FOIA s.24(2) – Qualified exemption: national security

FOIA s.23 – Absolute exemption: Information supplied by, or relating to, bodies dealing with security matters

Norman Baker MP v IC, the Cabinet Office & National Council of Civil Liberties

EA/2006/0045
4th April 2007

Cases:
Hogan and Oxford City Council v Information Commissioner [2006] UKIT EA_2005_0030

Quinn v Information Commissioner [2006] UKIT EA_2005_0010

DTI v Information Commissioner [2006] UKIT EA_2005_0007

Secretary of State for the Home Department v Rehman [2001] UKHL 47; [2003] 1 AC 153

Facts
In 1966 Harold Wilson gave a statement to the House that there was to be no tapping of MPs' telephones but that if there was a need to change this general policy then he would inform Parliament when it was compatible with the security of the country to do so. This has become know as the 'Wilson Doctrine'. Since then no PM has made a statement to the House except that in 2006 Tony Blair informed the House that, despite advice from the Interception of Communications Commissioner that he should treat MPs like everyone else, he had decided to maintain the Doctrine. Since 1966 interception of communication has become governed by Part I of the Regulation of Investigatory Powers Act 2000 (RIPA) which prohibits telephone tapping except as provided for under the Act.

The CO refused to confirm or deny that it held information in relation the first part of the request in order to safeguard national security under s.24(2) FOIA. In relation to the second part of the request the CO refused to confirm or deny under s.23(5) that the information was supplied to it or related to one of the bodies specified in s.23(3) who deal with security matters.

Mr Baker complained to the IC who upheld the CO's Notice, although finding there had been a breach of s.17(4) because he considered that providing an explanation of why the exemptions applied would not involve disclosing the information. No steps were required to be taken because the CO subsequently sent a letter to Mr Baker with such an explanation.

Findings
<u>The interrelationship between ss 23 and 24 and explanation of s.24</u>
S.24(1) renders information which does not fall within s.23(1), (i.e. information which was not directly or indirectly supplied by, and does not relate to, any of the security bodies) exempt information if, or to the extent that the duty to communicate

is not required for reasons of safeguarding national security. The exemption is a qualified exemption, meaning that even if information falls within the description of the exemption (and is thus exempt information) it is then necessary to consider whether in all the circumstances the public interest favours disclosure of the information or maintenance of the exemption. The fact the exemption is qualified implies that there may be instances in which it will be in the public interest to disclose information, regardless of the fact that the exemption is required in order to safeguard national security. Otherwise the exemption will be effectively become an absolute exemption.

S.24(2) provides that "the duty to confirm or deny does not arise if, or to the extent that, the exemption from s.1(1)(a) is required for the purpose of safeguarding national security." Unlike s.24(1), this limb of the national security exemption does not limit itself to "information which does not fall within s.23(1)." Indeed s.24(2) is not expressed to relate to any particular category of information and it does not itself stand as a "provision" which "states that the duty to confirm or deny does not arise in relation to information" for the purposes of s.2(1). As it was plainly not the intention that s.24(2) should operate independently of s.2(1), s.24(2) must nevertheless be made to interact with s.2(1), so that section 24 *is itself* a "provision" which "states that the duty to confirm or deny does not arise in relation to any information." On this basis, s.24 provides that the duty to confirm or deny does not arise in relation to information which does not fall within s.23(1) if, or to the extent that, exemption from s.1(1)(a) is required for reasons of safeguarding national security. Again the exclusion is a qualified one, so that even if the terms of s.24(2) are satisfied (and thus the duty to confirm or deny does not arise) it is then necessary to consider whether in all the circumstances the public interest favours confirmation or denial or maintenance of the exclusion. The fact that the exclusion is qualified implies that there may be instances in which it will be in the public interest to divulge the existence of information, regardless of the fact that the exemption from that duty is required in order to safeguard national security.

<u>CO's rationale behind the exemptions claimed</u>
The IC concurred with the Director, Security and Intelligence's explanation of why the exemptions were claimed. He explained that since the announcement of the Wilson Doctrine the Regulation of Investigatory Powers Act 2000 (RIPA) has been introduced, which regulates telephone tapping and other forms of interception. He explained how RIPA would effect whether s.23 and/or s.24 FOIA will be claimed in cases involving the safeguarding of national security and why the CO proceeded in the way it did in this case. The Tribunal also concurred with this explanation and rejected counter arguments from the organization 'Liberty'.

<u>Public Interest Factors taken into account under s.24</u>
The Tribunal weighed up many factors for and against maintaining the exemption to disclosure of the information.

With regard to maintaining the exemption for instance, they stated that ss.15-19 of RIPA set out detailed duties on the part of Ministers and Departments to safeguard information relating to interception. It includes, at s.17, an express exclusion from legal proceedings and prevents questions being asked from which information about interception might be inferred, or even that it has, may have occurred or is going to

occur. These complicated and wide ranging provisions reflect the need to prevent not only the disclosure of such information but also speculation and discussion about it. It is strongly against the public interest to release any information that might undermine these provisions.

With regard to denying the exemption for instance, they stated that in general there is a strong public interest in being able to provide assurance that tools such as telephone interception are being used responsibly, lawfully and for proper purposes. There is a particular public interest in knowing whether the telephones of individual democratically elected MPs are being tapped. The role of MPs, and the ability of individuals to communicate with MPs, is fundamental to the operation of a democratic system of government.

The Tribunal found that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Conclusion

The Tribunal were satisfied that the IC was correct to conclude that the CO had applied the exemptions properly to both parts of the Request. Meaning that for the first part of the Request s.24(1) was engaged and for the second part of the Request s.23(1) and s.24(1) were engaged. They also held that the duty to confirm or deny does not arise because exemption from s.1(1)(a) is required for the purpose of safeguarding national security and that the public interest was in favour of non-disclosure.