



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

**Appeal No: EA/2018/0119**

**ON APPEAL FROM:**

Information Commissioner's Decision Notice No: FS50703832

Dated: 17th May 2018

**Mr Faisal Qureshi**

**Appellant**

**and**

**Information Commissioner**

**Respondent**

**and**

**Foreign and Commonwealth Office**

**2<sup>nd</sup> Respondent**

**Heard at Field House**

**Date of Hearing: 14<sup>th</sup> and 15<sup>th</sup> May 2019**

**Before**

**Miss Fiona Henderson**

**Judge**

**and**

**Ms Suzanne Cosgrave**

**and**

**Ms Marion Saunders**

**Tribunal Members**

**Date of Decision:** 25 July 2019

**Date of Promulgation:** 10 October 2019

**Attendances:**

For the Appellant: Mr Qureshi appeared in person by telephone on 14th May and by video-link on 15th May

For the Respondent: Mr Robin Hopkins (Counsel)

For the 2nd Respondent Ms Naina Patel (Counsel)

**Subject matter:**

The Freedom of Information Act 2000 s21, 23 and 27

**Cases:**

*Birkett v DEFRA [20117 EWCA Civ1606*

*IPSA v ICO and Leapman [20157AACR 37*

*ICO v Malnick and Another GIAI44712017*

*APPGER v IC and FCO [20157 UKUT 0377 (AAC)*

*Corderoy and Ahmed v Ie, AGO, Cabinet Office [20177 UKUT 495 (AAC)*

*Campaign against the arms trade v IC and MoD (EAI200710040)*

*APPGER v IC and MOD (GIA 150-1522011)*

*FCO v IC and Plowden [20137 UKUT 0275*

*NHS England v IC and Dean [20197 UKUT 145 AAC*

**DECISION**

**REASONS**

**Introduction**

1. This is an appeal against the Commissioner's decision notice FS50703832 dated 17th May 2018 which held that the Foreign and Commonwealth Office (FCO) correctly relied upon s27(1)(a) FOIA to withhold the disputed information and this exemption also provides a basis to withhold the information to which s27(2) FOIA was applied.
2. In April 1986 an attempt was made to bomb an EI Al flight leaving London Heathrow and going to Tel Aviv, Israel. Mr Nezar Hindawi was convicted in an English Court in October 1986. The facts were that he had tricked his pregnant fiancée into taking the bomb on board the aeroplane. Subsequently it appeared that the attempt was connected to the Syrian government. The UK later broke off diplomatic relations with the then Syrian regime and had diplomatic support provided by Australia who hosted a British interests section.

**The request for information**

3. On 7th October 2014 the Appellant made the following request to the FCO:  
*"I am looking for documents concerning the attempted bombing of an El Al Flight, that was to fly out from Heathrow Airport, Uk to Tel Aviv Israel on the 17th April 1986 "*. The Appellant was provided with a substantive response to his request on 23rd March 2017. The FCO concluded that most of the information they had identified could be disclosed with redactions (some 338 pages<sup>1</sup>) but that some documents were withheld in their entirety. The exemptions relied upon were:
  - S23 FOIA (security bodies);
  - s27(1)(a) FOIA (prejudice to international relations);
  - s27(2) FOIA (confidential information received from a state) and
  - s40 FOIA (personal data).

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<sup>1</sup> The Tribunal has not been provided with this material and it was not suggested by any party that they needed sight of this information in order to determine the issues raised upon appeal

4. The Appellant asked for an internal review on 25th March 2017 challenging reliance upon s 27(1)a and 27(2) FOIA. He provided copies of documents that he had received from the US State department in response to a freedom of information request to them<sup>2</sup>. He had cross referenced these with the information received and believed that the FCO had withheld documents relating to communications between Her Majesty's Government (HMG) and the Jordanian and French Governments concerning their doubts about who was responsible for the bombing attempt. The internal review dated 28th September 2017 upheld the original decision.
5. The disputed information is also found in "historical records" as defined in s62(1) of FOIA. By reason of its dual status as historical records and public records the Secretary of State for Digital Culture, Media and Sport was consulted in relation to any document where s27 was relied upon. This did not take place until after the Appellant's request had been refused but has now been done and has not affected the decision to withhold information.<sup>3</sup>

