONS FOR DECISION

Introduction

1. By way of an email dated 8 January 2009 Mr Gradwick applied to the Foreign & Commonwealth Office (FCO) for the disclosure, in particular, of documents held by them pertaining to the removal of Jose Mauricio Bustani as Director General of the Organisation for the Prohibition of Chemical Weapons (OPCW).
2. Mr Gradwick's request read as follows: **Please disclose any letters, e-mails, reports, papers, memoranda or other documents held by the Foreign & Commonwealth Office concerning Jose Mauricio Bustani the former Director General of the Organisation for the Prohibition of Chemical Weapons. I am particularly interested in receiving copies of documents relating to the meeting held at The Hague on 21st April 2002 where his removal was sought. I am also interested in receiving copies of documents discussing or otherwise relating to Judgement 2232 of the Administrative Tribunal of the International Labour Organisation.**
3. By way of a letter dated 10 March 2009 the FCO replied to Mr Gradwick that they would release some of the sought information to him but would withhold (or redact) other information on the basis that it was exempt from disclosure under s.27(1) of the FOIA and that the public interest in maintaining the exemption outweighed the public interest in disclosure.
4. Mr Gradwick then sought an internal review and in a letter in reply dated 2 June 2009 the FCO upheld its own initial decision.

The complaint to the Information Commissioner

5. Mr Gradwick then submitted a complaint to the Office of the Information Commissioner on 26 July 2009 objecting both to the delay in the FCO answering his original request and their reliance upon s27 of FOIA to withhold information.
6. The Commissioner issued a Decision Notice dated 21 July 2010 which determined that the FCO had, save in one respect, dealt with Mr Gradwick's request appropriately. The one exception was that the Commissioner determined that the FCO should have set out which particular subsections of s27(1) it was relying on.

The appeal to the Tribunal

7. On 18 August 2010 Mr Gradwick submitted an appeal to the Tribunal (IRT). His Grounds of Appeal are set out in the Open Bundle of Documents before us at pp 25-28.
8. During the course of the appeal proceedings there were two developments that should be mentioned at this stage. First the FCO reviewed the information redacted from documents released to Mr. Gradwick and decided to release further material to him. Secondly the FCO sought to rely on an additional exemption (namely s.40(2) FOIA) in relation to the non-disclosure of 'junior' civil servants names which had been redacted from the documents disclosed to Mr Gradwick. This exemption had not been relied on by the FCO prior to the submission of Mr Gradwick's appeal to the IRT. This step (sometimes referred to as a 'late-claimed exemption') was opposed by Mr Gradwick but was permitted by the Tribunal in accordance with the decision in *Home Office v IC & Habibi* [2011] UKUT 17 (AAC).

The questions for the Tribunal

9. With respect to the central issue of the reliance on s27(1) in relation to the redacted information we found the analysis of Mr Gradwick's Grounds of Appeal set out in the final submissions from the Commissioner to be helpful. This read:

10. In his Response to the appeal, the Commissioner identified five grounds of appeal that appeared to be disclosed by the Appellant's Notice of Appeal. In his 'Reply Submission to Directions One and Two' of 11 October 2010, the Appellant clarified that he has seven grounds of appeal as set out at paragraph 10 of the Appellant's Reply Submission. These grounds may, it is submitted, be helpfully addressed as follows in the context of the legal issues that arise on this appeal:

1) Has the FCO properly applied the exemptions in s 27(l)(a) and/or (b) of FOIA to the information requested, i.e., first, has the FCO shown that the information in question would, or would be likely to, prejudice (a) relations between the United Kingdom and any other State and/or (b) relations between the United Kingdom and any international organisation or international court?

2) Second, does the balance of public interest favour withholding or disclosing the information that has been redacted by the FCO from the documents disclosed?

3) In particular, in considering (1) and/or (2):

a. Can each of the redactions be justified by reference to s 27(l) or any of its subsections? (*Appellant's First Ground*)

- b. Has the government adopted a policy of citing s 27(l) in all cases where a disclosure would show the US in a bad or otherwise embarrassing light, effectively turning the exemption at s 27(l) into an absolute exemption where the US is concerned? (*Appellant's Second Ground*)**
 - c. Have the arguments that have been put forward to justify the redactions been inconsistently and arbitrarily applied? (*Appellant's Third Ground*)**
 - d. Is there evidence of undue influence being exerted by any of the states party to the Chemical Weapons Convention on other state parties? (The Appellant asserts that the documents which have been disclosed suggest that undue influence was exerted, as a consequence of which the Appellant concurs with the Commissioner's statement at §39 of the Decision Notice that this indicates a 'compelling' public interest in disclosure.) (*Appellant's Fourth Ground*)**
 - e. Does the balance of public interest favour disclosure? (*Appellant's Fifth Ground*)**
- 4) The Appellant believes that officials at the FCO unlawfully disclosed his personal data to US authorities in contravention of s 55(3) of the Data Protection Act 1998 ("DPA"). (*Appellant's Sixth Ground*). Is this an issue that properly arises for determination on this appeal?**
- 5) The Appellant further contends (*Appellant's Seventh Ground*) that the Commissioner has failed to correctly carry out his statutory duty under s. 50(3) of FOIA. (This relates to**

the fact that the Commissioner did not consider whether the names of civil servants had been properly redacted as part of his investigation.) Is this an issue that properly arises for determination on this appeal? If so, what order should the Tribunal make?

