



Case: EA/2016/0176

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

Heard at: Field House, Breems Buildings, London EC4

Date of hearing: 30 and 31 October 2017

Date of decision: 8 May 2018

Date of promulgation: 8 May 2018

BETWEEN

ALL PARTY PARLIAMENTARY GROUP ON DRONES

Appellant

THE INFORMATION COMMISSIONER

First Respondent

THE MINISTRY OF DEFENCE

Second Respondent

**CHRIS RYAN
JUDGE**

**MARION SAUNDERS
JOHN RANDALL
MEMBERS**

In Attendance:

For the Appellant: Timothy Pitt Payne QC and Zac Sammour

For the First Respondent: Robin Hopkins

For the Second Respondent: Charles Bourne QC and Christopher Knight

DECISION

The Appeal is dismissed

REASONS

Summary

1. We have concluded that the Ministry of Defence ("the Ministry") was entitled to refuse the relevant part of a request for information submitted to it by the Appellant under the Freedom of Information Act 2000 ("FOIA") and that the Information Commissioner's Decision Notice FSS0607359 (of 14 June 2016) was accordingly correct.

Background Facts

2. On 8 January 2015 the Department of Defense of the Government of the United States of America ("DoD") issued a press release announcing its intention to return some of its military bases in Europe to the government of the countries where they were situated and to change the nature of the operations to be carried out at others. The proposed new arrangements formed part of a review by the US Government of a European Infrastructure Consolidation ("the Review") and were said to involve the following changes within the UK:
 - a. Ending operations at RAF Mildenhall, RAF Alconbury and RAF Molesworth and returning each site to the UK government;
 - b. The stationing of two squadrons of a new aircraft, the F-35, at RAF Lakenheath from 2020; and
 - c. The transfer to RAF Croughton of personnel from sites that were to be closed.
3. Substantially the same information was communicated to the House of Commons in an announcement by the Secretary of State on the same day.
4. A separate release by DoD on 14 January provided additional detail about the impact of the proposals on RAF Croughton. It included this passage:

" .. . intelligence and support elements located at RAF Alconbury and RAF Molesworth will consolidate. This will be an investment into a new intelligence complex at RAF Croughton to create efficiencies in operational mission support."

And later in the same document:

"The RAF Croughton site ensures continuation of the strong US intelligence relationship with the United Kingdom and will result in an exponential increase in U.S-NATO intelligence efforts."

5. On 7 January 2015, the day preceding the 8 January 2015 press release, the US Government had delivered to the UK Government a Host Nation Notification ("the HNN") setting out the changes proposed. On the same day a telephone conversation had taken place between the Secretary of State at the Ministry and the US Secretary of Defense. A memorandum recording the conversation had been prepared by an official at the Ministry ("the Memorandum").

6. The US Government had applied a protective marking to the HNN (SECRET REL US/GBR) indicating that it deemed the information within the document to be sensitive and to be viewed only by US and UK officials.

The Appellant's request for information and the Ministry's response to it

7. On 24 March 2015 Tom Watson M.P., the Honorary President of the All Party Parliamentary Group on Drones (" APPGOD") submitted a request for information to the Ministry of Defence ("MOD") in the following terms:

"(i) the dates of consultation made with the Department of Defence in connection with the European Infrastructure Consolidated Review and RAF Croughton taking place over the last year;

(ii) the date of any Host Nation Notification send by the US in connection with use of RAF Croughton in the last year;

(iii) the date of any approval, permission or other response sent in connection with RAF Croughton in the last year;

(iv) a copy of those Host Nation Notifications and responses requested in paragraphs (ii) and (iii).

8. The letter was treated as a request for information under the FOIA section 1. That provision requires a public authority, such as the Ministry, to provide information on request unless certain circumstances arise or the nature of the requested information brings it within the scope of one or more of a number of exemptions create.

9. The Ministry provided the dates of consultations under part (i) of the information request. It explained that these had included a briefing of the Vice Chief of Defence Staff by the US Defense Attaché on 19 November 2014. As to parts (ii) and (iii) the Ministry explained that the HNN had been provided in a letter dated 7 January 2015 and that the UK Government's approval in response to it was communicated on the same day. (It is accepted by all parties that the conversation recorded in the Memorandum constituted the UK Government's "response" referred to in the information request). However, the Ministry refused to disclose either the HNN or the Memorandum. It said that the information was exempt under FOIA section 27(1)(a) and 27(2).

