IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2011/0184
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

ON APPEAL FROM:

The Information Commissioner's
Decision Notice No: FS50323113
Dated: 29 June 2011

Appellant:	**MR TONY BEASLEY**
First Respondent:	**INFORMATION COMMISSIONER**
Second Respondent	**MINISTRY OF DEFENCE**

On the papers

Field House on 24 February 2012

Date of decision: 13 March 2012

Before

ROBIN CALLENDER SMITH
Judge

and

JOHN RANDALL and **ROSALIND TATAM**
Tribunal Members

Representations

For the Appellant: Mr Tony Beasley
For the First Respondent: Mr Ben Hooper, Counsel for the Information Commissioner
For the Second Respondent: Mr Charles Bourne, Counsel instructed by TSol

IN THE FIRST-TIER TRIBUNAL **Case No.** EA/2011/0184
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS

Subject matter:

FOIA

Absolute exemptions

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

Qualified exemptions

- National security s.24

Cases:

Baker v Information Commissioner EA/2006/0045 and *In the Matter of an Application by Freddie Scappaticci for Judicial Review* (2003) NIQB 56.

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal - having considered open and closed written submissions and open and closed written evidence on the preliminary point - dismisses the appeal.

This decision is open and there are no closed or confidential annexes to it.

REASONS FOR DECISION

Introduction

1. On 5 January 2009 Mr Tony Beasley (the Appellant) submitted two requests to the Ministry of Defence (the second Respondent).

2. In the first he requested access to the "Captain's patrol reports etc of HMS/M Turpin" during the time she was on covert operations in the Barents Sea and Kola areas during 1956/7 and/or possibly the end of 1955/56.

3. His second request stated: "Turpin had several 'skirmishes' in which I played a major part. I would ask for a copy of all information concerning myself." The second Respondent pointed out that this was a request for the Appellant's own personal data (under the Data Protection Act 1998) and would receive a response separately.

4. In respect of the Appellant's first request the second Respondent stated that information falling within the scope of the first request was held but was exempt from disclosure on the basis of s.26 FOIA. The Information Commissioner (IC) concluded, in his decision notice dated 29 June 2011, that the exemptions at s.26(1)(a) and s.26(1)(b) were engaged, and that the public interest in maintaining the exemptions outweighed the public interest in disclosing the information. There was partial reliance by the second Respondent on s.27 FOIA but, in the light of the IC's conclusion in respect of s.26, the IC had not gone on to consider that point.

5. In addition the second Respondent stated that

> it would neither confirm nor deny that the Ministry of Defence hold any other information on this subject by virtue of s. 23 (5) – Information supplied by, or relating to, bodies dealing with security matters, and 24 (2) – National Security.

The appeal to the Tribunal

6. The Appellant appealed to the Tribunal on 1 August 2011 with documents that set out some of the personal background history relating to his service on HMS/M Turpin.

7. His grounds of appeal were, in effect, that the IC had erred in concluding that the Ministry of Defence were correct in relying upon s. 23 (5) and s. 24 (2) as the basis for refusing to confirm or deny whether the disputed information was exempt from disclosure under FOIA.

8. In particular he argued that there was

> nothing in the information which I have requested which, in 2011, will compromise national security….info they say is secret can be accessed from the Military History Channel on Sky, the Telegraph and its obituary page, Chinese and Russian TV on Sky and the book GCHQ and other, 8 plus books on the subject.

9. The Tribunal decided to deal with the issues in relation to s. 23 (5) and s. 24 (2) as a preliminary point in the appeal.

Evidence

10. In addition to letters provided by the Appellant during the course of his appeal, the Tribunal has considered a written witness statement from the Chief of Defence Intelligence, Vice Admiral Alan Richards. This statement was presented in a redacted Open form and also in an un-redacted closed form.

11. The Tribunal also saw and considered MoD information that may or may not be in the scope of the request.

12. So that the Tribunal's decision can be presented in an Open form – without any kind of closed or confidential annex – no reference has been made to the content of closed or redacted material.

13. Vice Admiral Richards explained that he had been Chief of Defence Intelligence since 23 January 2012. He was the principal advisor on defence intelligence issues. That role meant him playing a part in wider national security matters through close liaison with other Government departments and intelligence agencies. He was also Deputy Chairman of the Joint Intelligence Committee (JIC). In his role as Chief of Defence Intelligence he was responsible for providing strategic warning of threats to the UK and UK interests worldwide. He was also responsible for the prioritisation and tasking of MOD's intelligence collection assets and utilising the output of those assets in delivering assessed intelligence product to the MOD and Armed Forces. He had responsibility for maintaining the defence relationship with the Intelligence Agencies and close international intelligence partners.

