



**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
(INFORMATION RIGHTS)**

UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Case No. EA/2011/0109

**GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

**The Information Commissioner's
Decision Notice No: FS50299276
Dated: 3 March 2011**

Appellant: Campaign Against Arms Trade

Respondent: Information Commissioner

2nd Respondent: Ministry of Defence

Before

David Marks QC
Tribunal Judge

Andrew Whetnall
Roger Creedon

DECISION

The Tribunal upholds the decision of the Information Commissioner (the Commissioner) in its Decision Notice dated 3 March 2011 reference no. FS50292976.

REASONS

Background

1. The Appellant is a well-known organisation committed to the aims reflected in its name. On 22 May 2009, it contacted The National Archive (TNA) by email to request access to files held under reference nos. DEFE68/133 and DEFE68/136. The first file (File 133) relates to the sale of arms to Saudi Arabia in the period from 1 January 1971 to 31 December 1972. The second (File 136) dealt with related matters for the earlier period of 1 January 1968 to 31 December 1968.
2. TNA by its response of 7 July 2009 invoked section 27(1) and section 27(2) of the Freedom of Information Act 2000 (FOIA). Section 27 provides that there is a qualified exemption with regard to the release of information which could put at risk the relations between the United Kingdom and other States or the interests of the United Kingdom or the United Kingdom's ability to promote or protect its interests. The full provisions of these sections will be set out below.
3. Section 27(2) exempts information if it is confidential information obtained from a State other than the United Kingdom or from international organisations. Again, the text of this provision will be set out below.
4. Both exemptions of section 27 being qualified exemptions involve a balance of the requisite public interests. By a further email of 2 September 2009, TNA contended that there was not a public interest in releasing some of the information requested. This was said to be because overall, United Kingdom's relationship with Saudi Arabia, both bilateral and commercial, had to be considered. TNA said that the Ministry of Defence (MOD) had decided that release of the information sought could have a consequent adverse effect. In addition, confidential information was involved.

5. In its response, the Appellant invoked an earlier decision of the Tribunal, namely *Gilby v Information Commissioner and Foreign & Commonwealth Office* (EA/2007/0071, 0078 and 0079). It claimed that the approach adopted in that case had not been applied in the correct manner to this request. This aspect of the Appellant's appeal will be considered in further detail below. It is enough to say at this stage that the Appellant contended that the information otherwise not disclosed, contained, or was likely to contain, information relating to possible or actual corruption in connection with the subject matter of both files. The Appellant therefore asked for an internal review.
6. The results of the internal review were set out in an email from TNA dated 4 December 2009. This upheld the original decision.
7. The Appellant then contacted the Commissioner. In its letter of 19 January 2009, the Appellant summarised its "two grounds of complaint" relating first to the incorrect application of FOIA considerations, presumably a reference to the *Gilby* decision, and secondly as involving an "inappropriate level ... at which information has been redacted". As to the first complaint, it was contended that the withheld information "is in its character much more akin to the information originally withheld in *Gilby*" as distinct from another earlier Tribunal decision, namely *CAAT v Information Commissioner* (EA/2006/40). This latter decision involved two Memoranda of Understanding the terms of which were still in force as at January 2009.
8. As to the second ground of complaint, reliance was placed on two specific items of information which it said had been withheld but which were available for viewing as part of other files held by TNA.
9. It was claimed that despite the apparent sensitivity of the content of these items no sign of any resultant prejudice to United Kingdom/Saudi Arabia relations had been observed.
10. As will be seen, both these issues were addressed in further detail in the ensuing Decision Notice.

