

FOIA s23 – Information supplied by, or relating to, bodies dealing with security matters

Roger Beam –v– Information Commissioner and the Foreign & Commonwealth Office

EA/2008/0079

12 May 2009

Facts

This appeal arose from an original application by Mr Beam (“the Applicant”) to the Foreign and Commonwealth Office (“FCO”) for information concerning an official Dutch Commission of Enquiry into the circumstances in which the security of certain operations behind enemy lines between 1942 and 1944 had been compromised.

The issue which was to be decided by the Tribunal was whether the Information Commissioner (“IC”) was correct in finding, in its Decision Notice of 21 August 2008, that the three requested documents (“Disputed Information”) fell within the scope of the absolute exemption under s23 FOIA (information supplied by, or relating to, bodies dealing with security matters). The Applicant contended that the IC had erred in that he relied in part on an assurance from the Director General of Defence and Intelligence that s23 was engaged and did not check the position himself by inspecting the documents.

The Director General of Defence and Intelligence had written to the IC on 13 December 2007 confirming that she had viewed the Disputed Information and that she was fully satisfied that the s23 exemption had been correctly applied. Her witness statement (which had not been available to the IC) explained that all the Disputed Information (save for a small part of one of the documents) either related to or had been supplied, either directly or indirectly, to the FCO by the Secret Intelligence Service. The witness statement further explained the general arrangement developed by Whitehall Departments in consultation with the IC, whereby a senior government official with knowledge of intelligence matters would review material, and if satisfied that such material is exempt by virtue of s23 FOIA, would sign a document to that effect. This arrangement took into account the fact that such material is not always, by its very nature, instantly recognisable by an individual who has no or limited experience in the intelligence field. In this case there was a discussion between the FCO and the IC as to whether this procedure remained acceptable to the IC. It was agreed that it was.

Findings

The Tribunal found that the IC was correct in deciding that the FCO had complied with its obligations under s1 FOIA when refusing disclosure of the Disputed Information.

The Tribunal stated that it was not its place to tell the IC how, in general, he should conduct his investigations. The Tribunal went further by stating that it would not suggest that the IC should in all circumstances personally inspect all disputed material or that public authorities should follow the Ministerial Certificate route in all

cases where s23 is relied upon. The Tribunal considered that there will be cases in which such a process will be necessary or appropriate, and others where they will be disproportionate. In striking the correct balance, those involved on both sides of an investigation may draw from the circumstances of this case a number of conclusions:

- If the IC and the public authority agree that the relevant material should not be disclosed during the investigation (with or without an explanation from someone who can explain any features that are obscure to the uninitiated) there is a greater chance of the decision being appealed;
- There must be a greater chance of such an appeal surviving a strike out application so that the more cumbersome and expensive procedures that have been followed are then imposed on all parties;
- The less rigorous the investigation by the IC then, self evidently, the more likely it is that the Tribunal will actually conclude that the Appellant's case ought to be preferred at the substantive hearing; and
- The original requester will be left with the perception that he has been short changed.

The Tribunal also commented on the point raised by the FCO, that it would not have been appropriate to disclose to the IC material of the type under consideration in this case, as a person unfamiliar with such material would not understand its relevance. The Tribunal stated that from the facts of this case, it would have been quite easy for the short documents to have been inspected by the IC at a meeting, in the presence of someone who could have provided an immediate explanation of their identity and the terminology used by their authors.

Conclusion

The Tribunal concluded that the Disputed Information fell within the absolute exemption under s23 FOIA, and that the IC was correct in his conclusion that the FCO had dealt with Mr Beam's request in accordance with s1 FOIA.