



**Appeal No. EA/2014/0233**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No:  
FS5026820**

**Dated: 26th. August, 2014**

**Appellant: Maya Foa on behalf of Reprieve ("Reprieve")**

**First Respondent: The Information Commissioner ("the ICO")**

**Second Respondent: The Foreign and Commonwealth Office ("the FCO")**

**Before**

**David Farrer Q.C.**

**Judge**

**and**

**Andrew Whetnall and Nigel Watson**

**Tribunal Members**

**Date of Decision: 25th. April, 2016**

**Date of Promulgation: 26th. April 2016**

Robert Palmer and Julieanne Kerr Morrison appeared for Reprieve.

Laura John appeared for the ICO.

Rory Dunlop appeared for the FCO.

**Subject matter:**

The Freedom of Information Act, 2000 (FOIA) ss. 23(1), 23(5) and 27(1)(a)

Whether the FCO was entitled neither to confirm nor deny that it held requested information.

Whether requested information “related to” a body specified in s.23(3).

Whether disclosure of the requested information would or would be likely to prejudice relations between the United Kingdom and another state.

If disclosure would cause such prejudice, whether the public interest in withholding it outweighed the the public interest in disclosure.

**DECISION OF THE FIRST-TIER TRIBUNAL**

The Tribunal finds, as to paragraph 1 of the request of 26<sup>th</sup>. July, 2013, that it related to a body specified in s.23(3) of FOIA.

As to paragraphs 2 and 3 it finds that the FCO was entitled neither to confirm nor deny that it held the requested information.

It therefore dismisses this appeal. The FCO is not required to take any steps.

In those circumstances and having heard no oral argument as to the issues arising under s.27(1)(a), it makes no finding in relation to that claimed exemption.

Dated this 25th. day of April, 2016

David Farrer Q.C.

Judge

[Signed on original]

**Abbreviations**

In addition to those indicated above, the following abbreviations are used in this ruling and the closed annex -

The DN	The Decision Notice of the ICO
HMG	Her Majesty's Government
FTT	First – Tier Tribunal
UT	The Upper Tribunal
OSJA	The Overseas Security and Justice Assistance Guidance
NCND response	A “neither confirm nor deny” response to a request for information.

**The Statutory provisions material to this decision**

FOIA s.23

- (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).

...

- (5) The duty to confirm or deny does not arise if, or to the extent that, compliance with s.(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 in subsection (3).

**Relevant authorities**

*The All Party Parliamentary Group on Extraordinary Rendition v the Information Commissioner and the FCO [2015] UKUT 377 (AAC).*

(“APPGER”)

*The Cabinet Office v the Information Commissioner EA/2008/0080.*

*The Home Office v the Information Commissioner and Cobain [2014] UKUT 306 (AAC).*

## **REASONS FOR DECISION**

### The Background

1. Reprieve is a London – based legal action charity committed to the exposure and prevention of extreme violations of human rights throughout the world, in particular, as its name suggests, the use of the death penalty. Maya Foa is the Strategic Director of the Death Penalty Team. She submitted as evidence in this appeal a very full and most instructive witness statement dealing with the abuses which Reprieve is tackling and, more specifically, the use of capital punishment in Pakistan, the assistance given by the UK to “counter – narcotics” initiatives in Pakistan and Reprieve’s consequent engagement with the UK government in respect of such assistance. Possession of a substantial quantity of a proscribed drug is punishable by death in Pakistan. It is a strict liability offence, which means that proof that the carrier knew the nature of what he/she possessed is not required.
2. There is an obvious tension between the duty of the UK government (and many others) vigorously to promote human rights compliance wherever serious abuses may occur and its powerful and legitimate interest in assisting the lawful suppression of drug – trafficking and terrorism, which may have grave consequences within the UK. Such assistance may be financial, advisory or both. Such conflicts of interest pose very difficult problems for ministers and civil servants charged with deciding whether to provide funds and expertise for projects to counter drug trafficking and related security threats in countries which retain the death penalty or which may practise torture, unlawful imprisonment or other grave abuses of human rights.