11. The exchanges between the Appellant and the Commissioner in turn prompted a more considered response from TNA with regard to the original request. File 133 was entitled or described as relating to the “[MOD]: Central Staff: Registered Files and Branch Folders: sale of arms to Saudi Arabia”. The file was said to be made up predominantly of “telegrams, memos and general correspondence to deal with the negotiations which took place during 1971/72 regarding the Saudi Arabian Air Defence Program (SADAP)”. File 136 was stated as dealing with the follow-up to the Saudi decision not to renew a contract for the training and maintenance of aircraft operated by the Royal Saudi Air Force with the British firm, Airwork, but to give it to the Pakistani Air Force instead.
12. The same letter then articulated a number of general public interest considerations which could be said to militate for or against disclosure and which in effect reflected the earlier decision.
13. The outcome was that TNA stood by its original decision in releasing on 9 September 2009 File 133 “with less than a quarter of the pages requiring redaction”. The 170 undisclosed pages became closed file 133/1. File 136 was also released with ‘less than half the pages requiring redaction’. The 71 undisclosed pages became closed file 136/1

The Decision Notice and section 27

14. The Decision Notice is dated 3 March 2011 and bears the reference FS50292976.
15. At paragraph 13 it was pointed out that the Commissioner received copies of the withheld information on 20 September 2010 at which point TNA confirmed that the specific exemptions it was applying were section 27(1)(a), (c) and (d) as well as section 27(2). The Commissioner was then referred to the MOD for further details in relation to the relationship between the United Kingdom and the Kingdom of Saudi Arabia (KSA). In due course, the MOD provided

information to the Commissioner with further details regarding relations between the two countries.

16. At paragraph 19 and in relation to the consideration of the application of section 27, the Commissioner expressly pointed out that in reaching his decision he had been guided “very strongly” by the findings in the *Gilby* decision. He added that he considered that many of the Tribunal’s findings in that case “apply equally to this case”.

17. It is perhaps appropriate at this stage to recite the relevant provisions of section 27. The section is headed “International Relations”. In relevant part, section 27(1) provides as follows, namely:

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

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

18. Section 27(2) provides that:

“Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

19. Finally and for the sake of completeness, reference should be made to section 27(3) which provides that:

“For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the

circumstance in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.”

20. At paragraph 23 of the decision notice, the Commissioner stated that having reviewed the withheld information, he was satisfied that disclosure would be likely to raise the concerns discussed by the Tribunal in the *Gilby* case especially at paragraph 23 of that decision, a passage which will be referred to again below. He therefore found that the exemptions in sections 27(1)(a), (c) and (d) were engaged. Reasons for that finding were set out in a closed annex to the Decision Notice.
21. At paragraph 25, the Commissioner determined that the fact that some of the information was already in the public domain or the fact that the same would have been inadvertently released with no resultant identifiable prejudice, did not necessarily mean that disclosure of otherwise undisclosed information would not lead to an unfavourable reaction on the part of KSA for the present case. Reliance was again placed on a passage to that effect in the *Gilby* decision.
22. At paragraphs 27 to 31 inclusive, the Commissioner addressed the applicability of section 27(2). In reaching its decisions on disclosure TNA had relied on that subsection in addition to the provisions of 27(1) set out above. TNA had not specifically indicated which portions of the withheld information attracted section 27(2). Having reviewed the withheld information, however, the Commissioner had confirmed that some did engage section 27(2). He also stressed in the Tribunal's view quite correctly that the test articulated in section 27(2) based as it is on an expectation of confidentiality differs from what can be called a common law duty of confidence. The Commissioner stressed that he took into account the secretive nature of Saudi society, the Saudis' sensitivities regarding arms sales and the fact that concepts such as freedom of information and transparency were given less weight in the KSA than in the West. The Commissioner also found that information provided by a third party state, i.e. a state other than the KSA, also

engaged section 27(2) and gave his reasons in the closed annex. The Tribunal pauses here to note that although some stress was placed in its appeal by the Appellant on a failure by the Commissioner properly to address the application of section 27(2) the Tribunal finds no error of law made out with regard to the Commissioner's findings in that regard and proposes to make no further observation as to that subsection in this judgment.