11. The secondary question for the Tribunal to determine is whether the FCO were justified in relying on s.40(2) of FOIA to redact the names of junior civil servants from the documents disclosed to Mr Gradwick.

Evidence

12. All parties have agreed that this matter should be considered 'on the papers' only and we have heard no live evidence or oral submissions. No parties or representatives have attended the hearing.

13. We have considered, from the Appellant, the Notice and Grounds of Appeal and his submissions from October and December 2010 (though the latter related almost wholly to the allowance of a late-claimed exemption under s.40(2) FOIA). There have been no recent submissions from Mr Gradwick even though there was a permissive direction to serve and file submissions prior to this hearing. Mr Gradwick has been contacted by the Tribunal about the lack of submissions and, in response, has asked the Tribunal to consider the issues raised in his Grounds of Appeal.

14. We have considered, from the Commissioner, the Decision Notice, the Response to Appeal and the final submissions.

15. We have considered, from the FCO, their Response to the Appeal, the final submissions, and the statements from Ms Morris (open and closed) and accompanying exhibits.

Conclusion and remedy

16. With respect to the reliance on s40(2) FOIA in relation to the redacted names of junior civil servants we were most persuaded by the helpful analysis set out in the final submissions from the FCO on this point. We approve and adopt those submissions which read as follows:

17. **So far as concerns FOIA, s.40(2), the familiar analysis in this regard is that:**

(1) the withheld names comprise "personal data" within the meaning of DPA, s. 1 (1) (see FOIA, s.40(7)); and

(2) their disclosure would contravene Data Protection Principle 1 (DPP1) so that FOIA, s.40(2)-(3) is engaged and they are exempt.

18. **The key is essentially whether disclosure of the disputed names would contravene DPPI thereby triggering FOIA, s.40(3)(a)(i) or (b). This in turn comes down to whether disclosure would be "fair" for the purposes of DPA, Sch.1, Pt 1, para. 1 and meet the condition in DPA, Sch.2, para.6(l), "necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed".**

19. **It is submitted here that disclosure would cause "prejudice to the rights and freedoms or legitimate interests" of those named to such an extent that it would be "unwarranted" and neither "fair" nor "necessary". Furthermore, such disclosure could not be made fair by way of a "gateway" under DPA, Sch.2 (including under para.6). It is further submitted that the "necessary" and "warranted" criteria in DPA, Sch.2, para.6 are not met when applied in accordance with the approach taken by the Information Tribunal**

and the High Court in *Corporate Officer of the House of Commons v IC & Brooke* (EA/2007/060) 26/02/08, paras [60]-[61] and [2008] EWHC 1084 (Admin), [2009] 3 All ER 403 (DC).

20. The relevant three-fold test was also summarised by the First Tier Tribunal in *Gibson v IC* (EA/2009/0054) 22/01/10:

19. Put shortly and somewhat self-evidently, for disclosure to be justified, the public's legitimate interest had to outweigh the rights, freedoms and legitimate interests of the data subject. That equation was expressed in the following way in the Corporate Officer decision referred to above, in terms which were subsequently endorsed by the High Court by means of a three-fold test, namely: (1) there must be a legitimate public interest [in] disclosure; (2) that disclosure had to be necessary to meet that public interest,- and (3) the disclosure in question must not cause unwarranted harm to the interests of the individual. It is doubtful whether that three-fold formulation adds very much, if anything to the statutory language in Schedule 2, paragraph 6(l) in any event.

21. The IC's Practical Guidance Note "When should names be disclosed?" (15/08/08) identifies the following key factors, inter alia, when it comes to "fairness" (pp. 1-2):

1. Does the information requested relate primarily to the person's public function rather than their private life?

2. Should the individual expect their role to be subject to public scrutiny? You should consider: how senior they are; whether they have a public profile; and, whether their role requires a significant level of personal judgement and individual responsibility...

22. The following guidance is then given at p.3:

The presumption is in favour of protecting privacy, so the release of personal information will only be fair if there is a genuine reason to disclose. This involves a three-stage test. A public authority will generally have to satisfy itself that:

- there is a legitimate interest in disclosure;***
- the legitimate interest can only be met, or fully met, by the disclosure of information which identifies individuals (i.e. the disclosure is necessary to that purpose); and,***
- the disclosure would not involve unwarranted detriment to the individual's privacy or other rights and legitimate interests.***

This three-stage test is not exactly the same as a public interest test, but it involves similar considerations:

- You should identify the legitimate interests which a member of the public might have in the information. These may not be the same as, or limited to, any interest expressed by the particular requester, although any arguments they put forward should be considered.***
- You should consider whether the names add to the value of the information, or whether the interests would be fully met by providing information with the names redacted.***

