

**GENERAL REGULATORY CHAMBER**

**INFORMATION RIGHTS**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50178276**

**Dated: 10th. December, 2009**

**Appellant: The Commissioner of Police of the Metropolis**

**Respondent: Information Commissioner**

**Heard at: Central London Civil Justice Centre**

**Date of hearing: 11<sup>th</sup>. May, 2010**

**Date of decision: 23<sup>rd</sup>. May, 2010**

**Before**

David Farrer Q.C. Judge

and

David Wilkinson

and

Alasdair Warwood

**Attendances:**

For the Appellant: Jeremy Johnson

For the Respondent: Ben Hooper

**Subject matter:** Right neither to confirm or deny possession of information relating to bodies dealing with security matters or national security

**Cases:** Cabinet Office v Information Commissioner EA/2008/0080  
Baker v Information Commissioner and the Cabinet Office  
EA/2006/0045

## DECISION OF THE FIRST-TIER TRIBUNAL

**The Tribunal allows the appeal and quashes the Decision Notice. The Appellant owes no further duty to the requester under FOIA s.1(1)(a).**

### REASONS FOR DECISION

#### Introduction

- 1, On 6<sup>th</sup>. September, 2006, the then President of the U.S.A., George W. Bush, commenting on the practice of questioning terrorist suspects in secret detention facilities, stated that it had provided –

*“ . . information that has saved innocent lives by helping us stop new attacks, here in the United States and across the world”:*

He cited as one of several examples :- *“ (it) helped stop a plot to hijack passenger planes and fly them into Heathrow or the (sic) Canary Wharf in London”*

2. On 18<sup>th</sup>. July, 2007, Mr. Dominic Kennedy, the Investigations Editor of the Times, requested from the Appellant :

*“ Information about how a plot to hijack and fly passenger planes into Heathrow and Canary Wharf was foiled using information from the programme to detain suspected terrorists in undisclosed locations outside the United States”.*

He quoted President Bush`s speech by way of explanation.

3. The Appellant (“MPS”), by letter dated 2<sup>nd</sup>. August, 2007, refused to confirm or deny that it held such information in accordance with s.1(1)(a). It relied on no fewer than six exemptions, namely those provided for by Sections 23(5) (Security Bodies), 24(2) (National Security), 27(4) (International Relations), 31(3) (Law Enforcement), 38(2) (Health and Safety) and 40(5) (Personal Information). It was agreed at the hearing that the last three exemptions could not apply unless s.24(2) did and no independent argument was advanced upon them.

4. Part 2 of FOIA provides exemptions from the duty to confirm or deny (s.1(1)(a)) in almost all cases where there is an exemption from the duty to supply information (s.1(1)(b)). The object of such a refusal is, of course, to protect the public authority from the drawing of inferences, whether from a confirmation or a denial, which might cause the same kind of prejudice as disclosure of the exempt information. The fact that exempt information is or is not held may often be a clue as to all or some of its content, or, where such information is protected, its origin. A denial in response to one request will enable a later requester to draw the obvious conclusion, if no denial is then forthcoming.
5. Mr. Kennedy requested a review of that refusal by letter of 8<sup>th</sup>. August, 2007, in which he stressed the public interest in the release of this information. Following the review, MPS maintained the refusal, asserting, in respect of all the qualified exemptions relied on, a predominant public interest in withholding the information.
6. It is to be noted that the request focused on the method adopted to foil the plot, not simply the information, if any, derived from the interrogation. Nevertheless, given the terms of the Request, it would be impossible to answer the question under s.1(1)(a) without revealing whether or not such information was held and the appeal proceeded on that footing.
7. **The complaint to the Information Commissioner**  
Mr. Kennedy duly complained to the Information Commissioner ( the “IC”). The I.C. `s investigation was seriously delayed and the Decision Notice was finally issued on 10<sup>th</sup>. December, 2009, by which time Mr. Kennedy might be forgiven for having forgotten that he had made the request.
8. The IC concluded that MPS had failed to comply with s.1(1)(a) and was not entitled to rely on any of the cited exemptions. He found further a breach of s.17 in that MPS had failed to state why it said that the various exemptions were engaged or why the public interest favoured a refusal to confirm or deny. He ordered MPS to tell Mr. Kennedy, within 35 days, whether or not it held the requested information.
9. The finding as to s.17 was reflected in his reasons for rejecting the claim to exemption based on s.23(5). He referred to the “absence of explanation” as to how compliance with

