First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Appeal References: EA/2019/0212V
EA/2019/0450V
EA/2020/0142V

Heard by CVP on 13 November 2020

Before

JUDGE ANTHONY SNELSON
JUDGE MOIRA MACMILLAN

Between

(1) MR EDWARD WILLIAMS (EA/2019/0212)
(2) PROFESSOR MARK WICKHAM-JONES (EA/2019/0450)
(3) MR ANDREW LOWNIE (EA/2020/0142)

Appellants

and

THE INFORMATION COMMISSIONER

First Respondent

and

FOREIGN, COMMONWEALTH & DEVELOPMENT OFFICE

Second Respondent

DECISION ON PRELIMINARY ISSUE

On hearing Ms Alison Berridge, counsel, Mr Greg Callus, counsel, Mr Christopher Knight, counsel and Ms Jennifer Thelen, counsel on behalf of, respectively, the First and Third Appellants and the First and Second Respondents,

The Tribunal unanimously decides that:

(1) The First Respondent's decision that it was open to the Second Respondent to maintain the exemptions under the Freedom of Information Act 2000 ('FOIA'), ss23(1) and 24(1) "in the alternative", was incorrect as a matter of law.

(2) The Respondents are invited to deliver to the Tribunal, no later than 14 days after the date on which this Decision is sent to the parties, written submissions on:

(a) the appropriate form of a Decision to give effect to the holding in para (1) above; and
(b) further conduct of the litigation generally.

REASONS

Introduction

1. These cases arise out of requests for information directed by the three appellants to the Second Respondent (hereafter 'FCDO'), pursuant to the Freedom of Information Act 2000 ('FOIA').[1] The subject-matter of the requests was diverse.

2. On 10 May 2018 Mr Williams asked for all documents relating to Mr Abdul-Hakim Belhaj and his wife, Ms Fatima Boudchar. He added that if the "cost threshold" was exceeded[2], the request should be confined to 2004 documents. Although the story of Mr Belhaj and Ms Boudchar has been widely reported, a brief sketch may help to refresh memories. They were active opponents of the Gadaffi regime in Libya. In 2004, they were detained in Thailand and unlawfully rendered to Libya, where they were subjected to torture and other forms of mistreatment. Following their release, they brought claims for damages in the High Court in London alleging that the British Government had been complicit in the affair. Mr Jack Straw, the former Foreign Secretary, and Sir Mark Allen, a very senior civil servant, were joined in the proceedings. A separate claim challenged, by judicial review, the investigation by the Metropolitan Police into possible criminal offences committed in the course of the relevant history. The entire litigation was ultimately resolved in 2018 upon the British Government issuing a public apology to both Claimants and paying their legal costs together with damages of £500,000 to Ms Boudchar (Mr Belhaj sought no payment for himself). The apology acknowledged (*inter alia*) that their "harrowing" accounts of their experiences were true and that the "the UK government's actions [had] contributed to [their] detention, rendition and suffering."

3. Professor Wickham-Jones, an historian who has a special interest in British foreign policy in Italy in the immediate aftermath of the Second World War, made his request on 6 March 2019. It sought "… the declassification of a document concerning the political situation in Italy in 1947. The document is

[1] To which all section numbers below refer.
[2] See s12(1).

found in FO 371/67768 Political situation in Italy. Code 22 File 32 (papers 9331-10459). It is listed as Z9484/32/22."

4. On 14 April 2019 Mr Lownie requested a copy of file FCO 158/15 entitled "Guy Burgess's private papers: C D W O'Neill." Later, he added a request for file FCO 158/16, entitled "Guy Burgess: contacts with other government officials."

