



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0026
Information Commissioner's Ref: FS50084068

Heard at Procession House, London, EC4
On 17th September 2008

Decision Promulgated
14th October 2008

BEFORE

CHAIRMAN

ANNABEL PILLING
and

LAY MEMBERS

MICHAEL HAKE
IVAN WILSON

Between

DAVID ARMSTRONG

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Additional Party

Representation:

For the Appellant: Covington and Burling LLP
For the Respondent: Anya Proops
For the Additional Party: Cecilia Ivimy

Substituted Decision Notice

The Tribunal dismisses the Appeal for the reasons set out in this Decision.

The information requested was reasonably accessible to the Appellant and therefore, under section 21 of the Freedom of Information Act 2000, there was no obligation on the Commissioners for Her Majesty's Revenue and Customs to provide a copy to the Appellant.

Even if the information was not reasonably accessible to the Appellant, the information falls within the exemption at section 30 of the Freedom of Information Act 2000 and the public interest in maintaining the exemption outweighs the public interest in disclosure.

The Commissioners for Her Majesty's Revenue and Customs were entitled to withhold the requested information and we make no further direction.

Reasons for Decision

Introduction

1. This is an Appeal by Mr. David Armstrong against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 12 February 2008. The Decision Notice relates to a request for information made by Mr. Armstrong to the Commissioners for Her Majesty's Revenue and Customs ('HMRC'), previously Her Majesty's Customs and Excise ('HMCE')¹, under the Freedom of Information Act 2000 (the 'FOIA').

Background

2. The request for information concerned material relating to the trial of Abu Bakr Siddiqui at the Crown Court sitting at Southwark in 2001 on charges of exporting goods to Pakistan in contravention of Customs export controls (the 'Siddiqui trial').
3. In 1999, customs officers commenced an investigation into possible export offences committed by Siddiqui. That investigation was undertaken in the context

¹ HMRC was formed on 18 April 2005, following the merger of Inland Revenue and HMCE. Following the merger, responsibility for conducting criminal investigations continues to lie with HMRC, but prosecutions are now the responsibility of the Revenue and Customs Protection Office ('RCPO'), an independent prosecuting authority also established in April 2005.

of a wider investigation into the illegal supply and attempts to supply “dual use” goods, which could be used for military and civil purposes, to Pakistan to assist in their development of nuclear weapons.

4. Siddiqui was convicted of a number of offences.
5. The Appellant, Mr. Armstrong, is an investigative journalist based in Washington D.C., with a particular interest in the proliferation of weapons of mass destruction and the nuclear black market.

The request for information

6. By e-mail dated 18 January 2005, Mr. Armstrong requested to be provided with a copy of the following documents:
 - i) The full names, titles, and contact information for all witnesses in the case R v Abu Bakr Siddiqui, prosecuted on behalf of HMCE by Mr, Mukul Chawla and Ms. Joanne Cumbley in Southwark Court in August 2001.
 - ii) Witness information of all those who testified at the Siddiqui trial.
 - iii) A full transcript of the Siddiqui trial.
 - iv) Copies or detailed description of any exhibits introduced in the Siddiqui trial.
 - v) All documents, physical and/or electronic, relating to the investigation of Abu Bakr Siddiqui, his family, and associates including but not limited to notes, reports, memoranda, photos, audio and/or video recordings, email and/or text messages.
7. Simon Terrell, on behalf of HMCE, replied on 10 February 2005. Some of the requested information was attached to that letter², the remainder withheld as HMCE considered that the information was exempt from disclosure by virtue of sections 30 (requests iv and v) and 41 of FOIA (requests i and ii) or, in the case of the transcript of the trial (request iii), not held by HMCE.

² A list of the names of the witnesses who had given evidence at the trial.

8. Mr. Armstrong was dissatisfied with this response and requested an internal review on 17 February 2005. He highlighted that most of the information requested was presented in open court, and had therefore been made available to the public during the trial, and was being requested to gain a better understanding of the enterprises of Siddiqui.
9. The internal review was not completed until July 2005. Kevin Davis, of HMRC, conducted the review and communicated the outcome to Mr. Armstrong by letter dated 4 July 2005. He stated that a list of witnesses had already been provided to Mr. Armstrong, and that the contact details of the witnesses had been provided to HMRC in the knowledge that personal details would not be released, therefore the information was exempt under sections 41 and 30 FOIA. Mr. Davis also relied upon section 21 FOIA in respect of all the information recorded in the transcript which was reasonably accessible to Mr. Armstrong, albeit on payment, from the Crown Court. In relation to the remaining information, Mr. Davis stated that he was satisfied that the information was exempt under section 30 FOIA and that the public interest favoured maintaining the exemption. He outlined the public interest considerations that he had taken into account when reviewing the decision to withhold information under section 30 FOIA.

