



**GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS50584797
Dated: 11 February 2016**

Appellant: CIARAN ARTHURS

1st Respondent: INFORMATION COMMISSIONER

**2nd and 3rd Respondents: THE NATIONAL ARCHIVES (TNA) AND THE
MINISTRY OF DEFENCE (MoD)**

Heard at: FIELD HOUSE

Date of hearing: 26 JULY, 8 AND 9 DECEMBER 2016

Date of decision: 15 JANUARY 2017

Date of Promulgation: 30 JANUARY 2017

Before

ROBIN CALLENDER SMITH
Judge

and

ANNE CHAFER and ROSALIND TATAM
Tribunal Members

Representation:

Appellant: Ms Julianne Kerr Morrison, Counsel instructed by Mr Christopher Stanley of KRW Law, Belfast.

First Respondent: Mr Rupert Paines, Counsel instructed by Mr Richard Bailey for the Information Commissioner.

Second and Third Respondent: Mr Julian Blake, Counsel instructed by Government Legal Department for The National Archives (TNA) and the Ministry of Defence (MoD)

Subject matter: FOIA 2000

Absolute exemptions

- Personal data s.40
- Information supplied by, or relating to, bodies dealing with security matters s.23

Qualified exemptions

- National security s.24
- Defence s.26
- Law enforcement s.31
- Health and safety s.38

Cases and authorities cited:

Department of Health v IC & Simon Lewis [2015] UKUT 159 (AAC); *Kennedy v Charity Commission* [2015] AC 455; *Keane v ICO, Home Office & Commissioner of Police of the Metropolis* (EA/2015/0013); *AB v A Chief Constable* [2014] EWHC 1965 (QB); *Philips v IC & TNA* (EA/2012/0141); *BUAV v IC & Newcastle University* (EA/2010/0064); *CSA v Scottish Information Commissioner* [2008] 1 WLR 1550; *Keane v IC, Home Office and MPS* [2016] UKUT 0461 (AAC); *AHK v SSHD* [2012] EWHC 1117 (Admin); *APPGER v IC & MoD* [2011] UKUT 153 (AAC); *Salford City Council v IC and TieKey Accounts* (EA/2012/0047); re: *Freddie's Scappaticci's Application* [2003] NIQB 56; *An Informer v A Chief Constable* [2012] EWCA Civ 197 and Ruling of the Undercover Policing Enquiry on Restrictions Orders: *Legal Principles and Approach Ruling* (Pitchford LJ: 2016).

OPEN DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice dated 11 February 2016.

OPEN SUBSTITUTED DECISION NOTICE

The Substituted Decision

For the reasons set out in the Tribunal's Open and Closed decision, the Tribunal allows the appeal in part and substitutes – in this Open Decision - this Decision Notice in place of the decision notice dated 11 February 2016 for the reasons given in the body of this Open Decision.

The Closed Decision and Closed Annexe to it requires the Ministry of Defence and The National Archives to reveal some further information that is currently also withheld and which is also the subject of this appeal.

R Callender Smith

Judge

15 January 2017

REASONS FOR DECISION

Introduction

1. This appeal relates to a request for information about the bombing of McGurk's Bar in Belfast on 4 December 1971.
2. In this atrocity, 15 civilians were killed and 17 others were injured.
3. McGurk's Bar was situated in the Catholic New Lodge area in northern Belfast on the corner of North Queen Street and Great George's Street.
4. The bombing took place during a period of intense terrorist activity in Northern Ireland's Troubles. Bloody Sunday followed a few weeks later, on 30 January 1972.
5. Some years after the atrocity a member of a loyalist terror group was convicted for these and other murders.
6. Mr Ciaran Arthurs (Ciarán MacAirt), the Appellant, made his initial request for information on 11 February 2015 when he wrote to The National Archives (TNA) requesting Document reference WO 305/4617 which was the Headquarters Northern Ireland Log for December 1971.

7. This file contains records from the military headquarters of the British Army in Northern Ireland at that time.
8. The Tribunal adjourned the appeal hearing on 26 July 2016 on the basis that – after what amounted to a full Case Management Review with very specific Directions – Counsel for the Appellant confirmed that the request could be limited to:

matters surrounding, leading up to or relating to the bombing of McGurk’s Bar which occurred on 4 December 1971 and any events linked to that bombing and the casualties which then followed during December 1971 as well as attributions as to its cause and the steps taken to investigate the crime.
9. As part of the Directions then issued by the Tribunal, The National Archives (TNA) and the Ministry of Defence (MoD) were joined as additional Respondents to the appeal.
10. In terms of the Closed Material being relied on by the Respondents, the Directions required the material to be divided into three categories:
 - a. Level 1: information clearly relating to the bombing;
 - b. Level 2: information possibly relating to the bombing; and
 - c. Level 3: clearly irrelevant information.
11. The Directions further required that an Excel spreadsheet be produced to show, in respect of the Closed Material, the “level” of the information, the exemptions applied and the justification for any of the exemptions.
12. That meant that some information, falling within the revised scope of the Appellant’s request that had not previously been given to the Appellant, was disclosed to him.
13. Significantly, this included the information that the bomb had been placed in the entrance hall to McGurk’s Bar rather than being inside it.
14. The sensitivity in relation to this, and its crucial significance to the families of the deceased and injured, is that the ATO’s expert opinion – delivered

and recorded at the time – completely refuted the “own goal” propaganda that had subsequently been circulated at the time suggesting that the bomb makers were from Republican elements who had been inside McGurk’s Bar at the time of the explosion.