### **The complaint to the Information Commissioner**

6. The Appellant complained to the Commissioner on 3rd October 2017. The Appellant agreed to limit the scope of his request to reliance upon s 27(1)(a) and 27(2) FOIA. The Commissioner investigated the case prior to issuing her decision and received copies of the withheld information. Although the FCO sent documents 6 and 7 to the ICO they did not make submissions relating to the contents. Additionally, the FCO made submissions relating to documents 8 and 9 but no copy was in fact provided to the ICO as the FCO had decided that in their view it was not in scope. As such the Decision Notice does not apply to documents 6, 7, 8 and 9 which are before the Tribunal. The Commissioner's decision upheld the FCO position in relation to documents 1, 2, 3, 4 and 5 but also found that the FCO had breached s17(3) FOIA in failing to complete its public interest test considerations within a reasonable timeframe<sup>4</sup>. During the investigation the information that was then identified as disputed information was provided to the Commissioner. It has become apparent during the process of this appeal that additional information has now been identified as in scope, consequently there is no dispute between the parties that whatever the outcome of this appeal, the Tribunal will need to issue a substituted decision notice.

### **The appeal to the Tribunal**

7. The appellant appealed to the Tribunal in a notice dated 14th June 2018<sup>5</sup>. In his grounds of appeal he argued that the application of s27(1)(a) and 27(2)FOIA to the withheld material was excessive as the documents released did not give a complete historical picture and were inconsistent with the US State Department FOI disclosures.

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<sup>2</sup> Received in 2015 and 2016 i.e. after the date of the original request but before the substantive response from FCO.

<sup>3</sup> P69G

<sup>4</sup> This is not the subject of this appeal and not considered further in this decision.

<sup>5</sup> P12 OB

8. The Commissioner initially opposed the appeal relying upon her decision notice<sup>6</sup>, however, following receipt of the 2nd Respondent's response which indicated that new information was now considered to be in scope the Commissioner set out her provisional view in relation to each document and issue but said that she would wait to hear the evidence on the point before reaching a final position<sup>7</sup>.
9. The 2<sup>nd</sup> Respondent was joined by the Registrar by case management direction dated 25<sup>th</sup> July 2018. They set out their response dated 18th November 2018.<sup>8</sup> They continued to oppose the Appeal but indicated that:
  - i. There were 9 documents which had been withheld in part or entirety by the FCO because due to the parallel review under the Public Records Act provisions they had now identified other documents in scope<sup>9</sup>,
  - ii. They continued to rely upon s23 FOIA in the first instance where applicable and where it was not applicable or in the alternative s27(1)(a) and s27(2).
  - iii. Document 3 was in fact available in the public domain and as such s21 FOIA was relied upon,
  - iv. Documents 8 and 9 had originally been considered to be in scope however, their case now was that the documents were not in scope.
  - v. In light of the additional material before the Tribunal that did not form part of the material before the Commissioner, the Tribunal would need to issue a new decision notice.
  - vi. To the extent that the Appellant was challenging the sufficiency of the search any additional search would exceed the costs limit and s12 FOIA was therefore relied upon.
10. The case was listed for an oral hearing at Field House. Arrangements had been made for the Appellant to participate by telephone however, this proved problematic as due to technical problems the Appellant was unable to hear consistently what was being said in the hearing room. All parties were of the view that it would be difficult for the Appellant to question witnesses and follow legal argument in these circumstances and it was agreed therefore that the Tribunal should go into closed session first (as this had to be done in the absence of the Appellant) and on the second day of the hearing arrangements were made for the Appellant to participate via video link.
11. The Tribunal had regard to all the evidence before it (including an open bundle of 323 pages plus additional documents handed up during the hearing and a closed bundle which included the 9 withheld documents that formed the disputed information). The material in the closed bundle was withheld pursuant to rule 14 The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the Rules). The FCO reviewed the position during the hearing and additional

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<sup>6</sup> P16 OB

<sup>7</sup> ICO Skeleton argument 07.05.2019

<sup>8</sup> P20 OB

<sup>9</sup> The redactions in documents 6 and 7

information from Mr Hand's closed witness statement was disclosed to the Appellant during the hearing.

12. 2 written witness statements were provided each from:

- i. Mr Graham Hand (Senior Sensitivity Reviewer for FCO Services)<sup>10</sup>. He was a British diplomat of 25 years standing and former Ambassador. His current role involves ensuring documents identified by the FCO as requiring sensitivity review before release either under the Public Records Act 1958 (PRA) or FOIA are properly reviewed in accordance with legislation.
- ii. Mr Martin Tucker (Head of Archives at the FCO)<sup>11</sup>. He is responsible for the overall management of the FCO Archive Management Team including the FCO's release programme under the PRA and the work of the Historical Freedom of Information Team.

