Neutral citation number: [2024] UKFTT 186 (GRC)

Case Reference: EA/2020/0243

First-tier Tribunal

General Regulatory Chamber

Information Rights

Heard at Field House on 13-14 June 2023

Decision given on: 7 March 2024

Before

TRIBUNAL JUDGE Stephen Cragg KC

TRIBUNAL MEMBER Suzanne Cosgrave

TRIBUNAL MEMBER Anne Chafer

Between

DR SAM RAPHAEL

Appellant

And

INFORMATION COMMISSIONER

MINISTRY OF DEFENCE

Respondents

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Decision: The appeal is Dismissed.

Substituted Decision Notice: No substituted decision notice.

Ms McAndrew represented the Appellant

Mr Paines repesented the Information Commissioner

Mr Kosmin represented the Ministry of Defence

REASONS

MODE OF HEARING AND PRELIMINARY MATTERS

1. The proceedings were heard in person and consisted of both an OPEN and CLOSED session.

2. The Tribunal considered an agreed open bundle of evidence and submissions comprising 963 pages, an authorities bundle and a closed bundle.

BACKGROUND

3. The Appellant submitted the following request to the Ministry of Defence (MOD) on 1 April 2019:-

> The request relates to actions taken pursuant to MOD Policy on the Passing or Receipt of Intelligence Relating to Detained or Captured Persons, the latest version of which was released to me on 13 March 2019 (F012019/01980). It also relates to all earlier versions of this policy document (e. g. the May 2013 version, released to me on 8 December 2014 (F012014/05808)).
>
> Please provide me with overall figures, broken down by year, for the following:
>
> 1. Number of times that Ministers have been consulted in cases where MOD officials considered there to be a serious risk of torture and/or CIDT which cannot be mitigated (para 15 (viii) and (ix));
>
> 2. Number of times where Ministers have been consulted as above, and have subsequently approved intelligence sharing;
>
> 3. Number of times that prior approval has been sought from Ministers (para 22)

4. Number of times where Ministers have provided prior approval as above.

Similar figures were released to me on 8 December 2014, for the two years 2013 and 2014 (F012014/05808). The information I am seeking here is identical in nature to this. '

4. The Appellant made reference to the policy in question dating from November 2018 as being available at https://www.documentcloud.orq/documents/6015916—MOD—Torture—Policv-Nov—2018.html.

5. For the purposes of this appeal the Appellant has set out the following about the guidance in his skeleton argument:-

In July 2010, the Cabinet Office published Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees ("the Consolidated Guidance") The Consolidated Guidance provided that before interviewing or seeking intelligence from detainees in the custody of an overseas security or intelligence service, or seeking an individual's detention by such a service, UK personnel were required to consider whether that person "may have been or may be subjected to unacceptable standards of detention or treatment" (§9). The Guidance set out different actions to be followed depending on the degree of identified risk of such detention or treatment (in the "Consolidated Guidance Table", §11. The Consolidated Guidance Table materially provided:-

Situation	**Action**
If you know or believe torture will take place	1. You must not proceed and Ministers will need to be informed. 2. You should raise concerns with liaison or detaining authority to try and prevent torture occurring unless in doing so you might make the situation worse.
In circumstances where you judge there is a lower than serious risk of CIDT taking place and standards of arrest and detention are lawful	You may proceed, keeping the situation under review.
In all other circumstances	1. You must consult senior personnel. You must not proceed unless either: a) senior personnel and legal advisers conclude that there is no serious risk of torture or CIDT, or;

	b) you are able to effectively mitigate the risk of mistreatment to below the threshold of a serious risk through reliable caveats or assurances. 2. If neither of the two preceding approaches apply, Ministers must be consulted. …

6. In January 2020, the Consolidated Guidance was replaced by the *Principles Relating to Detention and Interviewing of Detainees Oversees and the Passing and Receipt of Intelligence Relating to Detainees*.

7. The MOD responded on 12 June 2019 and confirmed that it held some information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of sections 26(1)(b) FOIA (defence) and 27(1)(a) FOIA (international relations) FOIA. The MOD also refused to confirm or deny whether it held any further information falling within the scope of the request on the basis of section 23(5) FOIA (security bodies).

8. The Appellant contacted the MOD on 14 June 2019 and asked it to conduct an internal review of this response. The MOD informed him of the outcome of the review on 17 July 2019. The review upheld the application of the various exemptions cited in the refusal notice but also argued that section 24(1) FOIA (national security) applied.

9. By the decision notice dated 13 July 2020, the Commissioner (as described below) held that the MOD could withhold the information requested under section 27(1)(a) and section 23(5) FOIA. The decision notice did not address the MOD's then additional reliance on sections 24(1) and 26(1)(b) FOIA. Before the Tribunal, the MOD relied on the exemptions under section 27(1)(a) FOIA; section 23(1) FOIA, or in the alternative section 24(1) FOIA; and section 26(1)(b) FOIA. There was no longer any reliance on s23(5) FOIA.

THE LAW

Section 23(1) FOIA

10. Section 23 FOIA states as material:

> 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.

11. The principles governing the application of section 23 FOIA were set out in *Commissioner of the Police of the Metropolis v Information Commissioner and Rosenbaum* [2021] UKUT 5 (AAC) at §35 (and adopted at §43). The principles are not in dispute in this case:-

> 1. Section 23 affords the "widest protection" of any of the exemptions: *Cobain* at [19(b)] and [29].

2. The purpose of section 23 is to preserve the operational secrecy necessary for section 23(3) bodies to function*:* *Lownie* at [50].