3. Authoritative guidance on the proper approach to such problems, OSJA, was provided by the government in 2011. It was introduced by a foreword from the then Foreign Secretary, the Right Hon. William Hague and is specifically directed to HMG officials with the intention of ensuring that security and justice assistance to other countries also respected and upheld human rights and democracy. It was designed to provide instruction to all staff on identifying the types of human rights or IHL risks to be taken into account and to offer help as to how they might be mitigated. For those purposes OSJA contains two Checklists, A and B. Checklist A is to be used in the overall strategic approach to involvement with a particular country. It requires all such risks to be evaluated when designing or assessing a programme or project and to ensure that any feasible mitigation measures be incorporated. It prescribes the involvement of senior staff and ministers in cases of increased sensitivity. Checklist B provides similar guidance in relation to case-specific assistance.
  
4. Common to both the Checklists is a prescribed four – stage risk assessment process, the details of which vary to some extent, though the objectives are the same. This process is entitled the AIMS Framework, an acronym reflecting the four stages, Assessment of the host country, Identification of risks, consideration of possible Mitigation of such risks, assessment of the Seriousness of the risk that assistance might contribute to human rights violations. The final stage requires a determination whether the approval of senior personnel or a minister is needed.
  
5. Pakistan is a country which continues to experience grave problems with drug – trafficking and terrorism. Decisions on security and justice assistance to Pakistan undoubtedly require compliance with the OSJA guidance.

#### The Request

6. On 26<sup>th</sup>. July, 2013, Maya Foa made the following request to the FCO -

*"I am writing to request copies of the following documents in relation to the (OSJA) guidance dated 15<sup>th</sup>. December, 2011.*

- 1 The strategic assessment (Stage 1), risk identification assessment (Stage 2) and mitigation options (Stage 3) in relation to the human rights implications of providing assistance, financial or otherwise, to Pakistan law enforcement agencies and the document which answers the question of whether there is "a serious risk that the assistance might directly or significantly contribute to a violation of human rights (Stage 4) as required by the OSJA Guidance.*
  - 2 If ministerial authorization has been requested in relation to the proposed assistance, a copy of the relevant briefing paper given to the minister; and*
  - 3 If ministerial authorization has been granted in relation to the proposed assistance, a copy of the authorization. "*
7. The FCO responded on 20<sup>th</sup>. August, 2013. It refused to confirm or deny whether it held any of the three categories of information, relying on both s.23(5) and 24(2) of FOIA.
8. Reprieve requested an internal review and supported that request with a letter dated 27<sup>th</sup>. September, 2013, in which Maya Foa pointed out that the Foreign Secretary had confirmed to the House of Commons that HMG had provided counter – narcotics assistance to Pakistan and that the FCO's lawyers had told the High Court that, in reaching that decision, it had complied with the OSJA Guidance. An NCND response to request 1 was therefore pointless.
9. The FCO maintained its position after an internal review, even on further consideration, after taking account of the public disclosure of the existence of the information within the scope of request 1. In the course of the ICO's investigation, however, it abandoned reliance on s.23(5). It substituted s.23(1) as the exemption applicable to request 1 and, as to requests 2 and 3, switched to reliance on s.27(4)(a), an NCND response on the

ground that any response would or would be likely to prejudice UK relations with Pakistan.

10. Ms. Foa complained to the ICO on behalf of Reprieve on 10<sup>th</sup>. January, 2014. A lengthy investigation followed.

### The DN

11. The DN upheld the FCO refusals in relation to all three requests, The ICO found that the information to which request 1 related had been supplied by a s.23(3) body. As to requests 2 and 3, he found that s.27(4)(a) was engaged and that the public interest in maintaining the exclusion of the duty to confirm or deny outweighed the public interest in disclosing whether the FCO held the requested information. His conclusions were largely based on a confidential briefing from the FCO and the DN was inevitably uninformative as to his reasoning. A closed annex was attached.