5. In each case the request was met with the reply that information within the scope of the request was held but that it would not be supplied because it was exempt either under s23(1) (information supplied by, or relating to, bodies dealing with security matters) or s24(1) (national security).[3] In the case of Mr Williams additional exemptions were cited, but they do not matter for present purposes. Implicit in each refusal was an acknowledgment that the exemptions under ss23(1) and 24(1) were mutually exclusive. That is agreed on all sides to be right. However, the FCDO went on to explain that it was citing them both "in the alternative" because:

> **… it is not appropriate, in the circumstances of the case, to say which of the two exemptions is actually engaged so as not to undermine national security or reveal the extent of any involvement, or not, of the bodies dealing with security matters.**

6. The Appellants raised challenges but on review FCDO's position did not materially change.

7. The Appellants complained to the First Respondent (hereafter 'the Commissioner') but, following lengthy investigations, she upheld FCDO's right to cite ss23(1) and 24(1) "in the alternative" and concluded that the information sought was exempt under one or other of those subsections. She did not inquire into, much less determine, which of the two was applicable. In her decision notices she relied on published Guidance issued by the Information Commissioner's Office (prior to her appointment) which states that the Commissioner "will accept" refusal notices citing both provisions "in the alternative". We will come back to the Guidance in due course.

8. The appeals of Mr Williams and Professor Wickham-Jones were listed together before Judge Snelson alone for final determination on paper in August 2020. He was not willing to proceed in that fashion and directed a preliminary hearing to determine whether the Commissioner's decision that it was open to FCDO to maintain the exemptions under the Freedom of Information Act 2000, ss23(1) and 24(1) "in the alternative", was correct as a matter of law.

9. Mr Lownie's case, which raises the same question, was later consolidated with those of Mr Williams and Professor Wickham-Jones and the three matters

[3] This slightly over-simplifies. In the case of Mr Lownie it seems that FCDO initially refused the first request citing s23(1) only and the second citing ss23(1) and 24(1) "in the alternative". But following review it maintained the "alternative" plea in answer to both requests.

came before us[4] for remote hearing of the preliminary issue by CVP, with one day allocated. We had the benefit of helpful submissions on behalf of Mr Williams, Mr Lownie, the Commissioner and FCDO from, respectively, Ms Alison Berridge (acting, to her great credit, *pro bono*), Mr Greg Callus, Mr Christopher Knight and Ms Jennifer Thelen, all counsel. Understandably, Professor Wickham-Jones, who was unrepresented and claims no expertise in the law, was content to adopt the submissions of Ms Berridge and Mr Callus. Two further members of the Bar, Mr Aaron Moss and Mr David Mitchell, attended the hearing on behalf of FCDO but did not seek to address us.[5]

The Legal Framework

Legislation

10. FOIA, s1 includes:

> **(1) Any person making a request for information to a public authority is entitled–**
>
> **(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and**
> **(b) if that is the case, to have that information communicated to him.**

11. By s2 it is provided, so far as material, as follows:

> **(1) Where any provision of Part II states that the duty to confirm or deny[6] does not arise in relation to any information, the effect of the provision is that where either—**
>
> **(a) the provision confers absolute exemption, or**
> **(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,**
>
> **section 1(1)(a) does not apply.**
>
> **(2) 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—**
>
> **(a) the information is exempt information by virtue of a provision conferring absolute exemption, or**
> **(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.**
>
> **(3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—**
>
> **…**
> **(b) section 23 …**

[4] Given the importance of the point at issue, a two-judge constitution was empanelled at the behest of the acting Chamber President, Upper Tribunal Judge O'Connor.
[5] Mr Moss was, however, co-signatory to the skeleton argument presented by Ms Thelen in the Williams and Wickham-Jones appeals and Mr Mitchell was the author of FCDO's response to Mr Lownie's appeal.
[6] For the cumbersome formulation 'neither confirm nor deny' we will adopt below the customary abbreviation 'NCND'.

12. s17 includes:

> **(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—**
>
> **(a) states that fact,**
> **(b) specifies the exemption in question, and**
> **(c) states (if that would not otherwise be apparent) why the exemption applies.**
>
> **(2) Where—**
>
> **(a) in relation to any request for information, a public authority is, as respects any information, relying on a claim—**
> **(i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or**
> **(ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and**
> **(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,**
>
> **the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.**
>
> **(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming—**
>
> **(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or**
> **(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.**
>
> **(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.**

13. Part II of the Act contains the exemptions. So far as relevant, s23 provides:

> **(1) Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).**
>
> **(2) A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.**

(3) The bodies referred to in subsections (1) and (2) are—

(a) the Security Service,
(b) the Secret Intelligence Service,
(c) the Government Communications Headquarters,
(d) the special forces,
(e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
(f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
(g) the Tribunal established under section 5 of the Security Service Act 1989,
(h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
(i) the Security Vetting Appeals Panel,
(j) the Security Commission,
(k) [repealed]
(l) the Service Authority for the National Criminal Intelligence Service,
(m) the Serious Organised Crime Agency,
(n) the National Crime Agency,
(o) the Intelligence and Security Committee of Parliament.

