



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2015/0284

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50561061

Dated: 16 November 2015

Appellant: Edwin Morris

Respondent: Information Commissioner

Public Authority: Cabinet Office

Heard at: The Residential Property Tribunal, Alfred Place, London

Date of hearing: 1 March 2017

Date of decision: 30 May 2017

Before

Angus Hamilton

Judge

and

Darryl Stephenson

and

Nigel Watson

Subject matter: s 23(5) and 24(2) Freedom of Information Act 2000

Cases considered:

Commissioner of Police of the Metropolis v IC (2010/EA/0008)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 16 November 2015 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1 This decision must commence with an apology to all the parties involved for the substantial delay in its provision. This was a consequence of the Tribunal Judge being placed on long-term sick leave almost immediately after the hearing on 1 March. For the same reason the decision is being kept relatively brief.

2 Section 1 (1) of FOIA provides that:

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.

3 However information supplied by or relating to the security bodies specified in s.23(3) is exempt information by virtue of s.23(1). Information which does not fall under s.23(1) is exempt from disclosure under s.24(1) if the exemption is required for the purpose of safeguarding national security.

4 Sections 23(5) and 24(2) exclude the duty of the public authority to confirm or deny whether it holds information which, if held, would be exempt under s.23(1) or where 'neither confirm nor deny' in relation to the requested information is required for the purpose of safeguarding national security. The exemption in s.23 is an absolute exemption. The exemption is s.24 however is a qualified exemption and is subject to a public interest balancing test – in all the circumstances of the case the public interest in maintaining the exclusion of the duty to confirm or deny must outweigh

the public interest in disclosing whether the public authority holds the information (s.2(1)(b) FOIA).

Request by the Appellant

- 5 The Information Commissioner in his Response of 21 January 2016 has correctly set out the background to this appeal and the Tribunal has adopted that description.
- 6 This case concerns the alleged presence and activities in the United Kingdom of agents acting on behalf of the United States Federal Bureau of Investigation (FBI). On 24th of August 2014 the Daily Express newspaper published a story under the headline '*FBI agents to guard UK airports against jihadi fanatics*'. The story included the comments that: '*officially US officers who have been monitoring terrorist activity ever since the 9/11 attacks in 2001 will liaise with the Metropolitan Police's secretive SO15 counterterrorism command and MI5. However, there are fears they eventually intend to conduct their own parallel investigations and recruit their own informants in UK and European jihadi circles.*'
- 7 On 26 August 2014 the appellant requested disclosure from the Cabinet Office ('CO') of the following information: '*the press are reporting that FBI agents are coming to work in Britain. Is this correct? If so who has authorised this? What will they be doing? What powers do they have? How many will come? Who will pay for them? Who will they report to both here and in America? Is this a surrender of national sovereignty?*'
- 8 The CO responded on 16 September 2014. It refused to confirm or deny whether it held the information within the scope of the request in reliance on sections 23(5) and 24(2) of FOIA.
- 9 The Appellant sought an internal review on 17 September 2014 and the CO upheld the original decision on 14th of October 2014. On 8 November 2014 the Appellant complained to the Commissioner about the CO's

handling of his request. The Commissioner investigated the complaint and issued his Decision Notice on 16 November 2015.

- 10 The Decision Notice held that:

Section 23(5) is engaged as confirming or denying whether information within the scope of the request is held would be likely to reveal information that was, supplied directly or indirectly, by a security body listed in section 23(3), or that relates to such a body

Section 24(2) is engaged as confirming or denying whether information within the scope of the request is held would be likely to reveal whether the security bodies listed in section 23(3) are interested in the subject matter of the request. It is necessary for the CO to maintain a consistent position of neither confirming nor denying and it is reasonably necessary to withhold that information in order to safeguard national security. The public interest lies in favour of neither confirming nor denying whether the information is held.

The Appeal to the Tribunal

- 11 On 7 December 2015 the Appellant submitted an appeal to the Tribunal (IRT). The Notice of Appeal asserted that there was significant public interest in establishing whether the FBI had been given permission to operate in the UK not least because it was not an organization that could be trusted.
- 12 The Commissioner in his Response to the Appeal pointed out that the Appellant did not appear to dispute that s.23(5) was engaged and that this exemption did not require consideration of the public interest as it was an absolute exemption. In relation to s24(2), which the Commissioner again suggested that the Appellant did not dispute was engaged, the Commissioner repeated his conclusion that the public interest lies in favour of upholding 'neither confirm nor deny' ('NCND').

The Questions for the Tribunal

- 13 The Tribunal agreed that the central issue was that if the Commissioner and CO were correct that NCND applied then they had to satisfy the Tribunal of its ss.23(5)/24(2) NCND stance by reference to submissions that persuaded the Tribunal on the balance of probabilities that -
- a. as to section 23(5), requiring the CO to confirm or deny would involve the disclosure of information ('whether or not already recorded') which ... 'relates to' a section 23(3) body.
 - b. as to section 24(2) the exemption is required for the purpose of safeguarding national security.

Evidence, Submissions and Conclusion

- 14 With the agreement of the parties this matter was dealt with by way of a 'paper' hearing. The Tribunal considered all the submissions from the parties carefully. The Tribunal were of the view that although the Appellant's submissions were extensive they did not take the grounds of appeal beyond his essential submission that it was in the public interest that the CO disclosed whether they held the sought information and, indeed, that they disclosed that information if held.
- 15 The Tribunal first considered the applicability of s.23(5) and the term 'relates to'. The term 'relates to' is considered in some detail at p 20-21 of the Tribunal's bundle in the Commissioner's submissions. The Commissioner considered the relevant case law. There was no challenge to the Commissioner's submissions on this point and the Tribunal accepted that 'relates to' meant that it was only necessary for a party relying on this exemption *to show some connection between the information and a s.23(3) security body or that it touches or stands in relation to such a body. [Commissioner of Police of the Metropolis v IC (EA/2010/0008)].*

- 16 The Tribunal then considered the list of s.23(3) bodies:
- (a) the Security Service,
 - (b) the Secret Intelligence Service,
 - (c) the Government Communications Headquarters,
 - (d) the special forces,
 - (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
 - (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
 - (g) the Tribunal established under section 5 of the Security Service Act 1989,
 - (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
 - (i) the Security Vetting Appeals Panel,
 - (j) the Security Commission,
 - (k) the National Criminal Intelligence Service,
 - (l) the Service Authority for the National Criminal Intelligence Service.
 - (m) the Serious Organised Crime Agency.
 - (n) the National Crime Agency.
 - (o) the Intelligence and Security Committee of Parliament.
- 17 The Tribunal concluded that it was far more likely than not that one or more of these bodies would be involved if the FBI were operating on UK soil.
- 18 S.23(5) is an absolute exemption and as the Tribunal was satisfied that it was engaged it was not necessary for the Tribunal to go on to consider any public interest balancing test. The Appellant's submissions on where the public interest lay were consequently irrelevant.
- 19 The Tribunal did not consider it necessary to go on to consider the s.24(2) exemption.

20 The Tribunal's decision to dismiss this appeal was unanimous.

Signed:

Angus Hamilton DJ(MC)

Tribunal Judge

Date: 30 May 2017