



Tribunals Service
Information Tribunal

IN THE MATTER OF AN APPEAL TO THE INFORMATION TRIBUNAL
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Information Tribunal Appeal Number: EA/2007/0040
Information Commissioner's Ref: FS5008678
Date of Promulgation: 26 August 2008

BEFORE

CHAIRMAN

ROBIN PURCHAS QC

and

LAY MEMBERS

DAVID WILKINSON AND ANNE CHAFER

BETWEEN

CAMPAIGN AGAINST THE ARMS TRADE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

MINISTRY OF DEFENCE

Additional Party

OPEN DECISION

For the Appellant: Mr Tom Hickman, barrister
For the Respondent: Mr Akhlaq Choudhury
For the Additional Party: Mr Philip Havers QC, and Mr Alan Maclean, barristers
Special Advocate: Mr Khawar Qureshi QC, barrister

Introduction

- 1 This appeal concerns an information request made to the Ministry of Defence ('MoD') by Ms Ann Feltham on behalf of the Campaign Against the Arms Trade ('CAAT') dated 22nd February 2005. The request was initially for seven Memoranda of Understanding and a Defence Protocol. The Memoranda of Understanding ('MoU') included four MoU agreed with the Saudi Arabian Government ('SAG') dated respectively 7th May 1973 ('the 1973 MoU'), 26th September 1985 ('the 1985 MoU'), 17th February 1986 ('the 1986 MoU') and 3rd July 1988 ('the 1988 MoU').
- 2 It subsequently emerged that the 1973 and 1985 MoU had been placed in the National Archives ('TNA') for public inspection and CAAT had obtained copies. In the circumstances this appeal only concerns disclosure of the 1986 and 1988 MoU.
- 3 By letter dated 26th April 2005 Stephen Pollard, the Commercial Director and Deputy Director General of the MoD Saudi Armed Forces Programme Team ('MoDSAP'), claimed exemption under Sections 27 (International Relations) and 43 (Commercial Interest) of the Freedom of Information Act 2000 ('the FOIA') on the basis there would be likely to be prejudice to relations with the SAG and to commercial interests connected therewith. Section 43 of the FOIA has not been pursued before us.
- 4 On 26th May 2005 Ms Feltham requested review pursuant to the procedures in place with the MoD. By letter dated 26th July 2005 David Wray, Director of Information (Exploitation), on behalf of the MoD confirmed the decision previously made on the grounds that Section 27 was engaged and the information was exempt because of the damage to the United Kingdom's ('UK') relations with the Kingdom of Saudi Arabia ('KSA') together with the damage to commercial interests under Section 43 of the FOIA.
- 5 On 19th August 2005 CAAT appealed to the Information Commissioner ('IC').
- 6 On 8th May 2006 the 1985 MoU had been released to TNA and was subsequently published by *The Guardian* newspaper with other related material on 28th October 2006. By letter dated 7th November 2006 CAAT indicated that it would not in the circumstances be continuing to seek disclosure of the 1985 MoU. In January 2006 it came to light that the 1973 MoU had been placed in TNA by the Treasury for public inspection and this was then published in the *Daily Telegraph*. Both MoU have been subsequently withdrawn from TNA.

- 7 In December 2006 the Attorney General announced that the Director of the Serious Fraud Office ('SFO') had decided to discontinue the inquiry regarding activities in connection with the Al-Yamamah project ('the AY') involving the sale of arms to the KSA on the grounds that it would not have been in the national interest to continue with the investigation. That decision has since been subject to proceedings for judicial review, which were dismissed on appeal by the House of Lords¹.
- 8 On 4th April 2007 the IC published his decision confirming the decision not to release the information on the grounds that the Section 27 exemption applied and outweighed the public interest in disclosure. The IC confirmed that Section 43 "*may well be engaged*" but having regard to his decision in respect of Section 27 he had not gone on to consider Section 43.
- 9 CAAT appealed to the Information Tribunal on 1st May 2007. The hearing took place between 3rd and 10th March 2008, being held together with appeals in the case of **Gilby v Information Commissioner**² ('the Gilby appeals'), which are the subject of a separate decision.

Procedure

- 10 It is convenient at this stage to deal with some procedural matters. Directions were given by Mr Andrew Bartlett QC on 24th July 2007. The MoD had been made an additional party. The directions provided for closed evidence by the MoD and the IC on notice to CAAT.
- 11 We have referred above to the Gilby appeals, which also concerned arms sales to the KSA and Section 27 of the FOIA. In those appeals the Foreign and Commonwealth Office ('the FCO') was an additional party. Directions in the Gilby appeals were given on 26th September 2007 by the learned Chairman, which also allowed for closed evidence on behalf of the FCO and the IC with notice to Mr Gilby. The Gilby appeals were directed to be heard immediately following the CAAT appeal.
- 12 The Treasury Solicitor ('TSol'), acting on behalf of the MoD and FCO in both appeals, submitted joint evidence in the form of a witness statement from William Patey, Her Majesty's Ambassador to the KSA. CAAT and Mr Gilby proposed to call Carne Ross, the founder and director of Independent Diplomat and previously employed in the Foreign Office, to give evidence jointly in both appeals. On 31st October 2007 Mr Gilby with the support of CAAT sought a direction that the common evidence of both witnesses be heard together. By e-mail dated 14th December 2007 that was supported by the TSol. In view of the obvious common ground between the appeals we supported that approach in further directions given by letter dated 9th January 2008. The appeals had been listed to be heard sequentially over six days with the CAAT appeal commencing on 3rd March 2008.

¹ LTL 30/7/2008

² EA/2007/0071, 0078 and 0079

- 13 By letter dated 1st November 2007 Mr Gilby asked that this Tribunal should inspect all of the documents, the subject of his appeals, of whatever security classification. No objection was made to that request by CAAT or the TSol. We concluded that we should see all the documents in both appeals and included that in the directions dated 9th January 2008, in which we also indicated that arrangements had been made to inspect the documents on 29th January 2008, to which again no objection was raised. Regrettably only part of the documentation was available to us on 29th January 2008 and arrangements had to be made for the remainder of the documents to be inspected, which took place on 21st February 2008.
- 14 In the meantime pursuant to our directions dated 9th January 2008 timetables had been provided by CAAT and the TSol, in which the latter confirmed that the MoD and FCO would be relying upon closed evidence. Their timetable indicated that Mr Patey's closed evidence would take part of the first, third and fifth days of the hearing. By letters dated 12th February 2008 application was made by CAAT and Mr Gilby either for the appointment of a special advocate or that leave should be given for the respective Appellants to be represented by a special advocate. By letter dated 15th February 2008 TSol objected to that course. Solicitors acting for CAAT responded by letter dated 18th February 2008.
- 15 Having considered the remainder of the documents on 21st February 2008, by letter dated 22nd February 2008 we directed, inter alia:

"...

