IN THE UPPER TRIBUNAL **Appeal No. GIA/2690/2018**
ADMINISTRATIVE APPEALS CHAMBER

On appeal from the First-tier Tribunal (General Regulatory Chamber)(Information Rights)

Between:

Mr Andrew Lownie

Appellant

- v –

1. This Information Commissioner
2. The National Archives
3. The Foreign and Commonwealth Office

Respondent

Before: Upper Tribunal Judge K Markus QC
Decision date: 28 January 2020

Heard at the Royal Courts of Justice on 30 October 2019

Representation:

Appellant:	Mr G Callus (Counsel), instructed by Mr Lownie
1st Respondent:	Ms E Kelsey (Counsel), instructed by the solicitor for the Office of the Information Commissioner
2nd and 3rd Respondent:	Mr A Heppinstall (Counsel), instructed by the Government Legal Department

DECISION

The appeal is dismissed.

REASONS FOR DECISION

1. This is an appeal by Mr Lownie against a decision of the First-tier Tribunal ('FTT') that information which he had requested from the National Archives ('TNA') was exempt from disclosure under section 23(1) of the Freedom of Information Act 2000 ('FOIA').
2. The relevant facts and background are set out clearly in the FTT's reasons. The following brief summary of the background suffices for present purposes.
3. TNA is a non-ministerial government department and the official archive and publisher for the UK Government.

4. On 12 January 2016 Mr Lownie requested from TNA a number of closed Foreign and Commonwealth Office ('FCO') files including under reference 'FCO 158'. The official description of that reference is that it denotes FCO records "relating to Guy Burgess and Donald Maclean (known KGB spies), and subsequent investigations and security arrangements". The particular file which is the subject of this appeal is 'FCO 158/143 – Vetting of [name withheld] 1951-1980'. It concerns the security vetting of a person who was a member of the FCO. The Information Commissioner's decision notice refers to the information in the file having 'implications' with regards to the person's sexuality and unfounded allegations of espionage activities.

5. The file is held by TNA as a transferred public record for the purposes of Part VI of FOIA. The FCO is the responsible authority for the purposes of section 66 of FOIA. The file was transferred on 1 September 2015 with agreement for closure for a period of 92 years.

6. Following consultation with the FCO and the Advisory Council of National Records and Archives, TNA refused to provide the file in reliance on the exemption in section 38(1) of FOIA (that it would, or would be likely to, endanger the health or safety of an individual). On internal review, TNA consulted the FCO and another government department pursuant to section 66(5). The outcome of the internal review was that TNA confirmed the refusal, relying additionally on section 24(1) (safeguarding national security).

7. Mr Lownie complained to the Information Commissioner on 4 November 2016. By a decision notice dated 28 March 2017 the Commissioner upheld the refusal in reliance on section 38(1) and so did not address section 24.

8. Mr Lownie appealed to the FTT. The FCO was joined as a respondent in addition to the Commissioner and TNA. TNA and the FCO were jointly represented and advanced the same case. They resisted the appeal relying on section 38, section 24 and, by response to the appeal filed shortly before the expiry of the deadline for doing so, section 23(1). The relevant provisions of section 23 are set out below.

9. In accordance with the guidance in *Browning v Information Commissioner* [2014] EWCA Civ 1050, the FTT received open and closed material, and parts of the oral hearing were conducted in a closed session. Three witnesses gave evidence on behalf of TNA/FCO, in open and closed sessions. The gist of the closed session was provided to Mr Lownie, in writing, and was set out in the FTT's decision.

10. The FTT explained in its decision that, after the closed session, it became apparent that further work needed to be done by the Respondents "to get to grips with the detail of how the various exemptions were said to apply to the disputed information". The Respondents were directed to provide written closing submissions in that regard, and an open gist for Mr Lownie to which Mr Lownie was permitted to respond. The result of this exercise was that TNA/FCO conceded that about 30 pages of the file should be released with

redactions. Subject to that, their position remained that the whole of the remainder of the file was exempt under each of sections 23, 24 and 38. As this appeal is no longer concerned with section 38, I say no more about it.

11. In closed submissions TNA/FCO's position was that section 23 applied because the file related to a section 23 body but that, if section 23 did not apply, section 24 did. In either case they submitted that the public interest balance fell against disclosure. TNA/FCO provided a table setting out the basis on which section 24 was said to be engaged in respect of each document and the public interest balance was reached. The closed submissions and table were provided in redacted form to Mr Lownie.

12. The Information Commissioner's position in her final closed submissions was that 23 or section 24 applied to some but not all of the material and that, where those provisions were engaged, the public interest lay in favour of maintaining the exemption.

13. The FTT decided that section 38(1) was not engaged, but that section 23(1) was. As is explained further below, the effect of section 64(2) was that the exemption in section 23 was qualified in this case because the file was an historical record. The FTT decided that the public interest test lay against disclosure. The FTT did not need to determine the alternative case under section 24 but expressed some views as to the application of that section to the disputed information.

14. The FTT gave Mr Lownie permission to appeal to the Upper Tribunal on the following grounds advanced by him:

    a. Ground 1: In holding that section 23 applied to all the disputed information, the FTT erred in its approach to "relates to".

    b. Ground 2: The FTT wrongly permitted TNA/FCO to extend its reliance on section 23 from parts of the file to the whole file, as of right and so without considering whether and how to exercise its discretion in that regard in accordance with the approach to giving relief from sanctions.

    c. Ground 3: The FTT erred in its approach to the public interest balancing test under section 23, in that it treated the engagement of section 23 as carrying inherent weight. Moreover, the FTT's decision as to the public interest was irrational.

15. All of the Respondents resisted each of those grounds. Moreover, they submitted that, if Mr Lownie's appeal as to section 23 succeeds, the information was in any event exempt under section 24. The position of all the parties was that, if I allowed the appeal in relation to tribunal's decision regarding section 23, I should remake that decision or (if applicable) determine whether section 24 applies. However, they accepted that, if I concluded that I was not able to make those decisions on the material before me, the appeal must be remitted to the FTT.

16. I add here a note about the apparent shift in the Information Commissioner's position. As I have set out, in the FTT proceedings she submitted that section 23 applied to only some of the documents. Ms Kelsey explained that the Commissioner's opposition to Mr Lownie's appeal to the Upper Tribunal was not a concession that her position in the FTT was wrong in that regard. Her position before the Upper Tribunal was simply that, in reaching a different conclusion, the FTT did not err in law.

The oral hearing in the Upper Tribunal

17. An oral hearing took place before me on 30th October 2019. I had been provided with open written submissions from all the parties and closed submissions from the respondents. In addition to the open hearing, a closed hearing was required. In accordance with the guidance in *Browning*, Mr Lownie and his counsel were told as much as possible about what took place in the closed hearing and were provided with redacted copies of the closed written submissions.