The complaint to the Information Commissioner

10. Mr. Armstrong contacted the Commissioner on 19 July 2005 to complain about the way his request had been handled. He specifically asked the Commissioner to consider that the information requested was not contained in the trial transcripts as these contained only partial descriptions of items. He confirmed that he had been given access to the transcript of the trial, after a long and difficult process for a fee, and that it was impossible to make sense of the transcript without access to the items referred to.
11. Following the complaint, Mr. Armstrong focussed his request for information on obtaining copies of the "jury bundle". We were told that this comprised some 4 lever arch files of information and included witness statements, documentary evidence and records of interviews.

12. The Commissioner investigated the substantive complaint. During correspondence, HMRC confirmed to the Commissioner that it was not prepared to disclose the jury bundle and provided a detailed analysis of its contents. However, at this stage HMRC did indicate that it was prepared to disclose a number of internet pages contained within the jury bundle because of their accessibility and content.
13. The Commissioner was not satisfied with HMRC's analysis and sought, and received, further clarification.
14. The Commissioner concluded that section 30 FOIA was engaged in respect of the jury bundle and that the public interest weighed in favour of the exemption being maintained.

The Appeal to the Tribunal

15. Mr. Armstrong appealed to the Tribunal in October 2007.
16. Mr. Armstrong submitted to the Tribunal a "redefined request", confirming that he was only seeking copies of documents which were referred to during the trial, listed in Exhibit A appended to his Grounds of Appeal, and was not seeking any 'personal data' contained in the listed documents, although not conceding that HMRC are entitled to withhold that data.
17. The Tribunal joined HMRC as an Additional Party.
18. The Appeal has been determined without a hearing on the basis of written submissions and an agreed bundle of documents.
19. In addition, the Tribunal was provided with a copy of the disputed information. In line with common accepted practice in this Tribunal, this was not made available to Mr. Armstrong, as to disclose it to him would defeat the purpose of this Appeal.
20. Although we may not refer to every document in this Decision, we have considered all the material placed before us.

The Powers of the Tribunal

21. The Tribunal's powers in relation to appeals under section 57 of the FOIA are set out in section 58 of the FOIA, as follows:

(1) If on an appeal under section 57 the Tribunal considers-

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

22. The starting point for the Tribunal is the Decision Notice of the Commissioner but the Tribunal also receives and hears evidence, which is not limited to the material that was before the Commissioner. The Tribunal, having considered the evidence (and it is not bound by strict rules of evidence), may make different findings of fact from the Commissioner and consider the Decision Notice is not in accordance with the law because of those different facts. Nevertheless, if the facts are not in dispute, the Tribunal must consider whether FOIA has been applied correctly. If the facts are decided differently by the Tribunal, or the Tribunal comes to a different conclusion based on the same facts, that will involve a finding that the Decision Notice was not in accordance with the law.
23. The question of whether the disputed information is exempt from disclosure under section 30 FOIA is a question of law based upon the analysis of the facts. This is not a case where the Commissioner was required to exercise his discretion.

The questions for the Tribunal

24. Although the parties agree that the disputed information falls within the scope of section 30 FOIA and that the main question for the Tribunal is the question of where the public interest lies, the Tribunal has concluded that the relevant issues in this Appeal are as follows:
- a) What is the disputed information?
 - b) Does section 21 FOIA apply?
 - c) If not, do we agree with parties that information all falls within section 30 FOIA?
 - d) Does the public interest in maintaining the exemption outweigh the public interest in disclosure?
25. If we did not conclude that the disputed information was otherwise exempt from disclosure, we were invited to go on to consider the application of sections 41 and 44 FOIA.

