



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Case No. EA/2014/0259

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50538474
Dated: 18 September 2014**

Appellant: MARC OWEN JONES
1ST Respondent: INFORMATION COMMISSIONER
2ND Respondent: FOREIGN AND COMMONWEALTH OFFICE
Heard at: FIELD HOUSE, LONDON
Date of hearing: 10 AND 11 MARCH 2015
Date of decision: 29 APRIL 2015

Before

ROBIN CALLENDER SMITH
Judge

and

ANNE CHAFER and DAVE SIVERS
Tribunal Members

Attendances:

For the Appellant: Samuel Jacobs, Counsel instructed by Deighton Pierce Glynn

For the 1st Appellant: Written submissions from Laura John, Counsel instructed by the Information Commissioner

For the 2nd Appellant: Rory Dunlop, Counsel instructed by Government Legal Department (GDL).

GENERAL REGULATORY CHAMBER

INFORMATION RIGHTS

Subject matter: FOIA 2000

Qualified exemptions

- International relations s.27

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal in part – for detailed reasons disclosed in Confidential Annex A - and substitutes the following decision notice in place of the decision notice dated 18 September 2014

SUBSTITUTED DECISION NOTICE

Dated 29 APRIL 2015

Public authority: FOREIGN AND COMMONWEALTH OFFICE

Name of Complainant: MARC OWEN JONES

The Substituted Decision

For the reasons set out in the Tribunal's open determination - and detailed further in Confidential Annex A - the Tribunal allows the appeal and substitutes the following decision notice in place of the decision notice dated 18 September 2014.

Action Required Disclosure of the information detailed in the Confidential Annex within 31 days.

29 April 2015
Robin Callender Smith
Judge

GENERAL REGULATORY CHAMBER**INFORMATION RIGHTS****REASONS FOR DECISION****Background to the Appeal**

1. Mr Marc Owen Jones (the Appellant) is a PhD candidate at the School of Government and International Affairs at Durham University. His area of specialist study examines political repression in Bahrain. He has published a number of articles and papers on this topic. He is particularly interested in scrutinising the British role – both historical and contemporary – in relation to Bahrain and has conducted a substantial amount of archival search in respect of this.

2. On 10 June 2013 he asked the Foreign and Commonwealth Office (FCO)

I am writing respectfully to request the release of a retained section of a report entitled 'Bahrain: Internal Political Situation 1977' – File No. NBB014/1. The National Archives record for this retained extract is FCO 8 2827 [subsequently clarified on 17 June 2013 as 8 2872] Folio 4.

I believe the piece concerns a conversation between DE Tatham and the head of Bahrain's Special Branch. It was dated 1st December 1977.

3. He received a response on 8 July 2013 explaining that the FCO considered that section 27 Freedom of Information Act 2000 (FOIA), a qualified exemption, was engaged in relation to the requested information but stating that the FCO needed an additional 20 working days to consider the balance of the public interest test. The FCO sent their reply on 2 August 2013 stating that the requested information remained sensitive under section 27(1)(a) and that the United Kingdom's bilateral relations with countries in the Gulf region would be compromised if the information was released.
4. The Appellant asked for an internal review of the decision on 4 August 2013 and had to chase this request on 11 January 2014 because there

had been no response from the FCO. Having received no response, he contacted the FCO for a third time on 13 February 2014 and received an acknowledgement the same day advising that they would aim to respond in 20 working days. He contacted the FCO for a fourth time on 31 March 2014 asking for an update on the status of the review as 45 days had now elapsed.

5. The Appellant contacted the Commissioner on 16 April 2014. He was dissatisfied with the FCO's failure to commence an internal review in response to his emails dated 4 August 2013 and 11 January 2014.
6. After the Commissioner began to investigate the Appellant's complaint the FCO provided the Appellant with a response to the internal review dated 8 May 2014. The FCO maintained that the requested information was still exempt from disclosure on the basis of section 27 (1) (a) FOIA.
7. In May 2014, the Appellant made a further complaint to the Commissioner in relation to the FCO's decision to withhold information.
8. On 20 June 2014, the FCO provided the Appellant with a redacted copy of the information and maintained that the redacted information was exempt from disclosure on the basis of section 27 (1) (a) FOIA and that some of the information was also covered by section 40 (2) and 40(3).
9. The substance of this appeal relates to the redacted information that was withheld by the FCO on the basis of section 27(1) (a) and the potential damage to international relations. The section states:

s.27 International Relations

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

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

(2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

(3) For the purposes of this section, any information obtained from a State, organisation or court 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, organisation or court to expect that it will be so held.

