NCN: [2023] UKFTT 00397 (GRC)
Case Reference: EA/2020/0142

First-tier Tribunal
(General Regulatory Chamber)
Information Rights

Heard at Field House, London
Heard on: 14 February 2023
Decision given on: 28 April 2023

Before

TRIBUNAL JUDGE NEVILLE
TRIBUNAL MEMBER S COSGRAVE
TRIBUNAL MEMBER A CHAFER

Between

DR ANDREW LOWNIE

Appellant

and

(1) THE INFORMATION COMMISSIONER
(2) FOREIGN, COMMONWEALTH & DEVELOPMENT OFFICE

Respondents

Representation:
For the Appellant: Mr G Callus, counsel
For the First Respondent: Mr C Knight, counsel
For the Second Respondent: Mr D Mitchell, counsel

Decision: The appeal is dismissed.

REASONS

What we have decided

1. The information requested by Dr Lownie under the Freedom of Information Act 2000[i] ("FOIA") is exempt from disclosure under section 23(1) (information directly or indirectly supplied by, or relating to, one of various specified bodies concerned with national security), or section 24(1) (exemption required for the purpose of national security). Separate CLOSED reasons have been provided to the Information Commissioner and the Foreign, Commonwealth & Development Office that sets out which exemption applies, and why. In the interests of open justice, we have nonetheless sought to include as much detail as possible in these OPEN reasons, which may be freely read by anyone.

Introduction

2. The Foreign, Commonwealth & Development Office has a series of files with the prefix *FCO 15*. Its own description of that prefix is that it denotes records "relating to Guy Burgess and Donald Maclean (known KGB spies), and subsequent investigations and security arrangements". The defection of Guy Burgess and Donald Maclean to the Soviet Union in 1951, and the subsequent revelations concerning the 'Cambridge Five' spy ring, are well known. *FCO*, of course, refers to FCDO's former name 'The Foreign & Commonwealth Office', itself the successor to 'The Foreign Office'.

3. Dr Lownie is a historian and published author, whose works include a biography of Guy Burgess[ii]. On 14 April 2019 he made a request under the Freedom of Information Act 2000 ("FOIA") to the FCDO for file *FCO 158/15*, entitled 'Guy Burgess's private papers: C. D. W. O'Neil', and later for file *FCO 158/16,* entitled "Guy Burgess: contacts with other government officials". A third file, FCO 158/168/1, was also requested but this was not held by the FCDO and forms no part of the issues in this appeal.

4. In its response dated 15 May 2019, the FCDO decided that both files were exempt from the duty of disclosure at s.1 of FOIA. Exemption of the information in *FCO 158/15* was considered to be required for the purpose of national security, engaging s.24 of FOIA. For *FCO 158/16*, the FCDO relied upon two exemptions in the alternative: first, it again raised the national security exemption at s.24; second, it raised s.23, which exempts any information directly or indirectly supplied by, or relating to, one of various specified bodies concerned with national security. It was not specified which of those two exemptions actually applied and s.24(1) prevents it from being both. On 15 July 2019, after an internal review, the FCDO's decision was maintained.

5. Dr Lownie complained to the Commissioner, who began an investigation. FCDO then changed its position: it now claimed s.23 and s.24 as alternatives in relation to *both* files. In the Decision Notice under appeal[iii], dated 5 March 2020, the Commissioner agreed with the FCDO's conclusions and approach. As noted by the Commissioner at paragraph 18 of the Decision Notice, the rationale behind that decision could not be stated "without compromising the content of the withheld information itself or by revealing which of these two exemptions is actually engaged."

6. The effect, and indeed the acknowledged purpose, of reliance upon two alternative exemptions is to mask which one of them actually applies. So, Dr Lownie was not only denied the information to which he claims the law entitles him but was kept in the dark as to why. When lodging this appeal, he argued that this approach was unfair and unlawful. That argument was considered as a preliminary issue in this appeal and two other appeals together, and ultimately by the Upper Tribunal in Foreign, Commonwealth and Development Office v Information Commissioner, Williams and others [2021] UKUT 248 (AAC) (we shall refer to that authority as Williams to avoid confusion with another Upper Tribunal case concerning Dr Lownie). The Upper Tribunal held that the Act does permit a public authority, in order to protect national security, to 'mask' the actual exemption that applies by reliance upon ss.23 and 24 in the alternative. While this practice may well put the requester at a disadvantage, the remedy lies with the Commissioner (and, on appeal, the Tribunal) taking steps to be satisfied that one of the exemptions has been properly claimed. As well as stating those matters of principle, at [58] the Upper Tribunal held that in this specific appeal the FCDO is entitled to argue both exemptions in the alternative. That preliminary issue having been decided, the appeal has returned to this Tribunal.