…

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

14. The material parts of s24 are:

(1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security.

(2) The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.

(3) A certificate signed by a Minister of the Crown certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of safeguarding national security shall, subject to section 60, be conclusive evidence of that fact.

15. In s50, concerned with applications for decisions by the Commissioner, it is provided, relevantly, as follows:

(1) Any person (in this section referred to as "the complainant") may apply to the Commissioner for a decision whether, in any specified respect, a request for information made by the complainant to a public authority has been dealt with in accordance with the requirements of Part I.

(2) On receiving an application under this section, the Commissioner shall make a decision unless it appears to him—

(a) that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45,
(b) that there has been undue delay in making the application,
(c) that the application is frivolous or vexatious, or
(d) that the application has been withdrawn or abandoned.

(3) Where the Commissioner has received an application under this section, he shall either—

(a) notify the complainant that he has not made any decision under this section as a result of the application and of his grounds for not doing so, or
(b) serve notice of his decision (in this Act referred to as a "decision notice") on the complainant and the public authority.

(4) Where the Commissioner decides that a public authority—

(a) 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), or
(b) has failed to comply with any of the requirements of sections 11 and 17,
the decision notice must specify the steps which must be taken by the authority for complying with that requirement and the period within which they must be taken.

16. The appeal is brought pursuant to s57. The Tribunal's powers in determining the appeal are delineated in s58, so far as relevant, thus:

(1) If on an appeal under section 57 the Tribunal, consider –

(a) that the notice against which the appeal is brought is not in accordance with the law; or
(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the tribunal shall dismiss the appeal.

17. Ms Thelen also reminded us of the First-tier Tribunal (General Regulatory Chamber) Rules 2009 (as amended), r14, which includes:

(9) In a case involving matters relating to national security, the Tribunal must ensure that information is not disclosed contrary to the interests of national security.

Case-law

18. The fundamental duty of courts and tribunals to safeguard national security has been emphasised in countless authorities.[7]

19. In the particular context of FOIA, the Upper Tribunal ('UT') has pointed out that s23 provides the "widest protection" of any of the exemptions and that the

[7] See *eg R v Shayler* [2003] 1 AC 247, at para 25 (Lord Bingham).

"exclusionary principle" applies[8] so that "even perfectly harmless disclosure would only be made on the initiative or with the consent of the body concerned" (see *Home Office v Information Commissioner and Cobain* [2015] UKUT 27 (AAC), paras 28, 29). In *Corderoy v Information Commissioner and Attorney General* [2017] UKUT 495 (AAC) it was observed that, "Parliament clearly did not intend information to be obtained from or about security bodies by the back door".[9] The UT delivered a similarly robust defence of the "exclusionary principle" in *Lownie v Information Commissioner and Foreign & Commonwealth Office and the National Archives* [2020] UKUT 32 (AAC), especially at para 42.

20. Turning to the qualified exemption under s24, we note this observation in *Coppel on Information Rights,* 5th Edition (2020)[10], para 26-053:

> **Based on the authorities … the executive's assessment of whether exemption from the provisions of FOIA …is required for the purposes of safeguarding national security will not generally be gainsaid.**

Although the term 'national security' is not defined in FOIA, the concept has consistently been given a wide interpretation by the courts and there is no reason to read it more narrowly in the context of information rights. We take it to mean "the security of the United Kingdom and its people" (see *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 HL).

21. The point before us is not the subject of any binding authority and appears not to have been considered, even incidentally, by any court of record. In two reported decisions of the First-tier Tribunal ('FtT'), maintenance of the exemptions under s23(1) and 24(1) "in the alternative" has been accepted without discussion in circumstances where, it seems, the permissibility of doing so was not questioned.[11] We are, of course, not bound by decisions of the FtT in any event.