10. The relevant parts of FOIA section 27 read:

"(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice -

(a) relations between the United Kingdom and any other state,

(b) ...

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

APPGOD's complaint to the Information Commissioner about the response to its information request

11. On 30 November 2015 APPGOD complained to the Information Commissioner that the Ministry's refusal to provide the information sought in part (iv) of the information request did not comply with the terms of FOIA. On receiving such a complaint the Information Commissioner is required, under FOIA section 50, to investigate and issue a Decision Notice recording her decision on the complaint.
12. During the course of the investigation the Information Commissioner's Case Officer reported to APPGOD that the Ministry was confident that if APPGOD would be content to see just the part of the HNN that referred to RAF Croughton, then disclosure could be made, despite the high sensitivity of a diplomatic communication of this nature. The suggestion was not the Case Officer's own, but arose from communications with the Ministry. However, it subsequently transpired that, following further consideration, the proposed compromise solution would not be acceptable to the Ministry.
13. After completing her investigation the Information Commissioner issued Decision Notice FS50607359 on 14 June 2016. She decided as follows:
 - a. The information request should be interpreted as covering the entirety of the HNN, (even though it only contained limited reference to RAF Croughton), and the entirety of the Memorandum.
 - b. The information requested was exempt from the obligation of disclosure because disclosure would harm the UK's relations with the USA. The exemption in FOIA section 27(1)(a) was therefore engaged. The Information Commissioner considered that the HNN was classified by the USA at the time as "secret" and its content was regarded as sensitive. The Memorandum was also regarded by the USA as sensitive because it recorded a confidential discussion of matters covered by the HNN.
 - c. The public interest in maintaining the exemption outweighed the public interest in disclosure. There was a public interest in the disclosure of information regarding the proposed expansion of RAF Croughton (particularly if, as APPGOD feared, it reflected an expansion of US intelligence operations from within the UK, including the possible use of drones). However, the public interest in maintaining a strong and effective relationship with the USA outweighed those considerations, important though they were.
14. Having decided that the withheld information was covered by the exemption under FOIA section 27(1)(a), the Information Commissioner decided that she did not need to consider whether it might also have been exempt under section 27(2).

The Appeal to this Tribunal

15. On 13 July 2016 APPGOD appealed the Information Commissioner's decision to this Tribunal.
16. Appeals to this Tribunal are governed by FOIA section 58. Under that section we are required to consider whether a Decision Notice issued by the Information Commissioner is in

accordance with the law. We may also consider whether, to the extent that the Decision Notice involved an exercise of discretion by the Information Commissioner, she ought to have exercised the discretion differently. We may, in the process, review any finding of fact on which the Decision Notice was based.

17. Frequently we find ourselves making our decision on the basis of evidence that is more extensive than that submitted to the Information Commissioner. That is the case on this Appeal.
18. APPGOD's Grounds of Appeal raised the argument, for the first time, that the requested information should be regarded as environmental information because it was (in whole or substantial part) about the proposed expansion of a military base, which would have substantial environmental effects, both as to construction and, more importantly, the ongoing impact once built. The Information Commissioner should have made her decision on the basis of the freedom of information regime provided by the Environmental Information Regulations 2004 ("EIR") rather than the FOIA.
19. The significance of characterising the relevant information as environmental or not is that the EIR provides a regime that is more favourable to those seeking information than FOIA. First, the test for engaging EIR regulation 12(5)(a) is that disclosure "would" adversely affect international relations, whereas FOIA section 27 is capable of applying even if the prejudice to relations with another state would only be "likely" to result from disclosure. Secondly, EIR provides (regulation 12(2)) that a presumption should be made in favour of disclosure when assessing the possible application of an exception. Thirdly, any provision having the effect of preventing the disclosure of environmental information to the public should be given a restrictive interpretation. That arises from recital 16 to the EU Directive (2003/4/EC), which the EIR is intended to implement.
20. We note, in passing, that the Information Commissioner made it clear in the Decision Notice that, in her opinion, the adverse effect on relations with the USA "would" result from disclosure. She applied the more restrictive of the two tests available to her: the one identical to that provided under regulation 12(5)(a). The Grounds of Appeal asserted that she had erred in reaching that conclusion because the risk of prejudice did not attain the statutory test of likelihood. It was also asserted that the Information Commissioner had erred in her application of the public interest test by giving insufficient weight to the public interest in disclosure of information which would serve to create some form of meaningful transparency and accountability around the Government's approach to drone usage.
21. In a written Response to the Appeal filed by the Information Commissioner she conceded that the EIR was the correct regime under which she and the Ministry should have assessed the information request. However, she maintained her position that, even if the EIR had applied, she had been correct to conclude that the Ministry had been entitled to refuse disclosure.
22. The Information Commissioner also changed her position at this stage on the scope of the information request. She now considered, on reflection, that all of the information in the HNN was in scope but only part of the information in the Memorandum was.
23. The Ministry was added as a Respondent to the Appeal and filed its own Response. It adopted the position that the EIR did not apply to the withheld information and that the Information Commissioner had therefore been right to base her decision on FOIA. The Ministry's secondary position was that, even if the EIR regime did apply, the exception under EIR regulation 12(5)(a)