Evidence

26. We were provided with written witness statements prepared by Mr. Armstrong, David Green QC, Director of RCPO, open and closed statements from Simon Terrell, Customs Officer and Kevin Davis, an Assistant Director at HMRC.
27. Mr. Armstrong gives details of his work as an investigative journalist and his interest in the Siddiqui trial in the context of the Pakistani nuclear black market network. He is the author, along with a colleague, of a book published in late 2007 entitled "America and the Islamic Bomb: The Deadly Compromise". He states that in this book much is made of the information concerning the Pakistani nuclear black market network discovered by HMRC when investigating Siddiqui. He further outlines the potential relevance of the disputed information.
28. David Green QC was appointed by the Attorney-General as Director of the Customs and Excise Prosecutions Office in December 2004 and subsequently as first Director of RCPO in April 2005. He has not been involved in any aspect of

the FOIA request. In his statement he provides information about the use and handling of information in a criminal prosecution. This covers aspects of the preparation of a prosecution case and the status of evidential material gathered during the investigation. It is not necessary for us to repeat his evidence here in any detail, although we were greatly assisted by his expertise in the presentation of evidence during a criminal trial.

29. In dealing with public access to the evidence, Mr. Green QC explains that a member of the public, like the jury, would not have access to witness statements or other documents from the trial bundle. This would be because the evidence in the trial is the evidence given before the jury and witnesses may give different evidence from that contained in their witness statement so it could be misleading for that witness statement to be made available to anyone other than the parties and the Judge. Additionally, a member of the public would not have access to the jury bundle. However, certain documentary evidence which was before the jury but not read out verbatim (especially documents such as maps or photographs) may be released to the press if, for example, it would aid understanding of the proceedings. Reporters may also ask to look at particular documents to check spellings of names or to ascertain details which they did not hear at the relevant moment. More usually, this would involve a request for an opening note or other document the contents of which are effectively in the public domain (because, for example, the advocate had opened the case reading from it.) In his experience “it would be unheard of for a member of the public to request or be permitted sight of such documents.”
30. Mr. Green QC also makes reference to the CPS Protocol on disclosure to the media which has been provided to us.
31. Mr. Terrell sets out the background to the investigation into the illegal supply of “dual-use” goods to Pakistan. His evidence, in both his open and closed witness statements, is mainly concerned with the application of the public interest balancing exercise and the considerations why HMRC submit the public interest in maintaining the exemption outweighs the public interest in disclosure.

32. Mr. Davis gives evidence of the role of HMRC in the criminal justice system, identifying the legislation that governs HMRC's jurisdiction, and the process of the criminal investigation and prosecution. He also sets out the circumstances in which HMRC obtained the disputed information used in the Siddiqui trial.
33. We have also read the closed statements of Mr. Terrell and Mr. Davis which were not provided to Mr. Armstrong according to the practice of this Tribunal.

What is the Disputed Information?

34. The parties are not entirely in agreement as to what amounts to the information at the centre of this appeal. This may be because Mr. Armstrong has "redefined" his request, both formally in Exhibit A annexed to his Grounds of Appeal, and also within the material submitted to the Tribunal. We also have what appears to be a new request for information made on 17 May 2006 to HMRC in which Mr. Armstrong makes no mention of the fact that he is seeking an internal review of the refusal to disclose information following his initial request.
35. We also note that the list in Exhibit A was described within the Grounds of Appeal as a "comprehensive, though not exhaustive list of those exhibits believed to have been referred to in open court". There has been no attempt to further define the information sought or identify any other particular documents that are not contained within it. The Commissioner and HMRC do not have a copy of the transcript of the Siddiqui trial. We understand that Mr. Armstrong has portions of this transcript but we have been provided with only a few pages.
36. We have concluded that the "disputed information" is documents referred to in open court during the Siddiqui trial, either contained within the jury bundle or referred to elsewhere in evidence in front of the jury.

Legal submissions and analysis

Section 21 FOIA

37. Both the Commissioner and HMRC rely on section 21 FOIA in respect of the disputed information read out in open court during the Siddiqui trial on the basis that the transcripts of the trial are reasonably accessible to him, albeit for a fee.

38. A public authority need not comply with the duty to disclose under section 1 FOIA where any of the absolute exemptions provided for by FOIA apply. Section 21 FOIA is an absolute exemption. This means that the information is not disclosable regardless of any public interest there may be in disclosure.
39. Section 21 of FOIA provides as follows:
- (1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.*
- (2) For the purposes of subsection (1)-*
- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and*
- (b) information is to be taken to be reasonable accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.*
- (3) For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2) (b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.*
40. On a date before 2 January 2005, Mr. Armstrong applied to the Crown Court sitting at Southwark for a transcript of the Siddiqui trial.
41. Although that initial request was refused, Mr. Armstrong resubmitted his request with submissions as to why he believed it should be provided. A response was received from the trial Judge, HHJ Rivlin QC, stating that "he will grant the request provided there are not any legitimate objections from either the Defence or Prosecuting authority."

