IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)

UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000

Case No. EA/2011/0011

GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

The Information Commissioner's
Decision Notice No: FS50260346
Dated: 14 December 2010

Heard at: Field House, London

Date of hearing: 28 & 29 June 2011

Date of Decision: 21 September 2011

Appellant: Foreign and Commonwealth Office

Respondent: Information Commissioner

Representation: For the Appellant: Gerry Facenna of Counsel
For the Respondent: Ben Hooper of Counsel

Before

David Marks QC
Tribunal Judge

Richard Enderby
Narendra Makanji

DECISION

The Tribunal allows the Appeal by the Foreign and Commonwealth Office (the Appellant) and upholds the decision of the Information Commissioner (the Commissioner) in the Commissioner's Decision Notice reference number FS50260346 dated 14 December 2010 to the extent set out in paragraph 40 herein and in consequence subject to the following amendments namely:

(a) there not be disclosed two items of personal data which are identified in the closed judgment which is separate to the present judgment; and

(b) such other amendments as form part of the aforesaid closed judgment which relates to this appeal.

Introduction

1. Although the ambit of this Appeal as a whole concerns a number of specific provisions of the Freedom of Information Act 2000 (FOIA) the most important point of principle raised by the appeal concerns the scope and meaning of certain sub sections in section 30 and in particular 31 of FOIA. Section 30 in general terms deals with investigations and proceedings conducted by public authorities. It is a qualified exemption. Section 30(1) provides in relevant part:

   "Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of –

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   (b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct …"

2. Section 30(1)(a) should also be noted:

"Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of –

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained –
   (i) Whether a person should be charged with an offence, or
   (ii) Whether a person charged with an offence is guilty of it …"

3. Section 31 which deals with law enforcement being also a qualified exemption provides in relevant part:

"(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

   (a) the prevention or detection of crime,
   (b) the apprehension or prosecution of offenders,
   (c) the administration of justice,
   (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
   (e) the operation of the immigration controls,
   (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
   (g) the exercise by any public authority of its functions for any other purposes specified in sub section (2),
   (h) any civil proceedings which are brought by or on behalf of the public authority and arise out of an investigation conducted, for any other purposes specified in sub section (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of the powers conferred by or under an enactment, or

(i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that an inquiry arises out of an investigation conducted, for any of the purposes specified in sub section (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.

(2) The purposes referred to in sub section (1)(g)-(i) are –

(a) the purpose of ascertaining whether any person has failed to comply with the law,

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,

(d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is or seeks to become authorised to carry on,

(e) the purpose of ascertaining the cause of an accident,

(f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,

(g) the purpose of protecting the property of charities from loss or misapplication,

(h) the purpose of recovering the property of charities,

(i) the purpose of securing the health, safety and welfare of persons at work, and

(j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work".

4. Of specific importance to the principal issue arising in this Appeal are the provisions of section 31(1)(a) and (b) as well as section 31(2)(a) and (b). The central argument which has occupied most of this Appeal

is the proper interpretation to be afforded to section 31(1)(g) when read together with section 31(2)(a) and (b). Although the precise arguments deployed by the parties will be set out more fully below the essential issue is whether the language of the first sub section when read together with the last two sub sections would be sufficient as originally thought to cover an internal or departmental or disciplinary or similar enquiry made into an investigation set up in order to establish whether or not an employee has complied with departmental procedures or has committed a criminal offence.

5. The above argument, however, has not been determinative of the Tribunal's decision to dispose of this Appeal in the way set out in the first part of this Judgment. The Tribunal upholds the Commissioner's decision by reaffirming the Commissioner's determination in relying on section 31(1)(a) and (b) but with the amendments alluded to as set out in a related closed judgment. It has, however, been felt that it is appropriate to state its conclusions on the alternative arguments articulated by the parties with regard to the issue outlined in the preceding paragraph.

