



Neutral Citation Number:

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

Appeal No: EA/2014/0261

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50538627
Dated: 25 September 2014

Appellant: Richard Brooks

Respondent: The Information Commissioner

2nd Respondent: Ministry of Defence

Heard at: Field House, Breams Buildings EC4

Date of Hearing: 27 – 29 April 2015

Before

Chris Hughes

Judge

and

Pieter De Waal and Suzanne Cosgrave

Tribunal Members

Date of Decision: 18 July 2015

Attendances:

For the Appellant: Mr Brooks in person assisted by Mr Bousfield

For the Respondent:

For the 2nd Respondent: Charles Bourne QC, David Pievsky

Subject matter:

Freedom of Information Act 2000

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 25 September 2014 and dismisses the appeal.

REASONS FOR DECISION

Introduction

1. Mr Brooks is an investigative journalist. He has published an article about the role of the UK to support the Kingdom of Saudi Arabia (“KSA”) in a project relating to the acquisition and support of a communications capability for the Saudi Arabian National Guard (“SANG”), known as “the SANGCOM project”. He was drawing on information provided by a retired officer of the British army, Mr Ian Foxley, who was involved in the provision of services for the SANGCOM project under a contract entered into between the Ministry of Defence (“the MOD”) (“ and a company registered in the UK (“the contractor” and “the contract”).

2. Mr Brooks sought information from the press office of the MOD and then made a FOIA request on 22 January 2014 for:-

“information concerning:-

[1] the mechanism for approval by the MoD’s SANGCOM team of

(a) payments, or

(b) sub-contracting arrangements by prime contractor GPT Special Projects Management Ltd

[2] occasions on which the inclusion of “bought in services” in contract proposals and change proposals have been

(a) queried, and

(b) to any extent rejected by the MoD’s SANGCOM team

[3] the identities of senior civil servants, ministers and consultancy firms involved in the negotiation and signature of the LOA3P3 phase of the project (signed in Feb 2010)

[4] the nature of the letter of agreement signed by the ambassador to Saudi Arabia and SANGCOM in June 2013, referred to at the foreign affairs select committee hearing by FCO minister Andrew Murrison on 18 June.”

3. In opening exchanges before the Tribunal the parties confirmed their shared understanding that the focus of the request was for information related to recent years in particular the period around 2009/10.
4. The MOD provided some information on a general level with respect to the first two parts of the request, provided the information sought by request 3 and asserted that the information sought by request 4 was exempt from disclosure under s27(1) FOIA which provides that:-

“(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.”

5. On internal review the MOD maintained this position and Mr Brooks complained to the First Respondent (“the Commissioner”). During the course of the Commissioner’s investigation the MOD confirmed that it did not hold information related to the first request, did hold information within request 2, and that the information within requests 2 and 4 were protected from disclosure by a range of provisions of FOIA including s27(1).
6. The Commissioner considered a three stage test for determining whether the exemption was engaged:-
 - Did the harm alleged to be likely to occur relate to interests within the exemption
 - Was there a causal relation between the proposed disclosure and actual anticipated harm
 - Was there a real and significant risk of the harm occurring

7. He accepted that the protection of UK relations with KSA was an interest protected by the exemption, and that there were significant cultural differences between the UK and KSA which in the context of the SANGCOM project meant that disclosure was likely to result in harm which was real and of substance and would make relations more difficult and require specific diplomatic effort to remedy. He further found that the disclosure was more likely than not to harm UK relations with KSA on a broad range of issues going beyond the SANGCOM project.
8. The Commissioner acknowledged the importance of releasing information to enhance public understanding and that there was a public interest in providing assurance that the UK's arrangements with KSA were handled according to proper standards and in accordance with law. Against that he weighed the significance of the UK/KSA relationship in the defence, security, commercial and counter-terrorism areas.
9. He placed specific weight on the value of information relating to agreements between the UK and KSA and the fact that the Serious Fraud Office ("SFO") in August 2012 started an investigation into the SANGCOM prime contractor which meant that there was a particular interest in disclosure in order to clarify the role of the UK government. He drew attention to the existence of a memorandum of understanding between the UK and KSA covering the SANGCOM project which included a widely drafted confidentiality provision (DN paragraph 16). He acknowledged the current international situation and the strategic importance to the UK of ensuring a strong and effective relationship with KSA and concluded that disclosure would prejudice the UK's interest and that therefore the MOD was justified in withholding the material.

