THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: UA-2023-000935-GIA
[2024] UKUT 116 (AAC)
LOWNIE V INFORMATION COMMISSIONER AND THE FOREIGN, COMMONWEALTH AND DEVELOPMENT OFFICE

Decided following an oral hearing on 30 January 2024

Representatives

Mr Lownie	Greg Callus of counsel, instructed on direct access
Information Commissioner	Christopher Knight of counsel, instructed by Robin Bailey of the Information Commissioner's Office
Foreign, Commonwealth and Development Office	David Mitchell of counsel, instructed by the Government Legal Department

DECISION OF UPPER TRIBUNAL JUDGE JACOBS

On appeal from the First-tier Tribunal (General Regulatory Chamber)

Reference:	EA/2020/0142
Decision date:	28 April 2023

The decision of the First-tier Tribunal did not involve the making of an error on a point of law under section 12 of the Tribunals, Courts and Enforcement Act 2007.

REASONS FOR DECISION

1. I usually begin a decision by saying what a case is about. In this case, I can't do that, because it's a secret. I can't even say why it's secret, because that's a secret too.

A. Introduction

2. Dr Lownie is an historian and author. One of his subjects of interest is Guy Burgess, a member of the Cambridge Five who spied for Russia. He escaped there in 1951. In 2019, Dr Lownie made a request under the Freedom of Information Act 2000 (FOIA from now on) to the Foreign, Commonwealth and Development Office (FCDO from now on). He asked for information in files bearing Guy Burgess's name.

FCDO accepted that it held the information requested, but refused to disclose it. It relied on exemptions in sections 23 and 24 FOIA, both of which relate to national security, but declined to say which. Dr Lownie complained to the Information Commissioner, who agreed with FCDO that it was permissible to rely on the exemptions in the alternative in order to ensure that no security information was disclosed through the choice of exemption. Dr Lownie exercised his right of appeal to the First-tier Tribunal, which confirmed the Commissioner's approach. On further appeal, a Presidential Panel of the Upper Tribunal also confirmed the approach in *Foreign, Commonwealth and Development Office v Information Commissioner, Williams and others* [2021] UKUT 248 (AAC). Dr Lownie was one of the 'others' in that case. The Upper Tribunal remitted Dr Lownie's case to the First-tier Tribunal for decision.

3. This appeal is made against the decision made on remittal. It raises three issues. One issue is whether the information that Dr Lownie requested is held in the Public Record Office. This determines whether the exemption in section 23 is absolute or qualified. A second issue is the scope of the First-tier Tribunal's duty to give reasons for decision when the exemptions are relied on in the alternative. The final issue is raised only in order to preserve it for a possible appeal to the Court of Appeal. It concerns the relevance of the Convention right under Article 10.

B. The first issue – documents held in the Public Record Office

Relevant provisions of FOIA

4. These are the relevant provisions of FOIA:

> **1. General right of access to information held by public authorities**
>
> (1) Any person making a request for information to a public authority is entitled—
>
> (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
>
> (b) if that is the case, to have that information communicated to him.
>
> (2) Subsection (1) has effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
>
> …
>
> **2. Effect of the exemptions in Part II**
>
> (1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either—
>
> (a) the provision confers absolute exemption, or
>
> (b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, section 1(1)(a) does not apply.

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(3) For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—

…

(b) section 23, …

23. Information supplied by, or relating to, bodies dealing with security matters

(1) 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).

…

(3) The bodies referred to in subsections (1) and (2) are—

(a) the Security Service,

(b) the Secret Intelligence Service, [etc, etc] …

24. National security

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

(2) The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.

…

64. Removal of exemptions: historical records in public record offices

(1) Information contained in a historical record in the Public Record Office or the Public Record Office of Northern Ireland cannot be exempt information by virtue of section 21 or 22.

(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.

The issue

5. The issue is whether the information requested by Dr Lownie was held 'in the Public Record Office' (section 64(2)). If it was not, the exemption under section 23 is absolute (section 2(3)(b)). If it was, the exemption is qualified (section 64(2)). Of

course, Dr Lownie did not know whether section 23 applied. The effect of the decision of the Presidential Panel is that he had to assume that, if it did apply, it was a qualified exemption and argue accordingly. The need for such a potentially empty exercise is one of the criticisms of the Panel's decision.