The relevant background

6. In its edition of 3 October 2008 the Daily Telegraph published a version of a letter that had in effect been leaked, the letter in question being from Sir Nigel Sheinwald, the British Ambassador to the United States. Sir Nigel's letter contained what can be viewed as an assessment of Senator Barack Obama, the then Democratic nominee for the United States Presidency. The Appellant is the Foreign and Commonwealth Office. The Appellant looked into the reason for the leak. The exercise proved fruitless and continues to prove fruitless since the leak investigation in principle remains open.

7. By a letter dated 19 February 2009 a Matthew Davis made a written request for:

"… a copy of the Report or any documentation you hold about the leak of a letter from Sir Nigel Sheinwald in which President Obama is described as aloof and which is reported in the national press in November 2008".

8. The Tribunal has assumed that this last reference to November does not in any way materially alter the issues which have been argued on the appeal.

9. The Appellant confirmed it held the relevant information. However, it relied on section 30(1)(b) of FOIA and refused to publish it. Given the way in which this Appeal has evolved the Tribunal feels there is no need to set out section 30 in full but the relevant provisions have been set out above. It is enough to state that section 30(1)(b) in general terms exempts the information arising from any investigation which is conducted by the relevant public authority and which in the authority's view leads or may lead to a decision by that authority to institute criminal proceedings which the said authority has power to conduct. It has not been suggested in any way before this Tribunal that the Foreign and Commonwealth Office has any direct or innate power to conduct criminal proceedings. The most obvious criminal offence that might arise in the wake of a leak of the type considered in the present case would be an offence committed under the Official Secrets legislation.

10. In relation to the exemption contained in section 30(1)(b) the Appellant had to consider the relevant public interest. It stated that although it appreciated that public confidence in the investigations and/or litigation could be increased through greater transparency of its established investigatory processes, it nonetheless believed that the protection of confidential sources had to be respected and protected above all. In the event it refused to provide the information requested.

11. There then followed an internal review in which the Appellant maintained its position relying both on section 30(1)(b) as well as upon section 40 of FOIA which deals with personal data.

12. In the course of the ensuing investigation by the Commissioner the Appellant also invoked section 30(1)(a) and (b) as well as section 30(1)(g) when read together with section 31(2)(b).

The Decision Notice

13. The Commissioner's Decision Notice is dated 14 December 2010. It bears the reference mentioned at the head of this judgment. In paragraph 17 the Notice described the withheld information as comprising a bundle in turn containing a copy of the leaked letter, a series of emails and exchanges in which individual suspects were named, as well as their motives and opportunities for leaking the documents outlined, general exchanges on the progress of the enquiry, exchanges on how to manage any actual or likely damage arising from the leak, exchanges on how to manage similar situations in future, information generated as part of the enquiry itself, including responses to a series of questions put to recipients of the leaked letter and information about other evidence gathering. Finally it covered what was called a final scoping assessment document which summarised the inquiry's findings.

14. A major portion of the Notice dealt with the applicability of section 40 to the above information. The Tribunal is not concerned with any matter arising from the application of that exemption save to the extent that the Commissioner has asserted that there should be, and has duly assented, to a minor variation in that respect with regard to the information sought. That variation finds expression in the closed judgment.

15. The Notice also dealt with section 30. The Appellant had contended that it was possible that it could refer its findings arising out of its inquiry to the Crown Prosecution Service (the CPS) and ask the CPS

to institute or consider prosecution under the Official Secrets Act. The Commissioner found and duly determined that in his view this would not constitute the instigation of "criminal proceedings which the authority has power to conduct" within the words and meaning of section 30 (see paragraph 62). Instead the Commissioner claimed, on such an eventuality the Appellant would be inviting another authority to exercise its legal powers. In the Commissioner's view this did not satisfy the requirement which would trigger the engagement of section 30 and therefore section 30(1)(b) was not engaged. No reference was made to the possible application of section 30(1)(a).

16. As far as section 31 was concerned the Commissioner set out the relevant basic requirements that there had to be the fact or the likelihood of prejudice as a preliminary requirement to trigger the operation of the section. The public authority had to be able to demonstrate that there existed some causal relationship between the potential disclosure and the prejudice and that the prejudice is or was real, actual or of significance (see paragraph 68).

