



# Tribunals Service

Information Tribunal

Information Tribunal Appeal Number: EA/2008/0079  
Information Commissioner's Ref: FS 50117046

Heard at Victory House, London, EC4  
On 23 April 2009

Decision Promulgated  
On 12 May 2009

**BEFORE**

**CHAIRMAN**

**CHRIS RYAN**

and

**LAY MEMBERS**

**ROSALIND TATAM  
DAVID WILKINSON**

**Between**

**ROGER BEAM**

**Appellant**

and

**INFORMATION COMMISSIONER**

**Respondent**

and

**FOREIGN AND COMMONWEALTH OFFICE**

**Additional Party**

**Subject matter:**

Information supplied by, or relating to, bodies dealing with security matters s 23

**Cases:**

**Decision**

The Tribunal upholds the decision notice dated 21 August 2008 and dismisses the appeal.

### **Reasons for Decision**

1. This Appeal arises from an original application by Mr Beam addressed to the Foreign and Commonwealth Office (“FCO”) for information concerning an official Dutch Commission of Enquiry into the circumstances in which the security of certain operations behind enemy lines between 1942 and 1944 had been compromised. The detailed background was set out in an earlier decision of the Tribunal dated 17 December 2008 (the “First Decision”), allowing, in part, an application for the Appeal to be summarily dismissed. We do not therefore need to repeat it.
2. Since the date of the First Decision the composition of the Tribunal panel has changed because it became necessary for the documents retained by the FCO to be inspected by Tribunal members who had received an appropriate level of security clearance.
3. As a result of the First Decision:
  - a. the only documents in dispute, out of the five originally identified as falling within the scope of the Appellant’s request (“the Disputed Information”), are:
    1. FO 371/ 79556 Jacket Z 2083/G — two minutes. 1 page dated 3/3/1949 and 2/3/1949
    2. FO 371/ 79557 Jacket Z 6036/G - Telegram of 19/9/1949
    3. FO 371/ 79557 Jacket Z 6036/G - Minute of 26/9/1949 (together “the Disputed Information”);
  - b. the only issue to be decided is whether the Information Commissioner was correct in concluding, in his Decision Notice dated 21 August 2008, that each of them fell within the scope of the absolute exemption from the obligation to disclose provided by FOIA section 23; and
  - c. the only surviving ground for challenging the Decision Notice is the Appellant’s contention that the Information Commissioner had erred in that he relied in part on an assurance from the Director General of Defence and

Intelligence that section 23 was engaged and did not check the position for himself by inspecting the documents.

4. The relevant part of FOIA section 23 reads as follows:

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 –*

1. ...

2. *the Secret Intelligence Service,*

#### The First Decision

5. The First Decision described, in paragraphs 15 to 19, the steps taken by the Information Commissioner to investigate the Appellant's complaint about the FCO's refusal to disclose the Disputed Information. It drew attention to the fact that the Information Commissioner's Deputy, who conducted this part of the investigation on the Information Commissioner's behalf, either did not inspect the Disputed Information at all (according to the Decision Notice) or only had "cursory sight of the relevant file" during a meeting with the FCO but did not "examine the contents of the file in any detail" (according to the Reply to the Grounds of Appeal filed in this Appeal). Instead, the Information Commissioner relied on a letter from the Director General of Defence and Intelligence dated 13 December 2007 in which she confirmed that she had viewed the Disputed Information and confirmed that she was fully satisfied that the section 23 exemption had been correctly applied.

6. The conclusion reached in the First Decision was that the Appellant's ground of appeal, summarised in paragraph 3 c. above, was not "fanciful" and should not

therefore be summarily dismissed. It gave its reasons for that conclusion in the following terms:

*“No explanation has yet been advanced for the differences between the Decision Notice and the Commissioner’s Reply. In particular the Tribunal notes that the Decision Notice did not mention that the disputed material had been seen, albeit not read, and questions why if it was available (and bearing in mind the withheld material amounts to 4 pages) the Deputy Commissioner only had “cursory sight of the relevant file and its contents”? The Tribunal was told by the FCO that the Deputy Commissioner who dealt with this case had sufficiently high security clearance to have been able to read the disputed material. Additionally since he had been provided with the opportunity to view the disputed material, paragraph 26 of the Decision Notice would appear unnecessary”*

Paragraph 26 of the Decision Notice was in the form of a postscript and read:

*“The Commissioner notes that in the particular circumstances of this case he relied upon a re-assurance from the [Director General of Defence and Intelligence] that the information withheld is exempt from disclosure on the basis of section 23. However, the Commissioner wishes to emphasise to all public authorities that in dealing with complaints he has received under section 50 of the Act the Commissioner will usually require sight of the information withheld by public authority as well as an explanation as to why a public authority considers that information to be exempt from disclosure”*

### The substantive appeal

7. The Chair of the current panel directed that the Appeal should be determined at a paper hearing, on the basis that this direction would be re-visited if, on inspecting the information in dispute, the panel required further explanation before it could be determined whether or not it fell within the section 23 exemption. In the event we did not require such explanation, having inspected the three documents that comprise the Disputed Information. Accordingly the Appeal has been determined on the basis of that inspection supplemented by an agreed bundle of documents and written submissions provided by the parties. It may be some comfort for the

Appellant to know that, having seen the documents, we would be amazed if their disclosure would have expanded his knowledge significantly. However, our task is not to consider whether the FCO's decision to withhold them was necessary or wise. We simply have to decide whether they were supplied to it by one of the bodies identified in section 23(3), or related to such a body.

