

FOIA s.27 – Qualified exemption: international relations

Campaign Against the Arms Trade v IC & Ministry of Defence

EA/2006/0040

26th August 2008

Cases:

Sugar v IC and The British Broadcasting Corporation UKIT [2006] EA_2005_0023

Department for Education and Skills v IC UKIT [2007] EA_2006_0006

Evans v IC and Ministry of Defence UKIT [2008] EA_2006_0064

Hogan v IC UKIT [2006] EA_2005_0026_0030

Maher AATAD no V.84/291B

Facts

The appellant (CAAT) requested numerous Memoranda of Understanding (MoU) and a Defence Protocol from the Ministry of Defence (MoD). The request was refused on the basis that s.27 FOIA was engaged and outweighed the public interest in disclosure. The information was exempt because of the damage to the UK's relations with the Kingdom of Saudi Arabia ('KSA') together with the damage to commercial interests under s.43 of the FOIA.

The IC agreed that the information should be withheld on the basis of s.27 FOIA being engaged and outweighing the public interest in disclosure. The IC confirmed that s.43 "*may well be engaged*" but having regard to his decision in respect of s.27 he had not gone on to consider s.43.

Findings

The Tribunal regarded firstly whether the information, the subject of the request, was confidential information within the definition in s.27(2) and (3) of the FOIA; secondly whether disclosure of the information would have prejudiced or would have been likely to prejudice relations with the KSA and/or UK interests abroad for the purposes of s.27(1)(a),(c) and (d) of the FOIA; and finally, if they concluded that s.27 was engaged, whether in all the circumstances of the case the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

Confidential Information

The Tribunal rejected the argument that the MoU was not information for the purposes of the s.27(3) definition because it was an agreement and held that where information comes from a State for the purposes of an agreement, it would or could constitute information to which the definition in s.27(3) can be applied.

The MoU were marked with the heading 'secret' and the Tribunal concluded – applying the second part of s.27(3) – that the marking of 'secret' on the documents

coupled with the KSA's attitude that defence or supply of arms agreements should remain secret and confidential meant that it was reasonable for the KSA to expect that it would be held in confidence.

The Tribunal also considered evidence regarding KSA's objection to the release of the MoU. They held that the approach adopted by MoD in consulting the KSA was unsatisfactory. They considered that at the very least it should have been put neutrally to the KSA and that only if the KSA asked what the attitude of MoD was should that have been indicated. They considered it of importance that the FOIA processes in this country should be made clear to nations such as the KSA and others including importantly the support for transparency and disclosure which they enshrine.

However, the Tribunal considered that the attitude of the KSA would not have been different or that consent would have been given to the release of either the 1986 or the 1988 MoU, even if the request had been put in such terms as the Tribunal considered it should have been.

Therefore the Tribunal regarded those circumstances in terms of whether the circumstances in which the information in the MoU was obtained made it reasonable for the KSA to expect that it would be so held. They decided that the correct approach to that question was to consider what it would have been reasonable for the KSA to have expected in all the circumstances. Based on the characteristics of the KSA in that they are a secretive society, the Tribunal were satisfied that the MoU were entered into on a basis on which the KSA would have expected that each government would respect the confidentiality of those agreements at least in the absence of the other consenting to disclosure. They did not consider that the KSA could reasonably have been expected itself to apply the FOIA or regarded itself to be under any compulsion to accede to the release of information which it had provided on a confidential basis and to the release, of which it objected.

They therefore concluded that the MoU would have fallen within the definition of confidential information in s.27(3) and would therefore have constituted confidential information for the purposes of the exemption under s.27(2) of the FOIA. They added that they did not accept that this conclusion would allow the culture and regime in the KSA to trump the FOIA, particularly having regard to the fact that the interest in maintaining the exemption remains subject to the public interest balance in accordance with s.2(2) of the FOIA.

Prejudice to International Relations and UK Interests Abroad

The Tribunal observed that the test of what would or would be likely to prejudice relations or interests would require consideration of what is probable as opposed to possible or speculative and that prejudice is not defined, but accepted that it imports something of detriment in the sense of impairing relations or interests or their promotion or protection and further accepted that the prejudice must be real, actual or of substance, as described in *Hogan*. However, they opined 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. They did not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage.

The Tribunal held that the discovery of the disclosure of those MoU in 2006 and 2007 did in itself prejudice relations with the KSA. They accepted that there would be likely to have been prejudice for the purposes of s.27(1)(a), (c) and (d) as disclosure of the MoU would lead to "*a very serious reaction*" on the part of the KSA, that it would violate one of the key terms of a government-to-government agreement in respect of which it would be regarded as reneging on that agreement and that the harm to the relationship with KSA would be significant. The relationship was one based on mutual trust and confidence, which would be significantly undermined by disclosure of the MoU and that the Saudi Arabians who then no longer felt able to trust us would be unlikely to feel able to do business with us.

Thus the Tribunal concluded that the exemption under s.27 of the FOIA was engaged in this case both under s.27(1)(a),(c) and (d) and s.27(2) and (3).

The Public Interest Balance

With regard to maintaining the exemption, the Tribunal held international confidence with weight as that confidence continued to apply to both MoU and disclosure would have been seen as reneging on or flouting the basis upon which that information was obtained and the MoU entered.

This was reinforced by the Tribunal's conclusions as to the real implications for and prejudice to our relations with the KSA and the effect on UK interests abroad and their protection and promotion. However, the overarching concern was what they would see as a direct breach of the mutual confidentiality which attached to the MoU and which in their the KSA could reasonably have expected the UKG to observe. They held that there would in these circumstances have been a clear public interest in maintaining that confidentiality.

Conversely, the Tribunal regarded that great weight should be placed upon transparency in government transactions, including in particular those concerning international dealings and, here, the arms trade. However, because there was no evidence of corrupt dealings the weight attached was not even substantial. They further rejected the 'jigsaw argument' that the MoU would form part of the jigsaw, which by piecing together the disaggregated pieces of information would enable conclusions to be reached as to what may be hidden commissions or bribes, thus exposing corrupt practices and creating substantial weight to the argument for disclosing the information.

The Tribunal concluded in respect of both MoU that the public interest in maintaining the exemption having regard to the confidential nature of the information and the prejudice that disclosure would have been likely to cause to international relations and UK interests abroad outweighed the public interest in their disclosure. While the sensitivity of parts of the documents varied, there remained a powerful public interest attached to the fact that the documents were confidential as a whole and reasonably regarded as such by the KSA. The disservice to the public interest in breaching that confidentiality and the consequent prejudice would not have been overcome through redaction of parts of the documents.

Conclusion

The information requested in the form of the 1986 and 1988 MoU was exempt information in respect of which the public interest in maintaining the exemption outweighed the public interest in disclosure and for that reason s.1(1)(b) did not require the MoD to communicate the information to CAAT. The appeal was dismissed.