Legal Framework

18. The right of access to information held by public authorities is set out in Part 1 of FOIA. Under section 1 a person who requests it is entitled to information held by a public authority. Section 2 provides that that general right does not apply where one of the exemptions listed in Part II applies and either that exemption is absolute or, in other cases (commonly referred to as 'qualified exemptions') the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

19. One absolute exemption is in section 23. This provides:

> **23 Information supplied by, or relating to, bodies dealing with security matters.**
>
> (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).
>
> …
>
> (3) The bodies referred to in subsections (1) and (2) are—
>
> (a) the Security Service,
>
> (b) the Secret Intelligence Service,
>
> (c) the Government Communications Headquarters,
>
> (d) the special forces,
>
> (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,

(f) the Tribunal established under section 7 of the Interception of Communications Act 1985,

(g) the Tribunal established under section 5 of the Security Service Act 1989,

(h) the Tribunal established under section 9 of the Intelligence Services Act 1994,

(i) the Security Vetting Appeals Panel,

(j) the Security Commission,

(k) the National Criminal Intelligence Service,

(l) the Service Authority for the National Criminal Intelligence Service.

(m) the Serious Organised Crime Agency.

(n) the National Crime Agency, and

(o) the Intelligence and Security Committee of Parliament.

…"

20. There is a qualified exemption created by section 24, which provides as follows:

> **"24 National security.**
>
> (1) Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security…."

21. Section 2(3)(b) provides that section 23 creates an absolute exemption. However, the effect of section 64(2) is that, where information falling within section 23(1) is contained in a "historical record" in the Public Record Office, section 23 is a qualified exemption. Pursuant to section 62(1) of FOIA a record becomes a "historical record" when the last entry on the file is over 20 years old.

22. Where information is a "transferred public record" within the meaning of section 15 of FOIA because it had been transferred to the Public Record Office (which is now part of TNA), the effect of section 66 of FOIA is that TNA must consult the responsible authority (ie the body which transferred the information to TNA) before determining whether the information is exempt. If the responsible authority decides that the public interest favours withholding the information, there is a requirement to consult with the Secretary of State.

23. It was common ground in this appeal that the disputed information was both a historical record and a transferred public record.

Discussion

Ground 2

24. It is convenient to consider the procedural ground, Ground 2, first.

25. As set out above, TNA/FCO did not rely on section 23 until they filed their response to Mr Lownie's appeal in the FTT. In relation to section 23 the response stated that "information in a vetting file 'touches or stands in some relation' to section 23 bodies, if not also including information provided directly or indirectly by or to one of them." It continued "Accordingly, this qualified exemption applies to *parts of* the File" (my emphasis). In their skeleton argument for the FTT, the position was clarified: "section 23 applies to the whole file, but in the event that the Tribunal disagrees, it relies on section 24 in relation to those parts of the file found to be covered by section 23." Mr Heppinstall confirmed that this was their position at the hearing before the FTT.

26. Mr Callus accepted that TNA/FCO had been entitled to amend their response to rely on section 23, in the light of the decision of the Court of Appeal in *Birkett v Department for Environment, Food and Rural Affairs* [2011] EWCA Civ 1606, [2012] AACR 32, although he reserved his position on this point should the case proceed to a court which was not bound by *Birkett*. However, he submitted that the FTT had failed to grapple with a different point that he made there and which he advanced in this Tribunal.

27. Mr Callus' case in summary was that, while it is established that a public authority may introduce a new exemption as of right if done within the time limit for responding to the appeal, any application to rely upon a new exception made after the time limit would be subject to the case management powers of the FTT under rule 5 (*Birkett* in the Court of Appeal at paragraph 28). In the light of this, the FTT should have considered whether to permit TNA/FCO to rely on section 23 in relation to all rather than some of the disputed information. The change to TNA/FCO's case made for the first time in their skeleton argument amounted to reliance on a new exemption in relation to some of the material. As this had been introduced only after the expiry of the deadline (in the FTT's rules of procedure) for responding, the FTT ought to have considered whether to exercise its discretion under rule 5 as to whether to allow TNA/FCO to do so.

28. Moreover, Mr Callus submitted that any such discretion should have been exercised on the basis of the criteria applicable to considering whether to give relief against sanctions, in accordance with the principles established in *Mitchell v News Group Newspapers Limited* [2013] EWCA Civ 1537; [2014] 1 WLR 795, and *Denton v TH White Limited* [2014] EWCA Civ 906; [2014] 1 WLR 3926.

29. Rule 23(3) of the Tribunal Procedure (First-tier Tribunal)(General Regulatory Chamber) Rules 2009 requires a response to an appeal to include a statement of the grounds for opposition to the appellant's case. In the present case, the terms of the initial response were ambiguous but the sentence "information in

a vetting file 'touches or stands in some relation' to section 23 bodies, if not also including information provided directly or indirectly by or to one of them" appears to relate to the whole vetting file. It is not clear why the response then stated that section 23 applied only to part of the file. Nor did the response state which part or parts it applied to. The Commissioner had observed in her Response that TNA's position had been ambiguous but that did not prevent the Commissioner from setting out her position that there was not a sufficient basis to conclude that section 23 was engaged in respect of the whole file. In my judgment TNA's response did raise section 23 as of potential application to all or any part of the file. I consider that the position set out in the skeleton argument clarified the ambiguity but did not set out a substantive change to the position.

30. In any event, if I am wrong and TNA/FCO's position in the skeleton argument amounted to a change from the previously pleaded position, I am satisfied that it would be wholly inconsistent with the investigatory role of the FTT in information rights proceedings to have approached the change in the manner advocated by Mr Callus.

31. As is well established, the FTT stands in the shoes of the Information Commissioner and its proceedings are inquisitorial. The FTT's task is to determine whether a public authority has complied with its obligations under FOIA. In some cases the outcome will affect not only the immediate parties to the appeal. It is both a normal and desirable feature of such proceedings that a party is able to amend its position where that assists the FTT to reach the correct conclusion. A good example of this is found in what happened in the present case at the end of the hearing, when the Respondents were instructed to consider the disputed file page by page in order to identify whether any of it could be disclosed. The result of that exercise was that TNA/FCO decided that some pages were not exempt. To limit the procedural flexibility of the FTT in information rights cases would hinder the tribunal in discharging its function. As the Upper Tribunal said in *Browning v IC and DBIS* [2013] UKUT 236 (AAC) at paragraph 60, the FTT's function in such appeals is

> "investigatory and is to see that FOIA is properly applied to the circumstances …The existence of those exemptions means that the statutory scheme requires that the Requested/Disputed Information must be protected until it has been decided whether it may be revealed. If this were not the case, the purpose of the FOIA process and the appeal to the First-tier Tribunal would be destroyed."

