



NCN: [2023] UKFTT 00267 (GRC)
Case Reference: EA.2023.0059

**First-tier Tribunal
General Regulatory Chamber
Information Rights**

Decision given on: 8 March 2023

Before

**DISTRICT JUDGE REBECCA WORTH,
authorised to sit as a Tribunal Judge in the
First-tier Tribunal General Regulatory Chamber**

Between

FRANS BECKER

Appellant

and

INFORMATION COMMISSIONER

Respondent

Decision: The appeal is struck out under rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended.

REASONS

Background

1. On 05 November 2021 Mr Becker requested information from the Foreign, Commonwealth and Development Office ("FCDO"). On 02 December 2021 the FCDO told him that the information was held but would not be released, citing section 23 of the Freedom of Information Act 2000 ("FOIA") as the reason.
2. Mr Becker complained to the Information Commissioner's Office ("ICO") and, on 05 January 2023 Decision Notice IC-159649-V4S8 was issued confirming that the FCDO were entitled to rely on Section 23 of FOIA as the reason for not disclosing the information.

3. By Notice of Appeal dated 01 February 2023, Mr Becker lodged proceedings with this Tribunal. His Grounds of Appeal commenced:

It is perfectly clear that on the basis of section 23 (1) of FOIA, there is no obligation whatsoever to disclose the documents of SIS that we have been asking for.

4. The Grounds of Appeal went on to give reasons why, despite this acceptance, the information should be provided.
5. In Case Management Directions dated 08 February 2023, Tribunal Judge Lynn Griffin set out the legal position – that the Tribunal must apply the law and, if Mr Becker agrees that the information is caught by Section 23 (security bodies). She explained that she was considering whether to strike out the appeal and gave Mr Becker an opportunity to make representations as is required under the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, as amended¹ (“the GRC Rules”). The ICO was sent the documents and given an opportunity to make representations, with their obligation to respond being suspended.
6. By letter dated 15 February 2023, Mr Becker sent the following representations to the Tribunal (copied to the ICO):

1) As far as I can see, there is no obligation to disclose the documents concerned. But, on the other hand, there is no obligation either not to disclose them. The right to deny access does not imply that there would be no discretionary competency to grant access.

2) Evidently, this has been done before. For the excellent study MI6, The history of the Secret Intelligence Service 1909-1949, well known to every researcher in the field, the author - the historian Keith Jeffery – has had full access to the SIS archives. It seems that there are exceptions to the ‘exempt from disclosure under FOIA’.

3) In the case at hand, there is also a moral aspect, that may weigh in on the decision of your court: the descendants of those agents dropped in occupied Holland during 1942-1943 are under the assumption that these men have deliberately been sent straight into the hands of the Germans in order to deceive the enemy. It would clear the air if we could with certainty show that this has not been the case.

I don’t know if your tribunal has the jurisdiction to decide otherwise than a strike out on the basis of these arguments, but I hope you will consider them with wisdom.

7. The Tribunal is a creature of statute – it can do what Parliament has given it power to do, no more or less than that. In respect of this matter, all that this Tribunal can do is, as Tribunal Judge Lynn Griffin clearly stated, apply FOIA to the requested information.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/367600/tribunal-procedure-rules-general-regulatory-chamber.pdf

The law

8. Section 58 of FOIA provides:

Determination of Appeals

58(1) If on an appeal under section 57 the Tribunal considers –

- (a) that the notice against which the appeal is brought is not in accordance with the law, or
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

9. On an appeal, it is for the Appellant to persuade the Tribunal that the Decision Notice was wrong in law or discretion.

Consideration

10. Mr Becker does not dispute that the information falls within Section 23. On two occasions he has accepted this.
11. For the purposes of these proceedings, Mr Becker has to persuade the Tribunal that the public authority should be required to place the information in the public domain. Discretionary disclosure is not a matter which can be litigated in this Tribunal.
12. This Tribunal has not been given the remit to consider any “moral aspect”; the Tribunal is required to apply the law and that dictates the outcome. It is of note that Parliament decided that Section 23 of FOIA is an absolute exemption and, therefore, there is no public interest test to be applied.

Conclusion and decision

13. The only conclusion that I can reach is that there is no reasonable prospect of Mr Becker’s appeal succeeding because Mr Becker does not challenge the factual finding that the information was supplied by or relates to bodies dealing with security matters.
14. Therefore, and pursuant to rule 8(3)(c) of the GRC Rules, I strike out the appeal.

Signed:

District Judge Worth

Date: 07 March 2023