15. This refutation comes from the newly un-redacted and disclosed information at Serial 24 in the Headquarters Northern Ireland Log Sheet timed at 11.10:

ATO is convinced that bomb was placed in entrance way on ground floor. The area is cratered and clearly was the seat of the explosion. Size of bomb likely to be 40/50lbs

16. The Appellant, prior to the resumed oral appeal hearing, made it clear in the written submissions made on his behalf that he was “concerned by the sheer amount of material which had been classified as Level 3”. He wanted to be certain that the Tribunal had satisfied itself that the “levels” had been correctly identified and applied.

17. He confirmed (on 16 November 2016) that he did not seek to challenge personal data redactions of the Level 1 and Level 2 material. He was, however, concerned about the redaction to the document identified as Serial 26 relating to 5 December 1971 (which was almost immediately below the newly unredacted information at Serial 24 in respect of the ATO’s conviction that the bomb had been placed in the entrance to the Bar).

18. To give the context and scope of the information in question it is worth reflecting that the Information Commissioner’s original Decision Notice stated (at Paragraph 10):

The requested information relates to one month during a period of intense terrorist activity in Northern Ireland’s Troubles. The file contains a log of events as they occurred and how they were reported as more details became available, together with other more administrative details relating, for example, to members of the security

forces. It also contains summaries of each day's events, and messages including intelligence summaries which were compiled on a weekly basis. The intelligence summaries identify which of the different factions involved in the violence were suspected of being responsible for particular events, of the authorities over that period, together with information on weapons and explosives being used.

The Appellant's position at the resumed oral appeal

19. The Appellant adopted the substance of his second witness statement dated 4 November 2016.

20. In that witness statement he explained that partial disclosure of the information requested from The National Archives in the form of Ministry of Defence file WO 305/4617 had been provided to him.

21. However, even including the 30 pages of Intelligence Summaries that had been released to him in 2010 by the Ministry of Defence by virtue of another FOIA request he had made, only around 1/7 of the 346 pages had been released. Of those, 20 pages were heavily redacted Headquarters Northern Ireland logs. The bundle accounted for less than 1/10 of the 214 pages that made up the actual log and 1/13 of the logs and the Situation Reports (SITREPs).

22. In relation to the conclusions of the ATO, he regarded that disclosure as raising issues of "hugely significant public concern". He regarded it as a "searing indictment of the various police investigations and the Information Policy of the State" because it confirmed:

- a. The bomb expert on the scene of the aftermath of the explosion asserted that the pub was attacked and that he had reported that to HQNI and, via that, to the General Officer Commanding.
- b. The expert opinion of the ATO was that the bomb had been "placed" in the entrance hall of the pub. It had not accidentally exploded within the main bar area. That physical evidence had also been supported by a Home Office Pathologist appointed by the Police Ombudsman to re-examine the evidence.

c. The seat of the explosion was clear.

d. HQNI had made an operational decision not to publicise this expert opinion that the bar was attacked and that the bomb had not exploded inside the main area of the bar.

23. This information had either not been made available to previous investigations such as those carried out by the original inquest, the PSNI at the Historical Enquiries Team or the Office of the Police Ombudsman of Northern Ireland (OPONI) or it had been made available and those investigations had withheld it from him.

24. He would be seeking to rely on that information to argue that a full and proper enquiry into the McGurk's Bar bombing was required. It was:

horrific that this critically important information is only now being ventilated because of the intervention of a Tribunal nearly 45 years after the fact. So many of the victims' and family members have gone to their graves without a modicum of truth or justice.

25. The Appellant then outlined, over eight pages from Paragraphs 9 – 22 of his witness statement, the information that he believed *should* exist in the logs.

26. This included reference to the document relating to 5 December 1971, serial 15 – 22, Sheet 3 covering the period between 0315 – 1030. It is a sheet that should have been at page 186 of the Open Bundle but was not and had neither been included in the disclosure given to him or the schedule of information.

27. In his view the information covered by these Serials were potentially crucial because they covered the time when the pretext for the bombing as an "own goal was created by RUC". He noted that the Appeal schedule had indicated the information fell into Level 3.

