



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0071, EA/2007/007, EA/2007/0079
Information Commissioners Ref: FS50111530, FS50125539, FS50119364

Heard at Audit House, London	Decision Promulgated
On 7-10 March 2008	22 October 2008

BEFORE

CHAIRMAN

ROBIN PURCHAS QC

and

LAY MEMBERS

ANNE CHAFER AND DAVID WILKINSON

BETWEEN

NICHOLAS JAMES GILBY

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

THE FOREIGN AND COMMONWEALTH OFFICE

Additional Party

OPEN DECISION

For the Appellant: Mr Gilby, in person

For the Respondent: Mr Akhlaq Choudhury

For the Additional Party: Mr Philip Havers QC, and Mr Alan Maclean, barristers

Special Advocate: Mr Khawar Qureshi QC, barrister

Introduction

- 1 These conjoined appeals concern three information requests to The National Archives ('TNA') by Nicholas Gilby under the Freedom of Information Act ('FOIA').
- 2 The first request was made on 12th December 2005 and related to file FCO8/1200, concerning the export of Saladin tanks for the Saudi Arabian National Guard ('SANG') in 1968-1969 ('Request A')¹.
- 3 The second request was made on 14th February 2006 and related to files FCO8/1198, 1199, 1914, 1191, 1912, 1193 and 1195, concerning the possible sale of arms to SANG and in the case of FCO8/1191 the provision of maintenance services to the Royal Saudi Air Force ('RSAF') ('Request B')².
- 4 The third request was made on 11th January 2006 and related to file FCO8/1187, which concerned the possible sale of tanks to Saudia Arabia ('Request C')³.

Request A

- 5 Request A was refused by e-mail dated 30th January 2006 in reliance on the international relations exception under Section 27 of the FOIA on the grounds that disclosure would put at risk the relations between the United Kingdom ("UK") and a foreign state, the interests of the UK abroad and the ability of the UK to promote or protect its interests abroad. The reasons included reference to the harm to bilateral relationships and the damage to UK commercial interests in the region.
- 6 Mr Gilby requested a review of that decision by letter dated 31st January 2006. By e-mail dated 20th March 2006 the Head of the Records Management Department at TNA upheld the decision except for a decision to release approximately 24 pages from the file, comprising mainly letters and telegrams between the Foreign and Commonwealth Office ('FO') and the British Embassy in Jeddah, which were to be released.
- 7 On 26th March 2006 Mr Gilby applied to the Information Commissioner ('IC') under Section 50 of the FOIA. By a decision notice dated 4th July 2007 the IC decided that in refusing the request (subject to the amendment on review) TNA had dealt with the request in accordance with the requirements of Part I of the FOIA. The IC concluded that Section 27 was engaged and that the interest in maintaining that exemption outweighed the public interest in disclosure. Mr Gilby appealed that decision by notice dated 27th July 2007.

¹ EA/2007/0071

² EA/2007/0078

³ EA/2007/0079

Request B

- 8 Request B was refused by TNA by e-mail dated 18th May 2006 on the grounds of the Section 27 exemption as with Request A. It acknowledged the strong argument for maintaining a full historical account but concluded that there would likely to be an adverse effect on UK relations with Saudi Arabia and on the UK's trade interests and the interests of British nationals in Saudi Arabia.
- 9 By letter dated 28th May 2006 Mr Gilby sought a review of that decision. By e-mail dated 6th July 2006 the Head of the Records Management and Cataloguing Department at TNA confirmed the decision to refuse the request for disclosure in reliance on the Section 27 exemption.
- 10 On 10th July 2006 Mr Gilby applied to the IC under Section 50 of the FOIA. In his decision notice dated 7th August 2007 the IC concluded that in refusing the request in reliance on Section 27 TNA had dealt with the request in accordance with the requirements of Part I of the FOIA. Mr Gilby appealed by notice dated 13th August 2007.

Request C

- 11 Request C was refused in part⁴ by e-mail dated 29th March 2006 in reliance on the Section 27 exemption, as with the other two requests. Specific reference was made to the general public interest in transparency and accountability but that that was outweighed by the public interest in the maintenance of positive diplomatic relationships with other governments and states.
- 12 By letter dated 2nd April 2006 Mr Gilby sought a review of that decision. By letter dated 8th May 2006 the Head of the Record Management and Cataloguing Department confirmed the refusal of the request in reliance on the Section 27 exemption. The letter explained the grounds for the decision in similar terms to that for Request B.
- 13 Mr Gilby applied to the IC under Section 50 by letter dated 15th May 2006. In his decision notice dated 31st July 2007 the IC concluded that in refusing the request in reliance on the exemption under Section 27 TNA had dealt with the request in accordance with the requirements of Part I. Mr Gilby appealed by notice dated 13th August 2007.

Procedure

- 14 On 26th September 2007 the learned Chairman gave directions in the appeals. The directions included that the appeals should be consolidated and heard together and that the Foreign and Commonwealth Office ("FCO") be added as an additional party. The directions allowed for closed evidence to be provided on notice to Mr Gilby and for arrangements to be made where requested for inspection of the information documents with higher security clearance than confidential. The directions further provided for the appeals to be listed for hearing immediately following an associated appeal in **CAAT v The**

⁴ Some documents were disclosed in full and others in part.

Information Commissioner (the CAAT Appeal)⁵. That appeal involved a request for disclosure of two Memoranda of Understanding (the MoU), which also related to the sale of arms and services to Saudi Arabia, in respect of which the request had been refused in reliance on Section 27 on the grounds of prejudice to international relations and UK interests abroad and confidentiality.

- 15 In consequence the CAAT Appeal and these appeals have been dealt with together and were heard over six days from 3rd to 10th March 2008, including closed sessions and the representation of the Appellants with the leave of the Tribunal by a special advocate, Mr Khawar Qureshi QC. We set out the background to and reasons for our procedural decisions in our decision in the CAAT Appeal, the relevant section of which is attached to this decision for convenience as Annex A.
- 16 Because the present appeals have been consolidated and essentially involve common issues, we have thought it convenient to give our decision on the appeals in a single decision letter. We have also provided a closed decision dealing with the closed evidence and documents and submissions in that respect.

The Law

- 17 In our decision on the CAAT Appeal we dealt with the question of timing for consideration of appeals to this Tribunal. We concluded that, where an appeal was in respect of a decision by the IC determining that a request had been dealt with in accordance with the requirements of Part I of the FOIA, the proper approach for the IC and in turn the Tribunal should be to have regard to the whole of the dealing with the request by the authority under Part I and that decision whether there should be disclosure of the information, including the public interest balance, should take into consideration the whole process, including, where applicable, any reconsideration on review. Our reasons for so concluding are set out fully in the CAAT decision, in respect of which we include the relevant part of the decision as Annex B to this decision letter. In the present case, however, we would confirm in respect of each of the appeals that we would have come to the same conclusion whether the matter was tested so as to include the review, as we think is appropriate, or limited to the original decision for the purposes of the Section 17 notice.

Security Exemption – FOIA s. 23

- 18 We note that in paragraph 40 of the reply of the FCO reliance was additionally placed upon the absolute exemption under Section 23 of the FOIA in respect of security matters. We deal with this briefly in the Closed Decision but suffice it to say that the reliance upon that exemption related to one limited part of one document and its application was not, as we understood the position, in issue before us. For our part, taking into account the evidence given in closed session and as explained in our closed decision, we are satisfied that the

⁵ EA/2000/0040; decision promulgated on 26th August 2008

exemption was properly established in respect of that limited part of the information. We do not propose to deal further with it in this open decision.

