



**IN THE FIRST-TIER TRIBUNAL**

**Case No. EA/2011/ 0118**

**GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

**ON APPEAL FROM:**

**The Information Commissioner's  
Decision Notice No: FS50265155  
Dated: 31st. March, 2011**

**Appellant: Richard Dowling**

**Respondents: The Information Commissioner (1)  
The Police Service for Northern Ireland (2)**

**Determination: On the Papers**

**Date of Decision: 22<sup>nd</sup>. February, 2012:**

**Before**

David Farrer Q.C.(Judge)

and

Paul Taylor and

Dave Sivers

**Subject matter:**

FOIA s.23 - Information supplied by or relating to bodies dealing with security matters.

**Cases:**

*Metropolitan Police Commissioner v. Information Commissioner*, EA/2010/0008

*Cabinet Office v. Information Commissioner*, EA/2008/0080

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal allows the appeal in part and substitutes the following Decision Notice.

“ The second respondent correctly asserted the exemption provided by s.23(1) of FOIA, save as to the matters specified in the closed annex to this Decision”.

**STEPS TO BE TAKEN**

Subject to the Second Respondent giving within the period specified below notice that it requires the Commissioner to issue a Decision Notice dealing with any or all of the exemptions provided for by sections 24, 31, 38 or 40 of FOIA, it must disclose the further information specified in the closed annex within 28 days of the publication of this Decision.

1. Background

On 12<sup>th</sup>. February, 1989, Patrick Finucane, a Roman Catholic Belfast solicitor, was shot dead at his home in the presence of his wife and children. Two guns were used and the gunmen escaped. The Ulster Freedom Fighters claimed responsibility for the killing. One of the guns, previously used in an attempted murder, was recovered but not the other.

2. Despite a number of arrests, the murder remained unsolved. Then, in 1990, a journalist, Neil Mulholland, supplied information as to a man named Stobie, who claimed to be both quartermaster for the Ulster Defence Association and an agent of the Royal Ulster Constabulary (“the RUC”) Special Branch. He further admitted supplying the gun used in 1987 in an attempt to murder Brian Lambert, a young Protestant, apparently targeted by mistake in an intended revenge killing for the notorious Enniskillen bombing on Remembrance Day.
3. It became apparent that Stobie had passed information as to the planning of a murder to his Special Branch handlers which had never been passed to the murder investigation team. Further critical information which he supplied never reached that team.
4. Mr John Stephens, as he then was, later Metropolitan Police Commissioner and now Baron Stephens of Kirkwhelpington, was asked to report on these and related matters and to pursue further inquiries with a view to prosecutions. He produced a first report.
5. In 1999, he was further requested by Sir Ronnie Flanagan, then Chief Constable of the RUC, to conduct further investigations into the murders of Finucane and Lambert and the activities of Stobie and other agents, including one, Brian Nelson, an army agent who had been convicted of many serious terrorist offences and imprisoned. He was asked to examine more generally evidence of collusion between the army (including its agent – handling branch, the Force Research Unit (“FRU”)), the RUC and loyalist paramilitaries relating to the murders of Patrick Finucane, Brian Lambert and to many more agents and violent incidents.

6. In 2001 the RUC was disbanded and replaced by the Police Service for Northern Ireland (“PSNI”), the second respondent to this appeal.
7. In 2003, Sir John Stevens, as he then was, reported. His report was referred to as the third Stevens report, though it is evident that there was no second report. A shortened version of the full report was published and included in the open bundle for this appeal. The remainder of the report has never been published due to security concerns.
8. The published report is itself a shocking document. It records in summary form, collusion between the RUC and loyalist groups, whereby RUC agents were allowed to engage in terrorist attacks, indeed murder, evidence of such attacks was mishandled by investigators, important intelligence was suppressed and warnings of threatened attacks were provided to Catholic targets much less frequently than to Loyalist. Agents were allowed to operate beyond any control. Sir John concluded that his investigations had been subject to widespread obstruction both by RUC and army personnel, even involving arson. Lives, including the lives of Finucane and Lambert, could have been saved and serious crimes prosecuted to conviction but for such disgraceful misconduct. As the appellant observes in his grounds and as has been said in Parliament, it is difficult to conceive of more serious charges made against organs of the state than those contained in the published Stevens III.
9. The Request

