



Tribunals Service
Information Rights

IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS) UNDER SECTION 57 OF THE FREEDOM OF INFORMATION 2000

Appeal No. EA/2010/0056

BETWEEN:

ROB EDWARDS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

THE MINISTRY OF DEFENCE

Additional Party

RULING

Introduction

1. This ruling which is made by the Tribunal Judge dealing with the papers on his own relates to a request made by the Appellant, the party who made the original request for the information which is sought to be disclosed, to have the same inspected and/or examined by a third party as a stated means of assisting the Tribunal when fully constituted to resolve the issues which the Appellant raises in his grounds of appeal. The Appellant submits that the third party would be prepared to give and sign an express undertaking not to disclose any of the disputed information which he might read or inspect to any other party or person.
2. The application is made under Rule 5 of the Tribunal's Rules, a full and formal description of which will be set out below.

3. The other parties to the appeal, namely the Information Commissioner (the Commissioner) and the public authority which has been joined to the appeal, namely the Ministry of Defence (the MoD) oppose the application.
4. For the reasons which are set out below, the Tribunal agrees with the Commissioner and the MoD and refuses to make the order which is sought on this application.

Background

5. The Appellant made a request in December 2006 for the disclosure of a number of reports relating to the safety of nuclear weapons. The MoD disclosed redacted versions of the reports. Other information was withheld under a number of separate exemptions under the Freedom of Information Act 2000 (FOIA). Details of these matters are not presently relevant.
6. In his Decision Notice, Reference No. FS50194621, the Commissioner determined that some of the information had been correctly withheld, but that some information should be disclosed.
7. The Appellant now appeals against the Decision Notice. The Tribunal agrees with the Commissioner and the MoD in general terms that the only grounds forming the basis of the appeal are that the public interest in maintaining a particular exemption, namely that under section 36(2)(b)(i) of FOIA does or did not outweigh the public interest in disclosure and for the sake of completeness and by way of second ground, the reasoning for withholding the information under section 27(1) of FOIA was, in the words of the Notice of Appeal, "baffling". The second ground does not appear to be relevant for the purposes of this application.
8. More particularly, the allegation on the appeal with regard to the first ground appears to be that the Commissioner erred in finding that the public interest in maintaining the exemption referred to and relied upon, namely section 36(2)(b)(i) of FOIA outweighed and/or outweighs the public interest in justifying disclosure. The Tribunal will need to return to the way this ground has since been articulated and expanded upon by the Appellant below.

The present application and its scope

9. The third party referred to in paragraph 1 of this Ruling is named as Mr John Large. Mr Large has submitted a memorandum under his letterhead, namely Large & Associates, Consulting Engineers of London, SE18. He submits that he would like access to "*full and unredacted versions of the five documents that are the subject of the Appellant's appeal against the above mentioned Decision Notice.*" Mr Large is in effect being put forward by the Appellant as an expert witness, although it is not clear

on further consideration of the submissions made by the Appellant that such is the case (in the sense that he can be regarded as a witness of fact as distinct from one whose opinion is being put forward) and it is also not clear that the other parties necessarily accept that such is the case.

10. The Tribunal is invited to consider, whether and if so, to what extent in accordance with the Commissioner's written response to the present application, even on the basis of the brief description of the appeal set out above, not all the five documents referred to by Mr Large can properly be the subject of inspection by him since not all those documents constitute the disputed information.
11. The first ground of the appeal stated above appears to constitute a challenge to the manner in which the Commissioner applied the appropriate public interests, in particular in relation to section 36(2)(b)(i) of FOIA which deals with the qualified exemption that arises if, in the reasonable view of a qualified person, disclosure of the information sought would, or would be likely, to inhibit the full and frank provision of advice.
12. Mr Large contends that allowing him access to the information constituting the five documents he refers to, will enable him to "*provide an opinion on the relevancy and marriage between S 36 and the content and context of the redacted text ...*"
13. With great respect to the Appellant and also to Mr Large, and in the light of the nature of the present application, the Tribunal finds it difficult to reconcile the contentions of those parties, in particular those of Mr Large on the one hand with the nature of the appeal as presently formulated on the other. The Tribunal has been set up as a statutory body under FOIA to address the very issues which the Appellant (and indeed Mr Large himself in the quoted passage appearing in the preceding paragraph of this Ruling) raises, namely the proper application of the public interest considerations arising in respect to any given request. This rationale, if nothing else, justifies the constitution of a full Tribunal panel consisting as it does of two Lay Members and a legally qualified Tribunal Judge. Not only does Mr Large appear to mischaracterise the Appellant's appeal, but he seems also to fail to understand the true nature of the appeal and the role of the Tribunal as just set out based on the evidence which the Tribunal then receives before it. This is not to say, as will be made clear below, that Mr Large is in anyway prevented from providing evidence to the Tribunal in an effort to assist the Tribunal. It is quite another thing however to suggest that he should in fact usurp the role of the Tribunal by himself being allowed to inspect the redacted and/or undisclosed material save in the most exceptional circumstances.