The Evidence

- 19 Mr Gilby represented himself and we would express our indebtedness to him for the courteous, restrained and succinct presentation of his case, which has been of considerable assistance to us. The evidence included:
- (a) two witness statements from Mr Gilby, who was not required for cross-examination;
 - (b) evidence by video link from Mr Carne Ross, previously a member of the FO and the founder and director of Independent Diplomat (evidence given jointly with the CAAT Appeal.);
 - (c) a witness statement from Mr Joe Roeber, a member of but not acting for or representing Transparency International, who was not required for cross-examination; and
 - (d) evidence from Mr William Patey, Her Majesty's Ambassador to Saudi Arabia, who gave evidence jointly on both the CAAT and these appeals as well as specifically in respect of the documents in question on these appeals.

We also heard evidence and considered documents together with submissions in closed session, which is the subject of our closed decision in the appeals.

The Questions for the Tribunal

- 20 The questions to be determined are the following:
- (i) whether disclosure of the information in whole or in part would have prejudiced or would have been likely to prejudice relations with the KSA and/or UK interests abroad for the purposes of section 27(1)(a),(c) and (d) of the FOIA;
 - (ii) whether the information was confidential information for the purposes of Section 27 (2) and (3) of the FOIA; and
 - (iii) If we conclude that section 27 is engaged under (i) or (ii) above, whether in all the circumstances of the case the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

Prejudice to International Relations and UK Interests Abroad

- 21 Section 27 (1) of the Act provides so far as relevant:

“Information is exempt information if its disclosure under the Act would or would be likely to prejudice:

- (a) *relations between the United Kingdom and any other State...*
- (c) *the interests of the United Kingdom abroad, or*
- (d) *the promotion or protection by the United Kingdom of its interests abroad.”*

- 22 As a matter of approach⁶ the test of what would or would be likely to prejudice these relations or interests would require consideration of what is probable as opposed to possible or speculative. Prejudice is not defined, but we accept that it imports something of detriment in the sense of impairing relations or the interests or their promotion or protection and further we accept that the prejudice must be “real, actual or of substance”, as described in Hogan⁷.
- 23 However, we would make clear that in our judgment prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage. For example, in our view there would or could be prejudice to the interests of the UK abroad or the promotion of those interests if the consequence of disclosure was to expose those interests to the risk of an adverse reaction from the KSA or to make them vulnerable to such a reaction, notwithstanding that the precise reaction of the KSA would not be predictable either as a matter of probability or certainty. The prejudice would lie in the exposure and vulnerability to that risk. Similar considerations would apply to the effect on relations between the UK and the KSA (compare the approach of the Australian Administrative Appeal Tribunal in Maher at para 41⁸). Finally in this respect we note that it is the relations of the UK and the interests of the UK with which section 27(1) is concerned and not directly the interests of individual companies or enterprises as such.
- 24 The nature of any prejudice in these appeals depends to a considerable extent on the content of the documents involved in the light of the specific evidence which we heard in closed session. For reasons that we set out more fully in our closed decision we are satisfied that the disclosure of the information requested as a whole would be likely to have caused prejudice within the scope of Section 27 (1) (a), (b) and (d) of the Act and that the exemption accordingly was engaged. We consider the balance of the public interest subsequently in this decision.

The Open Evidence

- 25 Having given our overall view on the exemption, it is convenient to summarise the relevant open evidence in this respect. The principal witness was Mr Patey. There was some criticism of his position as a career diplomat and someone charged with the promotion of the interests of the UKG abroad.

⁶ These two paragraphs are similar to what we have said in our CAAT decision in that our general approach to the exemption has been similar.

⁷ EA/2005/0026/30 at para 30, a case dealing FOIA section 31 (law enforcement).

⁸ AATAD no V.84/291B

While that may be true, as we indicate in our CAAT decision, we take Mr Patey's evidence for what it was, that is evidence from a person with unrivalled experience of Saudi Arabian affairs and who was doing his best to assist us with what was his opinion on these matters.

- 26 In terms of the public interest it is clear from his evidence and we accept that the KSA has a pivotal position in the Middle East in respect of economic, political, religious, community and security matters. Mr Patey explained and again we accept that the KSA is generally an autocratic and secretive regime where the weight given to transparency, accountability and human rights is distinctly less than found in Western Europe. It is an absolute monarchy with the control largely in the hands of the King and the senior princes of the royal family. Mr Patey explained how members of the royal family have remained in senior jobs for long periods of time. For example the defence minister had been in place since 1962. Thus the documents, which in this case go back to the late sixties, may notwithstanding the passage of time continue to be directly relevant to those currently in power. Mr Patey also explained the importance of the consular role of Her Majesty's Government ('HMG') in regard to the considerable numbers of UK nationals in Saudi Arabia.
- 27 Mr Patey gave evidence in open session that disclosure of the information, the subject of these appeals, would result in a very serious reaction of the Saudi Arabian Government ('SAG') and would be likely to harm our relations with the KSA. This would, he said, have considerable implications in that, if the SAG was not able to trust the UK Government, it would find it difficult to do business with us. He confirmed the importance of the KSA in commercial terms, of which contracts for the supply and servicing of arms were only part, albeit an important part.
- 28 Mr Patey explained, and we accept, how the relationship with the KSA was essentially based on trust, mutual confidence and discretion. He also drew attention to the sensitivity of the position at the relevant time for these appeals, that is in the spring and summer of 2006. As set out in the CAAT decision, although the Eurofighter Typhoon deal had been concluded, further negotiations under that deal were continuing, but at the same time the Serious Fraud Office ('SFO') was investigating allegations of corruption in respect of the sale of arms to Saudi Arabia, having particular regard to the Al Yamamah project ("AY"). While the revelations in October 2006 in *The Guardian* of documents that had been put into the public domain including allegations against members of the Saudi Arabian royal family had not by then occurred, it was a period of some sensitivity.
- 29 In opening his case Mr Gilby made clear that he was not seeking disclosure of material which could genuinely seem offensive and in the disclosure of which there was no overriding public interest. He identified five categories: first, remarks which could reasonably be held to constitute derogatory comments about the personal appearance of members of the Saudi royal family or Saudi Government officials; second, derogatory comments about personal mannerisms of the royal family or officials; third, remarks that could reasonably be held to constitute offensive comments about religious beliefs or practices of members of the royal family or officials; fourth, references to any consumption

of alcohol by members of the royal family or officials; and, last, references to wives, mistresses or lovers of members of the royal family or government officials, which did not relate to corruption.

- 30 Mr Gilby relies on material which he contends has already been put in the public domain without causing identifiable harm to relations with Saudi Arabia. That includes a memo internal to AEI dated 19th July 1968⁹ (and thus before the edict by King Feisal dated 20th October 1968 which banned commissions or middlemen) and which included the statement that:

"The Saudi royal family have now learned that this commission was paid (£100,000.00) and Prince Abdul Rachman has made it very plain to both Geoffrey Edwards and Jack Baldwin that unless he receives some commission through Geoffrey no further orders in Saudi Arabia will be forthcoming for either GEC or in fact for other British companies."

- 31 Mr Patey confirmed that Prince Rachman was a deputy defence minister. He indicated that he thought that disclosure would have prejudiced the relationship with Saudi Arabia but that he would be surprised if the Saudi Arabians were aware of it.