32. The point was made clearly, again, by the Court of Appeal in *Birkett* at paragraph 24 in the context of the EU Directive on access to environmental information, but what the Court said applies equally to information requested under FOIA. Given the importance of some of the public interests protected by FOIA, if a public authority mistakenly fails to rely on an exemption or wrongly limits its application, the tribunal is not precluded from considering it.

As *Birkett* decided, it is for the tribunal to decide, in the exercise of its case management powers, whether to permit reliance on a new exemption.

33. I have considered the decision of the Supreme Court in *BPP Holdings Ltd v Commissioners for Her Majesty's Revenue and Customs* [2017] UKSC 55; [2017] 1 WLR 2945. That case concerned a decision of the FTT (Tax Chamber) to bar HMRC from taking part in proceedings for a serious and prolonged breach of an order of the tribunal. The Court of Appeal upheld the decision of the FTT and gave guidance as to the approach of tribunals in such cases. It said that, while the CPR did not apply to tribunals, tribunals should not adopt a different, more relaxed, approach to compliance with rules, directions and orders than the courts that are subject to the CPR. The position of the Supreme Court was set out by Lord Neuberger at paragraph 26: "the cases on time-limits and sanctions in the CPR do not apply directly, but the Tribunals should generally follow a similar approach".

34. However nothing that was said by the Supreme Court or the Court of Appeal in that case leads me to conclude that the tribunal in the present case should have subjected TNA/FCO's changed position on section 23 to the criteria applicable to consideration of relief against sanctions. Firstly, although I acknowledge that much of the reasoning in the Supreme Court and Court of Appeal was of general application and not specific to the tax tribunals, at paragraph 23 Lord Neuberger recognised that in tribunals different circumstances might sometimes require a different approach to that of the courts. In a similar vein, the qualification "generally" at paragraph 26 shows that he contemplated that the CPR approach would not always be the correct one. Secondly, it is relevant that the particular appeal was in a tax case. The considerations which are relevant to the inherent flexibility required in information rights cases, to which I have referred above, would not apply in the same way in tax cases. Thirdly, the circumstances in *BPP Holdings* were very different to those in the present appeal. That case involved significant procedural non-compliance by HMRC including failure to comply with an order by the tribunal which was itself made to address prior non-compliance, HMRC had been warned that failure to comply may result in being barred from further participation in the proceedings, there was no reason advanced for non-compliance and the judge found that HMRC's failings had caused very clear prejudice to the appellant. Fourthly, in *BPP Holdings* the taxpayer had sought a barring order. The Appellant in the present case did not raise an objection in the FTT to TNA/FCO's reliance on section 23 in relation to the whole file.

35. In the present case there could have been no reasonable basis for refusing to allow TNA/FCO to rely on section 23 in relation to the whole file. It made no difference to Mr Lownie's ability to participate in the appeal because he had not seen any of the disputed information. Moreover, as TNA's initial response had not identified which parts of the file were said to be engaged by section 23, it followed from their position that *any* of the information *could* engage

section 23. Regardless of their subsequent change of position, the case advanced would always have required consideration of the whole file.

36. Moreover, I am satisfied that the FTT could not reasonably have refused to allow TNA/FCO to advance a case that material was exempt under section 23 given the above and the potentially serious consequences of disclosing such information without proper consideration of the application of FOIA and the public interest test.

Ground 1

37. The Appellant's case under this ground was, in summary, that the FTT erred in holding that the whole file related to a section 23 body. Mr Callus submitted that the tribunal's construction of "relates to" was too wide and that its approach was inconsistent with case law. The legal submissions focussed in particular on two decisions of the Upper Tribunal as to the scope of section 23.

38. The first is a decision of a three judge panel of the Upper Tribunal, *APPGER v Information Commissioner and Foreign and Commonwealth Office* [2016] UKUT 377 (AAC), [2016] AACR 5. As is set out in the head note of the reported decision, the Upper Tribunal rejected a submission (advanced by Mr Pitt-Payne QC for APPGER) that information "relates to" a section 23 body only if the information has that body as "its focus, or main focus" or an equivalent connection to that body. The Upper Tribunal explained this conclusion as follows:

> "15. First, it is simply inconsistent with the ordinary meaning of the language. For example in plain English a planning proposal to redevelop Site A may well *relate to* the adjoining property Site B even though its main *focus* is obviously Site A.
>
> 16. Second, it is inconsistent with Parliament's clear intention that, because of what they do, there should be no question of using FOIA to obtain information from or about the activities of section 23 bodies at all. There is no point sending a letter making a FOIA request to Thames House. As Ms Steyn put it, Parliament had shut the front door by deliberately omitting the section 23 bodies from the list of public authorities in the Schedule to the Act. Section 23 was a means of shutting the back door to ensure that this exclusion was not circumvented.
>
> 17. This broad approach by reference to identified bodies is not narrowed by the qualified exemption in section 24(1), namely that "information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security". This is a safety net provision which recognises that national security issues may arise in respect of information that is not within the absolute section 23 exemption. Rather this safety net provision reinforces the view that Parliament's intention was to put section 23 bodies outside the ambit of the right to

information conferred by FOIA and a narrow approach to an absolute exemption would not promote that purpose.

18. Third, Mr Pitt-Payne's proposed narrow construction of section 23(1) is inconsistent both with the approach to date of the F-tT (see eg *Cabinet Office v Information Commissioner* (EA/2008/0080 at [21]–[23] and [27] and *Commissioner of Police of the Metropolis v Information Commissioner* (EA/2010/0008 at [15]) and Upper Tribunal case law (*University and Colleges Admissions Service v Information Commissioner and Lord Lucas* [2014] UKUT 557 (AAC); [2015] AACR 25 at [45]–[46] and *Home Office and Information Commissioner v Cobain* [2015] UKUT 27 (AAC) at [19], [28] and [29]).

…

21. In the course of oral argument Mitting J suggested that a possible way of benchmarking a decision on the application of section 23(1) was to ask whether it concerned "information, in a record supplied to one or more of the section 23 bodies, which was for the purpose of the discharge of their statutory functions". So, for example, the functions of the Security Service include "the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means" (section 1(2) of the Security Service Act 1989; see also section 1 of Intelligence Services Act 1994 as regards the functions of the Secret Intelligence Service).

….

23. We agree with Ms Steyn that it is important not to allow a judge-made formulation based on statutory functions to supplant or override the statutory "relates to" test in section 23(1). However, we also agree with Mr Hopkins that a steer as to the contours of the statutory language may be helpful (not least for the Commissioner, for future F-tTs and for future requesters).

24. There are many cases in which Ms Steyn's submission is reinforced by guidance to the effect that the approach taken to the meaning and application of an ordinary English word that can have a range of meaning is best shown by the reasons given in a particular case for the application of the test that contains it. But that solution is not, or is not as readily, available when a FOIA exemption is found to apply to information. This is because an open explanation cannot be given by reference to the actual content of the information.

