



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

**Appeal No: EA/2017/0199**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50671281**

**Dated: 14 August 2017**

**Appellant: Nicholas Must**

**Respondent: (1) The Information Commissioner**  
**(2) Foreign and Commonwealth Office**

**On the papers**

**Date of meeting: 17 July 2018**

**Before**

**HH Judge Shanks**

**and**

**Anne Chafer and John Randall**

**Date of decision: 24 July 2018**

**Date of promulgation: 31 July 2018**

**Subject matter:**

Freedom of Information Act 2000 (FOIA)

Section 23 (security bodies)

Section 27 (International relations)

## **DECISION OF THE FIRST-TIER TRIBUNAL**

For the reasons set out below the Tribunal dismisses the appeal.

### **REASONS FOR DECISION**

#### **Background**

1. In 1949 a committee was established called the Western Union Clandestine Committee to “provide a focus for co-ordination between the Services charged with the conduct of clandestine activities in the five Western Union countries” in planning for war in Western Europe against the Soviet Union. The five countries concerned were the UK, France, the Netherlands, Belgium and the US. The representatives on the Committee were members of the secret services of those countries. The Chairman was Major General Sinclair, who was a member of the Secret Intelligence Service (SIS). The secretariat of the Committee was based in London and comprised SIS staff.
2. On 8 March 2016 Nick Must, who describes himself as an independent researcher with a particular interest in Special Forces, made a request for information under FOIA addressed to the Foreign and Commonwealth Office. He sought the full contents of a file on the Western Union Clandestine Committee, reference FO 1093/396, whose existence he had learned of through the National Archives. In response, the FCO disclosed the whole file, which contains documents covering the period November 1949 to March 1950 including minutes of meetings of the Committee, but they redacted the names of officials attending the meetings, except for that of Major General Sinclair.
3. Having complained unsuccessfully to the Information Commissioner about the redaction of those names under section 50 FOIA, Mr Must has appealed to the Tribunal. The FCO was properly joined as a party to the appeal and has submitted a comprehensive Response document, to which Mr Must has replied. The parties

agreed that the appeal could be dealt with on the papers and we are satisfied that we can properly determine the issues in that way. We were provided with an open bundle of documents and have also had the opportunity to review file FO 1093/396 in its unredacted form.

The FCO's position

4. The FCO initially relied only on section 27(1) of FOIA to withhold the names of foreign representatives on the Committee. Section 27(1) provides as follows:

**Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-**

- (a) relations between the United Kingdom and any other State**
- (b) ...**
- (c) the interests of the United Kingdom abroad;**
- (d) the promotion or protection by the United Kingdom of its interests abroad.**

Section 27(1) provides a “prejudice” based exemption. The jurisprudence establishes that it is sufficient for it to apply if there is a real and significant risk that disclosure would make relations between the UK and a foreign country more difficult or call for a particular diplomatic response to contain or limit damage which would not otherwise have been necessary. The exemption is a qualified one so that it would only entitle the FCO to withhold information if the public interest in maintaining the exemption outweighed that in disclosure.

5. The FCO's position is that there is a clear policy that HM government does not name members of its own intelligence and security services unless the person has been officially and publicly identified. As a corollary, there is also a clear policy (which, importantly, is shared with their allies) that they do not name members of the intelligence and security services of allied foreign states: whether to name a foreign agent is a matter for the relevant state and not for HM government. Breach of this policy, say the FCO, would be likely to require significant diplomatic work to explain and make good and would be likely to cause damage in diplomatic and intelligence-sharing relationships. Although the information relates back to events 65 years ago

and there is clearly some public interest in its disclosure, the marginal public interest in knowing the precise identity of those who attended meetings of the Committee is outweighed by that in maintaining the section 27(1) exemption in this case. Prima facie, bearing in mind the FCO's expertise in the field, we are inclined to accept their position on section 27(1).

6. When it was rightly pointed out that the FCO had also redacted the names of three British citizens, one of whom was a representative on the Committee and two of whom were members of the Committee's secretariat, the FCO sought to rely on section 23(1) of FOIA. Section 23 provides an absolute exemption in respect of information:

**... if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3) [which include the SIS].**

Although this exemption was raised somewhat late in the day, we can see no possible answer to it: it cannot be disputed that the names of SIS members or staff are covered by the exemption and no question of public interest or the age of the information arises; the fact that the exemption is not always relied on in practice is of no relevance.

#### Mr Must's appeal

7. We have considered the points raised by Mr Must in his Notice of Appeal and his Replies to the Commissioner and the FCO.
8. The main theme of his Notice of Appeal, apart from rightly drawing attention to the redaction of the names of British citizens, is his suggestion that the FCO ought to consult with the other governments concerned and seek their consent to the disclosure of the names of their agents. We note that the FCO has not expressly responded to this point but, on reflection, we are not persuaded it assists him. It is clear that the FCO are not under any kind of duty to take this step and they need only establish that there is a real and significant risk that disclosure would cause relevant damage to the UK's relationship with the foreign government. Further, we can well see that seeking consent would in any event involve the FCO and the foreign government in

expending time, resources and diplomatic goodwill that could be better expended on other diplomatic priorities.

9. Apart from some irrelevant attacks on the Commissioner the main points made by Mr Must in his Reply to her are (1) that names of agents have been disclosed in the past in certain circumstances by the UK and US authorities and (2) that the contents of the file in this case (other than the names) have been disclosed and, as he puts it, “Surely the names are less sensitive than the issues which were discussed [at meetings of the Committee]?”. The first point does not address the nature of the policy which the FCO rely on: it is for the US (and other allied states’) authorities and not the UK authorities to decide when and in what circumstances US (and other) agents are to be named; what the UK and US or other states have done on other occasions in other circumstances is of marginal relevance. The second point fails to recognise that there must be special sensitivities involved in the identification of agents which can last for a very long time and that it is not necessarily right to say that the contents of discussions of the Committee in 1949 and 1950 are more sensitive than the identity of those who worked for the various secret intelligence services in those years.
  
10. In his Reply to the FCO, Mr Must appears to take strong objection to the fact that the FCO’s Response to his Notice of Appeal was drafted by counsel and to suggest that it indicates there is some kind of cover-up; we can assure him that a Response drafted by counsel on behalf of a government department is perfectly permissible and is common practice and that we have seen no indication of any improper cover-up in this case. Mr Must highlights the fact that it is open to the UK authorities to “waive” reliance on section 23(1) and that they have done so in the past on occasion; that is obviously correct but, given that section 23(1) is an absolute exemption, such a “waiver” will always be a matter of complete discretion. He also suggests that there may have been ex-Nazis among those on the Committee. If that were indeed the case we accept that there may well be a strong additional public interest in the disclosure of their names, but, having been provided with an unredacted copy of the file, we see no evidence to support the suggestion.

Conclusion and disposal

11. We do not consider that any of the points raised by Mr Must undermine the FCO's basic position on the naming of foreign agents as set out in paragraph 5 above which we accept. And, as we say in paragraph 6 above, we see no possible answer to the applicability of section 23(1) in relation to UK agents and staff.
  
12. For those reasons we conclude that the FCO was entitled to redact the names of representatives and staff named in the file and we dismiss Mr Must's appeal. This is a unanimous decision.

HH Judge Shanks

24 July 2018