3. It is "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". The exclusion of the section 23(3) bodies from the scope of FOIA was shutting the front door, and section 23 was "a means of shutting the back door to ensure that this exclusion was not circumvented": *APPGER* at [16].

4. The legislative choice of Parliament was 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": *Cobain* at [28]; *Lownie* at [53].

5. Asking whether the information requested is anodyne or revelatory fails to respect the difficulty of identifying what the revelatory nature of the information might be without a detailed understanding of the security context: *Lownie* at [42]; *Corderoy* at [59].

6. When applying the 'relates to' limb of sections 23(1) and (5), that language is used in "a wide sense": *APPGER* at [25]; *Corderoy* at [59]; *Savic* at [40].

7. The first port of call should always be the statutory language without any judicial gloss: *APPGER* at [23]; *Corderoy* at [51]; Savic at [40].

8. With that warning in mind, in the context of 'relates to' in section 23, it may sometimes be helpful to consider the synonyms of "some connection", or "that it touches or stands in some relation to" (*APPGER* at [13], [25]) or to consider whether the request is for "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" (*APPGER* at [21], [26]; *Lownie* at [57]). But the 'relates to' limb must not be read as subject to a test of focus (*APPGER* at [14) or directness (*Lownie* at [59]- [60]).

9. The scope of the 'relates to' limb is not unlimited and there will come a point when any connection between the information and the section 23(3) body is too remote. Assessing this is a question of judgment on the evidence: *Lownie* at [62].

10. The assessment of the degree of relationship may be informed by the context of the information: *Lownie* at [4] and [67].

11. The scope of the section 23 exemption is not to be construed or applied by reference to other exemptions, including section 24: *APPGER* at [17]; *Lownie* at [45] and [52].

12. In a section 23(1) case, regard should be had as to whether or not information can be disaggregated from the exempt information so as to render it non-exempt and still be provided in an intelligible form: *Corderoy* at [43].

> 13. Section 23(5) requires consideration of whether answering ‘yes’ or ‘no’ to whether the information requested is held engages any of the limbs of section 23: *Savic* at [43], [82] and [92].
>
> 14. The purpose of section 23(5) is a protective concept, to stop inferences being drawn on the existence or types of information and enables an equivalent position to be taken on other occasions: *Savic* at [60].

12. The cases referred to are *Home Office v Information Commissioner and Cobain* [2015] UKUT 27 (AAC); *APPGER v Information Commissioner and Foreign and Commonwealth Office* [2015] UKUT 377 (AAC), [2016] AACR 5; *Savic v Information Commissioner, Attorney General's Office and Cabinet Office* [2016] UKUT 535 (AAC), [2017] AACR 26; *Corderoy v Information Commissioner* [2017] UKUT 495 (AAC), [2018] AACR 19; and *Lownie v Information Commissioner and others* [2020] UKUT 32 (AAC), [2020] 1 WLR 3319.

Section 24 FOIA

13. Section 24 FOIA states as material:

> **24.— National security**.
>
> 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.”

14. The principles applicable to section 24 are also well-established and approved by a three-judge panel of the Upper Tribunal in *Foreign, Commonwealth and Development Office v Information Commissioner & Williams & Wickham-Jones & Lownie* [2021] UKUT 248 (AAC) at §§31-32:-

> (1) The term national security has been interpreted broadly and encompasses the security of the United Kingdom and its people, the protection of democracy and the legal and constitutional systems of the state: *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153, paras 15-16 per Lord Steyn, para 50 per Lord Hoffmann and para 64 per Lord Hutton.
>
> (2) A threat to national security may be direct (the threat of action against the United Kingdom) or indirect (arising from the threat of action directed against other states): Rehman, paras 16 and 64.
>
> (3) Section 24 is not engaged, unlike the majority of the qualified exemptions, by a consideration of prejudice. Its engagement is deliberately differently worded.
>
> (4) The term “required” means “reasonably necessary”: *Kalman v Information Commissioner & Department for Transport* [2011] 1 Info LR 664, para 33.

> (5) National security is a matter of vital national importance in which the Tribunal should pause and reflect very carefully before overriding the sincerely held views of relevant public authorities: *APPGER v Information Commissioner & Ministry of Defence* [2011] UKUT 153 (AAC), [2011] 2 Info LR 75, para 56 (citing *Rehman*).
>
> (6) Even where the chance of a particular harm occurring is relatively low, the seriousness of the consequences (the nature of the risk) can nonetheless mean that the public interest in avoiding that risk is very strong: Kalman, para 47. As the Upper Tribunal put it: "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": *Keane v Information Commissioner, Home Office and Metropolitan Police Service* [2016] UKUT 461 (AAC), para 58 (approving *Kalman*). That does not mean that the section 24 exemption carries "inherent weight", but is rather a reflection of what is likely to be a fair recognition of the public interests involved in the particular circumstances of a case in which section 24 is properly engaged."

15. That statement of principles has been accepted as authoritative: *Lownie v Information Commissioner & Foreign, Commonwealth and Development Office* [2023] UKFTT 397 (GRC) at §52.

16. The relationship between sections 23 and 24 was also addressed in *APPGER* at §17 as follows:-

> This broad approach by reference to identified bodies [in section 23] 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.

17. In *FCDO v Information Commissioner, Williams and others (sections 23 and 24)* [2021] UKUT 248 (AAC), the Upper Tribunal determined that it was open to the FCDO to rely upon sections 23(1) and 24(1) in the alternative as a matter of law. Recently, in *Lownie v ICO and FCDO* [2023] UKFTT 00397 (GRC) at §58, the FtT determined Dr Lownie's appeal on the basis of s.23(1) alternatively s.24(1) FOIA. The principles governing s.23(1) and 24(1) identified above were expressly adopted in Lownie.