28. In summary, expressing his view as "expert opinion" he believed that:

- a. If the expert opinion of the ATO in serial 24 was the only reference to the placement of bomb in the information held, its release was still critically important to the families and was grave evidence of the State's "cover-up and disinformation".
- b. There should be other critical information in the Log regarding the bombing and its immediate aftermath. He had intentionally kept his list of highlighted information focused on such matters.
- c. If information was not held or before the Tribunal (including witness testimony, discovery and examination of the car used in the attack, suspects, disinformation, the false witness), the families needed to know. He, the families and the public needed to find out the reasons for its absence. Those reasons could be that (a) the RUC had withheld the information/evidence from HQNI (b) the false information/intelligence did not exist (c) Information Policy dictated that any evidence pointing the finger of blame to pro-state loyalists was suppressed and/or buried.

29. In particular, the disappearance from the file of a critical SITREP covering the time of the bombing and its aftermath was disturbing and should be of concern to the Tribunal if it was absent without reason or covering document.

The Open oral evidence of Sandra Gardiner on behalf of the MoD

30. The Tribunal heard and considered Open and Closed oral and documentary evidence from Sandra Gardiner on which she was cross-examined both in Open and Closed session.

31. The key elements of her Open statement are set out below to ensure maximum transparency in respect of the content and methodology that she adopted.

32. Ms Gardiner is the Information Rights Operations Team Leader at the MoD where she had worked for 21 years. She had been responsible there for matters concerning Information Rights since 1 October 2012.
33. She explained that the TNA item that was the subject of the Appeal was an unregistered MoD file titled “Commander’s Diary, Headquarters Northern Ireland (HQNI), December 1971. A “Commander’s Diary” was a term used within the MoD to describe a collection of papers collated in order to provide an operational account of activities undertaken within the unit during a specified period.
34. She had visited The National Archives at Kew and confirmed that the information in the Closed bundle was a full and direct copy of the original file.
35. The “Diary” in question consisted of the following sets of papers:
- a) Duty Officer Log Sheets (212 pages) – The log sheets within the file detailing all events that fell under the responsibilities of HQNI as they were reported to, and logged by, the Duty Officer. It also included information that was passed to the Duty 2 Officer for onward transmission to serving individuals, such as serious illness or deaths of relatives living in England and Scotland. The information in the HQNI duty logs may not always directly reflect that which may have been recorded in any local unit logs, as routine business would not have been reported centrally;
 - b) Accommodation Situational Reports (6 pages) – These reports were copies of weekly signals from HQNI to MOD UK providing an update on the progress of accommodation projects. There was no operational activity held in these reports;
 - c) Situational Reports (41 pages) – These were copies of the daily signal that was sent to the 'AIG 1354' recipient group. AIG stands for 'Army Information Group', and would include staff working in public relations roles. The signals provide a summary of the headline events from the Duty Officer Logs and were used to provide daily situational awareness briefings for MOD personnel involved in NI operations; and
 - d) Intelligence Summaries (82 pages) – These were weekly summaries of events and information that had been gathered by, or supplied to, intelligence officers and security forces personnel. Each report consisted of a general summary which was supported by a series of annexes covering:

- i. A forecast of events.
- ii. A list of explosive devices activated that week.
- iii. Details of personalities and vehicles that had come to the attentions of security forces during the week. This included details of individuals, such as suspected or known members of terrorist or other subversive organisations.
- iv. Detailed reports of intelligence that had been gained in period from a variety of sources.

36. All Intelligence Summaries were protectively marked SECRET, although some annexes (those that fell under the descriptions at iii and iv above) had the additional security marking of 'PERIMETER – UK EYES ONLY'.

37. In terms of the consideration and classification of the information in scope she had taken responsibility for coordinating the MoD's review and assessment of the file contents in the light of the Tribunal's Case Management Note of 27 July 2016. She had used the knowledge and experience of staff from across the following areas of the MoD to inform the categorisation of the information into the required three levels:

a) Information Rights – Her team was the MoD lead on the management of the Freedom of Information Act ("FOIA") requests and conducts the MoD's internal review function. The review of the Diary was conducted using the same process that is followed for FOIA complaints handling. Following the assignment of information within the file into the three classes, this team took on responsibility for disclosing all information falling within Levels 1 and 2 to which exemptions did not apply, or where the balance of public interest lay in release.

b) Directorate Judicial Engagement Policy – Staff in this area supported the Bloody Sunday Inquiry and had experience of reviewing material in relation to UK military operations in Northern Ireland. Their experience of managing historic cases that relate to Northern Ireland meant that they had a good understanding of the operational and social context at the time the file contents were written.

c) 38 (Irish) Brigade Policy Legacy Disclosure Cell – Staff in this area were responsible for responding to all FOIA requests that the MoD received in relation to UK military operations in Northern Ireland. Based in Lisburn, they had a good understanding of both the historic and current operational and social context within the Belfast region, and were well placed to provide an indication of any potential harm that could arise from information releases.

d) Directorate Business Services Knowledge and Information Team – It was staff in this team that made the decision to pass the file from the MoD to TNA as a closed file, due to the sensitivity of the content. When the Appellant first made his request to TNA, staff in this area were asked by TNA to provide an indication of the sensitivity of the information and exemptions that may need to be considered.

e) Army Historical Branch – Provided advice on the development of Commander's Diaries for deployed units and the structure and content of the one that is subject to this Appeal.