was engaged and the public interest in maintaining it outweighed the public interest in disclosure.

24. A direction was made by the Tribunal Registrar that the disputed information should be made available to us on a closed basis, pursuant to rule 14(6) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009. A direction was also given that certain passages of the witness statements filed by the Ministry were to be treated as closed material. Those parts of the written materials were dealt with on a closed basis during the hearing of the Appeal.
25. For various different reasons the hearing itself was adjourned from time to time but ultimately came on for hearing on 30 and 31 October 2017 when APPGOD was represented by Timothy Pitt Payne QC and Zac Sammour, the Information Commissioner by Robin Hopkins and the Ministry by Charles Bourne QC and Christopher Knight. We are grateful to all the advocates for their assistance, particularly in agreeing to present closing submissions in writing, (in the circumstances described in the postscript to this decision) and for the balance and clarity of those submissions.

The evidence

26. The evidence filed by the Ministry consisted of Witness statements signed by Patrick Reilly the Head of the North American Department of the Foreign and Commonwealth Office, and by Richard Berthon, the Director of Strategic Programmes for the Ministry.
27. Mr Reilly has been a member of the Diplomatic Service since 1995 and has considerable experience in handling confidential exchanges between the UK and other countries. He explained the importance of maintaining trust and confidence both generally and with respect to the USA, with whom the UK had a particularly close relationship facilitating close cooperation on defence matters, including the sharing of information. In those circumstances the disclosure of any information contrary to the wishes or expectations of the USA inevitably caused a risk of damage to the relationship. Mr Reilly made specific reference to the damage caused when the High Court ordered the release of a seven paragraph summary of a US intelligence report concerning a former Guantanamo Bay detainee, Binyam Mohamed, notwithstanding a claim for public interest immunity on the basis that publication would be damaging to national security. The decision prompted a review of intelligence sharing arrangements, the withholding of some material and greater caution by the US in the provision of information. Although Mr Reilly assessed the risk likely to result from the disclosure of the withheld information on this case to be at the lower end of a spectrum, in which the Binyam Mohamed case was at the upper end, he nevertheless thought that the risk was real and that there was a very strong public interest in avoiding it by respecting the importance that the USA places on the confidentiality of information on defence asset locations.
28. Mr Berthon had also acquired considerable experience in defence policy and operations, including during a three year posting to the British Embassy in Washington as Counsellor for Defence Policy within the British Defence Staff. He explained the process by which the Ministry considered the information request, which involved the British Defence Staff in Washington liaising with their counterparts in the DoD. They took the view that the USA should not be asked whether it would agree to relax the protection implicit in the security marking applied to the HNN, because this would itself cause harm to the bilateral relationship

at a sensitive moment in time. They also considered that there was little or no chance of a response being received within the legal timeframes set out in FOIA.