18. S.24(1) FOIA is a qualified exemption which means that even if we are satisfied that the exemption is required for the purpose of safeguarding national security, it is possible for the public interest in disclosure to outweigh the public interest in maintaining the exemption.

Section 27 FOIA

19. Section 27 FOIA provides an exception to the duty to make disclosure of the information for international relations. It reads, materially, as follows:-

> 27 (1) 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) …
> >
> > (d) …
>
> (2) ….
>
> (3) …
>
> (4) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)—
>
> > (a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or
> >
> > (b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

20. In order for the prejudice based exemption in section 27 FOIA to be engaged, three criteria must be met by the MOD.

21. First, the actual harm which the MOD alleges would, or would be likely to, occur if it the information is disclosed. Second, the MOD must be able to demonstrate that some causal relationship exists between the information held and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the MOD is met, namely that disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

22. In relation to the lower threshold ('would be likely') the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, this places a stronger evidential burden on the MOD. The anticipated prejudice must be more likely than not to occur. The relevant principles are set out in *Campaign against the Arms Trade v Information Commissioner and others* EA/2007/0040 at [80]-[81], [85]; *APPGER v Information Commissioner and the Ministry of Defence* [2011] UKUT 153 (AAC) at [56]; *FCO v Information Commissioner and Plowden* [2013] UKUT 0275 (AAC) at [13]. A helpful summary is at [56] in *APPGER*:

> 56. There are essentially two issues:
>
> i) would disclosure of the information be likely to prejudice international relations;
>
> ii) if so, does the public interest in maintaining the exemption outweigh the public interest in disclosing it.
>
> Both matters are for the Tribunal to determine for itself in the light of the evidence. Appropriate weight needs to be attached to evidence from the executive branch of government about the prejudice likely to be caused to particular relations by disclosure of particular information: see *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153, [50]-[53] and see also R *(on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 at [131] per Master of the Rolls:
>
>> "In practical terms, the Foreign Secretary has unrestricted access to full and open advice from his experienced advisers, both in the Foreign Office and the intelligence services. He is accordingly far better informed, as well as having far more relevant experience, than any judge, for the purpose of assessing the likely attitude and actions of foreign intelligence services as a result of the publication of the redacted paragraphs, and the consequences of any such actions so far as the prevention of terrorism in this country is concerned."

THE DECISION NOTICE

23. The decision notice is dated 13 July 2020. The Commissioner concentrated on the exemption claimed under s27 FOIA, and explained the MOD's position as follows:-

> 9. …the MOD explained to the Commissioner that intelligence sharing agreements, and information relating to any exchanges made under that theme, are based on mutual trust and considered confidential between the relevant parties. The MOD argued that whilst it is public knowledge that there is a UK and MOD policy which outlines the guidelines that have to be followed when

passing or receiving intelligence relating to detained or captured persons, the expectation is that information relating to any exchanges considered under that policy is not revealed publicly by the parties involved. Therefore, the release of such information would be considered a breach of trust that would likely to prejudice the UK's relationships with the foreign authorities that shared the intelligence for which Ministerial advice was sought. However, the MOD noted that any perceived UK breach of trust relating to the sharing of intelligence could have wider implications for the UK's relations with other states which involve the sharing of sensitive or classified material.

10. As explained below, the complainant questioned why the MOD had sought to withhold this information when it had disclosed substantively the same information in response to a previous request five years earlier. The complainant argued that the MOD had failed to explain what circumstances had changed over the period.

11. In response to this point the MOD explained to the Commissioner that during 2013 and 2014 (the period covered by the complainant's previous request) the UK Armed Forces were actively engaged in ground operations in Afghanistan under Operation HERRICK. The MOD explained that during this operation, UK forces had been conducting detention operations that involved the transfer of captured persons to Afghan authorities, including Afghan police forces where criminal acts falling under their jurisdiction were believed to have been committed. The MOD explained that the NATO International Security Assistance Force (ISAF) set a deadline of December 2014 to end combat operations in Afghanistan, and in line with this the UK's role gradually shifted from one of combat to training and assistance over that period, with the formal withdrawal of UK combat forces in late 2014. During this transition, responsibility for security passed from ISAF to Afghan National Security Forces (ANSF). The MOD explained that this is a material change to the UK Armed Forces operating environment between 2013-2014 and the present time.

12. However, the MOD explained that it was now of the view that the information released in response to the complainant's previous request should not have been disclosed. It explained that the publication of information that provides the public and adversaries with an insight into the MOD's intelligence sharing with partner forces and highly sensitive UK operational data was an error, and one that should not be repeated.

13. The MOD explained that the approach taken in this request was supported the position outlined in the written statement by the Minister for the Armed Forces given on 11 June 2019:

> 'We do not comment on the details of our intelligence sharing arrangements relating to detainees or captured persons as to do so would, or would be likely to, prejudice the capability, effectiveness or security of the Armed Forces. However, I would like to reassure the hon. Member that this Government stands firmly against torture and does not participate in, solicit, encourage or condone the use of torture or cruel, inhumane or degrading treatment or punishment for any released purpose.

> Our policy and activities in this area are entirely in accordance with both domestic and international law.