38. Where possible, Ms Gardiner also made contact with individuals who had worked on Northern Ireland issues during the 1970s to check her understanding of some of the processes and procedures that would have been followed.

39. Each area identified above had been provided with a copy of the file, as it was held in the Closed bundle, and the description of the Levels set in the Directions. A file schedule, prepared to meet the requirements within Paragraph 6 of the Directions, was submitted to the Tribunal (closed version) and Appellant (open version) on 7 October 2016.

40. That document was the product of the comments and feedback from all those who reviewed the file. In the very few instances where there was disagreement, further checks were made to determine the appropriate level. Where these checks were inconclusive, the information was treated as being in the higher of the two possible categories.

41. Level 1 information was readily identified as that in which 'McGurk's Bar' or the bombing of this establishment was directly mentioned. Staff were also aware to search for references to 'Tramore Bar'. The names of the McGurk's Bar victims and bombing suspects, as well as that of the individual subsequently convicted of the bombing, were also used as key search terms under Level 1.

42. Any incidents recorded as being on or near the corner of North Queen Street and Great George's Street, referencing a 'bar bombing' or the New Lodge area were marked for consideration under Level 2, and further checks conducted.

43. The bulk of the file was determined to fall in Level 3 by all those who reviewed it. The main part of the report consisted of the Duty Log sheets. There was a gradual increase in the level of violence over 1971, and by December there were daily reports of shootings, bombings, protests and demonstrations against the military and security forces from across HQNI's area of responsibility. The logs also include details of civilian crimes such as armed robbery, as well as road accidents, hoaxes and some instances where individuals had been singled out because of their religion or links to the military for 'punishment'. It is a reflection of the period that an event such as the bombing of McGurk's Bar is not more prominent throughout the entire file.
44. There was also information within the file relating to the health and welfare of military personnel and their relatives. There was more than one instance where a report passed to the Duty Officer related to injuries or illnesses of a relative that he was being asked to pass on to the local unit, or where welfare assistance was being arranged for relatives of injured servicemen.
45. The only case, in which this was not considered Level 3, was in relation to the shooting of Major Jeremy Snow in the New Lodge/Tiger Bay area. It was public knowledge that Major Snow's relatives travelled to Ireland prior to his death from his wounds.
46. Following the initial categorisation of the file, the information within it was compared with that available in the Police Ombudsman's (NI) Report relating to the complaint by relatives of the victims of the McGurk's Bar Bombing published February 2011, the Saville Report (Bloody Sunday Inquiry) published 15 June 2010 and previous MoD FOIA releases that had been made to the Appellant or other requesters.
47. That enabled Ms Gardiner to identify information that was already in the public domain, and where further releases of similar material could now be made.
48. In terms of the preparation of the material for Release the MoD had understood the Directions at paragraph 6 of the CMN to mean that

information designated as Level 3 was out of scope for the purposes of any exercise to determine which exemptions might be applied to information in the file. As such, all information listed as Level 3 within the schedule was redacted or removed for release in the revised open bundle in the manner described below:

a) Duty Officer Log Sheets – Level 3 information within the ‘Event’ column was blacked out. The corresponding Level 3 information within the other columns was left visible to provide some context for the Level 1 and 2 material that was released. There was one redaction made under the exemption at Section 40(2) (personal information) of the FOIA. This appears in the ‘Action’ column of page 32 of the closed bundle (page 186 of the open bundle).

b) Accommodation Situational Reports – All information within this section was Level 3, and therefore removed in its entirety.

c) Situational Reports – Level 3 information within the main text was blacked out. Additional Level 3 information in the page was left visible to provide some context for the Level 2 material that was released.

d) Intelligence Summaries – Level 3 information was removed from the pages where Level 1 and 2 information were identified. Any blacking out of text within this section indicates areas where exemptions were applied.

49. The Information Rights Team alone has expended more than 100 hours of effort reviewing the file, cross-checking the information within it to categorise all the material, considering the balance of public interest in relation to exemptions and then preparing the Level 1 and 2 information for release.

50. She was not able to estimate how much additional effort would have been required to determine the possible harm that might arise on the release of the Level 3 material within the file, and preparing it for release. A copy of the material released to the Appellant, clearly indicating the distinction between the removed Level 3 information and redacted Level 1 and Level 2 information, has been prepared for the Tribunal, and had been provided as a separate written submission to the closed bundle.

51. In terms of the application of FOIA exemptions, a detailed, line by line assessment of the file resulted in the identification of a number of exemptions that could be applied to the Level 1 and Level 2 information.

Her Closed note, describing the consideration of the qualified exemptions that were applied, had been provided to - and confirmed by - the TNA before being passed to the Tribunal and the Information Commissioner on 7 October 2016.

52. The MoD considered the use of the exemptions at Sections 38 and 40(2) to be necessary because, when considering the release of information relating to individuals, and information or intelligence that was provided to the security forces, the MoD had to take the possibility of reprisals into account. The Saville Report contained a brief history and explanation of the situation in Northern Ireland in the months leading up to 30 January 1972, where there were:

deep and seemingly irreconcilable divisions between nationalists (predominantly Roman Catholic and a majority in the city) and unionists (generally Protestant and a majority in Northern Ireland as a whole).