42. Although we have not been provided with copies of all the relevant correspondence, it appears that Mr. Armstrong was able to obtain a transcript of the Siddiqui trial but chose not to obtain a full transcript, just limited portions of the evidence.
43. On 18 October 2005, Mr. Armstrong again contacted the Crown Court at Southwark. He made reference to the help he had received in obtaining transcripts of witness testimony in April 2005 and now requested additional information from the Siddiqui trial; namely, the jury bundle and transcripts of interviews with the Defendant that had been read at the trial. He clarified, on 22 October 2005, that this was not a request under FOIA, but a request for public documents that had been introduced in open court to be made available to him. He indicated that he was willing to pay any fees involved.
44. At this stage, of course, Mr. Armstrong had complained to the Commissioner about the outcome of the internal review and the refusal of HMRC to disclose the disputed information to him, but he was still awaiting the outcome of the Commissioner's investigations.
45. On 23 January 2006, there was a hearing before HHJ Rivlin QC during which the Judge requested to know more precisely how Mr. Armstrong was intending to use the material. It appears from the note of the hearing that we have seen that Counsel instructed on behalf of HMRC had not been adequately instructed and was unable to give an indication as to their position. This is most unfortunate in light of the position regarding Mr. Armstrong's application under FOIA for similar material. No decision was made by HHJ Rivlin and the matter adjourned for the parties to have a further opportunity to put their case forward. It was anticipated that there would be a full hearing for the Judge to decide the matter in due course.
46. It does not appear that there was a further hearing of this matter. We have seen a letter written by those instructed on behalf of Mr. Armstrong dated 31 January 2006 in which it is indicated that the material he now seeks is not confined to the

jury bundle and interview transcripts³, but includes witness statements and two files of correspondence referred to in the evidence of one witness.

47. The solicitors on behalf of the Defendant had no comments to make on the application and regarded the decision as to whether to release court documents as a matter for the sole discretion of the learned judge.
48. RCPO, as the relevant prosecuting authority, responded by making reference to the FOIA application, submitting that, in its opinion, the proper recourse was to appeal to the Commissioner rather than to apply to the Crown Court for access to the same material. It indicated that it would be represented by Counsel at the next hearing.
49. Mr. Armstrong chose, for whatever reason, not to pursue his application before the Crown Court despite the indication that HHJ Rivlin is said to have given.
50. One difficulty we face is that the parties are not in agreement as to what parts of the disputed information were read out in full, merely referred to or not referred to at all during the trial and we have not had access to a transcript of the Siddiqui trial to be sure ourselves. There can be no criticism of HMRC for not providing a copy; they do not hold a copy and there is no requirement on them to obtain one. To do so would be to circumvent the provisions of section 21 FOIA.
51. Although Mr. Armstrong does have some transcripts, we have been provided with a very limited number of pages to illustrate an argument advanced on his behalf. Mr. Terrell was in court and has attempted to identify the relevant documents but, even if we did have access to the full transcript, it is clear from the evidence before us, it would be an excessively time consuming task to carry out the exercise. We can say from our examination of the papers that it would take days rather than hours. The result of this is that we cannot know with any certainty which documents in the jury bundle were referred to in open court.
52. We respectfully consider that the Commissioner and HMRC are wrong to regard the application of section 21 FOIA as limited to those parts of the disputed information that were read out in full during the Siddiqui trial. The jury bundle,

³ Or, indeed, to the material listed in Exhibit A or falling within the “disputed information”.

transcripts of interviews and any other documents referred to during the trial were placed before both the Judge and jury and retained by the Crown Court.

53. Mr. Armstrong, in our interpretation of his arguments, concurs with this view as he submits that section 21 FOIA cannot apply as the Crown Court has now destroyed all the relevant material under its document retention protocol. He does not seek to limit the relevance of section 21 to the transcripts, which are, as far as we are aware, still available in the usual way. There is no evidence to support the assertion that the Crown Court has disposed of the relevant records. We are of the opinion that the Crown Court, on notice that a full application was to be heard, would not have destroyed the papers pending a final determination of the matter.
54. It seems to us that the application before HHJ Rivlin QC was abandoned prematurely. Mr. Armstrong argues that the Court would be obliged to disclose the material a) because it is already in the public domain, and b) to satisfy the principles of open justice; there are no exceptional circumstances to justify withholding the information by the Court.
55. We are reluctant to attempt to determine the final decision of the Judge, particularly as Mr. Armstrong states that the Judge was minded to grant the application. If Mr. Armstrong is correct, the disputed information would be exempt from disclosure under section 21 FOIA and there would be no purpose to the FOIA request made to HMRC.
56. It is not for this Tribunal to take the place of a Circuit Judge sitting regularly in the Crown Court charged with an application from a member of the press to obtain copies of documents used during a trial held in open court; we do not consider it part of our jurisdiction to undermine the ability of the courts to dispense justice openly. We remind ourselves that disclosure under FOIA is disclosure to the whole world; it is not possible for us to limit the disclosure of the disputed information or place any restrictions upon its use in the way that a Judge dealing with the matter in the Crown Court might be able to.