24. The Appellant was recorded as explaining that

> 14….he had requested substantively the same information as released in a previous request (FOI2014/05808), but the MOD had not explained what had changed in the intervening five years which meant the such information was now considered to be exempt from disclosure. The complainant suggested that it seemed possible that the only change is the greater public scrutiny on intelligence sharing following the release of the MOD's policy issue on this as a request of a separate request he had made for it.
>
> 15. The complainant noted that the MOD had argued that the information is 'operationally sensitive' and would 'prejudice the capability or effectiveness of our armed forces'. He also noted that the MOD had argued that it would also 'be likely to adversely affect relations with our allies if revealed.' However, the complainant argued that it was very unclear how the information requested would produce this harm. He emphasised that he had requested aggregate figures, which the MOD had released to him before; he also emphasised that he did not ask for details of the nature of intelligence to be shared, nor the identity of the ally. Furthermore, he noted that the refusal notice argued that prejudice would be likely to occur in combination with 'other information that could be revealed under the FOIA', but it is unclear what that information would be and how it would combine to generate harm. He suggested for this argument to hold the likelihood of that harm occurring would need to be realistic not purely hypothetical and the harm genuine.

25. Commissioner found that section 27(1)(a) FOIA was engaged:-

> 18.….the Commissioner accepts that the potential prejudice described by the MOD clearly relates to the interests which the exemption contained at section 27(1)(a) is designed to protect.
>
> 19. ….the Commissioner acknowledges that there is an expectation that information shared between states on the basis of intelligence sharing agreements will be treated confidentially. In light of this she accepts that it is plausible to argue that disclosure of the withheld information which relates directly to information provided to the UK under such an agreement would be against the expectations of the states that provided it. In turn, she accepts that disclosure of the information would therefore have a negative impact on the

> UK's relations with those states, or as described by the Tribunal above, would require a damage limitation response that would otherwise have not been necessary.
>
> 20. ….the Commissioner is persuaded that the risk of prejudice occurring is one that is more than hypothetical. In reaching this conclusion she appreciates that the information requested is simply aggregate data and does not identify which states provided the data. However, given the clear expectation of the states in terms of how information shared with the UK would be treated, and the inherent sensitivity of such information, the Commissioner is satisfied that even disclosure of the such aggregate data still poses a real and significant risk to the UK's relations with the states who provided it with the intelligence.

26. In relation to the public interest:-

> 26. The Commissioner accepts that there is a significant public interest in the disclosure of the information sought by the complainant. As he noted, following the MOD's disclosure of its policy regarding such intelligence there were Parliamentary debates and media articles about this matter, including questions being raised as to whether the policy was compliant with the Cabinet Office's consolidated guidance on torture. Disclosure of the withheld information would provide the public with a clear insight into the number of occasions Ministers were consulted and prior approval had been sought for a five year period. The Commissioner accepts that disclosure of the information could further inform ongoing debate on the operation of the policy in question.
>
> 27. However, the Commissioner considers there to be a very significant public interest in protecting the UK's relationships with other states, not least to ensure that intelligence sharing arrangements are not compromised. In attributing weight to the public interest in favour of maintaining the exemption the Commissioner accepts that the disclosure risks not only directly harming the UK's relations with the states that provided the intelligence in question but also risks undermining the UK's intelligence sharing relations with other states. In the Commissioner's view this adds further weight to the public interest in maintaining the exemption.

27. Taking the above into account the Commissioner concluded 'by a relatively narrow margin' that the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information. The Commissioner decided not to considered the MOD's reliance on sections 24(1) and section 26(1)(b) of FOIA.

28. However, the Commissioner noted that, at that time, the MOD also sought to rely on section 23(5) FOIA to refuse to confirm or deny whether it held any further information falling within the scope this request. The Commissioner was satisfied that on the balance of probabilities confirming whether or not the MOD holds any further information falling within the scope of the request could reveal information related to one or more bodies identified in section 23(3) FOIA and that the MOD was therefore entitled to rely on section 23(5) FOIA to refuse to confirm or deny whether it held any further information falling within the scope of the request.

THE APPEAL AND THE HEARING

29. By way of appeal the Appellant challenged the decision notice on the basis that: (i) section 27(1)(a) FOIA was not engaged; alternatively, even if section 27(1)(a) FOIA was engaged, the public interest was in favour of disclosure; and (ii) the MOD was not entitled to rely on section 23(5) FOIA. The Appellant also made brief submissions in relation to the application of sections 24(1) and 26(1)(b) FOIA

30. Since these appeal proceedings were issued the MOD was joined as a party, and confirmed that it also intended to resist disclosure on the basis of sections 24(1) and 26(1)(b) FOIA. The MOD confirmed that it no longer relied on section 23(5) FOIA to refuse to confirm or deny whether it held further information responsive to the request. Instead, the MOD placed reliance on section 23(1) FOIA, in the alternative section 24(1) FOIA in relation to the whole of the information requested, rather than just some of that information.

31. The MOD also identified a "Parliamentary Statement" given by the then Minister for the Armed Forces, which explained that the "prior approval" section of the MOD's policy had never been used and would be removed from future iterations of the policy. In the light of this Statement, the Appellant accepts that the third and fourth limbs of his request fall away. This appeal accordingly proceeds in relation to the first and second limbs of his request only. As the Appellant identified in his skeleton argument:-

> The question now arising for determination by the Tribunal is therefore whether the MOD is entitled to withhold information relating to the number of times Ministers are consulted on, and approve, information sharing in circumstances in which there is a serious and unmitigable risk that such action will lead to detainees being tortured and/or subjected to CIDT, on the basis of one or more

> of: sections 23(1), in the alternative section 24(1); section 26(1)(b); and/or section 27(1)(a).

32. Dr Raphael provided a witness statement and gave evidence at the hearing. His concern was that repeated statements made by the government that torture was not condoned or encouraged were not supported by the available evidence. He said it was a well-known fact that between 2001 and 2010 there was the sharing of information hundreds of times where the government knew or suspected, or should have known or suspected, that the information was derived from the application of torture or which would lead to torture. He believed there should be a debate about the issue based on the fully available information, as to whether the publicly stated policy was being applied in practice.

