Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2008/0080
Information Commissioner's Ref: FS50151297

Heard at Pocock Street, London, EC4
On 31st March 2009

Decision Promulgated
4th June 2009

BEFORE

CHAIRMAN

CHRIS RYAN

and

LAY MEMBERS

PAUL TAYLOR
IVAN WILSON

BETWEEN:

THE CABINET OFFICE

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Subject matter: Duty to confirm or deny s.1(1)(a): Information supplied by, or relating to, bodies dealing with security matters s.23

Cases:
Foreign and Commonwealth Office v Information Commissioner (EA/2006/0065)
Baker v Information Commissioner (EA/2005/0002).
Re Smalley [1985] AC 622
Department for Education and Skills v Information Commissioner (EA/2006/0006)
Butters v Information Commissioner (EA/2008/0088)
Common Services Agency v Scottish Information Commissioner [2008] 1 WLR 1550

Representation:

For the Appellant: Mr Tim Eicke
For the Respondent: Mr Ben Lask

Decision

The Tribunal allows the appeal and substitutes the following Decision Notice in place of the decision notice dated 2nd September 2009.

Information Tribunal **Appeal Number: EA/2008/0080**

SUBSTITUTED DECISION NOTICE

Dated 4 June 2009

Public authority: THE CABINET OFFICE

Address of Public authority: 70 Whitehall, London, SW1A 2AS

Name of Complainant: Mr Meirion Jones

The Substituted Decision

The Decision Notice dated 2 September 2008 shall stand in all respects save that, as regards the second part of the Complainant's request, the Public Authority is not required to notify the Complainant whether it held the information requested. Accordingly no action is required.

Dated this 4th day of June 2009

Signed

Chris Ryan

Deputy Chairman, Information Tribunal

Reasons for Decision

Introduction

1. The central issue in this Appeal is whether the Cabinet Office was entitled to inform a person requesting certain information that it neither confirmed nor denied whether it held it.

2. The Cabinet Office, as a public authority, has an obligation under the Freedom of Information Act 2000 ("FOIA") to provide information to those requesting it. The core obligation is set out in FOIA Section 1(1)(a), which provides that any person making a request to a public authority for information "…is entitled…to be informed in writing …whether it holds information of the description specified in the request". Section 84 defines "information" as "information recorded in any form". If such information is held it must be communicated to the person making the request (Section 1(1)(b)). However, FOIA section 23 provides that information is exempt from disclosure obligations "if it was directly or indirectly supplied to the public authority by, or relates to…" one or more of a number of bodies operating in the area of national security. The bodies in question are listed in FOIA section 23(3). For convenience we will refer to each of these as a "security body". They include the Security Service and the Secret Intelligence Service.

3. No security body is included in the definition of a public authority for the purposes of the FOIA and they are not therefore under any obligation to disclose information that they hold. Section 23 is only concerned, therefore, with information that has found its way into the hands of an organisation that does fall within the definition of "public authority", and then only in respect of information that has either been supplied to such a public authority by a security body, or relates to a security body.

4. If information falls within the scope of the Section 23 exemption the public authority holding it is not only released from any obligation to disclose it. In addition it may not be obliged to state whether or not it holds it. Section 23(5) provides, in effect, that a public authority is entitled to state that it neither confirms nor denies that it

holds requested information "if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to [a security body]…".

5. The exemption is an absolute one. Once it has been established that the relevant information was supplied by, or relates to, a security body then the obligation to disclose whether it is held and, if so, to release it, falls away without any further matters being considered. In particular, there is no question of considering whether the public interest in maintaining the exemption outweighs the public interest in disclosure (as is the case with many of the other FOIA exemptions)

The request for information and the complaint to the Information Commissioner

6. On 9 July 2006 a Mr Meirion Jones sent an e-mail to the Cabinet Office asking for certain information about Nyman Levin who, it was said, had collapsed and died in the Cabinet Office in 1965. The first part of the request was for any report or other details about the death. The Cabinet Office replied that it did not hold any such information. It is now accepted that this response satisfied the requirements of the FOIA and this part of the request therefore played no part in the Appeal.