7. To decide whether either exemption applies, we must first resolve an issue relevant to *how* the s.23 exemption operates in this case. That exemption provides that information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the security bodies specified in s.23(3). It is usually an absolute exemption, meaning that information to which it applies is exempt whether or not any possible prejudice could arise from its disclosure. It protects even the most anodyne and inconsequential information – in the authorities, an example is given of material supplied by GCHQ explicitly for public consumption such as its Twitter feed. But s.64 of FOIA disapplies the absolute nature of the exemption for any information contained in a "historical record in the Public Record Office" (now the National Archives). Dr Lownie argues that *FCO 158/15* meets that description. If he is correct, then the exemption becomes dependent on the outcome of a public interest balancing test. It will only exempt the requested information if the factors put forward against disclosure outweigh those that support it, the latter including the public interest in transparency and accountability. Both respondents accept that *FCO 158/15* is a historical record, but they do not accept that it is in the Public Record Office. They argue that s.23 continues to provide an absolute exemption.

8. The issues before the Tribunal are therefore:

    a. Is *FCO 158/15* a historical record in the Public Record Office?

    b. Is the information in *FCO 158/15* and *FCO 158/16* exempt from the duty of disclosure under either s.23(1) or s.24(1) of FOIA?

9. In addressing these questions, in Information Commissioner v Malnick and Anor [2018] UKUT 72 (AAC) at [45] and [90] it was confirmed that the Tribunal exercises a full merits appellate jurisdiction. We make any necessary findings of fact and decide for ourselves whether the provisions of the Act have been correctly applied. But the Tribunal does not start with a blank sheet: the starting point is the Commissioner's decision, to which the Tribunal should give such weight as it thinks fit in the particular circumstances. The proceedings are inquisitorial, save that the Tribunal is entitled to respect the way in which the issues have been framed by the parties.

The hearing

10. The OPEN documents before the Tribunal were contained in an agreed hearing bundle. Latterly provided by the FCDO was a redacted page from the document 'Retention Instrument 135' ("RI 135"). We were also provided with helpful skeleton arguments from all counsel. We heard evidence from Mr Graham Hand, called on behalf of the FCDO, who was capably and comprehensively cross-examined by Mr Callus and Mr Knight.

11. The Tribunal then moved into CLOSED session, excluding everyone save those attending on behalf of the Commissioner and FCDO. The Tribunal had previously made an order under rule 14(6) of its Procedure Rules allowing FCDO to rely on evidence that would not be disclosed to anyone except the Commissioner. This consisted of the requested information itself, an unredacted version of Mr Hand's witness statement, confidential correspondence between the FCDO and the Commissioner, other material to which those documents referred, and a further skeleton argument from Mr Mitchell. To assist the Tribunal in achieving a fair procedure, and in accordance with the guidance given in Browning v The Information Commissioner [2014] EWCA Civ 1050 at [35], Mr Knight and Mr Mitchell prepared a narrative setting out as much as possible of what had transpired in

the CLOSED session, so that Mr Callus could make submissions in relation to it. We then resumed in OPEN session, hearing closing submissions from the parties. Our decision was reserved.

The evidence

12. Mr Hands' witness statement describes how he has been employed since 2017 as the Senior Sensitivity Reviewer for FCDO. His role relates to documents that require review before being released under the Public Records Act 1958 or FOIA. He describes how his background of 25 years as a British diplomat, including as HM Ambassador to Bosnia Herzegovina and Algeria, has equipped him to accurately identify where the release of information would or would be likely to be prejudicial to the interests of the United Kingdom.

13. Mr Hand states that both *FCO 158/15* and *FCO 158/16* are presently retained by FCDO. It is important to clarify that 'retained' in this context refers to a legal decision to retain the file rather than place it into (now) the National Archives, all according to the provisions of s.3 the Public Records Act 1958. At some point in or prior to 2014 the files would have been sent from London to the FCDO's archive facility at Hanslope Park. The work of this facility includes reviewing files to decide if they are suitable to be placed in the National Archives, and archiving those which are retained. Since its arrival at Hanslope Park, *FCO 158/16* has never left. In August 2015 *FCO 158/15* was sent to the National Archives, except for four folios (it is not known which) that were retained. A folio is an individual documentary entry in a file, such as a letter and its enclosures. By no later than 19 October 2015 however, the whole of *FCO 158/15* was back at Hanslope Park.

