IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

BETWEEN

(1) MINISTRY OF DEFENCE (EA/2019/0038)
(2) PETER BURT (EA/2019/0041)

Appellants

-and-

(1) THE INFORMATION COMMISSIONER (both appeals)
(2) PETER BURT (EA/2019/0038)
(3) MINISTRY OF DEFENCE (EA/2019/0041)

Respondents

SKELETON LEGAL ARGUMENTS

PETER BURT

Appellant

Date of hearing: 2 – 3 December 2019.

1. At issue is the application of sections 21, 24, 26, and 27 of the Freedom of Information Act 2000 to the contested documents, and which parts of the documents are covered by which of these exemptions (if any).

2. In considering this case, the Information Tribunal should aim to ensure that exemptions claimed for the contested documents are applied correctly and not stretched beyond the intention of Parliament in passing the Freedom of Information Act.

3. I anticipate that I will agree with much of the legal case to be made by ICO, with the exception that we will have a different view over the extent of material in the contested documents which should be covered by the section 24 and section 26 exemptions under the

Freedom of Information Act.

4. Before addressing these matters, I request that the Tribunal considers whether the Ministry of Defence has provided adequate justification for amending its position on the exemptions which apply to the contested documents, and, given that these amendments have been introduced at a relatively late stage in the appeal process, whether they should be accepted.

Late stage claim for exemptions

5. Having claimed throughout the internal review and appeal to the Information Commissioner that information in the contested documents was covered by the section 36 exemption (effective conduct of public affairs), the Ministry of Defence abandoned this position at the commencement of its case to the Information Tribunal and instead stated that it "now seeks to rely on the exemptions under ss.21, 24, 26 and 27 as reasons why it would be contrary to the public interest to disclose the disputed information"[1]

6. This represents a change at a late stage in the appeal process from a reliance on the s.36 exemption for the contested information to four newly claimed exemptions. This might be interpreted as an attempt to "move the goalposts". The Tribunal is entitled to consider whether this is justified. Guidance from the Information Commissioner relating to complaints to the ICO about the handling of requests states that "It is not good practice to introduce new reasons for refusing a request at this late stage ... and you should avoid doing so". It follows that it is even poorer practice to introduce new reasons for refusing a request at the Information Tribunal stage of the appeal process, as MoD has done in claiming that a new set of exemptions apply to the contested information.

[1] Paragraph 3, Ministry of Defence Grounds of Appeal, 8 February 2019.

7. The Information Tribunal's case law (Commissioner of Police of the Metropolis v Information Commissioner EA/2010/0006) suggests that late reliance on an exemption from disclosure should only be permitted where there is reasonable justification for so doing[2]. No justification is given in the MoD Grounds of Appeal for application of the new exemptions at this late stage of the appeal process, nor any explanation as to why they were not claimed when the original request for information was handled at the request and internal review stages by the MoD. The Upper Tribunal, in the case of the All Party Parliamentary Group on Extraordinary Rendition and the Information Commissioner and the Ministry of Defence (GI/150-152/2011) subsequently echoed this view, stating that "one might have thought that late claims should only be permitted where a reasonable justification is shown"[3].

8. Evidence has been presented (Peter Burt, Witness Statement 2) to show that an examination of statistics on the use of exemptions under the Freedom of Information Act indicates that the exemptions under sections 24 and 26 are more commonly used than the section 36 exemption by the Ministry of Defence when processing Freedom of Information requests; are robust against challenge; and are procedurally easier for officials to use than the section 36 exemption. There appears to be no good reason why officials could not have applied the newly claimed section 21, 24, and 26 applications during the substantive stage of processing the Request for Information, or at the Internal Review stage.

9. I conclude that the Ministry of Defence is not acting in good faith in claiming that the exemptions under sections 21, 24, 26, and 27 apply to content previously covered by the section 36 exemption, and that the MoD has not provided the justification for application of the new exemptions which is required under case law.

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[2] Commissioner of Police of the Metropolis v Information Commissioner EA/2010/0006 (paragraph 34).