The case in the First-tier Tribunal

6. FCDO accepted that it held the information requested under section 1(1) FOIA. Part of one of the files containing the information had been sent to the Public Records Office in August 2015 and returned no later than October 2015. Despite the sensitivity of the contents, no one knows: (a) which parts were sent and which retained; (b) precisely when they were returned; or (c) why the contents were moved around. There is no paper trail.

7. The First-tier Tribunal did not accept the argument of either the Information Commissioner or Dr Lownie on when a record was *in* the Public Records Office. It rejected the argument that it was determined by the physical location of the file:

> 41. … 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?

8. The tribunal then gave its interpretation:

> 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. …

9. The tribunal then described how that definition applied in practice:

> 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.'

10. Finally, the tribunal decided that once a record was *in* the Public Record Office, it remained there until it lost that status in accordance with the Public Records Act 1958 (at [48]). There is no appeal against that part of the tribunal's decision.

The case in the Upper Tribunal

11. Mr Knight took the lead on this issue between the respondents. He did not challenge the tribunal's interpretation, as the Commissioner accepted that it was workable. I am grateful for Mr Knight's explanation of the interaction between FOIA and the Public Records Act 1958. In the event, I have interpreted FOIA in its own terms with only a passing reference to the 1958 Act.

12. Mr Callus argued that *in* should be interpreted literally. There was no need to worry about documents that were wrongly placed in the Public Record Office, because the public interests balance test would invariably favour withholding rather than disclosing. Accessioning as a relevant concept was pure invention.

13. I agree with the tribunal's reasoning and conclusion.

14. The interpretation of a statute requires a tribunal to give a meaning to the statutory language. The approach was recently authoritatively stated by the Supreme Court in *R (O) v Secretary of State for the Home Department* [2023] AC 255:

> 29. … 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. …

15. I have a difficulty in applying that in this case. I would have preferred to be able to take the concept of holding information (section 1(1)) as part of the context for interpreting section 64. That in turn might have affected or been affected by whether the transfer into the Public Record Office was reversible. As it is, FCDO has accepted that it holds the information and that has not been challenged, and there is no appeal against the decision on reversibility. That has restricted the scope of the context that I have considered. I do not know whether my decision would have been different if the context had not been so confined. As it is, I have had no argument on the wider context.

16. The legal issue for the First-tier Tribunal was whether the information in the file was *in* the Public Records Office. The practical question, though, was whether it ever came to be there. Hence the focus on the process of entering the Office. There has to be a process. If there were not, any file could be deposited in the Office by being delivered to the reception. The tribunal's explanation elaborates on the arbitrary consequences that would follow. I would add to that explanation the shifting back of forth of the duties of the Keeper of the Public Records under section 2 of the 1958 Act.

17. There is nothing in FOIA that sets out what the process should be. For practical purposes, the starting point must be the process used by the Office, provided that it is consistent with the function of the Office in relation to the records. The process described to the First-tier Tribunal represents the bare minimum necessary to ensure that appropriate records are retained and inappropriate ones returned, together with the necessary records that allow for systematic storage and access to the records. I consider that the tribunal was right to accept that process as the test for when a record was *in* the Office. Having done so, it was right to find that the file had never been *in* the Office.

18. I do not accept Mr Callus's argument that the public interests balance test would take care of the practical anomalies and difficulties identified by the tribunal. It might provide a useful backup should something go wrong, but on Mr Callus's argument it would be a substitute for the Office operating any initial safeguard or protection. That would not be right in principle.

The second issue – adequate reasons

19. The First-tier Tribunal provided reasons for its decision that either section 23 or 24 applied, but did so in closed reasons that were not provided to Dr Lowie. Mr Callus argued that that was a breach of the tribunal's duty to provide reasons.

The First-tier Tribunal's rules of procedure

20. These rules are made under the Tribunals, Courts and Enforcement Act 2007. Section 22 provides:

> **22 Tribunal Procedure Rules**
>
> (1) There are to be rules, to be called 'Tribunal Procedure Rules', governing—

(a) the practice and procedure to be followed in the First-tier Tribunal, …

(2) Tribunal Procedure Rules are to be made by the Tribunal Procedure Committee.