23. The Commissioner then turned to the competing public interests, the outcome of which has already been referred to and set out above. The principal argument in favour of disclosure was the importance of disclosing information which revealed the extent or the possible involvement of "UK officials" in the payment of commissions in connection with arms sales. The Commissioner referred in particular to the Saudi Royal edict in the KSA of 20 October 1969¹ which made such payments unlawful in that country.
24. Against that factor was the public interest inherent in preserving bilateral and commercial interests and ties between the two countries. Particular reliance was placed on the MOD informing the Commissioner that the KSA was an important overseas market, especially with regard to arms sales and an important ally and source of intelligence in the fight against terrorism. Reference was again made to evidence from a former UK Ambassador to the KSA which had been heard and considered in the *Gilby* decision. Finally, reference was made to the element of trust and confidence reflected in section 27(2) and the risk of the erosion of such trust and confidence.
25. In conclusion in relation to this issue, the Commissioner accepted the Appellant's argument that there is a "greater public interest as regards the possible involvement of UK officials" in the payment of commissions in relation to arms sales (paragraph 41). However, he pointed out at paragraph 42 that as regards the possible involvement of Saudi officials, the public interest was balanced "differently".

¹ The decision notice gives the wrong year. It should be 1968

26. In the closed annex, the Commissioner described how what could be called UK official related information might be disclosed “without inappropriately revealing any information regarding negotiations” which was the subject of the two files in question.
27. Limited disclosure was therefore ordered, taking into account the public interest relating to the role of United Kingdom officials and the possible payment of commissions and bribes.

Notice of Appeal

28. The Notice of Appeal is dated April 2011. It is reasonably clear both from that document as well as from the earlier exchanges already described in this judgment that the following matters are raised. It is alleged that the Commissioner erred in law by failing to apply what is said to be the relevant principles in the *Gilby* case. A particular contention appears to be that, whether in the light of the *Gilby* decision or otherwise, the notion of the involvement, actual or possible, of United Kingdom officials or agents in the payment of commissions or agency fees was not given sufficiently wide consideration by the Commissioner. Paragraph 41 of the Decision Notice sets out the position taken by the *Gilby* tribunal on this matter.
29. In support of this argument reliance was placed on a document described as the Jeddah Telegram No. 8 of 3 January 1972, said to be withheld in its entirety in File 133, but ordered to be disclosed in the wake of the *Gilby* decision. In this document which the Tribunal has seen, allusion is made to the payment of commissions or agency fees to agents who were not only non-UK nationals but also agents or representatives for other non-UK and non-KSA national entities competing for contracts in Saudi Arabia.
30. The Tribunal understands this is being put forward as an example of the sort of information which the Tribunal believes it might be said or might be alleged is being withheld but whose disclosure has not, in his view, resulted in the prejudice of the type envisaged by section 27(1)

31. Since the element of prejudice referred to in section 27(1) of necessity finds reflection in the broader issues relating to the competing public interests, the Tribunal accepts that the Appellant is in addition contending that the Commissioner erred in concluding that the public interest in invoking the exemption in section 27(1) outweighs the public interest disclosure with regard to some, but not all, of the requested information.
32. No reference is made in the Grounds of Appeal to section 27(2). As stated above, the Tribunal will make no comment on this provision in relation to the appeal. It follows that the Commissioner's finding at paragraph 30 of the Notice that "some of the information is additionally exempt under section 27(2)" of FOIA stands.
33. The Tribunal notes, however, that in the witness statement provided in relation to this appeal by Mr Gilby on behalf of the Appellant reference is made to information relating to meetings with members of the Saudi Royal family in connection with the applicability of section 27(2). However, that does not in the Tribunal's view detract from the conclusion with the Tribunal has reached on this particular issue.

The Evidence

34. Part of the fresh evidence placed before the Tribunal in relation to this appeal since the Decision Notice is a 7 page witness statement prepared by Nicholas Gilby referred to above. He is not surprisingly the same person as the person named in the *Gilby* decision.
35. His principal contention is that there has already been release of sufficiently sensitive information to make the release of further similar information innocuous contrary to the position adopted by the Commissioner. In other words, Mr Gilby maintains that such information as might be embarrassing to the KSA and its Royal family which is already in the public domain is not, as was stated in the *Gilby* decision at paragraph 42, information which:

“... appears to have been either leaked or mistakenly put in the public domain, largely comprising individual and disaggregated documentation.”

