



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights
Decision notice FS50714296**

Appeal Reference: EA/2018/0198

**Considered on the papers
On 20 August 2019**

Before

JUDGE CHRIS HUGHES

TRIBUNAL MEMBERS

MARION SAUNDERS & PAUL TAYLOR

Between

MINISTRY OF DEFENCE

Appellant

and

INFORMATION COMMISSIONER

First Respondent

COMMITTEE ON THE ADMINISTRATION OF JUSTICE

Second Respondent

DECISION AND REASONS

1. The appeal is allowed and to the extent necessary this decision of the tribunal is substituted for the original decision notice.

2. Operation Helvetic is the name of the military assistance provided to the civil authorities of Northern Ireland.
3. On 3 May 2017 the Second Respondent (CAJ) a non-governmental organisation, made a request to the Appellant (MOD) in the following terms:-

'This is a Freedom of Information request by the Committee on the Administration of Justice (CAJ) in relation to Operation HELVETIC, which commenced in Northern Ireland in 2007 further to the ending of Operation BANNER.

We are seeking:

1: What information does the MoD hold that sets out the Terms of Reference (or similar document) of Operation HELVETIC;

2: Copies of any document captured by (1) above which sets out the terms of reference of Operation HELVETIC.'

4. In its initial reply the MOD responded confirming that it held material within the scope of the request but indicated that some information fell within the scope of three provisions of FOIA *"Section 26(1)(b) and/or Section 23(1) and section 24(1) in the alternative."* It later confirmed that *"terms of reference are set out in the Chief of Defence Staff (CDS) Directive and Operation Order for Operation Helvetic"* it also stated that it was relying on s26(1)(b) and that it applied the exemption *"because the information requested is sensitive and its disclosure would prejudice the capability, security and effectiveness of our Armed Forces in future operations ...the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information"*
5. CAJ requested an internal review. In responding the MOD confirmed the application of s26(1)(b) but released *"a small amount of less sensitive information which provides a general description of Op Helvetic"* The review confirmed that *"the use of sections 23(1) and 24(1) in the alternative is being cited to withhold some information in scope of your request as it is not appropriate, in the circumstances of this case, to say which of the two exemptions is actually engaged."* The review then provided advice and assistance to CAJ to provide links to material setting out the principles of the provision of military aid to civil authorities and stated *"Op Helvetic provides specialist Explosive Ordnance Disposal (EOD) capabilities held at readiness, to respond to requests from the Police Service of Northern Ireland"*.
6. The right to receive information under FOIA is limited by a number of exemptions contained in that Act. In this case the exemptions identified by the MOD were:-

23. – (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, and
- (l) the Service Authority for the National Criminal Intelligence Service.

24. – (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.

26. – (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

.....

(b) the capability, effectiveness or security of any relevant forces.

(2) In subsection (1)(b) “relevant forces” means –

(a) the armed forces of the Crown

7. CAJ complained to the First Respondent (IC) who investigated. In addressing the scope of the request the MOD explained that it did not hold a single document specifying the terms of reference for Operation Helvetic, the IC adopted a different interpretation (DN paragraphs 12-13):-

“However, the two documents it identified described in detail the specific procedures, methods and techniques and terms of reference for the Operation. The MOD explained that it considered the terms of reference for an operation as defining not only the purpose of that operation but also its scope and limitations. It was for that reason that the two documents were initially identified as relevant to the request, albeit that the MOD noted it could be argued that information specifically about the tactics and operational techniques could be seen as out of scope of the request although it considered it very difficult to isolate such information as it was embedded into other parts of the documents.

13. In the Commissioner’s opinion the MOD’s interpretation as to the type of information that would form part of the terms of reference is a reasonable one. Furthermore, given that in the particular circumstances of this case no standalone document exists which sets out the terms of reference for Operation HELVETIC, she is of the view that the entire contents of both of the two documents fall within the scope of the request. “

8. In her decision notice the IC considered the application of s26(1)(b) to the information. In reviewing the possible harm caused by disclosure of the information she concluded that real and substantial prejudice would arise from the disclosure of the information contained in the Operation Order for Operation Helvetic. She noted the CAJ's argument information about a s23 body had been contained in an annex to a UK-Ireland agreement of 2006 which was published in 2014 and that the Police Service of Northern Ireland had published information about Operation Helvetic. While some information contained within the CDS Directive for Operation Helvetic was also exempt she identified parts of that document in a confidential annex sent to the MOD which were not exempt. In weighing the public interest in disclosure she stated:-

"28. The Commissioner agrees that there is a clear and weighty public interest in disclosure of information which would provide the public with a greater understanding of the armed forces role in Northern Ireland under Operation HELVETIC. More specifically, the Commissioner recognises that the complainant has advanced a number of strong reasons why the public interest favours disclosure of more of the withheld information, if not all of the withheld information. Moreover, having examined the withheld information the Commissioner accepts that it could, in part, be used to address some questions and issues that the complainant has raised. As a result, in the Commissioner's opinion the public interest in the disclosure of the withheld information should not be underestimated. However, despite the weight that these arguments attract, the Commissioner has concluded that they are outweighed by the public interest in maintaining the exemption contained at section 26(1)(b). She has reached this conclusion because she agrees with the MOD that there is a particularly compelling public interest in ensuring the capability, effectiveness or security of the UK's armed forces. In the circumstances of this case the Commissioner considers that this argument attracts notable further, and ultimately compelling, weight given that the information relates to an ongoing operation."