33. Dr Raphael explained that so far as he was aware there had been no adverse effects or demonstrable impact caused by the disclosure in 2014. He accepted that disclosure of the numerical information says little about compliance with the overarching policy, and does not provide information about individual cases, but would provide a meaningful insight into policy and practice and how the UK adheres to its commitments under international law. The information would show whether authorisations were being sought under the Consolidated Guidance even where the risk of torture or CIDT was serious. Public debate would be enhanced by knowing how many times authorisations had been asked for and granted.

34. In open session Mrs Armstrong endorsed the witness statement provided by Anthony McGee, her predecessor (described as Deputy Director for Operational Policy in the MOD) and dated 9 December 2020.

35. Mr McGee said in relation to s23 and s24 FOIA that:-

> Having corrected its earlier erroneous reliance on section 23(5) and section 24(1)FOIA (as to which see above), the MOD relies on section 23(1), which is an absolute exemption. Even if the MOD were unable to establish prejudice (which, including as set out in this statement, it can), the information must nevertheless be withheld.
>
> As to section 24(1), withholding the requested information is necessary for the purpose of safeguarding national security. While it is public knowledge MOD has a policy to share and receive intelligence with foreign partners, disclosure of the requested information could have harmful impact on co-operation with other states, which could then impact on the security of the UK and its people. Release could undermine any ongoing or future operations and it is possible that

the accumulation of information could enable interested parties to build a picture of UK intelligence sharing and how regularly it does, or does not occur, which is extremely sensitive to national security. Again, this information, when combined with other information in the public domain, such as regions of operations and known international partners, would create a mosaic of understanding and so risk national security.

36. Mr McGee said in relation to s27 FOIA that:-

> Disclosing the requested information would undermine the UK's position and compromise its ability to work with other states on matters of intelligence sharing relating to detainees or captured persons. As identified above, the exchange of intelligence between states is one of the most sensitive elements of any relationship and it is dependent on mutual trust. Intelligence is shared on the basis that such activities will remain confidential and not be disclosed. As a long-standing matter of policy, HMG does not comment on intelligence matters for reasons including the preservation of intelligence sharing relationships, and the same considerations inform the MOD's reliance on section 27(1)(a) FOIA in this appeal.

37. In relation to s26 FOIA, Mr McGee said in his OPEN statement that:-

> Disclosing the requested information would prejudice the capability, effectiveness or security of UK Armed Forces and any partner forces they are operating with. The disclosure of the requested information would provide adversaries with a clear indication of the tempo, regularity and scale of level of intelligence sharing that may, or may not, have occurred with foreign authorities. This would contribute to the cumulative mosaic understanding that adversaries can build of the way in which sensitive military operations are conducted by British Armed Forces or our allies worldwide. This could in turn impact the security and protection of UK and partner forces.
>
> While it is recognised that the Information Requests ask for numerical data in respect of certain actions, providing such numbers, even if zero, when collated with other information in the public domain or through FOIA requests, could reveal how active we may be in certain parts of the world and risk force protection issues if disclosed. As a consequence, this may prejudice our relationships with allies and partner forces, by adversely impacting on their perception of and willingness to engage with UK Armed Forces. Were foreign forces to limit their engagement with UK Armed Forces, that could result in a wider impact on the UK Armed Forces' sensitive operational intelligence sharing relationships, which would be detrimental to UK Armed Forces capability.
>
> While the release of the information might be seen to demonstrate the MOD's commitment to transparency and openness regarding the conduct of military

> operations, the overall public interest is best served in withholding the requested information, given that the disclosure would prejudice the capability and effectiveness of UK Armed Forces and partner forces.

38. Mrs Armstrong was taken through the various policy documents and explained that the policy of not condoning or encouraging torture was one for ministers to comply with. The role of *officials* was to identify when risks of torture or CIDT arose and in appropriate cases to set out the information for ministers to make the final decision about the sharing of intelligence. Officials were not taking those decisions, but applying a procedure to ensure cases were referred to ministers where necessary, and she accepted that often these cases were finely balanced, and the policy did not preclude authorisation where there was a serious risk of CIDT or torture. Mrs Armstrong was clear that when there was no doubt that torture or CIDT was involved then there would be no information sharing. She disagreed that the policy condoned torture

39. Mrs Armstrong said that as of 12 June 2019 a new scheme was being developed where a new set of Principles would replace the Consolidated Guidance (from early 2020) and that was public knowledge at that time.

40. In relation to the 'mosaic' effect her evidence (see para 10 of ws) was that the ICPO produced materially similar figures but they were aggregated so that the figures were for referrals by all agencies (see McGee E682) table E834, and that disclosure of the requested information would allow the MOD figures to be subtracted from the aggregate, which raised concern. Even providing rounded numbers (for example less than 5) could include a mosaic risk as low numbers can provide important information especially where they might be contrasted with larger numbers.

41. In relation to the mosaic risk, Mr McGee said in his OPEN witness statement:-

> …In this OPEN statement, I am unable to address in substance the risk or potential risk arising from the disclosure of the requested information when considered in conjunction with other information publicly available or available to adversaries.
>
> Nevertheless, I note that the erroneous prior disclosure of numerical information in the 2014 Response places a particular complexion on mosaic risk in this appeal. In 2014, information was disclosed concerning details of intelligence sharing in 2013 and 2014. Were the requested information to be disclosed, information reflecting a total of seven years of intelligence sharing would be placed in the public domain. That information would be capable of consideration alongside other information and reports regarding the activities of the UK Government and its forces, as well as foreign forces and allies, so as to illuminate and render public aspects of properly confidential intelligence sharing

> arrangements. Taken together with the 2014 Response, disclosure of the requested information would place a sizable and thereby conspicuous body of information in the public domain concerning intelligence sharing. In my view, that would or would be likely to undermine the UK Government's relations with other states, prejudice the capability, effectiveness or security of UK Armed Forces and/or relevant cooperating forces, and prejudice national security.
>
> The totality of the precise information held by adversaries is not known to HMG, unsurprisingly. The suggestion …that mosaic risk for the purposes of this appeal must be evidenced "by reference to specific information in the public domain" places an impractical and unduly onerous burden on the MOD, in my view.