Both witnesses attended the hearing and were available to provide evidence to the Tribunal. In the event only Mr Hand was required to provide oral evidence (in open and closed session) as Mr Tucker's evidence went towards s12 FOIA and providing explanations for the delay in providing a substantive response to the original request and identifying different documents for consideration by the Tribunal which whilst contextually helpful was outside the scope of the issues identified to be determined in this Appeal.

13. Following the closed evidence of Mr Hand the FCO reviewed their position in relation to the exemptions relied upon in relation to document 7. They applied to amend their response pursuant to rule 5 of the Rules in relation to that document:

- i. No longer seeking to rely upon the majority of the redactions and
- ii. Relying upon s23(1) FOIA in the first instance or alternatively s27(1) FOIA in relation to the smaller piece of information that remained in issue (instead of s27(2) FOIA).

Whilst the Commissioner observed that it was unfortunate that this had happened at such a late stage, she did not object to the application, neither did the Appellant although he sought safeguards that the Tribunal would satisfy itself that the new exemptions were properly engaged on the facts.

14. The Tribunal allowed the application. In doing so it had regard to *Birkett v DEFRA* [20117 EWCA Civ 1606 which we accept sets out the principle that an Appellant is entitled to rely upon a new exemption at appeal but if they seek to do so at a later stage the right is qualified subject to the Tribunal's case management powers. We have also had regard to the overriding objective as set out in rule 2 and are satisfied that permitting the amendment is proportionate and will lead to greater transparency for the Appellant (because a smaller portion is now sought to be withheld) and is thus in keeping with the legislation. He is not prejudiced by the change in exemption relied upon as he has not had sight of the redacted information and the exemptions now relied upon are already raised within this appeal. As such the Appellant's

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<sup>10</sup> P177 and p311 OB

<sup>11</sup> P188 and p316 OB

general arguments are applicable to this document and are already before the Tribunal.

15. The tribunal has set out the principles that it has applied and its conclusions in the open decision but has also prepared a closed annex which sets out further detail by direct reference to the withheld material.

### **The questions for the Tribunal**

#### *Scope and s12 FOIA:*

16. It was acknowledged that the Appellant's request was very wide. Although an attempt was made to narrow it by way of date (the Appellant confirmed on 9th October 2014 that he was content for his request to be limited to 1986<sup>12</sup>) no other clarification was sought by the FCO as to what information the Appellant was seeking. The Appellant told the Tribunal that he had been looking for all documents relating to the case within 1986 but that he had developed a particular interest in the political ramifications of the incident in light of the information he had received from the US State Department.<sup>13</sup>
17. Mr Tucker's evidence was that the case officer identified 12 Near East and North Africa Department NENAD files from which the disclosures have been made and from which the disputed information emanated. The FCO accept that there are 13 additional NENAD files which may contain potentially relevant material as well as other areas (such as the Permanent Under Secretary's Department (PUSD) and Research Analyst Files, Geoffrey Howe Private Office Papers etc.<sup>14</sup>) which were not considered. Similarly, in extracting material that was considered to be in scope the case officer sought to exclude documents on<sup>15</sup>:
  - a) Summoning the ambassador,
  - b) Press enquiries,
  - c) Handling pre-trial allegations and publicity,
  - d) Contingency measures against Syria in response to the apparent involvement of the Syrian government and actions to be taken after Hindawi's trial,
  - e) Events after Hindawi's trial,
  - f) Relations with Syria/Saudi Arabia,
  - g) Interviewing Syrian Embassy officials and their removal/withdrawal from the London Embassy and
  - h) Other policy matters.
18. This narrowing of scope was unilateral and made without consultation with the Appellant or the provision of advice and assistance pursuant to the FCO's duty under s16 FOIA which would have enabled the search to be more targeted. Whilst it was clear that the Appellant did not agree with the limitations that had been imposed upon the focus of the search he confirmed at the oral hearing that he was

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<sup>12</sup> P270 OB

<sup>13</sup> Received in 2015 and 2016 which was after the information request but before the FCO's substantive reply.