17. Second, the authority also had to indicate the likelihood of that prejudice occurring. The Commissioner observed that in the present circumstances he only had to consider what he described as the lower threshold of "would be likely" as a basis for the arguments presented to him. Reliance was placed on the now well known formula in the Tribunal's decision of John Connor Press Associates Limited v Information Commissioner (EA/2005/0005) especially at paragraph 15 with its reference to a risk of prejudice.

18. The Appellant had relied on what was called the unlikely effect that the release of information would be likely to have upon the Appellants own potential to gather evidence in further leak inquiries.

19. In paragraph 74 the Commissioner determined that he did not consider that the Appellant had provided evidence of a causal link between disclosure of this information in the case in question and prejudice to

the matters particularised in section 31(1)(a) to (b). However, the Commissioner had found that the release of such information would entail the engagement and the breach of section 40. It could thereby be said that the requisite prejudice was present.

20. At paragraph 80 and following, the Commissioner turned to the specific issue raised with regard to the interplay between section 31(1)(g) and section 31(2)(b). At paragraph 84 the Commissioner stated the following, namely:

"The Commissioner questions the appropriateness of the FCO's application of section 31(1)(g). Generally he considers that "functions" for these purposes must be statutory or core functions of the public authority, matters that have been specifically entrusted to the public authority, rather than general powers exercisable by any public authority."

21. In addition the Commissioner pointed to the presence of the term or expression "ascertaining" in section 31(2)(a) to (e). That, it was said, necessarily suggested that the matter would need to be formally "ascertained" by the police or by the CPS and/or by the courts. Those were, it is claimed, the only parties or organs which could actually "ascertain" in a sense of being able to determine whether any person had failed to comply with the law.

The Appeal

22. In its Grounds of Appeal the Appellant made it clear that it appealed only in relation to certain passages within the disputed information in respect of which it claimed that section 31 was wrongfully addressed by the Notice. No appeal was made against the Commissioner's findings on section 30 although the Grounds of Appeal pointed out in turn that the Appellant did not agree with the Commissioner's legal analysis on that point.

23. For the sake of completeness at this point the Tribunal should refer to the fact that section 27 of FOIA which deals with international relations was also invoked in relation to certain parts of the information. Prior to the hearing of the appeal ,the Commissioner accepted that one document referred to in the disputed information was exempt under s27 FOIA and that the public interest was in favour of maintaining that exemption in relation to that document . A minor variation to that effect is therefore included in the closed judgment relating to this open judgment . No further argument was pursued on this point. In relation to section 31(1)(g) the Appellant rejected the interpretation afforded to the term "ascertaining" which has been referred to above. In the words of paragraph 23 of the Notice of Appeal the language of sub section 31(1)(g) read together with 31(2)(a) and (b) is wide enough to cover, for example, a disciplinary investigation by a government department seeking to ascertain whether an employee has complied with the Civil Service Code or committed a criminal offence.

24. Reference was made in addition to an alleged inconsistency between the Commissioner's approach articulated in the present case and the findings or contents of a Decision Notice under reference number FS50085720 addressed to the Cabinet Office especially at paragraph 74-78 inclusive and heard on appeal in a decision in this Tribunal in Gradwick v Information Commissioner and the Cabinet Office (EA/2010/0030). The public interest alleged to be in favour of the maintenance of the exemption reflected the prevention of the disclosure of details of confidential investigations and of investigation techniques or methods for handling unauthorised leaks and thus not providing assistance to those seeking to avoid detection or commit similar offences in the future.

The Commissioner's response

25. In his written Response the Commissioner viewed the Appellant's Appeal as raising two distinct grounds for present purposes. First the Commissioner claimed that there had been no suggestion by the

Appellant that the Commissioner had misdirected himself in law when considering whether either section 31(1)(a) and/or section 31(1)(b) was engaged in this case. Rather as the Respondent put it this ground challenged merely the application of the relevant principles on the facts.