12. Subsequently, the ICO stated that his finding that the information as to request 1 had been “supplied” by a s.23(3) body was an error (see §14); it should have read “related to” . Reprieve was understandably concerned over this amendment; for Reprieve, it rendered the response of the FCO and the findings of the DN still more opaque and altered the nature of the case it had expected to meet when filing its grounds of appeal. However, the Tribunal does not consider that, on all the evidence, it affects the outcome of this appeal, as will become apparent.

### The Appeal

13. Reprieve appealed by a Notice dated 22<sup>nd</sup>. September, 2014. Its grounds, as directed to the exemptions then relied on and the stated findings of the DN ( see § 12), were clearly and fully set out and were accompanied by copies of the DN, related correspondence

and of the OSJA Guidance. Given the changes in the case that Reprieve subsequently had to meet, little is to be gained by analyzing those grounds now.

14. The ICO's Response of 21<sup>st</sup>. October, 2014 disclosed the drafting error which resulted in a finding that the information within request 1 was supplied by a s.23(3) body, whereas it should have read "related to". He submitted that this expression should be broadly construed.
15. On the ICO's application the FCO was joined as Second Respondent. It lodged its Response on 2<sup>nd</sup>. December, 2014. It supported the ICO's revised finding as to request 1 and dealt briefly with s.27(4), since its case could not be fully set out in an open document.
16. Reprieve's Reply argued that it was most unlikely that all the information covered by request 1 had a connection with a s.23(3) body and that disaggregation of material from other sources should be performed. Otherwise, it was largely concerned with s.27(4)(a).
17. Only in an Amended Response dated 22<sup>nd</sup>. January, 2015 did the FCO first state its reliance on the NCND response provided for in s.23(5). It simply added that the OSJA Guidance did not state that a concern as to human rights abuses in a particular country would, of itself require a submission to the minister and that a confirmation or denial as to requests 2 and 3 would relate to a s.23(3) body. Further submissions and evidence would be made in closed documents.
18. Whilst it was regrettable, from Reprieve's standpoint, that the playing field moved as it did, it was plainly consistent with the overriding objective that, if s.23(5) might be engaged, the Tribunal should receive evidence and argument relating to it.



19. The first day of the hearing was largely occupied by two procedural issues -

(i) Should the Tribunal make a decision on the two s.23 issues and consider the s.27 exemption only if it had first decided that the FCO could not rely on a s.23 exemption ? (This was the approach proposed by the Tribunal. It was opposed by Reprieve.)

(ii) Should Reprieve's solicitor and counsel be permitted to take part in the closed session during which FCO evidence would be heard, on undertakings as to not communicating information disclosed in the closed session to their client ? Alternatively, should the appeal be adjourned so that a special advocate could participate in the closed session ?

20. The Tribunal ruled that it would first deal with the s.23(1) exemption on request 1 and the NCND response to requests 2 and 3 (s.23(5)) together and give its decisions. If, or to the extent that the FCO failed to make good its case, the Tribunal would then consider the issues arising in relation to s.27(4)(a) issues. It would permit neither counsel for Reprieve nor a special advocate to participate in the closed session. Those rulings were upheld on an interlocutory appeal to the UT.

21. Accordingly, when the hearing resumed, the immediate questions for the Tribunal were

–

(i) As to request 1, was the requested information supplied by and/or did it relate to a s.23(3) body ?

(ii) As to requests 2 and 3 would a confirmation or denial disclose information supplied by or relating to a s.23(3) body ?

22. The only witness on this appeal was Owen Jenkins, Director of the South Asia and Afghanistan Directorate of the FCO. He submitted in evidence open and closed witness statements. His open statement made clear that, as regards request 1, the FCO said that

the information was both supplied in part by a s.23(3) body and related to it and that submissions to a minister were required only in cases of high sensitivity.