The appellant is an Irish television journalist. On 14<sup>th</sup>. November, 2008 he requested from PSNI copies of Stevens II and Stevens III reports. There was no Stevens II and this appeal relates simply to Stevens III, published in April, 2003. Whilst the personality and motives of a requester under FOIA are immaterial, it is hard to imagine a subject in which the Irish public, hence Irish journalists, could have a greater legitimate interest than the full content of Stevens III, recording, as it does, the conduct of certain elements of the police and the security forces. That said, the public interest is not an issue here since the exemption under scrutiny is absolute.

10. The PSNI responded on 8<sup>th</sup>. January, 2009, confirming that it held Stevens III but refusing to disclose it, relying on the exemptions provided by ss. 23, 24, 30, 31 and 38 of the Act. It further stated that some information was in the public domain, though, given the nature of the request, it is hard to see what that meant, unless it was a reference to the published report.
11. The appellant requested a review and, following a confirmation of its refusal by the PSNI, complained to the ICO on 17<sup>th</sup>. August, 2009.
12. The ICO in his Decision Notice focussed on the exemption enacted in s.23(1), which provides :

*“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).”*
13. It is not suggested that the unpublished information was supplied to Stevens by a s.23(3) authority, rather that it all “relates to” one or more than one. The RUC was, of course, not a s.23(3) authority, nor is its successor. Citing Tribunal authorities, the ICO decided that “or relates to” must be very broadly construed and that the applicability of the subsection must be proved on a balance of probabilities. He concluded, apparently without reading the unpublished parts of Stevens III but after discussions with the PSNI, that the exemption covered everything in Stevens III that had been withheld from publication.
14. Having reached that conclusion, he made no decision as to the remaining exemptions asserted.
15. The Appeal

In an eloquent and compelling series of written arguments the appellant forcefully challenged the apparent breadth of the ICO`s interpretation of “or relates to” in s.23(1). That indeed is the critical issue in this appeal, coupled, of course, with the

application of those words, as interpreted, to Stevens III. The appellant also emphasised strongly the public interest in this issue and, as he contended, the inconsistent stance of the PSNI when confronted with requests for such information. He contrasted the meagre provision of detail in the published version of Stevens III with the much fuller expose of similar matters in the 2007 O'Loan report into the murder of Raymond McCord Junior.

16. These are all powerful political arguments but they do not assist in the interpretation of s.23(1) which creates a class exemption covering any information falling within its reach, quite regardless of sensitivity or importance or perceptions of the public interest.

17. The reasons for our decision

There is, therefore, a single issue of law for our determination in this open decision, namely, how broadly should we construe “or relates to”?

18. We start from a consideration of the policy behind this provision. It has nothing to do with any direct damage to national security (see s.24). It expressly protects any direct or indirect security source of requested information but goes much further.

19. Information describing a s.23(3) body or its activities is clearly covered but “relates to” plainly extends beyond that. If that were the limit of its ambit, words such as “identifies or in any way describes” would have sufficed.

20. We consider that any significant connection between such a body and such information is caught by s.23(1). In *Metropolitan Police Commissioner v. Information Commissioner*, EA/2010/0008 the Tribunal observed at §15:

*“... 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.”*

21. The policy of this subsection was spelt out in *Cabinet Office v. Information Commissioner*, EA/2008/0080 at §27:

*“We can quite understand ... that, in the context of a possible leak of information from a security body, the Parliamentary draftsman should have deliberately chosen a form of words that would produce a more extensive restriction on rights of disclosure than might be appropriate in other circumstances.”*

22. We conclude that a broad interpretation of these words is therefore inevitable. There are clearly limits to be imposed by commonsense and, in a particular case, the probable ambit in principle of the need for protection.

23. We cannot go further in this open decision but are satisfied that this approach is the correct one to apply to Stevens III.

24. We have carefully scrutinised its application to the requested information and have given our decision in the closed annex.

Signed:

[Signed on original]

**David Farrer Q.C.**

Tribunal Judge

22<sup>nd</sup>. February, 2012