The appeal to the Tribunal

10. Mr Brooks appealed against the Commissioner's decision. He stated that he would put forward serious evidence of bribery, and that there was no proper explanation from the MOD of what "bought in services" under the contract meant. He sought "an explanation of very strong prima facie evidence of bribery following six arrests by the Serious Fraud Office". There was a public interest, he said, in understanding the nature of the corruption he alleged, which could be achieved by disclosing the information requested.
11. The Commissioner resisted the appeal relying on the findings of the decision notice. He made clear that in his decision to uphold the exemption in s27(1) he had not

relied solely on the confidentiality of terms agreed between the UK and KSA, although this was relevant to the question of prejudice for the purpose of the exemption in s27(1), in particular any reaction that may come from KSA if confidential information were to be disclosed. He acknowledged the public interest grounds identified by the Appellant but reaffirmed his assessment of the overall public interest balance.

12. The MOD supported the Commissioner's stance and argued that the question of possible corruption or bribery did not prevent the exemption being raised, but went to the consideration of where the balance of public interest lay. The MOD submitted that disclosure would be likely to prejudice relations with KSA and would prejudice the interests of the UK abroad and the promotion and protection of the interests of the UK abroad, and therefore exemption was claimed under three limbs of s27(1), (s27(1)(a),(c) and (d)). It also submitted that some of the information sought was confidential information obtained from a foreign government and therefore a further exemption was claimed under s27(2).
13. While the MOD also claimed other exemptions in respect of certain parts of the withheld information, it is unnecessary to deal with them in view of the conclusion we have reached in respect of the s27(1)(a) exemption.

The question for the Tribunal

14. For the purpose of the s27(1)(a) exemption, the issue for the Tribunal to resolve is whether public disclosure of the requested information would prejudice relations between the UK and KSA and, if so, whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information (s2(2)(b) FOIA).

Evidence

15. Two witnesses gave evidence on behalf of Mr Brooks. Retired Lieutenant Colonel Ian Foxley gave evidence relating to his employment with the contractor. He gave details of his role and activities and the circumstances of his departure from this employment. He had raised concerns about the administration of the contract with the MOD's SANGCOM personnel based in KSA and left his employment and KSA in December 2010. He had submitted a report to the MOD setting out his concerns about the contract.

16. Mr Nicholas Gilby gave evidence on behalf of Mr Brooks based on his research into the history of military sales from the UK to KSA. He provided some background on the history of this particular relationship and his experience in matters which had “shone a light on the behaviour of UK officials”. He indicated that he considered that there was a far stronger case for disclosure than was acknowledged by the Commissioner and drew attention to the importance of anti-corruption activity and the OECD convention on combatting bribery. He confirmed that to his knowledge the SFO investigation was continuing.
17. Two witnesses gave evidence in open and closed session on behalf of the MOD. Mr Richardson is a senior civil servant in the MOD with responsibility for a range of commercial matters including work in relation to the arrangements agreed between the UK and KSA for the SANGCOM project. The MOD has a 76 strong team based in KSA to support and oversee the project and the contractor’s performance under the contract. The contract is funded entirely by KSA.
18. In closed session the Tribunal explored Mr Richardson’s understanding of the scope of the Appellant’s request and why he believed that the exemption in s27(1)(a) applied to all of the information within the scope of the request. He described the allocation of responsibility for governance of MOD’s many commercial projects to different officials and noted that there are not many Government-to-Government agreements like the arrangements agreed with KSA for the SANGCOM project. The Tribunal explored with him the general practice of querying or rejecting payments in the administration of projects and contracts, and in the commercial and financial management of contractors. Mr Richardson said that his normal practice was that if anything appeared suspicious to him he would query it. He did not accept that it would be “negligent” not to query overheads which equated to a particular proportion (e.g. 15%) of the total cost of a particular contract. Many contracts contain provisions for the payment of different types of overheads and costs, which may be described in many different terms. His role included responsibility for commercial probity in general and he had oversight of many large projects comprising some 300-400 contracts. The amount of time he spent on them varied greatly and was dependent upon, inter alia, the relevant stage where a contract may be in its implementation. In his experience the issues that may be raised by a project would be wholly dependent