14. He noted that the activities of the U.K.'s intelligence agencies and the Armed Forces operating in support of them were secret. It was vital that no information was disclosed that would affect the ability of the agencies in the proper discharge of their function. To ensure that, it was necessary to prevent the advancement of knowledge about what they did. As a result it was Government policy to 'neither confirm nor deny' (NCND) whether information was held that related to their work where that was necessary to safeguard national security.

15. He stated:

> A common misperception is that NCND is used to 'hide' the fact that a Department has information which it does not wish to disclose. Whilst this can be the case, the NCND principle is broader in that it also affords the ability to avoid having to disclose that information does not exist. In some situations, simply confirming or denying whether the public authority holds a particular category of information could itself disclose sensitive and damaging information. The principle of NCND is needed to avoid the harm which may arise if public authorities have to confirm or deny whether they hold or not, particular information. In such circumstances the confirming or denying of the existence of information can communicate sensitive and potentially damaging information.
>
> The MoD considers that the maintenance of confidentiality is vital to the capability and effectiveness of our intelligence agencies and Armed

> Forces operating in support of them. This level of confidentiality is very high and consistency of approach must be maintained when protecting their information to avoid any future prejudice. The very sensitive considerations that attached to confirmation or denial of holding information sourced by or 'related to' bodies dealing with security matters is represented by the specific inclusion of the intelligence agencies under the absolute exemption at section 23 of the Freedom of Information Act 2000.
>
> There is considerable overlap between information covered by s.23 (security bodies) and s.24 (national security); the ability to use them together (s.23 (5) and s.24 (2)) is essential where it is necessary to answer a request in a way that preserves the NCND.
>
> …. I should emphasise that Government does not accept that information which is 'in the public domain' has been 'made public' if it has not been officially avowed….For NCND to work as the protective measure for which it was designed, then a consistent use of NCND for certain topics or types of information is vital. If NCND is only applied in very specific circumstances or only when information is indeed held then NCND would become an indicator of interest rather than a cover.

Conclusion and remedy

16. The Tribunal is satisfied to the required standard – the balance of probabilities – that the approach outlined above by the Chief of Defence Intelligence in respect of NCND is the correct approach. s.23 (5) and s. 24 (2) can operate in conjunction with each other where reliance on one or the other exemption alone would itself reveal sensitive information in the sense that it would reveal whether or not a s.23 body was (or would be) involved.

17. As pointed out in the IC's written submissions on this preliminary issue, if reliance was placed only on s.23 (5), then it could be inferred that the need for an exemption from the duty to confirm or deny arose as a result of the case relating (in some way) to one or more s.23 bodies. By contrast, if reliance was placed only on section 24 (2), then it could be inferred that whilst national security interests required an exemption from the duty to confirm or deny, this was *not* because the case related to any s.23 bodies.

18. The Tribunal finds that the fact that there are various books and television programmes that suggest that the subject matter of the Appellant's request is no longer sensitive is erroneous and misplaced in this context. The fact that claims may have been made about particular intelligence matters in the media does not

mean that the Government has to abandon its NCND stance in relation to those intelligence matters.

19. Counsel for the IC correctly identifies the *Scappaticci*[1] matter as a relevant comparator in this area. In that case there was significant press coverage speculating that Mr Scappaticci was an undercover agent working within the IRA.

20. It was also common ground – given the IRA's stance towards potential informants – that this put his life in severe danger. The Northern Ireland High Court upheld the Government's NCND stance. If press and media claims about intelligence matters were in themselves sufficient to require the Government to confirm or deny the truth of such claims, then intelligence secrets could always be exposed simply by speculating about them in the press and thereafter requiring the Government to confirm or deny whether those speculations were correct.

21. In terms of s.24 (2), the duty to confirm or deny only does *not* arise if 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.

22. In terms of the public interest balancing act on *this* particular point the Appellant believes that a full response to his information request will help him in his personal dealings with the MoD.

23. The Tribunal recognises that such issues may matter greatly to the Appellant but concludes in its findings that this does not give rise to any significant factors in favour of disclosure as regards the wider, public interest.

24. For the reasons explained above the Tribunal is satisfied that the exemptions – jointly – are correctly and properly being claimed in relation to this information request by the Appellant. On that basis, his appeal must fail on this preliminary point.

25. Our decision is unanimous.

[1] *In the Matter of an Application by Freddie Scappaticci for Judicial Review* (2003) NIQB 56.

26. There is no order as to costs.

Robin Callender Smith

Judge

14 March 2012