- (2) *having considered the papers and the materials provided, the Tribunal is of the provisional view that it will need to consider evidence and hear representations in private for the purposes of rule 22; however, it cannot make a direction to that effect without having heard representations from the parties and its view is only provisional at this stage; it would intend to deal with this matter and any other procedural issues at the commencement of the hearing, unless application is made for directions beforehand;*
- (3) *If the Tribunal decides to hear part of the appeals in private and again subject to an application being made under rule 23 and any representations in that respect, the Tribunal would be of the provisional view that it would be necessary for reasons of substantial public interest to exclude the Appellants and their representatives, having regard to the subject matter of the appeals and the exceptions relied upon;*
- (4) *the Tribunal has however concluded that in the particular circumstances of these appeals a Special Advocate should be appointed to represent the interests of both Appellants during the closed part of the hearing, if any; the*

advocate should be appointed from the Attorney General's Panel of Special Advocates and should comply with the requirements of CPR Part 76, which should provide the broad procedural framework; while the Tribunal intends to give its full reasons later, it makes clear at this stage that the reason for this direction is that the nature and extent of the documents, the subject of the appeals, is such that the Tribunal considers that exceptionally in this case the proper and fair disposal of the appeals would be materially assisted by the appointment of a Special Advocate to represent the interests of the Appellants in asking questions and making submissions as appropriate in respect of any closed material as part of any closed session. The Tribunal is making the direction at this stage to enable a Special Advocate to be appointed and to prepare for the hearing. The Tribunal should make it clear that the Special Advocate should have sufficient security clearance to see any documents that he or she requires to view. ..."

The directions went on to provide for a procedural session at the beginning of the hearing.

- 16 On 26th February 2008 TSol emailed referring to "*the significant quantity of closed material*" in the appeals and seeking arrangements for the handling of that documentation. By e-mail at 10.15 am on Thursday 28th February (one clear working day before the hearings) TSol asked that the evidence in respect of the Gilby documentation should be dealt with separately on account of the "*very different*" nature of the disputed information in each case. The e-mail acknowledged that that course was a departure from the hitherto agreed approach of all parties. About 1 ½ hours later TSol e-mailed a letter dated 28th February 2008 expressing its surprise at the direction appointing a special advocate and stating that it was "*deeply puzzled*" by the reference to the extent of documentation in the CAAT appeals in that respect.³
- 17 On the first day of the hearing we conducted a procedural directions hearing in both appeals, which was in the event broadly consensual. Mr Khawar Qureshi QC had been appointed to represent both Appellants as special advocate. We made directions that the closed material should be dealt with in private session with the exclusion of the Appellants and persons other than the MoD, FCO and IC, as proposed in our interim directions. We also confirmed that the Appellants should be represented by Mr Qureshi as special advocate in the closed sessions. We drew attention to the unsatisfactory nature of the closed documents provided to us in the Gilby appeal and requested that we be provided with a coherent and hopefully chronological bundle of documents with some documentary guidance as to their nature. That was supported by Mr Qureshi. Mr Philip Havers QC, representing both the MoD and the FCO, accepted the unsatisfactory state of the documentation and agreed that a comprehensive and ordered bundle should be provided, hopefully by the third

³ We consider the points made in this letter in paragraph 21 below.

day of the hearing and, if possible, earlier than that to Mr Qureshi. Timetabling for the hearing was agreed, which enabled the open and closed evidence of Mr Patey to be heard jointly on the first and third days and specifically on documents in the Gilby appeals on the fifth day. The joint evidence by video link of Mr Ross would be heard on the second day of the appeal. A transcript of the open parts of the hearing had been agreed to be taken and that has proved of great assistance both during and following the hearing of these appeals.

18 We will now set out our full reasons for the procedural decisions made on the first day of the hearing following our interim directions dated 22nd February 2008.

19 The starting point was whether any part of the hearing should be in private as provided for by Rule 22 of the 2005 Rules⁴. Rule 22 (1) provides:

"All hearings by the Tribunal ... shall be in public unless, having heard representations on the matter from the parties having regard to the desirability of safeguarding:

(a) the privacy of data subjects; or

(b) commercially sensitive information; or

(c) any matter in respect of an exemption contained in Part II of the 2000 Act is claimed

the Tribunal directs that the hearing or any part of the hearing should take place in private."

As we indicated in our interim directions, it was necessary to have oral representations to determine this application in accordance with Rule 22. The appropriate principles and approach are set out in the Tribunal's decision in **Sugar**⁵, which we respectfully adopt for the purposes of our decision. It was in our view and as accepted by the parties necessary to consider evidence and submissions in respect of the information, the subject of the appeals; as explained in **Sugar**, it would have been impossible to do that in open session without defeating the object of the exemption under Section 27 in seeking to maintain the nondisclosure of the documents; we accordingly ruled with the consent of the parties that the evidence and submissions specifically in respect of the documents should be dealt with in closed session.

20 We then turn to the application by the MoD and FCO that the respective Appellants should be excluded from the closed sessions under Rule 23 of the Rules, which provides:

⁴ The Information Tribunal (Enforcement Appeals) Rules 2005

⁵ EA/2005/0023

"(1) *Where an application is made to the Tribunal by a minister of the Crown for a party or parties to the appeal to be excluded from the proceedings or any part of them, the Tribunal shall grant such an application and exclude that party or parties, if and only if it is satisfied that it is necessary for the reasons of substantial public interest to do so.*

...

(3) *Where the Tribunal considers it necessary, for the reasons of substantial public interest, for any party to be excluded from the proceedings, it must:*

(a) *direct accordingly,*

(b) *inform the party or parties excluded of its reasons to the extent that it is possible to do so without disclosing information contrary to the public interest, and*

(c) *inform the relevant Minister."*

Again we refer to the reasoning in **Sugar**⁶, which we adopt. The application on behalf of the MoD was unopposed, at least in the light of the provisional decision we had made as to representation by a special advocate that parties other than the MoD and the IC should be excluded from the closed sessions in accordance with our ruling under Rule 22; the reasons were the same, that was to preserve non-disclosure of the relevant documentation claimed to be subject to the exemption, the object of which would otherwise be defeated by inclusion of the Appellants in the closed sessions. For those reasons we were satisfied that it would be in the substantial public interest and necessary for the Appellants to be excluded to enable the decision to be made in accordance with the relevant provisions of the FOIA.

21 We then considered further directions and in particular the question of representation by a special advocate; we were entirely satisfied without objection from any party that we had powers to make that direction in accordance with our general power under Rule 14 (1); insofar as it was necessary we would also rely upon the general power for the conduct of the proceedings under Rule 24 (4); it did not seem to us to be necessary to rely on any inherent jurisdiction. In the light of the objection by the TSol and the fact that a similar direction has not previously been given in this Tribunal, we will set out our reasons and approach in a little detail :

(a) We did not consider that as a matter of principle representation by a special advocate was required or justified because of the engagement of any particular human right; it seemed to us that the role of the Tribunal is essentially inquisitorial and as an independent body the

⁶ Supra

Tribunal is well-able in the vast majority of cases to conduct an investigation of closed material and evidence without the appointment of a special advocate or similar representation;

