



Neutral citation number: [2024] UKFTT 45 (GRC)

Case Reference: EA/2022/0113

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

**Determined, by consent, on written evidence and submissions
Considered on the papers on 11 October 2023.**

Decision given on: 19 January 2024

Before

**TRIBUNAL JUDGE Stephen Cragg KC
TRIBUNAL MEMBER Kate Grimley Evans
TRIBUNAL MEMBER Anne Chafer**

Between

JON AUSTIN

Appellant

And

INFORMATION COMMISSIONER

Respondent

Decision: The appeal is Dismissed.

Substituted Decision Notice: None

REASONS

MODE OF HEARING

1. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules.

2. The Tribunal considered an open bundle of evidence and documents comprising pages 1 to 79, together with a closed bundle.

BACKGROUND

3. The Appellant submitted the following request to the Home Office on 20 January 2019:-

“In March 2021 the Home Office published a summary of the Independent Review of Serious and Organised Crime available here-

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/968765/Independent_Review_of_SOC.pdf

On page 2 it said:

"The terms of reference for the Review are at Annex A, the terms of reference for the advisory group are at Annex B, and a list of contributors and a summary of evidence reviewed is at Annex C."

While Annex A was published on pages 7 to 9, Annex B and C were accidentally left off.

Could you please send me Annex B and Annex C under the FOIA”.

4. On 4 March 2022, the Home Office responded. It refused to provide the requested information, citing sections 23(1), 24(1) and 31(1) of FOIA. The Appellant requested an internal review on 21 May 2022, saying:-

... I do not believe the annex is exempt as according to the summary that was published it was due to be published as part of it and must have been left out as an oversight.

The annex would include the names of police chief constables and police and crime commissioners etc who helped with the review and these types of people would not be exempt under national security etc.

5. The Home Office provided an internal review on 14 June 2022, in which it maintained its original position. When doing so it clarified:-

Whilst Annexes B and C are referenced in the Executive Summary, it was not the intention to publish these and they do not form part of the Executive Summary itself.

6. The Appellant contacted the Commissioner on 12 September 2022, to complain about the way his request for information had been handled.

STATUTORY FRAMEWORK

7. The right of access provided by FOIA is set out in section 1(1) and is separated into two parts. Section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held. Both rights can be the subject to the application of exemptions.

8. Under section 23(1) FOIA:-

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).'

9. The 'named security bodies' are listed at section 23(3)1 of FOIA. The exemption under s23(1) FOIA is an absolute exemption and therefore it is not subject to the public interest test set out at section 2 of the FOIA.

10. In determining whether information 'relates to' a s.23 body, 'relates to' is used in a wide sense, although it is not to be stretched too far; a mere incidental connection between the information and the body is not enough – see the decisions of the Upper Tribunal in *APPGER v IC & FCO* [2015] UKUT 0377 (AAC) and *Corderoy v IC & Attorney General* [2017] UKUT 0495 (AAC), and the Court of Appeal in *Department of Health v IC & Lewis* [2017] EWCA Civ 374.

The Upper Tribunal in *Commissioner of the Police of the Metropolis v Information Commissioner & Rosenbaum* [2021] UKUT 5 (AAC) endorsed as being correct principles which made it clear that section 23 FOIA affords the 'widest protection' of any of the exemptions, and that 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'.

DECISION NOTICE

11. The decision notice is dated 31 January 2023 and the Commissioner upheld the Home Office's reliance on the exemption in sections 23(1) FOIA.

12. The Commissioner noted that:-

16. The Commissioner has previously considered a request for a copy of the whole review, ie not the available summarised version. The two annexes which are requested here form part of the body of that review.

17. In his decision IC-87061-N7Z6¹, the Commissioner found that the Home Office was entitled to rely on section 23 of FOIA to withhold the report in its entirety.

18. Based on the same rationale, rather than repeating the arguments, the Commissioner draws the same conclusion here. Section 23 is properly engaged.

13. On that basis it is necessary to consider the decision in IC-87061-N7Z6 which is dated 19 January 2022 and concerns a request made on 8 September 2020. That decision explains that:-

4. In 2019, Sir Craig Mackey QPM was appointed to lead an independent review of the powers, capabilities and funding needed to tackle serious and organised crime.

5. A report of his findings was presented to the Minister for Security on 27 February 2020.

6. An executive summary of the report was published on 16 March 2021 on the GOV.UK website. The full version of the report has not been published.

14. The Commissioner explained that:-

20. Although engaging the exemption [in s23(1) FOIA] only requires that information be supplied by, or relate to, a named security body, the Home

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022638/ic-87061-n7z6.pdf>

Office explained that the report is composed of information both supplied by, and relating to, one or more named security bodies and that this information is embedded throughout the report, meaning that the report could not be disclosed with redactions.

21. The Home Office identified the named security body/bodies in question to the Commissioner and explained why the information was both supplied by, and related to, the body/bodies in question. Consequently, the Home Office said that the report was exempt from disclosure under section 23(1), in its entirety.

22. On being notified that the Home Office had revised its position to apply section 23(1), the complainant made submissions against its application. It was his understanding, drawn from the published terms of reference and the Executive Summary, that there would have been limited contributions from named security bodies and that the report instead contained significant contributions from, and relating to, bodies which were not named security bodies. He argued that information concerning them and their contributions would not engage section 23(1):

“I would hope you reach a revised view in the decision notice that much of the report that looked at information provide by the wealth of non security bodies that took part in the review, as evidenced above, and which it relates to cab [sic] be released.”