(4) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)—

(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or

(b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

(5) In this section—

“international court” means any international court which is not an international organisation and which is established—

(a) by a resolution of an international organisation of which the United Kingdom is a member, or

(b) by an international agreement to which the United Kingdom is a party;

“international organisation” means any international organisation whose members include any two or more States, or any organ of such an organisation;

“State” includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom.

The complaint to the Information Commissioner

10. The FCO maintained to the Commissioner that disclosing the redacted information would – rather than simply being likely to – damage its relations with Bahrain. It argued that, despite its age, even information dating back to 1977 could have this effect when taken into account by the respective States considering their current relationship.

11. The Commissioner considered that, for prejudice-based exemptions like section 27 (1) (a) to be engaged, three criteria needed to be met:

- (1) The actual harm which the public authority alleged would, or would be likely, to occur if the withheld information was disclosed had to relate to the applicable interests within the relevant exemption;
- (2) The public authority had to be able to demonstrate some causal relationship existed between the potential disclosure of the information being withheld and the prejudice which the exemption was designed to protect. In addition, the resultant prejudice that was alleged had to be real, actual or of substance; and
- (3) It was necessary to establish whether the level of likelihood of prejudice being relied on by the public authority was met – i.e. disclosure “would be likely” to result in prejudice or disclosure “would” result in prejudice. In relation to the lower threshold the Commissioner considered that the chance of prejudice occurring had to be more than a hypothetical possibility; there had to be a real and significant risk. With regard to the higher threshold that placed a stronger evidential burden on the public authority. The anticipated prejudice had to be more likely than not.

12. The Commissioner accepted that the potential prejudice to the UK’s relations with Bahrain fell within interests that the exemption was designed to protect, that there was a causal link between the potential disclosure of the withheld information and the exemption which was real and of substance and that disclosure could result in making relations more difficult and that – in the circumstances of the case – the higher threshold of likelihood was met in terms of prejudice to the U.K.’s relations with Bahrain. He emphasised that, having considered the information, he had fully taken into account that the requested document dated from 1977.

13. Because section 27 was a qualified exemption, the Commissioner went on to apply the public interest test to see whether – in all the circumstances of the case – the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

14. In terms of maintaining the exemption the FCO had argued that it was clearly against the public interest to harm the UK’s ability to maintain effective bilateral relations with countries in the Gulf region, such as Bahrain, with whom the UK had enjoyed a stable and strong relationship as a trading and regional partner. The FCO had pointed out that it was providing an extensive programme of technical and diplomatic assistance in support of the reform programme Bahrain had embarked on since the

unrest in 2011. The FCO had argued that its ability to provide such a level of reform assistance was based on the strong relations, trust and confidence the UK had established with Bahrain. There were significant British defence interests in Bahrain which acted as an amenable host to the Royal Navy and RAF. Any impact on the UK's relationship with Bahrain could harm UK interests in other areas such as immigration and consular services where British interests required – or would benefit from – Bahraini assistance.

15. In terms of disclosing the information, the FCO acknowledged that it would add to the public's understanding of, and knowledge on, the subject. It accepted that there was a public interest in a greater understanding of the UK's foreign relations and the information could also aid the better historical understanding of Britain's conduct.
16. The Appellant had referenced involvement of British colonial forces in the torture of Kenyans during the Mau Mau uprising in the 1950s. That was relevant because the requested document was a record of the meeting with the late Ian Henderson who, in 1977, was the Head of the Bahrain Special Branch. Prior to that, Mr Henderson had served as a colonial police officer in Kenya in the 1950s and was directly involved in the suppression of the Mau Mau uprising.
17. In 2000 it had been announced that the British government had launched an investigation into allegations about Mr Henderson's complicity in the torture of detainees and prisoners in Bahrain. The investigation was dropped in 2001 and Mr Henderson had always firmly denied the allegations.
18. The Appellant explained that, given that context, he was concerned that important evidence was being withheld about the possibility of British complicity in egregious human rights acts against Bahraini subjects
19. The Commissioner concluded that, in the light of the considerable and notable weight to be attributed to the public interest in avoiding prejudice to the UK's relations with Bahrain, the public interest in maintaining the

exemption outweighed the public interest in disclosing the redacted information.