- (b) However we would make clear that it is imperative in this respect that a party relying on closed material to establish an exemption should ensure that any documentation is presented in a manner and at a time which would enable the Tribunal to discharge its inquisitorial task; the documentation should be properly ordered with an explanation, where appropriate, of that documentation and its subject matter; the documentation should be presented in a coherent fashion;
- (c) We expect that in a case of this kind the Tribunal would generally need to see the documentation, the subject of the information request; if it is to see that documentation, it should be presented in a coherent and explained fashion as indicated above; and in the light of that a directions hearing should be held at an early stage to include directions as to any closed hearings that may be considered necessary, the handling of the documentation and other related matters; it should be incumbent upon those relying upon the closed material to ensure that proper provision is made for the handling and storage of documents in a manner consistent with their security classification, to include convenient storage for the Tribunal during the hearing.
- (d) In the present case this had not been done; the documentation provided to us was provided without explanation, piecemeal and in an incoherent manner that made it effectively impossible to understand; we were accordingly left with the choice of abandoning all or part of the six-day hearing, which had been fixed for several months or taking steps to secure as far as we were able the fair and efficient disposal of the appeals in accordance with the fixed timetable;
- (e) It was, as we said in our interim directions dated 22nd February 2008, because of the nature and extent of the documents that exceptionally we directed that a special advocate could be appointed to represent the interests of the Appellants in both appeals; we should however make it clear that even in the light of the more ordered bundle provided to us on the evening of the fourth day of the hearing (immediately preceding the day on which the evidence was to be considered) it would have been difficult in these appeals for the Tribunal satisfactorily to have dealt with this material without the assistance of a special advocate representing the Appellants; in our open decision we cannot elaborate on that other than to say that it was both the number of documents and the nature of their contents which in our judgement justified this step to assist the efficient and fair disposal of the appeals;
- (f) With the benefit of hindsight we remain firmly of the view that it was as we indicated in the interest of the efficient and fair disposal of the appeals, because of the exceptional nature and extent of the documentation the Tribunal should have been assisted by representation of the Appellants through a special advocate;

- (g) We should also deal specifically with the point made by the TSol in its emails on 28th February 2008; we would agree that, if the CAAT appeal had been proceeding independently, there would not have been the justification for the appointment of a special advocate; however, seeing that for reasons with which we agreed the appeals were being dealt with together at least so far as the common evidence was concerned (including closed evidence), it would in our view have been inappropriate and impracticable to seek to confine the role of the special advocate to deal with submissions and questions on documentation in the Gilby appeal alone; it would have been very difficult, if not impossible, for the special advocate to have assisted us in respect of the public interest balance and the application of Section 27 based on the closed evidence as to the documents in the Gilby appeals without having the opportunity to consider and, if need be, question the joint closed evidence in respect of both appeals; if the TSol had thought that there was benefit in the total separation of the hearings and evidence that should have been raised at a far earlier stage; in the event we remain firmly of the view that this Tribunal was assisted in disposal of these appeals by hearing the appeals in effect together; and
- (h) Having heard the appeals we remain in no doubt that the procedural decisions taken on 22nd February and 3rd March 2008 were appropriate to ensure the most efficient and effective disposal of these appeals; we would repeat that the justification for the appointment of a special advocate to represent the Appellants was exceptional having regard to the nature and extent of the documents concerned; we hope that in future no Tribunal will be faced with documentation that is not presented properly in a form that can assist its understanding by the Tribunal, which in turn will reduce any need for special representation in future cases of this kind.

The Law

- 22 It is next convenient to deal with legal submissions that were made as to the approach which this Tribunal should take, having regard to what was the evolving factual context following the initial information request and in particular the timing at which its decision should be considered.
- 23 In **Department for Education and Skills v Information Commissioner (EA/2006/0006)** dated 19th February 2007 the approach, which in that appeal was agreed, was summarised at paragraph 20 (iv):

"The competing public interest must be assessed by reference to the date of the request or, at least, around that time. This is particularly important where considerable time has elapsed and the timing of the disclosure requested may be a significant factor in deciding where the public interest lies."

In **Evans v Information Commissioner** dated 26th October 2007⁷ the matter was fully argued and the Tribunal's decision is set out at paragraphs 22 to 24 including in particular at paragraph 23:

"In deciding whether to communicate information which falls within Section 36, the public authority must itself apply the public interest test in Section 2 (2). Clearly, that must be applied at the time of the request. It was that decision of the MoD which was the subject of Mr Evans' complaint to the Commissioner; it was the Commissioner's decision that the complaint had been dealt with in accordance with the requirements of Part I (at least insofar as the application of Section 36 was concerned) that was then appealed to this Tribunal. We have to consider the public interest test as it applied at the time of the request."

Submissions

- 24 Mr Hickman on behalf of CAAT submits that those decisions of the Tribunal and others to similar effect were wrong and that properly understood we should consider the requirements under Part I including the application of the exemption and the public interest balance at the time of our decision. He draws attention to Section 1(1)(b), which he submits makes plain that the entitlement to have information communicated to the applicant, which is expressed in the present tense, is a continuing right. That is, he submits, consistent with Section 1(4), which allows amendments or deletions of the information to continue up until the information is to be communicated, which may be at the time of the Tribunal's decision. Similarly under Section 2(2)(b) the exemption including the public interest balance is expressed in the present tense and is, he submits, continuing as part of the right under Section 1(1). He accepts that sections 10 and 17 govern the time within which the authority must comply with the obligation under Section 1(1), but he says that that is procedural and does not detract from the continuing right to information under Sections 1 and 2 of the Act.
- 25 He draws attention to Section 45(1) and (2)(e), which provide for a Code of Practice to include procedures to deal with complaints about the handling of requests for information. He submits that Part VI of the 2004 Code of Practice at paragraphs 39 and 40 makes clear that this is a continuing obligation in that the code requires on review "*a full re-evaluation of the case*".
- 26 Turning then to Section 50 and the question for determination by the Commissioner, namely whether the request "*has been dealt with in accordance with the requirements of Part I of the Act*", he submits that "has been" is also consistent with a continuing information entitlement up until the date of determination. Moreover, he submits that this approach is supported by Section 50(4) which uses the present tense in referring to the steps to be taken where there has been a failure and Section 51(1)(b)(i) which refers to the issue whether a public authority has "*complied or is complying with any*

⁷ EA/2006/0064

of the requirements of Part I". He submits that those provisions are consistent with the provision for the determination of appeals under Section 58, which in turn requires this Tribunal to consider whether "*the notice against which the appeal is brought is not in accordance with the law*".