7. The second part of the e-mail was in these terms:

> *"Was Nyman Levin interviewed as part of (or subject to) any security investigation into unauthorized contacts with foreign contacts or leaks of British or allied atomic secrets? Was he warned about contact with Israeli scientists? Were two other British nuclear scientists also investigated and cleared? Was there any investigation into leaks of British secrets to Israel?"*

The Cabinet Office responded to this part of the request on 7 August 2006. It stated that it neither confirmed nor denied that it held the information. At the time it relied on the exemption in FOIA section 24(2), as well as the section 23(5) exemption detailed above.

8. The Cabinet Office maintained that position following an internal review and a complaint about the refusal was lodged with the Information Commissioner on 13 February 2007. It took the Information Commissioner eleven months to even approach the Cabinet Office in order to start a substantive investigation, but he ultimately decided, in a Decision Notice dated 1 September 2008, that the Cabinet Office's response, neither confirming nor denying whether it held the requested information, had breached FOIA section 1(1)(a). The reason for reaching that conclusion was explained in the Decision Notice in these terms:

> *"…the Commissioner does not believe that all of the requested information, were it to be held, would necessarily fall within the class of information covered by section 23…The Commissioner considers that it is possible that a 'security investigation' could be conducted by bodies other than those cited in section 23(3), such as the police or staff of the Atomic Weapons Research Establishment."*

The appeal to the Tribunal

9. On 29 September 2008 the Cabinet Office appealed to this Tribunal, asking for an oral hearing. On the day before a pre hearing review was due to take place on 16 January 2009 the Treasury Solicitor wrote to the Tribunal and the Information Commissioner stating that the Cabinet Office had decided to abandon its case based on section 24 and to rely only on section 23. At the same time it stated that the Cabinet Office held "*no information relating to investigations conducted by bodies not specified in section 23(3) of the Act into Nyman Levin and 'two other scientists' referred to in [the original request] and/or any warnings given to Nyman Levin by any body not specified in section 23(3) of the Act".* This clarification was subsequently repeated in a letter of 21 January 2009 to Mr Jones.

10. Mr Jones made two applications to be joined as a party to the Appeal. Both applications were rejected because, although he clearly had much background information and an understandable interest in seeing the information requested, he did not appear to be able to do more than simply support the case for disclosure being put forward by the Information Commissioner. Joinder would therefore have

increased cost and procedural complexity without providing a new or different perspective to assist the Tribunal make its decision.

11. In light of the change in the Cabinet Office's position, and following discussion at the pre hearing review, the Tribunal ordered that a preliminary issues hearing should take place. The formulation of the issue to be decided, as submitted by the Cabinet Office at the time, has been refined, by agreement on all sides and for the sake of clarity. It is as follows:

> *"In circumstances where:*
>
> 1. *the Cabinet Office has confirmed that it does not hold any information covered by the original request which was supplied to it by, or relates to, a body not listed in FOIA section 23(3) (so that, if any information were held, that information must have been supplied by, or relate to, a section 23(3) body); and*
>
> 2. *the Information Commissioner has conceded that, in the present case, a positive statement to the effect that the Cabinet Office did hold relevant information that had been supplied by, or relates to, a section 23(3) body would involve the disclosure of information relating to a section 23(3) body*
>
> *is the Cabinet Office entitled to state that it neither confirms nor denies whether it holds relevant information, in reliance on section 23(5), on the basis that a statement by it on whether or not it holds relevant information would inevitably involve the disclosure of information relating to a section 23(3) body"*

12. We refer to this formulation as "the Question". Its purpose was to identify an issue that could be determined as a matter of law and construction (and therefore without evidence) on the basis that a decision on it might dispose of the whole appeal. The Cabinet Office subsequently filed amended Grounds of Appeal reflecting the change to its case and the Information Commissioner filed an amended Reply in response. At the request of the Tribunal both of these documents were prepared in extended form, incorporating, in effect, both the pleaded case and a skeleton of the arguments in support of it.