22. The FtT has considered the distinct question whether a public authority may cite the quite differently worded NCND provisions under s23(5) and 24(2) "in the alternative", concluding that it may: *APPGER v Information Commissioner and Foreign & Commonwealth Office* (EA/2011/0049). The question cannot, however, be regarded as closed. No court of record has pronounced on it and the UT in *Savic v The Attorney General* [2016] UKUT 534 (AAC) noted *obiter* that there was "some force" in the argument that the FtT in *APPGER* had taken an "impermissibly broad" approach.[12]

[8] The exemption is absolute: see s2(3)(b).
[9] Para 29.
[10] Cited below as *Coppel*
[11] *Arthurs v Ministry of Defence* (EA/2016/0062) and *Shannon v Information Commissioner and Cabinet Office* (EA/2018/0149).
[12] See paras 98-102 and 105-6.

Secondary materials

23. In Guidance entitled 'How sections 23 and 24 interact' issued by the Commissioner's Office in 2009 and reissued 2012, the following paragraphs appear:

> **25. Section 23(1) and 24(1) are mutually exclusive 25. This means they cannot be applied to the same request.**
>
> **…**
>
> **26. The fact that section 24(1) can only be applied to information that is not protected by section 23(1) can present a problem, if a public authority does not want to reveal whether a section 23 security body is involved in an issue. If it could only cite section 24(1) in its refusal notice, this would disclose that no section 23 body was involved. Conversely, if only section 23(1) was cited, this would clearly reveal the involvement of a security body.[13] To overcome this problem the Commissioner will allow public authorities to cite both exemptions 'in the alternative' when necessary. This means that although only one of the two exemptions can actually be engaged, the public authority may refer to both exemptions in its refusal notice.**
>
> **…**
>
> **27. Previously, where public authorities have been concerned that being able to rely only on either section 23(1) or section 24(1) would reveal the involvement or not of a security body, they have tried to avoid the problem by applying the NCND provisions of the two exemptions. This is the case despite the fact that confirming the information is held would not reveal anything which needed to be protected. The perceived problem is that if the public authority confirms the information is held, it would then have to rely on just one exemption to withhold it. The Commissioner is satisfied that allowing public authorities to cite sections 23(1) and 24(1) in the alternative is the pragmatic solution to the problem. There are benefits to the applicant in that they at least receive confirmation that the information is held. In addition, the public authority is not placed in the odd position of refusing to confirm whether information is held where it obviously is and so avoids looking unnecessarily obstructive.**
>
> **Refusal notices**
>
> **28. When a public authority cites sections 23(1) and 24(1) in the alternative, consideration needs to be given to the contents of the refusal notice. Technically section 17(1) requires public authorities to specify the exemption they are relying on. However, it is important in these circumstances that the refusal notice effectively disguises which provision actually applies. Therefore, the Commissioner will accept a refusal notice which cites both exemptions, stating that they are being cited in the alternative and then explaining why each one could apply. As section 24 is qualified, the refusal notice would also have to explain the application of the public interest test to that provision.**

24. By contrast, in Guidance on the operation of s23 dated March 2012 the Ministry of Justice[14] said this:

[13] This is often called the "giveaway effect".

[14] This Guidance adopted the legal analysis on which prior Guidance issued by the Department of Constitutional Affairs had been based.

> **In practice it is very rare that a neither confirm nor deny response will cite just section 23, as this will confirm that the question of whether or not information is held relates to one of the section 23 bodies. Therefore, to avoid releasing information about one of these bodies which has not already been released, it will be necessary to rely upon neither confirm nor deny under both section 23 and section 24. By using both exemptions it obscures the fact that a section 23 body may or may not have been involved. This is permissible in contrast to the application of section 23(1) and section 24(1) to withhold information that the duty under section 1(1)(b) applies to, where the exemptions are mutually exclusive, although there are instances where they may appear together to withhold different information. The ability to use section 23(5) and section 24(2) together in respect of the same information is important in order to maintain the principle that information about section 23 bodies is exempt.**

Analysis

Preliminaries

25. Throughout our deliberations we have been careful to keep in mind the critically important role of the law in safeguarding national security.

26. In argument before us (submissions, para 30) Mr Knight contrasted (a) the case where the public body invokes s23(1) and s24(1) "in the alternative" as a tactical device to avoid the risk of disclosing the involvement of a security body and (b) the case where, on the facts, there is genuine doubt as to which provision is applicable. We will refer to the two categories as "masking" and "boundary" cases respectively. It will be necessary to return to Mr Knight's argument below, but we should record at the outset that it is not in question that the three disputes before us are all "masking" cases.