8. We have been assisted in reaching a decision on that issue by a Witness Statement provided by the official who wrote the letter on which the Information Commissioner relied in his Decision Notice. The official is Alison Mariot Leslie who is the Director General Defence and Intelligence at the FCO and is responsible for overseeing the relationship between the FCO and the intelligence agencies. Her statement explained that she acquired familiarity with the format and language used in exchanges, such as those comprising the Disputed Information, from the early stages of her career in the late 1970s. The witness statement then confirms that Ms Leslie was satisfied that, apart from a small part of one of the documents, which we refer to below, all the Disputed Information either related to or had been supplied, either directly or indirectly, to the FCO by Secret Intelligence Service. Her reasons for reaching that conclusion were set out in a closed part of her Witness Statement, which was made available to the Information Commissioner and the Tribunal (but not the Appellant, as to do so would effectively pre-judge the decision we are required to make). We think that we can summarise the relevant part of the evidence in an open decision, without risk of breaching confidence. As to item 1 in paragraph 3 a. above, Ms Leslie explained the significance of some of the terminology used at the time, which made it clear that, whether or not the document had emanated from the security service, it clearly related to it. On the basis of the same explanations we are satisfied that items 2 and 3 were clearly sent to the FCO from the security service and were therefore "supplied to" it for the purposes of the section.
9. The part of the Disputed Information that Ms Leslie accepted fell outside section 23 was this. Item 4 of the Disputed Information is a telegram on which a manuscript note has been added. It reads: *"I spoke to Mr. Peck at The Hague and asked him to ask Mr. Seymour to call at the Foreign Office on the morning of October 1st*

*[Illegible signature]*

26th Sept”

Ms Leslie expressed the view, in her Witness Statement, that this appeared to have been written by a Foreign Office official and as such was not part of the telegram. On that basis the FCO did not claim that it fell within section 23. This part of the information should therefore be disclosed. We have set out in an annex to this Decision the redacted form in which we think it should be disclosed.

10. On the basis explained above we conclude that the Information Commissioner was correct in deciding that the FCO had complied with its obligations under FOIA section 1 when refusing disclosure of the Disputed Information. We have reached that conclusion on the basis of material that was not available to the Information Commissioner before he issued his Decision Notice. He did not see it for the reasons set out in the First Decision and summarised in paragraph 5 above. Ms Leslie's Witness Statement explained the arrangement made with the Information Commissioner during his investigation in more detail, as follows:

*“ 6. FOIA contains at least two routes whereby Section 23 material can be evidenced as exempt. The first route developed by Whitehall Departments in consultation with the ICO addresses the point that such material is not always, by its very nature, instantly recognisable by an individual who has no or limited experience in the intelligence field. The procedure is for a senior government official with knowledge of intelligence matters to review the material. If content that the material is exempt by virtue of Section 23, he or she will sign a document to that effect. That person will have expertise and experience of intelligence matters which will allow them to assess the material and identify the parts to which section 23 applies. The need for seniority is also a signal to all parties concerned of the seriousness with which the government department concerned takes the request and the status of the section 23 material.*

*7. In this case there was discussion between the FCO and the ICO in the autumn of 2007 as to whether the procedure remained acceptable to the ICO. It was agreed on 12<sup>th</sup> October 2007 that it was. I read the disputed material, and came to the conclusion that it was exempt under section 23. Consequently, I signed [the letter on which the Information Commissioner relied].*

*8. Section 23(2) permits a second route to claim exemption by use of certification by a Minister of the Crown. If the Minister signs a certificate certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in section 23(3) , then subject to section 60, that certificate is conclusive evidence of that fact. There is, so far as I am aware, no obligation to use that route, and we did not feel it necessary or helpful to the parties concerned to take up ministerial time by going down that line in this case.”*

11. A witness statement was also provided by Graham Smith the Deputy Commissioner for the Information Commissioner’s office, who explained in a little more detail the arrangement made between the Information Commissioner and the FCO. He said that as he was one of a limited number of senior staff members approved to view classified documentation he attended the meeting at the FCO on 12 October 2007. He said that he was invited to have a brief look at the file in which he understood the Disputed Information was contained. He then said :

*“Having viewed the file, in which I understood the documents requested were retained, I was satisfied that the material appeared to have dated from the relevant period, coincided with the dates referred to in Mr Beam’s request, related to the subject matter in question and could only have been supplied by or related to bodies dealing with matters of national security”.*

He went on:

