

**FOIA s27(1)** –international relations

**EIR Reg 2** – Definitions: environmental information

## ***Foreign and Commonwealth Office v IC & Friends of the Earth***

**EA/2006/0065**

**29<sup>th</sup> June 2007**

### **Cases:**

Department of Education and Skills v IC & The Evening Standard [2007] UKIT  
EA\_2006\_0006

### **Facts**

The background to the case involved the so called “ghost ships”, ie various US naval vessels which had been shipped across the Atlantic in late 2003 for the purposes of dismantling in the United Kingdom. Public concern had been expressed about the pollution and environmental risks which might arise were the dismantling operations to be carried out. As at the date of the appeal the ships remained in the United Kingdom but not yet the subject of any dismantling.

The request was made on 6 January 2005 by the Friends of the Earth as Additional Party in the terms of the matters set out in the above summary. The FCO refused to divulge the information, arguing that they would otherwise be prejudicial to the effective conduct of international relations and relying further upon the free and frank exchange of information in the context of such relations depended on the maintenance of trust and confidence between States. Later the FCO on a review confirmed that the subject matter came up during a meeting on 13 November 2003 and during subsequent telephone calls on 14 and 15 November 2003. In mid January 2006 the FOE confirmed that it had made a similar request under the United States Freedom of Information Act to the US Secretary of State.

In the Decision Notice the IC noted that the US State Department had by then said that it would prefer the information to be withheld on the grounds of sensitivity. He regarded the section 27 exemption as being engaged but found that the information requested did not constitute “environmental information” under the EIR. In ordering the FCO to communicate to the Additional Party the remaining information, the IC stressed that there was a substantial risk justifying a public interest in such release even though there was likely to be some prejudice with regard to relations between the United Kingdom and the United States.

### **Findings**

The Tribunal differed from the findings of the IC principally on the basis that although whether release should be affected was not necessarily a matter for the FCO’s judgment. The view of the FCO was nonetheless one which as the relevant public authority that should be properly taken into account with regard to the weight

to be attributed to the relevant factors in the balance. The Tribunal had to give some credence to the evidence proffered on behalf of the FCO. Even though the content of the exchanges might not have been of the degree of sensitivity contended for, the Tribunal was satisfied that the exchanges were at a sufficiently high level such as to have attracted a shared assumption that the exchanges were made in confidence.

There were four subject areas which pertained to the exchanges stemming from the underlying facts: first the fact that the vessels were being imported to be dismantled in the United Kingdom, secondly that authorisations previously given to the dismantling company were withdrawn, thirdly the fact that the United Kingdom Environment Agency had given its consent to the trans-shipment of the vessels before the necessary consents being finalised and finally, the lack of co-ordination between the United Kingdom regulators as to all of which the Tribunal heard evidence.

The Tribunal accepted that the four matters referred to were of public concern particularly in the wake of detailed departmental enquiries into the events in question. The Tribunal also accepted that the disputed information at least had a potential to add to the sum total of the public's interests and concerns and in particular that the public might be said to have a right to know the extent to which Ministers and senior officials were involved in the decision making process.

However, the fact remained that the exchanges were conducted in confidence, secondly, that the prosecution of a successful foreign policy depended upon mutual trust and confidence, thirdly, that proper records might not be kept if there were a perceived view of likely disclosure, next the United States had explained its own view in a formal manner that was against the concept of disclosure and particular damage might be caused to the special relationship between the United States and the United Kingdom with regard to the way in which the United States might in future treat information that the United Kingdom intended to share in confidence with the United States. The information in question had been marked "restricted" to reflect many of the above considerations.

The Tribunal was loathe to say that information should be exempt, e.g. under s.35(1) of FOIA simply on the basis of its status, its classification or the seniority of those whose actions were recorded cf *DfES*, at paragraph 20.

The Tribunal agreed with the Commissioner that s.27(1) was engaged but found on the facts that there was a significant risk of prejudice to UK/US relations and international relations as whole were disclosure to be ordered and that the likelihood of prejudice was high on the basis of the evidence which the Tribunal had heard. The decision, however, was related specifically to the facts of the present case. Of particular import was the fact that there was nothing of substance in the disputed information, moreover there was an abundance of material in the public domain that addressed each of the principal areas of public concern principally in the departmental reports and finally the evidence before the Tribunal made it clear that the exchanges in question played no or no meaningful part in the final decision by the Government to allow two of the four vessels in question to be docked in this country.

### **Observations**

The Tribunal was not persuaded that s.27(2) was engaged in the case: that subsection providing that information was exempt "if it is confidential information obtained from

a State other than the United Kingdom or from an international organisation or international court.” The Tribunal also found no assistance in the so called concept of non-justiciability advanced by the FCO being the principle that English courts will not require an executive to act on the basis of an assessment by the court as to the best means of effecting international relations. S.27 was not an absolute exemption nor should it be approached as such. The Tribunal also indicated that it agreed with both the Commissioner and the FCO that the EIR did not apply to the information requested in the case.

### **Conclusion**

The Tribunal ordered that the information requested consisting of exchanges or discussions or correspondence between the Foreign and Commonwealth Office (FCO) and the US State Department between September and December 2003 inclusive at the levels either of Secretary of State or Minister or Senior Civil Servant be not disclosed, namely the personnel involved on each side in the substance of each communication or communications.