27. The scheme of FOIA was conveniently summarised by Ms Berridge (submissions, para 11) as consisting of:

> **(a) A general right of access to information held by public authorities, comprising both (i) a right to have such holding "confirmed or denied", and (ii) a right to have such information communicated;**
>
> **(b) A detailed scheme of exemptions from the above rights;**
>
> **(c) Specific requirements for the contents of the refusal notice in any case where an exemption is relied upon to refuse to confirm or deny holding of, or to communicate, requested information;**
>
> **(d) Exemptions from the requirements of s17 in specified circumstances (s17(4)).**

28. It is common ground that the option of giving NCND responses has been forfeited: rightly or wrongly, FCDO has admitted that information within the scope of each request is held.

29. From the foregoing outline, it becomes apparent that the question of pure law for our decision is whether or not FCDO's responses to the requests, purportedly in compliance with s17(1), by which it cited s23(1) and 24(1) "in the alternative" was, as the Commissioner found, in accordance with the law.

The key provision: s17(1)

30. Given that the preliminary issue before us turns on the proper interpretation of s17(1), it is a striking fact that experienced counsel for both Respondents barely touched upon that subsection in their written submissions and pleadings. The subsection forms part of the legislative framework and must, of course, be read in the context of the FOIA scheme as a whole. But the starting-point, as always, is the wording of the particular provision to be construed. We begin with three observations on its constituent parts.

31. In the first place, the duty on the public authority giving notice of refusal is to "specify" the exemption relied upon. We agree with Ms Berridge and Mr Callus that the word "specify" is commonplace and has a clear meaning. Left to our own devices, we would take it as ordinarily meaning to state with precision. More fully and authoritatively, the Oxford English Dictionary offers this:

> **To mention, speak of, or name (something) definitely or explicitly; to set down or state categorically or particularly; to relate in detail. Usually said of persons, but sometimes said of an act, document etc**.

We would expect a requester met with a notice which "specifies" the exemption(s) relied upon to have a clear understanding of the ground(s) on which the public authority is claiming the right to NCND or the right to refuse to communicate the information requested.

32. Second, what must be specified is "the exemption in question", namely the exemption on which the public authority is "relying" in support of the claim that the information sought is exempt. Absent any indication to the contrary, it seems to us plain and obvious that the exemption on which the authority is relying must be one which it believes to be applicable or at least arguably applicable, and certainly cannot include one which it knows to be inapplicable. We have been shown nothing to the contrary. It was not suggested that the statute (within s17(1) or anywhere else) expressly permits, or even hints at the admissibility of, a s17(1) refusal citing an exemption which, to the knowledge of the public authority, does not apply. This is hardly surprising: any freedom of information legislation which gave a general[15] right to public authorities to undermine its core purpose by refusing requests on bogus grounds would be a remarkable thing.

[15] We have ss23 and 24 very much in mind, but our analysis here is of s17(1), which forms part of the general scheme.

33. Third, what must be specified is an exemption which is relied upon by the public authority "to any extent". In so far as it may have been tentatively suggested that a public authority citing two mutually exclusive exemptions "in the alternative" may properly be seen as relying on the inapplicable exemption "to an extent", we reject that notion. The public authority does not, in our judgment, rely "to *any* extent" on an exemption which it cites purely for tactical reasons and which it knows does not apply. We repeat our reasoning above on the meaning of "rely".

Other provisions of FOIA

34. So much for s17(1). We were also reminded by Ms Berridge and Mr Callus of the terms and effect of s17(4). Not surprisingly, they relied heavily on the fact that the subsection excuses the public authority from making a statement under s17(1)(c) (explaining why the exemption applies) where doing so would itself involve disclosing exempt information, but does *not* excuse it from complying with s17(1)(b) (the duty to identify the exemption relied upon). They submitted that it was evident that Parliament had deliberately drawn the line where it had in order to ensure that the requester would know what exemption was relied upon and the public authority would be excused from *explaining* its reliance where to do so might result in the release of exempt information. We see compelling force in that submission.

