ON APPEAL FROM:

The Information Commissioner's Decision Notice No:
FS50469024

Dated: **2nd. April, 2013**

Appeal No. EA/2013/0093

Appellant: **T J MCINTYRE (TM)**

First Respondent: **THE INFORMATION COMMISSIONER**

("the ICO")

Second Respondent **THE HOME OFFICE ("HO")**

Before

David Farrer Q.C.

Judge

and

Jacqueline Blake

and

Gareth Jones

Tribunal Members

Date of Decision: 9th. April, 2014

Date of Promulgation: 14th. April, 2014

Representation:

The Appellant	Francis Davey
The Commissioner	Eric Metcalfe
The Home Office	Oliver Sanders

The Subject Matter	FOIA s.24(1) Whether material relating to the blocking of certain websites required exemption from the duty to provide information, for the purpose of safeguarding national security and, if it did, whether the public interest in disclosure of that information was greater than the interest in maintaining the exemption.
Reported Cases:	*Kalman v ICO and Department of Transport A/2009/0111* *Summers v ICO and Metropolitan Police Commissioner EA/2011/0186.* *Quayum (Camden CLC v ICO EA/2011/0167* *R. (Binyam Mohammed) v Secretary of State for Foreign Affairs [2010] EWCA (Civ.) 65* *Appger v ICO and Ministry of Defence [2011] UKUT 153 (AAC)*

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal dismisses the appeal .

Dated this 9th day of April, 2014

David Farrer Q.C.

Judge

[Signed on original]

REASONS FOR DECISION

The Background

1 Among its vast choice of websites the world – wide internet offers access to some which offer harmful or dangerous material. Two obvious categories are material designed for the sexual exploitation of children or young people and information intended to inspire acts of terrorism or offer practical instruction in committing acts of terrorist violence. The latter category will be referred to in this Decision as "terrorist material".

1. UK – based sites can be asked to remove terrorist material and face prosecution under the Terrorism Acts, 2000 and 2006. Websites outside the UK cannot generally be dealt with in the same way. Filtering is the only process which can be applied to them. It is a voluntary procedure involving software filtering companies ("SFCs").

2. A directorate within HO, the Office for Security and Counter – Terrorism ("the OSCT") works to combat terrorism in the UK, including the dissemination and promotion of terrorist material. This involves what is known as the "Prevent strategy", which is designed to suppress terrorist material and protect vulnerable individuals from its influence. The OSCT works in close collaboration with the Counter Terrorism Internet Referral Unit ("the CTIRU"), a team within the Metropolitan police, which is authorised to seek the removal of illegal terrorist material from the web, as mentioned in the preceding paragraph.

3. Implementation of such a strategy necessarily involves the digital industry, specifically SFCs and internet service providers ("ISPs"). The engagement of SFCs has been achieved

by cooperation rather than legal sanction. Such cooperation, says the HO, depends very largely on mutual trust and confidence. It involves a delicate relationship.

4. Since 2008 the chosen mechanism for such cooperation as regards terrorist material, has been a written agreement in the form of a confidential licence deed, incorporating a rolling HO list of websites and pages ("uniform resource locators"- "URLs") containing or believed to contain terrorist material. Such a list is incorporated into the SFCs` corporate internet software filtering products. Clause 6 of the licence deed includes a range of provisions requiring both the SFC and the HO to maintain confidentiality as to the terms. Whilst the whole spectrum of URL filtering was reviewed in 2011, the system in 2014 is substantially unaltered from that introduced by the last Labour government. The period up to the review was referred to in evidence as "phase 1" and the subsequent period to "phase 2".

5. The filtering process operates widely across public facilities, such as libraries, colleges and schools. It is applied similarly, but not under the licence in question here, to sexual material exploiting children or other vulnerable parties and to material involving "cyber bullying". The domestic end – user has the choice to filter out undesirable URLs. Filtering is distinguishable from the "blocking" of websites, which is undertaken by the ISP and requires no consent from the end – user.

The Request for information

6. On 13th. November, 2010, towards the end of phase 1, TM made a series of thirteen requests for information to HO, of which one (no. 6) was in the following terms-

What liability would be faced by the Home Office or filtering firms in relation to harm caused by wrongful inclusion of a site on this list ? Please furnish copies of any documentation relating to same."