29. The possibility of seeking a view from the US Government was considered again after APPGOD had complained to the Information Commissioner, on the basis that some parts of the withheld information might, by then, have become less sensitive in light of the amount of information that had become available in the public domain in the meantime. The DoD was approached. Its personnel indicated that several elements of information within the HNN remained classified and appeared still to be sensitive. Disclosure could not be sanctioned, therefore, without a full inter-agency sensitivity review being undertaken. Such a review would be complex and time consuming. If pursued it would absorb resources which would not then be available to deliver other aspects of the shared bilateral agenda. The Ministry decided, on that basis, not to ask the DoD to undertake a review.
30. Although the DoD had no view on the possible release of the Memorandum (it is, of course, a document created by the Ministry and not DoD and was not therefore capable of having a US protective marking applied to it) Mr Berthon reported that the Ministry decided that its disclosure could inadvertently disclose information that the USA regarded as sensitive. It should therefore be treated in the same way as the HNN for the purpose of responding to the information request.
31. Mr Berthon's witness statement went on to provide argument, rather than evidence, designed to support the Ministry's argument that only parts of the Memorandum fell within the scope of the information request and to explain why he believed that there was strong public interest in not ordering disclosure.
32. In July 2017 the Ministry filed a further witness statement, which had been signed by Iain King. At the time he was the Defence Counsellor based in Washington responsible for policy and nuclear liaison with the USA, having replaced Mr Berthon. He stated that he had read Mr Berthon's witness statement and adopted the evidence set out in it as his own.
33. Both Mr Reilly and Mr King attended the hearing and answered questions (in open and closed sessions) put to them by the parties' advocates and the panel.

The issues on the Appeal

34. The issues we are required to address are the following:
 - i. Does all or part of each of the HNN and the Memorandum fall within the scope of the information request?
 - ii. Should the request for disclosure of information be assessed under the EIR or the FOIA?
 - iii. Is either FOIA section 27 or EIR regulation 12(5)(a) (depending on the outcome of our consideration of issue ii.) engaged in respect of some or all of the information falling within the scope of the information request?
 - iv. If so, does the public interest in maintaining the relevant exemption or exception outweigh the public interest in disclosure?

35. We will deal with the arguments submitted, and the decision we have reached, in respect of each issue in the same order.

Issue i: Scope of the information request

Arguments in respect of the HNN

36. The Information Commissioner and APPGOD argue that the whole of the HNN is in scope, whereas the Ministry argues that only part of it is.

37. The Information Commissioner argued that, properly construed, the information request encompassed the content of an HNN that referred to RAF Croughton: it was not to be interpreted as seeking only those parts of any such document that referred to RAF Croughton. APPGOD (which, of course, has not seen the document) supported the Information Commissioner on this issue and invited us to find that the HNN falls within scope in its entirety, because the language of the information request is wide and should not be subjected to an overly strict interpretation. APPGOD pointed out that the witnesses had approached the scope of the information request in wide terms and the Ministry had not suggested a narrow interpretation during the Information Commissioner's investigation.

38. The Ministry argued that the proper construction was that APPGOD's interest was in the HNN as it related to RAF Croughton and that the cross reference from part (iv) of the information request to part (ii) supports that interpretation.

Decision in respect of the HNN

39. We believe that we should concentrate on the language of the information request, rather than on how its scope may have been approached during previous stages of the legal processes resulting from its rejection by the Ministry. We think that, while it would not be appropriate to approach an information request as though it were a professionally drafted deed or contract, it is clear that in this case it had been drafted with some care by those having familiarity with the process of obtaining evidence from government bodies, including through the use of Parliamentary questions. Against that background, we think that it is appropriate to construe part (iv) as cross referring back to part (ii). Part two identifies the area of interest as "*any Host Nation Notification sent by the US in connection with use of RAF Croughton*". Part (iv) then asks for a copy of any such notification. Read together the language used should not be interpreted as a request for any HNN, to the extent that it deals with, or refers to, RAF Croughton. Its correct meaning is that the fact that an HNN is connected with RAF Croughton brings the HNN within the scope of the information request.

40. We therefore conclude that the whole of the HNN falls within the scope of the information request.

Arguments in respect of the Memorandum

41. In the case of the Memorandum, the Information Commissioner's modified position was that only parts fell within scope. The Ministry supported that view but APPGOD argued to the contrary.

42. The Ministry argued that the Information Commissioner had adopted a contradictory position in arguing that all of the HNN, but only part of the Memorandum, fell within scope. It argued that the same arguments in favour of a limited scope should be applied to both documents. The Information Commissioner justified the difference in approach to the two documents by arguing that the Memorandum, as the "response" to the HNN, was only within scope to the extent that it responded to the HNN. It was not right to treat, as being included, any other information that happened to be contained in the Memorandum.
43. APPGOD relied on the same arguments that it presented in respect of the HNN. It said that the proper construction of the information request was that it asked for all the information contained in both of the documents referred to.