<sup>14</sup> P317 OB

<sup>15</sup> P202 OB

asking the Tribunal to rule on the documents that had been identified and not to rule on the sufficiency of the search. This was in part due to the fact that the Appellant had been reminded by the Commissioner and FCO of his right to make a fresh, targeted, information request which did not prevent the files already searched from being re-searched through the prism of a fresh request.

19. When interpreting the meaning of the request we apply *IPSA v ICO and Leapman* [2015] AACR 37 which states that:

*"interpretation of a written request depends on the objective meaning of the words used, read in their context and in the light of relevant background facts n.* The Tribunal is therefore still required to consider whether documents 8 and 9 fall within the objective terms of the information request but beyond that the Tribunal is satisfied that it need not consider the sufficiency of the search or s12 FOIA.

#### *S21 FOIA*

20. Document 3 is a US Foreign Broadcast Information Service Report dated April 25 1986. It was originally withheld pursuant to s27(1)(a) and 27(2) FOIA and identified to the Commissioner as such. It is now known to be available in the public domain in the Reagan Presidential Library Digital Library Collections. The FCO therefore relied upon s21 FOIA (namely that it is information accessible to the applicant by other means). The Appellant accepted this and it was agreed between the parties that there was no issue to be determined by the Tribunal in relation to this document.

#### *Issues to be determined*

21. It is therefore accepted that the issues for the Tribunal to determine are:
- i. Where the FCO relies upon s 23(1) FOIA is that exemption engaged?
  - ii. Where FCO relies on s27(1)(a) or s27(2) FOIA are those exemptions engaged and if so does the public interest balance favour maintaining the exemption or disclosure?
  - iii. In relation to documents 8 and 9 are they within the scope of the request (as worded objectively.)

#### **Are Document's 8 and 9 within the scope of the request?**

22. The FCO argue that documents 8 and 9 are out of scope as they relate to actions taken after the trial and discuss arrangements IF the UK were to sever diplomatic relations with Syria (therefore it does not deal substantively with the attempted bombing). Having heard the evidence and had sight of the documents concerned, the ICO agreed. Mr Hand's evidence was that the documents related to which country to approach as a protecting power should the UK sever diplomatic relations. The Tribunal has viewed the documents and agrees that this is an accurate description of the content and context of the documents.
23. The FCO argued that the information arose as a "consequence" of the attempted bombing but is not information or a document "concerning" the bombing '(which is

the wording of the request). Their case is that the documents had arisen at several removes from the attempted bombing:

- i. There was an attempted bombing,
- ii. As a result of the bombing the UK might wish to sever diplomatic ties,
- iii. If that were to happen who would be approached?

24. The Appellant argued that a member of the public making a request rooted in a particular incident is not expecting a narrow view so that only documents that refer to the event itself are included. He argues that "concerning the attempted bombing" would include information around the theme, as an event does not take place in isolation; it is like a domino with one thing leading to another and what is included would be the consequences of an event as well. He maintains that if it were interpreted as narrowly as suggested by the FCO his request would only lead to documents created on the day with direct reference to the facts of the Incident. He argues that this is inconsistent with the information already provided by FCO.
25. The Tribunal repeats that in finding documents 8 and 9 are not in scope, it is not opining as to whether the unilateral scope as set out at paragraph 50 of Mr Tucker's statement is justified. Additionally, the Tribunal has not seen the 338 pages of information already disclosed and has not therefore analysed consistency, however, in our judgment there is no need to do so as the issue is not whether the FCO have erroneously disclosed more information than they were required to, but whether Docs 8 and 9 fall within the objective definition of the request.
26. The Appellant further relies upon the reference in Document 9 to the terrorist history of the family of the El Al bomber<sup>16</sup>. However, it was the FCO's case that this is not the same as information concerning the attempted bombing. It was referred to only in the context of a reason why the UK would find it difficult to approach Germany as a protecting power<sup>17</sup>? Their case is that the reference to the Bomber's brother is not sufficient to bring the whole document within the ambit of the request.
27. The Tribunal agrees that mere reference to the brother of the bomber even in the context of a different terrorist act, in a discussion about a speculative approach for diplomatic assistance from a 3rd party is not sufficient to make that document "concerning" the El Al bombing. The Tribunal is satisfied that the reference to the brother fails the relevance test when applied to the El Al bombing as specified in the information request and objectively is not sufficient to bring the document within the ambit of the request.
28. Tribunal observes that from his arguments to the Tribunal, the Appellant's definition of scope (including his arguments that references to the brother are in scope) would necessitate the extension of "concerning the bombing" to include references to Syria or Hindawi within the timeframe identified. The FCO argues

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<sup>16</sup> Emphasis added

<sup>17</sup> Open gist of closed session dated 14.5.19



that the Tribunal would need to add the words "as a direct result of the bombing" to the request to bring it within the parameters suggested by the Appellant. We agree and are satisfied that the 2 documents are too far removed from the bombing to be categorised objectively as within scope.