This sectarian divide, as it was called, had existed for a long time. Among other things, it had led in the years preceding Bloody Sunday to many violent clashes between the two communities and with the police, then the Royal Ulster Constabulary (RUC). The police had become regarded by many in the nationalist community not as impartial keepers of the peace and upholders of the law, but rather as agents of the unionist Northern Ireland Government, employed in their view to keep the nationalist community subjugated, often by the use of unjustifiable and brutal force.

53. This Report also provided an outline of the paramilitary organisations that were operating in Northern Ireland:

There was a further dimension in the form of paramilitary organisations. By the beginning of the 1970s the Irish Republican Army (IRA) had split into two organisations known respectively as the Provisional IRA and the Official IRA. These paramilitary organisations (often referred to simply as the IRA, though they were distinct organisations) had restarted a campaign of armed violence, in the belief that only by such means could Northern Ireland be freed from what they regarded as the yoke of British colonial domination and become part of a united Ireland. There were also those on the unionist side of the sectarian divide who organised and used armed violence in the belief that this was required to maintain the union with the United Kingdom. This further dimension meant that the security forces, in addition to their other responsibilities, had to deal with those using armed violence.

54. In respect of the information in scope and the exemptions engaged, particularly Section 38, consideration also been given to the current security situation in Northern Ireland.
55. The current security threat level for Northern Ireland-related terrorism in Northern Ireland remains severe, meaning an attack was "highly likely" with the threat level from Northern Ireland-related terrorism in Great Britain raised from moderate to substantial in May 2016.
56. Further to this, her Exhibit A (a 30-page timeline published on the BBC News website: <http://www.bbc.co.uk/news/uk-northern-ireland-10866072>) provided detail on more recent incidents in Northern Ireland and demonstrated the continuing hostilities that existed within the community.
57. Most significantly, it included a report which shows that the vandalism to the McGurk's bar bombing memorial was treated as a hate crime.
58. In terms of the prejudice-based exemptions - Sections 26(1) and 38 – she believed that if the information for which Sections 38 and 26(1) had been claimed was released, reprisals or harm to individuals would be likely to occur. That assessment is based on (i) the historic animosities which exist in Northern Ireland (ii) the current security situation in Northern Ireland and (iii) the recent vandalism of the memorial to the victims of the bombing, which made it clear that this could not be considered to be an 'historic' issue.
59. Her concern about this had been heightened by the press reporting of this Appeal. The fact that disclosures from these proceedings had attracted widespread publicity reinforced my existing concern that any further disclosures will not be limited simply to use in the Appellant's investigations, but could be used by those who wish to re-visit old animosities or sectarian divisions.
60. Whilst she acknowledged the public interest in transparency and the thrust of the Appellant's reasons for seeking the information, the assessed damage associated with further release meant that disclosure could be contrary to the public interest.

61. In respect of Sections 38 and 26, I believed that the level of harm in the release of this information was set at “would be likely to” for the reasons explained above.
62. In terms of Sections 23(1) and 24(1) in the alternative, some of the information, as indicated in the Open Schedule, was being withheld under either Section 23(1) or Section 24(1) of the FOIA. This was because it could be exempt under Section 23(1), which relates to the bodies specified in Section 23(3) of the Act, although it was also possible that the information relates to none of these bodies. Sections 23(1) and 24(1) are being cited in the alternative as it is not appropriate, in the circumstances of this case, to identify – in the Open witness statement - which of the two exemptions was actually engaged. To do so would undermine national security or reveal the extent to which, if at all, any of the bodies specified at Section 23(3) were involved. Any information that was not exempt from disclosure under Section 23(1) was exempt under Section 24(1) of the FOIA, which exempts information from disclosure if its exemption was required for the purpose of safeguarding national security.
63. In terms of the disclosure of personal information and the ‘100 year Rule’ and in line with the MoD’s obligations under the Data Protection Act 1998 protecting personal data, particularly sensitive personal information, was of the utmost importance to the MoD. Careful consideration was given to all information identified as Level 1 and 2 to determine if its release would potentially breach the DPA principles.
64. It was standard government practice to assume that an individual was still alive if they would not yet have reached the age of 100. While several of the entries in the file made reference to the age of the individual being named, some did not. In these cases, the age of the individual was estimated and the ‘100-year rule’ applied.
65. That principle, and its application to archival files, such as the one that was the subject of this Appeal, was explained at paragraph 4.1.5 of the Code of Practice for Archivists and Records Managers under Section 51(4) of the Data Protection Act 1998:

Given the large number of individuals commonly featuring in archive collections, archivists will not be in a position to ascertain whether they are still alive and hence protected by the Act. If it is not known whether a data subject is alive or dead, the following working assumptions can be used:

- Assume a lifespan of 100 years
- If the age of an adult data subject is not known, assume that he was 16 at the time of the records
- If the age of a child data subject is not known, assume he was less than 1 at the time of the records

66. The MoD's consideration of the personal information within the file had been conducted in accordance with that principle.

