



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

Appeal No: EA/2017/0224

ON APPEAL FROM:

Information Commissioner's Decision Notice No: FS50639257

Dated: 14 September 2017

BETWEEN

FAISAL QUREHSI

Appellant

THE INFORMATION COMMISSIONER

Respondent

THE CABINET OFFICE

Second Respondent

Heard on the papers: 16-17 July 2018

Before

HH JUDGE SHANKS

ANNE CHAFER

JOHN RANDALL

Date of Decision: 12 October 2018

Date of Promulgation: 16 October 2018

Subject matter:

Freedom of Information Act 2000

TRIBUNAL'S DECISION

For the reasons which follow the appeal is allowed in part and the Tribunal issues the following substitute decision notice.

SUBSTITUTED DECISION NOTICE

Complainant: Faisal Qureshi

Public Authority: The Cabinet Office

Decision

The Public Authority was obliged under section 1 of the Freedom of Information Act 2000 ("FOIA") to disclose the following parts of the identified documents pursuant to the Complainant's request dated 26 April 2016:

Memo Geoffrey Howe to Prime Minister dated 31 August 1988:

- (a) Paras 1 and 2;
- (b) Para 3 down to "... formal speech"
- (c) Para 5 except for sentence 3 and sentence 4;
- (d) Last two sentences of para 6
- (e) Para 7.

Cable UK Embassy to FCO: paras 3 and 4.

The Public Authority was however entitled to withhold the balance of any material it held coming within the request in reliance on section 23 and/ or 27 of FOIA.

Action required

The Public Authority must disclose to the Complainant those parts of the identified documents set out above by 2 November 2018.

REASONS

Introduction

1. On 17 August 1988 President Zia Ul Haq of Pakistan along with the US Ambassador and others were killed in a plane crash near Lahore. The precise cause of the crash has never been conclusively established and the event remains a matter of considerable debate and discussion.
2. In 2013 the Appellant, Faisal Qureshi, a journalist who has been investigating the cause of the crash for many years, made a request to the Cabinet Office under FOIA for any documents they held relating to the death of President Zia and its aftermath. The Cabinet Office responded in a letter dated 30 September 2013 by relying on the "neither confirm nor deny" provisions relating to national security in sections 23(5) and 24(2) of FOIA: the writer of the letter stated: "I can neither confirm nor deny whether any of the information you have requested is subject to the exemptions at section 23(1) or 24(1) of [FOIA]".
3. On 26 April 2016 Mr Qureshi requested the same information and the Cabinet Office responded by saying that they continued to rely on the same provisions as they had in 2013. After a review that decision was upheld on 27 June 2016.
4. Mr Qureshi complained to the Information Commissioner on 25 July 2016. After being pursued by the Commissioner for many months (including by means of an information notice under section 51 of FOIA), the Cabinet Office finally issued a revised response to Mr Qureshi on 5 May 2017. They said that they had reviewed their files and located "*additional* information in scope of the request". They disclosed four apparently innocuous documents including two versions of the cable containing Mrs Thatcher's condolences (see pp 96-101 of the open bundle). They stated that "some of the information held" was exempt under section 27(1)(a), (c) and (d) and 27(2) of FOIA (foreign relations). And they stated that in continued reliance on section 23(5) and 24(2) they were "... unable to confirm or deny whether further information is held that would engage s23 or s24 of [FOIA]".
5. Mr Qureshi remained unhappy with the response and asked for the Commissioner to make a decision under section 50 of FOIA. The Commissioner upheld the Cabinet Office's approach and Mr Qureshi has appealed. Our task on the appeal is, in effect, to decide, on the evidence now available, whether the Cabinet Office were entitled to respond to the request as they did on 5 May 2017.
6. In addition to the open appeal bundle we have been supplied with a closed unredacted version of the witness statement of Gareth Bayley, a senior civil servant who is now the Prime Minister's Special Representative for Afghanistan and Pakistan, and with a closed bundle of the documents referred to by Mr Bayley in his statement. Contrary to the impression possibly created by paragraph 25 in the open version of Mr Bayley's statement, we make it clear that there were in fact six (not five) documents in the bundle and that the Cabinet Office confirmed when we sought clarification that these documents comprised the totality of the material held

which fell within the terms of Mr Qureshi's request and which had been withheld (ie they were not just “examples” of such documents).

7. The parties had agreed to the appeal being decided on the papers and we are satisfied that this was an appropriate way of dealing with it.

Section 27

8. The Cabinet Office rely on section 27 specifically in relation to two documents. Given our decision on the contents of these documents we are able to identify them in this judgment: one is a confidential memo written to the Prime Minister by Geoffrey Howe (then Foreign Secretary) dated 31 August 1988 following his attendance at President Zia's funeral; the other is a copy of a cable from the UK Embassy in Islamabad to the Foreign Office which seem to have been sent soon after the crash and which is headed “Death of President Zia”.
9. Section 27 provides as follows:

(1) Information is exempt information if its disclosure under [FOIA] would, or would be likely to, prejudice–

(a) relations between the United Kingdom and any other State

(b) ...