- ***You should decide whether the benefits of disclosure are proportionate to any potential harm, distress or intrusion to the individuals named.***

23. Applying the above considerations to this case, it is submitted that: the staff whose names have been withheld were in junior positions; they did not have a public or political profile or personal responsibility at a macro level for budgetary, personnel or policy matters; ministers and SMS grade staff were ultimately accountable for their work; and they therefore have a reasonable expectation that their privacy should be respected and their names protected. The withholding of the names of more junior staff who are not in public facing roles in such circumstances has recently been approved in, e.g. *Dun v IC & NAO (EA/2010/0060) 18/01/11.*

24. Consequently we conclude that the names of junior civil servants were rightly redacted from the documents disclosed by the FCO to Mr Gradwick and that the exemption in s40(2) FOIA was rightly claimed.

25. In relation to the redaction of the security markings on the documents disclosed to Mr Gradwick – this seems to have been treated as a peripheral issue by the Respondents and the submissions from the FCO are very brief. One of the principal points made by the FCO is that this information did not form part of Mr Gradwick's initial request for information. However the same could be said of the redaction of junior civil servants' names and yet this latter issue, as can be seen from the preceding paragraphs, has been addressed fully by the FCO and a specific FOIA exemption has been relied on. In relation to the removal of the security markings the FCO have not raised any FOIA exemption but assert that it can be justified on 'relevance and practical grounds'

26. We have considered this issue carefully and have concluded that in the absence of any specifically claimed FOIA exemption this information falls to be disclosed to Mr Gradwick.

27. In relation to the redacted information where the Respondents rely on s.27(1)(a) and (b) FOIA we have been assisted by the helpful analysis set out in the Commissioner's final submissions (paragraph 10 above).

28. We first considered the questions posed at paragraphs 10(4) and (5) above. In relation to the issue at paragraph 10(4) (the allegation of the wrongful disclosure of Mr Gradwick's personal data to the US authorities) we consider that this is not an issue that falls to be considered as part of this appeal as it falls entirely outside its ambit.

29. In relation to the issue at paragraph 10(5) (the alleged failure by the Commissioner to perform his statutory duty under the FOIA) we also consider that this is not an issue that properly falls to be considered as part of this appeal. However, as is clear from this judgement, we have considered the issue of the redaction of junior civil servants' names. It was the failure of the Commissioner to consider this point that led Mr Gradwick to allege a breach of statutory duty.

30. We then turned to consider the claimed s27(1) FOIA exemption in relation to the redacted data and the issues set out in paragraphs 10(1) and (2) above. Our approach was to consider first the redacted information - which was made available to us in submitted the 'closed bundle' - and secondly the detailed explanation for the redaction of that information set out in the 'closed' statement of Jill Morris.

31. Having considered these points we concluded in relation to each piece of redacted information that that information would, or would be likely to, prejudice:

(a) relations between the United Kingdom and any other State and/or

(b) relations between the United Kingdom and any international organisation or international court?

And that consequently the exemption at s27(1)(a) and/or (b) was properly claimed by the FCO.

32. We also concluded that the balance of public interest favoured withholding the information.

33. It is not possible to give more detailed reasons for reaching these conclusions as to do so would inevitably involving disclosing the information that is exempt from disclosure.

34. We did however note that even after the FCOs review of their redactions there is still an inconsistency in the FCO's approach to redaction. At paragraph 4.4 of Ms. Morris' closed statement an explanation is given for the redaction of the information at CBD/15/38/A. This is, in brief, the specific countries that voted for/against or abstained in relation to the vote of no confidence in Mr. Bustani on 22/03/02. However we also note from the most recent bundle of reviewed redacted documents that this very information has in fact been disclosed to Mr. Gradwick.

35. Our analysis is that the redaction of this specific information could have been justified by relying on s.27(1)(a). However given that the information has now been disclosed we would invite the FCO to look again at other documents containing this information with a view to applying a consistent approach across all documents. We note that the FCO has already done this in relation to the specific countries which opposed/supported/abstained in relation to the vote of 22/04/02. The FCOs position is that this information could have been withheld under

s27(1)(a) but that since it has been disclosed 'in error' there should now be consistent disclosure (paragraphs 4.1 and 4.2 of Jill Morris closed statement)

36. Mr. Gradwick has been right to express concern (paragraph 10(3)c above) about the inconsistent approach adopted by the FCO in relation to redactions. We are however satisfied that - given the reviews conducted by the FCO during the course of this appeal and providing the issues raised in the preceding paragraphs are addressed – this particular concern has now been dealt with appropriately.

37. Following the analysis set out at paragraph 10 above this leaves us to consider briefly the points raised at paragraphs 10(3)b and d above. On these points we would like to offer Mr. Gradwick the reassurance that, having carefully inspected the information redacted from the documents disclosed to him, we could find no evidence whatsoever to support his concerns that information was redacted solely because its disclosure would have caused embarrassment to the US or because it would have disclosed inappropriate pressure being applied by any member countries of the CWC.

Our decision is unanimous

Signed:

Angus Hamilton DJ(MC)

Judge

Date: 23 August 2011