25. However apart from the steer given in earlier cases and by the F-tT in this case to the effect that in section 23(1) "relates to" is used in a wide sense we agree with Ms Steyn that a steer or guidance in general terms is impermissible and unhelpful.

26. Having said that, we acknowledge 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 and so exempt under section 23."

39. The Upper Tribunal then proceeded to consider the approach suggested by Mitting J and at paragraph 33 concluded that it had "considerable utility in the application of section 23". The Tribunal then applied that approach to its consideration of the application of section 23 to the particular disputed documents. However, in the light of the clear statement by the Upper Tribunal that there should be no judicial gloss on the statutory test, the further guidance given at paragraph 33 must be understood as the probable outcome of the application of that test to the information considered there. That explains the use of the word "likely" at paragraph 26.

40. The other case referred to by the parties was *Corderoy and Ahmed v Information Commissioner, Attorney-General and Cabinet Office* GI/428/2017, [2018] AACR 19. The Upper Tribunal considered *APPGER* and the earlier cases referred to there and said:

> "53. ….for the reasons set out in paragraphs 23 to 25 of *APPGER v IC and FCO*, the judicial language in earlier cases should not be substituted for the statutory language and the correct approach is to give effect to that language in its context and so having regard to the relevant statutory purpose and other principles of statutory construction."

41. The Upper Tribunal went on to say that, nonetheless, the reasoning in the earlier cases provided assistance on the correct approach. The Tribunal reviewed the discussion in *APPGER* in the context of provision of "disaggregated information", that being the extraction of information from documents and other records as discussed in paragraphs 32 and 33 of *APPGER*. The Upper Tribunal said (paragraph 56) that the question to be asked is "Did Parliament intend that an absolute or qualified exemption would apply to the Disaggregated Information?" and (paragraph 57) the approach to answering that question was

> "to address by reference to the content of the information in question …which of the exemptions Parliament intended to apply. In other words, is the Disaggregated Information still 'caught' by section 23, or is it subject to the qualified exemptions in sections 35(1)(c) and/or 42?".

42. At paragraph 59 the Upper Tribunal reiterated the "backdoor" point made at paragraph 16 of *APPGER*, and observed that there can be difficulty in an outsider identifying what the "revelatory nature of information" might be. I understand this to mean that those who do not know the workings of security bodies, or do not have a detailed knowledge of the disputed information and the wider security context to which it is said to relate, may not be able to identify whether the information reveals anything about security matters or what it reveals. I agree with that observation. What appears to an outsider,

including the FTT, anodyne, uninformative and lacking in interest may in fact, to those who are "in the know", provide information about matters related to a security body.

43. In *Corderoy*, however, the Upper Tribunal was satisfied that there was no "revelatory problem" for reasons which it explained at paragraph 60. The Upper Tribunal concluded as follows:

> "62. Returning to what we regard as the central question we have concluded that although we accept that the Disaggregated Information was and is of interest to security bodies for their statutory purposes and, as a matter of ordinary language, can be said to relate to them, Parliament did not intend such information to be covered by the absolute section 23 exemption. The reasons for this are that (i) the interest of the security bodies in such information is shared by Parliament and the public because it relates and is confined to the legality of Government policy, and so (ii) such information falls obviously within the qualified exemptions in sections 35 and 42 as being legal advice on the formulation of Government policy."

44. In the light of the Upper Tribunal's acceptance of the approach in *APPGER* that "the judicial language in earlier cases should not be substituted for statutory language", I do not consider that the further discussion from paragraph 55, which I have summarised above, qualified that over-arching principle. The identification of what Parliament intended is best understood as a tool used by the Upper Tribunal in applying the statutory language, and the conclusion in paragraph 62 is best understood as the application of the statutory language to the particular facts of the case.

45. I am reinforced in my view because, as a matter of general principle, the fact that information might come within the scope of a qualified exemption cannot of itself be an answer to the question whether it is within the scope of a different absolute exemption. Indeed such an approach would be contrary to the clear statement of the Upper Tribunal in *APPGER* (to which I make further reference below) that the scope of section 24 (a qualified exemption) cannot define the scope of section 23.

46. In my judgment, in particular when read along with paragraph 60, at paragraph 62 the Upper Tribunal identified the true nature of the Disaggregated Information in order to apply the statutory words. In that case it concluded that, although the information was of interest to the intelligence agencies, its true nature was legal advice provided to the Cabinet Office, it was of general interest and that there was nothing in it which concerned the security bodies as such.

47. Importantly, the Upper Tribunal in *Corderoy* did not qualify the following propositions or guidance that can be derived from *APPGER*:

a. The phrase "relates to" should not be construed narrowly. In the light of the ordinary meaning of the language, parliamentary intention to "shut the backdoor" to ensure the exclusion of section 23 bodies from the reach of FOIA, and previous authority, the phrase is used in a wide sense (*APPGER* paragraphs 15-19 and 25; *Corderoy* paragraph 59).

b. There should be no judicial gloss to the statutory test (*APPGER* paragraphs 23 to 25; *Corderoy* paragraphs 51 and 53).

48. Mr Callus submitted that the Upper Tribunal in *APPGER* and *Corderoy* had failed to give section 23(1) its proper construction. His suggestion was that both cases concerned information which obviously fell within the domain of the section 23(3) bodies and their work, the implication being that the Upper Tribunal had not had to grapple with the application of the provision in more difficult cases. That was clearly not the position, however, at least in *Corderoy* where the question of the application of section 23 to the Disaggregated Information arose precisely because the information did not obviously fall within the domain of a section 23(3) body.

49. Mr Callus next submitted that the tribunal should avoid an approach to "relates to" which gives an excessively wide interpretation of section 23(1), for two reasons. Firstly, the wider the reach of section 23, the narrower that of section 24. Indeed, he said, "relates to" could be attributed such a wide meaning that there would be no role for section 24. Secondly, because section 23 creates (in most cases) an absolute exemption, it should not be construed so that it can apply to entirely anodyne information.