- 32 Mr Gilby also referred to a BAC memorandum dated 12th December 1963, recording payment of a substantial commission to Prince Rachman, which had been put in the public domain. In addition he produced an extract from a valedictory in 1972 from the then ambassador, William Morris, referring to payment of commissions to members of the Saudi royal family, which had been read out on the *BBC Newsnight* programme on 16th June 2006.

- 33 When these documents were put to him, Mr Patey accepted that he was not aware of any direct prejudice that had been caused by their disclosure.

- 34 Mr Gilby then drew attention to an article dated 24th January 2006¹⁰ in the *Guardian* newspaper, reporting files that had been released under the FOIA, including reference to payment of a commission to a middleman, Mr Fustucq, the brother-in-law of Prince Abdullah, now the present king, of £700,000.00 (nearly 15%) of a £5,000,000 arms sale. When asked about consequent prejudice, Mr Patey said:

"I think I can help you out here. The answer to each of those questions to each document will be "No", but I would argue that cumulatively the drip of revelations and discussion of this in public as a result of public documents being deliberately released has an impact on the way King Abdullah and senior princes will view the United Kingdom and obviously in pursuing our interests that could have an impact. So the answer to each of your questions to each document will be "No", but cumulatively I would take a different view."

⁹ Bundle p 288/9

¹⁰ Bundle p 29/30

- 35 Mr Gilby also relied on a telephone note dated 21st October 1968¹¹ (the day after the King's edict), recording a conversation with Sheikh Ali Alireza which stated:

"I telephoned Ali Alireza at his hotel in Brussels in order to discuss with him the telex dated 17th October received from Fitzpatrick of the British Embassy in Saudi, the most important point of which was Fitzpatrick's talk with General Makki Tounisi and the question of the latter asking to be covered for 3½% in the contract price. I told Ali Alireza that we regarded any question of commission as his problem and his alone, but if this request by the General meant that the 7½% which we had included was insufficient we should know immediately. His advice was that we should include a little bit more (we have in fact already got a fair negotiating margin in our price). Alireza emphasised the point however that we must not at any time disclose to anyone in Saudi Arabia that we were employing agents."(underlining in the original)

- 36 In cross-examination Mr Patey explained that Mr Fitzpatrick was a defence attaché at the time and agreed that what he appeared to be doing was passing on requests for bribes from "*the top brass in Saudi Arabia to British arms companies*". He agreed that that was a serious matter. He then added:

"In the 1960s the payment of commissions in the Middle East in respect of contracts would have been normal commercial behaviour and would have been accepted as such and it wouldn't have been contrary to his public duty to either brief companies about the existence of such payments or to brief companies on who was receiving payments; standards of public morality and integrity have changed in the past 40 years. In the 1960s I wouldn't apply the standards of 2000 to what was happening in the sixties."

He continued:

"They would have thought it part of their providing a service to British companies to brief them on how business was actually done in the Middle East and in Saudi Arabia and ... they would not have regarded themselves as ... pretending that commissions were not paid; I'm just putting myself in the position of somebody in the sixties."

- 37 In re-examination, when asked about this telephone note and whether he would have objected to disclosure, Mr Patey said:

"I think that is marginal. I think I might have said that General Tounisi is dead and Mr Fitzpatrick has moved on; I think it is marginal; I would not necessarily have objected to that one."

¹¹ Bundle p 321

In answer to the Tribunal he added:

"I think it is sensitive politically in Saudi Arabia that senior princes and you know I probably want to say most of this in closed session, but there is a sensitivity surrounding the activities of Princes who are in current positions on the historical record of what they may or may not have done."

Mr Patey had said earlier in re-examination that he would have advised against open release of those parts of the documents referring to serving members of the Saudi Government.

- 38 Mr Gilby also drew attention to his second witness statement, where he records that in February 2008, notwithstanding that in November 2007 his first witness statement had drawn attention to the existence of these and related documents, none of them had been removed from TNA. When it was raised with him in cross-examination, Mr Patey distinguished this from the removal by the MoD of the MoU from TNA (referred to in the CAAT Appeal) as follows:

"The documents they took back were MoUs that had been the subject of an agreement with the Saudis that they would remain confidential. Their inadvertent release was a breach of that confidence; taking them back was an attempt to restore the established position that these were confidential documents to us. I regard that as a slightly different nature from other material which might be embarrassing to the Saudi family. I think the MoUs do represent an agreement between the two governments and have a slightly different status."

He continued:

"It is a different order of confidentiality. One is an agreement between us that we will maintain confidentiality of these documents, the other relates to the impact disclosure would have on the relationship between us. They are a different order I think."

- 39 Mr Gilby also referred to an internal memorandum dated 11th January 1972¹² in respect of a visit by a Mr Hubert to Jedda, which refers to the activities of Mr Khashoggi and in particular:

"If a deal has to be done with Khashoggi it should be done. His own personal demands will probably be high, but that is the way business is done in Saudi Arabia, the king's edict about 25 percenters notwithstanding. Either Khashoggi is offered the cut he wants or we should pull out."

It continued:

¹² Bundle pp 100-102

"Since when the ambassador sees the king he will indicate our willingness to do business on a G-to-G basis, there might be advantages in MTS (a firm) coordinating any British equipment business to provide the quasi-government oversight as well as passing on the douceurs. Much will depend if we get a good part of the equipment loaf or some Khashoggi crumbs thrown disdainfully at us."

- 40 Mr Gilby then drew attention to an article dated 23rd October 2007¹³ published in the *Daily Report*, a newspaper circulating in Saudi Arabia, which reproduced verbatim a report in the *Daily Telegraph* of the same date, which referred to draft government guidelines in 1976 as to the payment of commissions. The article recorded that the draft guidelines included that Saudi officials *"would certainly not officially approve the payment of fees, although they undoubtedly expect appropriately discreet arrangements to be made."* The article continued *"Such sentiments were expressed by figures as senior as King Fahd when he was crown prince according to the document."*
- 41 Mr Gilby submitted that this range of information, containing as it did allegations of bribery and the involvement of the royal family, had not resulted in any identifiable adverse prejudice and that sensitivity in respect of the documents, the subject of the information requests, had self-evidently been exaggerated. Prejudice in any real or substantial form would be unlikely to arise as a result of disclosure of further documents of similar character.

Conclusions

- 42 We accept that there has been a significant amount of material that has come into the public domain which contains material that would likely to be offensive or embarrassing to the KSA royal family and also alleging or containing evidence of the payment of commissions contrary to the King's edict on 20th October 1968. However, we also accept Mr Patey's evidence that the effect of formal disclosure of a mass of documents under the FOIA on behalf of the FCO would have been of a different order from information that appears to have been either leaked or mistakenly put in the public domain, largely comprising individual and disaggregated documentation.
- 43 Our conclusions depend in these appeals to a considerable extent on the detailed nature of the documents and the information that they contain and the evidence that we heard and the submissions made in closed session. We are convinced that the disclosure of the documents would have prejudiced or would have been likely to prejudice our relations with the KSA for the reasons that we set out in our closed decision. On that evidence we are satisfied that, where the Saudi Royal family or other Government officials in Saudi have become aware of documents of the kind to which Mr Gilby referred as part of his evidence and to which we have referred above, it is likely to have resulted in prejudice to the UK's relations with KSA. We consider that, if the FCO had acceded to Mr Gilby's requests for information in the present appeals, it would

¹³ Gilby ws 2 annex B p 10

have been highly likely to have come to the attention of KSA officials directly or indirectly and would have resulted in prejudice of that kind.