26. Second, the word “ascertaining” in the context of section 31(1) and (2) for present purposes meant or necessarily suggested a definition which contained an element of determination and not the act or phenomenon of investigating a matter in forming a view in relation to that matter. Moreover, section 31(1)(a) to (f) and (h) to (i) all concerned functions assigned to specific and particular public authorities. Additional reliance was placed on certain Explanatory Notes to FOIA in support of the overall contention that the Appellant’s reading was anomalous and unjustifiable.

27. As can be seen from the terms of the Decision Notice set out above no specific mention is made in the Decision Notice to section 31(1)(a). However, the Commissioner accepts that with regard to that particular exemption the public interest militated in favour of maintaining the exemption and as has been indicated above the Tribunal is content to rest its decision on the basis that it is satisfied with regard to the limited number of items still in dispute not only that this sub section is engaged but also that the public interest in respect of each of those specific items militates in favour of maintaining the exemption.

Evidence

28. The Tribunal heard from two witnesses who gave evidence on behalf of the Appellant. Both witnesses gave both open and closed witness statements. The two witnesses were first, Gavin Marshall. He had worked for the Appellant for over 30 years. In particular he holds the post of Head of Home Security in the Appellant’s Estates and Security Directorate. That Directorate’s remit includes the protection of staff,

family and other personnel from the threat of terrorism and similar security threats.

29. Having reviewed the disputed information, he concluded that even in the wake of the particular inclusive investigation which followed upon the Daily Telegraph publication in October 2008 it was still possible that the inquiry could “reignite”, although he duly accepted that the likelihood of that happening was in his words “relatively remote”. The real concern lay in the undermining of similar investigations. This he said could assist persons “with malicious intent” to more efficiently disguise their actions or to disrupt the progress of future investigations. The open statement went on to say that it could also “reduce the effectiveness of techniques used to investigate those committing breaches” and who could therefore develop measures to counter or evade investigative techniques.

30. The Appellant’s other witness was Mr Martin Sterling, a civil servant working in the Cabinet Office, and more particularly, for the Government Security Secretariat of the Intelligence Security and Resilience Group within the Cabinet Office. He explained that the Cabinet Office was responsible for a document entitled “Security Policy Framework” which was referred to as the SPF and which sets out the central and internal protective security policy and risk management considerations for government departments. He pointed in particular to a passage within the SPF which dealt with data handling procedures. He said that the SPF, though written with a view to improving the public understanding of government protective security, did not lessen the need to preserve the confidentiality of material about leaks or about leak investigations.

The Issues on the Appeal

31. The Appellant’s primary case is that should the Tribunal accept the evidence of its two witnesses; it thereby followed that the information which remains in dispute would be covered by section 31(1)(a) and/or

(b). On that basis there would be no need to go on to consider the issue which was set out at the beginning of this judgment and reflected in paragraph 85 of the Decision Notice. The Tribunal has approached the primary assessment on the basis that it is sufficient in each case to reach a suitable decision by reference only to the engagement or otherwise of the exemptions addressed by section 31(1)(a) and/or (b) without the need to go on further to consider for the purposes of this decision at least whether, and if so to what extent, section 31(1)(g) is also engaged. However, since the parties have ably and fully addressed this issue, and as already stated the Tribunal feels that it should go on to deal with and give its judgment with regard to the relevant arguments in that particular respect.

Scope of section 31(1)(g)

32. The basic ingredients of the parties' respective arguments have been alluded to already. Apart from the Appellant's contention drawn from its Grounds of Appeal, and in amplification of them, the Appellant maintains that although the decision whether to prosecute a civil servant may lie elsewhere, particularly in relation to Official Secrets Act offences where the involvement of the Attorney-General is required and even though the decision to convict may ultimately lie with the courts, section 31(1)(g) and section 31(2) are not limited to public authorities whose functions are or include the prosecution of crime. Put shortly, the Appellant claims that if a public authority is in fact exercising one of its functions, which function can be said to be exercised for the purpose of ascertaining such matters, the exemption will thereby be engaged.