67. Where she had been able to confirm that the individuals named in the file, such as Mr Gerry Fitt, were deceased, the exemption at Section 40 of the FOIA had not been engaged.

68. In most other cases the details of individuals were redacted. An exception was made for the names of those injured in the McGurk's Bar Bombing as the names of these individuals would have been well known at the time.

69. The names of service personnel below the rank of Brigadier were also redacted, in line with existing MoD policy to protect those who were not considered to be in public facing roles.

70. In cross-examination Ms Gardiner stated that in relation to the "missing" document relating to 5 December 1971, serial 15 – 22, Sheet 3 covering the period between 0315 – 1030, it had not been with the file at the point of transfer to TNA. She had examined the transferred file carefully and there were no obvious signs of tampering or removal. She believed that what had been handed over to TNA was the complete documentation in respect of the whole file.

71. The Tribunal heard submissions in open court and in closed session as well as considering open and closed material, including witness statements and all of the withheld information itself.

72. The Tribunal adopted the guidance for the approach to be taken by courts and tribunals in respect of any closed material procedure set out immediately below.

73. In *Bank Mellat v HMT (no. 1)* [2013] UKSC 38, which was not a case about FOIA, Lord Neuberger said at paragraphs 68-74 that:

- i) If closed material is necessary, the parties should try to minimise the extent of any closed hearing.
- ii) If there is a closed hearing, the lawyers representing the party relying on the closed material should give the excluded party as much information as possible about the closed documents relied on.
- iii) Where open and closed judgments are given, it is highly desirable that in the open judgment the judge/Tribunal (i) identifies every conclusion in the open judgment reached in whole or in part in the light of points made or evidence referred to in the closed judgment and (ii) says that this is what they have done.
- iv) A judge/Tribunal who has relied on closed material in a closed judgment should say in the open judgment as much as can properly be said about the closed material relied on. Any party excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and the arguments it has received.

74. In *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC) the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA cases, noting that such practices are likely to be unavoidable in resolving disputes in this context:

- i) FOIA appeals are unlike criminal or other civil proceedings. The Tribunal's function is investigative, i.e. it is not concerned with the resolution of an adversarial civil case based on competing interests.
- ii) Closed procedures may therefore be necessary, for consideration not only of the disputed material itself, but also of supporting evidence which itself attracts similar sensitivities.
- iii) Parliament did not intend disproportionate satellite litigation to arise from the use of closed procedures in FOIA cases.
- iv) Tribunals should take into account the Practice Note on Closed Material in Information Rights Cases (issued in May 2012). They should follow it or explain why they have decided not to do so.

v) Throughout the proceedings, the Tribunal must keep under review whether information about closed material should be provided to an excluded party.

75. The closed bundle in this appeal contained the disputed information. It was necessary for the Tribunal to see this and consider the redacted elements of it when set against the Open material before reaching its conclusions.

76. The Tribunal has considered carefully and rigorously the material in the light of the Appellant's points and concerns already expressed in the Notice of Appeal and in its other representations and submissions.

77. Consideration of the Closed Material – and the cross-examination of Ms Gardiner in Closed session during the appeal hearing – resulted in TNA and MoD agreeing (with the concurrence of the Information Commissioner) to the following summary together with the release of further material that had been redacted:

Page 29 Serial 9 and

Page 30 serial 12 can be released.

9 0120 39 Bde 69 – 93 Clifton Park Avenue, man challenged.

12 0245 39 Bde Hillman Harding Streatham Street to be searched from now on.

The witness was taken through the content of the Level 1 and Level 2 information and was asked about the application of the exemptions. She explained why TNA and MoD considered that they apply.

The witness was taken through examples of Level 3 material and was asked why TNA and MoD considered them to be irrelevant. She did so.

Some of the questions related to geographical proximity, others to timing or similarities.

The witness clarified that when she confirmed that the missing SitRep did not exist, she was saying that it was not in the file when it was viewed by the MoD. It does not exist so far as she is aware, having made enquiries but that does not rule out the possibility that it may exist somewhere.

The witness was asked about the extent of the work done. She explained the 100 hours was related to her team and this could be doubled in relation to the overall considerations.

The MoD can confirm that documents 58 and 229 [in the Closed Bundle pagination] relate to human source material provided in confidence.