23. Mr. Jenkins gave oral evidence, first in closed then in open session. Mr. Palmer, on behalf of Reprieve, submitted a substantial list of questions, the majority, quite understandably, relating to the s.27(4)(a) exemption, which it wished to be put to Mr. Jenkins by the Tribunal in the closed session. Inevitably, given the absence of information available to him as to the content of the closed statement, many of those questions simply did not arise from the evidence given. A few did and they were put. Specifically, Mr. Jenkins was asked both by Ms. John, for the ICO, and by the Tribunal, as to each stage of the AIMS process, about the possibility of severing parts of the information responsive to request 1, so that meaningful extracts could be disclosed, even if the Tribunal's finding was that the s.23(1) exemption should be upheld. He replied that severance was not possible in respect of information at any stage of the OSJA assessment and stated why not, according to the FCO. He was asked whether he was confident that all the relevant information was before the Tribunal and stated that he was. Manual and electronic searches had been performed. In answer to further questions, he stated that submissions to the minister were rare. He gave evidence on the issue of the supply of the requested information.

24. These very limited items of information were disclosed to Reprieve after discussions with counsel for the FCO and the ICO and before Mr. Palmer cross examined Mr. Jenkins. It is right to add that Mr. Jenkins' evidence as regards the NCND response to requests 2 and 3 (s.23(5)) was carefully tested by Ms. John and by some questions from the Tribunal. Some of Mr. Jenkins' answers anticipated Mr. Dunlop's closing submissions.

25. The Tribunal is fully alive to the difficulties confronting an advocate in Mr. Palmer's position, given the minimal picture he had of the information material to request 1 and s.23(1). There could be little, if any fruitful cross examination of Mr. Jenkins. The main

points were matters of argument rather than evidence. As regards requests 2 and 3, Mr. Palmer explored the various possible reasons for a submission to a minister in order to show that it did not necessarily result from the involvement of a s.23(3) body.

Mr. Jenkins stated that all such cases involve serious political issues. How far the fact that there are multiple explanations for a submission is material to the Tribunal's findings will be considered later in this Decision.

### The case for the Appellant

26. In final submissions as to s.23(1) and request 1 Mr. Palmer argued that

- (i) it was inconceivable that all the information responsive to the request was supplied directly or indirectly by a s.23(3) body.
- (ii) "relates to" must be interpreted so as to confine related information within reasonable boundaries. The fact that a project involved a s.23(3) body did not mean that everything surrounding the project related to that body. For example, the strategic overview required by stage 1 of both Checklists, A and B, would be the product of department expertise and research; it would not be linked to a s.23(3) body.
- (iii) involvement of a s.23(3) body in a project did not mean that an assessment of that project "related to" that body. The design of and preparation for a task must be distinguished from the subsequent assessment of that task by another body or person.
- (iv) the Tribunal should conduct a line – by – line examination of the various documents within the scope of request 1 and order disclosure of information which did not intrinsically relate to a s.23(3) body, even if the results were fragmentary.
- (v) Looking at information more broadly, elements within the requested documents which in themselves did not relate to a s.23(3) body must be disaggregated from those which did. It was not sufficient for the FCO to say that all the information was bound up as a single whole within the relevant documents. Mr. Palmer referred us to the Upper Tribunal's approval of such a process of severance

conducted by the FTT in *The Home Office v the Information Commissioner and Cobain* ( see [2014] UKUT 306 (AAC) at §31).

(vi) The OSJA Guidance was designed to reassure Parliament and taxpayers that public funds were not being used in ways resulting in serious human rights violations and that, if they were, ministers should be accountable. S.23 provided an absolute exemption, excluding considerations of the public interest. To add to that restriction a very broad interpretation of “relates to” would be to discount the pressing need for such reassurance and such accountability.

27. As to s.23(5), Mr. Palmer relied on similar principles to those which, he argued, should guide the Tribunal’s interpretation of “relates to” in s.23(1).

28. He further submitted that a submission to a minister pursuant to either Checklist could be required as a result of various factors or combination of factors. It said nothing about the s.23(3) body, not even that it had some involvement. Here, it was accepted by the FCO that a s.23(3) body featured in the requested information. A confirmation or denial that a ministerial submission had been made added nothing whatever to what had been disclosed about that body. The FCO should be required to say whether it held information responsive to the second and third requests.