*“I did not however examine the full contents of the file. The withheld information was not specifically shown to me. Indeed from the discussion it was made clear to me that there was no immediate intention to provide it to me for my close examination....I had met all but one of those attending the meeting before on other matters relating to requests for information under and compliance with the Act. Following previous successful meetings and negotiations with them, I had built up a relationship with them such that I trusted them to be truthful in their dealings with me”*

On that basis Mr Smith said he was willing to accept a letter along the lines of the

one subsequently written by Ms Leslie confirming her view that the section 23 exemption was engaged. He explained the Information Commissioner's general policy in this regard as follows:

*"The issue of a Ministerial Certificate should not become a routine procedure. Whilst the Commissioner would not hesitate to ask for a Ministerial Certificate in a particular case, he does not consider it appropriate or necessary for this to be a regular occurrence, particularly given the pressure on Ministers' time. In most cases, as in this one, he will first consider whether he can be satisfied on other evidence that section 23 of the Act applies."*

12. The Appellant summarised his criticism of the procedure adopted (in terms that are understandably argumentative in tone but are not inaccurate, in our view) as follows:

*"The FCO tells the Commissioner the withheld material cannot be released for viewing but they are willing to meet with someone with the right security clearance to view it; the Deputy Commissioner attends the meeting at which a file of the withheld material is present but the FCO has no intention of passing it over to him for examination even though he is appropriately security cleared; he sees the outside of a file which he understands to contain the withheld documents; he relies on his good relations with FCO officials when they tell him the documents are covered by the Section 23 exemption; and that is backed up formally by the letter two months later from the Director General of Defence and Intelligence."*

13. In the First Decision the Tribunal expressed surprise that a procedure had been adopted which appeared to give to an informal assurance by an official evidential weight that was broadly equivalent to that of a Ministerial Certificate under section 23(2). This clearly influenced its decision to refuse summary dismissal and we can quite understand why.
14. As we have decided that the conclusion reached by the Information Commissioner was correct, it is not material to our decision to consider how he chose to carry out his investigation. The FOIA does not include any specific direction on the point. Section 50 (setting out general requirements for investigations) simply requires him



to decide whether the public authority in question dealt with the original information request in accordance with the statute, without imposing any requirement, or providing any guidance, as to how he should go about the task. And section 23 does not add any requirement, in terms of the process that should be followed, when the exemption is asserted but the certificate procedure set out in subsection (2) is not adopted. The Information Commissioner has argued in his submission that in those circumstances he was entitled to rely on the letter from Ms Leslie, (together with the oral assertions made at the meeting in October 2007 and such limited examination of the file as took place), in order to satisfy himself that, on the balance of probabilities, the Disputed Information had been supplied to the FCO by, or related to, the Secret Intelligence Service.

15. We do not think that this Tribunal should tell the Information Commissioner how, in general, he should conduct his investigations. And we would certainly not suggest either that the Information Commissioner should in all circumstances personally inspect all disputed material or that public authorities should follow the Ministerial Certificate route in all cases in which section 23 is relied on. There will be cases in which those processes will be necessary, or at least appropriate, and others where they will be disproportionate. However, in striking the correct balance, those involved on both sides of an investigation may draw from the circumstances of this case a number of conclusions. First, if the Information Commissioner and public authority agree that the relevant material should not be disclosed during the investigation (with or without an explanation from someone who can explain any features that are obscure to the uninitiated) there is a greater chance of the decision being appealed. Secondly, there must be a greater chance of such appeal surviving a strike out application so that the more cumbersome and expensive procedures that we have followed are then imposed on all parties. Thirdly, the less rigorous the investigation by the Information Commissioner then, self evidently, the more likely it is that a Tribunal will actually conclude that the Appellant's case ought to be preferred at the substantive hearing. And finally (and perhaps most importantly) the original requester will be left with the perception that he has been short changed. In this case he has said in his written submission that he feels that his complaint to the Information Commissioner "was dealt with in an eccentric and peculiar fashion, to say the least". We have some sympathy with his conclusion

even though, as we have said above, this does not provide him with a sustainable ground of appeal in the circumstances of this particular case.

16. We would like to add a comment on a point raised by the FCO. It suggested that it would not be appropriate to disclose to the Information Commissioner material, of the type under consideration in this case, because a person who was not familiar with such materials would not understand their relevance. However, it is very clear from the facts of this case that it would have been quite easy, during the October 2007 meeting, for the Information Commissioner's representative to have inspected the four short documents which we have seen, in the presence of someone who could have provided an immediate explanation of their identity and the terminology used by their authors, along the lines of that provided to us in Ms Leslie's witness statement.

#### Conclusion and remedy

17. For the reasons we have given we conclude that the Disputed Information falls within the absolute exemption provided by FOIA section 23 and that the Information Commissioner was accordingly correct in his conclusion that the FCO had dealt with Mr Beam's request in accordance with FOIA section 1.

18. Our decision is unanimous.

Signed:

Chris Ryan

Deputy Chairman

Date: 12 May 2009