- 44 Again, for the reasons we set out in our closed decision, we conclude that the disclosure of the information would have or would have been likely to have prejudiced UK's interests in Saudi Arabia because of the risk of an adverse reaction of the SAG in respect of trade dealings with the UK and otherwise. That too would have been likely to prejudice UK's promotion of its interests in Saudi Arabia. We are accordingly in no doubt that the information in the present case would be such that its disclosure would have resulted or would have been likely to result in prejudice to the UK's international relations and its interests abroad and their protection and promotion for the purposes of Section 27 (1) (a), (c) and (d).

Confidential Information

- 45 Section 27(2) and (3) of the FOIA provide, so far as relevant:

"(2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom ...

(3) For the purposes of this section, any information obtained from a State ... is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State ... to expect that it will be so held."

- 46 The evidence and submissions in these appeals were principally focussed on prejudice for the purposes of section 27(1) and particularly the public interest balance. However, for reasons that we explain in our closed decision, some of the information was information obtained in circumstances which in our judgement made it reasonable for the KSA to expect that it would be so held. Examples of that would be information that comprised reports of the Saudi Council of Ministers or private audiences with the King. In these circumstances we have also concluded that for the reasons explained in our closed decision there is information, the subject of the requests, which is confidential information within sections (2) and (3) of the FOIA. There is a considerable overlap in the present case between the two limbs of exemption under section 27 and in practice our decision in applying the public interest balance is the same in respect of both classes of exemption.

The Public Interest Balance

- 47 Section 2(2) provides, so far as relevant:

"In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the

extent that ...(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

- 48 This provision provides for the essential balancing of the public interest in withholding and disclosing the information. The balance requires disclosure unless in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure. Thus it requires a broad consideration of all factors relevant to the effect on the public interest to be determined on the basis of a presumption in favour of disclosure.
- 49 We have already referred above to the importance of relations with Saudi Arabia in a number of fields and the public interest in avoiding prejudice to those relations. We are firmly of the view that maintenance of good relations with Saudi Arabia is in the UK national interest.
- 50 In coming to that conclusion we have had careful regard to the evidence of Mr Roeber and of Mr Ross. In particular Mr Ross, who gave evidence in both the CAAT and Gilby appeals, emphasised what he said was the importance of seeing documents that might reveal the extent to which serving members of the SAG may have been involved in engaging agents and requiring the payment of commissions in defiance of the King's 1968 edict. He contends that, while it may be that the SAG had failed to understand UK norms of behaviour as an open and democratic country, the UKG should insist on reciprocal respect from the SAG for our culture and approach. By acquiescing in their secretive and autocratic regime, he said, the UKG would in effect be encouraging and condoning those practices.
- 51 Our international relationship with the KSA is important for a wide range of interests including matters of commercial and consular interest. We accept the general importance of transparency and accountability. We have already referred to the nature of the Saudi Arabian regime with a record that is far removed from that in Western Europe so far as accountability and human rights is concerned. We also accept the particular importance of transparency in the fight against corruption and related malpractice. However in themselves those considerations do not in our view negate the public interest in maintaining our good relations with Saudi Arabia and avoiding prejudice to the UK interests in that country or the promotion or protection of those interests. While we accept that in overall global economic terms trade with Saudi Arabia and in particular arms sales are relatively small, we are in no doubt as to their importance in the public interest having regard to both the open evidence which we have heard but also that in closed session.
- 52 For the reasons set out above and in our closed decision we are clear that disclosure of the information requested would be highly likely to result in real and substantial prejudice of that kind, which would be contrary to the public interest.
- 54 We reach a similar conclusion in respect of that part of the information which is for the reasons set out in our closed decision confidential with the meaning of section 27(2) and (3). Disclosure of this part of the information would be

likely to have led to the erosion of trust and confidence on the part of the KSA, who would have seen that disclosure by the FCO of confidential information in breach of what the Saudis would have regarded as a clear understanding underpinning their dealings and relationship in this respect. We believe that there is a public interest in maintaining that confidentiality. We do however accept the distinction made by Mr Patey between a general expectation that dealings would be regarded as confidential and documents which have been expressly agreed to be confidential or are specifically marked confidential or secret, as in the CAAT appeal. In principle we attach greater weight to the public interest in maintaining the latter exemption than the former.

- 55 Turning then to the public interest in disclosure, in addition to the general public interest in transparency and accountability for the reasons referred to above we believe that in the present case there is a particular consideration, which is the possible involvement of UK officials directly or indirectly in the payment of commissions or agency fees in connection with arms sales, particularly following the King's edict dated 20th October 1968 making such payments unlawful in the KSA.
- 56 Mr Gilby submits that, while the edict preceded the Anti-Bribery Convention 1997, the better view is that the Prevention of Corruption Act 1906 would apply, making such activities unlawful, so long as there was some part of the corrupt activity which took place within UK territory.¹⁴ However in our view the public interest in disclosure does not fall to be so narrowly defined. Whether or not the conduct overseas was in breach of the 1906 Act, it was plainly contrary to the edict dated 20th October 1968 and in any event it is in our view a matter of potentially significant public interest to see to what extent HMG, though its servants and agents, was involved directly or indirectly in seeking to secure contracts in reliance on the payment of commissions or agency fees.
- 57 We accept that such behaviour may well have been commonplace in commercial circles in that part of the world at the time. However, in weighing the public interest in this respect we make it clear that we attach significant additional weight to the public interest in disclosure insofar it would enable an understanding of the involvement of public officials of this country in practices of that kind. The detail of this we consider in our closed decision.
- 58 Specifically in respect of the evidence by Mr Ross, we do not consider that there was an equivalent public interest in disclosure of information that related to activities of others involved on behalf of the SAG. Moreover in that respect the public interest in maintaining the exemption was potentially the greater because of the greater sensitivity of information to the extent that it related directly to those involved in the SAG. We do not accept that this would have constituted any acquiescence in the practices of that regime on the part of the UKG. It would have been a proper application of the principles governing disclosure of information in this country through the balances incorporated into the FOIA.

¹⁴ Gilby Grounds of Appeal pp 6/7

- 59 We are satisfied on the evidence before us including in particular the evidence given to us in closed session that in principle the public interest in maintaining the exemption under section 27(1) and where it applies section 27(2) did not outweigh the public interest in disclosure of the information so far as the activities of UK officials in the sale of arms and services are concerned with reference particularly to the payment and negotiation of commissions and employment of agents. In so concluding, we recognise that the disclosure of that information would have been likely to prejudice relations with the KSA and UK interests abroad in that it exposes both to the risk of an adverse reaction from the SAG. However, having regard to the evidence before us, we are firmly of the view that the degree of that prejudice is such that it would not have justified the public interest in disclosure in that respect being outweighed. Thus to that extent we consider that the decision of the IC was not in accordance with the law.
- 60 However, we conclude that the public interest in the maintenance of the exemption otherwise under section 27 would have outweighed the public interest in disclosure and thus we agree with the decision of the IC in that respect. We also agree that the absolute exemption under section 23 applied as set out above.
- 61 The result of the above has been our proposed direction for the disclosure of information subject as appropriate to redaction of matters which in our judgment go beyond that particular interest or otherwise would engage the interest in maintaining the Section 27 exemption in a way that alters the balance of public interest affecting disclosure.
- 62 We should make clear that throughout our considerations we have had regard to any human rights that may be engaged. That has included consideration of the right to respect for private and family life under article 8 and the right to freedom of expression under article 10. In the former case we take the view that the information, the subject of our proposed direction, would be public in nature and would not engage any individual's rights under article 8. However, in so far as any such right may be indirectly engaged, on the evidence before us we are of the view that the public interest would justify interference with the right to that extent in favour of disclosure. We have also had regard to the balance under article 10 between the right to freedom of expression and preventing disclosure of information received in confidence, but in our judgement that is fully addressed above in considering the relevant provisions under the FOIA.
- 63 We should also add that in reaching our conclusions we have not been assisted by or placed weight on evidence relating to the judicial review of the decision to discontinue the SFO investigation. We take the view that the decision in this case addresses a different subject matter and on different principles subject to a specific legislative regime. We have not accordingly found it helpful to compare that to the application of principles that apply to the legality of the decision taken to discontinue the SFO investigation, other than that factually the SFO investigation formed part of the context within which decisions in the present case were taken and have to be examined.