Decision in respect of the Memorandum

44. We have had the benefit of considering the content of the Memorandum. Mr Berthon's witness statement provided the following open indication as to its content:

"23. The first paragraphs ... were considered to be personal information as the conversation began with a discussion of personal circumstances and pleasantries that do not have any bearing on, or relation to, the HNN.

24. The final paragraph relates to a further issue, which is again unrelated to the HNN, and would not inform the public interest in relation to US military basing."

Our own review of the document satisfies us that this was an accurate description.

45. It follows that the Memorandum records a conversation that was much more than just a response to the HNN. The use of the word "response" justifies a more restrictive interpretation than in the case of the HNN. The information request asked for information about the UK Government's response to the HNN. The Memorandum contains the only recorded information on such a response. In our view it is only in scope to the extent that it did so.

Conclusion on Issue i.

46. For the reasons given, we have decided that the whole of the HNN, but only those parts of the Memorandum that are not covered by the summary description set out in paragraph 44 above, fall within the scope of the information request. It is therefore only the first and third paragraphs of the Memorandum that are within scope.
47. We would add, in passing, that had we decided that the information request had a more extended meaning, it would have included information in respect of which there would have been a strong argument for redaction if disclosure was to be ordered. The additional information would have no value to the public interest factors in favour of disclosure which we come to review under issue iv. below.

Issue ii: The appropriate regime

Arguments

48. All parties based their arguments on the language of the definition of environmental information set out in EIR regulation 2. In relevant part it reads:

“(1) In these Regulations:

...

'environmental information' has the same meaning as in Article 2(1) of the Directive, namely any information in written, visual, aural, electronic or any other material form on-

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among those elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting, or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements ...

49. There was agreement between the parties as to what the "measure" was that we should take into account for the purposes of sub-paragraph (c) of the definition. It was the Review and/ or the changes that it proposed (in particular the closure of some bases and the expansion of RAF Croughton.) APPGOD argued that those changes were likely to affect the elements and factors referred to in sub-paragraphs (a) and (b). The Information Commissioner supported that part of APPGOD's case and stressed the impact of the proposed changes on the landscape (particularly in respect of any construction work undertaken at RAF Croughton), as well as noise and emission levels in the vicinity of each base affected by the Review. The Ministry accepted that implementing the planned changes would affect elements of the environment and that there was undoubtedly a connection between the withheld information and those factors. However, it argued, there was not sufficient connection between them to enable it to be said that the withheld information was "on" the factors likely to affect the environment. APPGOD, supported by the Information Commissioner, countered that approach by arguing that the withheld information formed an essential part of the process by which the changes referred to would be put into effect.

50. It was accepted by all parties that the definition had been authoritatively considered by the Court of Appeal in *Department for Business, Energy and Industrial Strategy v Henney* [2017] EWCA Civ 844 ("*Henney*"). The information sought in that case was a Project Assessment Review of the progress made at the relevant time in a project to introduce "smart" meters for domestic use, in particular the communications and data control aspects of that project. It had been common ground between the parties that the smart meter programme was likely to affect the relevant environmental elements (part (a) of the definition) as well as the factors likely to affect them (part (b)). The area of dispute was whether the Project Assessment Review (as a "measure" for the purpose of part (c)) constituted information on the programme as a whole and not merely on its communications and data aspect.