35. It may be superfluous to add that s17, the only section dedicated to refusals of requests, was the obvious place for any provision to limit or qualify subsection (1)(b), had Parliament seen a need to do so. No such provision was enacted in s17 (or anywhere else in the Act) and none has been added since.

36. We have considered whether our preliminary views based solely on the language of s17 need to be revised in light of other provisions of FOIA. Our attention was drawn to s30 (investigations and proceedings by public authorities) and s31 (law enforcement), another pair of mutually exclusive exemptions. It was not suggested that any public authority had sought to rely these exemptions "in the alternative" or that any tribunal or court had considered whether such a response was or would be in accordance with the law. Neither Mr Knight nor Ms Thelen sought help on the proper construction of s17 from elsewhere in the Act.

Case-law

37. Counsel agreed that the case-law was of very limited assistance for our purposes. The reported FtT decisions[16] in cases where the Commissioner has accepted the public authority's reliance on ss23(1) and 24(1) "in the alternative" do not help because the permissibility of doing so was not considered in any of them.

[16] Cited above

38. As for the FtT decisions on the NCND provisions (s23(5) and s24(2))[17] (erroneously cited as directly in point in the response of FCDO in Mr Williams's case), these are certainly not in point and Mr Knight was right to accept that they cannot serve as support for anything more than an argument by analogy. But even that, we think, puts the Commissioner's case much too high. In the *APPGER* case the FtT, in concluding that the NCND provisions could be run in tandem, explicitly contrasted those subsections with the differently-worded and admittedly exclusive provisions under s23(1) and s24(1).[18] The logic of the FtT was, we think, entirely consistent with the submissions to us on behalf of the Appellants.

39. It was common ground that the *Savic* case is not, for our purposes, binding authority one way or the other. But for what it is worth it seems to us that the UT's comments, *obiter* as they are, clearly favour the Appellants: given that they question the reasoning in *APPGER* on ss23(5) and 24(2), it would seem to follow *a fortiori* that the tribunal's doubts about the permissibility of a public authority which has admitted holding the requested information seeking to cite ss23(1) and 24(1) "in the alternative" would be likely to be all the more profound.

The Respondents' main submissions

40. Athough his written submissions dwelt on what appeared to be policy-based arguments, Mr Knight in his oral address to us boldly submitted that there was no difficulty with s17(1) and no requirement for a "purposive" interpretation. In short, FCDO had complied with the subsection and the Commissioner had rightly accepted the responses. In our judgment, Mr Knight's attractively simple submission must be rejected. The responses did not "specify" anything and certainly did not "specify" the exemption "relied upon". As Ms Berridge put it, if, when asked what she has had for breakfast, she replies "cereal *or* toast", she has not "specified" the information requested. She has offered two answers, one of which is wrong, and she knows to be wrong.[19]

41. Mr Knight prayed in aid the Commissioner's Guidance as fairly addressing the "problem in issue", while rightly accepting that it had no legal status. We have considered the Guidance with care. Our starting-point is that it emanates from a body which has accumulated considerable learning and experience in administering our information rights legislation. That alone entitles the document to respect. We should be slow to accept an implicit submission that the Commissioner has issued, re-issued and now stoutly defended in legal proceedings a document which rests on a significant misapplication of FOIA.

[17] Also cited above

[18] Paras 91-114, especially at 101. As Mr Knight rightly accepted (submissions, para 36), the FtT's reasoning "is tied quite specifically to the terms of the NCND provisions".

[19] Mr Callus gave another illustration: Question: When was the meeting? Answer: Tuesday or Thursday. The field for inquiry is narrowed but, to state the obvious, the answer does not "specify" the relevant day. And one of the two days named is incontrovertibly wrong.

And we should be particularly careful given that the Guidance bears upon the delicate and fundamentally important subject of national security.

42. These things having been said, our function is to interpret the legislation and ask whether FCDO's plea "in the alternative" is in accordance with the law. For the reasons already given, we cannot reconcile the Commissioner's case with the clear language of s17. The policy on which the Guidance is based is clear enough, but policy cannot be allowed to supplant the statute. The difficulties do not end with s17. We have been given no explanation for the assumed power of the Commissioner to "accept" a response at variance with the duty under s17(1)(b) to specify the exemption relied upon. The Guidance offers none. Surprisingly, to our minds, it merely describes the requirement as operating "technically" (para 28), as if that word diminishes its legal force. It is a central element of s17, itself a key component of what Mr Callus rightly described as the "carefully-calibrated" legislative architecture. We have looked in vain for any provision that permits derogation from it.

