



**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
(INFORMATION RIGHTS)**

**Appeal No: EA/2014/0011**

**BETWEEN**

**MR NEIL OLIVER**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**First Respondent**

**and**

**POLICE SERVICE OF NORTHERN IRELAND**

**Second Respondent**

**Before**

**Brian Kennedy QC  
Dave Sivers  
Paul Taylor**

**Representation:**

**For the Appellant:**

**Neil Oliver**

**For the First Respondent:**

**Laura John of counsel**

**For the Second Respondent:**

**Peter Coll of counsel**

**DECISION**

The Tribunal refuses the Appeal.

We direct that the requested information should not be disclosed and the Closed Bundle should remain confidential.

**Introduction:**

[1] The appeal is in relation to the application of Sections 23(5) and 24(2) of the Freedom of Information Act 2000 (“FOIA”)

[2] The impugned decision under appeal is the Decision Notice (“DN”) from the First Respondent dated the 17 December 2013: Reference FS50499821 which sets out clearly the issues engaged, the scope of the case and the detailed analysis and reasons for the Decision reached.

**REASONS**

**[3] Background to the Appeal:**

1. The factual background to the Appeal is set out in paragraphs 1 - 10 of the DN and the outcome was that the First Respondent, (with detailed reasons set out therein), found that the Second Respondent was entitled to rely on sections 23(5) and 24(2) of FOIA.
2. On 10 January 2013, the Appellant requested from the Second Respondent the following information;  
  
*“1. Are there on-going police investigations into the Omagh bombing? And if so,  
2. How many detectives are involved in the case? And 3.  
3. How many have been over the last three years?”*
3. Ultimately the Appellant complained to the First Respondent on 13 March as a result of dissatisfaction and sought a review on 11 April 2013.
4. The second respondent considered the request under FOIA, on review, and on 24 May 2013:
  - a) It provided the information sought in Request 1., and confirmed that an investigation into the Omagh bombing is on-going; and
  - b) It refused Requests 2 and 3 under section 30(1)(a) FOIA . Although not specifying which subsection it relied upon, it did not either confirm or deny the requested information was held.

[4] The First Respondent investigated the complaint during which the Second Respondent indicated they wished to rely on sections 23(5) and 24(2) and section 30(3), in order to neither confirm nor deny that it held the disputed information.

[5] The DN, subject matter of this appeal has been helpfully summarised by counsel for the First Respondent thus;

- a) The Second Respondent could rely on sections 23(5) and 24(2) FOIA, as:
  - i. where a request touches on matters of national security, a public authority can claim both exemptions without specifying which of them applies, in order to

obscure the involvement (or non involvement) of a security body designated: in section 23(3) FOIA. (See DN Para 16)

ii. the nature of the Second Respondents investigation into the Omagh bombing means the information held, if held, might relate to the involvement of one or more of the security bodies designated: under section 23(3) FOIA (see DN P18)

iii. the investigation of terrorist activities is relevant to safeguarding national security: under section 24(2) FOIA (See DN Para 19 -20)

iv. the public interest lies in favour of neither confirming nor denying whether the information is held. The Second Respondent's investigation is on-going, and releasing information that may reveal its scope, stage and focus could impact on both the investigation, and national security efforts more widely: (See DN P 29 – 33).

b) In view of his conclusion that sections 23(5) and 34(2) are engaged, it was not necessary to consider an application under section 30 FOIA: (SEE DN P 34).

c) The Second Respondent had failed to comply with its obligation under section 17 FOIA to provide a reasoned refusal notice: (See DN Ps 40 – 41).

#### **[6] The Legal Framework:**

The basic presumption, under section 1(1) (a) & (b) FOIA, in favour of confirmation of the existence, and disclosure of information is subject to certain exemptions, set out in Part II of FOIA. where an exemption states that a public authority is entitled to refuse to confirm or deny whether it holds the information requested, section 2(1) FOIA provides that the presumption in favour of disclosure does not apply. The relevant exemptions in Part II from the right to be informed whether a public authority holds the information requested as follows:

a) **Section 23(5)** provides that a public authority is entitled to refuse to confirm or deny whether it holds the information requested where to do so would involve disclosure of information provided by a body dealing with security matters:

***S.23: Information supplied by, or relating to, bodies dealing with security matters.***

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

*(2) A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of the fact.*

*(3) The bodies referred to in subsections (1) and (2) are (a) the Security Service, ---,*

*(4) -*

*(5) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection(3).*

- b) **Section 24(2)** provides that a public authority is entitled to refuse to confirm or deny whether it holds the information requested where it is necessary for the purpose of safeguarding national security:

**S.24. National Security:**

- (1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.
  - (2) The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.
  - (2) A certificate is signed by a Minister of the Crown certifying that exemption from section 1(1)(b) or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of safeguarding national security shall, subject to section 60, be conclusive evidence of that fact.
  - (4) A certificate under subsection (3) may identify the information to which it applies by means of a general description and may be expressed to have prospective effect.
- c) **Section 30(3)** provides that a public authority is entitled to refuse to confirm or deny whether it holds the information requested where that information (or would be if it were held) exempt information under Section 30:

**S. 30 Investigations and proceedings conducted by public authorities:**

- (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.
  - (c) any criminal proceedings which the authority has power to conduct.
- (2) Information held by a public authority is exempt information if --:
  - (a) it was obtained or recorded by the authority for the purposes of its functions relating to –:
    - (i) Investigations falling within subsection (1)(a) or (b),
    - (ii) criminal proceedings which the authority has power to conduct,
    - (iii) investigations (other than investigations falling within subsection (1) (a) or (b) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or

(iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and

(b) it relates to the obtaining of information from confidential sources.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) or (2).