78. Ms Kerr Morrison's submissions on behalf of the Appellant were, in summary:

- (1) That the Tribunal needed to satisfy itself that the information provided to it, both as Open and Closed material, was complete in terms of the information held (given issues in relation to pages 206 and 209 of the Open Bundle).
- (2) In terms of s.38 FOIA, the MoD reliance on the Upper Tribunal's judgment in *Keane v IC, Home Office and MPS* [2016] UKUT 0461 (AAC) - in which the Tribunal upheld the FTT's conclusion that section 38 FOIA was engaged – was misplaced and only related to the facts of that case. The MoD had to adduce evidence capable of showing that the disclosure of the specific information sought gave rise to a real and significant risk that the alleged harm would occur.
- (3) Acts of vandalism, even if accorded the status of a hate crime, did not constitute evidence that individuals would or would be likely to be harmed as a result of information being disclosed about the McGurk's Bar Bombing. There was no evidence that the disclosure of information to date in the pursuit of justice and accountability for the killing of innocent individuals at McGurk's Bar had resulted in any violence or backlash to individuals. (or for that matter the act of vandalism pointed to by the MOD) – or for that matter in relation to any other atrocity in Northern Ireland.
- (4) The disclosure of information into the public domain was widely accepted as serving a cathartic purpose in terms of dealing with the past in the North of Ireland.

- (5) The Tribunal was urged carefully to consider whether the information in issue was capable of identifying any particular informant or individual.
- (6) As to the MoD's case on sections 23(1), 24(1) and 26 FOIA, there was a stated concern by Ms Gardiner that disclosure of the relevant disputed information would inhibit the provision of similar information in the context of the Northern Ireland troubles by undermining the absolute expectation of confidentiality enjoyed by sources/informants and/or that the disclosure would give rise to a threat to national security.
- (7) It was, however, inherently unlikely and wrong to suggest that disclosure of information relating to an incident in 1971 posed national security threats as at 2015.
- (8) Similar material had been released into the public domain (for example regarding the use of enhanced interrogation techniques by the British Security Forces against PIRA suspects in the early 1970s or the Appellant's own archival research informing his writing on the subject of the McGurk's Bar Bombing 1971) without any threat to national security being cited.
- (9) In fact the release of similar material held by the MoD and others, had positively contributed to the access to truth and reconciliation required by many victims and survivors of the Conflict. It had also informed previous and on-going legal proceedings. The majority of material disclosed exposed, as confirmed by courts/public inquiries and/or in the view of the Appellant, unlawful state practices including collusion.
- (10) The public interest in the disclosure of the complete picture was overwhelming.

Decision

79. The issues before the Tribunal are:

(1) Is the information identified as Level 3 irrelevant in that it is out of scope?

(2) Is the redacted information on page 32 (serial 27) relevant. If it is, is it exempt under s.40 of FOIA?

(3) Is the redacted information on pages 58 (serial 57) and 299 (Annex D, para 3) exempt under ss.23, 24 and 26 of FOIA?

(4) If not, is the redacted information on page 299 (Annex D para 3) exempt under s.38 of FOIA?

80. The Tribunal finds that the evidence provided by Ms Gardiner – both in Open and Closed sessions during the appeal - was clear, cogent and credible.

81. She answered all the questions posed to her helpfully, fully and in a focused fashion.

82. The Tribunal was satisfied that she was not only telling the truth but that she had made background and ancillary enquiries herself and via others to make certain that she had directed the information-gathering operation required in this appeal to be conducted in the most comprehensive and practical way.

83. It is a mark of her endeavours that what she and others did in the second stage of this appeal – after the Directions had been issued – took at least 200 hours but which was nominally booked through at 100 hours work so

that potentially inappropriate exemptions relating to the time spent were not utilised.

84. The Tribunal has had the advantage of seeing all the disputed information. We are satisfied that we have seen a full and direct copy of the file as it relates to the substance, focus and remit of the Appellant's information request as it was transferred to The National Archives. Having seen – at an early stage in the appeal – a wealth of information the Tribunal is as satisfied as it can be that it has seen everything it should have done.

85. Importantly, the Tribunal is satisfied that where there are apparent gaps in the information provided this is because the information was not in the file as it was transferred to TNA and not because it was subsequently weeded out. The response to the information request can only relate to the information held and – where for whatever reason – information is not there as a logical progression (as with an apparently missing Serial) it should not be presumed that it has been deliberately extracted before being delivered to TNA.

86. This Tribunal is only concerned – within the terms of its statutory framework - about issues relating to information requested by the Appellant that is held by TNA in respect of this appeal.

87. When the Appellant states that he believes – from his experience and expertise – that there is more information in respect of this request that should have been disclosed to him the Tribunal can only point out that it has seen everything and – subject to matters in the Closed Decision – he is optimistically mistaken.

88. Ms Gardiner's statement sets out in some detail the history of troubles in Northern Ireland and the present security threat. Most significantly, (i) the threat from terrorism remains assessed as "severe", meaning an attack is "highly likely"; (ii) continuing hostilities exist within the community, as more recent incidents have shown; and (iii) the McGurk bar bombing is still a

source of tensions, with a memorial recently being vandalised. The Tribunal agrees that this is not a case that can be characterised simply as historic, although it has its roots in The Troubles.

89. The Upper Tribunal judgment of *Keane v IC, Home Office and MPS* [2016] UKUT 0461 (AAC) upheld the application of the s.24(1) (national security) and s.38(1) (health and safety) exemptions in respect of material from TNA covering a period from 1890-1910. The information in the present case is considerably more recent.