- 64 Overall therefore we conclude that the decision notice of the IC in this case was not correct in law in that in our opinion the FCO in its decisions in 2006 should have dealt with these requests in accordance with the requirements of Part I so as to disclose further information than was released on review under Request A or otherwise. We set out the principles on which the information to be disclosed through redaction of the relevant documents or otherwise in our interim closed decision which was released to the parties on 9th June 2008. An agreed basis for redaction was submitted to the Tribunal on 22nd September 2008, with which the Tribunal agreed subject to two passages to identical effect, which, following consideration of further representations from the parties, the Tribunal concluded should also be disclosed in its substituted notice.
- 65 For the above reasons the Tribunal's decision is that these appeals should be allowed and a substituted notice issued that the Additional Party should disclose the information to the Claimant in the form set out in the bundle marked A identified in our closed decision with the additional information set out in that part of our closed decision. Disclosure as directed shall take place within 28 days from the date of this decision. Our decision is unanimous.

Signed

Mr Robin Purchas QC

Date: 13 October 2008

ANNEX A

Extract from the CAAT appeal decision

Procedure

- 22 It is convenient at this stage to deal with some procedural matters. Directions were given by Mr Andrew Bartlett QC on 24th July 2007. The MoD had been made an additional party. The directions provided for closed evidence by the MoD and the IC on notice to CAAT.
- 23 We have referred above to the Gilby appeals, which also concerned arms sales to the KSA and Section 27 of the FOIA. In those appeals the Foreign and Commonwealth Office ('the FCO') was an additional party. Directions in the Gilby appeals were given on 26th September 2007 by the learned Chairman, which also allowed for closed evidence on behalf of the FCO and the IC with notice to Mr Gilby. The Gilby appeals were directed to be heard immediately following the CAAT appeal.
- 24 The Treasury Solicitor ('TSol'), acting on behalf of the MoD and FCO in both appeals, submitted joint evidence in the form of a witness statement from William Patey, Her Majesty's Ambassador to the KSA. CAAT and Mr Gilby proposed to call Carne Ross, the founder and director of Independent Diplomat and previously employed in the Foreign Office, to give evidence jointly in both appeals. On 31st October 2007 Mr Gilby with the support of CAAT sought a direction that the common evidence of both witnesses be heard together. By e-mail dated 14th December 2007 that was supported by the TSol. In view of the obvious common ground between the appeals we supported that approach in further directions given by letter dated 9th January 2008. The appeals had been listed to be heard sequentially over six days with the CAAT appeal commencing on 3rd March 2008.
- 25 By letter dated 1st November 2007 Mr Gilby asked that this Tribunal should inspect all of the documents, the subject of his appeals, of whatever security classification. No objection was made to that request by CAAT or the TSol. We concluded that we should see all the documents in both appeals and included that in the directions dated 9th January 2008, in which we also indicated that arrangements had been made to inspect the documents on 29th January 2008, to which again no objection was raised. Regrettably only part of the documentation was available to us on 29th January 2008 and arrangements had to be made for the remainder of the documents to be inspected, which took place on 21st February 2008.
- 26 In the meantime pursuant to our directions dated 9th January 2008 timetables had been provided by CAAT and the TSol, in which the latter confirmed that the MoD and FCO would be relying upon closed evidence. Their timetable indicated that Mr Patey's closed evidence would take part of the first, third and fifth days of the hearing. By letters dated 12th February 2008 application was

made by CAAT and Mr Gilby either for the appointment of a special advocate or that leave should be given for the respective Appellants to be represented by a special advocate. By letter dated 15th February 2008 TSol objected to that course. Solicitors acting for CAAT responded by letter dated 18th February 2008.

27 Having considered the remainder of the documents on 21st February 2008, by letter dated 22nd February 2008 we directed, inter alia:

" ...

- (2) *having considered the papers and the materials provided, the Tribunal is of the provisional view that it will need to consider evidence and hear representations in private for the purposes of rule 22; however, it cannot make a direction to that effect without having heard representations from the parties and its view is only provisional at this stage; it would intend to deal with this matter and any other procedural issues at the commencement of the hearing, unless application is made for directions beforehand;*
- (3) *If the Tribunal decides to hear part of the appeals in private and again subject to an application being made under rule 23 and any representations in that respect, the Tribunal would be of the provisional view that it would be necessary for reasons of substantial public interest to exclude the Appellants and their representatives, having regard to the subject matter of the appeals and the exceptions relied upon;*
- (4) *the Tribunal has however concluded that in the particular circumstances of these appeals a Special Advocate should be appointed to represent the interests of both Appellants during the closed part of the hearing, if any; the advocate should be appointed from the Attorney General's Panel of Special Advocates and should comply with the requirements of CPR Part 76, which should provide the broad procedural framework; while the Tribunal intends to give its full reasons later, it makes clear at this stage that the reason for this direction is that the nature and extent of the documents, the subject of the appeals, is such that the Tribunal considers that exceptionally in this case the proper and fair disposal of the appeals would be materially assisted by the appointment of a Special Advocate to represent the interests of the Appellants in asking questions and making submissions as appropriate in respect of any closed material as part of any closed session. The Tribunal is making the direction at this stage to enable a Special Advocate to be appointed and to prepare for the hearing.*

The Tribunal should make it clear that the Special Advocate should have sufficient security clearance to see any documents that he or she requires to view. ..."

The directions went on to provide for a procedural session at the beginning of the hearing.

- 28 On 26th February 2008 TSol emailed referring to "*the significant quantity of closed material*" in the appeals and seeking arrangements for the handling of that documentation. By e-mail at 10.15 am on Thursday 28th February (one clear working day before the hearings) TSol asked that the evidence in respect of the Gilby documentation should be dealt with separately on account of the "*very different*" nature of the disputed information in each case. The e-mail acknowledged that that course was a departure from the hitherto agreed approach of all parties. About 1 ½ hours later TSol e-mailed a letter dated 28th February 2008 expressing its surprise at the direction appointing a special advocate and stating that it was "*deeply puzzled*" by the reference to the extent of documentation in the CAAT appeals in that respect.¹⁵
- 29 On the first day of the hearing we conducted a procedural directions hearing in both appeals, which was in the event broadly consensual. Mr Khawar Qureshi QC had been appointed to represent both Appellants as special advocate. We made directions that the closed material should be dealt with in private session with the exclusion of the Appellants and persons other than the MoD, FCO and IC, as proposed in our interim directions. We also confirmed that the Appellants should be represented by Mr Qureshi as special advocate in the closed sessions. We drew attention to the unsatisfactory nature of the closed documents provided to us in the Gilby appeal and requested that we be provided with a coherent and hopefully chronological bundle of documents with some documentary guidance as to their nature. That was supported by Mr Qureshi. Mr Philip Havers QC, representing both the MoD and the FCO, accepted the unsatisfactory state of the documentation and agreed that a comprehensive and ordered bundle should be provided, hopefully by the third day of the hearing and, if possible, earlier than that to Mr Qureshi. Timetabling for the hearing was agreed, which enabled the open and closed evidence of Mr Patey to be heard jointly on the first and third days and specifically on documents in the Gilby appeals on the fifth day. The joint evidence by video link of Mr Ross would be heard on the second day of the appeal. A transcript of the open parts of the hearing had been agreed to be taken and that has proved of great assistance both during and following the hearing of these appeals.
- 30 We will now set out our full reasons for the procedural decisions made on the first day of the hearing following our interim directions dated 22nd February 2008.
- 31 The starting point was whether any part of the hearing should be in private as provided for by Rule 22 of the 2005 Rules¹⁶. Rule 22 (1) provides:

¹⁵ We consider the points made in this letter in paragraph 21 below.