13. The preliminary issue came before us for decision on 31 March 2009, based on those pleadings/skeletons and a bundle of agreed documents comprising:

    i. The Decision Notice

    ii. The Amended Grounds of Appeal

    iii. The Amended Reply

    iv. The Treasury Solicitor's letter to the Tribunal and the Information Commissioner dated 15 January 2009.

    v. The Treasury Solicitor's letter to the journalist who made the original request dated 21 January 2009.

    The Cabinet Office was represented by Mr Tim Eicke of counsel and the Information Commissioner by Mr Ben Lask of counsel.

14. It became apparent, in the course of preparing for the hearing, that there was uncertainty on one point arising out of the further information included in the Cabinet Office's letter to Mr Jones of 21 January 2009. The doubt arose from the fact that the letter did not specifically refer to information on "…*any investigation into leaks of British secrets to Israel*", words that did appear in the final section of the original request as set out in paragraph 7 above. Mr Eicke told us, at the start of the hearing, that he was not in a position to clarify the point without seeking further instructions. However, we decided to proceed with the hearing on the general principle that was in issue, acknowledging that the precise scope of any decision reached might depend on a subsequent analysis of the width of the original request. The parties undertook to try to resolve any differences of interpretation in subsequent correspondence and to notify the Tribunal as to whether agreement had been reached. In the event they were not able to agree and we will therefore come back to this question at the end of our decision.

The legal arguments on the general principle at stake.

15. The essence of the Cabinet Office's case, put forward on its behalf by Mr Eicke, was that a statement by it to the effect that it does not hold information covered by the request itself involves disclosing information relating to a security body. He argued that the effect of the admission set out in sub-paragraph (a) of the Question was that, in the circumstances of this particular case, all other options had been closed. Accordingly, the Cabinet Office was entitled to give a "neither confirm nor deny" response. Counsel for the Information Commissioner, Mr Lask, responded that, whether or not a "neither confirm nor deny" response may be given, depends on whether, in the particular circumstances of the case, a "no information held" response would in fact disclose information that related to a security body. He said that it was not therefore open to the Tribunal to determine the Appeal simply as a matter of construction – it would be necessary to proceed to hear evidence and further argument.

16. Mr Lask based his argument largely on what he says is the correct construction of section 23(5), although he also argued that the interpretation proposed by the Cabinet Office distorted the intended effect of the sub-section and was inconsistent with the general scheme of the FOIA. He also argued that that there was no convincing rationale for the Cabinet Office's position.

17. On the construction issue Mr Lask suggested that the Cabinet Office had concentrated on the expression "relates to", but had ignored or not given appropriate weight to, some of the language contained in the preceding words of sub-section 5; in particular the requirement that, in order for it to be triggered, it must be established that a section 1(1)(a) statement would "involve the disclosure of any information". He drew attention, in particular, to the definitions in the New Shorter Oxford English Dictionary of "information" ("communication of the knowledge of some fact or occurrence") and "disclosure" ("make known, reveal").

18. There was no serious dispute between the parties as to the dictionary definitions. In the case of the meaning of "information", both sides acknowledged that the inclusion in sub-section 5 of the words "(whether or not already recorded)" broadened the definition beyond that provided in FOIA section 84, but Mr Lask