43. Mr Knight also made the point that it is commonplace and in keeping with the statutory scheme to plead exemptions in the alternative. Of course, that is right, but it does not address the problem before us. In a case of two mutually exclusive exemptions, naming both "in the alternative" does not amount to "*specifying*" either and in so far as the response names the exemption known to be inapplicable it offends against s17(1)(b) on the further ground that that exemption is not "*relied upon*" ("to any extent").

44. In a related submission, Mr Knight contended that the exemption(s) cited "need not be correct". Citation of exemptions was a procedural, rather than "substantive", requirement (see *Oxford Phoenix Innovation Ltd v Information Commissioner and The Medicines and Healthcare Products Regulatory Agency* [2018] UKUT 192 (ACC), especially at paras 37-40). We agree, but the (procedural) obligation on the public authority under s17 is to identify the exemption(s) on which it *in fact* relies. A response which cites an exemption which the authority knows to be inapplicable does not "specify" the exemption relied upon.

45. We must now return to Mr Knight's argument that there is no logical distinction between the "masking" case and the "boundary" case. We can see that in the hypothetical "boundary" case (we were not told of any reported decision in which a "boundary" dilemma arose, let alone one in which any court or tribunal at any level had been required to grapple with any resulting legal consequences) the Commissioner and the public authority would be in a less uncomfortable position than that in which the Respondents find themselves here. There is certainly a difference between, on the one hand, arguing that, on the particular facts, the legislation gives rise to a genuine quandary as to which one of two exemptions is applicable and, on the other, defending a stance which seeks positively to mislead the requester by citing alongside a potentially tenable exemption one which the responder *knows* to be

inapplicable. But whether the distinction is significant as a matter of law is a different matter. On the face of it, s17(1) imposes the same obligation on the public authority in the "boundary" case as in the "masking" case. In the language of the legislation, Parliament has given no signal that it recognizes the possibility of a dilemma in *either* instance, still less that it favours special treatment to cater for any dilemma. It requires in every case that the authority reveal its hand to the extent of specifying genuinely the exemption relied upon. If (in the overall context of legislation which starts by providing a general *right* to information) Parliament has enacted not one but two possible (but mutually exclusive) exemptions that may be applicable in a particular case, it hardly lies in the mouth of the public authority to complain that it has difficulty in deciding between the two. There is nothing exceptional about the law facing a party with a decision as to how, within a particular legal structure, to put its case. The authority here should be well-placed to make its election: it knows what information is requested, what information is held and what exemptions are potentially in play. In the circumstances there is evident force in the argument that if Parliament had wished to cater for the sincere but perplexed public authority struggling to decide between alternative exemptions, it would have enacted a specific provision for that purpose.[20] These things having been said, we remind ourselves that the disputes before us are all agreed to be "masking" cases, and we prefer to express no concluded view on Mr Knight's imaginary "boundary" case at this stage. If a concrete example ever arises, it will no doubt be apt for consideration by the Tribunal in due course, on the basis of real facts rather than conjecture.

46. We do not think it necessary to summarise Ms Thelen's submissions as they largely mirrored those of Mr Knight, although we did not sense that she was entirely with him in his contention that a "purposive" interpretation was unnecessary because s17 gave no rise to difficulty anyway.

Conclusions

47. For all of the above reasons, we have reached the conclusion that the preliminary issue must be answered in favour of the Appellants. Their interpretation of s17 is in keeping with the statutory language and the scheme of FOIA as a whole. That of the Respondents is not.

48. Our reasoning makes it unnecessary to adjudicate on the second part of Mr Callus's submissions, directed to human rights points.[21]

[20] This part of the Mr Knight's argument would presumably be equally applicable to the case of a public authority faced with a choice between relying on s31 and s32. We note that the supposed problem of the "boundary" case is not acknowledged in the Commissioner's Guidance, which is premised narrowly and specifically on the perceived need to devise a procedural remedy for a public authority that does not want to reveal the involvement of a security body.