14. Mr Hand accepted that *FCO 158/15* must have been reviewed for sensitivity and (apart from the four folios) considered suitable by the reviewer to be placed in the National Archives open to public view: that was how it came to be sent there. He would not have reached the same decision himself and considers none of the file suitable for public viewing. He does not know how the file came to be returned. It might have been because the reviewer or someone else at FCDO had second thoughts and sought the file's return, or because when National Archives' own staff first looked at its contents, they had queried whether it had truly been meant for release. Either way, the file had been sent back to Hanslope Park and has not left since.

15. Mr Hand had been unable to determine exactly when *FCO 158/15* had been sent back to Hanslope Park other than it was before 19 October 2015, as a shelf record on that date showed it as present and intended for formal retention. Certainly, he said, it had been sent back "before accessioning took place". Mr Hand, while recognising that he was not there to make submissions on the law, gave his opinion that a file had only been formally transferred to the National Archives after accessioning: *FCO 158/15* was sent to the National Archives, but not transferred.

16. On 18 April 2019, Dr Lownie made his request for *FCO 158/15*. On 2 May 2019 that file was included in RI 135, the effect being to formally retain it at FCDO under s.3(4) of the 1958 Act. Mr Hand confirmed that retention of a document under RI 135 requires a request to be submitted to the Advisory Council, which would report to the Secretary of State who would have given approval under RI 135. Dr Lownie's complaint to the Commissioner had expressed puzzlement at why this had been done given that another file he had requested was retained under 'Lord Chancellor's Instrument 106' ("LCI 106"). When this was put to

Mr Hand, he candidly admitted that the files had likely already been subject to lawful retention under LCI 106 (which has since been re-made as RI 106[iv]). The later use of RI 135 was either a mistake, or a 'belt and braces' approach, but Mr Hand did share Dr Lownie's assumption that it was a direct response to the request for information.

17. Mr Hand's evidence continued in CLOSED session, where he answered questions concerning the format and reproduction of the requested files. Mr Knight, in the interests of fairness and by reference to the actual contents of the files, asked questions of Mr Hand concerning FCDO's case on both the applicability of the relevant exception(s) and whether any of the files could be disaggregated – that is to say, whether any individual documents could be disclosed (with redactions if necessary). Mr Hand gave evidence as to the files' contents in general, explaining why he disagreed with the apparent conclusion in 2015 that some of *FCO 158/15* was not sensitive and could be sent to the National Archives. He set out why, in his view, nothing in either file could be disaggregated.

18. Mr Hand also set out his understanding of what was meant by the archival term 'accessioning', being the process of the National Archives accepting the file, entering it into its catalogue and making it available to the public to access. That had not happened here.

19. Neither Mr Knight nor Mr Callus put forward any reason why Mr Hand's evidence should not be considered reliable. For ourselves, we found Mr Hand to be a helpful and knowledgeable witness, unafraid to give his independent personal view. We accept his evidence on the events that took place and the processes that were followed, both in FCDO in general and in relation to these files in particular. Our assessment of his evidence on exemption and disaggregation is set out in our CLOSED reasons.

Is *FCO 158/15* a historical record in the Public Record Office?

Dr Lownie's case

20. Section 64(2) FOIA provides as follows:

> ...
>
> *(2) In relation to any information falling within section 23(1) which is contained in a historical record in the Public Record Office or the Public Record Office of Northern Ireland, section 2(3) shall have effect with the omission of the reference to section 23.*

21. The disapplication of s.2(3) in relation to s.23 (rendering it a qualified, rather than absolute, exemption) therefore requires two conditions to be satisfied.

22. First, the information must be contained in a historical record. According to s.62, a record becomes a "historical record" at the end of the period of twenty years beginning with the year following that in which it was created. Everyone agrees that *FCO 158/15* is historical record. Second, the historical record must be "in the Public Record Office". This is now the National Archives. FOIA gives no definition of when a record should be considered as "in" the Public Record Office, nor does there appear to be any authority on the issue.