36. In Mr Gilby's words, such information as referred to in the passage quoted above has been disclosed “by the relevant bodies after their standard processes had been followed, and not through malice or error.” Moreover, he says that such information is far from being properly characterised as “individual and disaggregated documentation”.
37. Mr Gilby exhibits a relatively large number of documents from what he describes as a lengthy list of files which can be viewed at TNA and which cover the period 1963 to 1980 relating to UK arms sales to the KSA. He claims that both such files and other files contain documents which refer to what he describes as corrupt practices.
38. Finally, Mr Gilby maintains that in the wake of the Tribunal decision in *Gilby*, documents have been disclosed which, amongst other things, deal with corruption in the context of arms sales generally.
39. In addition, the Tribunal has received a number of witness statements, open and closed (the latter being an un-redacted version of an otherwise open statement), from representatives of the MOD. The first is Simon Marsh, the Deputy Head of Corporate Memory at the MOD. In his principal witness statement, he explains the processes by which MOD transfers files to TNA and provides a detailed explanation as to how the requested information came to be held as closed information.
40. The files were transferred to TNA in July 2008. Although the closed periods for the two files are due to end in 2013 and 2019, in the case of File 135 and File 136 respectively, Mr Marsh states that he envisages the MOD recommending a further period of closure with regard to such files for the Lord Chancellor to consider in due course.

41. In a further witness statement, Mr Marsh responds to Mr Gilby's witness statement by making the following observations. First, he states that records over 25 years of age are regarded as "historical". Responsibility for deciding whether they should be sent to TNA rests with TNA and Records Policy & Review teams within the MOD. MOD also determines whether any information remains sensitive and should be closed or retained in the department. Once a record has been transferred it becomes publicly available at TNA and will not generally therefore be subject to FOIA requests unless it has been sent there closed.
42. He then explains at some length how it was that the information referred to by Mr Gilby in his witness statement came to be released and available for inspection. He refers in particular to MOD guidance which describes the review process. He also refers to what he calls the challenge of maintaining consistency in the review of Saudi Arabia related files and attempting to maintain such consistency across government departments other than the MOD alone. This, he says, explains the chance of reviewers coming to different decisions as to whether release should be made of certain information.
43. As a result, he claims that it is "almost inevitable" that situations will arise where different reviewers make different redaction decisions with regard to the same record. It was therefore, in his words, "not surprising" that the Appellant was able to obtain a copy of the Jeddah telegram
44. Mr Marsh adds that in late 2006, there was a major re-review exercise of all Saudi files conducted across government departments generally in an attempt to address some of the consistency, or lack of consistency, pointed out by Mr Gilby and highlighted in his statement. He adds that it is unclear whether or not and to what extent Mr Gilby's evidence properly takes account of the outcome of that process.

45. The other witness put forward by the MOD was David Hatcher. He is the Head of Policy and Resources from the MOD Saudi Armed Forces Projects (MODSAP). As his job title might suggest, Mr Hatcher sought to explain the potential harm to the public interest that would be caused by the release of the requested information. Much of what he says in his statement which is in part redacted, reflects matters which have already been touched on.
46. First, he claims that the relationship between the United Kingdom government and the Saudi Arabian government is based on trust and mutual respect. Second, even though the requested information dated back to the period 1968 and 1972, and in Mr Hatcher's words covered issues "that have long been since overtaken by events", he claimed that release would still cause harm. He said that despite the age of the information sought, the Saudis would still view its release as a breach of confidentiality since it covered meetings between the two States' senior officials. Third, the damage to our reputation from such a breach could impact on relations with other countries. Fourth, Saudi contracts could be put at risk, which would impact on the UK economy and its exports. Mr Hatcher made reference to one prior inadvertent release of similar sensitive material in March 2006 when published in the Guardian newspaper which had incurred formal and firm Saudi disapproval.

The Gilby Decision

47. Since it appears to be a vital ingredient in the Appellant's arguments in this appeal, the Tribunal believes it is important to set out the facts and matters in issue in the *Gilby* decision.
48. The case consolidated three requests to TNA by Mr Gilby. All three related to files which dealt with sales of tanks, the possible sale of arms and further tanks to the Saudi Armed Forces. With regard to the first request, and indeed with all requests in due course, refusal was

followed by an internal review that maintained and justified the refusal to disclose any information sought.

