



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2017/0283

Determined, by consent, on written evidence and submissions

Before
Judge Stephen Cragg Q.C.

Tribunal Members
Mr Paul Taylor
Mr Gareth Jones

Between

Christopher Kinsey

Appellant

And

Information Commissioner

1st Respondent

The Foreign and Commonwealth Office

2nd Respondent

OPEN DECISION AND REASONS

INTRODUCTION

1. This is the OPEN judgment in this case. Given the nature of the request and the response, it has been necessary for the Tribunal also to prepare a

CLOSED annexe which directly addresses the closed material. This is because to disclose the correspondence (described below) from the Foreign and Commonwealth Office (FCO), and the full reasons from the Commissioner in the decision notice of 15 November 2017 'would be to risk confirming or denying whether the information is held, and could thus risk bringing about the harm that the exemption [s38(2) FOIA] seeks to avoid' (as the Commissioner says in paragraph 26 of her Response to the appeal, with which we agree).

BACKGROUND

2. The Appellant wrote to the FCO on 5 and 12 March 2017 as follows:-

I would be grateful if you could confirm whether the FCO is funding the Risk Advisory Group, a private security company, to help train the Lebanon army and if so, what is the nature of the training, how long is the current contract for, and what oversight/transparency mechanisms are in place to ensure the company is adhering closely to the training program it has been contracted to deliver?

3. On 31 March 2017, the FCO replied, refusing to confirm or deny whether it held the requested information. The FCO relied upon s38(2) FOIA (danger to health or safety) and s40(5) (personal data). That decision was upheld on review on 6 June 2017.

4. The Appellant complained to the Commissioner on 6 June 2017, noting that similar information had been provided to him in relation to Private Security Companies (PSCs) working in Iraq and Afghanistan, and that he was seeking general, not personal, information.

5. The Appellant referred to the Montreux Document, which sets out good practice for governments who engage PSCs in areas of armed conflict, and the International Code of Conduct (ICOC) and the ICOC Association

which is responsible for the monitoring of PSCs. He noted the UK government role in establishing the Association and its indication that it would only engage PSCs who were signatories to the ICOC (which did not include the Risk Advisory Group).

6. The FCO provided detailed arguments to the Commissioner in two letters. The Commissioner issued a decision notice on 15 November 2017 in which she found that the FCO was entitled to rely upon s38(2) FOIA, and that to confirm whether or not the information was held would endanger safety of individuals. The Commissioner was not able to elaborate on these conclusions in the decision notice. The Commissioner decided that the public interest in not endangering individuals' safety outweighed the public interests in disclosure. The Commissioner also accepted an argument that the Montreux Document was not relevant as there is no armed conflict in Lebanon, and that the issue relating to the ICOC (which the Commissioner did not set out in detail in the decision notice) did not affect the balance of the public interest.
7. The Appellant filed an appeal on 8 December 2017, the grounds of which effectively go to the balance of the public interest in confirming or denying whether the information is held. The Appellant takes issue with the argument that there is no armed conflict in Lebanon such that the Montreux Document does not apply; and he argues that if the FCO is not required to confirm or deny the existence of PSC contracts, then this undermines concepts of accountability and transparency which are key concepts of the ICOC.

LEGAL FRAMEWORK

8. Under s1(1)(a) FOIA a public authority is obliged to advise an requester whether or not it holds the information requested, but that this duty to confirm or deny does not always apply if the public authority can properly

rely on one of the exemptions from the duty in FOIA: S2(1)(a) FOIA. Section 38(2) FOIA creates one such exemption (which is qualified and therefore the public interest in maintaining the exemption can be outweighed by the public interest in disclosing whether the public authority holds the information) :-

38. – Health and safety.

(1) Information is exempt information if its disclosure under this Act would, or would be likely to-

- (a) endanger the physical or mental health of any individual, or
- (b) endanger the safety of any individual.

(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with [section 1\(1\)\(a\)](#) would, or would be likely to, have either of the effects mentioned in subsection (1).

9. The Commissioner has summarised the leading case law which relates to the more common ‘prejudice’ exemptions in FOIA, and argues that the case law should also apply where the exemption relates to whether something is, instead, ‘endangered’. We agree with that approach, and therefore the steps to be taken are (a) to identify the relevant interests with the exemption; (b) the nature of the ‘endangerment’ involved; and (c) the likelihood of this occurring (see *Hogan v IC and Oxford City Council* EA/2005/0026 and 0030).