23. Mr Callus submits that a record becomes "in the Public Record Office" upon being physically located there, but that its status is then permanent. The record remains "in the Public Record Office" even if physically removed elsewhere. In support, he points out that

placing the record in the Public Record Office is legally mandated by the provisions of s.3 of the Public Records Act 1958 ("PRA"). We do not consider any of the various amendments made to the section over the years to be material to the present issue, and the relevant parts now read as follows:

> *3. – Selection and preservation of public records*
>
> *(1) It shall be the duty of every person responsible for public records of any description which are not in the Public Record Office or a place of deposit appointed by the Secretary of State under this Act to make arrangements for the selection of those records which ought to be permanently preserved and for their safe-keeping.*
>
> *...*
>
> *(4) Public records selected for permanent preservation under this section shall be transferred not later than 20 years after their creation either to the Public Record Office or to such other place of deposit appointed by the Secretary of State under this Act as the Secretary of State may direct:*
>
> > *Provided that any records may be retained after the said period if, in the opinion of the person who is responsible for them, they are required for administrative purposes or ought to be retained for any other special reason and, where that person is not the Secretary of State, the Secretary of State has been informed of the facts and given his approval.*
>
> *...*
>
> *(5) The Secretary of State may, if it appears to him in the interests of the proper administration of the Public Record Office, direct that the transfer of any class of records under this section shall be suspended until arrangements for their reception have been completed.*
>
> *(6) Public records which, following the arrangements made in pursuance of this section, have been rejected as not required for permanent preservation shall be destroyed or, subject in the case of records for which some person other than the Secretary of State is responsible, to the approval of the Secretary of State, disposed of in any other way.*
>
> *...*

24. It can be seen that once a public record is 20 years old, and selected for permanent preservation, one of three things must be done with it: first, transfer to the Public Record Office; second, transfer to another place of deposit; or third, retention. The second two outcomes each require approval by the Secretary of State, and the retention instruments discussed above are the way in which this is formally done. So, argues Mr Callus, a historical record being "in the Public Record Office" for the purposes of s.64 must be interpreted in the wider legislative context: it has not been physically put there by reason of everyday administrative practicality, or on a temporary basis, but as a formal step in fulfilment of a legal obligation. In support, he pointed at the overall scheme of the PRA being that transfer of a record to the Public Record Office is treated as permanent. This is

illustrated by s.4(6) which allows the government department from which it was transferred to have it temporarily returned. There is no power for a public authority to simply change its mind, take back the record and retain it, argues Mr Callus; s.64(2) must be interpreted as applying to a record that *has been* transferred to the Public Record Office until some provision of the PRA formally transfers it elsewhere. The engagement of s.63 and s.64 has such a significant effect upon the exemptions that can be claimed by a public authority as to highlight the importance placed by Parliament on the importance of access to historical records. None of this, argues Mr Callus, is consistent with an interpretation of s.64(2) that allows a public authority to disapply its provisions by unilaterally, and perhaps even unlawfully, reversing its decision to transfer the record.

The Information Commissioner's case

25. Mr Knight also argued that "in" simply means "physically in", but strictly referring to where the record happens to be physically located at any particular time. The file was indeed "in the Public Record Office" for a few weeks during 2015, but by the time of Dr Lownie's request had been back "in" FCDO for over three years. It had long ceased to be "in the Public Record Office". This, he argued, has the benefit of taking the statutory language at its most literal and straightforward, and furthermore leads to a simply expressed and applied test: where is the record?

26. Section 1 of FOIA is concerned with whether information *is* held, not whether or how it *ought* to be held. It is an incontrovertible fact that FCDO holds *FCO 158/15* and the submissions made on behalf of Dr Lownie invite the Tribunal, argued Mr Knight, to step outside its statutory jurisdiction and apply s.64 to the situation that *ought* to exist rather than the one that actually does. The Commissioner has no position on the lawfulness of FCDO taking back the file. If, purely hypothetically, Mr Callus was right and the FCDO's recall of the file was unlawful, then this is a matter to be challenged on judicial review. It is not for the Commissioner or the Tribunal to exercise supervisory authority on a public authority's compliance with the 1958 Act.

27. Mr Knight was challenged by the Tribunal as to whether it can have been the intention of Parliament that a public authority, perhaps in anticipation of a politically awkward information request, could deliberately frustrate the operation of s.64 by taking back possession of a record for the only reason that it would render the s.23 exemption absolute. He maintained his position, acknowledging that the act of taking back the record would have that effect. While doing so might be susceptible to challenge in the Administrative Court, for example according to the principles set out in R. (Padfield) v Minister of Agriculture, Fisheries & Food [1968] UKHL 1, the question for this Tribunal to answer would remain the factual one posed by s.64(2). A similar principle is well-established in relation to the exemption at s.12 of FOIA concerning the cost of complying with a request, it being held in Cruelty Free International v Information Commissioner [2017] UKUT 318 that the Tribunal has no jurisdiction to exclude costs incurred by reason of a public authority having arranged its record-keeping practices unlawfully.