49. The appeal was heard orally. Evidence was given by three representatives of the Foreign Office, both in open and closed sessions. One such witness was Mr William Patey, the then Ambassador to Saudi Arabia.
50. The Tribunal in that case had to determine first whether the requisite prejudice was shown with regard to section 27(1), and if it was clear that section 27 was engaged, whether the public interest in maintaining the exemption outweigh the public interest in disclosure.
51. At paragraph 23 of its determination, the Tribunal adopted a well-known formula with regard to prejudice long since addressed and adopted by this Tribunal in a number of its decisions, namely, in the words of the Tribunal, that “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.” The Tribunal went on to point out that in its view, it did not consider that prejudice “necessarily required demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage”. It followed that in its view, there would or could be prejudice to the interests of the United Kingdom abroad for promotion of such interests “if the consequence of disclosure was to expose those interests to the risk of an adverse reaction from the KSA or to make them vulnerable to such a reaction”. Reference is made for these purposes to the well-known decision in *Hogan* (EA/2005/0026/30), particularly at paragraph 30.
52. In its closed decision, the Tribunal expressed its reasons as to why it was satisfied that disclosure of the information requested as a whole would be likely to have caused prejudice.
53. From paragraph 25 onwards, the Tribunal turned to summarise the evidence as to the competing public interests. It referred to Mr Patey’s

evidence which this Tribunal is content to find reflected in the evidence of Mr Hatcher which has been summarised above.

54. Mr Gilby had made it clear to the Tribunal in the *Gilby* case that he was not seeking the disclosure of information which could be regarded as/or constituting in any form of offensive material, i.e. information of a primarily personal nature. As in the present case, Mr Gilby referred to and relied on information which he said was already in the public domain to justify the contention that those documents' disclosure had not caused any direct prejudice.
55. At paragraph 42, the Tribunal accepted that there had been "a significant amount" of material that had come into the public domain and "which contains material that would be likely to be offensive or embarrassing to the KSA Royal family" and also alleging or containing evidence of the payment of commissions contrary to the Kings' edict on 20 October 1968. The Tribunal went on as follows, namely:

"However we also accept Mr Patey's evidence that the effect of formal disclosure of a mass of documents under the FOIA on behalf of FCO would have been of a different order from information that appears to have been either leaked or mistakenly put in the public domain, largely comprising individual and disaggregated documentation."

This is a passage which has already been referred to above.

56. In the event, the Tribunal decided that the requisite prejudice existed. As to the public interest balance, the Tribunal effectively summarised its issues at paragraph 51 and 52 as follows, namely:

"51 Our international relationship with the KSA is important for a wide range of interests including matters of commercial and consular interests. We accept the general importance of transparency and accountability. We have already referred to the nature of the Saudi Arabian regime with a record that is far

removed from that in Western Europe so far as accountability and human rights is concerned. We also accept the particular importance of transparency in the fight against corruption and related malpractice. However in themselves those considerations do not in our view negate the public interest in maintaining our good relations with Saudi Arabia and avoiding prejudice to the UK interests in that country or the promotion or protections of those interests. While we accept that in overall global economic terms, trade with Saudi Arabia and in particular arms sales are relatively small, we are in no doubt as to their importance in the public interest having regard to both the open evidence which we have heard, but also that in closed session.

52. For the reasons set out above and in our closed decision we are clear that disclosure of the information requested would be highly likely to result in real and substantial prejudice of that kind, which would be contrary to the public interest.”

57. Turning to the public interest militating in favour of disclosure, the Tribunal, in its decision, set out its views at paragraph 55 and 56 as follows, namely:

“ 55. Turning then to the public interest in disclosure, in addition to the general public interest in transparency and accountability for the reasons referred to above we believe that in the present case there is a particular consideration, which is the possible involvement of UK officials, directly or indirectly, in the payment of commissions or agency fees in connection with arms sales, particularly following the King’s edict dated 20 October 1968 making such payments unlawful in the KSA.