on the lifecycle of the project, because one project could be very time-consuming for a certain period and then require virtually no management time for another period.

19. Mr Oakden is a senior diplomat. He was Ambassador to the United Arab Emirates during 2006-2010, Managing Director for Strategic Trade in UK Trade and Investment during 2010-2013, and from 2013- 2015 he was the Foreign & Commonwealth Office Director for the Middle East with responsibility for relationships with members of the Gulf Cooperation Council, Iraq, Iran, Yemen and for the Coalition's fight against ISIL. He is now Ambassador to Jordan. In his open evidence he emphasised the scale and significance of the bilateral relationship between the UK and KSA on a wide range of issues from trade and investment to security, defence and counter-terrorism. Good relations with KSA were of significance in respect of key UK priorities including countering ISIL, achieving stability in Syria and Iraq and in support of UK counter-terrorism work more generally. For example, in 2010 the assistance of KSA was important in foiling the printer bomb attack by the group Al-Qaeda in the Arabian Peninsula.
20. He stressed the importance of maintaining personal relationships of trust with senior Saudi princes and placed emphasis on the cultural significance of the inviolability of a person's family and home as a basic principle of Islamic culture. The division between a public and private sphere was not appreciated in the same way in KSA as it may be in the UK. An individual's good name was seen as of great importance and any besmirching of it, even if the individual was dead, could cause substantial offence and difficulties. Such issues had been a feature of relations between various countries and KSA: for the UK there had been significant difficulties arising out of the Anglia TV film "Death of a Princess" in 1980.
21. He confirmed that there had been substantial shifts in commercial practice with respect to corruption during the course of his career with a clear move towards transparency and respect for international norms against corruption. There was significant recognition of this in KSA. There was a UK policy of zero tolerance and he would have a duty to report any evidence of wrong-doing.
22. In his opinion, while KSA appreciated the legal framework of FOIA under which the UK Government operated, their concern would be the consequences that disclosure of the disputed information would have for them. The reaction and response from KSA

to public disclosure of the information would necessitate significant diplomatic effort to limit and contain the damage to relations between the two States.

23. There were considerable sensitivities about defence contracts for reasons of national security. By way of example, Mr Oakden gave evidence on the consequences of the allegations of corruption linked to the Al-Yamamah arms contract involving BAE Systems: he summarised the result of that as rendering his work considerably more difficult.
24. In closed session Mr Oakden gave a more detailed explanation of the justification for claiming the s27 exemption in this case. He gave specific examples of matters which cause him to believe that disclosure of the withheld information would harm the UK's relations with KSA despite accepting that diplomats have the role of attempting to mitigate any harm that may occur to the UK's relations with another State. He gave examples of previous difficulties in international relations with various States in similar circumstances.
25. He was taken to the information within scope of the request and clarified that, contrary to the indication he had given during the open session, he had in fact read the contents of all the withheld information.
26. He commented specifically on why he believed that harm to the UK's relations with KSA would occur due to disclosure of the information and why the public interest on balance favoured maintaining the exemption.