FCDO's case

28. Mr Mitchell largely adopted Mr Knight's arguments. He further argued that Dr Lownie's position takes the clear and unambiguous word "in" and replaces it with "has been", or alternatively requires a whole new clause to be read into the statute, along the lines of "… any record which has been transferred and then returned shall continue to be treated as if it is

in the Public Records Office". If Parliament had wanted the law to apply in that way, then it could have easily said so. There is likewise no reference at all to the PRA in s.64 FOIA, and it would be wrong to treat them as part of one scheme.

29. Mr Mitchell also argued that Dr Lownie's position could lead to absurd results. What if someone in a public authority were to simply place the wrong document in an envelope, and only realise a few days later? On Dr Lownie's interpretation that document would be irrevocably treated as in the Public Record Office for ever more, even if the mistake was promptly remedied and the document returned.

Consideration

30. We are grateful to Mr Callus, Mr Knight and Mr Mitchell for the skill with which they put their respective clients' cases but find ourselves unable to entirely agree with any of them.

31. The principles of statutory interpretation are well-established. In R. (Quintavelle) v Secretary of State for Health [2003] UKHL 13, Lord Bingham held as follows:

> *8. The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined, and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.*

32. More recently, in R. (O) v Secretary of State for the Home Department [2022] UKSC 3, as held by Lord Hodge:

> *29. The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated:*
>
> > *"Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context."*
> >
> > *(R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd [2001] AC 349, 396).*
>
> *Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider*

context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in Spath Holme, 397:

> *"Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament."*

33. Even where particular words used in a statute appear at first sight to have an apparently clear and unambiguous meaning, it is always necessary to resolve differences of interpretation by setting the particular provision in its context as part of the relevant statutory framework: R. (Fylde Coast Farms Ltd) v Fylde Borough Council [2021] UKSC 18, at [6].

34. The mechanism in the PRA by which a record is put in the Public Record Office is plainly of relevance. The age at which s.62 FOIA turns a record into a "historical record" is 20 years. This matches the age at which the obligations under s.3 of the PRA, already set out above, become engaged. Indeed, both sections previously specified a period of 30 years until being simultaneously amended by the Constitutional Reform and Governance Act 2010. Their respective consequences can be seen to deliberately coincide. That link is supported by Part VI of FOIA being concerned with the nature of the "record" in which the information is contained, the the Act's other core provisions concern the information itself without any reference to how it is stored. Later in this Part, section 66 explicitly references the PRA. Section 5(3) PRA provides that:

> *(3) It shall be the duty of the Keeper of Public Records to arrange that reasonable facilities are available to the public for inspecting and obtaining copies of those public records in the Public Record Office which fall to be disclosed in accordance with the Freedom of Information Act 2000.*

35. It is clear that both Acts fall to be interpreted as operating in a connected statutory framework, and that this provides the context in which Parliament chose to express itself as it did in s.64 of FOIA.

36. Moving to one of the features of that statutory framework put forward by Mr Callus, we agree that once a file is transferred to the Public Record Office under s.3(4) PRA it does not appear to be open to a government department to simply reverse its decision and take it back. We note, in particular, the following provisions of s.4:

> *4. – Place of deposit of public records*
>
> *...*
>
> *(3) The Secretary of State may at any time direct that public records shall be transferred from the Public Record Office to a place of deposit appointed under this section or from such a place of deposit to the Public Record Office or another place of deposit.*

> *(4) Before appointing a place of deposit under this section as respects public records of a class for which the Secretary of State is not himself responsible, he shall consult with the Minister or other person, if any, who appears to him to be primarily concerned and, where the records are records of a court of quarter sessions the records of which are, apart from the provisions of this Act, subject to the directions of a custos rotulorum, the Secretary of State shall consult him.*
>
> *(5) Public records in the Public Record Office shall be in the custody of the Keeper of Public Records and public records in a place of deposit appointed under this Act shall be in the custody of such officer as the Secretary of State may appoint.*
>
> *(6) Public records in the Public Record Office or other place of deposit appointed by the Secretary of State under this Act shall be temporarily returned at the request of the person by whom or department or office from which they were transferred.*

37. It can be seen that subsection (3) empowers the Secretary of State to transfer records out of the Public Record Office to another place of deposit, but only where it has been appointed in accordance with the section. Subsection (5) provides that public records "in the Public Record Office" shall be in the custody of the Keeper of Public Records. That shorthand "in" is in the same form as that which appears in FOIA. Subsection (6) entitles whoever transferred the record to have it temporarily returned. These carefully laid out statutory powers, with conditions for their use, cannot be consistent with a separate and unwritten power to unilaterally recover a file that has been the subject of a transfer to the Public Records Office, whether because the transfer was thought to be a mistake or otherwise. It would run a coach and horses through the statutory scheme. So we agree with Mr Callus that transfer to the Public Record Office under s.3(4) is irrevocable save where authorised by, and in accordance with, an explicit statutory provision. That being the correct interpretation of s.3(4) PRA, it becomes less likely that Parliament intended s.64 FOIA to provide a wholly different test based on physical location alone.