The appeal to the Tribunal

20. The Appellant's Grounds of Appeal made the following points in summary:

- (1) The Commissioner had not asked the Appellant for more detail about his reasons for seeking the information. If he had been asked he would have explained that the background related to Ian Henderson who had been accused of torture directly and indirectly by a number of Bahrainis and that the allegations were investigated by the British police.
- (2) The Appellant was seeking disclosure of the document because it concerned the internal security situation in Bahrain and covered a meeting between Mr Henderson and an FCO official David Tatham. The Appellant believed that the unredacted document might have important information relating to Mr Henderson's role and his activities in Bahrain. Information already released alluded to serious issues within the Security Services and the unredacted material could shed more light on the reasons for that, since such issues could have contributed to abuses in Bahrain. In 1977 there were 11 British police officers including Mr Henderson in Bahrain and the UK clearly had a role in events in Bahrain.
- (3) The Appellant believed that Mr Henderson knew important information that should probably have been passed on to specific authorities, some of which had since been released. There might be unknown important episodes in the redacted information which were not yet known to the public
- (4) The Appellant submitted that, on grounds of procedural fairness, he had not been given the opportunity to respond to any of the reasons given by the FCO before the Commissioner came to his conclusion. He maintained that the Commissioner's decision lacked sufficient information and was procedurally unfair and asked that

more information be released or fuller reasons given for it being withheld so that he could properly respond to the refusal.

- (5) The Appellant maintained that the Commissioner had not applied the correct approach to the public interest test. To suggest that disclosing the full record of a conversation which had taken place nearly 40 years ago – where one of the parties was now deceased – would damage the extremely close and durable relationship between Bahrain the UK which had lasted for decades was “completely absurd”.
- (6) In terms of the public interest favouring the disclosure of the information there were two particular factors that were highlighted.
- (7) The first related to the transparency and accountability of the actions of the British Government in relation to Bahrain. Britain had a long history of close relations with Bahrain against a background of allegations of egregious human rights abuses including torture and extra-judicial executions. There was public concern that the British Government had insulated the Government of Bahrain from criticism, and may have concealed evidence of serious wrongdoing. Although the Appellant was a British citizen he was concerned that citizens of Bahrain also had an interest in the transparency and accountability of their respective governments on this issue.
- (8) The second factor related to the removal of a plausible suspicion of wrongdoing which applied in relation both to Mr Henderson and the UK government officials in the case. The Appellant believed that evidence could shed light on questions of complicity by these actors – or otherwise in egregious acts – against citizens of Bahrain. The information could have the potential to remove the plausible suspicion of wrongdoing while matters were still within collective memory but at a time period sufficiently far removed to reduce embarrassment to those involved.

21. The Tribunal heard oral evidence from Mr Edward Oakden and from the Appellant. The Tribunal was able to ask questions of the former in both the open and the closed sections of the appeal hearing and of the Appellant during the open session.
22. Mr Oakden adopted his statement dated 13 February 2015 and gave his evidence as a senior diplomat based at the FCO and Director of the Middle East, a post he had held since August 2013. He had joined the FCO in 1981 and had worked in various posts both in and outside the Middle East including as British Ambassador to the UAE in 2006 – 2010. He had extensive experience of Middle Eastern matters.
23. His evidence given at the open portion of the appeal was to the effect that the extent to which HM Government had the trust and support of the Bahraini Government directly affected its ability to achieve national defence interests both within Bahrain and the wider region. Defence cooperation was a key pillar of the bilateral relationship and there was successful cooperation across a range of other areas including human rights and political reform assistance, security and counter-terrorism, trade and investment.
24. Bahrain was a generous host of the Royal Navy and the Royal Air Force, providing basing and overflight rights free of charge. In December 2014, the Foreign Secretary signed a Memorandum of Understanding with the Government of Bahrain to establish a more permanent naval base in Bahrain, which the King had agreed to fund. The new agreement provided improved facilities for UK Royal Navy personnel and allowed the UK to expand its operational effectiveness in a volatile region and would provide for the future a forward base for naval operations.
25. If the Bahraini authorities concluded that confidential information exchanged during the course of UK reform assistance projects could now be released, they could be less inclined to continue to accept such assistance. This had happened in other countries. Disclosure of material would then cause damage to the UK's initiatives to enhance human rights,

civil liberties and good governance at a time when the UK was providing increasingly sensitive assistance on police reform in the security sector.