33. This last contention admittedly has much attraction about it. However, for reasons which are advanced by the Commissioner, and in the Tribunal's judgment, the contention is misconceived. For the exemption to be engaged, the public authority must be exercising its functions for the purpose of the matter or matters referred to and articulated in section 31(2)(b). In the Tribunal's judgment, the word

"ascertain" connotes some element of determination with regard to non-compliance with the law or responsibility for conduct which is otherwise improper. In the latter respect, one thinks of the civil service code which has been referred to already. In any event, the reading is certainly justified with regard to any action that is illegal.

34. Uncertainty, if there be uncertainty, exists with regard to investigations into staff misconduct such as may lead to a disciplinary as distinct from a judicial outcome. Section 31 is dealing with law enforcement. In the case of the Appellant, it is but one, albeit a major government department, among many other similar important departments. In the Tribunal's view, section 31(2)(b) addresses failure to meet formal requirements regarding disciplinary matters and employment criteria which amount to more than enquiries or investigations into the actions of staff. It is not necessary for the purposes of the appeal further to refine this overall characterisation.

35. Reverting to the facts of the present appeal, it is nonetheless suggested that there is here present a formal function of "ascertaining" as to who may be responsible for a leak. On the evidence heard by the Tribunal and in the Tribunal's firm judgment, the Appellant is neither an authority, nor a body charged with the responsibility of coming to a formal determination as to whether there has been non-compliance with the law, nor with the responsibility of determining in turn who might be responsible for improper conduct.

36. The Tribunal is also impressed by and with the effect of the overall statutory context against which section 31(1)(g) should be viewed. There can be no doubt that section 31(1)(a),(f), (h) and (i) also address or involve functions which can be said to be assigned to particular public authorities or groups of authorities. This lends force to a construction of the term "function" which in turn gains from having regard to those activities. The Appellant's argument would on the other hand attribute a degree or an element of generality to the notion of

"functions" which the whole of the section, in particular section 31(2), does not appear to contain.

37. Although the Tribunal is of the firm view that the above considerations militate in favour of the interpretation of section 31(1)(g) in the way advanced by the Commissioner, it notes that the relevant Explanatory Notes to FOIA referred to above state with regard to section 31 at paragraph 114:

"Subsection (g) exempts information which would, or would be likely to, prejudice the exercise of any public authority of its functions for any of the purposes specified in subsection (2). This subsection essentially protects the conduct of investigations and proceedings which may lead to prosecution."

38. The issues, however, finally are one of statutory interpretation alone. If a public authority is exercising its functions as part of a process whereby another public authority ascertains whether there has been failure to comply with the law, it cannot in any sensible way be said that the first authority is exercising its functions "for the purpose of ascertaining" whether that party has failed to comply with the law. The Tribunal again agrees with the Commissioner on this score. The first authority can be said only to be exercising its functions for the purpose of enabling the second authority to ascertain whether that person has failed to comply with the law.

39. The Appellant invoked to the Tribunal's decision in *Gradwick v Information Commissioner supra*. With respect to the Appellant, the Tribunal however finds that nothing of any assistance can be found in this decision. The decision involved different facts, and indeed, did not analyse section 31 in the way which has been addressed in this case. It cannot in the Tribunal's view have any bearing upon the particular arguments which have been deployed in this appeal.

Conclusion

40. The number of items of information which remain in issue between the parties is, as indicated, relatively small. They are considered in sufficient detail in a closed judgment which of necessity is only available to the parties. As indicated above, the Commissioner has accepted that two items of information should be redacted on account of the exemption being invoked in their favour by virtue of section 40, that one item should be redacted on the basis of s 27 and that two items should be redacted under s 31(1)(a) Such other items to remain in issue are effected in the terms of the overall decision at the head of this judgment.

41. It follows that the Tribunal allows the appeal to the extent of the amendments to the Decision Notice which are referred to in the formal opening part of this judgment.

David Marks QC
Tribunal Judge

Dated: 21 September 2011