As a result of subsequent developments, this was the only request in the series which required a decision from the ICO and in respect of which this appeal is brought to the Tribunal.

7. The request poses a question of law, which might involve opinion rather than information. However, HO took no such fastidious point in its response nor in subsequent dialogue or submissions to the Tribunal and it is evidently to be interpreted as a request for information relevant to the formation of an informed opinion on the issue of such liability. As such, it is highly specific and substantially restricted the range or amount of responsive material. As became apparent at the hearing, it also confined the relevant arguments to a much narrower compass than may have been foreseen or intended. It was accepted by TM and the ICO that the only material within the scope of the request was a single sub – clause of the licence issued to SCFs and a further short submission to a minister that added nothing to the content of that short provision. Other relevant documents, if they ever existed, had not surfaced during the HO search and may have been removed or destroyed.

8. The subsequent history of the request was set out in the Decision Notice but has no bearing on the outcome of this appeal. Suffice it to say that HO initially refused to confirm or deny holding the requested information, relying on FOIA ss.41(2). In a Decision Notice dated 20th. February, 2012 the ICO ruled that s.41(2) was not engaged and required HO to confirm or deny holding the information. On 19th. March, 2012, HO confirmed that it held the information but refused to supply it, relying now, additionally, on s.43(2). TM immediately requested an internal review which was refused by HO on 13th. December, 2012, after a most regrettable delay. That delay, required the intervention of the ICO in October, 2012, who rightly indicated that he would now investigate TM`s complaint without waiting for the outcome of the review. The HO`s refusal introduced for the first time s.24(1), whilst abandoning s.41(2). HO earned few marks for promptness or consistency.

The Decision Notice

9. The ICO concluded that s.24(1), which is available where exemption from the duty to disclose is required for the purpose of safeguarding national security, was engaged and that, in accordance with the balance of public interests, it should be maintained. He did not, therefore, consider s.43(2). That exemption was not the subject of argument before the Tribunal; we have not considered it.

10. TM appealed.

The Appeal

11. His grounds of appeal and further written submissions were of a quality to be expected from a distinguished academic lawyer. As indicated above, however, some of the most interesting issues that he raised do not, in our view, require decision, given the limited material matching the request. It is right to add that such an assessment demands a sight of the withheld information, which we, but not he, have had. His written submissions and the oral arguments of Mr. Davey are reviewed at paragraph 19.

The evidence

12. The only witness was Ms. Rosemary Pratt, a senior civil servant recently appointed to the OSCT as Head of the Prevent Unit but with previous relevant experience at a senior level in another government department. The direction for an oral hearing given by the Tribunal after an initial agreement for a determination on the papers was substantially due to an apparent attack on the candour and plausibility of the evidence contained in the open witness statement which she submitted on behalf of HO. It involved, among other matters, an assertion that HO had been culpably inconsistent in its handling of the issue of confidentiality as to the identity of SCFs which had agreed URL licences, in effect, abandoning confidentiality when that suited the needs of the moment. As a result, Ms. Pratt gave evidence on oath.

13. In the event, she was cross examined at the hearing by Mr. Davey but issues relating to her or H.O`s candour or integrity were not explored.

14. Ms. Pratt described the dangers posed to security by ready access to terrorist material and the complementary role of the social media in its wide and rapid dissemination.. She gave a detailed account of the role of the OSCT and the inception and development of the system of confidential licences. She emphasised the sensitive nature of the relationship between it and both ISPs and SCFs, arising from their concern as to a possible public perception that they were unreasonably colluding with the government in fettering freedom of speech and the expression and reception of controversial and unpopular opinions. The HO position was and remains that these companies which engaged with HO in the blocking or filtering of extremist websites were and are very reluctant to be identified publicly, notwithstanding the obvious exception, Smoothwall, which had advertised its cooperation with OSCT and the CTIRU, quoted by the minister concerned, Mr. Coaker, in a parliamentary answer in April, 2009.

