IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2015/0080
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS 50559792
Dated: 9 March 2015

Appellant:	**NATE JONES/NATIONAL SECURITY ARCHIVE**
1st Respondent:	**INFORMATION COMMISSIONER**
2nd Respondent:	**THE CABINET OFFICE**
Heard at:	**FIELD HOUSE**
Date of hearing:	**23 NOVEMBER 2015**
Date of decision:	**8 DECEMBER 2015**
Date of promulgation:	**22 DECEMBER 2015**

Before

ROBIN CALLENDER SMITH
Judge

and

ANNE CHAFER and DR HENRY FITZHUGH
Tribunal Members

Written representations:

For the Appellant: Nate Jones on behalf of The National Security Archive, The George Washington University Gelman Library, Washington DC.
For the 1st Respondent: Adam Sowerbutts, Solicitor for the Information Commissioner
For the 2nd Respondent: Robert Palmer, Counsel instructed by the Government Legal Service

IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2015/0080

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

Subject matter: FOIA 2000

Absolute exemptions

- Information supplied by, or relating to, bodies dealing with security matters s.23

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 9 March 2015 and dismisses the appeal.

REASONS FOR DECISION

Background

1. In 1983 a simulation exercise was conducted by the North Atlantic Treaty Organisation (NATO) that was intended to gauge the effectiveness of NATO's Command, Control and Communications procedures in the event of a nuclear war.

2. That exercise was codenamed Exercise Able Archer.

3. Mr Nate Jones (the Appellant) who is based at the National Security Archive at George Washington University in Washington DC has made a particular study of events surrounding this period.

The request for information

4. On 9 July 2014 he asked The Cabinet Office for information about "…. the 23 March 1984 Joint Intelligence Committee report, reference JIC (84) (N) 45, entitled 'Soviet Union: Concern About a Surprise NATO Attack' which

was written in response to the NATO military exercise code-named Able Archer 83."

5. At the time and following a review The Cabinet Office declined to provide the information on the basis of FOIA exemptions at section 23 (1), 24 (1) and 27 (1) (a), (b), (c) and (d).

The complaint to the Information Commissioner

6. In support of his complaint to the Information Commissioner the Appellant submitted that the report in question – or at least parts of it – should be disclosed because:

> "Even if some information must remain withheld, it is entirely likely that the document holds much information that can be segregated and released with great benefit to the public interest.
>
> An abundance of documents have already been released by the US and UK governments on the 1983 Soviet "War Scare" referencing information on the Soviet defector Oleg Gordievsky and British and US intelligence – including human intelligence and signals intelligence. These include:
>
> - Photographs and records of Oleg Gordievsky meeting and debriefing President Reagan,
> - British Ministry of Defence documents confirming the "unprecedented the reaction" as well as intelligence sharing between US and UK,
> - A classified CIA 1996 Studies in Intelligence article "The 1983 War Scare in US-Soviet relations" by Ben B Fischer, a History Fellow at CIA Centre for the Study in Intelligence,
> - A Department of State document confirming a British source alerted the US to the danger, and
> - A US Air Force After Action Report of the NATO Command Post Exercise Able Archer 83.

- Michael Herman of the Soviet Division at GCHQ from 1997 to 1982 had recently discussed the contents of this document at length. He also strongly recommended declassification as it “benefits public interest.”

7. The Information Commissioner considered a letter provided from Mr Dominic Wilson, a senior official of The Cabinet Office, who had the experience and authority to validate the provenance of the report.

8. Mr Wilson assured the Commissioner that most of the information in the report was either directly received from one of the bodies listed in section 23 (3) or was directly related to them. Information in the report not considered exempt under section 23 (1) was considered exempt under section 24 (1).

9. The Cabinet Office had acknowledged that there was a general public interest in better public understanding of the steps the authorities take to maintain national security including an understanding of the lessons learned from exercises such as Able Archer. It had taken into account the age of the information and concluded that, although it was almost 30 years old (at the time of decision) the information was still relevant in the context of the UK’s national security.

10. It had recently reviewed the information held on Exercise Able Archer as part of a recent annual transfer of records to the National Archives and all of the information hadbeen retained by The Cabinet Office under the terms of section 3 (4) of the Public Records Act.