56. Mr Gilby submits that, while the edict preceded the Anti-Bribery Convention 1997, the better view is that the Prevention of Corruption Act 1906 would apply, making such activities unlawful, so long as there was some part of the corrupt activity which took

place within UK territory. However, in our view, the public interest in disclosure does not fall to be so narrowly defined. Whether or not the conduct overseas was in breach of the 1906 Act, it was plainly contrary to the edict dated 20 October 1968 and in any event it is in our view a matter of potential significant public interest to see to what extent HMG, though [sic] its servants and agents, was involved directly or indirectly in seeking to secure contracts in reliance on the payment of commissions or agency fees.”

58. The result therefore was that there should be disclosure of information “subject as appropriate” to redaction of matters which in the Tribunal’s judgment went beyond the maintenance of the exemption.
59. In this Tribunal’s view even though it is not bound by another decision of the Tribunal the heart of the decision in the Gilby is in paragraphs 59 and 60 of that decision. For the sake of completeness they are set out in full below.

“ 59. We are satisfied on the evidence before us including in particular the evidence given to us in closed session that in principle the public interest in maintaining exemption under section 27(1) and where it applies in section 27(2) did not outweigh the public interest in disclosure of the information so far as the activities of UK officials in the sale of arms and services are concerned with reference particularly to the payment and negotiations of commissions and employment of agents. In so concluding, we recognise that the disclosure of that information would have been likely to prejudice relations with the KSA [Kingdom of Saudi Arabia] and UK interests abroad in that it exposes both to the risk of an adverse reaction from the SAG [Saudi Arabian Government] however, having regard to the evidence before us, we are firmly of the view that the degree of that prejudice is such that it would not have justified the public interest in disclosure in that respect being

outweighed. Thus to that extent we consider that the decision of the IC was not in accordance with the law.

60. However, we conclude that the public interest in the maintenance of the exemption otherwise under section 27 would have outweighed the public interest in disclosure and thus we agree with the decision of the IC in that respect. We also agree that the absolute exemption under section 23 applied as set out above.”

60. This Tribunal adopts the general approach as set out in Gilby both in that decision’s open judgment as well as in its closed judgment.

The Appellants’ submissions in the present appeal

61. It appears to the Tribunal that although there are clearly two grounds of appeal which initially were advanced by the Appellant they have been supplemented by additional contentions which although on one view can be regarded as being in substance revisiting the two initial grounds, nonetheless can perhaps be regarded as raising additional and separate issues.
62. The two main grounds are first that the Decision Notice erred in law in its findings that disclosure of much if not all of the requested information would or would be likely to prejudice the relationship between the UK and KSA. In other words it is contended that section 27(1) does not apply to the information requested.
63. The second principal ground is that for the purposes of section 27(1) the Commissioner failed properly to apply the public interest considerations in determining that disclosure should not be made as regards some of the information requested.
64. In the Appellant’s reply to the Commissioner’s response, the Appellant has introduced it seems a third main ground of appeal going to the

operation of section 27(2). The Tribunal has already indicated that it finds no error of law in that regard.

65. The additional points can be summarised in the Tribunal's view as follows. First, it is said that the Commissioner adopted a "very narrow interpretation" of the Gilby decision. The implication being that had he not done so more material would have been disclosed. The Tribunal interprets this contention as being to the effect that an inappropriate test was applied by the Commissioner in the case when addressing the public interest considerations an argument which the Tribunal ultimately regards as being no more than a reiteration of the second ground of appeal outlined above.
66. Second, the Appellant submits, as with the previous additional point in its reply following upon the Commissioner's formal Response to the Notice of Appeal, that no information similar to much of the "requested information in this case has been disclosed "inadvertently" since Gilby. This is a reference to the Commissioner's own contention that disclosure of the requested information in the present case could potentially lead to greater prejudice to the relationship with KSA than what was called "the small amount of separate information inadvertently released at different times". Reference to the "inadvertent" disclosure referred to by the Appellant appears to relate to the release by the former Department of Trade and Industry of sensitive information to TNA in 2006 referred to in para 46 above.

Consideration

67. The Tribunal would agree with the proposition that if corrupt activities on the part of UK officials are evident from the papers, as defined in paragraph 59 of the Gilby decision, there is a strong public interest in disclosure. This conclusion is fortified by paragraphs 55 and 56 of that decision where specific reference is also made to the involvement (direct or indirect) of HMG officials or agents in the seeking or securing

of contracts, entailing in turn reliance on the payment of commissions or similar activity.