50. Mr Heppinstall pointed out, correctly in my view, that the starting point for understanding section 23 is the policy that lies behind it. The provision seeks to preserve the operational secrecy necessary in order for the section 23 bodies to operate, the importance of which was explained in *R v Shayler (David)* [2002] UKHL 11, [2003] 1 AC 247 at paragraph 25:

> "There is much domestic authority pointing to the need for a security or intelligence service to be secure. The commodity in which such a service deals is secret and confidential information. If the service is not secure those working against the interests of the state, whether terrorists, other criminals or foreign agents, will be alerted, and able to take evasive action; its own agents may be unmasked; members of the service will feel unable to rely on each other; those upon whom the service relies as sources of information will feel unable to rely on their identity remaining secret; and foreign countries will decline to entrust their own secrets to an insecure recipient: see, for example, *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 118c, 213-214, 259a, 265f; Attorney General v Blake [2001] 1 AC 268, 287d-f. In the *Guardian Newspapers Ltd (No 2) case,* at p 269e-g, Lord Griffiths expressed the accepted rule very pithily:

> "The Security and Intelligence Services are necessary for our national security. They are, and must remain, secret services if they are to operate efficiently. The only practical way to achieve this objective is a brightline rule that forbids any member or ex-member of the service to publish any material relating to his service experience unless he has had the material cleared by his employers. There is, in my view, no room for an exception to this rule dealing with trivia that should not be regarded as confidential. What may appear to the writer to be trivial may in fact be the one missing piece in the jigsaw sought by some hostile intelligence agency." "

51. This imperative was recognised by the Upprt Tribunal in *APPGER* at paragraph 16, which I have cited above. Section 23 of FOIA was designed to ensure that information which cannot be obtained from section 23 bodies (which are not subject to FOIA) could not nonetheless be obtained from public authorities which are subject to FOIA.

52. It would be wrong in principle to interpret section 23 by reference to the perceived role of section 24 rather than to give effect to the important public policy imperative which drives section 23. As the Upper Tribunal said in *APPGER* at paragraph 17, section 24 is "a safety net provision which recognises that national security issues may arise in respect of information that is not within the absolute section 23 exemption". It would turn the operation of these provisions on their head if the scope of section 23 were defined by reference to section 24. Moreover, even if "relates to" is given such a broad meaning that section 24 could not apply to information which has any connection, even very remote, with a section 23 body, that would not deprive section 24 of utility. There are many other circumstances in which the national security exemption might apply. Contrary to Mr Callus' submission, and as the Upper Tribunal also said at paragraph 17 of *APPGER*, the existence of the safety net reinforces the view that section 23 bodies should be outside the ambit of the right to information conferred by FOIA.

53. I also reject Mr Callus' second submission summarised at paragraph 49 above. A similar point was addressed in *Commissioner of Police of the Metropolis v Information Commissioner* (EA/2010/0008):

> "15. Sections 23 and 24 are closely linked provisions. Not surprisingly, s.24 applies only where s.23 does not. Whereas s.24 protects from disclosure, subject to the weighing of conflicting public interests, any information outside s.23 which should be withheld in the interests of national security, s.23 provides absolute protection to information coming from or through the specified security bodies or which, "relates to" any of those bodies. Significantly for this appeal, that very broad class of information plainly embraces, not just the content of information handled by a specified body but the fact that it handled it. It is, moreover, an exemption which applies without proof of prejudice.

> Parliament decided that the exclusionary principle was so fundamental, when considering information touching the specified bodies, that even perfectly harmless disclosure would only be made on the initiative or with the consent of the body concerned."

54. That was a decision of the FTT but it has been endorsed by the Upper Tribunal at paragraph 28 of *Home Office v IC and Cobain (Final Decision)* [2015] UKUT 0027 (AAC) and, implicitly at least, approved by the Upper Tribunal in *APPGER.* The above passage succinctly explains that the purpose of section 23 is that *all* information to which it applies should be exempt regardless of prejudice. It has been drafted so as to enable the withholding of entirely anodyne information.

55. This is reinforced by the example discussed by the Upper Tribunal in *APPGER* at paragraphs 29 – 31. A thesis sent to a section 23 body in that example was entirely unrelated to the body and so could be disclosed, but the fact that it was sent to the section 23 body was information which related to that body and so would be exempt from disclosure. I note that the fact that the thesis was sent to the body might say nothing about the activities of the body and might be entirely anodyne information, but it would nonetheless be exempt.

56. Mr Callus next submitted that, although it is not necessary for the information to refer to a section 23 body, the information must say something about a section 23 body and its activities. He said that this was consistent with Parliament's intention, as explained in *APPGER* at paragraph 16, that "because of what they do, there should be no question of using FOIA to obtain information from or about the activities of section 23 bodies at all". But this observation should not be read in isolation from the front door/back door point. The absolute nature of the exemption reflects the fact that section 23 bodies are not subject to FOIA in respect of any information held by them.

57. Asking whether information says something about the activities of a section 23 body may be a useful question and may be determinative of the application of section 23 body, but it is not the only question that can be asked and there is nothing in section 23 or the case law to warrant limiting it in this way. In any event, if Mr Callus was right that information relates to a section 23 body if it "tells you something about that body or its activities", he would have no good complaint about the FTT's approach in this case in the light of paragraphs 73 and 80 if its decision.

58. Mr Callus pointed out that section 23(1) specified that it covered information both "directly or indirectly supplied" by a section 23 body but that there was no such qualification in respect of "relates to". He said that it could be inferred from this that the latter phrase was used only in a "direct" sense. If Parliament had intended it to cover both directly and indirectly relating, it would have said so, as it did in relation to "supplied by". On this basis, he submitted, information which "relates directly to" a section 23 body was caught but other

information was not, although it could be subject to the qualified exemption in section 24.

59. In my judgment the qualification of the term "relates to" advanced by Mr Callus is not warranted. It involves a judicial gloss on the test which was expressly deprecated in *APPGER* and implicitly disapproved in *Corderoy*. I do not accept his linguistic analysis that, without qualification, "relates to" naturally means "directly relates to". The term "relates to" does not need to be qualified because it is capable of embracing both a direct and indirect connection. While the same might be said of "supplied", I can readily see that, without the addition of "directly or indirectly", there would be a risk of it being construed as limited to "directly" which might be thought to be its more natural meaning as commonly used.

60. Moreover, adding the qualification "directly" does not provide a workable solution. It is not at all clear what "directly related to" means. Mr Callus attempted to answer the point by suggesting that it means "anything that tells you directly about the section 23 bodies and their activities" but that is a circular definition which incorporates the same difficulty. The problem does not arise in relation to the phrase "directly or indirectly supplied by" because the inclusion of the two forms of supply means that it is not necessary to know the limits of "directly".

61. The phrase "relates to" appears in other provisions of FOIA. Mr Callus referred to the decision of the Court of Appeal in *Department of Health v Information Commissioner* [2017] EWCA Civ 374, [2017] 1 WLR 3330 at paragraph 13, citing the FTT's approach to "relates to" in section 35(1). However, there the meaning of "relates to" was not in issue and the Court of Appeal made no comment on the FTT's approach. In any event, what the FTT said there was that "relates to" "should not be read with uncritical liberalism as extending to the furthest stretch of its indeterminacy, but instead must be read in a more limited sense so as to provide an intelligible boundary, suitable to the statutory context". That says no more than was said in *APPGER* at paragraphs 15-17 and *Corderoy* at paragraph 53. It does not add anything to the understanding of "relates to" in section 23 which, although appearing in the same Act, has a specific statutory context which is different to that of section 35.