¹⁶ The Information Tribunal (Enforcement Appeals) Rules 2005

"All hearings by the Tribunal ... shall be in public unless, having heard representations on the matter from the parties having regard to the desirability of safeguarding:

- (a) the privacy of data subjects; or*
- (b) commercially sensitive information; or*
- (c) any matter in respect of an exemption contained in Part II of the 2000 Act is claimed*

the Tribunal directs that the hearing or any part of the hearing should take place in private."

As we indicated in our interim directions, it was necessary to have oral representations to determine this application in accordance with Rule 22. The appropriate principles and approach are set out in the Tribunal's decision in **Sugar**¹⁷, which we respectfully adopt for the purposes of our decision. It was in our view and as accepted by the parties necessary to consider evidence and submissions in respect of the information, the subject of the appeals; as explained in **Sugar**, it would have been impossible to do that in open session without defeating the object of the exemption under Section 27 in seeking to maintain the nondisclosure of the documents; we accordingly ruled with the consent of the parties that the evidence and submissions specifically in respect of the documents should be dealt with in closed session.

32 We then turn to the application by the MoD and FCO that the respective Appellants should be excluded from the closed sessions under Rule 23 of the Rules, which provides:

"(1) Where an application is made to the Tribunal by a minister of the Crown for a party or parties to the appeal to be excluded from the proceedings or any part of them, the Tribunal shall grant such an application and exclude that party or parties, if and only if it is satisfied that it is necessary for the reasons of substantial public interest to do so.

...

(3) Where the Tribunal considers it necessary, for the reasons of substantial public interest, for any party to be excluded from the proceedings, it must:

- (a) direct accordingly,*
- (b) inform the party or parties excluded of its reasons to the extent that it is possible to do so without*

¹⁷ EA/2005/0023

disclosing information contrary to the public interest, and

(c) inform the relevant Minister."

Again we refer to the reasoning in **Sugar**¹⁸, which we adopt. The application on behalf of the MoD was unopposed, at least in the light of the provisional decision we had made as to representation by a special advocate that parties other than the MoD and the IC should be excluded from the closed sessions in accordance with our ruling under Rule 22; the reasons were the same, that was to preserve non-disclosure of the relevant documentation claimed to be subject to the exemption, the object of which would otherwise be defeated by inclusion of the Appellants in the closed sessions. For those reasons we were satisfied that it would be in the substantial public interest and necessary for the Appellants to be excluded to enable the decision to be made in accordance with the relevant provisions of the FOIA.

33 We then considered further directions and in particular the question of representation by a special advocate; we were entirely satisfied without objection from any party that we had powers to make that direction in accordance with our general power under Rule 14 (1); insofar as it was necessary we would also rely upon the general power for the conduct of the proceedings under Rule 24 (4); it did not seem to us to be necessary to rely on any inherent jurisdiction. In the light of the objection by the TSol and the fact that a similar direction has not previously been given in this Tribunal, we will set out our reasons and approach in a little detail :

- (a) We did not consider that as a matter of principle representation by a special advocate was required or justified because of the engagement of any particular human right; it seemed to us that the role of the Tribunal is essentially inquisitorial and as an independent body the Tribunal is well-able in the vast majority of cases to conduct an investigation of closed material and evidence without the appointment of a special advocate or similar representation;
- (b) However we would make clear that it is imperative in this respect that a party relying on closed material to establish an exemption should ensure that any documentation is presented in a manner and at a time which would enable the Tribunal to discharge its inquisitorial task; the documentation should be properly ordered with an explanation, where appropriate, of that documentation and its subject matter; the documentation should be presented in a coherent fashion;
- (c) We expect that in a case of this kind the Tribunal would generally need to see the documentation, the subject of the information request; if it is to see that documentation, it should be presented in a coherent and explained fashion as indicated above; and in the light of that a directions hearing should be held at an early stage to include directions as to any closed hearings that may be considered necessary, the

¹⁸ Supra

handling of the documentation and other related matters; it should be incumbent upon those relying upon the closed material to ensure that proper provision is made for the handling and storage of documents in a manner consistent with their security classification, to include convenient storage for the Tribunal during the hearing.

- (d) In the present case this had not been done; the documentation provided to us was provided without explanation, piecemeal and in an incoherent manner that made it effectively impossible to understand; we were accordingly left with the choice of abandoning all or part of the six-day hearing, which had been fixed for several months or taking steps to secure as far as we were able the fair and efficient disposal of the appeals in accordance with the fixed timetable;
- (e) It was, as we said in our interim directions dated 22nd February 2008, because of the nature and extent of the documents that exceptionally we directed that a special advocate could be appointed to represent the interests of the Appellants in both appeals; we should however make it clear that even in the light of the more ordered bundle provided to us on the evening of the fourth day of the hearing (immediately preceding the day on which the evidence was to be considered) it would have been difficult in these appeals for the Tribunal satisfactorily to have dealt with this material without the assistance of a special advocate representing the Appellants; in our open decision we cannot elaborate on that other than to say that it was both the number of documents and the nature of their contents which in our judgement justified this step to assist the efficient and fair disposal of the appeals;
- (f) With the benefit of hindsight we remain firmly of the view that it was as we indicated in the interest of the efficient and fair disposal of the appeals, because of the exceptional nature and extent of the documentation the Tribunal should have been assisted by representation of the Appellants through a special advocate;
- (g) We should also deal specifically with the point made by the TSol in its emails on 28th February 2008; we would agree that, if the CAAT appeal had been proceeding independently, there would not have been the justification for the appointment of a special advocate; however, seeing that for reasons with which we agreed the appeals were being dealt with together at least so far as the common evidence was concerned (including closed evidence), it would in our view have been inappropriate and impracticable to seek to confine the role of the special advocate to deal with submissions and questions on documentation in the Gilby appeal alone; it would have been very difficult, if not impossible, for the special advocate to have assisted us in respect of the public interest balance and the application of Section 27 based on the closed evidence as to the documents in the Gilby appeals without having the opportunity to consider and, if need be, question the joint closed evidence in respect of both appeals; if the TSol had thought that there was benefit in the total separation of the hearings and evidence that should have been raised at a far earlier

stage; in the event we remain firmly of the view that this Tribunal was assisted in disposal of these appeals by hearing the appeals in effect together; and

- (h) Having heard the appeals we remain in no doubt that the procedural decisions taken on 22nd February and 3rd March 2008 were appropriate to ensure the most efficient and effective disposal of these appeals; we would repeat that the justification for the appointment of a special advocate to represent the Appellants was exceptional having regard to the nature and extent of the documents concerned; we hope that in future no Tribunal will be faced with documentation that is not presented properly in a form that can assist its understanding by the Tribunal, which in turn will reduce any need for special representation in future cases of this kind.