15. However, sensitivity to publicity went beyond the identities of companies cooperating, whether ISPs or SFCs. In relation to the licence deed, containing the confidentiality clause already referred to, the fact of disclosure could be as damaging to trust and the willingness of further companies to sign up as the nature of the information disclosed. If an SFC discovered that one important element in its agreement with HO was disclosed, whether upon request or pursuant to an order of the ICO or the Tribunal, it was likely to foresee further breaches of confidentiality, which could induce it to withdraw from the agreement. The majority of ISPs and SFCs were strongly averse to publicity for these arrangements and effective filtering depended upon their goodwill and cooperation, in relation to terrorist material and the other categories of illegal material referred to above. In passages in the closed statement redacted from the open she referred to evidence supporting some of these conclusions.

16. Ms. Pratt questioned the value to the public of disclosure of the particular information in the licence agreement within the scope of the request. She acknowledged, as she must,

that mistakes could occur when including websites on the URL list but doubted whether disclosure would assist the public in understanding what redress might be available to the injured party from any actionable inclusion. No agreement between HO and SFC could affect the rights of a third party. It could only allocate liability between them.

17. TM`s case rested substantially on the following submissions –

(a) The term "Liability" in the request must be broadly construed, not limited to those liabilities arising from the terms of the licence deed governing relations between HO and licensee. It further extended to potential liability in defamation, judicial review proceedings, HO`s vicarious liability for the acts of the SCFs and liability for economic loss arising from a wrongful blocking of a website, resulting in loss of sales. It also covered the exposure of the UK to action before the European Court of Human Rights for interference with rights under Article 6 and Article 10 (the right to receive and impart information and ideas) of the European Convention on Human Rights. Article 10 was engaged by the nature of the licensing arrangements giving rise to the question whether the filtering was prescribed by law and, if so, whether that law was properly accessible to the citizen.

(b) Section 24(1) was not engaged. The information requested did not involve disclosure of the identities of participating companies. To argue that companies might fear future disclosure of their identities from disclosure of an entirely unrelated feature of their agreement with HO was pure speculation.

(c) Disclosure did not involve naming the licensee companies.

(d) No SCF or ISP had given evidence in support of HO`s position, despite the Tribunal`s invitation to consider the value of such evidence.

(e) HO had lacked candour in failing to disclose Smoothwall`s use of its licensee status as a marketing tool, and the possibility that other companies had announced their participation. That cast doubt on its credibility generally.

(f) As to the public interest, there is a strong interest in the public understanding the nature of government measures to combat the spread of terrorist material.

(g) Similarly, the public has an interest in knowing whether HO has behaved responsibly and whether the filtering system is compatible with Article 10.

(h) Whether HO has instituted an effective method of rectifying wrongful filtering or blocking measures – probably by mistaken inclusion on the URL list – is a matter of substantial public concern.

(i) So also is the question whether HO has adequately shielded the taxpayer from the consequences of acts giving rise to claims for damages from aggrieved website owners.

(j) Disclosure of the relevant provision(s) of the licence could shed light on the question of Article 10 compliance.

18. The HO `s submissions were, understandably, linked closely to Ms. Pratt`s evidence. They are reflected further in the reasoning of the Tribunal set out below. Certain of the matters raised did not, as it turned out, require a finding by the Tribunal. The ICO made submissions as to the engagement of s.24 and the balance of public interests, referring specifically to the need to consider with great care the views of those experienced in security issues, when assessing the strength of the case for maintenance of the exemption in s.24 cases.

The issues

19. They are plainly –

(i) Is s.24 engaged ?

(ii) If it is, does the public interest in maintaining the exemption outweigh the interest in disclosure ?

Our Decision

FOIA s.24(1)

20. S. 24(1) provides –

" Information which does not fall within s.23(1) is exempt information if exemption from s.1(1)(b) is required for the purpose of safeguarding national security".

S.1(1)(b) is, of course, the provision which imposes the general duty of disclosure on a public authority. It was agreed that s.23(1) (information supplied by or relating to specified bodies concerned with national security) did not apply to this information.

23 The critical term here is "required". Clearly, it imposes a significant test. . On the other hand, in matters as critical as these, it would be absurd to set the bar too high. Previous decisions of First – Tier Tribunals have indicated that "required" should be interpreted as "reasonably necessary" and that the threat need not be direct or immediate (see *Kalman v ICO and Department of Transport EA/2009/0111 para.33 Summers v ICO and Metropolitan Police Commissioner EA/201/0186 para. 73. Quayum (Camden CLC) v ICO EA/2011/0167 para.42*). We agree that this is the right standard.