### **Legal submissions and analysis**

29. The Respondents invited the Tribunal to consider the question of s23 FOIA (where it was raised) first. This was because it is an absolute exemption without consideration of the public interest and where it is engaged it is determinative of the issue in relation to the information concerned. In cases where the Tribunal was not satisfied that s23 was engaged they were invited to consider s27(1)(a) only going on to s27(2) if the FCO's case in relation to s27(1)(a) failed. We are satisfied that this approach is proportionate having regard to the overriding objective as set out in rule 2. In light of our findings relating to scope and s23 and 27(1)(a) FOIA the Tribunal has not gone on to consider s 27(2) FOIA in relation to any of the withheld information<sup>18</sup>.
30. S 23 FOIA provides:  
*(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).*  
Section (3) provides a list of applicable UK bodies including the Security Service, Secret Intelligence service etc.
31. There was no dispute between the parties as to the applicable approach derived from *APPGER v IC and FCO [2015J UKUT0377 (AAC) and Corderoy and Ahmed v IC, AGO, Cabinet Office [2017J UKUT 495 (AAC)* these can be summarised as:  
a) The language of the exemption is broad,  
b) There is no test of focus or primary focus  
c) This reflects parliament's intention that FOIA should not be used as a backdoor route to obtain information about or from the security bodies.  
d) Consideration should be given to whether the information was the sort of information to which Parliament intended s23(1) to be applied.
32. We are conscious that in assessing this exemption the Appellant's hands are tied in that he has not had access to the information. He is not able therefore to check the factual basis upon which the exemption rests. He sought safeguards that the Tribunal would satisfy itself that the new exemptions were properly engaged on the facts. The Tribunal was taken through each withheld document in closed session by Mr Hand whose evidence we accept and was provided with specific information relating to the identity of the agency concerned and the context of the documents. Although we are not satisfied that s23 is engaged in relation to document 7 this is not inconsistent with our finding that Mr Hand was a comprehensive and credible witness. Our finding reflects our agreement with the Appellant that the evidence of the link to a s23 body should be definite and not implied.

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<sup>18</sup> ICO v Malnick and Another GW447/2017 at paragraph 109

33. In the closed document we have indicated in relation to each document where we are satisfied that s23 FOIA is engaged our findings as to:
- The body concerned and the evidence relied upon to conclude that they fall within the schedule at s23(3).
  - Whether the information was "directly" or "indirectly" supplied by or if it "relates to" a s23 body,
  - The Tribunal has asked itself the question when assessing direct or indirect supply:  
*"how did the public authority come to have this information?"<sup>19</sup>*
  - Where it "relates to" we have applied the following reasoning:  
*"Applying the ordinary meaning of the words "relates to" it is clearly only necessary to show some connection between the information and a s23 (3) Security body; or that it touches or stands in some relation to such a body. Relates to does not mean "refers to"; the latter is a narrower term"<sup>20</sup>.*
34. Although the above approach to "relates to" is derived from the First Tier Tribunal decision in APPGER we are satisfied that the reasoning was consistent with the Upper Tribunal's reasoning in the appeal from that decision<sup>21</sup>. The example given in APPGER<sup>22</sup> of a circumstance where substantive information would fall outside of the s23 exemption is of a general personnel memorandum about privilege days for civil servants (for the purposes of their annual leave). The fact that such a memorandum has been copied to a section 23 body is subject to the absolute exemption, but not the substantive information in the document about privilege days. This was in keeping with the Upper Tribunal's rejection of a focus or main focus test and their acknowledgement that:  
*"information in a record supplied to one or more of the section 23 bodies for the purpose of the discharge of their statutory functions is highly likely to be information which relates to an intelligence or security body"* for the purposes of s23 FOIA<sup>23</sup>.
35. S 27 FOIA provides:
- (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 ...*
- (2) *Information is also exempt information if it is confidential information obtained from a state other than the United Kingdom or from an international organisation or international Court.*
36. S 27(1)(a) FOIA is prejudice-based, the FCO argue that disclosure would be likely to prejudice international relations. We are satisfied that this entails a significant or