ANNEX B

Extract from the CAAT appeal decision

34 It is next convenient to deal with legal submissions that were made as to the approach which this Tribunal should take, having regard to what was the evolving factual context following the initial information request and in particular the timing at which its decision should be considered.

35 In **Department for Education and Skills v Information Commissioner (EA/2006/0006)** dated 19th February 2007 the approach, which in that appeal was agreed, was summarised at paragraph 20 (iv):

"The competing public interest must be assessed by reference to the date of the request or, at least, around that time. This is particularly important where considerable time has elapsed and the timing of the disclosure requested may be a significant factor in deciding where the public interest lies."

In **Evans v Information Commissioner** dated 26th October 2007¹⁹ the matter was fully argued and the Tribunal's decision is set out at paragraphs 22 to 24 including in particular at paragraph 23:

"In deciding whether to communicate information which falls within Section 36, the public authority must itself apply the public interest test in Section 2 (2). Clearly, that must be applied at the time of the request. It was that decision of the MoD which was the subject of Mr Evans' complaint to the Commissioner; it was the Commissioner's decision that the complaint had been dealt with in accordance with the requirements of Part I (at least insofar as the application of Section 36 was concerned) that was then appealed to this Tribunal. We have to consider the public interest test as it applied at the time of the request."

Submissions

36 Mr Hickman on behalf of CAAT submits that those decisions of the Tribunal and others to similar effect were wrong and that properly understood we should consider the requirements under Part I including the application of the exemption and the public interest balance at the time of our decision. He draws attention to Section 1(1)(b), which he submits makes plain that the entitlement to have information communicated to the applicant, which is expressed in the present tense, is a continuing right. That is, he submits, consistent with Section 1(4), which allows amendments or deletions of the information to continue up until the information is to be communicated, which may be at the time of the Tribunal's decision. Similarly under Section 2(2)(b) the exemption including the public interest balance is expressed in the

¹⁹ EA/2006/0064

present tense and is, he submits, continuing as part of the right under Section 1(1). He accepts that sections 10 and 17 govern the time within which the authority must comply with the obligation under Section 1(1), but he says that that is procedural and does not detract from the continuing right to information under Sections 1 and 2 of the Act.

- 37 He draws attention to Section 45(1) and (2)(e), which provide for a Code of Practice to include procedures to deal with complaints about the handling of requests for information. He submits that Part VI of the 2004 Code of Practice at paragraphs 39 and 40 makes clear that this is a continuing obligation in that the code requires on review "*a full re-evaluation of the case*".
- 38 Turning then to Section 50 and the question for determination by the Commissioner, namely whether the request "*has been dealt with in accordance with the requirements of Part I of the Act*", he submits that "has been" is also consistent with a continuing information entitlement up until the date of determination. Moreover, he submits that this approach is supported by Section 50(4) which uses the present tense in referring to the steps to be taken where there has been a failure and Section 51(1)(b)(i) which refers to the issue whether a public authority has "*complied or is complying with any of the requirements of Part I*". He submits that those provisions are consistent with the provision for the determination of appeals under Section 58, which in turn requires this Tribunal to consider whether "*the notice against which the appeal is brought is not in accordance with the law*".
- 39 Thus he concludes that the language of the Statute admits of a construction requiring a contemporary consideration of issues relating to the exemption and the public interest. Moreover as a matter of principle that approach accords with the importance of considering the public interest in a current and relevant context and not looking to the past, particularly having regard to the implications of the passage of time on the public interest balance (see Hogan para 58²⁰).
- 40 Mr Hickman also relies by analogy on the application of Section 86 of the Immigration and Asylum Act 2002 ('the IAA'). Under Section 86 (3) the Tribunal is there to allow the appeal insofar as it considers that a decision "*was not in accordance with the law*" or a discretion "*should have been exercised differently*". Macdonald's Immigration Law & Practice in the United Kingdom, Sixth Edition, at paragraph 18.49 concludes that Section 86 (3) should be read as if it required an appeal to be allowed "*if the decision would not be in accordance with the law if implemented now*".²¹ Mr Hickman submits that the importance of having regard to the evolving situation in terms of the public interest is similar in immigration and information fields.
- 41 Mr Maclean, who appears with Mr Havers QC for the MoD, and Mr Choudhury, who appears for the IC, join forces in seeking to support the approach in DFES and in Evans. They submit that Section 1(1)(b) is

²⁰ 17th October 2006 EA/2005/0026 and 0030

²¹ See also para 18.49 footnote 6.

expressed in the present tense as an immediate entitlement of a person making the request. That is consistent in their submission with Section 1(4) that the information, the subject of the request, is the information held at the time the request is received unless account can be taken of amendment or deletion that would in any event have been made but only between then and the time when the information is to be communicated under subsection (1)(b). Similarly the exemption under Section 2(2)(b) is, they say, to be applied in accordance with Section 1(2) to the immediate right of access to information under Section 1(1)(b).

- 42 Timing for compliance is governed by Section 10(1) requiring compliance promptly or in any event not later than the twentieth working day subject to Section 10(3), under which time for compliance can be extended until such time as is reasonable in the circumstances. Notice has to be given under Section 17 as to the decision in respect of the request, which in their submission effectively completes the process required in accordance with Part I of the Act. They submit that this is consistent with Section 14(2), which makes clear that repeated requests for information can be made, at least if a reasonable interval has elapsed since the previous request.
- 43 Provision for the Code of Practice including complaint or review procedures is not under Part I of the FOIA but under Part III and, they say, is to be distinguished from the requirements of Part I, as can be seen from the language used in Section 47(1) and (6), which refer to the requirements of the Act as opposed to the provisions of the Code.
- 44 Section 50(1) of the Act requires the Commissioner to consider the question:

"Whether a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I".

That is, they submit, plainly looking back to the dealing by the authority under Part I of the Act. That is, they say, a principled approach, having regard to the importance of limiting consideration of the request at the time it is made, leaving reconsideration to a fresh request, in the first place made to and considered by the authority. They submit that this is also consistent with Section 50(4) which applies where a public authority "has failed to communicate information or to provide confirmation or denial in a case where it is required to do so by Section 1 (1)", which is, they say, a clear reference to past compliance by the authority.

- 45 They accept that if the Commissioner concludes that an authority has failed to communicate information, the decision notice must specify steps to be taken for complying with that requirement and the period within which they must be taken and that decision is one for the IC at the time of his or her decision. However, that does not detract from the approach outlined above. It simply leaves the IC with a limited discretion as to the form of the decision notice.

- 46 Section 58(1) provides that on appeal the Tribunal is to consider the notice of the IC and whether it "is not in accordance with the law" or whether where the notice "*involved*" an exercise of discretion the IC ought "*to have exercised his discretion differently*". They submit that in context those provisions are plainly looking back to the action taken by the IC, which for the reasons set out above is itself looking back to the manner in which the request was dealt with under Part I.