24. It is doubtful whether secrecy as to the intrinsic nature of the withheld information is reasonably required for the purposes of safeguarding national security. That, however, is not the HO case. It is rather that any disclosure relating to the licensing arrangements is inconsistent with the requirement for confidentiality contained in clause 6 of the licence and is liable to undermine trust in such confidentiality in the future, as regards both existing and potential licence – holders. This might include a fear that their identities could be revealed against their wishes.

25. TM dismisses this argument as conjectural and, at first blush, there seems to be force in his criticism. Ms. Pratt referred, however, to a widespread conviction within the OSCT that any such disclosure could damage important and sensitive relationships with SFCs and ISPs. There was further brief supporting evidence which is referred to in the closed annex. The absence of supporting evidence from SFCs was explained as resulting from a desire to avoid disturbing the relationship by bringing them before the Tribunal. We do not regard that as a compelling reason but accept that it is genuinely advanced.

26. Security is a matter of vital national importance in which units such as the OSCT and the CTIRU have considerable experience, whereas the Tribunal has little or none. It is therefore right that it should pause and reflect very carefully before overriding what is plainly the sincerely held view of those bodies. We are assisted by guidance from the Court of Appeal (Lord Neuberger M.R.) in the context of national security at para. 131 of *R. (Binyam Mohammed) v Secretary of State for Foreign Affairs [2010] EWCA (Civ.) 65,* namely that *"it would require cogent reasons for a judge to differ from an assessment of this nature made . . ((here) by the HO)"*. Such an approach was adopted similarly in *Appger v ICO and Ministry of Defence [2011] UKUT 153 (AAC)* at para.56. Of course, that does not mean that the Tribunal abdicates its responsibility for the decision, simply that it pays serious attention to that assessment.

27. We are not persuaded that Ms. Pratt`s evidence on these matters should be rejected because of the alleged inconsistency of the HO`s position on disclosure nor the claim that it has "lacked candour" in its dealings with the ICO. The evidence as to ministerial statements does not justify such a finding, certainly as regards the level of concern as to disclosure within HO.

28. The gravity of the threat is important in such an assessment, coupled, of course, with the likelihood of exposure to the threat if the information is disclosed. There is ample evidence, in the Tribunal`s judgement, that the threat to national security posed by

widespread access to terrorist material is very real and very dangerous. The likelihood that this would be the result of disclosure here is not overwhelming but it is certainly substantial.

29. We agree with HO that the requirement in the licence for compliance with FOIA has no bearing, either on the engagement of s.24(1) or the balance of public interests. That argument was advanced in written submissions but not pressed at the hearing.

30. Taking account of all these matters the Tribunal concludes that, viewed both from the standpoint of November, 2011 and today, s. 24(1) is engaged.

The balance of public interests

31. TM advanced a number of important matters of public concern that disclosure would promote. They are set out at paragraph 19. The Tribunal accepts without hesitation that UK compliance with ECHR Article 10 as regards the filtering system is an issue of considerable public importance as is the question whether there is proper provision for wrongful inclusion on the URL list. Promotion of a proper understanding of government measures to suppress terrorist material is equally a serious public interest.

32. However, the Tribunal has to decide whether disclosure of the withheld material would promote public understanding of any of these important matters or indeed any others relating to the filtering system. It would not, in the slightest degree. It would contribute nothing to public understanding of any of the major issues very properly raised by TM.

33. That material could inform the public only as to one, very minor question of legitimate interest, which is identified in the closed annex. The answer to that question would be correctly guessed by most informed observers, without disclosure.

34. The public interest in upholding the exemption is effectively set out in the case for the engagement of s.24(1).It is not irresistible but it is certainly far weightier than any interest in disclosure.

35. That being so, the balance of interests plainly favours maintaining the exemption.

36. For these reasons, the appeal is dismissed.

37. This decision is unanimous.

David Farrer Q.C.

Tribunal Judge

9th. April, 2014