11. The Commissioner found that most of the information in the report was exempt from disclosure on the basis of section 23 (1) – an absolute exemption without an inbuilt public interest test – because it had been supplied by or related to one of the bodies listed in section 23 (3) FOIA.

12. Information that did not fall within that category was exempt from disclosure on the basis of section 24 (1) on the basis that it related to

safeguarding national security. In so far as there was a public interest in understanding the lessons learned from Exercise Able Archer he concluded that the strong public interest in safeguarding national security prevailed and that there should not be disclosure of it.

13. He also concluded that whether or not some of the information relating to Exercise Able Archer had been disclosed in the past was not relevant to the question of whether the withheld information should be disclosed in this instance.

The appeal to the Tribunal

14. The thrust of the Appellant's appeal is that the exemptions should not be used to deny "the entirety of this document" under FOIA because of the "extreme public interest the release of the information in this document will serve".

15. In addition, the record should not be withheld in its entirety because of the multitude of British, American, Russian and other documents already declassified and released on the topic. Based on the historical value of this particular record the release would be "in the best interests of the general community due to an intense and pressing public interest to understand the events that occurred during the Cold War".

16. Even if some of the information had to be withheld the Appellant argued that the document would hold much information that could be segregated and released with great benefit to the public interest. He pointed to the example of the Ministry of Defence doing this with a FOIA release to the Nuclear Information Service.

17. He pointed to an "abundance of documents already released by the US and UK governments on the 1983 "War Scare" referencing information on the Soviet defector Oleg Gordievsky and British and US intelligence – including human intelligence and signals intelligence."

18. He believed the UK Cabinet Office was improperly citing National Security concerns to withhold information already well-known about a subject much in need of elucidation.

19. In a letter setting out final points for the Tribunal to consider dated 6 November 2015 he added that, in relation to the absolute exemption in section 23 FOIA, "just because a document can be withheld on purely technical grounds does not mean that it should, or that the public benefit from its disclosure does not outweigh such technicalities."

20. He emphasised that the document that he was seeking was 32 years old and had been requested in the first place because of a reference found to it in the British National Archives. Treating the document as if it was a modern intelligence source, rather than the historical record that it is, was a dangerous precedent to set and not one that the Tribunal should allow.

<u>Evidence</u>

21. The Tribunal considered both the open written submissions and evidence set out by the Appellant and the open and closed submissions, materials and evidence provided by the Second Respondent, the Cabinet Office.

22. In particular it has considered both the open and the closed versions of the witness statement of Mr Dominic Wilson dated 1 September 2015.

23. As he explained, he recently took up his post as Director of Operational Policy (Security Policy and Operations) at the Ministry of Defence having previously undertaken the role of the Director of Security and Intelligence in the National Security Secretariat of the Cabinet Office for almost four years.

24. His witness statement addressed the issue of the reliance on section 23 FOIA. He stated that it was drawn from his own knowledge and experience of working within Government and, in particular, of working in

an environment which requires dealing with classified and highly sensitive material.

25. He had been consulted at the point when the Commissioner was investigating the request, prior to issuing his Decision Notice. That had been with a view to providing a letter under the terms of the Memorandum of Understanding on National Security Cases (the MOU). That MOU had been signed by the Information Commissioner and the Secretary of State for Justice.

26. The substance of the MOU was that any reasoned explanation and background information provided by an appropriate person in the Department would generally suffice to satisfy the Commissioner that the relevant exemptions had been properly relied on without the need to disclose the contents of the withheld information and without the need for a formal section 23/24 certificate under FOIA.

27. He had concluded that the exemptions had been correctly applied and provided a letter confirming that most of the information in question engaged section 23 and, where it did not, it engaged section 24.

28. As a result of a cross-Whitehall consultation with interested parties in relation to the information in question – prior to the appeal being heard - it had become clear that the Cabinet Office no longer relied on section 24 or 27 in respect of the information. He believed however that section 23 (1) continued to apply to those parts of the document the Cabinet Office maintained should be withheld.