42. Mrs Armstrong accepted that there is a public interest in how often authorisation was requested and granted under the policy. She accepted that the information sought was not to do with the actual intelligence to be shared. However, she adopted Mr McGee's statement in which he said in OPEN that:-

> 51. While it is public knowledge that there are MOD policies which outline the guidelines that have to be followed when passing or receiving intelligence relating to detained or captured persons, the expectation is that information relating to any exchanges considered under that policy is not to be revealed publicly by the parties involved. The release of such information would be considered a breach of trust that would likely to prejudice our relationships with the foreign authorities. It should also be noted that any perceived UK breach of trust relating to the sharing of intelligence could have wider implications for our relations with other states which involve the sharing of sensitive or classified material.
>
> 52. Accordingly, the public interest balance lies heavily in favour of withholding the requested information, disclosure of which would undermine the UK's position and compromise its ability to work with other states on matters of intelligence sharing relating to detainees or captured persons.

Submissions

43. In relation to section 23 FOIA the Appellant accepted that it affords wide protection for information falling within its scope. He pointed out the need to ensure that where the 'relates to' limb of s23 (1) is relied upon then this requires the Respondents to show that there is "some connection between the information and a section 23(3) body; or that it touches or stands in some relation to such a body": *Williams*, §30(8). The Appellant says it is necessary to consider whether or not "information can be disaggregated from the exempt information so as it render it non-exempt and still be provided in an intelligible form" (*Williams*, §30(12); *Corderoy v Information Commissioner* [2017] UKUT 495 (AAC), at §43). The Appellant invited the Tribunal carefully and rigorously to

consider the question of whether the Requested Information was supplied by and/or relates to a section 23(3) body.

44. The Appellant submits that particularly anxious scrutiny of the MOD's evidence on the application of section 23(1) FOIA is required, in circumstances in which: (i) for several months, the MOD was erroneously relying on section 23(5) FOIA as entitling it to neither confirm nor deny whether it holds "further" information within the scope of the request; and (ii) the MOD now seeks to withhold all information within the scope of the request on the basis of section 23(1) FOIA.

45. The MOD advances very similar arguments in support of its position that each of sections 24(1), 26(1)(b) and 27(1)(a) FOIA are engaged, and that the public interest in disclosure is outweighed by the public interest in maintaining each exemption.

46. The MOD argues, through the witness statement of Mr McGee, oral evidence from Mrs Armstrong, and by submissions, that disclosure of the requested information relates to and/or could or would reveal the tempo, regularity and context of intelligence sharing between the UK and other states. In consequence, it is said that disclosure of the requested information engages the exemptions because (a)it could have a harmful effect on other states' willingness to co-operate with the UK in relation to such matters, thereby impacting on the UK's security and the security of its people within the meaning of section 24(1) FOIA; (b) it would reveal sensitive military operations being conducted by the UKAF or those of allies worldwide, and would thereby prejudice the capability, effectiveness or security of the UKAF within the meaning of section 26(1)(b); and (c) it would be regarded as a breach of the trust that underpins intelligence sharing agreements, and would thereby prejudice relations between the UK and other states within the meaning of section 27(1)(a) FOIA.

47. The MOD also argues that the requested information could, when combined with other information already in the public domain, be used to build a fuller picture of UK intelligence sharing and/or operations, thereby engaging all three exemptions (the so-called "mosaic risk").

48. The MOD argues that the public interest balance is in favour of maintaining each of the exemptions. Insofar as this relates to section 27(1) FOIA, the Commissioner agreed that the public interest is in favour of maintaining the exemption. This was stated to be by 'a relatively narrow margin' in the decision notice although the Commissioner was more convinced by the MOD's arguments by the end of the hearing and told the Tribunal that that was the case.

49. The Appellant submits that disclosure of the requested information would not, and would not be likely to, reveal the tempo, regularity and context of the UK's information sharing with other states.

50. Thus, the requested information necessarily relates to only a small sub-set of the UK's practices in the context of intelligence sharing, and within this small sub-set, the request was deliberately framed so as to exclude operationally sensitive information and/or information disclosure of which would prejudice national security or international relations. No specific information is sought, for example, about sharing agreements or partners, individual detainees or theatres of operations, and the request is for aggregate figures only.

51. On that basis the MOD therefore has not demonstrated that sections 24(1), 26(1)(b) and/or 27(1)(a) FOIA are engaged on the basis contended for.

52. The Appellant points out that materially identical or similar information to the requested information has already been disclosed, in particular in 2014. Although the MOD has argued that this is now seen as an error the MOD has not provided any OPEN evidence that such disclosure revealed or was likely to have revealed the tempo, regularity and context of information sharing or otherwise impacted the UK's forces, national security, or international relations. The MOD has not provided any OPEN evidence as to how a material change of circumstances (in the form of the UKAF's transition from active engagement in ground operations in Afghanistan, to the provision of training and assistance) from 2014 onwards, is relevant to the likelihood of the requested information revealing the tempo, regularity and context of information sharing.