26. He maintained in cross-examination – and in the closed evidence that he gave to the Tribunal – that the information withheld, despite its age, could still be harmful to relations between the UK government and Bahrain. Also the concerns of one Gulf state were keenly felt by others in the region.
27. The Appellant adopted his written witness statement dated 28 November 2014 as the foundation for his oral evidence.
28. In terms of the political and historical context he pointed out that British officials had admitted to using violent methods to extract confessions. Charles Belgrave, a British official who worked in Bahrain between 1926 and 1957 (and his multiple roles included financial adviser to the Ruler, commandant of the police and judge) used torture on detainees in a number of high-profile cases as did his British colleague Captain Parke. Methods included beatings, sleep deprivation and on one occasion the placing of lighted pieces of paper between the toes of the detainee. Officers like these shielded the Al Khalifa family from justice when they committed egregious acts.
29. After leaving Kenya where he had a role in combating the Mau Mau insurgency, Mr Henderson became Bahrain's Head of Security in 1966 and retired in 2000. In 1971, following Bahrain's independence, death by torture appeared to increase. Between 1976 and 1986 eight people died in police custody. During the 1990s, British officials including Mr Henderson still worked in the Bahrain security forces. The Metropolitan police had conducted an investigation into allegations of torture against Mr Henderson and, in February 2008, they concluded that there was no realistic prospect of conviction.
30. One of the reasons he was pursuing the appeal was because he believed that transparency about the events was key to healing fractures in Bahraini society and achieving reconciliation. That was especially the case with those events that had happened over 30 years ago and which could

potentially shed light on the problems inherent with Bahrain security services which the British government was reportedly helping to reform.

31. He did not believe that the relationship between the UK and Bahrain would be impaired by the disclosure he was seeking. The strength of the relationship allowed for “frank discussions” as evidenced by Britain’s willingness to criticise the Bahraini authorities on certain issues. In 2012 Alistair Burt had criticised the harsh sentences imposed on Bahraini activists and William Hague, as Foreign Secretary, had expressed similar concerns in 2011.
32. Given the extent of British influence in Bahraini politics in the 1970s, understanding the security situation would enlighten the public about the UK government’s knowledge and role in matters. Because the withheld information referred to the security apparatus – or indeed the security situation – it was clearly within the British remit with regards to its historical and contemporary role. While there might be a significant public interest in maintaining strong relations between the UK and Bahrain, the withheld information was necessary to give the public the information needed to promote good decision-making by public bodies including the Foreign and Commonwealth Office.

Closed Material

33. The Tribunal was provided in advance of the hearing with an agreed bundle of material which included an unredacted version of the information in question and an unredacted version of the written witness statement of Mr Oakden.
34. The Tribunal reminded itself of the guidance for the approach to be taken by courts and tribunals in respect of any closed material procedure.
35. In *Bank Mellat v HMT (no. 1)* [2013] UKSC 38, which was not a case about FOIA, Lord Neuberger said at paragraphs 68-74 that:
 - i) If closed material is necessary, the parties should try to minimise the extent of any closed hearing.

ii) If there is a closed hearing, the lawyers representing the party relying on the closed material should give the excluded party as much information as possible about the closed documents relied on.

iii) Where open and closed judgments are given, it is highly desirable that in the open judgment the judge/Tribunal (i) identifies every conclusion in the open judgment reached in whole or in part in the light of points made or evidence referred to in the closed judgment and (ii) says that this is what they have done.

iv) A judge/Tribunal who has relied on closed material in a closed judgment should say in the open judgment as much as can properly be said about the closed material relied on. Any party excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and the arguments it has received.

36. In *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC) the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA cases, noting that such practices are likely to be unavoidable in resolving disputes in this context:

i) FOIA appeals are unlike criminal or other civil proceedings. The Tribunal's function is investigative, i.e. it is not concerned with the resolution of an adversarial civil case based on competing interests.

ii) Closed procedures may therefore be necessary, for consideration not only of the disputed material itself, but also of supporting evidence which itself attracts similar sensitivities.

iii) Parliament did not intend disproportionate satellite litigation to arise from the use of closed procedures in FOIA cases.

iv) Tribunals should take into account the Practice Note on Closed Material in Information Rights Cases (issued in May 2012). They should follow it or explain why they have decided not to do so.

v) Throughout the proceedings, the Tribunal must keep under review whether information about closed material should be provided to an excluded party.