90. Insofar as the 'living individual' issue is concerned, the fact that the McGurk children were 11, 12 and 15 (page 30) supports the maintenance of the 100 year rule for individuals whose ages are not known. It is not proportionate to require TNA to carry out a comprehensive check to establish if all individuals referred to within a given file are alive. Here, the MoD has conducted an exercise to see if any of the individuals named in the Level 1 and Level 2 information are deceased. The redactions which have been applied take into account the Appellant's concern.

91. Section 23(1) FOIA provides as follows:

(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).

92. The list of security bodies identified in subsection (3) includes, by way of example only, the Security and Intelligence Agencies, special forces, SOCA and the NCA.

93. Section 24 provides as follows:

(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.

94. These exemptions are properly relied on in the alternative. The Tribunal confirms that this is the consistent approach of public authorities in such circumstances, so as not to undermine national security or reveal the extent of any involvement, or not, of the bodies specified at Section 23(3).

95. In terms of section 26 (1), it provides that:

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice— (a) the defence of the British Islands or of any colony, or (b) the capability, effectiveness or security of any relevant forces.

96. Whilst section 23 is ordinarily an absolute exemption, section 64(2) of FOIA has the effect of removing its absolute protection in cases of information contained in a historical record such as in the present case.

97. All of the above exemptions are therefore subject to a public interest test. The Tribunal has applied this test to the information in question mindful of the fact that engaging the national security and defence exemptions necessarily requires a particularly strong public interest to justify disclosure.

98. *Keane* (at [58]) states:

Whilst it may well be wise to avoid characterising particular exemptions as carrying "inherent weight" (see Upper Tribunal Judge Turnbull's decision in the Cabinet Office case at paragraph 66), the reality is that the public interest in maintaining the qualified national security exemption in section 24(1) is likely to be substantial and to require a compelling competing public interest to equal or outweigh it (as recognised in the First-tier Tribunal decision in *Kalman v Information Commissioner* [2010] UKFTT EA 2009 0111 (GRC).

99. This broadly reflects the approach taken by the courts to Public Interest Immunity (PII) applications. In *AHK v Secretary of State for the Home Department* [2012] EWHC 1117 (Admin), Ouseley J observed that it is

highly likely that harm to the public interest through the disclosure of a document dealing with defence, national security or diplomatic secrets would preclude disclosure...

100. This was in a PII context “absent real evidence of serious misconduct by the government in an individual’s claim.”

101. Furthermore, the Tribunal’s approach to judgements involved in assessing damage to national security and defence acknowledges the relevant institutional competence of the public authority which makes the assessment. Precisely the same approach has been applied in the context of this case, where the Ministry of Defence has made an informed assessment based on its own institutional competence and having sought guidance from the relevant government and military departments.

102. These exemptions are claimed in respect of the redacted information on pages 58 (serial 57) and 299 (Annex D para 3). TNA and the MoD correctly redacted these because:

- In the case of page 299, the redactions have been made in order to protect information which has been provided by a source. As the OPEN log provided by the Ministry of Defence observes, it “provides intelligence info and possible reprisals if others can identify source from information provided”. Redactions of this nature protect

(i) the safety of the individuals who provided the information

(ii) their families or persons close to those individuals and

(iii) the wider, and vital, principle of ensuring that those willing to share such information, whatever

the case, are able to do so in the absolute expectation of confidence. To undermine this confidence risks reducing the number of people willing to provide such assistance. In a context such as Northern Ireland this can have devastating consequences.

103. In the case of page 58, the Appellant has been provided with the following extract:

10 “Col GS [redacted] action maybe taken against [redacted] who laughed and jeered at McGurks Bar victims funeral corteges today and yesterday”

104. The redactions have been explained in the OPEN log as follows: Redaction to “Name of Company” “Text relating to intelligence”, justified because it contains “details of employment and how information was received”. These redactions are necessary, proper and proportionate.

105. These documents exist in the context of the historic animosities which exist in Northern Ireland, the current security situation there and the recent vandalism of the memorial to the victims of the bombing, which makes it clear that this cannot simply be considered to be an ‘historic’ issue but has an abiding and contemporary legacy.

106. The Tribunal is satisfied that the risk of some damage to these important public interests is a real one. It cannot be discounted on the basis of passage of time. The scale of the risk relates to the context of the seriousness of the public interests at stake. Because of this, the public interest here plainly falls in favour of maintaining the exemption.

107. Having considered the reach of the exemptions above, the Tribunal does not find that any reliance on s.38 FOIA, the potential damage to physical or mental health exemption, is warranted.

108. For all of these reasons – **but subject to a further Closed Decision** – the Tribunal is satisfied to the required standard, the balance of probabilities, that the further information that has now been released to the Appellant has been done so in respect of the relevant exemptions and that the withheld information is correctly withheld either because it is out of scope or because the correctly identified exemptions have been applied.

109. Our decision is unanimous.

110. There is no order as to costs.

Robin Callender Smith

Judge

15 January 2017