29. For the FCO, Mr. Dunlop argued for a broad interpretation of “relates to”, which was consistent with the natural meaning of the words. He relied on the observation of the FTT in *The Cabinet Office v the Information Commissioner EA/2008/0080* §22 –  
“ . . . a statement by the Cabinet Office that it held no information falling within the original request may not say anything about a security body or its activities, but, in the very limited scope of the factual matrix created by the terms of the Question, it may create sufficient connection between the terms of the response and a security body for the purpose of subsection 5”.

as supporting the simple requirement of a connection.

30. He further cited the decisions of both the FTT and the UT in *APPGER* (*see EA/2011/0049 – 0051(FTT) at §§61, 65 and 68 and [2015] UKUT 377 (AAC)*. (UT) at §§20 and 25.)

At §20 the UT rejected a submission that the test was whether the Information had for its “focus or main focus” a security body. At §25 it stated that “relates to” was used in “a wide sense” but declined to lay down further general guidance as to its application since the words of the statute were ordinary terms readily interpreted on the facts of a particular case.

31. Mr. Dunlop argued that all the information within scope related to a security body and that, as a matter of fact, no disaggregation was possible. On the evidence, some but not all the information was supplied by a s.23(3) body.

32. As regards s.23(5), he submitted that, whilst confirmation regarding information material to requests 2 and 3 would say nothing about the extent of the involvement of the s.23(3) body, it would indicate a degree of seriousness in the sensitivity of any assistance, which would be a further statement relating to that body.

33. On behalf of the ICO Ms. John reminded the Tribunal of the need for scrutiny of the undisclosed documents in relation to both exemptions. She did not argue for any specific disaggregation within the information.

### Our Reasons for this Decision

34. On the basis of evidence which we read and heard in a closed witness statement and closed session, we find that most of the requested information was supplied by a s.23(3) body. A summary of that evidence and our conclusions is contained in the Closed Annex to this decision. We cannot more fully disclose that evidence or our reasons for this finding in this open decision. That is regrettable, since Reprieve was unable to test the very clear evidence on this issue which was received by the Tribunal.

35. We propose, therefore, to deal as fully as possible in this open decision with the alternative basis for invoking s.23(1) and s.23(5), that the information “relates to” a s.23(3) body. We do so without reference to the overlap between information being supplied by and relating to such a body. Our purpose is to demonstrate, so far as possible, why this appeal fails, simply on the “relates to” basis.
36. As to the interpretation of “relates to” a starting point is a consideration of the apparent policy behind the s.23 exemptions.
37. Parliament did not include any of the security bodies in Schedule 1 to FOIA. It clearly intended that they should remain, not simply protected from inquiries by wide – ranging exemptions, but right outside the scope of FOIA. Additionally, FOIA provides an absolute exemption as regards information held by any public authority which originates from, is passed on by or “relates to” such a body, an exemption which therefore overrides any public interest, however apparently compelling. The indications are that the legislature intended to exclude from the reach of the new regime of transparency any information with a link to the statutory functions of s.23(3) bodies, whether held by such a body or any other public authority or person falling within FOIA ss. 3 – 7. We qualify this statement by the reference to “statutory functions” in deference to the observations of Mitting J. referred to at §21 of the UT decision in *APPGER* which neatly reflect the commonsense limits to the required relationship between the information and the s.23(3) body. They exclude trivial links such as reception by such a body of general governmental directives as to purchasing flowers for work areas.
38. That being so, it is not hard to see why “relates to” must be given a broad interpretation.