placed stress on the limitation in the dictionary definition resulting from the inclusion of a reference to a "fact or occurrence". He also relied on the decision of a differently constituted panel of this Tribunal in *Foreign and Commonwealth Office v Information Commissioner* (EA/2006/0065) in which, in the context of a section 27 exemption, it stated that the word may be taken to connote knowledge of any fact or event even if it did not in fact prove to be very informative for the recipient. Mr Lask argued that when those defined terms are taken into account the correct interpretation of sub-section 5 was that a statement whether the Cabinet Office held relevant information would have to reveal knowledge of some fact or occurrence about a security body before a "neither confirm nor deny" response would be permissible. If it only revealed information about the Cabinet Office (the fact that it did or did not hold relevant information) sub-section 5 would not apply; for that to happen the statement must also reveal information about a security body. The hypothetical example was suggested of an enquiry to a public body as to whether it held information about the location of GCHQ. A statement that the public authority did hold such information could be made without disclosing any information about GCHQ. In the present case, he said, it had been accepted that if the Cabinet Office did hold relevant information, and confirmed that it did, that would reveal something about both the Cabinet Office and a security body; it would indicate that the security body had investigated, or taken some interest in, the subject matter of the original request. But the converse would not necessarily be true. A statement that the Cabinet Office did not hold relevant information could mean:

a. that no investigation or enquiry had taken place;

b. that an investigation had been held, but no information about it had been provided to (and therefore was not held by) the Cabinet Office; or.

c. that such information had been provided to the Cabinet Office but it had not been retained by it at the date of the request.

Accordingly, Mr Lask argued, two of the three possibilities did not tell one anything about a security body.

19. Mr Eicke argued that the value of the right to give a "neither confirm nor deny" response was that it provided protection for security bodies in future cases, even if

not in the original case in which it was invoked. He relied on a hypothetical example put to the Tribunal in evidence (and found persuasive by it) in *Baker v Information Commissioner (EA/2005/0002)*. The relevant request in *Baker* was for information on the number of MPs who had telephone communications intercepted and the example provided by the witness in that case was as follows:

> "*In the example I will assume that a requestor makes two identical requests one year apart, each asking for the number of MPs who have had their communications intercepted. At the time of the first request no interception has taken place. The Cabinet Office replies that no information is held. During the following year an MP's communications are intercepted under statutory warrant. The stated reason for which the warrant is sought is to protect national security. The Prime Minister…determines that it would not, at that time, be compatible with his remit for protecting national security to announce the interception to the House of Commons. Meanwhile the requestor makes his second request. The Cabinet Office holds information about the interception. The Cabinet Office can no longer answer that it holds no information. Answering that the Cabinet Office can neither confirm nor deny that it holds information will strongly encourage speculation that something has changed since he made his first request. In this example it would encourage speculation that an interception had taken place. This in itself would be damaging to national security*"

Although the facts of that case were different, in that there had been no narrowing of the potential categories of applicable information (i.e. no equivalent to qualifications set out in (a) and (b) of the Question), the historical background did make it more likely that no information would be held. This was because surveillance of MPs had by then been regulated for over 40 years by what has become known as the "Wilson Doctrine". This states that no intercepts of an MP's telephone were to take place, but that if there was a development of any kind which required a change of policy then the Prime Minister of the day would, at such moment as seemed compatible with national security, make a statement about it in Parliament. Mr Eicke suggested that this background did not reduce the possible categories of relevant information to the same extent that they have been reduced in this case, but argued that, as the Tribunal in *Baker* found that the Cabinet Office

had been entitled to give a "neither confirm nor deny" response in that case, then it would be even more appropriate for us to reach the same conclusion in the context of this appeal. It seemed to us at one stage that this line of argument was taking us towards the factual issues, which are not for consideration as part of the preliminary issue defined in the Question. However, if all that Mr Eicke was saying was that the conclusion reached in *Baker* supports the view that sub-section 5 should be construed in a way that maintains, and does not circumvent, the broad protection that the concept of "neither confirm nor deny" responses is intended to provide, then it is an argument that we can take into account at this stage.

