



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2019/0183V

Before

Judge Stephen Cragg Q.C.

and Tribunal Members

Mr John Randall CBE
Mrs Suzanne Cosgrave

Heard via the Cloud Video Platform on 15 July 2021

Between

PHIL MILLER

Appellant

and

(1) INFORMATION COMMISSIONER

(2) POLICE SERVICE OF NORTHERN IRELAND

Respondents

The Appellant was represented by Omran Belhadi

The Commissioner was represented Harini Iyegar

The Police Service of Northern Ireland was represented by Philip Aldworth QC

DECISION AND REASONS

DECISION

1. The appeal is dismissed.

MODE OF HEARING

2. The proceedings were held via the Cloud Video Platform. All parties represented joined remotely. The Tribunal was satisfied that it was fair and just to conduct the hearing in this way.
3. The Tribunal considered an agreed open bundle of evidence comprising 178 pages, and an authorities bundle.

BACKGROUND

4. On 24 May 2017 the Appellant made the following request for information to the Police Service of Northern Ireland (PSNI):-

I am requesting copies of two reports compiled by John Percival Morton CMG OBE, also known as Jack Morton, hereafter MORTON. In 1973, MORTON produced a report, referred to as the 'Morton Report', which contained advice on the relationship between the RUC and the Army. In 1979, MORTON visited Sri Lanka and produced a report, referred to as the 'Morton Report', which contained advice on the reorganisation of Sri Lanka's security apparatus. Please provide a copy of both reports.

5. The PSNI provided a response to the Appellant on 8 August 2017, stating that it was refusing to disclose the first report requested, which it held, citing section 23(1) FOIA as a basis for non-disclosure.
6. The Appellant, not being satisfied with the PSNI's response, requested an internal review on 9 August 2017. The PSNI provided a response to that request on 18 September 2017. It stated that it did not hold the 1979 Morton Report and apologised for not articulating this in its response to the Appellant. It maintained its position in relation to the 1973 Morton Report. The Appellant contacted the Commissioner on 9 October 2017 to complain about the way his request for information had been handled

THE RELEVANT FOIA SECTIONS

7. Under section 23(1) FOIA:

'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).'

8. The bodies listed in subsection (3) include the Security Service. The exemption under s23(1) FOIA is an absolute exemption and therefore it is not subject to the public interest test set out at section 2 of the FOIA.

THE DECISION NOTICE

9. The Commissioner issued a decision notice dated 1 May 2019. The Commissioner explained the background as follows:-

10. The Commissioner is aware that the information held by the PSNI which falls within the scope of the complainant's request consists of a report which is over 45 years old. In responding to the Commissioner's request for submissions, the PSNI has verified the provenance of this report with the Security Service. The Security Service confirmed that the report was directly

supplied to the then Royal Ulster Constabulary (RUC) now known as the PSNI, by MI5.

11. The PSNI has informed the Commissioner that, in June 1973, an RUC Chief Constable accepted an offer from the then Director General of the Security Service for a senior MI5 officer to conduct a review of and report on the RUC Special Branch organisation and its functions. Jack Morton, a serving MI5 officer, carried out this work on the instruction of the Director General of the Security Service.

12. The Commissioner, having asked the PSNI whether the information was supplied directly or indirectly to it by one of the security bodies listed in section 23(3) of the FOIA, was informed that the information was supplied directly to the PSNI, then the RUC, by MI5, which falls within section 23(3)(a) of the FOIA.

10. The Commissioner did not examine the report but considered whether she was satisfied that the information had been supplied by a security body set out in s23(3) FOIA and explained as follows:-

14. The Commissioner, in the particular circumstances of this case, considers that it initially appeared entirely plausible that the information falling within the scope of the complainant's request would engage the exemption at section 23(1) of the FOIA. As the Commissioner has also received written and verbal assurances from senior officials within the PSNI, who have viewed the information and who have regular access to information relating to the security bodies and understand the relationship between the PSNI and those bodies, she is satisfied, in this instance, by that assurance that the information was supplied directly to the PSNI by MI5.

THE APPEAL

11. The Appellant's appeal is dated 26 May 2019. Not all the grounds in the appeal were relied upon in the hearing before us and we refer only to those that were relied upon. The Appellant argued that there was insufficient evidence upon which to conclude that the author of the Morton report was acting in his capacity as an officer of the Security Service.

12. The Appellant also argued that the Commissioner has failed to follow the principles set out in the case of *Corderoy v IC* [2017] UKUT 495 (AAC). The point in the *Corderoy* case is whether the information sought can be disaggregated so that some of the information is outside the exemption in s23(1) FOIA and so can be disclosed.