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<sup>19</sup> Paras 59 APPGER EA/2011/0049-0051

<sup>20</sup> EA/2011/0049-0051 as quoted in paragraph 13 of APPGER UKUT 0377 (AAC)

<sup>21</sup> APPGER UKUT 0377 (AAC) paragraphs 13-20

<sup>22</sup> Paragraph 20 APPGER UKUT 0377 (AAC)

<sup>23</sup> APPGER paragraph 26

weighty chance of real, actual or substantial prejudice to relations between the UK and any other State. The Commissioner and FCO rely upon FTT authority which is not binding upon this Tribunal as articulating circumstances where prejudice can arise if:

*"disclosure makes relations more difficult or calls for particular damage limitation response to contain or limit damage which would not otherwise have been necessary"*<sup>24</sup>.

Whilst we are not bound by the FTT on this point we agree that this represents a concise articulation of the way in which we should apply the statute.

37. We accept that in assessing the consequences of disclosure the Tribunal should give appropriate weight to the FCO's evidence and expertise (which can be expected to be informed by the advice and relevant experience of advisers and thus likely to go beyond the experience of the panel for the purposes of assessing the likely attitude and actions of foreign intelligence services faced with the publication of the redacted information) the panel may need therefore to rely more on the evidence and less on its own experience.<sup>25</sup>

The Commissioner reminded the Tribunal that this did not mean that the Tribunal should defer to the FCO's witness or overlook the public interest in disclosure.

38. Mr Hand gave full, clear and example based, persuasive, concrete answers (e.g. paras 21 and 22 closed statement) as to why prejudice would be likely to arise. His answers were measured, cogent and coherent. There was no reason not to accept the account he has given.
39. In relation to s27(1) the Appellant challenged the likely prejudice arising from disclosure in light of the passage of time, and disclosures by other States. Where we find s27(1) to be engaged we have given detailed reasons in the closed annex in which we identify:
- Which State or States is/are likely to be prejudiced.
  - What that prejudice would consist of.
  - Why prejudice would be likely notwithstanding the passage of time and /or change in government if applicable.
  - The impact of any other information known to be in the public domain.
40. The Appellant argued that International relations have changed with the passage of time. It was his case, using Syria as an example, that the position was very different now compared to 30 years ago:
- It was a different Head of State,
  - Current relations between the UK and Syria are poor,
  - A future state would not be offended by information relating to a failed terrorist plot supported by a now defunct regime.
  - Prejudice cannot be assessed when the future government of Syria is unknown.

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<sup>24</sup> Campaign against the arms trade v IC and MoD (EA12007/0040)

<sup>25</sup> APPGER v IC and MOD (GIA 150-1522011) and FCO v IC and Plowden [2013] UKUT 0275

41. He further argued that:
  - in relation to other states boundaries, governments and regimes have changed,
  - likely prejudice would be reduced if equivalent information was in the public domain through the media or releases from other governments.
  - Information became less sensitive over time.
42. Mr Hand's evidence was that a change of regime/head of State and the passage of time did not remove the risk of prejudice. Using Syria as an example offence could still be caused notwithstanding the difficulties between the countries at present and even though the president in power in 1986 is not the current incumbent. Mr Hand relied upon the hope of a more amenable successor and a wish not to jeopardize that future relationship. There was a distinction between the State of Syria and specific governments of Syria. HMG would take care not to offend the State of Syria if there was no need to. They would redact gratuitous material that is offensive to the State of Syria if there would be an ongoing resonance to the citizens of the State.
43. The Appellant challenged whether the withheld material would be sufficient to cause offence sufficient to be likely to lead to prejudice. Mr Hand's evidence was that when deciding whether there was a risk of real, actual or substantial prejudice there was a threshold of the amount of offence that might arise e.g. a country being "difficult to deal with" would not pass the threshold however, if negative things were said about a people e.g. "Syrians", then he would want to redact that as any successor government is bound to find that offensive.
44. When asked about defunct territories and regimes (e.g. the former USSR) Mr Hand acknowledged that regimes and boundaries can change but distinguished between a political structure and the underlying physical territory which is still there (albeit under a new name) and the populace who still can be offended.
45. He acknowledges that the disputed information is more than 30 years old but observed that historic documents can be very frank and therefore more likely to cause offence if disclosed in a context of modern expression and sensibilities. He gave examples in closed session of information which remains sensitive despite the passage of more than 100 years.
46. When challenged about disclosing information commensurate with information already publicised in the media, Mr Hand's evidence was that even things that are already reported in the media could be prejudicial if HMG disclosed them. He argued that there is a difference between information reported in the press and information confirmed in an official document. His experience is that if disclosed by HMG a foreign government tends to take that amiss more deeply than if it is contained in a press report, the implication being that it has official status and loses deniability.
47. When placing HMG disclosures in the context of disclosure by other governments (he was specifically asked about the documents from the US State Department)

