



Neutral citation number: [2023] UKFTT 412 (GRC)

Case Reference: EA/2019/0450

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

**Heard at: Field House, London
Heard on: 28 March 2023
Decision given on: 28 April 2023**

Before

**JUDGE ANTHONY SNELSON
TRIBUNAL MEMBER S COSGRAVE
TRIBUNAL MEMBER A CHAFER**

Between

PROFESSOR M WICKHAM-JONES

Appellant

and

**(1) INFORMATION COMMISSIONER
(2) FOREIGN, COMMONWEALTH AND DEVELOPMENT OFFICE**

Respondents

Representation:

For the Appellant: John Fitzsimons (Counsel)

For the Respondent: Aaron Moss (Counsel)

Decision: The Second Respondent ('FCDO') was entitled to withhold the information requested by the Appellant on the basis of the exemptions under the Freedom of Information Act 2000, sections 23(1) alternatively 24(1).

OPEN REASONS

1. The Appellant is a historian with a special interest in the British Labour Party's policy towards Italy following the Second World War.
2. On 6 March 2019 he made a request to the FCDO for the declassification of a specific file on the political situation in Italy in 1947. The document was held by the FCDO and had not been released to the Public Records Office under the Public Records Act 1958.

3. The FCDO replied that the information requested was held but that it would not be disclosed as it was exempt under FOIA, s23(1) (security bodies) or s24(1) (national security). Those exemptions are mutually exclusive.
4. By a decision notice dated 27 November 2019 the First Respondent (“the Commissioner”) determined that the requested information was exempt under FOIA, ss23(1) or 24(1).
5. A hearing was held before the First-tier Tribunal on 13 November 2020 to determine whether, as a matter of law, it was open to the FCDO to rely on s23(1) or 24(1) in the alternative. It decided on 29 December 2020 that it was not but, by a decision of 1 October 2021, the Upper Tribunal (‘UT’) overturned it. At para 58, the UT stated:

“The FCDO was entitled to rely upon sections 23(1) and 24(1) in the alternative so as to protect the interests of national security by masking whether or not the information requested relates to one of the security bodies listed in section 23(3).”

6. The appeal came before us for final hearing on 28 March 2023. The Appellant was represented by Mr John Fitzsimons, counsel, acting *pro bono* the FCDO by Mr Aaron Moss, also counsel. We are grateful to both for their assistance.
7. We began with brief openings from both counsel. We then moved into a closed session, during which Mr Moss took us in detail through the disputed material. Finally, counsel delivered succinct closing submissions.
8. FOIA, s23(1) states:

“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 bodies specified in subsection (3).”

Subsection (3) contains a long list of security bodies.

9. The effect of s64(2) is that where information within s23(1) is contained in a “historical record” in the Public Record Office (Now the National Archives), s23(1) creates a qualified exemption. Subject to this, the exemption is absolute. As we have noted, the disputed file was never transferred to the Public Records Office.

10. FOIA, s24(1) states:

“Information which does not fall within s23(1) is exempt information if exemption from s1 security.”

Accordingly, this provides for a qualified exemption.

11. In the Commissioner’s response dated 17 January 2020, para 21, it is stated that:

“the Commissioner cannot elaborate upon her rationale for the above conclusion without revealing which of the two exemptions apply or indeed without compromising the content of the withheld information itself.”

12. The shared view of counsel was that, in explaining its decision-making, the Tribunal had no more room for manoeuvre than the Commissioner. That said, Mr Fitzsimons reminded us that, given the necessary resort to closed proceedings, we were the Appellant’s “eyes and ears” and must examine the closed material with great care to test whether a tenable ground for withholding the information was shown. We acknowledge that responsibility and have done our best to live up to it.

13. We have also had careful regard to the applicable legal framework. In relation to s23(1), Mr Fitzsimons stressed three points in particular. First, the Tribunal must be satisfied that the information relates to an *existing* security body within s23(3). Second, although the “relates to” wording is wide its scope is not unlimited and there will come a point when any connection between the information and the body is too remote (*Commissioner of Police of the Metropolis and ICO v Rosenbaum* 2021 UKUT 5AAC, para 35). Third, a “blanket approach” to s23(1) is to be avoided: “regard should be had 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” (*Rosenbaum*, para 35).

14. In relation to s24(1), Mr Fitzsimons reminded us (on the subject of “national security”) of the familiar authority of *Home Dept v Rehman* [2001] UKHL 47, para 14. On the public interest balancing test he emphasised the key considerations bearing on the public interest. In particular, he submitted, these were the *extent* of the engagement of s24(1) (specifically whether it applies to all the disputed information) and the degree of *harm* against which protection was needed.

15. We have had Mr Fitzsimons’s measured arguments very much in mind. Nonetheless, having regard to the closed material, we have concluded that the alternative exemptions relied upon were validly cited and that the Commissioner’s decision entailed no error or law or inappropriate exercise of discretion.

16. Accordingly the appeal must be dismissed.

Signed *Judge Anthony Snelson*

Date: 28 March 2023

*NB: The heading and formatting of this decision has been altered to enable upload to the National Archives.
This note does not form part of the decision.*