In that case also the Commissioner was criticising for not examining the withheld material to see if disaggregation is possible. The Appellant argues that in this case, for example, Mr Morton would have been supplied with information by the Royal Ulster Constabulary (RUC) which would not necessarily fall within the scope of 23(1) FOIA, presumably if the information was then replicated in the report.

13. In response to this part of the appeal the Commissioner argued that this was a straightforward case where Mr Morton was instructed by the Director General of the Security Service to write the report, and therefore was a case where the report was directly supplied by the Security Service. The *Corderoy* decision was not relevant because that was a case which concerned whether the information ‘relates to’ bodies such as the Security Service (the other limb of s23(1) FOIA) where arguments of disaggregation might be relevant as to what material could be extracted from the information requested.

14. The other point raised by the Appellant was that the refusal to disclose the information by the PSNI was a disproportionate interference with the Appellant’s rights under Art 10 ECHR. In relation to this argument, the Commissioner pointed out that the law was now more certain than it was when the Appellant made his request. In *Kennedy v Charity Commission* [2015] AC 455, the Supreme Court decided, according to the headnote of the case, that FOIA:-

...did not provide an exhaustive scheme for disclosure; that the effect of sections 32(2) and 78 was not that there was an absolute prohibition on disclosure of information held by persons conducting an inquiry, but that any question of disclosure should be addressed outside the 2000 Act and under other statutory rules and/or common law powers which were preserved....

15. That approach was confirmed in the case of *Times Newspapers and Kennedy v UK* (Appn no: 64367/14)(13 November 2018), where the Strasbourg court said at paragraph 82:-

82. Although the applicants have focussed their complaints on the Article 10 compliance of the “absolute exemption” under section 32(2) of the FOIA, in examining their complaints the Court will have regard to the domestic legal framework as a whole and not simply the FOIA. While the Court has now recognised that Article 10 § 1 of the Convention might, under certain conditions, include a right of access to information (see *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 149, 8 November 2016), it does

not include a right of access to information by a particular legislative scheme. What matters, therefore, is whether the legislative framework as a whole satisfies the requirements of Article 10 of the Convention, read in light of the Court's most recent jurisprudence.

16. Thus, simply because information is not available under FOIA does not mean there is necessarily a breach of Art 10 ECHR. The Upper Tribunal has recently followed this approach in *Moss v IC and Cabinet Office* [2020] UKUT 242 (AAC) (30 July 2020), where UTJ Wright concluded that:-

(i) I am bound by domestic court authority not to follow the expanded view as to the reach of Article 10 of the ECHR taken in *Magyar*; and

(ii) even if *Magyar* does apply in domestic law, its application does not assist Mr Moss to obtain a result more beneficial to him than otherwise applies under the Freedom of Information Act 2000 ("FOIA") and accordingly the First-tier Tribunal made no material error of law in the decision to which it came.

17. The PSNI also responded to the appeal. The PSNI agreed with the Commissioner, but clarified that Mr Morton had recently retired from MI5 when he compiled the report, and was referred to as a retired MI5 officer rather than a serving officer. However, PSNI confirmed that Mr Morton compiled the Report on the instruction of the Director General of MI5 and was working directly on behalf of MI5 at all material times.

18. The Appellant pursued this last point made by PSNI and pointed out that the Commissioner had said in the decision notice that Mr Morton was a 'serving' officer, and if that was not the case, then cast doubt on whether the report had in fact been supplied by the Security Service. The Appellant asked for clarification of the position, and argued that the 'belated concession demonstrates the evidence provided to the ICO is not as 'credible and cogent' as suggested'.

THE HEARING

19. At the hearing of this appeal we were taken through contemporary correspondence that related to Mr Morton's appointment.

20. There is an extract from minutes of a meeting of the Joint Intelligence Committee held on 11 June 1973 which records that the terms of reference of the report were to review 'the organisation, staffing and equipment of the RUC Special Branch, and to make recommendations'.
21. There is a letter from M.B. Hanley who we were told was head of MI5, also dated 11 June 1973, to the Chief Constable of the RUC in which Mr Hanley states that he has selected 'Mr J.P. Morton who retired as one of our Directors last summer' as a 'senior officer to undertake a review of the RUC Special Branch'.
22. A letter from M.T.B Clayton, Director of Establishments, dated 15 June 1973 was sent to Mr Morton offering him 'special duties in Northern Ireland' and setting out terms of appointment including that 'the pension which you receive from this Service will be totally abated during the period of appointment.' On 18 June 1973 Mr Morton replied to Mr Clayton to accept the appointment.
23. In addition, Mr Aldworth QC for the PSNI took us to correspondence dated 11 October 2018 between PSNI and the Commissioner during the Commissioner's investigation of the Appellant's complaint, in which PSNI made it clear that 'a retired MI5 officer, Jack Morton, carried out this work on instruction from the Director General of the Security Service'. On 11 April 2019 the Commissioner sent an email to PSNI in which she referred to the fact that the report was 'compiled by a retired MI5 agent'. It seems that it was not until the decision notice that Mr Morton was described as a 'serving' MI5 officer. Ms Iyengar for the Commissioner accepted that any mistake came from the Commissioner in her description of Mr Morton, and not from information provided by PSNI.