20. Mr Lask conceded that a "no information held" response might therefore lead to speculation about whether any security body had involved itself in the matters referred to in the original request. (We would add that it might also enable any person with other information on the subject to narrow the possibilities). But, he said, those possibilities would fall to be considered in a further hearing, at which the evidence could be investigated and the policy requirements of the "neither confirm nor deny" principle could be debated in the context of this Appeal. It was sufficient for him to succeed at this stage if we were satisfied that, even after the admission set out in sub paragraph (a) of the Question, it was not the inevitable consequence of a "no information held" response that any concrete fact would be disclosed that related to a security body.

21. The more significant aspect of Mr Eicke's argument was his contention that Mr Lask, in stressing the need to consider the impact of a "neither confirm nor deny" response, had allowed himself, in effect, to replace the expression "relates to" with the word "about". The latter, he said, had a narrower meaning. He relied in his skeleton argument on the Concise Oxford Dictionary (2004), which interpreted the verb "relate" as "make or show a connection between" and the phrase "relate to" as "concern". In the course of argument he also handed up a print of an extract form the Oxford English Dictionary Online, which included the definition "To be related, have relation, stand in some relation, to another thing". Mr Eicke argued that, once it has been established that the Cabinet Office holds no relevant information supplied to it by, or relating to, a non-security body then even a "no information held" response must inevitably relate to a security body.

22. On this issue we accept Mr Eicke's argument in the sense that a statement by the Cabinet Office that it held no information falling within the original request may not say anything about a security body or its activities, but, in the very limited scope of the factual matrix created by the terms of the Question, it may create sufficient connection between the response and a security body for the purpose of sub-section 5. A "no information held" response says, in the context of the information request taken on its own, "the Cabinet Office does not hold any information about any interview, warning or investigation." But, when the context is adjusted to take into account the admission set out in sub paragraph (a) of the Question, its effect becomes "the Cabinet Office does not hold any information about any interview, warning or investigation in which a security body had been involved". There is clearly a sufficient relationship between that response and a security body for it to be said that it involves the disclosure of a fact or occurrence that "relates to" a security body. And the fact that the response could mean that no information is held because no investigation was ever conducted or that, if conducted, the Cabinet Office's information about it has been lost or destroyed, does not break that connection.

23. Mr Lask reinforced his argument on the interpretation of sub-section 5 by directing us to the case of *Re Smalley* [1985] AC 622 in which the House of Lords had concluded that the expression "relating to", in an entirely different context, was imprecise and that in those circumstances it was appropriate to proceed on a case by case basis, considering the meaning of the words in context. He said that the context of the present appeal was an absolute exemption and on that basis he asked us to distinguish the case of *Department for Education and Skills v Information Commissioner* (EA/2006/0006) in which a differently constituted panel of this Tribunal had expressed the view that the expression "relates to" should be given "a reasonably broad interpretation" in the context of FOIA section 35, a qualified exemption. We have followed the guidance of the House of Lord in construing sub-section 5 in the context of the case presented to us, that is to say, in the form of the Question. In doing so we have tried to give the statutory language its normal meaning and have not sought a broader (or narrower) meaning for any perceived policy reason. The language is clear enough, without strain, to bear the meaning we have given it.