Our decision on the applicable regime

51. The Court of Appeal in *Henney*, while criticising a particular form of words adopted by the Upper Tribunal, upheld its decision that the Project Assessment Review did fall within the scope of EIR. It was information "on" the Smart Meter Programme. The programme itself was undoubtedly a measure that was likely to affect the elements and factors set out in subparagraphs (a) and (b) of regulation 2(1) and the Project Assessment Review was integral to it, viewed as a whole.
52. The facts of *Henney* were clearly different from those of the present case. There is no issue here of an intermediate document through which the withheld information may be linked to environmental subject matter. However, in the course of reaching its decision on the facts before it, the Court of Appeal made a number of statements of general principle, by which we should be guided. Our summary of them is as follows:
- a. EIR is intended to give effect to Directive 2003/4/EC and must be interpreted, as far as possible, in the light of the language and purpose of that document.
 - b. The Directive itself, and therefore EIR also, should be interpreted by reference to the 1998 UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice on Environmental Matters - the Aarhus Convention.
 - c. The Aarhus Convention is intended to ensure that citizens are able to access information that enables them to express any concerns they may have on environmental issues and to participate in decision making on them.
 - d. The definition in EIR regulation 2(1) should be interpreted in accordance with normal principles of construction, which may include an assessment of the wider context in which the requested information was created. That wider context may include whether access to the information would enable the public to be informed about, or to participate in, decision making on its subject matter, as required by the Aarhus Convention.
 - e. The adoption of a purposive approach to construction does not lead inevitably to a broadening of the meaning of words under consideration; it could lead to a provision being interpreted more restrictively than its literal meaning, if that was necessary to give effect to the legislative purpose of the provision under consideration.
 - f. Accordingly, the broad language of regulation 2(1) did not mean that the right of access should be treated as giving unlimited access to information, which only had a minimal connection with environmental subject matter. That category of information was too remote from, or incidental to, relevant subject matter to be properly construed as being "on" it.
53. In light of that guidance, we approach the possible inclusion of the HNN and the Memorandum within the definition of "*environmental information*" by considering whether disclosure would achieve the purpose of the Aarhus Convention by providing information that would make the public better informed about, and better able to contribute to decision making on, the relevant environmental issues. We conclude that it would not. We have reached that decision based on a careful study of each document. The HNN reports the outcome of the Review in broad policy

terms only. A reader of the HNN could speculate on changes on the ground that might follow (as he or she could from the public statements made at the time) but the decisions, at the level of generality in which they are reported in the HNN, fall clearly within a category of information that is too remote from any of the elements or factors set out in sub-paragraphs (a) or (b) of the definition. Disclosure would not provide the public with any information, beyond what was already in the public domain, that would enable it to address any environmental issue.

54. The Memorandum, as a response to the HNN, clearly does not extend the scope of the content of that document.
55. We conclude, therefore, that neither of the documents comprising the withheld information falls within the scope of the definition of "environmental information" and that we should therefore proceed to determine this Appeal under the law set out in FOIA and not EIR.

Issue iii: Engagement of FOIA section 27

56. In light of our decision in respect of Issue ii., the test (under FOIA section 27) which we have to apply is whether disclosure "*would, or would be likely to, prejudice ... relations between the United Kingdom*" and the USA.

Arguments

57. The Information Commissioner argued that the threshold for engaging the exemption was met in this case on the basis that the relevant prejudice "*would*" occur, as she had determined in the Decision Notice. (She was criticised for having reached that conclusion notwithstanding that the Ministry itself had made its decision to reject the information request on the basis that prejudice would only "*be likely*" to occur. We see no merit in the criticism - it is open to the Information Commissioner to decide, following her investigation of the circumstances surrounding the information request, that the stricter of the two tests had been satisfied.)
58. It was further argued on the Information Commissioner's behalf that the level of harm that would follow from disclosure did not have to be any higher than an impact that required a particular damage limitation response to contain or limit damage. The argument was based on a First-tier Tribunal decision (*Campaign Against the Arms Trade v Information Commissioner and Ministry of Defence* - EA/2007/0040) which is not a binding precedent. However, it strikes us as a sensible statement as to the level of risk appropriate for engaging the exemption. The evidence of Mr Berthon, adopted by Mr King and expanded during his cross examination, was said by the Information Commissioner to fully support the conclusion reached in the Decision Notice, to the effect that the identified test for establishing prejudice to relations had been satisfied.
59. The Ministry supported the Information Commissioner's suggested definition of the test for determining prejudice. It relied on another First-tier Tribunal decision in support - *Gilbey v Information Commissioner & the Foreign and Commonwealth Office* (EA/2007/0071) quoting paragraph 23, which included this passage:

" ... prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary."

60. As to the evidence, the Ministry invited us to accept that in matters of national security, defence and international relations the relevant public authority, speaking through the witnesses who it calls to give evidence, have much greater expertise than either the Information Commissioner or this Tribunal in anticipating and assessing the likely reaction of a foreign government to an order for disclosure. On this point it relied upon the authority of the Upper Tribunal decision in *APPGER v Information Commissioner & Ministry of Defence* [2011] UKUT 153 (AAC) and (in a different, but not unrelated context) the Supreme Court decision in *R v Secretary of State for the Home Department* [2014] UKSC 60.