[3] All Party Parliamentary Group on Extraordinary Rendition and the Information Commissioner and the Ministry of Defence, GI/150-152/2011 (paragraph 38).

Section 21 exemption

10. The MoD's Grounds of Appeal contend that "All of the disputed information which is not yet in the public domain (and therefore exempt under s.21) is exempt under s.24 and/or s.26".

11. Given the nature of this claim it is surprising that no indication has been given to show which information in the disputed documents is covered by the section 21 exemption, and nor have any directions been given to show where such information is located in the public domain. The only statement made on this matter on behalf of the Ministry of Defence is the comment by Ms Nicholls that "Where the MOD relies on section 21 that is because the information is already in the public domain, namely in the equivalent annual report for 2014-15, which is publicly available."[4]

12. Section 21 of the FOI Act states that "Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information". It follows that such information also qualifies for consideration in open session of the Tribunal.

13. The Information Tribunal considered this matter in the case of Ames v Information Commissioner and the Cabinet Office, EA/2007/0110, 24 April 2008. The Tribunal doubted that it would be legitimate for a public authority to say to an applicant that the information is somewhere to be found on a large website, even if the applicant is well informed (paragraph 19), and subsequent guidance from the Information Commissioner states that information "is unlikely to be reasonably accessible to the applicant if a large amount of searching is required in order to locate the information"[5] .

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[4] Paragraph 28. Vanessa Nicholls witness statement.

[5] Information Commissioner: 'Information reasonably accessible to the applicant by other means (section 21)'. Box, p7. https://ico.org.uk/media/for-organisations/documents/1203/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf

14. In the Ames case the Tribunal also concluded that "Section 21 (read with sections 1 and 2) requires that the information *requested* is accessible by other means; it is not sufficient that there is other information (or evidence) accessible which is "*relevant to the request*"."

15. Guidance from the Information Commissioner states that "information, although generally available elsewhere, is only reasonably accessible to the applicant if the public authority... is able to provide the applicant with precise directions to the information so that it can be found without difficulty. When applying section 21 in this context, the key point is that the authority must be able to provide directions to the information"[6] (my emphasis).

16. It seems unlikely that the DNSR annual assurance report for 2015-16 repeats exactly the same information as the DNSR annual assurance report for 2014-15. Examination of all the equivalent annual reports on defence nuclear safety assurance from 2005 to 2014-15 indicates that there has been a change in the situation compared to the previous year, and that to reflect this evolution each report provides an update on the safety situation compared to the previous year's report. However, assuming Ms Nicholls is correct in advising the Tribunal that information in the 2015 - 16 report is already in the public domain by virtue of publication of the 2014 – 15 report, she should be able to identify precisely on a paragraph-by-paragraph and sentence -by-sentence basis which parts of the 2014 – 15 report are duplicated in the 2015 – 16 report.

17. If the information in the 2014-15 annual report is broadly similar but not identical to that in the 2015-16 report, and the requested report contains material not available in the earlier report, this material cannot be reasonably considered to fall within the scope of section 21 and

[6] Information Commissioner's Office: 'Information reasonably accessible to the applicant by other means (section 21)'. Para 20, p7. https://ico.org.uk/media/for-organisations/documents/1203/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf

should not be withheld from release.

Section 24 exemption

18. The mere fact that the information in the contested documents relates to the UK's nuclear weapons programme is clearly not grounds for claiming exemption under sections 24 or 26 of the Freedom of Information Act. At the time the Act was passed Parliament had the opportunity to legislate to exempt all information relating to defence nuclear programmes from release under the Freedom of Information Act, but did not do so. The Tribunal should therefore start from the position that information relating to nuclear weapons is not subject to a blanket exemption from release and that the general right of access to information held by public authorities (section 1 of the Freedom of Information Act 2000) applies to such information. The question of whether or not release of such information is justified should be addressed on the merits of the case that can be made following a public interest test to demonstrate whether its release might prejudice national security or defence interests.