his evidence was that if information that was being protected related to e.g. the US Government; HMG would aim to achieve parity and to release it to the extent that the US Government do. When given the hypothetical example of the CIA releasing British intelligence information, his experience was that this would lead to "a very sharp rejoinder" from the UK.

48. His experience was that the business of inter-governmental relations depends upon discretion and trust. Intelligence is not released except by prior arrangement, and States have very long memories and are extremely sensitive to perceived slight.
49. As set out above, we accept Mr Hand's evidence on all of the above points and have had regard to the contents of the disputed information itself. We are satisfied that disclosure would be likely to cause prejudice and that s27(1) FOIA is engaged in relation to Document 5, 2<sup>nd</sup> redaction of document 6 and the revised single redaction of document 7.

### **Public interest**

50. This is only relevant in relation to the 3 pieces of information where the Tribunal has determined that s27(1)(a) is engaged. The Tribunal gave consideration to the date when the public interest test should be applied. The ICO argued that the tribunal should consider whether there was any difference in the public interest at the date of request and at the date of the response because a 2 ½ year gap between request and response was not specifically dealt with in case law. This might be material if the political climate either domestically or in the relevant other State had changed materially between the request date and the date of refusal. The Tribunal considers that if this were a material consideration this would also have been applicable when assessing the likelihood of prejudice when determining whether s27(1) was engaged.
51. In our judgment whilst the time between request and response is much greater than usual, the possibility for this happening could arise even within the customary much shorter timetable envisaged within FOIA. Despite the possibility of a request becoming "refusable" between the date of the request and refusal, the case law which we must apply is unequivocal as set out in *NHS England v IC and Dean [2019] UKUT 145 AAC*<sup>26</sup> which identifies the relevant date as being when the public authority refused the request. We are satisfied that refusal by the public authority encompasses the internal review which constitutes the public authorities "final" refusal and we have therefore taken October 2017 as the date at which we have assessed the public interest balance. We are supported in our conclusion that the position is not changed by the length of the delay in responding because provision for dealing with a change in circumstances between the relevant date and the date of remedy is capable of being factored into the steps directed by the Tribunal upon determination.<sup>27</sup>

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<sup>26</sup> R (Evans) v A-G [2015] AC 1787 and APPGER v IC and FCO [2016] AACR 5

<sup>27</sup> ICO v HMRC and Gaskell [2011] UKUT 313 (AAC)

52. If we are wrong and the legal position is altered because of the length of the delay we are satisfied that on the facts of this case there was no difference in the balance of public interest between the date of the request and its refusal. In reaching this conclusion the Tribunal has had specific regard to the contents of the withheld information involved and is satisfied that notwithstanding the length of the delay before answering there is no change in the prejudice or public interest considerations as between the request date and the date of refusal and internal review. In this regard we rely upon the evidence of Mr Hand relating to diplomatic "long memories" and the distinction between a State and a regime which we are satisfied can also be considered as the contrast between causing national offence and personal offence to an individual.
53. In favour of disclosure we have taken into consideration the following:
- a) The need for Transparency. It is accepted that the attempted bombing was a matter of great public interest that has had international ramifications. Transparency as to the evidence and information available at the time which would inform action taken or not taken is in the public interest.
  - b) Although considerable information is now disclosed it appears that there was a disagreement relating to the extent of official Syrian involvement amongst the international community. The Appellant relies upon documents from the State department including:
    - a report from the US Ambassador in Jordan to the US Secretary of State in Washington which refers to King Hussein of Jordan having passed to the British Ambassador in Amman his view that President Assad of Syria did not order or know of the Bombing,
    - Telegram 245 mentions comments from King Hussein to the British Ambassador in Jordan about the question of Syrian involvement or otherwise in terrorism (but not the bombing itself),
    - Summary by the Head of European Affairs at the US State Department to the US Charge d'Affaires in Germany of a newspaper article from the Washington Times 8.11.86 interviewing the French Prime Minister in which he expresses views that Syria may not be involved.<sup>28</sup>We accept that it is in the public interest that the public are able to assess the competing views, but observe that this public interest is met to some extent by the fact that these differences of opinion are now in the public domain, in particular, the latter document was based upon information in the public domain contemporaneously.
  - c) Where some information is in the public domain it is in the public interest that any incomplete or incorrect information is identified to ensure the accuracy and completeness of the historical record. Whilst we agree we have had regard to the extent to which the specific information informs this debate and the significance of any discrepancy if applicable.