38. As already noted, the phrase "in the Public Record Office" is used repeatedly in the PRA. It cannot depend on physical location. To give just one example, if the Keeper of Public Records lends a public record to an exhibition, as s.2(4) allows him to do, he can hardly have relinquished his legal status as its custodian according to s.4(5). Again, a conflicting meaning of the same phrase in s.64 FOIA – part of the same connected statutory scheme – is less likely to be correct.

39. We next turn to consequences, which form a proper part of the context in which the provision is interpreted. As held in Fry v Inland Revenue [1959] Ch 86, at 105 (and approved by Lord Hodge in Project Blue Ltd v Revenue and Customs [2018] UKSC 30, at [110]:

> *…The court, then, when faced with two possible constructions of legislative language, is entitled to look at the results of adopting each of the alternatives respectively in its quest for the true intention of Parliament. …*

40. The representatives in this appeal have put forward undesirable consequences to the other's interpretation. As it happens, we agree with them. Mr Mitchell is right that the irrevocability argued by Mr Callus leads to undesirable consequences if the wrong document is inadvertently posted to the Public Record Office. Mr Callus is right that such a weighty matter as the alteration to the s.23 exemption (and indeed the exemptions at s.21 and s.22) is

unlikely to have been intended as so easily and arbitrarily reversible by physical location; this would be subject to the vagaries of happenstance and perhaps even deliberate abuse.

41. Each representative sought to diminish the significance of the consequences identified by the other as being exceptional in practice. With that, we do disagree. A pure test of physical location could give rise to problems quite regularly. A historical record might be sent to a specialist third party contractor for restoration work or lent to the British Library for an exhibition. It might be temporarily returned to a public authority for something to be checked, pursuant to s.6(6) of the 1958 Act. It is easy to think of other examples, but difficult to imagine that Parliament can have intended s.64 to switch off each time the physical record leaves the National Archives' premises and switch on each time it returns. It would lead to arbitrary and unexpected consequences, of which a possible course of events in this case provides a real example. A reviewer decides that a file ought to be transferred and sends it the National Archives. On speaking to a colleague, he or she realises that this was a mistake so asks the National Archives to send it straight back again. There is, again, no logical reason why the s.23 exemption should remain unaltered while the file travels on the motorway, become a qualified exemption during the file's brief rest in Kew – substantially weakening the exclusionary interest identified in the authorities – only to become absolute again when starting its journey home. The same would apply to Mr Mitchell's example of entirely the wrong document being put in an envelope. And what of digital records? A digital file emailed or uploaded to the Public Record Office is physically "in" its systems and likely also physically "in" the transferor's systems, at least for a short while. If sent by mistake, must the application of s.64 depend on whether the Public Record Office deletes its own copy?

42. Having set out why the purely physical test put forward by the parties is unlikely to be correct, we turn to what "in the Public Record Office" does mean. In our view, it is the ordinary formal use of the word "in" when describing any object or record in a museum, gallery or archive. Van Gogh's *Sunflowers* is in the National Gallery. If you take your young child to see it, who draws it in pencil, then both versions could be described as physically "in" the National Gallery. When you later say that your child has had a drawing in the National Gallery, the joke only works by muddling two everyday meanings of the phrase to achieve an absurd result. Of those two discrete meanings, the section bears the one that applies to *Sunflowers*.

43. That meaning of "in" is quite easily discerned in most situations. Everyone knows the difference between a book that is in their local library, and a book that they own but have taken there to read. We further consider it to be the plain meaning of the statutory language in the context of discussing public records. Describing something as being "in" the Public Record Office would mean to most people that it is recorded there. Something "in" the National Archives is archived there. It also mostly avoids the adverse consequences of a purely physical test and sits comfortably with the way in which the phrase is used in the PRA. It can cope with digital records. An email is sent to the National Archives. The file is inspected by an archivist who accepts it as a public record now "in" custody under the PRA, and starts the process of cataloguing it, storing it and (if appropriate) making it publicly available. If the archivist sees that the wrong file has been attached by mistake, or before it is processed the email is recalled, then none of those steps will be taken. This is a far more workable distinction than attempting to work out the ownership of the storage medium on which a file resides at a particular time.