24. Mr Lask's argument that the Cabinet Office's proposed interpretation would distort the intended effect of sub-section 5 took as its starting point the overall scheme of the FOIA. This creates basic rights to information which may only be circumvented if either the particular circumstances set out in sections 9, 12 and 14 apply (fee not paid, cost of compliance excessive or request vexatious), or if the information requested falls within one of the exemptions set out in Part II of FOIA. Each of the Part II provisions includes a definition of the category of information covered and a specific provision identifying the circumstances in which a "neither confirm nor deny" response would not infringe section 1(1)(a). He argued that the underlying purpose was that a public authority should only be permitted to avoid the section 1(1)(a) obligation if complying with it would itself undermine the exemption by revealing the very information which was intended to be protected. He said that this approach was illustrated by the decision of a differently formulated panel of this Tribunal in *Butters v Information Commissioner* (EA/2008/0088), which decided, in a case involving the data protection exemption set out in FOIA section 40, that a "neither confirm nor deny" response was permitted if there would otherwise be a breach of data protection principles. In the case of section 23 Mr Lask argued that the purpose of sub-section 1 was to maintain secrecy about security bodies; in effect to ensure that their exclusion from the scope of the FOIA (by virtue of their not being treated as public bodies) should not be undermined simply because information about their activities had passed into the hands of a public authority, which did have disclosure obligations under FOIA. He said that the approach adopted by the Cabinet Office would mean that no consideration would be given to the effect of a section 1(1)(a) statement; no question would be asked as to whether complying with it would have the consequence that sub-section 5 is intended to avoid. In effect that the linkage between the purpose of the exemption and the relaxation of the section 1(1)(a) requirement, which is found consistently in other provisions, would be broken. In this connection Mr Lask drew our attention to sections 27(4) and 30(3), in both of which the linkage with the relevant exemption (respectively, potential harm to international relations and public authority investigations) is expressly preserved by cross reference to the sub-sections that define it. Mr Eicke did not accept that Butters was comparable and countered by arguing that sub-section 5 of section 23 was clearly intended to be wider than sub-section 1 and there was no risk of distorting the overall statutory purpose by

applying the normal meaning of the language that the Parliamentary Draftsman appeared to have deliberately adopted.

25. Mr Lask also relied on a May 2008 Ministry of Justice publication providing guidance on the application of section 23 (Exemptions Guidance 23: Information supplied by, or related to, bodies dealing with security matters). He drew our attention to the following passages:

> *"The fact that a public authority does not hold information supplied by one of the Security Bodies can itself be information relating to those bodies. If information falls within the exemption in section 23, it will very often be important to consider whether it is necessary to rely on the exclusion of the duty to confirm or deny wither the information is held. A non-committal response can be useful as it will not disclose information as to whether a Security and Intelligence Agency is or is not involved in a certain area of work"*
>
> *"The ability to 'neither confirm nor deny' that information is held is important, because confirming that information is not held and thus that there is, or has been, no SIA involvement in an issue can be as sensitive as confirming that there is or has been such involvement".*

Mr Lask placed emphasis on the words in those passages which we have underlined. He argued that the first passage clarified that the purpose of section 23 was to prevent revealing that there had been no security body involvement in particular events, but that the tentative language of the underlined phrases demonstrated that the purpose would not be undermined in all cases where a "no information held" response was given. He accused the Cabinet Office of going further than the guidance in suggesting that a "neither confirm nor deny" response would always be permitted, once it had been determined that the section 23 exemption had been engaged. He also relied on paragraph 17-036 of the second edition of Information Rights by Philip Coppel, which included this sentence:

> *"In certain circumstances, the fact that a public authority does not hold information which was supplied to it by, or which relates to, a security body could itself reveal the lack of any security body involvement in the subject matter of the relevant information request."*

Mr Lask again stressed that the author states only that a "no information held" response "could" disclose information about the security body, not that it inevitably would. The response to that from the Cabinet Office was that one only reaches a situation where the sub-section 5 exemption must apply when, as in the present case, all other possibilities have been removed. In this case it is the incorporation into the Question of the admission at (a) and the concession at (b) that has led to a situation in which the only possible conclusion on the facts was that any information held had been supplied by or related to a security body. General guidance, written in more speculative terms in order to allow for other sets of circumstances are not relevant or helpful in those circumstances, it says.