(c) the interests of the United Kingdom abroad

(d) the promotion or protection by the United Kingdom of its interests abroad.

(2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom ...

(3) ... any information obtained from a State ... is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State ... to expect that it will be so held.

Section 27 provides a qualified exemption, so that it can only be relied on to withhold information if the public interest in maintaining the exemption outweighs that in disclosure of the information. It is well established in the case law that prejudice is “likely” for the purposes of section 27(1) if there is a “real and significant risk” of the relevant prejudice arising, not merely a hypothetical possibility. Such prejudice will arise if relations are made more difficult, or a particular diplomatic response is required to contain or limit damage which would not otherwise be required.

10. We have considered the contents of the memo and the cable in detail along with Mr Bayley's statement. We are satisfied that, with the exception of some passages which we refer to below, the information in those documents is “confidential”

information obtained from another state for the purposes of section 27(2) and/or frank commentary on the situation following the death of President Zia (including frank commentary on specific individuals) whose disclosure would involve a real and significant risk of relevant prejudice for the purposes of section 27(1). We have therefore gone on to consider whether the public interest in maintaining those exemptions outweighed that in the disclosure of the information.

11. As to the public interest in maintaining the exemptions, we note Mr Bayley's expertise, his account of the background in relation to President Zia and his assessment of the prejudice to the UK's international relations if disclosure was made. We are fully cognisant of the time that has passed since the events in question (nearly 30 years at the time of the revised response) but we also take account of the continuing importance and sensitivity of the relationship with Pakistan in particular.
12. Mr Qureshi relies on the fact that the Cabinet Office initially relied only on sections 23 and 24 (and then apparently also in relation to the anodyne documents that were released to him in May 2017) as an indication that the subsequent reliance on section 27 cannot be justified. We agree that the Cabinet Office's overall response to this request has not been satisfactory but they are entitled to rely on new exemptions and we have scrutinised their case appropriately.
13. Mr Qureshi also relies in this context on the fact that the US authorities have apparently disclosed a substantial amount of material relating to the cause of the crash which he has provided to us. We make two observations on this: first, decisions of the US government relating to their own relationship with a third country really cannot have any substantial relevance to decisions of this Tribunal about the relationship between the UK and that third country; second, as far as we can see, the US information relates mainly to detailed investigations as to the cause of the crash; the UK material we are considering consists, as we have indicated, of commentary and speculation at a high level of government in the immediate aftermath of the crash.
14. As to the public interest in disclosure, we acknowledge that the death of President Zia was an important event and that Mr Qureshi's investigations into it are in the public interest. However, although disclosure of the two documents would no doubt be of some limited historic interest and contribute in a general way to the transparency of the workings of the UK government at the highest level in relation to foreign affairs, it will be obvious from their timing that they are most unlikely to throw any light on the true cause of the crash, which we understand to be Mr. Qureshi's main interest in making his request under FOIA.
15. Looking at the material in the light of all the circumstances and taking account of the public interest considerations we have identified, we are satisfied that, although neither public interest was particularly weighty, the public interest in maintaining the exemption under section 27 was real and outweighed that in disclosure.
16. As mentioned above, there are some fairly anodyne passages in the two documents which can be "disaggregated" where section 27 is not engaged. These are indicated in the substitute decision notice set out above and will need to be disclosed to Mr Qureshi.

Section 23/24

17. Section 23 provides:

(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 [security] bodies specified ...

...

(5) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified ...

18. Section 24 provides:

(1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) [the duty to supply requested information] 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) [the duty to state whether information is held] is required for the purpose of safeguarding national security.

19. The section 23 exemption is absolute and so no question of weighing the public interest arises in relation to that section. The case law recognises the broad scope and importance of the protection conferred by it and the width of the words “relates to”. Section 24 is a qualified exemption so that the public interest in maintaining the exemption has to be weighed against that in disclosure of the requested information. The Information Tribunal in the case of *Baker v ICO and Cabinet Office* (EA/2006/0045) approved the use of the exemptions in both sections 23(5) and 24(2) together as a means of avoiding any inference that a security body may be involved in a transaction.

20. We have set out above the replies given to Mr Qureshi by the Cabinet Office relying on sections 23/24. We are not sure whether the formula adopted (“I can neither confirm nor deny whether any of the information you have requested is subject to the exemptions at section 23(1) or 24(1) ...”) is entirely apt given the terms of sections 23(5) and 24(2). But in any event we are satisfied that the revised response dated 5 May 2017 implicitly discloses that there is information held by the Cabinet Office coming within the terms of the request for which the exemptions at section 23(1) or 24(1) are relied on and we have therefore considered the applicability of those sections.

21. It is sufficient to say that we are satisfied that any material in the bundle which is not exempt under section 27 is covered by section 23(1). In the circumstances the Cabinet Office were entitled to withhold such material regardless of any public interest considerations.

Conclusion

22. For those reasons the appeal is allowed in part, although in substance the Cabinet Office has succeeded.

HH Judge Shanks

12 October 2018