[21] Those arguments were in the end only faintly pursued, Mr Callus rightly acknowledging the obvious difficulties (at least at first instance) presented by *Moss v Information Commissioner* [2020] UKUT 242 (AAC).

49. The outcome turns on a pure question of statutory interpretation but is reinforced by two wider considerations. First, we are mindful that FOIA provides citizens with an important constitutional right. That right would seem illusory if the legislation permitted requests for information to be met (in any circumstances) with responses which suppressed even the category of exemption relied upon. Second, our decision avoids the absurd logic of the Respondents' case, which permits – indeed requires – the public authority to give a refusal notice which recites the grounds on which *two* exemptions, one of which does not, and cannot, apply, "could apply"[22], and, in the case of s24, explains why the public interest balancing test, which may or may not be applicable and which the public authority may or may not have carried out, favours maintenance of that exemption, or would do if it was applied. Such logic is liable to get the law a bad name.

50. On the other hand, the result should not, we think, be seen by FCDO or other interested public bodies as a cause for disquiet. We venture three points. First, despite the *obiter* doubts in *Savic*, it is and remains, as we understand it, accepted practice to cite ss23(5) and 24(2) "in the alternative" on the strength of the FtT ruling in *APPGER* and there seems to be no reason to expect that to change unless and until that decision is overturned by the UT. Second, citing s24(2) alone *may* provide a public authority with another means of avoiding disclosure of the involvement (or not) of a security body. Ms Berridge argued (submissions, para 31) that a response along these lines would have that effect: "We rely on s24(2) because if we confirm or deny that we hold this information we will have to rely on one of ss23(1) or 24(1) in order to avoid communicating it and that would – either in the present case or by providing a reference point for future cases – reveal something that it is not in the public interest to reveal." Mr Knight and Ms Thelen challenged the permissibility of such a response, and we were treated to an interesting exchange between counsel, but we do not think it appropriate to reach a concluded view on what was an academic debate about a point that might have been, but had not been, taken by the public authority. On any view, it seems to us that Ms Berridge has identified an arguable means, worthy of examination in a proper case, of reconciling the requirements of ss17, 23 and 24 and the public interest in preserving national security. Third, fears about the "giveaway effect" are in any event liable to be overstated. In this regard, the following remarks in *Coppel* p687, are illuminating (footnotes excluded):

> **First, bare reference to s23 under s17(1)(b) will not identify the security body or bodies in question or reveal anything specific about their involvement, although this may be apparent from the context. Secondly, the institutional exclusion of the security bodies from [the] FOIA regime means there is less scope for strategic sequential requests liable to yield variable responses and designed to flush out information through the giveaway effect. Thirdly, simultaneous joint reliance on ss23 and 24 may be possible in relation to a single information request where different pieces of the information requested are subject to those provisions, and it**

[22] See the Guidance, para 28.

may also be possible to rely on different exemptions in the alternative. Fourthly, … s23(5) of FOIA allows a neither confirm nor deny response where divulgence would disclose unrecorded as well as recorded security body information and, because the fact that no such information is held is itself capable of being unrecorded information and may suggest that the security bodies did not and do not have any involvement in the subject matter of the request, there is considerable scope for reliance on … s23 even in cases where the security bodies are not involved. This will also limit the giveaway effect because it may not be clear whether s23(5) has been invoked by reason of security body involvement or the total absence thereof.

Disposal

51. We note the arguments of Mr Callus[23] as to the appropriate form of Decision in the event of the Tribunal upholding the Appellants' case on the preliminary issue, but consider it appropriate to allow the Respondents, and in particular FCDO, an opportunity to make submissions on that question in light of our decision.

52. We are also mindful that our decision leaves FCDO in an unfortunate position. Having forfeited its NCND rights and responded to these information requests in reliance on the Commissioner's Guidance, it may complain that it finds itself disadvantaged. The wide language of our Decision, para (2)(b) is intended to give complete liberty to both Respondents, within the stipulated timeframe, to make any procedural applications open to them.

Anthony Snelson
Moira Macmillan

Judges of the First-tier Tribunal
Date: 29th December 2020

[23] Submissions, para 38c