



Tribunals Service
Information Tribunal

Information Tribunal

Appeal Number: EA/2006/0053

Freedom of Information Act 2000 (FOIA)

Decision Promulgated

BEFORE

INFORMATION TRIBUNAL DEPUTY CHAIRMAN

David Farrer Q.C.

LAY MEMBERS

Anne Chafer

and

Michael Hake

Between

Michael McCarthy

Appellant

and

INFORMATION COMMISSIONER

Respondent

Determination on written submissions

Decision

The Tribunal upholds the decision notice dated 26th. July, 2006 and dismisses the appeal.

Reasons

- 1 On 2nd. February, 2005, the Appellant requested from the Foreign and Commonwealth Office (the “FCO”) a copy of “the UK – USA agreement of June 1948” which was “largely concerned with signals intelligence”. The FCO responded on 5th. March, 2005, invoking the Freedom of Information Act, 2000 (“FOIA “) sections. 24(2) and 27(4)¹and stating that it could neither confirm nor deny that it held such information. It maintained that position following an internal review, which the Appellant had requested on 10th. March, 2005. The Appellant complained to the Information Commissioner (“the IC”) in April, 2005. In a letter dated 26th. June, 2005, he argued that his right to life under Article 2 of the European Convention on Human Rights (“ECHR”) was engaged in this complaint and should prevail over any exemption from the duty to communicate information which FOIA may provide.

- 2 There followed a most regrettable delay of about a year due to an administrative oversight for which the IC later expressed his regret. He first referred the complaint to the FCO on 27th. March, 2006.

- 3 On 17th. May, 2006, the FCO responded in the terms set out in paragraph 4.3 of the Decision Notice. In essence it came to this :
 - There was no 1948 Agreement but there is a “British – US Communication Intelligence Agreement”, signed in March, 1946
 - The FCO held no copy ;
 - Its existence had not been disclosed until the recent discovery that the US Government had publicly confirmed its existence. The FCO was therefore willing to do likewise.

¹ Which, in cases involving respectively national security and international relations, relieve a public authority of the obligation, to confirm or deny that it holds such information.

- 4 Further enquiry by the IC elicited from the FCO that a copy was held by a body to which s.23 of FOIA applied.
- 5 By his Decision Notice, the IC ruled that the FCO had complied with the requirements of Part 1 of FOIA in dealing with the Appellant`s request, save that it should have provided a fuller explanation as to why it initially refused to confirm or deny that it held the requested information. He accepted that the FCO did not hold a copy of the Agreement. He accepted that the only copy was held by a body falling within s.23(3) (Security services and related bodies).
- 6 The Appellant, by his Notice of Appeal, made four criticisms of the Decision Notice :
 - (i) The IC should have required the FCO to disclose a copy of the Agreement ;
 - (ii) He should have censured the FCO for its initial failure to confirm or deny whether it or another Government body held a copy of the Agreement ;
 - (iii) He was wrong to treat the Agreement as subject to an absolute exemption from the duty imposed by FOIA s. 1
 - (iv) He had wrongly failed to have regard to the Appellant`s right to life enshrined in Article 2 of ECHR.

The Decision

- 7 This appeal is plainly unsustainable. In making such an observation, the Tribunal casts no doubt whatever on the sincere concerns which lie behind the Appellant`s determination to study the Agreement. However, if there is a route for reaching it, which we doubt, it is not through the FOIA.
- 8 The primary issue is : does the FCO hold a copy. The I.C was perfectly entitled to accept its assurance that it did not. There seems no obvious reason why it should, still less for it to deny untruthfully that it held one since, if it did, it would undoubtedly be entitled to invoke s. 23(1)² or s. 24(1)³ as providing an absolute exemption from the duty to disclose.
- 9 The IC has no power to censure. He noted the FCO`s initial failure to explain its position. The FCO duly confirmed the existence of the Agreement before the Decision Notice was issued.
- 10 The Agreement was clearly covered by s. 23(1), even without a ministerial certificate (see s.23(2)). Whilst the point is clear, it was not directly material to the Request anyway.

² “Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection 3 (*the security services etc.*)”.

³ “Information which does not fall within s.23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security”.

11 The Appellant`s right to life is unaffected by the presence of the Agreement in or absence from the archives of the FCO. A refusal to disclose the Agreement could not possibly interfere with the Appellant`s rights under Article 2. Whether or not he saw the Agreement could not affect the risk of the United Kingdom becoming involved in a conflict which might endanger his life, even if such a risk engaged his Article 2 rights, which it does not. There is no basis for arguing that s. 23 is incompatible with Article 6. Even if it were, the IC was bound to

12 Apply s. 23 as required by s. 6 of the Human Rights Act, 1998. It is primary legislation enacted by Parliament. Neither he nor the Tribunal has the power to declare it incompatible, still less to refuse to apply it.

Dated this 27th April 2007

Signed

D.J. Farrer Q.C.

Deputy Chairman, Information Tribunal