68. However the Tribunal, like the Information Commissioner, has found some real difficulty in applying a workable and justifiable approach to partial disclosure of documents through redaction. This is particularly so in those cases where there is potential as opposed to actual engagement with questionable practices and the information is inextricably connected in one way or the other with material which could cause offence and damage to relations with KSA since its release is likely to be perceived as a serious breach of confidentiality. Where documents concern UK strategies for dealing with would be commission takers, as opposed to the actual payment of commissions, the weight in favour of disclosure is often in our view less than the justification for non-disclosure. One self evident example would be an extension of the circumstances addressed in the Gilby decision and the extracts cited above, namely where allegations of the type levelled against UK officials encompassed as a matter of necessity Saudi officials and individuals and related parties.
69. In those circumstances the Tribunal does not regard the public interest in disclosure as being of the same order or weight when viewed against the public interest in maintaining the relevant exemption or exemptions. In such a case in the Tribunal's firm view, disclosure which would necessarily entail adverse or disparaging observations in relation to those ruling in Saudi and related parties could justifiably be regarded as carrying at the very least a high probability of prejudice to this country's relationship with the KSA or to UK interests in that regard.
70. There is, of course, one particular marked difference between the present appeal and the Gilby decision. The present appeal has been dealt with by common consent on the papers alone. In Gilby there was a vastly more detailed examination of the information in dispute. Given those basic factors the Tribunal is firmly of the view that it must therefore approach this appeal with a proper sense of proportion and

also with a due sense and degree of proportionality. The costs which would be attendant on a more protracted exercise means that a minute dissection of what is a substantial body of information cannot properly be justified at least in the present case and the Tribunal so finds.

71. This is not to say that this Tribunal has not carefully considered to what extent any information which might otherwise be regarded as combining disclosable and non-disclosable material could be segregated. To elicit yet further representations from the parties on such matters would, in the Tribunal's view, simply not be proportionate for the reasons given above and for that reason the Tribunal is simply not minded to embark on that course. Indeed the same has not even been suggested.
72. The Tribunal bears a further important consideration in mind. No party in this appeal has contended let alone established that the nature of both of the Saudi ruling establishment as well as the nature of the UK/Saudi relations in general has changed either substantively or at all since 2008. The Tribunal bears in mind the written evidence it has received, eg that of Mr Hatcher as referred to in this open judgment.

The Tribunal's findings

73. As to the two principal grounds of appeal, the Tribunal finds that s 27 is engaged and that the Commissioner properly applied the public interest considerations. It rejects the argument that, given the level and extent of disclosure in the wake of the Gilby decision and indeed in another context, disclosure of much although not all of the requested information would not necessarily lead to an unfavourable reaction on the part of KSA for the following reasons.
74. First, enough has been already said in this judgment to the effect that in Gilby the Tribunal in that case found that the effect of what could be called mass disclosure would have been "of different order" from information that might have been leaked or mistakenly put into the

public domain: see in particular paragraph 42. The Tribunal agrees with that general approach.

75. Second, as has already been made clear the Tribunal's general approach has been to adopt the same approach as that taken in *Gilby* subject to various observations already made.
76. Third, as part of this overall ground the Appellant makes a specific contention that the Commissioner should have directed that there be a more extensive degree of disclosure than that ordered. This is not a valid ground of appeal but nothing further need be said about it in the Tribunal's view.
77. Fourth, the Tribunal was asked to consider and address one particular document at page 463 of the open bundle, part of a tranche of disclosures following a further review, being a document which bore a number of redacted entries. The Appellant in general terms contended that it necessarily followed that the Commissioner had failed properly to apply the *Gilby* decision and/or had otherwise adopted an approach that was "very narrow". The Tribunal is not impressed by such an argument. The document in question cannot be viewed in isolation. As already made clear in this judgment the overall governing principle reflects a necessity to respect what can be called the overall sensitivity of the information and the context of the particular case. The document is but one in a series of documents which overall describes the relationship between two sovereign States and their respective agencies.
78. Fifth, the Appellant appears to contend, much in the same vein as the other contentions he makes, that too much redaction has occurred with regard to those documents which have been released in part. The main theme advanced by the Appellant is that extensive redaction occurred with regard to names as distinct from other matters. The Tribunal feels that it is enough in its judgment to observe that it is invariably the context in which individuals can be identified rather than