DISCUSSION

24. It is clear to us from the correspondence that PSNI described Mr Morton to the Commissioner as a retired MI5 officer and there is no basis on which to say that PSNI misled the Commissioner. The contemporary correspondence clearly sets out the position that Mr Morton was appointed to compile the report for the RUC as instructed by MI5. Mr Hanley's letter of 11 June 1973 to the Chief Constable

confirmed his offer of assistance was ‘to make available a senior officer to undertake a review’. The correspondence then shows how Mr Morton was re-hired for this specific purpose. It seems to us that Mr Morton can be described as both a retired MI5 officer and a serving MI5 officer at the time he prepared the report.

25. On that basis it is also clear to us that the information sought, in the terms of the report, was ‘directly...supplied’ by the Security Service and is therefore covered by that limb of s23(1) FOIA. Once we have reached that conclusion it would appear unnecessary to consider the alternative basis upon which s23(1) FOIA can apply, namely the information held by PSNI ‘relates to’ the Security Service.
26. However, the Appellant considers that disaggregation is a factor even if we are concerned only with the ‘directly ... supplied’ limb of s.23(1) FOIA. We have considered the points made by the Appellant about the case of *Corderoy*. This was a very different case in which the request was for the Attorney General’s legal advice on the legality of a drone strike which was intended to, and did, kill a terrorist in Syria. Such advice was likely to relate to a number of arms of government, including the Cabinet Office, Ministry of Defence and Foreign Office in addition to s.23(3) FOIA bodies. Two issues arose of potential relevance to the current case.
27. First, given the range of government and other interests in the legal advice there was a possibility that matters not relating to s.23 FOIA bodies could be disaggregated from those that did. Second, the Commissioner was criticised for not seeing the closed material but relying on assurances that all of it fell within s.23 FOIA.
28. In our view, the *Corderoy* case was indeed concerned with the ‘relates to’ limb of s23(1) FOIA where it can readily be seen that disaggregation of some of the information requested may be an issue if there are, for instance, interests of other government departments or public authorities covered by the requested material. It is hard to see how the same matters can be relevant where the information involved has been directly supplied by a s23(3) FOIA body, as in the current case– the information has either been directly supplied or it has not.
29. The Appellant argued that the report might contain information that had initially been provided by the RUC to the Security Service. That might be the case, but if

that information was then replicated as part of the report, it seems to us that it becomes part of the information directly supplied by the Security Service to the RUC and so covered by s23(1) FOIA. And of course the Appellant has specifically requested the report itself. As Ms Iyegar for the Commissioner argued, if the Appellant wanted the information provided by the RUC to the Security Service, then that was a separate FOIA request he could make to the PSNI.

30. On the basis that it is the report itself that has been requested, it seems clear that the report was directly supplied by the Security Service and there was no need for the Commissioner to examine the withheld material to reach that conclusion.
31. This Tribunal had decided to view the withheld material and arrangements had been made for this to happen in Belfast shortly before the March 2020 Covid 'lockdown', which made that particular course of action very difficult. In now considering the appeal without viewing the withheld material, as we have done, we made it clear to the parties that viewing the material was still an option if the Tribunal felt that that was necessary.
32. However, having found that the Mr Morton was employed by the Security Service and the material was directly supplied by the Security Service to the RUC, in our view there is no need for the Tribunal to take the further step of viewing the report.
33. In relation to the Article 10 argument, we accept that the law has clarified since the Appellant made his request. The Appellant sought to argue that the Appellant's status as an investigative journalist, and so a kind of social watchdog, meant that the approach not adopted by the UT in the *Moss* case could be distinguished. On our view, however, there is nothing in the *Moss* judgment which would support this distinction.
34. The simple point is that, as stated by the Supreme Court in *Kennedy*, Article 10 ECHR cannot be invoked in FOIA disputes so as to achieve a more favorable outcome than can be achieved by applying the words of the statute. In our view that statement of the law does not permit a different approach to be taken by this Tribunal on the basis that the requester has a certain attribute or status that other requesters may not have.
35. For all those reasons, this appeal is dismissed.

STEPHEN CRAGG QC

Judge of the First-tier Tribunal

Date: 6 August 2021.