- 27 Thus he concludes that the language of the Statute admits of a construction requiring a contemporary consideration of issues relating to the exemption and the public interest. Moreover as a matter of principle that approach accords with the importance of considering the public interest in a current and relevant context and not looking to the past, particularly having regard to the implications of the passage of time on the public interest balance (see **Hogan** para 58⁸).
- 28 Mr Hickman also relies by analogy on the application of Section 86 of the Immigration and Asylum Act 2002 ('the IAA'). Under Section 86 (3) the Tribunal is there to allow the appeal insofar as it considers that a decision "*was not in accordance with the law*" or a discretion "*should have been exercised differently*". Macdonald's Immigration Law & Practice in the United Kingdom, Sixth Edition, at paragraph 18.49 concludes that Section 86 (3) should be read as if it required an appeal to be allowed "*if the decision would not be in accordance with the law if implemented now*".⁹ Mr Hickman submits that the importance of having regard to the evolving situation in terms of the public interest is similar in immigration and information fields.
- 29 Mr Maclean, who appears with Mr Havers QC for the MoD, and Mr Choudhury, who appears for the IC, join forces in seeking to support the approach in **DFES** and in **Evans**. They submit that Section 1(1)(b) is expressed in the present tense as an immediate entitlement of a person making the request. That is consistent in their submission with Section 1(4) that the information, the subject of the request, is the information held at the time the request is received unless account can be taken of amendment or deletion that would in any event have been made but only between then and the time when the information is to be communicated under subsection (1)(b). Similarly the exemption under Section 2(2)(b) is, they say, to be applied in accordance with Section 1(2) to the immediate right of access to information under Section 1(1)(b).
- 30 Timing for compliance is governed by Section 10(1) requiring compliance promptly or in any event not later than the twentieth working day subject to Section 10(3), under which time for compliance can be extended until such time as is reasonable in the circumstances. Notice has to be given under Section 17 as to the decision in respect of the request, which in their submission effectively completes the process required in accordance with Part I of the Act. They submit that this is consistent with Section 14(2), which makes clear that repeated requests for information can be made, at least if a reasonable interval has elapsed since the previous request.

⁸ 17th October 2006 EA/2005/0026 and 0030

⁹ See also para 18.49 footnote 6.

31 Provision for the Code of Practice including complaint or review procedures is not under Part I of the FOIA but under Part III and, they say, is to be distinguished from the requirements of Part I, as can be seen from the language used in Section 47(1) and (6), which refer to the requirements of the Act as opposed to the provisions of the Code.

32 Section 50(1) of the Act requires the Commissioner to consider the question:

"Whether a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I".

That is, they submit, plainly looking back to the dealing by the authority under Part I of the Act. That is, they say, a principled approach, having regard to the importance of limiting consideration of the request at the time it is made, leaving reconsideration to a fresh request, in the first place made to and considered by the authority. They submit that this is also consistent with Section 50(4) which applies where a public authority "has failed to communicate information or to provide confirmation or denial in a case where it is required to do so by Section 1 (1)", which is, they say, a clear reference to past compliance by the authority.

33 They accept that if the Commissioner concludes that an authority has failed to communicate information, the decision notice must specify steps to be taken for complying with that requirement and the period within which they must be taken and that decision is one for the IC at the time of his or her decision. However, that does not detract from the approach outlined above. It simply leaves the IC with a limited discretion as to the form of the decision notice.

34 Section 58(1) provides that on appeal the Tribunal is to consider the notice of the IC and whether it "is not in accordance with the law" or whether where the notice "*involved*" an exercise of discretion the IC ought "*to have exercised his discretion differently*". They submit that in context those provisions are plainly looking back to the action taken by the IC, which for the reasons set out above is itself looking back to the manner in which the request was dealt with under Part I.

Decision on Approach

35 It is convenient to start with the structure of the relevant part of the FOIA. Part I deals with access to information held by public authorities. Part II deals with exempt information for the purposes of Part I. Part III deals with the general functions of the Lord Chancellor and Information Commissioner. Part IV deals with enforcement and Part V with appeals.

36 We start with Part V which provides for the function exercised by this Tribunal. Section 57 provides that, where a decision notice by the Commissioner has been served, the complainant or public authority may appeal to the Tribunal against the notice. The powers of the Tribunal are set out under Section 58. This Tribunal is either where the notice is not in

accordance with the law to allow the appeal and/or substitute such other notice as could have been served by the Commissioner or in any other case to dismiss the appeal. We are in no doubt that the language of this section, which looks back to the decision by the IC, requires a review of the decision by the Commissioner and to that extent a decision which is based upon the function exercised by the Commissioner at the time it was exercised.

37 We have had careful regard to the submissions made by Mr Hickman in respect of provisions of the IAA, but we have concluded that they are not of assistance in construing the FOIA in that they concern different legislation in a different legislative and factual context.

38 We turn accordingly to consider the enforcement provisions under Part IV and in particular the decision of the IC under section 50. By Section 50(1) a person can apply to the IC for a decision

"whether ... a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I."

That seems to us a straightforward provision. The question for the IC is to consider whether as a matter of fact and law the request for information "*has been dealt with*" in accordance with the requirements of Part I. Its purpose is, as the title of the part makes clear, to enforce the obligations on the authority to comply with its obligations under Part I of the Act. Thus it is entirely in accordance with the structure and objective of the provisions that the IC should be looking to see whether the authority has in fact so complied. That in our view should involve looking to see whether the authority has complied at the time at which it was required so to do under part I.

39 Section 50(2) seems to us consistent with that approach. The exceptions to the duty to make a decision on the application for enforcement include:

"(a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in accordance with the Code of Practice under Section 45".

We return to that in the context of overall timing below. However for present purposes this seems to us to indicate that the IC's task is to consider how the request "has been" dealt with under Part I.

40 We take the same view of Section 50(4), which applies where the Commissioner decides that a public authority "*has failed to communicate information ... in a case where it is required to do so*" or "*has failed to comply ...*". That seems to us entirely consistent with an obligation to look and see what has been done in the past at the time at which it was required by the authority.

41 We consider that the language of section 51 is also consistent with this approach. We agree that as an approach it is principled in that it allows the authority to consider the application in the first place and leaves the

consideration of changed events to a new application, subject to section 14 of the FOIA.

- 42 We should then deal with what we consider is the correct approach to consideration of how the authority dealt with the information request under Part I of the Act. We take the view that the IC should be concerned with the whole course of dealing by the authority to see whether that was in accordance with the requirements of Part I. Those requirements in our view are not limited to the time of the request itself and include the consideration of the response to the request including any consideration of an exemption in accordance with Part II.
- 43 In our view the authority should consider its response including the application of any exemption at the time at which it is required to respond. The provisions requiring the authority to consider and comply with the request are all expressed in the present tense. There is nothing in the language which requires the authority to confine its consideration to the time of the making of the request as such.
- 44 That is consistent with Section 1(4) of the Act, in accordance with which the information remains the information at the time the request is received except that account can be taken of amendments or deletions that would have occurred in any event regardless of the request up until "*the time when the information is to be communicated under subsection (1) (b)*". It seems to us that the expression "*is to be communicated*" in Section 1(4) refers to the time at which the information is in fact to be communicated, whether that is as a result of the initial decision on the request or review or indeed, if it applies, the decision notice of the IC or this Tribunal, when "account" can (but need not) be taken of amendments or deletions that would have taken place in any event.
- 45 A particular issue arises as to whether or not the requirements under Part I include compliance with any review procedure that the authority has adopted in accordance with the Code of Practice. As pointed out by Mr Maclean and Mr Choudhury, the only reference in Part I to the Code of Practice is under Section 16 in respect of the provision of advice and assistance. However, we consider that it is of relevance that Part III is dealing with the functions of the Lord Chancellor and the Information Commissioner generally and in the context of Section 45(1) the function as amended of the Secretary of State to issue a Code of Practice providing guidance as to the practice which it would be desirable to follow in connection with the discharge of the authorities' functions under Part I. Thus the statutory framework for Part I includes guidance as to the procedure that it would be desirable in the opinion of the Secretary of State for the authority to follow.
- 46 The Code of Practice is by Section 45(2)(e) to include provision of procedures for dealing with complaints about the handling of requests for information. Under Section 50(2)(a) it is a reason for the IC not making a decision on an application under that section that a complainant has not exhausted the complaints procedure where one is provided in accordance with the Code of Practice.