Legal submissions and analysis

27. In submissions for Mr Brooks it was argued that the SFO inquiry relates to a private company while the focus of the request in this case is the MOD itself. He submitted that, while the issue as put forward by Counsel for the MOD was "the very serious prejudice that would occur if material is released contrary to the wishes or expectations of the Kingdom of Saudi Arabia", there was a question for the Tribunal to consider about separation of powers and the independent ability of the Tribunal (as part of the judiciary) to order disclosure of disputed information separate and distinct from any act of the UK Government. It was further argued by Mr Brooks that KSA was a sophisticated country and that those within the higher echelons of the Saudi government appreciated the rule of law in the UK which made it a preferred partner and place to do business. He argued the importance of disclosure i.e.

increased transparency as a route to eliminating corruption, and argued that the evidence led by the MOD suggested that it was not effective in its systems and processes to eliminate corruption. His request was intended to open up government to show how corruption arose.

28. The MOD submitted that in the field of international relations the expertise of experienced diplomats and senior civil servants should be given substantial weight by the Tribunal when considering the likely prejudice arising from disclosure. There was a particularly strong interest in maintaining diplomatic communications and ensuring the flow of intelligence, and a strong interest in maintaining the confidence of bilateral exchanges with trusted allies. The MOD accepted that there was clearly a significant interest in disclosure where information revealed involvement of UK officials in the payment of bribes, but there was no such evidence in this case.
29. On the evidence, the Tribunal accepts that the exemption in s27(1) is engaged in this case. In considering the balance of public interest, the Tribunal recognises the force and significance of the arguments advanced by Mr Brooks in this appeal and in his submissions. He made it clear that what he was concerned to find was, as he stated orally, the “smoking gun” of the MOD’s culpability i.e. their complicity in covering up corruption. If indeed the information he sought were to reveal such evidence then, in the Tribunal’s view, the arguments in favour of disclosure which he has advanced would have considerable weight. However, in this case, the information he sought does not, on its face, disclose any “smoking gun” suggesting misconduct on the part of MOD staff or officials.
30. It may be noted that the SFO investigation relating to the contractor’s involvement and conduct in the SANGCOM project, which led to six arrests in 2012, is still proceeding. The Tribunal considers that it is clearly the function of that investigation to determine whether unlawful acts have taken place. In this appeal Mr Brooks articulated a suspicion that there is prima facie evidence of bribery and that the information he has sought from the MOD will provide corroboration of that. However it does not, and the withheld material does not bear out his argument.
31. On the other side of the public interest balance the Tribunal was satisfied by the witnesses put forward by the MOD that, if the withheld information were to be disclosed to the public, the response and reaction from within KSA and from

influential figures who function within the government of KSA and are able to affect UK economic, security and political interests, would be significant and to the detriment of those interests and to the detriment of relations between the two States. While there may be some understanding in KSA that disclosure of information ordered by the Commissioner or this Tribunal under FOIA would not be a decision made or sanctioned by the UK government, the KSA would, on the evidence, interpret such disclosure as the release of sensitive information protected by contractual confidentiality agreed between the two States and therefore a breach of trust and confidence. To require such disclosure on the basis of a public interest in uncovering corruption would also be viewed by KSA as an unwarranted and unjustified inference of wrongdoing and personal criticism of senior figures in KSA who have or had direct involvement in the SANGCOM contract – particularly where this is not supported by the information in question.

32. In conclusion we accept on the evidence that, in this case, public disclosure of the withheld information would prejudice relations between the UK and KSA and that the prejudice and harm that would follow from such disclosure is real and significant. We also accept that, in all the circumstances of this case, the public interest in maintaining the S27(1)(a) exemption outweighs the public interest in disclosing the withheld information.
33. The Tribunal is accordingly satisfied that the Commissioner's decision is correct in law, and the appeal is dismissed.
34. Our decision is unanimous.

Judge Hughes

[Signed on original]

Date: 18 July 2015