### **[7] The Issues under Appeal:**

The Appellant argues, generally, as can be seen in his grounds of Appeal that the DN is not in accordance with the facts, does not take adequate cognisance of “precedent” and that the reasons given by the First Respondent in his exercise of the Public Interest test were inadequate

The First Respondent summarises the more specific grounds of appeal thus:

- a) In respect of S.23(5), if a Ministerial certificate was not obtained under S. 23(3) then S. 23(5) is not engaged;
- b) Section 24(2) is not engaged, as “national security” has been interpreted too widely;
- c) The public interest favours disclosure under Section 24(2).

### **[8] The Evidence:**

This Tribunal had the benefit of evidence from Detective Agnew of the P.S.N.I. C2 Serious Crime Branch, senior investigating officer into the Omagh Bombing since August 2011. He decided to release minimal information about the investigation by reasons of the sensitivity. He confirmed that he has met with the victims’ families and provided them with some confidential information about his investigation. He however gave evidence about his concerns about more general revelation of information about his investigation. He specifically stated that release of any specific information about the investigation would have impeded on the ability of Police to take action on suspects.

When asked why the P.S.N.I. had adopted the not confirm nor deny (“NCND”) stance in response to the request, he stated: *“I believe there would have been a personal risk to the investigation, to myself and other individuals --by revelation of involvement at all.”* This, as we interpret it, is direct and incontrovertible evidence that a positive or negative response to the request, in this case, would prejudice the investigation.

He confirmed that previous announcements that there was no investigation had assisted him, as suspects were not alerted and less vigilant. In answer to a direct question from the Tribunal panel, he explained: *“It may have been expected that investigation was on going but further information would be detrimental.”* And added that in his view that no information of the inquiry should be released as it can and in his experience does assist suspects.

His evidence was that, in his experience, this is the sort of investigation that the Security Services might be involved in. Therefore, provided section 24(2) is engaged, and it is justified by the public interest, the P.S.N.I. is entitled to rely on sections 23(5) and 24(2) without it specifying which of them applies. In the impugned DN the First Respondent has accepted this argument and found the public interest favoured the position adopted by the Second Respondent and gives detailed reasons for his decision. The Appellant has not

persuaded the Tribunal that this decision was wrong. On the contrary this Tribunal agree and adopt the reasoning in paras 13 to 33 of the DN.

**[9] Conclusions:**

a) We do not accept the Appellants' argument that; if a Ministerial certificate was not obtained under S. 23(3) then S. 23(5) is not engaged; Sections 23(2) and 24(3) make such a certificate "*conclusive evidence of*" the applicability of sections 23(2) and 24(3). We agree with the Respondents' contention that it is not a pre-requisite to the application of those sections.

b) The Tribunal have substantial information in the open bundle, and have heard evidence, in support of the NCND stance taken by the Second Respondent. We have also been referred to the decision in All Party Parliamentary Group on Extraordinary Rendition V IC (EA/2011/0149,150 AND 151) at paras 73 -114, which sets out in detail the operation of sections 23(5) and 24(2), and the circumstances in which a public authority is justified in relying on the two together in order to mask the involvement/non-involvement of a body designated under section 23. See in particular paras 93 – 114.

We find that there is potential for information, which might be held in this case, to relate to the involvement of a security body designated in section 23(3). We agree that the P.S.N.I. and its predecessor had responsibility for National Security in Northern Ireland until the Security Service, MI5, which is designated in section 23(3)(a) took over in 2007 and that the Omagh bombing was a significant breach of national security, and an investigation into it might potentially involve the Security Service.

We accept that section 24 is clearly engaged in this case for the reasons given and in particular that the term "National security" encompasses investigations into breaches of national security, as well as attempts in advance to prevent such breaches. We too, reject the Appellant's contention that this interpretation is "*far too wide*".

c) We agree that on the facts of this case, the public interest in confirming or denying the information is held does not outweigh the public interest in neither confirming nor denying whether the requested information is held, under section 24(2). We accept that there is substantial public interest inherent in safeguarding national security, and in maintaining the exemption in section 24 when it is engaged. The P.S.N.I. has confirmed that its investigation is on-going, and the evidence of Detective Agnew before this Tribunal confirms responding to this request, other than by way of NCND, would prejudice this investigation.

Furthermore the Appellant has failed to provide any significant evidence that disclosure of the requested information, if it was held, would significantly enhance the public interest.

We note the First Respondent recognises the public interest in particular in the families of victims of the Omagh bombing being informed (and reassured) about the investigation, and he understands the P.S.N.I. are, in this case, (confirmed by the evidence before this Tribunal) are in liaison with the victims families. The First Respondent in making his decision, (the subject of this appeal) is of the view that these communications, which are not to the world at large, are a more appropriate forum for information on the investigation to be imparted, insofar as that can be done without prejudicing the investigation. This Tribunal adopts this reasoning in support of the public interest test on disclosure on the particular facts of this case. We cannot and will not venture into other occasions where different factual circumstance may have pertained and described as "precedents" by the Appellant. Each case must be decided on its own merits.

For the reasons give above we find that the Appellant has failed to establish that the First Respondent was wrong in coming to his conclusions as set out in the DN.

**[10]** In the factual circumstances outlined above and for the reasons given the Tribunal unanimously refuse this appeal.

Signed:

Brian Kennedy QC  
18th July 2014.