62. I accept that there will come a point when any connection between the material and a section 23 body is so remote as to mean that the material does not relate to that body. But that is a value judgment to be made on the evidence. The judgment is informed by the statutory purpose of section 23, as identified in *APPGER* paragraph 16. In making that judgment, the FTT should remind itself that it may be difficult to identify the nature of what the material may reveal (see *Corderoy* at paragraph 59(a)).

63. In the present case, the FTT noted that there was a dispute between the parties as to the meaning of "relates to" and summarised the case law (in particular the decisions in *APPGER* , *Corderoy* and *Lewis*). It noted that in

APPGER the Upper Tribunal said that 'relates to' was used in a wide sense but that *Corderoy* showed the intended width was restricted. The FTT observed as follows:

> "71. A feature of the legal discussions in *APPGER* [2015] and *Corderoy* is that they never quite state explicitly the core problem of interpreting 'relates to'. If indirect connections are allowed, the literal meaning of 'relates to' provides no limit at all, since ultimately everything in this world is indirectly related to everything else. Therefore, one has to find the boundary intended by 'relates to' by consideration of the statutory purpose discernible from the context."

64. The tribunal then noted that the statutory purpose had been identified in *APPGER* at paragraph 16, or in the tribunal's words "FOIA is not to be used in a way that reveals the activities of section 23 bodies" (paragraph 73). The FTT found that this was consistent with the approach suggested by Mitting J at paragraph 21 of *APPGER* which the Upper Tribunal thought had "considerable utility" (paragraph 33). I note that, as the Tribunal found in *Corderoy*, that approach cannot always be applied on the facts but it was not an error of law for the FTT to have regard to it in so far as it was pertinent on the facts of the case.

65. The tribunal's approach was a correct summary of the legal position.

66. On the facts, the FTT concluded as follows:

> "78. The question whether information was supplied by or relates to (in the sense explained above) a security body is a question of objective fact, which (unlike the application of s 24) does not require any judgments concerning matters of national security.
>
> 79. The Second and Third Respondents, through Mr Heppinstall, rely upon s 23 in relation to the whole of the file other than the pages which have been redacted and recently released.
>
> 80. We were initially sceptical of that submission. Mr Callus made a powerful submission concerning the number of times the file had apparently been considered without anyone realising that s 23 was applicable. However, on further consideration we have come to the conclusion that s 23(1) applies to the remaining parts of the file which have not been redacted and released. The reason for this is that disclosure of the file would disclose specific information about the actual activities of a security body in relation to a particular person. And in the particular circumstances, such disclosure could not practicably be prevented by selective redactions.
>
> 81. Redaction from the file of specific references to that body would not prevent such disclosure."

67. The connection identified by the FTT between the disputed information and the file, at paragraph 80, cannot on any basis be described as remote. Moreover, the conclusion is clearly a rational one. The file in question was the vetting file of a deceased former civil servant and on the evidence there clearly

was a connection between the information in that file and the security bodies. The clearest exposition of this in the open evidence was by Mr Tucker in his witness statement where he explained the intimate connection between the content of the vetting file and the activities of section 23 bodies.

68. Mr Callus repeated in the Upper Tribunal the submission summarised by the FTT at paragraph 80 as to the number of times that the file had been reviewed without anyone identifying that section 23(1) might be engaged. He submitted that it could be inferred that, even if the file contained information about section 23 bodies, it must be "so marginal and tangential as to fail any 'remoteness test' that might be thought to apply". I reject this. There could be a number of reasons why those reviewing the file did not identify section 23 as being applicable until late in the day. I do not know why that was, but one can readily see that a possible reason could be that there was a focus on other exemptions which deflected attention from consideration of section 23. In addition, the request was originally considered by TNA and it was not considered by the FCO until after the first internal review by TNA.

69. In any event, it was for the FTT to decide on the evidence whether section 23 applied. Ultimately its decision cannot be wrong in law simply because other departments or agencies had previously failed to identify its application. The fact that other agencies including the respondents had failed to identify it for a lengthy period of time would emphasise the need for the FTT to be astute in its task, but the FTT's comment at paragraph 80 shows that it was. This is reinforced by the FTT's direction that, after the hearing, the Respondents were to explain how the exemptions applied to each document.

70. Mr Callus also invited the Upper Tribunal specifically to rule on whether the FTT was correct to find that section 23 was engaged by the name of the subject of the file. He relied in particular on the FTT's observation that, if section 23 did not apply, section 24 would not prevent the release of the name. Mr Callus submitted that the name itself would not necessarily say anything about a section 23 body. That may be so in some cases, but not in this case. Part of the FTT's confidential reasons, which I am satisfied can be disclosed without doing harm to the interests protected by sections 23 or 24, was that disclosure of the subject's name would reveal specific activities of a section 23 body. On the facts of the case, this was a finding which was open to the FTT.

71. In my judgment, the FTT's view as to the application of section 24 to the name does not assist Mr Callus in relation to section 23. First, the FTT did not make a determination on that matter. As it said at paragraph 91, it simply made some "brief remarks concerning our assessment of the facts, which could be relevant in the event of an appeal". In any event, the logic of the tribunal's observation at paragraph 95 is not that section 23 did not apply. It is implicit in that paragraph that it had accepted that section 23 applied to the disputed information, and the observation at paragraph 95 applied only on the hypothetical basis that the FTT had been wrong in that regard. If it had been

wrong in that regard, it would have meant that the name itself did not "relate to" a section 23 body and, in that event, the FTT could see no other prejudice to national security if the name was disclosed. Third, the tests under the two provisions are different. If disclosure of a name alone would not prejudice national security, that does not mean that disclosure would not relate to a section 23 body. It would be known that the name was contained in a vetting file and, at the very least, disclosure of the name could well show that a section 23 body had in some way been involved in the vetting of the named individual.

72. For these reasons Ground 1 fails.

Ground 3

73. The gist of the closed session set out by the FTT included the evidence of Mr Tucker (Head of Archives at the FCO) that disclosure of the disputed material would harm national interests because it would disclose details of the vetting process and the involvement of certain security bodies, including vetting and investigative techniques and details about how vetting decisions were made. The gist stated that Mr Tucker had given evidence as to why those concerns arose. Mr Tucker also said that all information relating to vetting of an individual was confidential and that the confidentiality was necessary to the vetting process. Disclosure of any information relating to vetting would harm the process and give rise to national security concerns.

74. TNA/FCO's open and closed written submissions in the FTT set out in greater detail their case as to the importance of maintaining the confidentiality of the file.

75. In its decision the FTT noted that there was a clear public interest in disclosure of the information, including for the light it shed on the conduct of government and also because of the public interest in the Burgess and Maclean affair. On the other hand, the FTT accepted that there had already been a high degree of public comment and debate in relation to this high profile matter and that "Whilst the contents of the file might be of interest to those concerned with the detail of those affairs, it is not assessed that the content will significantly add to the detail already in the public domain, and thus will not enhance the quality of the public debate and discussion as to these historical public affairs."