47 It is also useful to have regard to the provisions of the relevant Code of Practice. Part II provides for the provision of advice and assistance including clarifying the request and other matters. Part III deals with the transfer of request for information where some other authority would be better-placed to respond to the request. Part IV deals with the consultation with third parties and Part V deals specifically with confidentiality obligations. Pausing there it would seem to us that, where an authority had adopted the Code of Practice but had failed to deal with a request in accordance with its provisions under Parts II-V, it would not have dealt with the request for information "*in accordance with the requirements of Part I*" of the Act.

48 We take the view that the submission of Mr Choudhury and Mr Maclean, seeking to distinguish between the requirements spelt out in mandatory terms in Part I and the incorporation of the Code of Practice through Part III to Part I as to what is desirable as the manner in which the request should be dealt with is unduly restrictive in this respect. Nor do we accept that the use of the terms '*requirements*' and '*provisions*' respectively for the Act and the Code in Section 47(1) and (6) of the Act justifies exclusion of the Code, where applicable, from consideration whether a complaint has been dealt with in accordance with the requirements of Part I.

49 Coming then to Part VI of the Code, which provides for the complaints procedure, paragraphs 39 and 40 are as follows:

"39. *The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue. Complaints procedures should be as clear and simple as possible. They should encourage a prompt determination of the complaint.*

40. *Where the complaint concerns a request for information under the general rights of access, the review should be undertaken by someone senior to the person who took the original decision, where this is reasonably practicable. The public authority should in any event undertake a full re-evaluation of the case, taking into account the matters raised by the investigation of the complaint."*

It seems to us from the language of those paragraphs that what was intended on review was a fresh decision as a full re-evaluation of the case, including matters relating to the public interest. Paragraphs 44-46 of the Code deal with notification of the outcome of the review to the applicant.

50 We note that the review procedure is in fact acknowledged as part of Part I by Section 17(7)(a), which requires notice of the complaints procedure where one exists.

- 51 It may well be the case that in a given situation a conclusion is reached on review for exclusion of information relying on a different exemption or other matters material to the decision as to how the request should be handled. For example, in the Gilby appeals on review Section 23 of the FOIA was relied upon in respect of part of the information. Alternatively, if an error in handling had been made in the initial decision, the review would provide the opportunity for the error to be addressed by the authority as part of its Part I procedures. It would seem to us bizarre if the IC in considering how the request was dealt with in accordance with the requirements under Part I was not able to include how in the event it was dealt with on review, particularly insofar as he is not required to make a decision at all unless the opportunity for review has been taken up.
- 52 Moreover it seems to us that the requirements of Part I should be seen in an administrative law context as well as the express terms of the Part. There would generally be a legitimate expectation of compliance with a Code of Practice adopted by an authority, in respect of which a failure to comply would normally render the dealing under Part I unlawful in the absence of some overriding justification.
- 53 We accordingly conclude that the proper approach of the IC and in turn the Tribunal should be to have regard to the whole of the dealing with the request by the authority under Part I and that the time for the consideration whether there should be disclosure of the information, including the public interest balance, should include the whole of that process, including, where applicable, any reconsideration on review. We should, however, make it clear that in the circumstances of the present appeal we would have come to the same conclusion whether the matter was tested so as to include the review, as we think is appropriate, or limited to the original decision for the purposes of the Section 17 notice.

Evidence

- 54 We had evidence from Ann Feltham, the Parliamentary Coordinator for CAAT, Vincent Cable, MP and former acting leader of the Liberal Democratic Party, and Carne Ross by video link, who is the founder and director of Independent Diplomat and whose evidence was also given in respect of the Gilby appeals. We had witness statements from Nicholas Hildyard, who is director and policy analyst at Corner House, and Paul Ingram, Senior Analyst at the British American Security Information Council, neither of whom was required for cross-examination. The MoD called, as we have indicated, William Patey, Her Majesty's Ambassador to Saudi Arabia, who gave evidence jointly in the present appeal and the Gilby appeals, Mr Stephen Pollard, the Commercial Director and Deputy Director General of MoDSAP, and Katherine de Bourcier, the Director of Information (Exploitation) with the MoD, a position she had held since December 2007.

The Questions for the Tribunal

55 The questions to be determined are the following:

- (i) whether the information, the subject of the request, was confidential information within the definition in Section 27(2) and (3) of the FOIA;
- (ii) whether disclosure of the information would have prejudiced or would have been likely to prejudice relations with the KSA and/or UK interests abroad for the purposes of section 27(1)(a),(c) and (d) of the FOIA; and
- (iii) If we conclude that section 27 is engaged under (i) or (ii) above, whether in all the circumstances of the case the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

We will consider these questions in turn.

Confidential Information

56 Section 27(2) and (3) provide:

"(2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom ...

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

57 We agree with what emerged as the common position of the parties that Section 27(3) provides the definition of confidential information for Section 27 (2) (and can be contrasted with the common law right of confidence, the subject of Section 41 of the FOIA).¹⁰

58 As we have said, the information, the subject of the present appeals, comprises the 1986 and 1988 MoU. As Stephen Pollard explained in his open evidence, there has been an enduring relationship between the UK armed forces and those of the KSA for a considerable time. Under the 1973 MoU British Aircraft Corporation ('BAC') agreed to maintain aircraft and equipment of the Royal Saudi Air Force ('RSAF') and train their personnel. Under the subsequent 1985 MoU provision was made for the supply of a range of Tornado and other aircraft together with support services through British

¹⁰ We have noted the decision in SS for the Home Office v BUAV 2008 EWHC 892 but it does not seem to us to give rise to any new point in the context of these appeals.

Aerospace Plc ('BAe'), into which BAC had by then been incorporated. The support team on behalf of the United Kingdom Government ('UKG') became MoDSAP. The KSA gave the project the title 'Al Yamamah' ('AY') which means 'The Dove'.

59 In the 1986 MoU detailed arrangements were set out for continuing provision under AY. That in turn was followed by the 1988 MoU, which provided for the provision of additional aircraft, weapons and ships.

60 The 1973 MoU was marked 'Confidential' on every page. Clause 16.3 provided:

"Each government will protect the security of any plans, specifications or information provided by the other in accordance with the indicated security classification. Neither government will communicate such classified material to a third party unconnected with this Memorandum of Understanding without the agreement of the other."

It was signed, as were the other MoU, by Sultan Bin Abdul Aziz, Minister of Defence and latterly Crown Prince and Deputy Prime Minister.

61 The 1986 MoU was headed 'RSAF Secret' on each page, which Mr Pollard explained was equivalent to 'Confidential' in UK security classification. Mr Pollard told us in his open evidence that the 1986 and 1988 MoU were marked 'Secret' on every page.