10. We also accept that where the exemption is engaged, there is likely to be a strong public interest in maintaining it, given that the exemption is designed to protect health and safety of individuals, although the extent to which health and safety are endangered and the risk of this occurring must also be considered in each case.

DISCUSSION AND DECISION

11. The Commissioner argues in her Response to the appeal that ‘the Appellant does not appear to contest that s38(2) is engaged. He must

therefore agree that the safety of individuals would be likely to be endangered by disclosure of the withheld information'. It seems to us that this is an unfair assumption to make: the Appellant has not had sight of the material upon which the FCO bases its reliance on the exemption, and he is therefore not in a position to say whether or not individuals would be likely to be endangered by the confirming or denying that the information is held.

12. The Tribunal needs to consider this issue for itself and does not assume that the Appellant has made the concession described by the Commissioner. The Tribunal has seen the submissions made by the FCO to the Commissioner on this issue and we agree with the Commissioner that s38(2) FOIA is engaged and the exemption applies. We are not able to explain our reasons in this OPEN judgment, but have done so in the CLOSED annexe that accompanies it.

13. In relation to the public interest test, in the Response from the Commissioner it is said that 'The Appellant has not explained why the mere fact of having it publicly confirmed whether or not the FCO has a contract with the Risk Advisory Group is strongly in the public interest'. Again, this is a little unfair to the Appellant, who has not been told what are the public interest factors relied upon by the FCO and the Commissioner (other than that they relate to 'avoiding the ...risk to the safety of individuals' (paragraph 24 of the Response)) which outweigh anything that the Appellant has said in his appeal. The Commissioner states that a summary of her arguments is set out in a Confidential Annex to the Response, and the FCO's explanatory letters to the Commissioner of 9 and 26 October 2017.

14. The Tribunal will consider those arguments in the CLOSED annexe.

15. In relation to the Appellant's grounds in relation to the public interest he states that it is wrong to state that the Montreux Document does not apply, as there is an armed conflict in Lebanon. We do not think that we can be the right forum for deciding whether there is an armed conflict in Lebanon or not, according to international law, and, like the Commissioner, we can see that there may be reasonable competing views on the issue. However, we also note that the Montreux Document is said to 'provide practical guidance in other contexts' (p39) such as 'post-conflict situations' (para 5 of the preface, p9). The Document says it is not legally-binding but is clearly designed to 'promote respect for international humanitarian law and human rights law whenever [private military and security companies] PMSCs are present in armed conflict'. It seems clear to us that the Appellant's concern is that any PSCs contracted with by the FCO should comply with international law, and are being monitored in that regard, and so in our view there is a public interest in disclosure of the fact whether or not such contracts exist, in order to be able to identify when any international standards or guidance (and the role of the FCO in upholding them) may be relevant.

16. It also seems to us to be somewhat unfair of the Commissioner to state that 'the Appellant has not alleged any specific failure to meet good practices set out in the Montreux Document', when he has not even been told whether there is a contract in existence or not.

17. In relation to the ICOC, though, the Commissioner recognises the significant public interest more generally in transparency and accountability in this area. As she says she 'also recognises that confirmation or denial of whether FCO had a contract with the Risk Advisory Group would serve this interest to some extent'. We agree with that approach.

18. However, having considered carefully the submissions made by the FCO and the Commissioner which necessarily have not been disclosed to the Appellant, for the reasons set out in the CLOSED annexe we accept those submissions, and in our view the public interest in avoiding the risk to individuals' safety outweighs the public interest we have identified in the FCO disclosing whether or not it holds the information requested.

CONCLUSION

19. For the reasons set out above, and enlarged upon in the CLOSED annexe, we dismiss this appeal. We recognise the frustration this will cause to the Appellant but this is unavoidable in the circumstances of this case.

20. The Commissioner did not consider whether the exemption in s40(5) FOIA applies, having found in favour of the FCO on other grounds. We take the same approach.

Signed *Stephen Cragg QC*

Stephen Cragg QC

Judge of the First-tier Tribunal

Date: 24 September 2018.

Promulgation Date: 17 October 2018

(Case considered by Panel on 24 August 2018).