76. The FTT concluded that this did not outweigh the public interest in withholding the information

> "87. On the other side of the balance there is the strong public interest in preserving the secrecy of operation of security bodies, which is reflected in the features that the security bodies are not subject to FOIA and that s 23 is normally an absolute exemption.
>
> 88. Mr Heppinstall submitted:

> "The fact that section 23 when applied to historical documents becomes a qualified exemption is because Parliament recognised that the passage of time *might* mean that absolute secrecy is not required."
>
> 89. In our view, the feature that the s 23 exemption is subject to the public interest test in the case of a transferred record allows for the possibility of cases where the public interest in disclosure is strong, and also indicates Parliament's judgment that at some point the passage of time will so dilute the importance of s 23 that the ordinary public interests in disclosure of governmental information will outweigh it.
>
> 90. In the present case the judgment which we must make is a matter of impression, having heard the evidence, read the file and considered the parties' arguments. In our view the policy underlying the s 23 exemption remains relevant in the case of this file. The reasons for disclosure are not particularly strong. Our conclusion is that the public interest in maintaining the exemption outweighs the modest public interest in disclosure."

77. The first basis on which Mr Callus challenged this conclusion was that he said that the FTT had wrongly ascribed "inherent weight" to the fact that the material fell within section 23 and that the FTT had failed to grapple with the specific risks of disclosure upon which the Respondents had relied. He submitted that the FTT had placed weight on the fact that, in most cases, section 23 created an absolute exemption. Mr Callus submitted that the correct approach was that, as the exemption was qualified in this case, there could be no weight ascribed to the fact that in non-historical records cases the exemption would be absolute. Section 64(2) had disapplied the absolute nature of the exemption in the case of historical records but the FTT had failed to give this full effect because it had afforded some weight to the fact that in other cases the exemption would be absolute. He said that Parliament's clear intention was that in relation to historical records, the exemption should operate in the same way as any other qualified exemption. Both sides of the scales start empty and the FTT must weigh all relevant factors.

78. Mr Callus submitted that his position was supported by the fact that there may be cases in which section 23 was engaged but that no weight should attach to non-disclosure of the information in question. He gave the example of GCHQ's twitter account. The content of the account would be within section 23 but there could be no public interest in withholding it as it was already in the public domain. But the fact of the information being in the public domain reveals why this example does not assist Mr Callus. FOIA exemptions are about information which a public authority does not wish to disclose. It was not part of Mr Heppinstall's case that no information relating to a section 23 body would be made public. The content of GCHQ's twitter account is a very good example of why he could not advance such a case.

79. Mr Heppinstall's case was that it was impossible to ignore the fact that the public interest test had to be applied in the context of section 23, and the policy behind section 23 was to preserve the absolute secrecy within which

section 23 bodies operate. The moment absolute secrecy was breached, prejudice arose. The relevance of the exemption becoming qualified in the case of historical records was that the exemption no longer played a trump card; it left open the possibility that time and other factors could tip the balance. He accepted that the scales started empty but the factors in favour of non-disclosure would weigh heavily.

80. Ms Kelsey agreed with Mr Heppinstall's position save that she was not prepared to say that weight would *always* attach to the policy reasons lying behind the section 23 exemption because she could not predict that the position might not be different in some future case.

81. In support of his submission Mr Callus relied on the Upper Tribunal's decision in *The Cabinet Office v Information Commissioner* [2014] UKUT 0461 (AAC), where the Upper Tribunal decided that no inherent weight attached to the exemption in section 35(1)(b) of FOIA, a qualified exemption where information held by a government department relates to Ministerial communications. Upper Tribunal Judge Turnbull had conducted a careful and instructive analysis of case law as to the weight to be ascribed to various exemptions including the different sub-categories of exemption under section 35(1). It was recognised in that case law that some FOIA exemptions carried inherent weight, those being section 35(1)(c) and section 42, because section 35(1)(c) reflected the confined nature of the Law Officer's Convention (paragraph 46(4)) and, in relation to section 42, the doctrine of legal professional privilege was binary and very specific and, moreover, was not a "relates to" exemption (paragraph 46(5)). However, other categories of exemption in section 35 were very wide and covered information which could not possibly be confidential (see Stanley Burnton J in *OGC v Information Commissioner* [2008] EWHC 774 (Admin) at paragraph 79).

82. Judge Turnbull observed that the fact that information merely had to "relate to" the subject matter of the exemption "means that the exemption could be engaged without bringing into play to any significant extent any of the public policy considerations underlying the exemption" and "once one accepts that there can be cases within [the exemption] which do not attract any inherent weight, that …demonstrates a fatal flaw in the contention that, as a matter of statutory construction, Parliament intended that some significant weight should be attached to [it]" (paragraph 54).

83. I do not consider that that observation assists in understanding the exemption in section 23. The starting point is that Parliament has decided that, save for the case of historical records, there is such a powerful interest in non-disclosure that the exemption is absolute. The inescapable conclusion is that (in the case of information which is not a historical record) the importance of preserving the secrecy of section 23 bodies is of itself sufficient reason that the information should not be disclosed, whether by the front or back door. The policy reasons underlying that interest do not disappear in the case of historical records. However, in those cases that interest is weighed in the

balance along with all other relevant considerations both for and against disclosure.

84. Considerations of "inherent weight" are difficult to apply here. One can start with empty scales but some interests in non-disclosure weigh more heavily than others. I find the following observations by Judge Turnbull particularly useful in this context:

> "67. I think that some confusion and apparent contradiction has been introduced into the case law by formulating the question as being whether the exemption in a particular subsection of section 35(1) carries inherent weight. In my judgment it is preferable (i) to consider to what extent the public interest factors potentially underlying the relevant exemption are in play in the particular case and then (ii) to consider what weight attaches to those factors, on the particular facts...
> *[Judge Turnbull's emphasis]*
>
> 68. It does not of course follow that a tribunal cannot go wrong in law if it adopts that approach and finds that there is no significant public interest in maintaining the exemption. If, for example, a tribunal finds (or could on the evidence only properly find) that disclosure of the information would directly impact upon on one or more of the public policy concerns underlying s.35(1)(a) and/or (b) (e.g. "safe space", collective Cabinet responsibility etc), it may be that the only proper finding would then be that there would necessarily be significant general damage to the public interest resulting from the likely effect on ministerial or other official behaviour in the future. It seems to me that the limits on the freedom of the fact finding body's decision making ability, in relation to these exemptions, will need to be established very much on a case by case basis."