57. We are satisfied that the disputed information is reasonably accessible to Mr. Armstrong from the Crown Court and is therefore exempt from disclosure under section 21 FOIA. This is an absolute exemption from disclosure.

Section 30 FOIA

58. If, however, we are wrong about the application of section 21 FOIA, we have gone on to consider the application of section 30 FOIA. All parties agree that the disputed information falls within this exemption and that we must consider where the public interest lies.

59. The relevant part of section 30 FOIA provides as follows:

(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of-

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained-

(i) whether a person should be charged with an offence, or

(ii) whether a person charged with an offence is guilty of it,

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

(c) any criminal proceedings which the authority has power to conduct.

60. We are satisfied that the disputed information was obtained by HMRC and has been held by it for the purposes of a criminal investigation conducted under the Customs and Excise Management Act 1979 and, therefore, falls within section 30 FOIA.

61. Section 30 FOIA does not confer an absolute exemption from disclosure but, under section 2(2)(b) FOIA, the duty to disclose under section 1(1)(b) FOIA does not apply to the extent that "in all the circumstances of the case, the public

interest in maintaining the exemption outweighs the public interest in disclosing the information.”

62. The meaning of section 2(2)(b) of FOIA is clear and unambiguous: the information is only exempt from disclosure if the public interest in maintaining the exemption *outweighs* the public interest in disclosing the information. If the scales are level, then the information must be disclosed.
63. The public interest balancing test must always be performed in light of the particular facts at issue.

Public interest in maintaining the exemption

64. A number of public interest factors were identified by HMRC and the Commissioner in favour of maintaining the exemption.
65. It is submitted that disclosure of the disputed information at the time of the request would have prejudiced an on-going investigation related to the Siddiqui investigation.
66. We have been told that the Siddiqui investigation produced a wealth of intelligence to assist other law enforcement agencies. Material from the Siddiqui investigation led to a further investigation into two British nationals suspected of assisting Libya in the development of a nuclear weapon. HMRC’s view is that disclosure of the relevant documents would have prejudiced that investigation. This goes hand-in-hand with the submission that the public interest in maintaining the exemption outweighs the public interest in disclosure because disclosure would prejudice future criminal investigations and gathering of intelligence concerning nuclear proliferation.
67. Mr. Terrell’s closed witness statement provided us with more information about the public interest considerations HMRC put forward in favour of maintaining the exemption in section 30 FOIA. Mr. Armstrong has not had the opportunity to see this statement or to comment on its contents. While we accept that Mr. Armstrong may feel that this is unsatisfactory, this is common practice in this Tribunal because of the nature of our jurisdiction and we are satisfied that it is necessary in this case. While we are, of course, not able to outline in this Decision the

evidence that he gave, we can indicate that we were assisted by the level of detail provided in the closed witness statement.

68. Mr. Armstrong submitted that the arguments advanced by HMRC in this regard are incompatible with the fact that HMRC included the disputed information in a jury bundle that was used in open court in the Siddiqui trial without any attempt to protect the alleged sensitivity of the documents at the time and without any apparent expression of concern about revealing them in a public trial. He submits that we should give this factor either no or little consideration when balancing the public interest considerations.
69. We do not know, as we have already indicated, exactly which documents were referred to or read in full during the trial, however, we can envisage circumstances in which the Prosecutor during the Siddiqui trial may have invited a witness and the jury to look at a particular document but deliberately not read it out in open court.
70. HMRC submits that disclosure of the disputed information would also prejudice the prevention and detection of criminal activities relating to nuclear proliferation. HMRC argues that the disputed information reveals a system of working by those involved in that network and also reveals certain aspects of what HMRC knows about the network and disclosure would assist those engaged in serious criminal activity to avoid detection by HMRC. Mr. Armstrong agrees with HMRC that Siddiqui worked as part of a network of persons involved in the illegal procurement of equipment to assist in the development of nuclear weapons programmes abroad but, as before, relies on the fact that the disputed information was included in the jury bundle. We accept the evidence we have been provided with by HMRC on this topic and consider that this is a strong factor in favour of maintaining the exemption.
71. HMRC argues that disclosure would damage the interests of third parties whose information is contained in the disputed information. The authorities we were