the bare fact of the disclosure of the name itself which will be determinative. In addition and in accordance with the observations made by the Commissioner it is often not practicable or indeed justifiable to remove material from a piece of information without a resultant distortion of the meaning and nature of the information.

79. Sixth and by way of another illustration of the manner in which the Gilby decision has been allegedly misapplied by the Commissioner in his decision notice, the Appellant claims that the withholding of some 160 pages of documents in full cannot be justified on the true reading of that decision. The Tribunal finds this contention devoid of any meaning. The question is one of fact and effectively one of assessment. If in fact the documents can quite reasonably be regarded as being subject to the terms of section 27 then disclosure should not be made.
80. Seventh and in support of the overall contention that the approach represented by the Gilby decision was misapplied by the Commissioner, the Appellant points out that the information disclosed in the wake of the Gilby decision demonstrated or demonstrates that disclosure should be ordered, if not at least considered in the instant case. He claims that on the basis of earlier disclosures it can be assumed that what is now being treated as undisclosable is information relating to the payment of commissions by UK officials and therefore warrants disclosure. Further, the Appellant alleges that there are at least 5 other sets of circumstances which in broad terms should entail the prospect if not the fact of disclosure.
81. These five circumstances can be briefly summarised. First, there are those cases in which the British Government might be said to have “co-ordinated” the bids of UK companies. Second, there are those cases in which the British Government had “decided” upon some “strategy” that UK companies should adopt. Third, there were those cases in which the British Government has “set up” a “government to government” “umbrella” for any deals where necessary. Fourth, there

were those cases in which the British Government “generated” intelligence from high level Saudis especially where this concerned the activities of “agents” who would expect commissions or agency fees. Finally, there were those cases in which the Government “paid some kind of active or direct part in effecting corrupt payments”.

82. The Tribunal finds difficulty in explaining its approach to these five categories in full in an open judgement. The disputed information can be characterised as adding up to an accumulation of intelligence and information about arms procurement options, the engagement of potential suppliers from the UK, and other nations, and the claims of various individuals to act as introducers or agents. Some of these would-be fixers are assessed as having no real influence, some as having a stronger claim to act with authority. In its resolve to support sales in this somewhat difficult-to-read market, the options of umbrella contracts, government to government contracts, and coordinated bids are all explored, and this could possibly be construed as indicating a willingness to contemplate commission payments. It is fair to say that there is evidence of an acknowledgment that it would not be possible to operate in the market as it stood without some recognition of the reality of local practices. There is no evidence of any seeking of personal enrichment by UK officials.
83. In this context we appreciate that it is a matter of some practical difficulty to apply the razor envisaged in the Gilby decision to secure disclosure of *possible* participation by UK officials and agents without releasing papers that, taken as a whole, would be likely to compromise relations with the KSA. Both the open evidence to the Tribunal in Gilby, and the open and closed conclusions recognise the problem. Whereas the fifth category of cases (active engagement in corrupt payments) clearly attracts the strongest presumption of disclosure, there is little or nothing to show under that heading beyond the passages that have already been disclosed.

84. The Tribunal has therefore decided, consistent with our interpretation of the decision in Gilby, that the process of selected disclosure with names and details redacted has been taken as far, perhaps even a little further, than it can usefully go without distortion of facts, or risk of prejudice to relations as recognised under s27 of the Act. The Tribunal is of the clear view that the Information Commissioner has addressed the problem with reasonable and proportionate care, and in a manner consistent with the open and closed guidance in Gilby in so far as it is practicable to apply them to the documents in this case.

Conclusion

85. For all the above reasons the Tribunal dismisses the appeal.

Signed:

David Marks QC
Tribunal Judge

Dated: 22nd November 2011