85. In substance this is the approach adopted by the FTT in the present case. The FTT carried out a conventional balancing exercise, assessing the interests in disclosure and non-disclosure. At paragraph 84 it noted the importance of the Burgess and Maclean affair and the interests connected with it. At paragraph 85 it noted other public interests in disclosure, but it explained at paragraph 86 why it did not consider that significant weight attached to disclosure of the file. The FTT then went on to consider the factors on the other side of the scales. The comment at paragraph 87 is no more than a statement of the obvious. There is a strong public interest in preserving the secrecy of operation of security bodies. The fact that the exemption was normally absolute reflected this strong public interest. The fact that the exemption was qualified did not detract from the value to be ascribed to the importance of secrecy, but meant that that interest was to be balanced against the public interest in disclosure.

86. I do not accept that, in referring only to generic concerns about release of categories of information, the FTT was effectively and incorrectly ascribing

"inherent weight" to the public interest in maintaining the exemption independently of the facts of the case. The factors relied on by TNA/FCO against disclosure were not dependent on the character or content of each individual document. The point that they made was that prejudice arose if the absolute secrecy within which vetting took place was breached. Reasons supported by evidence were given for asserting that this was the case, in open and more fully in closed. As was made clear by TNA/FCO's open closing submissions to the FTT at paragraphs 70 and 71, while it was appropriate in relation to section 24 to address the documents individually in identifying the harm arising from disclosure, no such exercise was carried out in relation to section 23 because the public interest asserted was, in its nature, generic to the type of file in issue.

87. There was nothing wrong in the FTT taking into account the reason for the exemption being qualified in relation to historical records. That would assist the tribunal in weighing the competing interests for and against disclosure. Moreover it is obvious that the policy was that the passage of time might diminish the need for secrecy. However in the present case the FTT's decision was that the policy underlying the exemption itself remained relevant.

88. The FTT's reasoning at paragraph 90 shows that it considered the particular features relevant to this case. It took into account "the evidence,…the file, and…the parties' arguments". The policy underlying section 23 was "relevant in the case of this file". The FTT considered the impact of the passage of time. It thought that the public interest in disclosure was "modest", a description which was clearly directed to the information in issue in this case.

89. In this part of the decision the FTT did not set out more detailed or specific considerations advanced by TNA/FCO relevant to the confidentiality which it claimed. However the submissions and evidence regarding this had been summarised earlier in the decision and this must be what the tribunal was referring to at paragraph 90.

90. For these reasons I reject the challenge to the FTT's approach to the public interest balancing exercise.

91. The second basis on which Mr Callus challenged the conclusion was, in essence, a rationality and reasons challenge. He submitted that the FTT failed to explain how it had assessed the important factors upon which he had relied in his closing submissions and his speaking note in the FTT.

92. Mr Callus submitted that the FTT should have taken into account that the vetting file had been reviewed nine times without anyone realising that section 23 was engaged, and this should have been a weighty factor in assessing the prejudice arising from disclosure. As I have said, at paragraph 80 the FTT addressed this submission in deciding whether section 23 was engaged. Once it had rejected that aspect of Mr Callus' case, it is difficult to see what further traction this point could have had regarding the weight to be ascribed to the interests relied on by the Respondents.

93. Mr Callus also relied on the fact that two other files (the "Pridham file" and the "Floyd file") had come into the public domain without any evidence of the ill-effects relied on by TNA/FCO. The release of these files, he said, contradicted the case made by TNA/FCO as to the inherent requirement for confidentiality of vetting files.

94. The witnesses addressed the Pridham file in closed session and their evidence was summarised in the gist: a time would come in the future when the subject file would also be released; it had been explained in closed why the Pridham file did not engage sections 23 or 24; and, despite the Pridham file having been released, it was explained in closed why disclosure of the subject file would harm national security considerations. The witnesses addressed the impact, if any, of the Pridham file on the "chilling effect" and "jigsaw" arguments.

95. The FTT did not mention the Pridham file in the reasons for its decision. It explained in its decision that the Floyd file was released between the date of the oral hearing and its decision, explained briefly the circumstances of the release of that file and that Mr Lownie had submitted that its release undermined the respondents' case. TNA/FCO had agreed to provide Mr Lownie with a redacted copy of the file but had not done so in time for Mr Lownie to refer to it in his submissions, but Mr Lownie did not apply to the FTT for delay so as to conclude his submissions. The FTT noted Mr Lownie's submission that TNA/FCO had delayed the redacted release of the file even though it had already been made public and that this indicated a loss of perspective by them as to the sensitivity of historical material of this nature and of the public interest balancing exercise. The FTT's conclusion, at paragraph 38, was:

> "We have not seen the Floyd file and express no view on whether it is relevant or not. Our duty is to exercise our own judgment after close scrutiny of the evidence which has been placed before us. The complaint reminds us to consider with particular care whether there has or has not been a loss of perspective on the part of TNA/FCO as to the sensitivity of the disputed file."

96. Although the FTT referred only specifically to the Floyd file, the same point would have applied to the Pridham file. Indeed that very point was made in TNA/FCO's closing submissions in relation to the Pridham file. Furthermore it is apparent from that part of the gist relating to the Pridham file that the witnesses had explained why the respondents' case was not undermined by the release of the Pridham file.

97. The FTT's approach as expressed in relation to the Floyd file was correct. Even if there was an inconsistency in the approach to the Floyd file and the file in issue in these proceedings, that would not of itself have undermined the case of TNA/FCO. These were not judicial review proceedings and consistency of decision-making was not relevant to the FTT's task which was to decide whether the file in issue should be released. The FTT correctly

identified that the relevance of the release of the Floyd file was to call for particular care in considering the case advanced by TNA/FCO. The same position pertained in relation to the relevance of the release of the Pridham file and it was immaterial, in the circumstances, that the FTT did not specifically mention it in this regard.

The closed submissions and evidence, and the FTT's confidential annex

98. The FTT's reasoning in the confidential annex is brief. However, when considered in the light of the closed materials and submissions, I am satisfied that the open and closed reasoning is adequate to explain the FTT's decision.

99. As I have already pointed out, the FTT wished to be satisfied that the exemptions in sections 23 and 24 applied to every document in respect of which they were claimed and in that regard the FTT invited the Respondents to provide further written closed submissions. The FTT accepted TNA/FCO's open and closed case in this regard. The Commissioner's written submissions questioning the application of the section to some documents did not specifically address individual documents and so took matters no further. I have considered the documents in the file in the light of the closed submissions, in particular those of Mr Heppinstall on behalf of TNA/FCO. I am satisfied that, essentially for the reasons which he gave in those submissions, the FTT was entitled to conclude that all of the disputed information related to a section 23 body. I am also satisfied that the FTT was entitled to conclude that the public interest in disclosure, which was slight, was not outweighed by the public interest in maintaining the exemption. Indeed, having seen the documents, I find it difficult to see how the FTT could have concluded otherwise.

Conclusion

100. For the reasons given here, and in Closed Reasons which are confidential to the Respondents, this appeal is dismissed.

Signed on the original
on 28 January 2020

Kate Markus QC
Judge of the Upper Tribunal