9. She concluded:-

"29. In light of this finding the Commissioner has not considered the MOD's reliance on sections 23(1) and 24(1) of FOIA to the parts of the information which she has concluded are exempt from disclosure on the basis of section 26(1)(b)."

10. The MOD appealed against the decision to the extent of challenging the disclosure of one paragraph of the material listed in the confidential annex, the "disputed paragraph". The rest of the information which was ordered to be disclosed was disclosed to CAJ on 22 November 2018. The MOD argued that the information was not within the scope of the request as the contents of the paragraph "does not directly concern Operation Helvetic and reference to it is incidental". It further argued that s23(1) or in the alternative s24(1) applied to the disputed paragraph. S23(1) is an absolute exemption, if s24(1) were the relevant exemption then the impact on national security in the context of the risk of Northern Ireland terrorism was serious and real and favoured non-disclosure.

11. In resisting the appeal CAJ, having seen the undisputed material it had received as a result of the decision notice argued that it was difficult to see how the paragraph embedded within the CDS Directive for Operation Helvetic could have so little relevance to the scope of Operation Helvetic as to be outside the scope of the request. It argued that reliance on s23(1) would not be proportionate and the information should be disclosed in order to comply with the tribunal's duties under Article 10 ECHR. In the alternative it submitted that the s24(1) argument was tenuous and the public interest favoured disclosure.
12. The IC resisted the appeal with respect to the scope of the request but accepted the reliance on s23(1) or s24(1).
13. In the light of the extent of the powers of the tribunal which are restricted to the consideration of a statutory regime of access to information and the question of whether the decision notice was or was not wrong in law (S58 FOIA) and not the common law right of access the tribunal directed that CAJ's arguments should be limited to FOIA and its exemptions.

Consideration

14. The request for information seeks "*what information does the MOD hold which sets out the terms of reference...*" ie it is primarily a request for information. The second limb of the request is for "*copies of any document captured by (1) above which sets out the terms...*" In the light of its interpretation of the request the MOD focused on two documents. One section within one of those documents is the disputed paragraph. During the course of the IC's investigation the MOD confirmed that some information within scope of the request was within sections 23/24, however in her decision notice the IC states that in the light of her finding with respect to the balance of public interest arguments (decision notice paragraph 29) "*the Commissioner has not considered the MOD's reliance on sections 23(1) and 24(1) of FOIA to the parts of the information which she has concluded are exempt from disclosure on the basis of s26(1)(b).*" This seems to the tribunal to be a somewhat strange approach, while it would on one analysis be an unnecessary effort to perform that analysis since she was not directing this material should be disclosed, a consideration of whether the material where she was ordering disclosure fell within s23/24 before making such an order would appear prudent, the failure to take this proper precaution is unfortunate.
15. In its appeal the MOD stated that the disputed paragraph does not directly concern Operation Helvetic and the reference to it is incidental. It stated that the Northern Ireland Office raised a concern about the adverse national security impact of disclosing the disputed paragraph.
16. The tribunal is satisfied that the disputed paragraph is within part 2 of the request, ie it is contained in a document which contains information relevant to

the request, however given the incidental nature of the connection with Operation Helvetic the tribunal is not satisfied that the disputed information is part of the terms of reference of the Operation.

17. The primary issue before the tribunal is whether or not s23(1) or in the alternative s24(1) applies to this paragraph. It is clear to the tribunal from the consideration of the overall context that s23/s24 issues are engaged. The tribunal has set out its reasoning in a confidential annex.
18. In considering the balance of public interest in the disclosure the tribunal notes the arguments advanced by CAJ that some information regarding the role of a s23 body had been published in 2014. However, that voluntary exercise by the Government of publishing information does not assist in this case. The public interest in disclosing this information, in terms of understanding how the danger of terrorism in Northern Ireland is being addressed is negligible. On the other side of the balance substantial weight must be given to safeguarding national security and, in the context of the continuing severe risk of terrorism in Northern Ireland the detrimental impact of disclosing the disputed paragraph is of real substance.
19. The tribunal allows the appeal.

Signed Chris Hughes

Judge of the First-tier Tribunal

Date: 6 September 2019

Promulgation date: 5 November 2019