referred to did not particularly assist us. HMRC argues that case law⁴ emphasises the importance of maintaining the confidence of those who give evidence voluntarily to the investigative authorities for the purpose of criminal proceedings, and in particular the importance of not disclosing information so obtained otherwise than in the course of criminal proceedings, save where strictly necessary in the public interest. This is necessary to protect the interests of those who provide the information and, more generally, to ensure that there is public confidence in the criminal justice system and the free flow of information to investigative authorities is maintained.

72. We have a requirement to consider where the public interest lies; not whether disclosure is in the public interest, but whether the public interest considerations for maintaining the exemption outweigh those in favour of disclosure.
73. Although we draw some guidance from these earlier cases, we note that they were decided many years before the inception of FOIA. We adopt the approach taken by differently constituted panels of this Tribunal in other Appeals and we consider that we should apply caution when invited to apply dicta of the distinguished senior judges in these cases to questions we have to answer under the FOIA regime. There has been a significant change to the law and public authorities now operate in a different climate, subject to greater accountability to the public and transparency.
74. The disputed information contains a large amount of information concerning third party companies who did business with Siddiqui but who were innocent of his criminal activity. Evidence obtained from these companies was critical to the Siddiqui investigation. HMRC submits that disclosure of the disputed information would breach the trust the companies put in HMRC and could cause harm to their reputations, for example by the association of their names with Siddiqui and the illegal trade in goods destined for use in nuclear weapons programmes abroad.

⁴ *Taylor v Director of Serious Fraud Office* [1999] 2 AC 177 (HL) at pp210 C-H and 211 B-D; *Woolgar v Chief Constable of Sussex Police* [2000] 1 WLR 25 (CA) at p 29B-D; *Marcel v Commissioner of Police* [1992] Ch 255 (CA) p 256A-D

75. Mr. Armstrong submits that this argument presupposes that he would use the disputed information irresponsibly and would defame innocent businesses. He asks us to remember that he is an investigative journalist and not a member of the public. We remind ourselves that FOIA is “motive blind”. This means that the requestor of information from a public authority does not have to provide any reasons or justification for the request. It also means that any submissions about the proposed use of the information and the responsible approach of the requestor are also irrelevant. We do not interpret the argument of HMRC as levelling any aspersions on Mr. Armstrong.
76. HMRC also submits that disclosure of material provided by third parties would inhibit the free flow of information to HMRC. Mr. Armstrong submits that we should give this factor either no or little consideration when balancing the public interest considerations. He submits that those providing information to HMRC would have expected the documents they provided to be made public in the course of a trial and hence no prejudice to HMRC would be caused by the production of documents that have already been referred to in a public trial.
77. We have been told that the majority of the documents in the disputed information were obtained by HMRC under search warrants issued under section 8 Police and Criminal Evidence Act 1984, and the remaining documents were obtained voluntarily from individuals who provided statements to HMRC investigators. HMRC submits that it is clear that if HMRC is required to disclose documents obtained by it in confidence for the purpose of criminal investigation/proceedings, it could result in individuals and companies being less willing to co-operate in criminal investigations in the future.
78. We agree with HMRC that witnesses who provide information in the course of criminal investigations will legitimately expect that the information they provide will not be generally disclosed to members of the public by HMRC and will be kept confidential, save to the extent that it is to be adduced as evidence in the course of criminal proceedings or where they are informed to the contrary when providing the information. It is crucial for the effectiveness of its criminal investigation function that HMRC is able to maintain the trust of witnesses in this context.

79. Although the parties appear to be in agreement that section 18(1) of the Commissioners for Revenue and Customs Act 2005⁵ does not apply as it was not in force at the relevant time, we are interested to observe that Parliament has now legislated specifically against widespread disclosure of material gathered by HMRC.
80. The fact that the Independent Police Complaints Commission ('IPCC') is currently carrying out a criminal investigation regarding the conduct of an HMRC officer is said by HMRC to be another factor in favour of maintaining the exemption. We received further evidence and submissions on this matter in the closed documents not seen by Mr. Armstrong. We do not agree that this is a relevant factor to take into consideration when deciding where the public interest lies. In particular we take into account that this was not a relevant factor at the time the request for information was made and the fact that, in our opinion, we have been given conflicting evidence concerning the significance of the IPCC investigation.