54. Against disclosure we take the following into consideration:

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<sup>28</sup> p312 OB

- a) The likelihood of prejudice (as set out above) and that it is not in the public interest that the prejudice envisaged should come to fruition.
- b) There is already considerable information in the public domain including information relating to the Trial, the 338 pages of existing disclosure, press reports and analysis and international material (as exemplified by the documents submitted by the Appellant from US State Department).

55. Taking all these factors into consideration we are satisfied that the public interests in withholding the disputed information outweighs the public interest in disclosure.

### Conclusion

56. For the reasons set out in the open and closed decision, the appeal is refused and we have reached the following decision in relation to the withheld documents as set out in the table below:

Doc	Exemption	Analysis and result
Doc 1	S 23 <sup>29</sup>	We accept the link to a s23 body therefore exemption engaged
Doc 2	S23 <sup>30</sup>	We accept the link to a s23 body therefore exemption engaged
Doc 4	S23 <sup>31</sup>	We accept the link to a s23 body therefore exemption engaged
Doc 5	S27(1)(a)	We are satisfied of the likely prejudice and that the public interest favours withholding.
Doc 6 1 <sup>st</sup> redaction	S23 <sup>32</sup>	We accept the link to a s23 body therefore exemption engaged
Doc 6 2 <sup>nd</sup> redaction	S27(1)(a) <sup>33</sup>	We are satisfied of the likely prejudice and that the public interest favours withholding.
Doc 7	S 23 or s27(1)(a) <sup>34</sup>	We do not accept the link to a s23 body on balance however, we are satisfied of the likely prejudice and that the public interest favours withholding under s27(1)(a).
Doc 8	Scope <sup>35</sup>	Not in scope
Doc 9	Scope <sup>36</sup>	Not in scope

Signed Judge Fiona Henderson

Date: 25<sup>th</sup> July 2019

<sup>29</sup> This was originally withheld on the basis of s27(1)(a) and (2) and identified as such to the Commissioner. The FCO now rely inter alia on s23(1) FOIA.

<sup>30</sup> See footnote to Doc 1

<sup>31</sup> See footnote to Doc 1

<sup>32</sup> This document had been disclosed in redacted form to the Appellant but was not included in the Decision Notice.

<sup>33</sup> See footnote above

<sup>34</sup> The FCO changed their position during the course of the hearing and unredacted some of the withheld material, they were permitted to amend their grounds so as to rely upon s23 and in the alternative s27(1)(a)

<sup>35</sup> This document was identified to the Commissioner as one and the same as document 9 and exempt under s27 but it was not sent to the Commissioner. It is conceded that the documents are not the same and that if in scope only partially exempt.

<sup>36</sup> See footnote above, Doc 9 was also not sent to the Commissioner



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

**Case Number [EA/2018/0119]**

**SUBSTITUTED DECISION NOTICE**

**Dated: 25<sup>th</sup> July 2019**

**Public Authority: Foreign and Commonwealth Office**

**Address of Public Authority: King Charles Street  
London SW1A 2AH**

**Name of complainant: Mr Faisal A Qureshi**

**The Substituted Decision**

For the reasons set out in the Tribunal's determination, the Tribunal refuses the appeal and substitutes the following decision notice in place of the decision notice dated 17<sup>th</sup> May 2018 in order to reflect the documents withheld and exemptions relied upon which were not covered by the decision notice.

**Action Required**

The Tribunal has concluded that the FCO are entitled to rely upon:  
s23 FOIA in relation to documents 1, 2, 4 and 1<sup>st</sup> redaction document 6.  
s27(1) FOIA in relation to documents 5, 2<sup>nd</sup> redaction document 6 and 7 and that consequently they are not required to take any steps.

Dated this 25<sup>th</sup> day of July 2019

Signed Fiona Henderson  
Judge