s.1(1) (a) would involve disclosure as to bodies dealing with security. That is a significant and, at that time, justified comment.

10. As to s.24(2), the IC based his rejection of MPS`s case on the conclusion that a confirmation or denial would not influence the future conduct of a terrorist group, an argument developed with great care by Mr. Hooper before us.

11. The IC took a similar view as to the MPS case under s.27 as under s.23(5); it had simply not explained how the exemption was said to be engaged.

12. It will be noted that each of these arguments related to the engagement of the exemption. The public interest issue, which would arise if either or both of the qualified exemptions (s, 24(2) and s.27) were engaged, was not discussed in the Decision Notice nor specifically argued before us.

13. The appeal to the Tribunal

MPS appealed against each of these findings. Having regard to the conclusion that we have reached and our related decision to make no findings as to the engagement or application of other exemptions, we shall not recite in detail the arguments on either side nor set out the statutory provisions in relation to the exemptions, save those relevant to the claim for exemption under s.23(5).

14. The material provisions of FOIA provide as follows :

Section 1(1)(a)

*“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 ...”*

Section 2(1):

*“Where any provision of Part II states that the duty to confirm or deny 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.*

Section 23(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).”*

S. 23(3) lists various bodies, including, so far as material to this appeal, the Security Service,

Section 24(1) and (2)

*“(1) Information which does not fall within s.23(1) is exempt information if exemption from s.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.”*

15. Sections 23 and 24 are closely linked provisions. Not surprisingly, s.24 applies only where s.23 does not. Whereas s.24 protects from disclosure, subject to the weighing of conflicting public interests, any information outside s.23 which should be withheld in the interests of national security, s.23 provides absolute protection to information coming from or through the specified security bodies or which, “relates to” any of those bodies. Significantly for this appeal, that very broad class of information plainly embraces, not just the content of information handled by a specified body but the fact that it handled it. It is, moreover, an exemption which applies without proof of prejudice. Parliament decided that the exclusionary principle was so fundamental, when considering information touching the specified bodies, that even perfectly harmless disclosure would only be made on the initiative or with the consent of the body concerned.
  
16. It is the accepted practice of public authorities such as MPS when confronted with requests for information which might engage sections 23 or 24, to rely on the two provisions in conjunction, that is to say without specifying which of the two applies. That approach is calculated to avoid disclosure of the fact that a s.23 body is or might be involved and was approved in *Baker v Information Commissioner and the Cabinet Office EA/2006/0045*. MPS indicated in written argument that its refusal invoked both provisions in that way.

17. Evidence

The only evidence that we heard was from Detective Chief Superintendent W, Head of Intelligence in the MPS Counter Terrorism Command, who offered unrivalled expertise in this field. Much of her written evidence dealt with the deductions that terrorists might make from a confirmation or denial in answer to Mr. Kennedy`s request. Mr. Hooper, in written submissions and cross examination, analysed likewise the logically permissible inferences, in order to suggest ambiguities in any answer, hence the absence of any consequent threat to security.

18. However, Detective Chief Superintendent W gave more decisive oral evidence relevant to s.23, though her written statement had scarcely touched on the point. Cross examined as to the relations between her Command in MPS and UK and foreign security organisations (specifically the CIA), she stated that MPS had virtually no direct contact with, for example, the CIA and that it was “very unusual” for intelligence originating with a foreign service, such as the CIA, to reach MPS other than through a “section 23 body”. She repeated that “the established route for intelligence from a foreign agency would be through the (s.23) intelligence agencies”, that such a channel was “highly likely” and that MPS “does not seek intelligence other than through those agencies”.