Public interest in disclosure

81. Mr. Armstrong submits that either a) as the disputed information has entered the public domain by virtue of having been read out in full or referred to during the Siddiqui trial, the Tribunal must direct its disclosure or b) the fact that the disputed information has entered the public domain is a strong factor supporting the public interest in disclosure.
82. In addressing his submissions regarding the disputed information having entered the public domain, Mr. Armstrong concedes that there is no specific criminal case or other criminal legal authority on the present facts, or which identifies when a document has entered the public domain in the context of a criminal trial. He drew our attention to a number of authorities dealing with civil proceedings which he submitted were relevant. In light of the different rules of procedure and nature of the jurisdictions, we did not find these particularly helpful.
83. HMRC does not accept that all the disputed information has entered the public domain. It does agree that certain pieces of information from the documents that

⁵ Which prohibits disclosures of information by HMRC other than disclosures which are made for the purposes of HMRC functions or other specified purposes.

make up the disputed information were read out and can be said to have entered the public domain, but submits that the documents themselves and all the information contained in them are clearly not matters of public knowledge because they did not enter the public domain. HMRC stresses that it is an important consideration that the disputed information is not in the public domain in the form Mr. Armstrong seeks, that is, collated in a file which can be considered, analysed and cross-referenced with other material available to others privately or in the public domain.

84. We accept Mr. Armstrong's analysis of the authorities regarding the lack of distinction to be drawn between a document being read verbatim in court and a document read privately by a Judge, but we do not consider that the same must be the case in so far as material before a jury is concerned. A jury is charged with the grave responsibility of deciding whether a defendant is guilty or not of a criminal offence. We can envisage circumstances in which a jury is given access to material that is not to be disclosed in open court, albeit that it is not felt necessary to hold that part of the trial in private. The jury would necessarily have to view that material as part of the evidence, either for the Prosecution or the Defence, but it cannot be said that material has automatically entered the public domain.
85. We also consider that even if the disputed information had entered the public domain by virtue of having been referred to during the Siddiqui trial in 2001, it does not necessarily follow that it remains in the public domain. We agree with the observation of the Commissioner in the Decision Notice that knowledge obtained in the course of criminal trials is likely to be restricted to a limited number of people and such knowledge is generally short-lived.
86. We are not, therefore, satisfied that the disputed information is in the public domain. It follows that we do not agree with Mr. Armstrong that we must order disclosure of the disputed information for this reason. Even if the information had previously entered the public domain, that is not in itself conclusive of whether the public interest weighs in favour of disclosure, it is merely one consideration to be weighed in the public interest balance.

87. Mr. Armstrong asks us to consider this Appeal “against the background of the fundamental principle of open justice” and has cited a number of authorities highlighting the principle⁶. We readily accept that this is an important principle, however, we are not persuaded that it has any material relevance to the issues we must decide. We consider that it is misleading to suggest that this Appeal concerns the “conduct of litigation under the public gaze and under the critical scrutiny of all who wish to report legal proceedings” and that Mr. Armstrong “serves this critically important role of making available the benefits of open justice to members of the public.” We agree with the observation of HMRC that it is “disingenuous” of Mr. Armstrong to submit that HMRC’s failure to disclose the disputed information “is an unjust impediment to [his] ability to report the Siddiqui trial”. This Appeal concerns a request made under FOIA in 2005 for material used during a trial in 2001; this is not a request for information to assist the press in understanding proceedings or ensuring that there is a fair and accurate report of the trial itself.
88. We have been provided with a copy of the CPS Protocol on “Publicity and the Criminal Justice System”. The stated aim is “to ensure greater openness in the reporting of criminal proceedings”. Mr. Armstrong draws our attention in particular to the section which reads:

“Prosecution material which has been relied upon by the Crown in court and which should normally be released to the media, includes:... Maps/photographs (including custody photographs of defendants)/diagrams and other documents produced in court.”

He argues that this wording is sufficiently wide to cover all documents that are referred to in open court and/or are contained in the jury bundle or other bundles used in court that contain those documents.

89. We have to weigh that guidance against the evidence of David Green QC, an experienced Prosecutor. We are of the opinion that the Protocol exists to ensure that the media are able to present a fair and accurate report of court proceedings.