53. A similar argument is made about the Parliamentary Statement given by the then Minister for the Armed Forces in 2019: the MOD offers no OPEN explanation for why the requested information would or would be likely to reveal the tempo, regularity and context of information sharing or otherwise impact the UK's forces, national security, or international relations when the information disclosed in the Parliamentary statement apparently did not.

54. The Appellant points out that Section 19 of the Annual Report of the Investigatory Powers Commissioner 2019 (the IPCO 2019 Report) sets out a range of statistics relating to the use of the Consolidated Guidance by the MOD and the UK Intelligence Community (UKIC), including the number of times that "UKIC/MOD referred to Ministers for a decision because there was a serious risk of one of the categories of mistreatment (torture, for example) set out it the Consolidated Guidance" (§19.20). The Appellant argues that this information is materially similar to the

information requested under the first limb of the request (while accepting that it is not identical, since the IPCO statistics also cover referrals by UKIC).

55. The Appellant then argues that even if disclosure of the requested information would or would likely reveal the tempo, regularity and context of UK information sharing, this would not compromise the UKAF, national security and/or international relations within the meaning of sections 24(1), 26(1)(b) and/or 27(1)(a) FOIA, essentially for its reasons as summarised above.

56. In relation to so-called 'mosaic risk' associated with disclosure the Appellant's case is that this cannot be relied upon for the engagement of sections 24(1), 26(1)(b) and 27(1)(a) FOIA. The Commissioner's guidance, *Information in the Public Domain*, provides that '…general arguments will not carry much weight. It will be necessary to point to specific information already in the public domain, explain why it is likely that they will be combined, and explain how additional prejudice is likely to result from the combination. (para 64). However, the Appellant argues that the only 'specific information' the MOD has pointed to in OPEN evidence is the statistics contained in the IPCO 2019 Report, but it is unclear how, if aggregate numbers were provided, an adversary would be in a materially improved position to inform their assessment of the relative level of UKIC/MOD activity during the relevant year. Any such mosaic effect, even if made out, would only apply to 2019, and not to the other years covered by the request. The MOD has not explained why it is likely that the requested information would be combined with other information, as required by the Commissioner's guidance.

57. The Appellant notes that the MOD argues that the CLOSED witness statement of Mr McGee constitutes compelling evidence of mosaic risk.

58. The Appellant submits that the 'fuller picture' which the MOD claims would result from the disclosure of the requested information must be more than incidental in scale as, by definition, the disclosure of any information not yet in the public domain will add to the "picture" which can be gleaned from publicly available information.

59. The Appellant accepts that if the Tribunal concludes that sections 24(1), 26(1)(b) and/or 27(1)(a) are engaged, there will arise a public interest in maintaining the exemption in order to, respectively, safeguard national security, and avoid prejudice or likely prejudice to the capability, effectiveness or security of the UKAF and/or to relations between the UK and other states.

60. However, the Appellant contends that the specific harm which would result from disclosure is likely to be limited, for substantially the same reasons as are set out above.

61. The Appellant points to the extraordinarily strong public interest in disclosing the requested information. The Appellant sets out the following public interest factors in his skeleton argument:-

    (a) The public interest in knowing whether, and to what extent, Ministers authorise intelligence sharing in circumstances in which there is a clear risk of torture or CIDT to detainees.

    (b) The public interest in helping to understand whether the UK Government, its Ministers, and MOD personnel are complying with their obligations under international and domestic law.

    (c) The public interest in knowing whether the UK Government is complying with its repeatedly stated policy of refusing to participate in, solicit, encourage or condone the use of torture.

62. The Appellant points out that there was extensive public and Parliamentary debate which ensued following publication of the 2018 Policy, and says that it is also highly relevant that UK agencies have, in the past, 'routinely shared intelligence in circumstances in which torture and/or CIDT was or was likely to be taking place. The UK's history of such action creates an even greater public interest in understanding whether current practice is 'clean''. The Appellant's witness statement at §77-§78 and §81-§93 further emphasise these points. The Appellant invites the Tribunal to conduct the balancing exercise in respect of every figure which forms part of the requested information.

63. There was a CLOSED session in this case, the content of which is addressed in the CLOSED annex to this decision. It was possible to provide the following 'gist' of the CLOSED session:-

    1. Mrs Jennifer Armstrong ("**the witness**") adopted the CLOSED witness statement of Anthony McGee.

    2. The witness addressed the engagement of s.23(1), alternatively 24(1) FOIA, on the facts.

    3. The witness addressed the relevance of the fact that other information had previously been disclosed, including:

        a. Numerical data disclosed in 2014.

        b. Numerical data disclosed in various IPCO Reports.

c. Numerical data disclosed by way of a Parliamentary statement in respect of §22 of the 2018 Policy.

4. The witness addressed the likely reaction of international partners and adversaries if the disclosure of the requested information were to come to their attention.

5. The witness gave granular and specific examples of mosaic risk arising generally and as applicable to the specific content of the requested information.

6. The witness was asked each of the questions provided by the Appellant in advance of the CLOSED session. Of those:

   a. The answers to questions 1 to 3 [relating to issues whether the 'supplied by' and 'relates to' parts of s23(1)] cannot be provided in OPEN as they concern the ss.23/24 issues.

   b. As to question 4 [relating to whether a sizeable and conspicuous body of information would be placed in the public domain], the witness repeated the substance of her OPEN evidence and provided additional CLOSED information in support of the evidence at §44 of the First McGee W/S.

   c. Question 5 [about disaggregation]: no. The position is as stated in OPEN.

   d. The answers to questions 6 to 8 [about armed forces operational matters]cannot be provided in OPEN.

   e. As to questions 9 and 10 [about the Parliamentary Answer], the witness repeated the substance of her OPEN evidence.

   f. As to questions 11 and 12 [about the IPCO report], the witness provided an explanation of the matters raised therein.