19. Entirely understandably, Mr. Hooper did not attempt to challenge the factual accuracy of these assertions, despite their rather belated appearance. Rather he argued in his final submissions for the possibility that this information, originating apparently with the CIA could have reached MPS, if it reached it at all, from some source other than a s.23 body. He submitted that, in the context of s.23, nothing short of certainty would suffice.

20. Sympathetic as we are to Mr. Hooper`s plight, unprepared as he evidently was, to meet this evidence and his valiant attempt to circumvent it, we have no doubt that the normal principles as to the standard of proof apply. We unhesitatingly accept this evidence although faintly surprised that it had not emerged clearly at an earlier stage. It clearly establishes the probability that the requested information, if held, came through a s. 23 body.

21. Given that it is highly likely that information of the kind involved here would have come wholly or partly from the CIA to MPS via a s.23 body, if it came to MPS at all, what inference would a member of the public draw from a confirmation or denial that MPS held it? That depends on whether he or she knew or would readily conclude that MPS normally liaised with, for example, the CIA, through the Security Service.
22. Armed with the literature and media coverage of these matters available today, we have no real doubt that many readers and viewers would appreciate that, if MPS held the information to which President Bush referred, so did the Security Service and that it was through that agency that it had been supplied to MPS. Equally, a denial would, by parity of reasoning, indicate that the information had probably not reached either body, since it is hard for the layman to suppose that intelligence as to a planned attack on two of London's most obvious targets would not be passed to the police force responsible for their safety, if it reached the Security Service or any other s.23 body.
23. If that is so, confirmation that MPS held the information would not involve the disclosure of information which was directly or indirectly supplied to MPS by a s.23 body but the fact that this information had been passed by such a body to MPS would be information "relating to" that body.
24. By the same token, as a result of the deduction referred to in paragraph 22, a denial would amount to a statement that the Security Service (or other s.23 body) did not hold information; that is equally information "relating to" that body.

25. **Conclusion**

On this narrow and, in some respects, unsatisfactory basis we allow this appeal. We express no view on the interesting debate as to whether s.24(2) is engaged. We are somewhat sceptical as to the Appellant's case on s.27, since the U.S. president chose to publicise this information, raising doubts as to whether disclosure of the fact, if it were a fact, that it is held by MPS, would greatly damage relations with the USA. However, we make no finding on the issue.

26. We have remarked already on the wide ambit of s.23. It is not hard to understand why it is broadly drafted. In this particular case, however, we are concerned as to its effect. The interrogation of detainees in offshore facilities, the methods allegedly used, the use of information thereby obtained and the possible collaboration of the U.K. government in

these activities are still matters of vigorous and anxious debate in this country. Whether the CIA passed to UK intelligence the information referred to by President Bush may be a question of considerable importance in such a debate. In the rather unusual circumstances of this case (where a head of state has publicly announced the source of terrorist intelligence), it is hard to see that any significant damage could be caused by confirmation or denial. The extreme rarity of such announcements might be seen as a robust defence to the dangers of creating precedents.

27. That consideration cannot, however, affect our interpretation of the plain words of s.23(5). We have expressed earlier in this Decision some criticism of the delay in the IC `s handling of this complaint. It is fair to balance that criticism with the comment that, although we allow this appeal, we find it hard to see what other view on s.23(5) the IC could have formed on the exiguous material put forward in response to the Request and the Complaint by MPS. It was apparently only at the appeal stage – and even then very late in the day – that the critical testimony emerged.
28. Our decision is unanimous

**Signed**

**David Farrer Q.C.**

**Judge**

**Date 21<sup>st</sup>. May, 2010**