14. The Appellant has however responded to the above contentions by taking issue with the way in which the Commissioner has characterised the grounds of appeal. The Appellant maintains that the Commissioner sought to suggest that the grounds of the appeal related only to the way in which he, the Commissioner, conducted the public interest test rather than whether it was, or was not, in the public interest to withhold the information. At this stage, the Tribunal is not minded to block the right and ability of the Appellant to raise whatever grounds he feels are appropriate at the final hearing in accordance with the directions which have been made and subject to the contentions of the other parties. However, even if the Appellant is correct in saying that assessing the public interests is in issue before the Tribunal, that does not of itself necessarily allow a witness put forward on an independent basis to have the right to inspect the material which normally would be inspected by the Tribunal in closed session on a confidential basis in accordance with well established practice.
15. The Tribunal is minded to accept the Commissioner's characterisation of the appeal and the contention that what Mr Large is proposing to undertake goes beyond the present ambit of the appeal. However, if the Tribunal is wrong in making that finding, the fact remains that the Tribunal must still be satisfied that this case is of such an exceptional nature that the application sought should be granted.

The Tribunal Rules

16. The Tribunal's rules and procedure, for present purposes, are now to be found in the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009, SI 2009/1976 (the Rules). There can be no doubt that these Rules grant the Tribunal extremely wide powers to make directions in relation to the conduct of proceedings before it.
17. The Commissioner, in his written Response, refers to Rule 14 of the Rules. It is unnecessary for the Tribunal to refer further to this Rule in full. It addresses the case where the Tribunal considers whether to make an order which prohibits the disclosure or publication of any specific document or of related matters. Rule 14 does not seem to be material here. The Tribunal's invariable practice is to treat all requested information in confidence and if necessary to deal with submissions relating to the same in confidential or closed session. In practice, undisclosed information addressed during the conduct of an appeal will not be disclosed to an Appellant who is the requesting party, or to third parties.
18. Mr Large refers to Rule 14(4) which addresses a specific case where the Tribunal considers whether it should issue a direct prohibition forbidding disclosure to a third party. The Tribunal here has not made, nor does it consider making, a direction which prohibits disclosure. Consequently, Rule 14(4) which empowers the Tribunal

to give a supplementary direction to one made according to and addressed by sub-Rule (2) does not, in the Tribunal's judgment, here apply.

19. Although Mr Large has been referred to the Tribunal by the Appellant, the Tribunal is prepared for present purposes to accept that he is not a representative of the Appellant nor of course is he a party. As indicated above, from this it must follow that his purpose would appear to be that referred to in paragraph 12 above, namely to act by way of assistance to the Tribunal. Reference should in this regard therefore be made to the second set of Rules which might be thought to be appropriate, namely Rules 33 and 35. Rule 35 endorses the ability of the Tribunal to direct that hearings be heard in private and to determine which party or parties should attend. The considerations which apply in any given case will vary. Here, the Tribunal finds nothing in the present case to justify allowing the attendance of Mr Large at any closed session, whether on the basis he suggests or otherwise. This has to be done on an exceptional basis, if at all. The Tribunal is troubled by what is said in the latter part of Mr Large's statement to the effect that, as he puts it, at this "stage" in the appeal proceedings "*It would not, I suggest be appropriate for me to reveal the details of my reasoning and opinion for having full access to the disputed information.*" The Tribunal therefore remains to say the least somewhat in the dark as to the proper basis on which it is suggested that Mr Large should be entitled to attend, leaving aside the question of whether this is an exceptional case justifying such an attendance. Clearly, the Rules cannot fetter the views of a full Tribunal at any subsequent hearing. The parties remain entirely free to re-address these issues as the appeal approaches, or even during the conduct of the appeal itself.

The Tribunal's case-law

20. In the recent past, the Tribunal has faced an increasing call to entertain and grant applications for disclosure of requested information to a party other than the Appellant prior to and/or during an appeal, e.g. inspection by Counsel for the Appellant. See e.g. *People for the Ethical Treatment of Animals Europe v Information Commissioner and the University of Oxford* (EA/2009/0076). See also *DEFRA V Information Commissioner and Simon Birkett* (EA/2009/0106). In the *DEFRA* case, much the same comments as to the role and function of the Tribunal as are set out above are made.
21. Cases such as the *DEFRA* decision supra suggest that a non-party, whether he or she be an expert or not, should be allowed to attend only in exceptional cases. See also *Campaign Against the Arms Trade v Information Commissioner and MoD* (EA/2006/0040) referred to in paragraph 33 of the *DEFRA* decision.

22. Mr Large refers to the fact that “underlying” the subject matter of the appeal is what he calls “*a mix of highly technical facts*”. The Tribunal is presently prepared to assume as much. However, it will be open to the Tribunal when fully constituted to consider whether and if so, to what extent, it should avail itself of specialised technical assistance in the form of expert or other evidence, whether or not in the form described by Mr Large or otherwise. A generalised contention that the original requested information involves such issues is simply not enough, quite apart from its apparent failure to take into account the true characterisation of the Appellant’s appeal and the fact mentioned above that Mr Large is not yet prepared to explain why and to what extent he wishes to have full access to the disputed information.
23. The application is in effect in the Tribunal’s judgment no more than a request for a witness to have sight of the undisclosed material. Such a course was disapproved of by at least one other analogous Tribunal, namely the Competition Appeal Tribunal in *The Competition Commission and The Secretary of State for Business Enterprise and Regulatory Reform v Virgin Media Inc.* [2008] CAT 9, particularly at paragraph 14. There, the Competition Appeal Tribunal referred to what can be called a “cat out of the bag” scenario, namely that once an expert has seen otherwise confidential information, it is unlikely that he will ever “unlearn” it. In the context of FOIA, it can quite easily be seen how the spirit, if not the letter of FOIA would thereby be breached through such disclosure being allowed.

Conclusion

24. For all the above reasons, the Tribunal refuses to grant the application sought by or on behalf of the Appellant.

Signed

Mr David Marks QC
Tribunal Judge

Dated: 2nd September 2010