⁶ *Scott v Scott* [1911-1913] All ER 1; *Re Guardian Newspapers Ltd sub nom Chan U Seek v Alvis Vehicles* [2005] 3 All ER 155; *R v Secretary of the Central Office of the Employment Tribunals (England and Wales) Ex p Public Concern* [2000] I.R.L.R. 658.

We are satisfied that the media may be given access to certain documents at the discretion of the relevant Prosecutor, but that this access would not be widespread to include being provided with a copy of all documentary exhibits referred to during a trial. In any event, we remind ourselves that this is a request for information under FOIA and is not connected with the fair and accurate reporting of a current trial.

90. Mr. Green QC states that members of the public do not usually have access to documents of the type sought by Mr. Armstrong; members of the public do not have access to the jury bundle and although some documents may be released to the media during the trial (such as maps, photographs) this is to assist with accurate reporting of the trial. Mr. Armstrong suggests that members of the public *are* permitted to inspect the trial bundle but, while this may be the case for civil matters, we are satisfied that it is not common practice in criminal trials.

91. In his witness statement, Mr. Armstrong submits that the disputed information

*“**could** reveal crucial new insights into the nuclear smuggling ring. Faxes introduced into evidence **could** identify heretofore-unknown middlemen; invoices **may** point to suppliers; and payment records **could** expose financial institutions complicit in the smuggling operation. This information **could** be crucial in helping to reveal continuing trade in dangerous nuclear technology.”* (our emphasis)

92. It is clear to us from this that Mr. Armstrong is not concerned with the accurate reporting of a trial held at a Crown Court in 2001 but is speculating as to what other avenues of investigation could possibly be revealed from a close study of all the documentary evidence.

93. Criminal investigations are the responsibility and statutory duty of regulated bodies, such as the police or HMRC. We are not persuaded that there is public interest in disclosing material that may lead to the discovery of further offences or other matters requiring criminal investigation. We also consider that there is strong public interest in ensuring that the operations of authorities which are responsible for conducting criminal investigations are not jeopardised or thwarted through disclosures of information under FOIA.

94. Mr. Armstrong also argues that disclosure of the disputed information would “assist public understanding of an issue that is subject to current national debate” and that there is public interest in the government’s relationship with Pakistan. It is not clear if by “national” and “government” he is referring to the USA or the UK. HMRC does not deny that nuclear proliferation is an important subject, and that both the Siddiqui trial and investigation were matters on which the public would wish to be informed, but submits that the public interest in openness and accountability in respect of the Siddiqui investigation has already been served by the trial at which all the relevant information was considered and examined in public and to which the media had full access. The fact that the media might be interested in obtaining further information than was available to them by attending the Siddiqui trial cannot, it submits, outweigh the important public interest factors which weigh in favour of maintaining the exemption.
95. We are also satisfied that there is considerable public interest in achieving transparency in respect of both the criminal justice system and operations of investigatory authorities such as HMRC.
96. We remind ourselves again that FOIA is “motive blind” and that disclosure under FOIA is disclosure to the whole world.
97. We agree with the submission of HMRC that by contrast with the very strong public interest reasons for maintaining the exemption there is no significant public interest in disclosure of the information sought. We are satisfied that the public interest in maintaining the exemption does outweigh the public interest in disclosure.
98. We did give some consideration to the suggestion by Mr. Armstrong that the disputed information could be disclosed in a redacted form, to avoid disclosing “personal data” or to avoid revealing matters HMRC is concerned about, such as interview techniques. We note that we have received no assistance as to how this might be done in practice. In any event, such is the scale and diversity of the material that any attempt at redaction, even if it were practical which we seriously doubt, might well lead to the early engagement of section 12 FOIA (absolute exemption where cost of compliance exceeds appropriate limit).

Conclusion and remedy

99. For the reasons set out above, we have concluded that the disputed information is reasonably accessible to Mr. Armstrong. The exemption in section 21 FOIA is therefore engaged and this is an absolute exemption from disclosure.
100. If our conclusions regarding section 21 are wrong, we conclude that the exemption in section 30 FOIA is engaged and that the public interest in maintaining the exemption outweighs the public interest in disclosure.
101. In light of these conclusions, we consider that the Commissioner's Decision was not wrong in law and therefore have not continued to consider the application of sections 41 or 44 FOIA.
102. The Tribunal dismisses the Appeal and issues a Substituted Decision Notice.
103. Our decision is unanimous.

Signed:

Annabel Pilling

Deputy Chairman

Date: 5th October 2008