62 Mr Patey and Mr Pollard explained that the AY project continued and was expected to continue in force for twenty years or possibly longer for the support and upgrading of the Tornado aircraft. In December 2007 the related Al Salam project with a supporting MoU was entered into for the supply of Typhoon aircraft. The Al Salam and Al Yamamah projects will to this extent run concurrently. In cross-examination Mr Pollard also explained that AY had been renamed the Saudi/British Defence Cooperation Programme ("SBDCP") and that some changes had been made in the funding basis. However we have concluded the substantial relationship under AY continued between the two governments as agreed in the MOU. On this evidence we conclude that the substance of the 1986 and 1988 MoU remained in force between the KSA and the UKG. Mr Pollard also gave open evidence that both sides had agreed that the MoU would be confidential and that the information was exchanged on that basis.

63 In his submissions Mr Hickman challenges whether the definition under Section 27(3) applies at all to the MoU in the sense that they could not constitute "*information obtained from the KSA*". They were in the form of agreements and not properly regarded as information obtained for the purposes of that definition.

64 While to an extent this depends upon the nature of the contents of the MoU themselves, looking simply at the open evidence for the time being, we take the view that in principle, where information comes from a State for the

purposes of an agreement, it would or could constitute information¹¹ obtained from that State albeit for the purpose of the agreement, to which the definition in Section 27(3) can be applied. Thus we conclude that the MoU could constitute relevant information for the purposes of the definition of confidential information under Section 27(3).

- 65 It is then submitted by Mr Hickman that if the MoU were similar in form to the 1973 and 1985 MoU there were no terms that required them to be held in confidence. Clause 16.3 would not include the MoU itself and the heading “confidential” or “secret” did not amount to a term on which the information was obtained. While again this is a matter which we are better able to consider in the light of the particular provisions in the MoU, on the open evidence we are in some doubt whether the marking of the documents 'Secret', as indicated by Mr Pollard, would by itself amount to an express term on which the information was obtained requiring it to be held in confidence.
- 66 Although there might be a case for the implication of a term as to confidentiality, we take the view that the more relevant definition to be applied is that in the second part of subsection (3), that is whether the circumstances in which the information was obtained made it reasonable for the KSA to expect that it would be held in confidence. In our opinion the evidence in this respect is clear. Mr Patey and Mr Pollard told us that the attitude of the KSA to defence or supply of arms agreements was consistently that they should remain secret and confidential. That is consistent with documents that came into existence marked either 'Secret' or 'Confidential'.
- 67 The subject matter was such that secrecy or confidentiality would reasonably be expected to apply. We conclude on the open evidence that the circumstances in which the information in the MoU was obtained prima facie made it reasonable for the KSA to expect that they would continue to be so held, at least in the absence of consent to release from the KSA. There is no evidence that that consent was given.
- 68 In cross-examination an exchange of e-mails relating to defence procurement contracts with America was produced. We did not find that of direct assistance in the present case, partly because on the material we have it was plain that the KSA had not objected to release of that material but also because of the lack of detailed evidence as to the particular circumstances. In any event the application of the definition in Section 27(3) depends on the particular circumstances and facts relating to the information concerned. Mr Pollard made clear that it was not in every case that an MoU would be regarded or marked as confidential or secret.
- 69 We also had evidence in open session of an approach to the KSA to elicit their attitude to release of the MoU. Mr Pollard explained that the request was made in the following terms:

"In informing him [a senior advisor of KSA] of the fact that the request had been made we said in effect: 'These are confidential

¹¹ Defined in FOIA section 84(1) as information recorded in any form.

documents' or 'confidential secret documents' as of course he was well-aware and we gave him - we certainly indicated to him - it was the position of the British Government they should not be released and he expected that would be the position of the Saudi Government also."

In the light of that request it was made clear that the KSA would object to release.

- 70 The form of that approach to the KSA seeking consent to release was in our view properly criticised on behalf of CAAT as being leading and that it had not put the matter neutrally or allowed the KSA to reach its own conclusion, let alone a conclusion that took account of the presumption in favour of disclosure under the FOIA. As CAAT submitted, it did indeed echo what Mr Ross had described as follows:

"In my experience what tends to happen is that the FCO will say something like:

'There is this awful Tribunal in London that is threatening to release these documents, don't you think this will be a very bad idea?'

to which the foreign interlocutor is likely to respond:

'Yes, that would be a bad idea, please report that to London.'

when in fact there is a better way of putting it, namely, that:

'we have a democratic process in Britain which requires some scrutiny, not exactly comprehensive, but some scrutiny of this relationship. I take it that you would have no objection if historical documents relating to this relationship in the past were released. We will give you forewarning of such release; this is a natural part of our democratic process; I hope that you will be able to accept this.'

- 71 We have had the benefit of considering contemporary documentation in closed session and we are able to say in this open decision that in our view the approach adopted by MoD in consulting the KSA was unsatisfactory. We consider that at the very least it should have been put neutrally to the KSA and that only if KSA asked what was the attitude of MoD should that have been indicated. We consider it of importance that the FOIA processes in this country should be made clear to nations such as the KSA and others including importantly the support for transparency and disclosure which they enshrine.

- 72 For all that the fact remains that the KSA did object and there is no indication of consent. Furthermore the evidence that we have been given is that, even if the KSA had been asked neutrally, they would still have maintained their objection to disclosure. We have to consider that issue in 2005. That was

before the accidental disclosure of the 1973 and 1985 MoU had come to light. It was also at a time when the SFO was investigating the issue of sale of arms to the KSA in the light of allegations of corruption, a topic of some sensitivity.

- 73 Mr Pollard also gave open evidence as to the reaction of the KSA to the disclosure in *The Guardian* newspaper in an article on 28th October 2006 of the existence of the 1985 MoU and other documents. He explained that on 3rd November 2006 a senior Saudi Arabian general closely associated with the AY programme requested a meeting at which the general conveyed the KSA's displeasure that among other documents the MoU had been released and that the KSA was greatly concerned by the breach of security understandings between the two governments which "*greatly undermined the trust between the governments*".
- 74 We consider additional evidence in respect of this incident in our closed decision. For present purposes we conclude that, while that event occurred rather over a year later than the time with which we are concerned, there is nothing in the evidence before us that would lead us to believe that the attitude of the KSA would have been different in 2005 or that consent would have been given to the release of either the 1986 or the 1988 MoU, even if consent had been asked neutrally or with express reference to the FOIA. We therefore find that as a fact the KSA objected to disclosure of both MoU and that they would have maintained that objection even if the request had been put in such terms as we consider it should have been.
- 75 In those circumstances we have to consider whether the circumstances in which the information in the MoU was obtained made it reasonable for the KSA to expect that it would be so held. In our view the correct approach to that question is to consider what it would have been reasonable for the KSA to have expected in all the circumstances. That does not justify imposing on the KSA our particular customs and principles as to transparency or democratic accountability. It should be judged against what would have been reasonable for the KSA to have expected.
- 76 We accept the evidence given by Mr Patey as to the particular characteristics of the KSA including the secretive nature of its society. It is of course an absolute monarchy and powers of state are, and were, very much maintained within the Royal family, particularly in the hands of the King and the senior princes. The concept of freedom of information and transparency is generally alien to their culture.
- 77 To this extent the senior rulers and in particular the King could not be expected easily to accept or respond to the principles of disclosure and transparency to which we have referred in the context of the FOIA. We are satisfied on the evidence that these MoU were entered into on a basis on which the KSA would have expected that each government would respect the confidentiality of those agreements at least in the absence of the other consenting to disclosure. The MoU were marked secret and regarded as

confidential. We accept the evidence that the AY¹² remained in force in parallel with Al Salam to cover the provision of services to the KSA and that it and so the MoU were not redundant or only of historical relevance. We do not consider that the KSA could reasonably have been expected itself to apply the FOIA or regarded itself to be under any compulsion to accede to the release of information which it had provided on a confidential basis and to the release, of which it objected.