19. Documents relating to this case include a number of general statements relating to the UK's defence nuclear programme: for example, it is a "key component of the nation's national security strategy"[7], that it is the "apex of our force capabilities and national security strategy"[8], and that it is "vital to our national security strategy"[9]. The Tribunal should bear in mind that the direction of the national security strategy is a political choice made by the government of the day, and that other options are available to the United Kingdom in selecting its security strategy. Nuclear deterrence is just one part of the national security strategy and is no more or less important than other elements in the strategy. The Tribunal is asked to remain as neutral on this matter as it would be on any other policy issue it addresses,

7 Ministry of Defence Internal Review Response.
8 Paragraph 58, Decision Notice FS50754705.
9 Paragraph 4, Open Witness Statement on behalf of RAdm Keith Beckett.

and to avoid being seduced into the view that the defence nuclear programme has some kind of special status which means that it deserves extra protections under information law over and above those granted to defence matters in general.

20. Section 24 of the Freedom of Information Act states that: Section 24(1) provides that "Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security." The exemption is qualified subject to a public interest test (section 2(2)).

21. Evidence has been given to show that there is a public interest in releasing the contested information for the following reasons:

- There is a major public interest in being able to demonstrate that the UK's nuclear weapons and submarines are effective, functional, and safe. There is a particular interest in being able to demonstrate that they do not pose unacceptable risks to the public or the personnel who work with them.
- There is intrinsic benefit in ensuring that the regulation of nuclear safety is conducted in an open and transparent manner.
- There is considerable public and Parliamentary interest in the safety of the MoD's nuclear programme.
- In the current security environment, there is a need for accurate information to counter malicious narratives relating to UK military operations.
- It is in the UK's interests to set high standards of transparency in nuclear matters in order to discharge its international obligations and set a good example to other states.

22. Paragraph 58 of the Decision Notice states that a "strong case" has been advanced by the complainant in relation to use of the section 24 exemption and states that "the Commissioner

has concluded that by a relatively narrow margin, the public interest favours maintaining the exemption contained at section 24(1)". This assessment does not relate to information to which it is newly claimed that the exemptions apply, and which was previously covered by the section 36 exemption. As argued above, the case for use of the sections 24 and 26 exemptions is even weaker for the newly claimed material than for the material originally claimed to be covered by the exemptions.

23. In view of the apparently marginal nature of the Information Commissioner's decision, I should be grateful if the Information Tribunal would re-examine the public interest case for releasing information which the Ministry of Defence claims is covered by the section 24 exemption, and ensure that the Ministry's case is based on specific evidence which demonstrate an appreciable risk of harm if the information is released, rather than general claims about the importance of the UK's nuclear weapons.

24. In order to demonstrate beyond doubt that the release of information would prejudice national security interests, a public authority is able to seek a signed ministerial certificate to confirm that release of the information would be contrary to national security interests[10]. A ministerial certificate can only be challenged on judicial review grounds and represents very strong evidence that information is sensitive for national security reasons. Although it is accepted that this is not a conclusive point, it should be noted that the Ministry of Defence has produced no ministerial certificate to demonstrate that information in the two assurance reports should not be released for national security reasons.

Mosaic effects

25. It is claimed that release of information relating to national security may assist an adversary in

[10] Section 25, Freedom of Information Act 2000.

putting together a 'mosaic' using other information to draw conclusions about the MoD's nuclear programmes.

26. Evidence on the mosaic theory is presented in witness statement Peter Burt Witness Statement 6, in which the research findings of David E. Pozen are discussed. Pozen argues that, "rather than review mosaic claims with extra deference, as courts have traditionally done, courts ought to review these claims with extra scrutiny and skepticism on account of their susceptibility to misuse."[11]

27. In scrutinising mosaic claims, Pozen advocates carefully examining a) the 'support' presented by agencies for mosaic arguments – the quality of the evidence backing up such arguments, b) the 'specificity' of mosaic claims - the extent to which the claim relates to withholding information in general, or specific parts of documents which may be harmful, and the precise harm that would result from disclosure, and c) the 'plausibility' of the claims – the extent to which it is clearly and convincingly shown that harm would occur from release of the information[12].

