



IN THE FIRST-TIER TRIBUNAL

Appeal No: EA/2013/0241-

0246

**GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)**

ON APPEAL FROM:

**The Information Commissioner's Decision Notices No.s: FS50503577, FS50503572,
FS50503585, FS50492218, FS50503584, FS50503589 Dated: 10 October 2013**

Appellant: Donnie Mackenzie

Respondent: The Information Commissioner

Heard on the papers: Field House

Date of Hearing: 23 May 2014

Before

Chris Hughes

Judge

and

Suzanne Cosgrave and John Randall

Tribunal Members

Date of Decision: 7 July 2014

Date of Promulgation: 8 July 2014

Subject matter:

Freedom of Information Act 2000

REASONS FOR DECISION

Introduction

1. In the latter part of 2012 the Appellant in these proceedings, Mr Mackenzie, made a series of requests under the Freedom of Information Act (“FOIA”) of the Ministry of Defence (“MoD”) concerning “Information Operations”. In dealing with these requests the MoD has confirmed that it has relied on a definition of Information Operations contained in a document which is available online:-

Information Operations is defined as: Co-ordinated actions undertaken to influence an adversary or potential adversary in support of political and military objectives by undermining his will, cohesion and decision-making ability, through affecting his information, information based processes and systems while protecting one’s own decision-makers and decision-making processes.

2. In summary form the requests were for:-
 - Budget figures for UK and overseas activities including with respect to electronic activities (FS50503577)
 - Target lists (FS50503572)
 - The number of serving or former UK intelligence, police or military personnel on target lists (FS50503585)
 - The number and nature of Information Operations in the UK (FS50492218)
 - Details of the involvement of contractors and NGOs in Information Operations (FS50503584)
 - Lists of all Information Operations or similar activities taking place in the UK and confirmation of whether there had been or were any planned changes to the terminology used to describe these activities (FS50503589). The MoD confirmed that the terminology was unlikely to change.

3. In each case the MoD responded by neither confirming nor denying that information was held and relying on s23 (information supplied by or relating to bodies dealing with security matters) and s24 (national security) FOIA.
4. In a series of decision notices the Respondent in these proceedings the Information Commissioner “ICO” upheld the stance of the MoD. In so doing the ICO relied on the structure of FOIA as it gives effect to the “neither confirm nor deny “principle.

The ICO’s approach

5. In each decision notice the ICO confirmed that he did not know whether any of the information sought was actually held and it was unnecessary for him to know this in order to apply the statutory framework to requests such as this.
6. S 23(3) FOIA lists various bodies to which s23 applies – these include the Security Service (MI5), the Secret Intelligence Service (MI6), GCHQ, Special Forces and certain national police agencies. S23(1) provides that information is exempt information *if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)*. The general duty which public authorities have state whether or not they hold information is disapplied by s23(7) if compliance *would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or which relates to, any of the bodies specified in subsection (3)*.
7. S24(1) provides that any information which does not fall within s23 is also exempt from disclosure if such exemption is required in order to safeguard national security. If such exemption from disclosure is necessary, then s24(2) again provides that the public authority is exempt from the obligation to confirm or deny that it holds the information.
8. With respect to the s23 exemption (which is an absolute exemption; not subject to a public interest test) the Commissioner argued that the confirmation of whether information was or was not held would reveal information about a security body since *whether or not a security body is interested or involved in a particular issue is in itself information relating to a security body*. He argued that “relates to” is a term which should be interpreted broadly. The factual question of whether information does or does not relate to a security body is a question to be decided on the balance of

probabilities. The ICO concluded that there was a close relationship between the MoD *and the security services* and given *the* subject matter of the request, on the balance of probabilities, any information would relate to bodies identified in s23(3).

9. With respect to any requested information on the subject of “Information Operations” not relating to one of the listed bodies the Commissioner concluded that there was a risk of harm to national security by the disclosure of such information and that only the consistent use of neither confirm nor deny would be effective in protecting national security. He found that *withholding information in order to ensure the protection of national security can extend, in some circumstances, to ensuring that matters which are of interest to the security bodies are not revealed*

Mr Mackenzie’s appeal

10. Mr Mackenzie argued;-

- with respect to the s23 exemption that he had made specific requests for documents *which do not infringe on external organisations* he stated that much information was already in the public domain;
- with respect to the s24 exemption he alleged that there was in published documents which originated from the MoD an admission of misconduct and that therefore it was necessary to disclose the information. He also put together quotations from a range of sources which he considers are relevant to that argument which he asserted amounted to state sponsored criminality
- that the tribunal should see all the information which he had sought

Legal submissions and analysis

11. The subject matter of the information sought “Information Operations” is set out in paragraph 1 above. In this context it is helpful to consider the statutory basis of key organisations listed in s23(3) The Security Service Act 1989 defines the function of the MI5 as (S1(2)):-

The function of the Service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.

12. The Intelligence Services Act 1996 sets out the remit of MI6 (S(1)):-

(1) There shall continue to be a Secret Intelligence Service (in this Act referred to as “the Intelligence Service ”) under the authority of the Secretary of State; and, subject to subsection (2) below, its functions shall be—

(a) to obtain and provide information relating to the actions or intentions of persons outside the British Islands; and

(b) to perform other tasks relating to the actions or intentions of such persons.

(2) The functions of the Intelligence Service shall be exercisable only—

(a) in the interests of national security, with particular reference to the defence and foreign policies of Her Majesty’s Government in the United Kingdom; or

(b) in the interests of the economic well-being of the United Kingdom; or

(c) in support of the prevention or detection of serious crime.

13. It is immediately apparent that the function of information operations *to influence an adversary or potential adversary in support of political and military objectives*, is a similar formulation to the role of MI6 of performing *other tasks relating to the actions or intentions of [persons outside the British Islands] ... in the interests of national security with particular reference to the defence and foreign policies of Her Majesty’s Government..*

14. Similarly the *while protecting one’s own decision-makers and decision-making processes* matches very closely the function of MI5 of protecting *from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means.*

15. The definition of Information Operations therefore echoes precisely the statutory remits of MI6 and MI5 with respect to influencing the actions and intentions of foreign powers and the protection of parliamentary democracy. Any information requested about Information Operations therefore is a request for information about these s23(3) bodies since if they are actually carrying out any such Information Operations (which the tribunal does not know) it is information about them, if they are not, then it is information which relates to them since it relates to their statutory functions and duties and the tribunal is satisfied, on the balance of probabilities, that they will have knowledge or oversight of such activities (if they exist).

16. The information requested (from the definition provided in paragraph 1) is in any event about national security - the protection of the UK from external threat or the maintenance of civil government from subversion. While he has made a number of associations and attempted construct a tapestry of suspicions and inferences alleging gross criminality, Mr Mackenzie has produced no evidence to substantiate these assertions. Accordingly the Tribunal does not have any material to weigh in the scales of public interest. Therefore even if the information does not fall within s23 it is protected from disclosure by s24 and the same regime of “neither confirm nor deny” applies.
17. While Mr Mackenzie has argued that the tribunal should look at all the information he has requested (if it exists), this is to misinterpret the role of the Tribunal. It is the role of the tribunal to consider whether the Commissioner’s decision notice is in accordance with the law. The Tribunal is satisfied that the notice is in accordance with the law and the appeal is dismissed.
18. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 7 July 2014