- 78 In these circumstances we conclude that the MoU and the information contained within them would have fallen within the definition of confidential information in section 27(3) and would therefore have constituted confidential information for the purposes of the exemption under section 27(2) of the FOIA. We would add that we would not accept as it was put to us by Mr Hickman, that this conclusion would allow the culture and regime in the KSA to “trump” the FOIA, particularly having regard to the fact that the interest in maintaining the exemption remains subject to the public interest balance in accordance with Section 2 (2) of the FOIA.

Prejudice to International Relations and UK Interests Abroad

- 79 We turn then to consider Section 27(1) of the Act, which provides so far as relevant:

“Information is exempt information if its disclosure under the Act would or would be likely to prejudice:

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

- 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”, as described in Hogan¹³.

- 81 However, we would make clear that in our judgment 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

¹² In referring to the AY we hereafter include the changes in name and otherwise to which Mr Pollard referred.

¹³ EA/2005/0026/30 at para 30, a case dealing FOIA section 31 (law enforcement).

adverse reaction from the KSA or to make them vulnerable to such a reaction, notwithstanding that the precise reaction of the KSA would not be predictable either as a matter of probability or certainty. The prejudice would lie in the exposure and vulnerability to that risk. Similar considerations would apply to the effect on relations between the UK and the KSA (compare the approach of the Australian Administrative Appeal Tribunal in Maher at para 41¹⁴). Finally in this respect we note that it is the relations of the UK and the interests of the UK with which section 27(1) is concerned and not directly the interests of individual companies or enterprises as such.

82. Considerable reliance was placed by CAAT and their witnesses on the fact that the disclosure of the 1973 and 1985 MoU had not led to "*the sky falling in*" or demonstrable damage. Mr Patey in his evidence distinguished disclosure in those cases from the present in that the KSA, albeit expressing their concern as indicated above, accepted that the disclosure was accidental and that the MoU had been subsequently withdrawn so that the MoD and UKG could be seen to have been doing all it could to remedy the breach. This would be different from the situation where there was what the KSA would see as voluntary disclosure of confidential information by the MoD without their consent. Mr Patey told us that, while he had sought to explain to the KSA the procedures under the FOIA, the KSA would have found it difficult to understand why the UKG could not continue to protect confidential documents and information. We accept the distinction made by Mr Patey between accidental and deliberate disclosure by the MoD.¹⁵
83. However, more fundamentally we have no doubt that the discovery of the disclosure of those MoU in 2006 and 2007 did in itself prejudice relations with the KSA, notwithstanding that it is not easy to quantify the precise extent of prejudice, particularly having regard to the context of the SFO investigation. We have had additional and relevant closed evidence in this respect, with which we deal in our closed decision. Referring to the open evidence at this stage, the Eurofighter Typhoon deal had, we were told, been completed in December 2005. But Mr Pollard gave evidence, which we accept, that further negotiations on this deal were then suspended, only to be resumed early in 2007, reaching a successful conclusion in September (followed by the royal visit by the King of the KSA, an event of particular importance in respect of our international relations with that country).
84. This coincided with the discontinuation of the SFO investigation, but we are satisfied that the revelation of the disclosure of the MoU did cause real and actual prejudice to our relations with the KSA, albeit contributing to the prejudice caused by the SFO investigation and the revelation of other sensitive documents at the same time. That seems to us relevant but only circumstantially to the question that we have to determine, that is whether the disclosure of the 1986 and 1988 MoU in 2005 would have or would be likely

¹⁴ AATAD no V.84/291B

¹⁵ There was also evidence as to the restoration of relations following the showing of the controversial film "Death of a Princess" and the acquiescence of the KSA in the activities of Saudi dissidents in London, but in both cases we consider that there are clear distinctions to be made with the particular situation with which we are directly concerned.

to cause prejudice to UK relations or interests for the purposes of section 27(1).

- 85 In this regard we place particular weight on the evidence of Mr Patey. There was some criticism of his position as a career diplomat and someone charged with the promotion of the interests of the UKG abroad. While that may be true, we take Mr Patey's evidence for what it was, that is, evidence from a person with unrivalled experience of Saudi Arabian affairs and who was doing his best to assist us with what was his opinion on these matters. We accept that the KSA holds a pivotal role in the Middle East with importance in economic, cultural, social and security terms, both in itself and as part of the Middle East as a whole. There is a substantial resident population of UK nationals in the KSA.
- 86 We accept on the open evidence that the AY project was and is of substantial importance to the UK in economic and employment terms. The fact that looked at in macroeconomic terms its percentage proportion of UK global exports may be slight does not seem to us to prevent it from qualifying for consideration in terms of the interests of this country abroad and the importance of its promotion or protection in this respect. In any event the focus under Section 27(1)(a), (c) and (d) should include the continuing interest of the UK in, for example, negotiating further contracts and its continuing international relations with the KSA.
- 87 In 2005 the Eurofighter Typhoon deal was under consideration, quite apart from any other commercial or similar opportunities. The sensitivity of the situation would have been increased by the continuing SFO investigation. Against that background we have the unequivocal evidence of Mr Patey that disclosure of the MoU would lead to "*a very serious reaction*" on the part of the KSA, that it would violate one of the key terms of a government-to-government agreement in respect of which it would be regarded as renegeing on that agreement and that the harm to the relationship with KSA would be significant. He told us and we accept that the relationship was one based on mutual trust and confidence, which would be significantly undermined by disclosure of the MoU and that the Saudi Arabians who then no longer felt able to trust us would be unlikely to feel able to do business with us.
- 88 As he put it in reply to cross-examination:
- "In the Saudis' mind I think it would call into question whether they could continue to have agreements with us. There are negotiations going on. We've just signed another contract the Al Salam contract, as you say, which has confidentiality agreements in them. They would have second thoughts about doing business with us in terms of our ability to keep confidential what they would like to have confidential. So I think there could be some immediate consequences in the defence field. That would be the first area we would see an issue."*
- 89 We have already noted that the time with which we are concerned was before the Al Salam contract was entered. The prejudice would lie in the "*second*

thoughts" and exposure to the possibility of "*immediate consequences*", all of which in our opinion would have constituted prejudice. We have also had regard to the evidence given to us in closed session, which we have dealt with in our closed decision in this respect. We accept the evidence of Mr Patey in this regard and conclude that there would be likely to have been prejudice for the purposes of Section 27(1)(a), (c) and (d).