44. Mr Hand, who has huge experience in this area, sees transfer under the PRA as taking place upon "accessioning". As discussed during the hearing, this archival term simply refers to an archive or similar institution formally accepting custody of an object – this case, a record under the provisions of the PRA – and making appropriate cataloguing, storage and viewing arrangements. Interpretation of the law is a matter for us of course, but we do agree that in the absence of at least the first stage in that chain, we cannot see how a record can be described as "in the Public Record Office."

45. It was argued before us that the word "transfer" in the PRA is consistent with a physical test. While the meaning of word "transfer" varies between the many legal contexts in which it is used, it most often denotes a change of the person with entitlements or responsibilities for a particular thing. This is, again, consistent with the interpretation of s.64 that we have found to be correct.

46. We have also considered the relevance of s.64 not simply adopting the explicit definition of a "transferred public record" contained in s.15 of FOIA. It is explained by a "transferred public record" at s.15 including a record which has been transferred to a place other than the Public Record Office. By any interpretation, s.64 does not.

47. That, then, is how we interpret s.64. While there may be some other cases where the status is unclear and must be resolved, that task will be well within the fact-finding capabilities of the Commissioner and the Tribunal. The National Archives can easily confirm whether a particular record has been formally accepted into its collections. It is a factual enquiry, not an impermissible analysis of the lawfulness of a public authority's conduct as feared by the respondents. The interpretation best fits the language used elsewhere in the section and the context of the overall statutory scheme and has the consequence of restricting the alteration of the s.23 exemption to those records which have been properly accepted into the Public Record Office. In doing so, it pays due respect to the very significant consequences that follow.

Conclusion

48. The result of this analysis is that *FCO 158/15* was never formally placed in the National Archives. It arrived there physically, only to be promptly returned or recalled. It is likely, and we so find, that the file made it no further than initial storage and inspection. It is unlikely that the National Archives permitted a formally accepted file to simply be taken back, contrary to the PRA. So, while we agree that once a record is "in the Public Record Office" for the purposes of s.64 FOIA it can only lose that status in accordance with the PRA, *FCO 158/15* never had that status. The section is not engaged, and the s.23 exemption in this appeal (if applicable) remains absolute.

Is the information in FCO 158/15 and FCO 158/16 exempt from the duty of disclosure under either s.23(1) or s.24(1) of FOIA?

Legal principles

Section 23

49. Section 23(1) provides that information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of a number of security bodies specified in s.23(3).

50. In Commissioner of the Police of the Metropolis v Information Commissioner & Rosenbaum (Information rights - Freedom of information - qualified exemptions) [2021] UKUT 5 (AAC), at [35], the Upper Tribunal set out fourteen principles arising from the Act and previous authority. We set them out in full (details of the authorities cited can be found earlier in the Upper Tribunal's decision):

    1. *Section 23 affords the "widest protection" of any of the exemptions: Cobain at [19(b)] and [29].*

    2. *The purpose of section 23 is to preserve the operational secrecy necessary for section 23(3) bodies to function: Lownie at [50].*

    3. *It is "Parliament's clear intention that, because of what they do, there should be no question of using FOIA to obtain information from or about the activities of section 23 bodies at all". The exclusion of the section 23(3) bodies from the scope of FOIA was shutting the front door, and section 23 was "a means of shutting the back door to ensure that this exclusion was not circumvented": APPGER at [16].*

    4. *The legislative choice of Parliament was that "the exclusionary principle was so fundamental when considering information touching the specified bodies, that even perfectly harmless disclosure would only be made on the initiative or with the consent of the body concerned": Cobain at [28]; Lownie at [53].*

    5. *Asking whether the information requested is anodyne or revelatory fails to respect the difficulty of identifying what the revelatory nature of the information might be without a detailed understanding of the security context: Lownie at [42]; Corderoy at [59].*

    6. *When applying the 'relates to' limb of sections 23(1) and (5) , that language is used in "a wide sense": APPGER at [25]; Corderoy at [59] ; Savic at [40].*

    7. *The first port of call should always be the statutory language without any judicial gloss: APPGER at [23]; Corderoy at [51]; Savic at [40].*

    8. *With that warning in mind, in the context of 'relates to' in section 23 , it may sometimes be helpful to consider the synonyms of "some connection", or "that it touches or stands in some relation to" (APPGER at [13], [25]) or to consider whether the request is for "information, in a record supplied to one or more of the section 23 bodies, which was for the purpose of the discharge of their statutory functions" (APPGER at [21], [26]; Lownie at [57]). But the 'relates to' limb must not be read as subject to a test of focus (APPGER at [14) or directness (Lownie at [59]- [60]).*