39. Such an interpretation does not, in the Tribunal's view, permit the subtle distinction, persuasively advanced by Mr. Palmer, between the creation of or contribution to a project and its subsequent assessment. The project relates to any contributor and so does the assessment of that project, when performed by a person other than the contributor.
40. Furthermore, this approach to interpretation must affect any question of disaggregation. It requires a careful assessment of items of information said to be related to a s.23(3) body, to see, first whether, taken as a whole, they do, and then whether, within the body of that information, there is or are passages which can properly be regarded as quite independent of the related material. The shorter the item of information, the less likely the presence of such independent passages, though every case must be judged on its particular features. We do not consider that a "line – by – line" approach is called for here and doubt that it would be in most cases. Quite apart from the proper construction of the statute, the practical result would often be a fragmentary, incomprehensible hence valueless concoction.
41. We judge that the disaggregation approved in *Cobain* arose in most unusual circumstances, which in no way correspond to this case. In that appeal the request was for the number of orders made by the Home Secretary between specified dates, depriving an individual of British nationality on either counter – terrorism ("CT") or other national security ("NS") grounds. Other deprivation orders were made for reasons unconnected with CT or NS. The aggregate of all orders, whether on CT/NS or other grounds was in the public domain as a result of the answer to a Parliamentary Question, so that disclosure of the number of non – CT/NS orders would reveal the requested information through a simple arithmetical (or algebraic) calculation. The UT agreed with the FTT (§31) that the number of non – CT/NS orders could properly be separated

from the CT/NS orders and contrasting conclusions could be reached as to whether they related to a s.23(3) body<sup>1</sup>.

42. This amounts to no more than an acceptance that information relating exclusively to orders which are unconnected to security bodies is not information relating to security bodies. The two figures for CT/NS and non – CT/NS deprivation orders were related to each other only by an earlier decision to publicise the aggregate figure.

43. Applying these principles to the information to which request 1 applies, we have no doubt that -

(i) most of the information was supplied, directly or indirectly, by a s.23(3) body;

(ii) taken as a whole, each of the relevant documents, hence all the information, is related to a s.23(3) body.

(iii) there is no scope for disaggregation of any information because there is nothing independent of the relationship referred to in (i).

(iv) a line – by – line analysis is inappropriate and would permit no or no meaningful disaggregation.

44. We can say no more in this open decision as to our reasons for dismissing the appeal as regards s.23(1). The above conclusions are applied to the content of the relevant documents in the Closed Annex to this decision.

45. The application of s.23(5) to requests 2 and 3 involves the same consideration of the ambit of “relates to” in s.23(1), as to which we have already spelt out our approach. In the light of Mr. Palmer’s submissions it is necessary to emphasise that, when assessing

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<sup>1</sup> The UT proceeded to direct the use of the discretion as to steps to be taken, provided by s.50(4), to enable the FTT to protect the related information from disclosure by non – disclosure of the figure for non CT/NS orders.



the effect of a confirmation or denial by the FCO that it holds information within the scope of requests 2 or 3, we are not concerned with the question whether the answer might add to public information about a security body. The question is whether the information disclosed would relate to such a body, even if it tells us nothing about it. Hence, in our view, the fact that the Checklists may require a submission to the minister on account of factors other than the involvement of a s.23(3) body does not advance Reprieve's case. If a submission concerned a project which was related to a s.23(3) body, then disclosure of the fact of the submission would disclose information relating to that body, regardless of whether the submission was necessitated by that body's involvement.

46. Our finding as to the supply of the greater part of the requested information is, of course, also relevant to our decision on s.23(5).

47. We conclude that,

- (i) if information as to a decision to provide or to continue to provide counter – narcotics assistance to Pakistan related to a s.23(3) body, then
- (ii) additional information that such a decision, for whatever reason or reasons specified in Checklists A and B, involved a submission to/ briefing of a minister or,
- (iii) that such a decision did not involve a such a submission / briefing,
- (iv) would also relate to that body.

Accordingly, the FCO was entitled to NCND requests 2 and 3 since either response would provide information which related to a s.23(3) body.

48. A denial will often relate to the s.23(3) body just like a confirmation, as observed by the FTT at §22 of *The Cabinet Office v the Information Commissioner* ( see §28 above). Moreover, the use of a denial may prejudice the future use of NCND by enabling the requester to infer that such a response implies confirmation.

49. The Closed Annex adds nothing of substance to our findings in this open decision as regards requests 2 and 3 and s.23(5).

50. For these reasons and those further set out in the Closed Annex, we dismiss this appeal.

51. This is a unanimous decision.

David Farrer Q.C.

Tribunal Judge

25<sup>th</sup>: April, 2016

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17<sup>th</sup> May 2016: Decision amended under Rule 40 of the Tribunal's Procedure Rules 2009.