7. The Respondents delivered short oral CLOSED closing submissions in light of the CLOSED evidence. Each of the Respondents submitted that s.23(1), alternatively s.24(1) FOIA were engaged. As applicable, the public interest balance fell in favour of withholding the requested information in respect of ss.24(1) and 27(1)(a) (both Respondents) and additionally s.26(1)(b) (MOD only). The Commissioner did not make submissions on s.26(1)(b). Such submissions as can be made in OPEN, including submissions as to the public interest balance, were reserved to the hearing on 14 June 2023.

DISCUSSION

Section 23/24

64. Much of the Tribunal's discussion on the applicability of s23 or 24 FOIA will have to take place in the CLOSED annex to this decision.

65. The Tribunal recognises (and will apply) the entreaties in the case law both to have proper regard to the views of the MOD in relation to the applicability of these exemptions, and to subject these

views to proper scrutiny with reference to the statutory language of section 23(1) FOIA, especially in relation to evidence and submissions heard in CLOSED session.

66. In relation to s23 FOIA there was no dispute to the summary of the principles governing section 23(1) FOIA in *Rosenbaum*, and that the exemption applies whether "the requested information was 'supplied by' or 'relates to' a section 23(3) body (or both)."

67. The Tribunal has also considered whether any information falling within the scope of section 23 or section 24 FOIA in the alternative can be disaggregated from other information (further to *Corderoy v Information Commissioner* [2017] UKUT 495 (AAC) at §43).

68. On this point the Tribunal agrees with the MOD's case that the totality of the numerical data sought falls within the scope of section 23(1), alternatively section 24(1), such that disaggregation is not a proper course. We note that at §7 of the Appellant's skeleton argument, the Appellant 'accepts that, if section 23(1) applies to the entirety of the requested information, the appeal cannot succeed'.

69. We are satisfied that the entirety of the disputed information is exempt from disclosure on the basis of section 23(1) or section 24(1) FOIA. None of our reasoning, can be openly discussed without compromising the ability of the MoD to rely on the two exemptions in the alternative, so it is set out in our CLOSED reasons.

Section 27

70. Having regard to the evidence of Mr McGee, in particular those paragraphs set out above at paragraph 35, and the evidence of Mrs Armstrong, and giving appropriate weight to the institutional competence of MoD to make such an assessment (as required by the case law), the Tribunal accepts that s. 27(1)(a) FOIA is engaged in respect of the material in question for the reasons set out in the decision notice and set out by the MOD. We note that the decision notice took into account the key matters relied upon by the Appellant in this appeal to support his argument that s27 FOIA is not engaged, namely that the request was only for aggregate data, did not involve disclosure of states' identities, and that such information had previously been disclosed.

71. In our view on the basis of this evidence the actual harm (undermining of the UK's position and compromising its ability to work with other states on matters of intelligence sharing relating to

detainees or captured persons) which the MOD alleges would, or would be likely to, occur. We are satisfied that some causal relationship exists between the information being withheld and the prejudice which the exemption is designed to protect. We agree with the Commissioner that disclosure of the information 'would be likely' to result in the prejudice claimed by the MOD, on the basis of the evidence of Mrs Armstrong and Mr McGee.

72. We are able to say more about this in the CLOSED judgment.

Public interest

73. This matter is relevant to s. 24(1) FOIA, to the extent (if at all) it is necessary to rely on that exemption, and to s. 27(1)(a) FOIA. As was accepted by the parties the public interest factors for both exemptions are essentially the same.

74. There are undoubtedly significant public interests tending both in favour of disclosure, and in favour of the maintenance of the exemption.

75. The public interest in favour of disclosure is likely to need to be particularly strong to outweigh the factors protected by these exemptions. We heard submissions on this issue in CLOSED, and as the 'gist' (see above) reported, to the effect that 'As applicable, the public interest balance fell in favour of withholding the requested information in respect of ss.24(1) and 27(1)(a)'.

76. In our view, and having viewed the withheld material and considered it in the light of the points made by the Appellant about the public interest in transparency and openness, that competing public interest is outweighed the factors protected by these exemptions.

77. We do agree with the Commissioner that disclosure of the withheld information would provide the public with a clear insight into the number of occasions Ministers were consulted and prior approval had been sought for a five-year period, and that disclosure of the information could further inform ongoing debate on the operation of the policy in question. However, in our view that interest should not be overstated. As the Commissioner argues, it is clear that the Policy has already been the subject of very considerable public debate. A lot of the Appellant's evidence concerns the alleged deficiencies of the Policy, the Consolidated Guidance, and the conduct of UK state actors, it is said, in obtaining intelligence even where there is a serious risk of torture / CIDT. The Appellant is already able to engage in criticism of the Government in relation to the terms of

the Policy, and to argue that there are contradictions or conflicts between the Policy on the one hand, and other Government statements / the Government's legal obligations on the other.

78. Therefore, on the facts of this case in our view the balance of public interest is in favour of withholding the information sought. This view is bolstered by the evidence and submissions we read and heard within the CLOSED session, and discussed in the CLOSED reasons.

Section 26 and 23(5) FOIA

79. The Commissioner did not consider s26 FOIA in the decision notice and in our view, given our findings on other exemptions, we do not need to consider its applicability. We note that the MOD no longer relies on s23(5) FOIA and we do not need to address that in this decision.

CONCLUSION

80. Taking into account all of the above, this appeal is dismissed.

Recorder Stephen Cragg KC

Sitting as a Judge of the First-tier Tribunal

Date: 29 February 2024