Decision on Approach

- 47 It is convenient to start with the structure of the relevant part of the FOIA. Part I deals with access to information held by public authorities. Part II deals with exempt information for the purposes of Part I. Part III deals with the general functions of the Lord Chancellor and Information Commissioner. Part IV deals with enforcement and Part V with appeals.
- 48 We start with Part V which provides for the function exercised by this Tribunal. Section 57 provides that, where a decision notice by the Commissioner has been served, the complainant or public authority may appeal to the Tribunal against the notice. The powers of the Tribunal are set out under Section 58. This Tribunal is either where the notice is not in accordance with the law to allow the appeal and/or substitute such other notice as could have been served by the Commissioner or in any other case to dismiss the appeal. We are in no doubt that the language of this section, which looks back to the decision by the IC, requires a review of the decision by the Commissioner and to that extent a decision which is based upon the function exercised by the Commissioner at the time it was exercised.
- 49 We have had careful regard to the submissions made by Mr Hickman in respect of provisions of the IAA, but we have concluded that they are not of assistance in construing the FOIA in that they concern different legislation in a different legislative and factual context.
- 50 We turn accordingly to consider the enforcement provisions under Part IV and in particular the decision of the IC under section 50. By Section 50(1) a person can apply to the IC for a decision

"whether ... a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I."

That seems to us a straightforward provision. The question for the IC is to consider whether as a matter of fact and law the request for information "*has been dealt with*" in accordance with the requirements of Part I. Its purpose is, as the title of the part makes clear, to enforce the obligations on the authority to comply with its obligations under Part I of the Act. Thus it is entirely in accordance with the structure and objective of the provisions that the IC should be looking to see whether the authority has in fact so complied. That in our view should involve looking to see whether the authority has complied at the time at which it was required so to do under part I.

39 Section 50(2) seems to us consistent with that approach. The exceptions to the duty to make a decision on the application for enforcement include:

"(a) *that the complainant has not exhausted any complaints procedure which is provided by the public authority in accordance with the Code of Practice under Section 45*".

We return to that in the context of overall timing below. However for present purposes this seems to us to indicate that the IC's task is to consider how the request "has been" dealt with under Part I.

40 We take the same view of Section 50(4), which applies where the Commissioner decides that a public authority "*has failed to communicate information ... in a case where it is required to do so*" or "*has failed to comply ...*". That seems to us entirely consistent with an obligation to look and see what has been done in the past at the time at which it was required by the authority.

41 We consider that the language of section 51 is also consistent with this approach. We agree that as an approach it is principled in that it allows the authority to consider the application in the first place and leaves the consideration of changed events to a new application, subject to section 14 of the FOIA.

42 We should then deal with what we consider is the correct approach to consideration of how the authority dealt with the information request under Part I of the Act. We take the view that the IC should be concerned with the whole course of dealing by the authority to see whether that was in accordance with the requirements of Part I. Those requirements in our view are not limited to the time of the request itself and include the consideration of the response to the request including any consideration of an exemption in accordance with Part II.

43 In our view the authority should consider its response including the application of any exemption at the time at which it is required to respond. The provisions requiring the authority to consider and comply with the request are all expressed in the present tense. There is nothing in the language which requires the authority to confine its consideration to the time of the making of the request as such.

44 That is consistent with Section 1(4) of the Act, in accordance with which the information remains the information at the time the request is received except that account can be taken of amendments or deletions that would have occurred in any event regardless of the request up until "*the time when the information is to be communicated under subsection (1) (b)*". It seems to us that the expression "*is to be communicated*" in Section 1(4) refers to the time at which the information is in fact to be communicated, whether that is as a result of the initial decision on the request or review or indeed, if it applies, the decision notice of the IC or this Tribunal, when "account" can (but need not) be taken of amendments or deletions that would have taken place in any event.

- 45 A particular issue arises as to whether or not the requirements under Part I include compliance with any review procedure that the authority has adopted in accordance with the Code of Practice. As pointed out by Mr Maclean and Mr Choudhury, the only reference in Part I to the Code of Practice is under Section 16 in respect of the provision of advice and assistance. However, we consider that it is of relevance that Part III is dealing with the functions of the Lord Chancellor and the Information Commissioner generally and in the context of Section 45(1) the function as amended of the Secretary of State to issue a Code of Practice providing guidance as to the practice which it would be desirable to follow in connection with the discharge of the authorities' functions under Part I. Thus the statutory framework for Part I includes guidance as to the procedure that it would be desirable in the opinion of the Secretary of State for the authority to follow.
- 46 The Code of Practice is by Section 45(2)(e) to include provision of procedures for dealing with complaints about the handling of requests for information. Under Section 50(2)(a) it is a reason for the IC not making a decision on an application under that section that a complainant has not exhausted the complaints procedure where one is provided in accordance with the Code of Practice.
- 47 It is also useful to have regard to the provisions of the relevant Code of Practice. Part II provides for the provision of advice and assistance including clarifying the request and other matters. Part III deals with the transfer of request for information where some other authority would be better-placed to respond to the request. Part IV deals with the consultation with third parties and Part V deals specifically with confidentiality obligations. Pausing there it would seem to us that, where an authority had adopted the Code of Practice but had failed to deal with a request in accordance with its provisions under Parts II-V, it would not have dealt with the request for information "*in accordance with the requirements of Part I*" of the Act.
- 48 We take the view that the submission of Mr Choudhury and Mr Maclean, seeking to distinguish between the requirements spelt out in mandatory terms in Part I and the incorporation of the Code of Practice through Part III to Part I as to what is desirable as the manner in which the request should be dealt with is unduly restrictive in this respect. Nor do we accept that the use of the terms '*requirements*' and '*provisions*' respectively for the Act and the Code in Section 47(1) and (6) of the Act justifies exclusion of the Code, where applicable, from consideration whether a complaint has been dealt with in accordance with the requirements of Part I.
- 49 Coming then to Part VI of the Code, which provides for the complaints procedure, paragraphs 39 and 40 are as follows:

"39. *The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue.*

Complaints procedures should be as clear and simple as possible. They should encourage a prompt determination of the complaint.

40. *Where the complaint concerns a request for information under the general rights of access, the review should be undertaken by someone senior to the person who took the original decision, where this is reasonably practicable. The public authority should in any event undertake a full re-evaluation of the case, taking into account the matters raised by the investigation of the complaint."*

It seems to us from the language of those paragraphs that what was intended on review was a fresh decision as a full re-evaluation of the case, including matters relating to the public interest. Paragraphs 44-46 of the Code deal with notification of the outcome of the review to the applicant.

- 50 We note that the review procedure is in fact acknowledged as part of Part I by Section 17(7)(a), which requires notice of the complaints procedure where one exists.
- 51 It may well be the case that in a given situation a conclusion is reached on review for exclusion of information relying on a different exemption or other matters material to the decision as to how the request should be handled. For example, in the Gilby appeals on review Section 23 of the FOIA was relied upon in respect of part of the information. Alternatively, if an error in handling had been made in the initial decision, the review would provide the opportunity for the error to be addressed by the authority as part of its Part I procedures. It would seem to us bizarre if the IC in considering how the request was dealt with in accordance with the requirements under Part I was not able to include how in the event it was dealt with on review, particularly insofar as he is not required to make a decision at all unless the opportunity for review has been taken up.
- 52 Moreover it seems to us that the requirements of Part I should be seen in an administrative law context as well as the express terms of the Part. There would generally be a legitimate expectation of compliance with a Code of Practice adopted by an authority, in respect of which a failure to comply would normally render the dealing under Part I unlawful in the absence of some overriding justification.
- 53 We accordingly conclude that the proper approach of the IC and in turn the Tribunal should be to have regard to the whole of the dealing with the request by the authority under Part I and that the time for the consideration whether there should be disclosure of the information, including the public interest balance, should include the whole of that process, including, where applicable, any reconsideration on review. We should, however, make it clear that in the circumstances of the present appeal we would have come to the same conclusion whether the matter was tested so as to include the review, as we think is appropriate, or limited to the original decision for the purposes of the Section 17 notice.