61. The Ministry also referred us to the following passage in the Upper Tribunal decision in *Savic v Information Commissioner, Attorney General's Office and Cabinet Office* [2016] UKUT 535 (AAC):

" ... [it] *must be remembered that what is relevant is an assessment of those reactions [of the relevant foreign state] rather than the validity of the reasons for them looked at through 'English or any other eyes'*"

62. We were also invited to take note that *Savic* was a case that concerned the risk to intelligence sharing between the UK and the USA and that the decision placed emphasis on the long standing attitude of the USA to the release of material that it regards as confidential, particularly in the area of military operations. The evidence of the witnesses in this case was said to be consistent with the conclusions reached by the Upper Tribunal in *Savic*.

63. The fact that Mr Reilly assessed the risk in this case as rather lower down the spectrum than other cases did not, it was argued, undermine the Ministry's case. His assessment, viewed overall and as supported by Mr King during cross examination, was that, in the context of the special circumstances existing between the UK and the USA, the risk of disruption to relations in the crucial area of military cooperation was sufficiently serious to amount to an adverse effect sufficient to engage the exemption.

64. APPGOD argued that the characterising of the risk as being at the lower end of the risk spectrum suggested that not even the "*would be likely*" to prejudice test would be satisfied in this case. It also suggested that the case for saying that the exemption was engaged was weakened by the indication, given during the Information Commissioner's investigation, that partial disclosure might be given and by the fact that the US Government would be aware that a freedom of information regime exists in the USA, with the result that it might be expected to adopt a more understanding attitude than the governments of other countries that did not have such a regime.

65. The Ministry was also criticised by APPGOD for having failed to ensure that it fully understood the position of the USA, in that it did not make any enquiry before refusing the information request and, when re-visiting the issue during the Information Commissioner's investigation, it opted not to ask the DoD to undertake a full-agency review in order to see if, given the passage of time, approval for disclosure might be given. These facts, it was suggested, point to the adoption of an impermissible "blanket approach" to the withholding of information.

Our decision on whether the exemption was engaged

66. In our view the exemption was engaged. Disclosure would cause the harm that the exemption is intended to avoid. The evidence, which we were able to test during closed sessions, clearly

showed that the DoD would have disapproved of disclosure and that the disapproval would have been reflected in an adjustment in its attitude towards the UK. That adjustment would have been to the detriment of the UK even though any resulting sanction would probably not be at the level imposed after the Binyam Mohamed disclosure. Neither we nor the witnesses are able to be specific on the precise nature of such detriment, but we are satisfied that it would be of sufficient severity to cause the exemption to be engaged.

67. As we have indicated previously, we do not think that it is relevant to our assessment on this point that the Ministry suggested at one stage that a degree of disclosure might be acceptable. Our decision is based on the evidence we received, viewed overall, and is not undermined by the apparent perception of one individual, at a particular stage of the process, that a compromise was worth exploring.
68. Nor do we find that the Ministry's decision not to pursue a formal request for an inter-departmental review by the DoD undermines its case to any significant extent. We accept the evidence that those with a close knowledge of day to day communications between the US and UK Governments concluded at the time that the making of such a request would itself have disrupted the relationship in terms of both the tone of communications and the selection of matters that should be given priority. The strategy adopted by the UK Government at that stage demonstrates the delicacy of the relationship and undermines any suggestion that the UK Government could have mollified any adverse reaction to disclosure by an appropriate diplomatic communication.
69. Having determined that disclosure "would" cause detriment it is obviously not necessary to consider the lower test of "would be likely". The result on this point would therefore have been the same even if we were found to have been wrong in our assessment of the regime that applies.