- 90 In coming to that conclusion we have paid careful regard to the evidence called on behalf of CAAT that arms sales are not in the interests of UKG, having regard to the potential misuse of the arms and proceeds in connection therewith, the involvement of commission payments, leading itself to a self-perpetuating demand for further acquisitions, and the general association with bribery and corruption. Those considerations may be relevant to the public interest in maintaining the exemption as part of the public interest balance. But they do not seem to us to bear on the issue whether there would or would be likely to have been prejudice to relations between the UK and the KSA. Equally for the reasons that we have set out above we are firmly of the view that in principle maintenance of trade with the KSA and our good relations with the KSA was in the interest of the UK and that this would have included the sale of arms and services in connection therewith.
- 91 We accept the evidence that the current regime in KSA is such that one does not find the equivalent standards of transparency or for that matter human rights which are maintained in this country or elsewhere in Europe. However, that does not mean that there may not have been prejudice to the UK's relations with the KSA or that the interests to which we have referred above did not remain the interests of the UK.
- 92 Thus for the reasons set out above we conclude that the exemption under section 27 of the FOIA was engaged in this case both under section 27(1)(a),(c) and (d) and section 27(2) and (3).

The Public Interest Balance

- 93 Section 2(2) provides, so far as relevant:

"In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that ...(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

- 94 This provision provides for the essential balancing of the public interest in withholding and disclosing the information. The balance requires disclosure unless in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure. Thus it requires a broad consideration of all factors relevant to the effect on the public interest to be determined on the basis of a presumption in favour of disclosure.

- 95 Starting with the public interest in maintaining the exemption, the exemption under Section 27(2) and (3) is based on the existence of confidentiality arising out of circumstances in which information was obtained from a State, here the KSA. Thus Parliament recognised and we accept that there is an inherent disservice to the public interest in flouting international confidence. We find that reinforced in the present case where in our judgment it is clear that the KSA would not have done business with the UKG in entering into the 1986 or 1988 MoU other than on the basis of mutual confidence. As we have indicated above, that confidence continued to apply to both MoU and disclosure would have been seen as reneging on or flouting the basis upon which that information was obtained and the MoU entered. We regard that as a matter of significant weight in the context of international comity and relationships.
- 96 It is reinforced by our conclusions as to the real implications for and prejudice to our relations with the KSA and the effect on UK interests abroad and their protection and promotion, as set out above. We would, however, make clear that in our mind the overarching concern is what we would see as a direct breach of the mutual confidentiality which attached to the MoU and which in our judgement the KSA could reasonably have expected the UKG to observe. There would in our opinion in these circumstances have been a clear public interest in maintaining that confidentiality.
- 97 Against that we turn to consider whether that consideration would have outweighed the public interest in disclosing the information. There is, we accept, great weight to be placed upon transparency in government transactions, including in particular those concerning international dealing and, here, the arms trade. That becomes the greater where there is prevailing suspicion and some evidence of corrupt dealing or the giving of commissions or bribes, if for no other reason than to make clear that those circumstances did not apply in the instant cases. That might well be a sound reason for waiving the confidentiality on either government's part.
- 98 That general principle, which is not to be diminished, is significantly reinforced if the particular information comprised in the document, the subject of the information request, is one that discloses matters of specific and relevant public interest. In that context we distinguish between matters that relate to the provision of arms or their maintenance and support as such and matters that relate in the current context to corruption or the giving of commissions or bribes contrary to the edict of the King of KSA dated 20th October 1968¹⁶.
- 99 If either MoU revealed evidence of such conduct, we would expect to have attached significant additional weight to the public interest in disclosure, when balancing it against the public interest in maintaining the exemption. However, we have had the advantage of reading the MoU and we can say in this open decision that there is nothing in either of the documents that would support such a conclusion.

¹⁶ As it was put to Mr Patey on day 1 at p. 129, "confidentiality goes hand in hand with an assumption of right dealing."

- 100 That this might be the position was anticipated by Ms Feltham and Mr Hildyard in their evidence. CAAT submit first that even so the MoU would form part of the “jigsaw”, which by piecing together the disaggregated pieces of information would enable conclusions to be reached as to what may be hidden commissions or bribes, thus exposing corrupt practices. Furthermore they say that in this context, where there is evidence or allegations of extensive corruption, it is important that the core documents, here the MoU as the source contractual framework, are available for public inspection and consideration.
- 101 While we appreciate the force of the points made by CAAT in this respect, in the absence of anything to indicate that there is here a real connection enabling such conclusions to be reached, we do not attach substantial weight to the jigsaw argument or to the point of principle as to the availability of this information, which in our judgment adds little to the basic presumption in favour of and the public interest in disclosure of all public information. In the light of our consideration of the documents and the evidence we received in both open and closed sessions we are of the view that the public interest in maintaining the exemption having regard to the confidential nature of the information and the prejudice that disclosure would have been likely to cause to international relations and UK interests abroad outweighed the public interest in their disclosure.
- 102 Having reached this conclusion in respect of the MoU as a whole, we have considered whether any distinction should have been made between the two MoU and have concluded that we reach the same decision in respect of each MoU individually in that essentially the analysis that we have set out above applies equally to each MoU individually.
- 103 We have also considered in the light of the evidence which we heard in closed session and our scrutiny of the documents whether the public interest balance would shift through redaction of any parts of either or both MoU so as to allow the disclosure of the remainder. We have reached the firm conclusion that the public interest in maintaining the exemption based on confidentiality of the documents as a whole and the prejudice that would have been likely to arise would not be materially different when applied to partial disclosure on that basis. While the sensitivity of parts of the documents varies, we believe that there remained a powerful public interest attached to the fact that the documents were confidential as a whole and reasonably regarded as such by the KSA as explained above. The disservice to the public interest in breaching that confidentiality in this case and the consequent prejudice would not have been overcome through redaction of parts of the documents. In our judgement the public interest in disclosure would for the reasons which we have set out above continue to have been outweighed by the public interest in maintaining the exemption.
- 104 By way of postscript we should add that in reaching our conclusions we have not been assisted by or placed weight on evidence relating to the judicial review of the decision to discontinue the SFO investigation. We take the view that the decision in this case addresses a different subject matter and on different principles subject to a specific legislative regime. We have not

accordingly found it helpful to compare that to the application of principles that apply to the legality of the decision taken to discontinue the SFO investigation, other than that factually the SFO investigation formed part of the context within which decisions in the present case were taken and have to be examined.

- 105 Similarly we have not found the evidence in respect of the **Export Credits Guarantee Department** request for information, which Ms Feltham described in her second witness statement of direct relevance or assistance, not least because of the difference in factual content but also because it did not involve Section 27 of the FOIA.
- 106 For all the above reasons we conclude that the information requested in the present case in the form of the 1986 and 1988 MoU was exempt information in respect of which the public interest in maintaining the exemption outweighed the public interest in disclosure and for that reason Section 1(1)(b) did not require the MoD to communicate the information to CAAT. The appeal is accordingly dismissed.

Mr Robin Purchas QC

Date 15th August 2008