    9. *The scope of the 'relates to' limb is not unlimited and there will come a point when any connection between the information and the section 23(3) body is too remote. Assessing this is a question of judgment on the evidence: Lownie at [62].*

    10. *The assessment of the degree of relationship may be informed by the context of the information: Lownie at [4] and [67].*

11. *The scope of the section 23 exemption is not to be construed or applied by reference to other exemptions, including section 24: APPGER at [17]; Lownie at [45] and [52].*

12. *In a section 23(1) case, regard should be had as to whether or not information can be disaggregated from the exempt information so as to render it non-exempt and still be provided in an intelligible form: Corderoy at [43].*

13. *Section 23(5) requires consideration of whether answering 'yes' or 'no' to whether the information requested is held engages any of the limbs of section 23 : Savic at [43], [82] and [92].*

14. *The purpose of section 23(5) is a protective concept, to stop inferences being drawn on the existence or types of information and enables an equivalent position to be taken on other occasions: Savic at [60].*

51. As already discussed, in this appeal it is an absolute exemption. Information to which it applies is exempt from the duty of disclosure whether or not any possible prejudice could arise from its disclosure. In enacting the exemption, Parliament intended to exclude all the listed security bodies and their activities from the duty at s.1 of the Act.

Section 24

52. In approaching the exemption at s.24(1), the Upper Tribunal in Williams [2021] UKUT 248 approved six principles. We summarise them as follows:

(1) The term national security has been interpreted broadly and encompasses the security of the United Kingdom and its people, the protection of democracy and the legal and constitutional systems of the state.

(2) A threat to national security may be direct (the threat of action against the United Kingdom) or indirect.

(3) Section 24 is not engaged, unlike the majority of the qualified exemptions, by a consideration of prejudice. Its engagement is deliberately differently worded.

(4) The term "required" means "reasonably necessary".

(5) National security is a matter of vital national importance in which the Tribunal should pause and reflect very carefully before overriding the sincerely held views of relevant public authorities.

(6) Even where the chance of a particular harm occurring is relatively low, the seriousness of the consequences (the nature of the risk) can nonetheless mean that the public interest in avoiding that risk is very strong. The reality is that the public interest in maintaining the qualified national security exemption in section 24(1) is likely to be substantial and to require a compelling competing public interest to equal or outweigh it. That does not mean that the section 24 exemption carries "inherent weight" but is rather a reflection of what is likely to be a fair recognition of the public interests involved in the particular circumstances of a case in which section 24 is properly engaged.

53. As recognised by that final point, the exemption will only apply if the public interest in withholding the information outweighs the public interest in its disclosure.

The parties' submissions

54. We have been ably assisted in relation to the applicable legal principles by all three parties.

55. As to their application to the requested information, in his complaint to the Commissioner Dr Lownie said:

> *I cannot believe, having released so much on the Burgess & Maclean case, which is of historical importance and public interest, and almost seventy years after they fled to Russian [and with them all] dead that s.24 applies.*

56. There is little else he can say, of course, because neither he nor Mr Callus have been permitted to see the files nor any of the respondents' submissions on their contents. The input of the Commissioner in the CLOSED hearing, by way of Mr Knight's involvement and as predicted in Browning at [33], was of assistance in ensuring that we were best able to fulfil our own independent investigatory role and take into account such points as Dr Lownie might have made if he were there. We anticipate that attendance of a representative for the Commissioner will be essential in all cases where s.23 and s.24 are argued in the alternative.

57. The remainder of the arguments made cannot be disclosed in these OPEN reasons.

Decision

58. We have decided that all the contents of both files are exempt from disclosure on the basis of section 23(1) or section 24(1) of FOIA. None of our reasoning can be openly disclosed without compromising the ability of the FCDO to rely on the two exemptions in the alternative, so it is set out in our CLOSED reasons. We can nonetheless assure Dr Lownie that we have taken the utmost pains to ensure that this outcome is correct, and that FOIA has been correctly applied.

59. The requested information was exempt from disclosure, and the Commissioner's decision to that effect was in accordance with the law. The appeal is dismissed.

Signed — Date:

Judge Neville — 27 April 2023

[i] https://www.legislation.gov.uk/ukpga/2000/36/contents
[ii] Andrew Lownie, *Stalin's Englishman: The Lives of Guy Burgess* (Hachette, 2016)
[iii] https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617403/fs50864309.pdf
[iv] https://www.gov.uk/government/publications/signed-instrument-for-the-retention-of-public-records/the-security-and-intelligence-instrument