Issue iv: Public interest test

Argument

70. APPGOD accepted that the nature and severity of any adverse reaction to disclosure was relevant when considering the public interest in maintaining the exemption. However, it argued that the impact had been overstated by the Ministry and that, when considering this part of the case, we should take account of the UK Government's approach to moderating the impact of any disclosure by an appropriate diplomatic response and its failure to request an inter-departmental review (see paragraphs 63 and 65 above). Those decisions, it argued, meant that any prejudice has been "self-generated" by the Government.
71. We were urged by APPGOD to set against those factors four issues that demonstrated the public interest in disclosure. First, it was said, disclosure would address public concerns that the proposed expansion of RAF Croughton as an intelligence hub involved its use, or an extension of its current use, as a base from which the US Government controlled flying missions conducted by drones. Secondly, public interest arose over possible expansion of US intelligence activities, on a more general level. Thirdly, the environmental issues surrounding construction work at RAF Croughton and reduced or altered flying from other bases, supported disclosure. Even if the HNN or the Memorandum said little directly about environmental impact they might be helpful and informative for those (such as APPGOD itself) who had already amassed a body of significant expertise and knowledge on the subject. The fourth and

final factor was that there was a public interest in the disclosure of information that would cast light on the process that was followed prior to the announcement of the outcome of the Review. It appeared, APPGOD argued, that the process had involved minimal consultation between the DoD and the UK Government, as the responses given to paragraph (i) of the information request demonstrated. This was of particular concern, given that, on the US side, the planned changes had apparently reached the stage, in March 2014, of having been planned in sufficient detail to have been subjected to budgetary approval processes.

Our decision on the public interest balance

72. We, of course, have had the advantage of inspecting the withheld information. We therefore know how much light its disclosure would in fact cast on the first three areas of public interest to which APPGOD refers. APPGOD has itself been forced to rely on a small amount of media speculation to support its case. We can say, in open and without disclosing the content of the withheld information, that it neither says anything on any of those issues, nor contains any suggestion that they may or may not have featured in any communications between the two governments before or after the HNN was delivered. Disclosure would neither feed nor undermine the speculation.
73. In the case of the fourth issue - inter-governmental consultations - we can see that both the presence and absence of anything relevant in the withheld information could be said to be relevant on this issue. We say nothing as to what may or may not have been written, but consider that as disclosure would serve a public interest in either case, some weight should be attributed to this factor. However, it is relatively slight and comes nowhere near equalling the strong public interest in maintaining the exemption, for the reasons we have given when addressing the engagement of the exemption.
74. In the circumstances we are satisfied that the public interest in maintaining the exemption heavily outweighs any public interest in disclosure.

Conclusion

75. In light of our findings on the individual issues considered above, we have concluded that the Information Commissioner was right to decide that the Ministry had been entitled to refuse APPGOD's information request, although we reach that decision by a slightly different route because of the different way in which the issues were addressed before us.
76. Our conclusion is unanimous

Postscript

77. We have to add that one part of the preparations for the hearing of this Appeal was very unsatisfactory. Prior to the hearing, directions had been made by the Tribunal Registrar about the extent to which written materials were to be treated on a "closed" basis. We were provided with a closed bundle, which was supposed to reflect those directions. It did not. A large part of the first day of the scheduled two-day hearing was spent re-visiting the issue. We found ourselves with no option but to re-start from the beginning and reconsider each part of each document for which protection was sought. This occupied the whole of the first morning. Over an extended lunch break, and with the assistance of junior counsel, a new closed bundle was finalised and the process then explained in open hearing to APPGOD and its legal team (who

had, of course, been excluded from the hearing room while the review was carried out). The result was that a small amount of material was made available to the Appellant, beyond that which it had seen previously, albeit that some parts of that additional material had been redacted, for reasons that were explained to the Appellant's representatives at the time.

78. The Ministry accepted full responsibility for what had occurred. There was a suggestion that the problems may have resulted from a change of personnel at a crucial point in time. In those circumstances it is likely, in our experience, that responsibility would lie as much with the file management system created and supposedly monitored by more senior management, than with any individual case worker operating within the confines of that system. We are therefore happy to leave responsibility at organisational level, without seeking to pillory any individual or individuals. But we would be remiss if we did not record the fact that a significant number of people, several of whom would have been charging an appropriate level of fees for their attendance, were left wasting their time for several hours. And that the delayed start meant that there was time during the hearing only to deal with the witness' evidence, with closing submissions presented later in written form. The panel was therefore left to make its determination on the basis of those written submissions, which though thorough and clearly argued, had to be considered sometime after the hearing and without the facility of questioning the advocates or debating with them any points of interest or concern.

Chris Ryan
Judge
8 May 2018