29. The Tribunal reminded itself of the recent guidance for the approach to be taken by courts and tribunals in respect of any closed material procedure.

30. In *Bank Mellat v HMT (no.1)* [2013] UKSC 38, which was not a case about FOIA, Lord Neuberger said at paragraphs 68-74 that:

    i) If closed material is necessary, the parties should try to minimise the extent of any closed hearing.

ii) If there is a closed hearing, the lawyers representing the party relying on the closed material should give the excluded party as much information as possible about the closed documents relied on.

iii) Where open and closed judgments are given, it is highly desirable that in the open judgment the judge/Tribunal (i) identifies every conclusion in the open judgment reached in whole or in part in the light of points made or evidence referred to in the closed judgment and (ii) says that this is what they have done.

iv) A judge/Tribunal who has relied on closed material in a closed judgment should say in the open judgment as much as can properly be said about the closed material relied on. Any party excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and the arguments it has received.

31. In *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC) the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA cases, noting that such practices are likely to be unavoidable in resolving disputes in this context:

i) FOIA appeals are unlike criminal or other civil proceedings. The Tribunal's function is investigative, i.e. it is not concerned with the resolution of an adversarial civil case based on competing interests.

ii) Closed procedures may therefore be necessary, for consideration not only of the disputed material itself, but also of supporting evidence which itself attracts similar sensitivities.

iii) Parliament did not intend disproportionate satellite litigation to arise from the use of closed procedures in FOIA cases.

iv) Tribunals should take into account the Practice Note on Closed Material in Information Rights Cases (issued in May 2012). They should follow it or explain why they have decided not to do so.

v) Throughout the proceedings, the Tribunal must keep under review whether information about closed material should be provided to an excluded party.

32. The closed bundle in this appeal contained the disputed information and an unredacted witness statement from Mr Wilson.

33. It was necessary for the Tribunal to see the disputed information – and consider the totality of it – in relation to the exemptions claimed.

34. The Tribunal has considered carefully and rigorously the Appellant's points and concerns already expressed in the notice of appeal and in his other representations and submissions.

Conclusion and remedy

35. It is clear and settled law that section 23 (1) FOIA exempts from disclosure information that was directly or indirectly supplied to a public authority by – or relates to – any of the security bodies listed in the section.

36. Section 23 is an absolute exemption. No public interest test lies behind the operation of it.

37. The sole issue of fact before the Tribunal was whether the requested information was information directly or indirectly supplied to the Cabinet Office or whether it related to any of the security bodies listed in section 23 (3) FOIA.

38. Having examined the withheld information and considered the unredacted witness statement of Mr Wilson the Tribunal concludes that the information does indeed fall squarely and unequivocally within the section 23 FOIA absolute exemption.

39. As is stated in the Cabinet Office's final written submission (particularly at Paragraph 6) the vast majority of the document contents falls directly into the section 23 (1) exemption.

40. Where it does not, in terms of the balance of the document, it provides no further information of any substance capable of illuminating public understanding of the matter.

41. Release of this relatively little information would only point to the content of the information in question which would then engage the section 23 exemption or else which would give rise to a misleading impression about the nature of the information contained in the rest of the report.

42. In either event this would lead to unjustified speculation about what the rest of the report might contain.

43. There is a recognised and manifest public interest in not providing partial disclosure which could on its own be misleading: *FCO v IC and Plowden* [2013] UKUT 0275 (IAC) at [16].

44. The Tribunal is also satisfied that the "20 year rule" referred to by the Appellant does not apply to this information. It relates to the time period after which a record will become an "historical" record for the purposes of Part VI of the act.

45. When that happens some of the exemptions which would otherwise be applicable cease to apply but that does not affect the absolute exemption in section 23 (1).

46. The absolute exemption does not depend on whether – or to what extent – other documents with similar subject matter have already been made public.

47. For all these reasons the Tribunal is satisfied that the Cabinet Office has correctly withheld the information under the provisions of section 23 (1). For that reason, this appeal must fail.

48. Our decision is unanimous.

49. There is no order as to costs.

Robin Callender Smith

Judge

8 December 2015

Corrected (grammar and punctuation) 21 December 2015