28. In the UK, the Information Commissioner has stated that her approach will be "to assess the merits of mosaic arguments in the circumstances of each case and that they should not be dismissed automatically"[13]. Her view is that: "Where mosaic effect arguments are advanced the Commissioner's view has been that these will be more convincing where the public authority is referring to other specific information that is already in the public domain, rather than to information that may be disclosed at an indeterminate future time"[14], and the Commissioner's guidance on the mosaic effect states that "general arguments will not carry

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11 P664, David E. Pozen, op cit.
12 P653, David E. Pozen, op cit.
13 Paragraph 14, Information Commissioner's Office Decision Notice FS50616895, 13 June 2016.
14 Decision Notice FS50616895, 13 June 2016. Paragraph 17. https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624498/fs_50616895.pdf

much weight. It will be necessary to point to specific information already in the public domain, explain why it is likely that they will be combined, and explain how additional prejudice is likely to result from the combination"[15]. Guidance on mosaic arguments in relation to the Environmental Information Regulations[16] also emphasises the need for specificity, stating: "However, general arguments will not carry much weight. It will be necessary to point to specific information already in the public domain, explain why it is likely that they will be combined, and explain how additional prejudice is likely to result from the combination.

29. In summarise, there is a consensus that tribunals should not accept generic or speculative assertions that mosaics could be made if information is released. The Tribunal is asked to critically examine the MoD's mosaic claim and adopt the three tests of 'support', 'specificity', and 'plausibility' when assessing the claim.

Section 26 exemption

30. Section 26 (1) of the Freedom of Information Act 2000 states that "Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) the defence of the British Islands or of any colony, or

(b) the capability, effectiveness or security of any relevant forces.

The exemption is subject to a prejudice test and to a public interest test.

31. MoD has presented no open session evidence to show that defence personnel might be placed at risk by the release of the requested information. DNSR annual assurance reports published

[15] 'Information in the public domain. Freedom of Information Act. Environmental Information Regulations'. Information Commissioner, 2013. Paragraph 64, p18. https://ico.org.uk/media/1204/information-in-the-public-domain-foi-eir-guidance.pdf

[16] 'Information in the public domain: Freedom of Information Act. Environmental Information Regulations' ICO guidance. Paragraphs 64 and 65. https://ico.org.uk/media/1204/information-in-the-public-domain-foi-eir-guidance.pdf

for previous years contain no information which is relevant to the security of armed forces personnel, or which might compromise their security or effectiveness. The previous reports contain no information about specific operations and do not reveal specific details which might compromise defence security.

32. The Tribunal should not defer to assertions by the MoD that release of the information would prejudice defence or the armed forces, but should objectively assess whether the evidence presented justifies the use of the exemption.

33. Guidance from the Information Commissioner's Office on use of the section 26 exemption[17] indicates that the following factors would favour disclosure of information in the public interest:

- furthering the understanding and participation in the public debate of issues of the day;
- promoting accountability and transparency by public authorities for decisions they take and the way they spend public money;
- allowing individuals, companies and other bodies to understand decisions made by public authorities which affect their lives; and
- bringing to light information affecting public health and safety.

The last of these factors is particularly relevant, but each of them applies to the current case.

Section 27 exemption

34. Section 27(1) of the Freedom of Information Act 2000 provides a qualified exemption from disclosure in the following terms:

"(1) Information is exempt information if its disclosure under this Act would, or would be

[17] Information Commissioner's Office: 'Defence (section 26)'. Paragraph 26. https://ico.org.uk/media/for-organisations/documents/1181/defence-section-26-foia-guidance.pdf

likely to, prejudice -

(a) relations between the United Kingdom and any other State".