(3) In Schedule 5—

(a) Part 1 makes further provision about the content of Tribunal Procedure Rules, …

(4) Power to make Tribunal Procedure Rules is to be exercised with a view to securing—

(a) that, in proceedings before the First-tier Tribunal and Upper Tribunal, justice is done,

(b) that the tribunal system is accessible and fair,

(c) that proceedings before the First-tier Tribunal or Upper Tribunal are handled quickly and efficiently,

(d) that the rules are both simple and simply expressed, and

(e) that the rules where appropriate confer on members of the First-tier Tribunal, or Upper Tribunal, responsibility for ensuring that proceedings before the tribunal are handled quickly and efficiently.

(5) In subsection (4)(b) 'the tribunal system' means the system for deciding matters within the jurisdiction of the First-tier Tribunal or the Upper Tribunal.

And Schedule 5 provides:

11 Use of information

(1) Rules may make provision for the disclosure or non-disclosure of information received during the course of proceedings before the First-tier Tribunal or Upper Tribunal.

(2) Rules may make provision for imposing reporting restrictions in circumstances described in Rules.

16 Ancillary powers

Rules may confer on the First-tier Tribunal, or the Upper Tribunal, such ancillary powers as are necessary for the proper discharge of its functions.

21. The relevant First-tier Tribunal rules are the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI No 1976). Rules 14 and 38 provide:

14 Prevention of disclosure or publication of documents and information

…

(9) In a case involving matters relating to national security, the Tribunal must ensure that information is not disclosed contrary to the interests of national security.

> (10) The Tribunal must conduct proceedings and record its decision and reasons appropriately so as not to undermine the effect of an order made under paragraph (1), a direction given under paragraph (2) or (6) or the duty imposed by paragraph (9).
>
> **38 Decisions**
>
> …
>
> (2) Subject to rule 14(10) (prevention of disclosure or publication of documents and information), the Tribunal must provide to each party as soon as reasonably practicable after making a decision (other than a decision under Part 4) which finally disposes of all issues in the proceedings or of a preliminary issue dealt with following a direction under rule 5(3)(e)—
>
> …
>
> (b) written reasons for the decision; …

Why I have not dealt with issue estoppel

22. Mr Mitchell took the lead on this issue between the respondents.

23. Much of the argument focused on issue estoppel. I consider that it is not necessary to analyse this ground in that way and, indeed, it is better not to do so. Issue estoppel would deal with the issue between the parties, but there is a more fundamental issue here. That issue applies in all cases in which exemptions are relied on in the alternative on grounds of national security.

Why I do not accept that the First-tier Tribunal failed to comply with its duty to provide reasons

24. I put the fundamental issue to Mr Callus when he began his argument on reasons. If he is right, the duty to give reasons undermines the decision of the Presidential Panel. That cannot be right in principle and it is contrary to the rules that govern the giving of reasons in the General Regulatory Chamber.

25. The duty to give reasons is imposed by rule 38(2), which is expressly subject to rule 14(10), which refers to rule 14(9). Putting them together comes to this: the First-tier Tribunal must provide written reasons for its decision but without undermining the prohibition on disclosure contrary to the interests of national security. There was a discussion at the hearing about the enabling power for those provisions. They could be authorised by section 22(1)(a) (as practice or procedure), or by Schedule 5 under paragraph 11 (as provision for non-disclosure) or under paragraph 16 (as an ancillary power). It could be authorised under any, all or a combination of those powers: *Banks v Chief Adjudication Officer* [2001] 1 WLR 1411 at [43].

26. Given the decision of the Presidential Panel, the First-tier Tribunal was under a duty not to disclose whether it relied on section 23 or section 24 FOIA. Giving reasons that would disclose the relevant exemption would undermine the prohibition on doing so.

27. For completeness, I would have come to this conclusion even without the benefit of the rules that I have cited. The purpose of reasons is to explain a decision, not to undermine it. It really is that simple.

The third issue

28. This was set out in Mr Callus's skeleton argument in order to preserve it as a ground before the Court of Appeal. He did not address me on it, nor did the other counsel.

Authorised for issue
on 08 April 2024

Edward Jacobs
Upper Tribunal Judge