15. The Commissioner gave fairly short reasons for his decision that s23(1) FOIA applied as follows:-

24. The Commissioner has viewed the withheld information. The report identifies the challenges that serious and organised crime poses to the UK, and it makes a series of recommendations designed to reduce it, and the harm it causes. These recommendations are summarised in the Executive Summary which is publicly available.

25. The Commissioner has considered the Home Office’s submissions, which he cannot summarise in this notice without disclosing information which is, itself, exempt. He has also considered the content of the report, and the complainant’s submissions. While he understands the point the complainant makes, the exemption at section 23 will be engaged if the withheld information was supplied by, or it relates to, any named security body, regardless of whether it also contains information supplied by, or relating to, bodies which aren’t listed in section 23(3) of the FOIA.

26. In this case, the Commissioner is satisfied that the withheld information was both supplied by, and it relates to, one or more of the security bodies listed in section 23(3) of the FOIA, in its entirety. The Home Office’s submissions on why the report as a whole relates to the work of one or more named security bodies are particularly strong. Contrary to what the complainant believes, the

connection between the information and the named security body/bodies is not a remote one and it would not be possible to separate out and disclose information which is not caught by the exemption.

16. Consequently, the Commissioner was satisfied, in the previous case, that the Home Office was entitled to rely on section 23(1) FOIA to withhold the report in its entirety, and the Commissioner relied on that reasoning in relation to the disclosure of the two Annexes in the present case.

THE APPEAL AND RESPONSE

17. The Appellant's appeal is dated 28 February 2023. The appeal says:-

The ICO decision notice is flawed in that it did not give proper consideration to the fact that it was clear these two further annexes were supposed to be published with the summary.

It was also flawed because the ICO did not understand and therefore give any weight to the argument that the list of contributors in annex C could not be exempt under section 23(1).

Section 23(1) is (Information supplied by, or relating to, bodies dealing with security matters). The only agency involved in this review that is on the list of bodies dealing with security matters is the National Crime Agency.

We know from what has been published about this review that many stakeholders took part in this review including representatives from Police regional organised crime units (ROCUs), Standard police forces, The CPS and criminal justice system, civil servants, Other non security body law enforcement, Government departments, the private sector, Voluntary sector, police and crime commissioners and chief constables.

The names of these individuals in an annex would not be considered as information supplied by or relating to the NCA. As taking part in this review would involve them fulfilling a taxpayer-funded public function, the names of any above a certain seniority would be available under FOIA. This would include the police and crime commissioners and chief constables in the annexe and any others of sufficient seniority.

As a summary the terms of reference for the overall Review was published at Annex A, the terms of reference for the advisory group at Annex B, and the summary of evidence reviewed at Annex C could also be suitable for publication alongside the list of contributors."

18. The grounds emphasise and demonstrate that all kinds of agencies contributed to the report, and that the names of these agencies should not be withheld on the basis of s23(1) FOIA.

19. The Commissioner's response is brief and states as follows:-

The Commissioner considers that Appellant's grounds of appeal ('GOA') can be summarised as follows:-

The Commissioner erred in concluding that the exemption under S.23(1) was correctly engaged with respect to all of the requested information on the ground that bodies other than those listed in section 23(3) contributed to the review.

The Appellant firstly argues that the DN is flawed "in that it did not give proper consideration to the fact that it was clear these two further annexes were supposed to be published with the summary". However, regardless of what the initial intention was, the issue for the Commissioner and this Tribunal is whether the information is exempt under section 23(1) FOIA.

Secondly, the Appellant argues that the Commissioner erred in failing to "give any weight to the argument that the list of contributors in annex C could not be exempt under section 23(1)", that "the only agency involved in this review that is on the list of bodies dealing with security matters is the National Crime Agency" and argues that "the names of these individuals in a annex would not be considered as information supplied by or relating to the NCA".

The remainder of the grounds make similar points with the Appellant also arguing that the wording of the report suggested that input was sought from non-security bodies.

The Commissioner maintains that he was correct, on the facts of this case, to accept the submissions from the Home Office that the report should be read as a whole (including annexes B and C). The Commissioner accepts the view of the Home Office that the information contained within the annexes are related to the detail contained within the other parts of the review. The Home Office identified to the Commissioner the named security body / bodies in question and explained why the information was supplied by and related to the body / bodies in question.

DISCUSSION

20. The Tribunal has viewed the withheld material and is able to make its decision on the basis of what it contains.
21. As the Home Office made clear in its submissions to the Home Office (D61) ‘the exemption at section 23(1) (information supplied by or relating to security bodies) is engaged on the basis that the Review contains information that was directly supplied by security bodies, and information relating to them, contained within the entirety of the report’.
22. Having seen Annex B and Annex C it is the view of the Tribunal that the contents are integral to the report as a whole and contain information that was both supplied by, and relates to, one or more of the security bodies listed in section 23(3) of the FOIA, in its entirety, as the Commissioner found.
23. As the Commissioner also found, and as we agree, ‘the connection between the information and the named security body/bodies is not a remote one and it would not be possible to separate out and disclose information which is not caught by the exemption’.
24. We understand the Appellant’s approach to the case: in effect he is saying that reference to any of the s23(3) FOIA bodies can simply be excised from the two annexes, and there would be no reason not to disclose the rest of the information sought.
25. However, in our view to take that approach is not to apply the wide ambit of s23(1) FOIA and the associated case law correctly. When s23(1) FOIA is correctly considered, and the source and context of the information in Annexes B and C is recognised, it is clear that the information sought by the Appellant is exempt from disclosure for the reasons set out by the Home Office and the Commissioner.
26. For these reasons, this appeal is dismissed.

Signed

Recorder Stephen Cragg KC

Date: 18 January 2024