35. MoD holds that release of the requested information would, or would be likely to, prejudice relations with another state and is thus exempt from release under the section 27 exemption. MoD is unable to explain the reasons for this without involving disclosure of the exempt information itself. It is conjectured, however, that the information relates to relations with the USA or France, with whom the UK has long-standing nuclear co-operation arrangements.

36. An inspection of previous annual assurance reports published by the Defence Nuclear Safety Regulator suggests that any such information included in the report is likely to represent only a small part of the total content. The Tribunal is therefore asked to explicitly define and carefully limit the scope of material in the report which may be covered by the section 27 exemption.

37. I would like to request, when assessing whether the balance of the public interest favours application of the section 27 exemption, that the Tribunal considers the following factors:

- Whether the withheld information is specific or sensitive enough to cause realistic damage to the relationship between the two nations.
- Whether it has previously been alluded to in public before by either nation.
- Whether it mentions anything that the other nation is not already aware of.
- What particular harm would arise if the information was released and how this weighs against the wider public interest in disclosure.[18]

38. In the case of the USA and France, with which the UK has long standing and mature military

[18] Information Commissioner's Office: 'Freedom of Information Act Awareness Guidance No. 14: International Relations'. Page 8.

nuclear relationships, it should not be automatically assumed that relations will be made more difficult or a diplomatic response required if information of low sensitivity is published.

39. Guidance from the Information Commissioner's Office on use of the section 27 exemption states that the exemption will only apply if the disclosure of information would prejudice the international relations or interests of the UK itself, not of a part of the UK, or a sector or group in the UK, or the interests of the public authority itself[19]. In assessing whether the exemption applies to this case, the Tribunal should be clear whether any prejudice would indeed apply to the nation as a whole, rather than merely the interests of MoD or personnel within MoD.

Evidence in closed session

40. It is evident that much of MoD's evidence in this case will be given in closed session.

41. With regards to evidence and arguments which the MoD intends to introduce in closed session, the Tribunal should be aware of the ruling in the case of Bank Mellat v HMT (no.1) [2013] UKSC 38. In the ruling Lord Neuberger said (paragraphs 68-74) that:

"i) If closed material is necessary, the parties should try to minimise the extent of any closed hearing.

ii) If there is a closed hearing, the lawyers representing the party relying on the closed material should give the excluded party as much information as possible about the closed documents relied on.

iii) Where open and closed judgments are given, it is highly desirable that in the open judgment the judge/Tribunal (i) identifies every conclusion in the open judgment reached in

[19] Information Commissioner's Office: 'Freedom of Information Act Awareness Guidance No. 14: International Relations'. Page 4.

whole or in part in the light of points made or evidence referred to in the closed judgment and (ii) says that this is what they have done.

iv) A judge/Tribunal who has relied on closed material in a closed judgment should say in the open judgment as much as can properly be said about the closed material relied on. Any party excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and the arguments it has received".

42. The Bank Mellat v HMT case did not relate to information law, but in Browning v Information Commissioner and Department for Business, Innovation and Skills [2013] UKUT 0236 (AAC) the Upper Tribunal expressed similar views to those of Lord Neuberger about the use of closed material and hearings in FOIA cases.

43. The Tribunal is requested to conduct the hearing in accordance with these principles and ensure that the MoD discloses as much information in open session as can reasonably be released, and, in accordance with the Bank Mellat v HMT ruling, the Tribunal itself provides as much information as can properly be given about closed session material.

Conclusion.

44. The Tribunal is respectfully asked to:

- Ensure that as much material is available in open session as can properly be disclosed.

- Dismiss the claim that section 21 of the Freedom of Information Act applies to the contested documents as unjustified.

- Dismiss the claim that sections 24, 26, and 27 apply to further sections of the documents, over and above those claimed at the time the Decision Notice was issued, as unjustified.

- Review the balance of the public interest in relation to the application of sections 24, 26, and 27 as originally claimed at the time the Decision Notice was issued, in the light of evidence presented which demonstrates the strong public interest in disclosing information relating to nuclear safety and potential risks posed to the public and operational personnel.

Peter Burt

18 November 2019