37. It was necessary for the Tribunal to see and consider the disputed information in order to reach its decision.

38. The Tribunal has considered carefully and rigorously the Appellant's and the FCO's points and concerns already expressed in the notice of appeal and in other representations and submissions.

39. For reasons given in a separate, confidential Annex A, the Tribunal has concluded that some additional material can be released from that which was redacted in the 1977 Memorandum and from Mr Oakden's written witness statement.

Conclusion and remedy

40. The Tribunal accepts at the outset that it has had the advantage not granted to the Appellant of seeing all the information that has been withheld in the context of this appeal.

41. It can understand why he, and anyone reading this decision, should question why information recorded from a meeting with the British head of the Bahrain Special Branch – Brigadier Ian Henderson – and a senior British FCO official as long ago as 1 December 1977 should remain sufficiently sensitive in terms of this country's international relations with Bahrain as to continue to be undisclosed because the public interest requires this.

42. Nearly 40 years have elapsed, there is some information publicly available about the human rights issues and history involved and the question must inevitably be asked "what is so special or potent about what remains redacted that it cannot be disclosed?" The short answer is that what remains redacted is fairly and squarely information which attracts the operation and engagement of section 27 FOIA because it could damage the United Kingdom's relations with Bahrain and, if revealed, would or would be likely to prejudice international relations.

43. The Tribunal's case law in relation to the meaning of "prejudice" – and the likelihood of that arising – was comprehensively set out in the two paragraphs quoted immediately below from the decision in *Campaign Against the Arms Trade v IC and MoD* (EA/2007/0040).

[80] As a matter of approach the test of what would or would be likely to prejudice 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 interests or their promotion or protection

and further we accept that the prejudice must be “real, actual or of substance....”.

[81] However, we would make it clear that in our judgement 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 [X] or to make them vulnerable to such a reaction notwithstanding that the precise reaction of [X] would not be predictable either as a matter of probability or certainty. The prejudice would lie in the exposure and vulnerability to that risk.

44. Also, in terms of the appropriate weight to be attached to the views of officials with expertise in international diplomacy – in this case Mr Oakden who is the FCO’s Director of the Middle East and who among other things had been British Ambassador to the UAE from 2006 – 2010 – the Upper Tribunal decision in *All Party Parliamentary Group on Extraordinary Rendition v IC and FCO* [2011] UKUT 153 (AAC) known more commonly as APPGER is instructive. This decision makes it clear that there are two issues: whether the disclosure of the information would be likely to prejudice international relations and, if so, whether the public interest in maintaining the exemption outweighs the public interest in disclosing it. At Paragraph 56 is the observation:

Both are matters for the Tribunal to determine for itself in the light of the evidence. Appropriate weight needs to be attached to evidence from the executive branch of government about the prejudice likely to be caused to particular relations by disclosure of particular information.

45. While Mr Oakden’s written and oral evidence to the Tribunal was of considerable assistance in dispelling any final doubts that the Tribunal might have held, even without his evidence the Tribunal would have had little difficulty in reaching the conclusion that it has in this appeal.

46. The Tribunal believes that some limited and additional evidence that is currently redacted can be made public but, apart from that, the information that is then withheld is properly withheld under the provisions of section 27

FOIA on the basis that the public interest in maintaining the exemption outweighs the public interest in disclosing it.

47. There is a strong public interest in maintaining the U.K.'s relations with the Kingdom of Bahrain and with the other States within the Gulf region to which the Kingdom of Bahrain has close ties. There is a strong public interest in ensuring stability in the Gulf region, the kingdom of Bahrain is host to the UK's Royal Navy and RAF and an adverse impact on the UK's relationship with Bahrain could impact on the UK's defence interests and the UK relies on and benefits from the assistance of Bahrain in other areas such as immigration and consular services.

48. The Tribunal finds that the remainder of the disputed information would – as opposed to would be likely to – have an adverse effect on relations between the UK and Bahrain.

49. Our decision is unanimous.

50. There is no order as to costs.

Robin Callender Smith
Judge
11th May 2015