26. Mr Lask relied on the judgment of Lord Hope in *Common Services Agency v Scottish Information Commissioner* [2008] 1 WLR 1550 at paragraph 4 to stress that the purpose of the FOIA was to provide for the release of information, not its retention, and that the case being made by the Cabinet Office would have the effect of cutting down the right to information. In that case Lord Hope stated, in relation to the parallel statute Freedom of Information (Scotland) Act 2002, that as the whole purpose of the legislation was the release of information *"it should be construed in as liberal a manner as possible"*. On that basis, Mr Lask said, the right under section 1(1)(a) to be told whether information is held by a public authority should be given an interpretation that favours disclosure. It was a valuable right, whether or not its application in particular circumstances in fact might not tell the information requester very much. It is fair to add, however, that Lord Hope went on to say, in the same paragraph, *"…while the entitlement to information is expressed initially in the broadest terms that are imaginable, it is qualified in respects that are equally significant and to which appropriate weight must also be given".* Mr Eicke relied on that statement and also the words "as possible" in the earlier quotation to support his case that there are accepted limits on the extent of disclosure that may be achieved under the relevant legislation and a balance to be achieved in the construction of both the right to information and the scope of the exemptions to it. He said that where, as here, words limiting the scope of disclosure have been deliberately included (as he said they had in sub-section 5) we should not re-write them. He also said that if we were minded to allow our interpretation of the statutory language to be influenced by the perceived purpose we should start from

the basis that the purpose of section 23 was to ensure that the exclusion of security bodies from disclosure obligations should not be circumvented by allowing information relating to them to be obtained from a public authority that fell within the scope of FOIA.

27. We agree with the Cabinet Office on this issue. There are dangers in trying to draw inferences from the fact that the Parliamentary draftsman decided that different language was required for different types of exemption. In this case the main difference is that the information in question is held by a public authority but relates to a non-public body. In the case of the other sections referred to no question need arise as to the "leakage" of information from an organisation lying outside the scope of the FOIA to one that falls within it. The difference in language is more capable of being explained by that difference than by a departure from the underlying purpose of the act. We can quite understand, in any event, that, in the context of a possible leak of information from a security body, the Parliamentary draftsman should have deliberately chosen a form of words that would produce a more extensive restriction on rights of disclosure than might be appropriate in other circumstances. Such an outcome is entirely consistent with the judgment in *Common Services Agency,* when read in context. We conclude that there is therefore no reason for us to depart from the normal meaning of the words that the draftsman chose, as explained in paragraph 22 above

Conclusion on the general principle

28. For the reasons we have given we have concluded that, once the Cabinet Office had provided the additional information recorded in sub-paragraph (a) of the Question, it is entitled to rely on FOIA section 23(5) and to decline to either confirm or deny that it holds further information falling with in the original request. The Appeal therefore succeeds, although on the basis of facts that are materially dissimilar to those on which the Information Commissioner based his Decision Notice.

The scope of the original request.

29. We return at this stage to the disagreement between the parties as to whether the assurance set out in the Cabinet Office's letter of 21 January 2009 applies to the whole of the original request or only to the first three parts of it, so that it did not apply to the final part ("*Was there any investigation into leaks of British secrets to Israel?").* The Cabinet Office's position was that the final part, read in context, did not amount to a free standing request for information about whether there had ever been an investigation into leaks of British secrets to Israel. It said that the 21 January 2009 letter did therefore extend to the final part of the request. The Information Commissioner, while accepting that the final part should be read in the context of the earlier parts, argued that it did not follow that it carried precisely the same meaning as those parts. Accordingly, he said, it constituted a separate and discrete question, which sought a category of information beyond that covered by the earlier parts. It followed, he said, that it was not certain that (in the words of the 21 January letter) "*the only information sought by [Mr Jones] in relation to which he has not had a satisfactory response under section 1(1)(a) of the Act is information relating to investigations conducted and/or warnings given by one or more of the bodies listed in section 23(3)".*

30. We have concluded that the apparently wide meaning of the final part of the request should be interpreted as restricted by the narrower language of the categories of information set out in the earlier parts. We believe that this gives effect to the basis for interpretation, adopted by both parties, that the words in question should be interpreted "in the context" of the request as a whole. It is also consistent with the approach apparently adopted during the Information Commissioner's investigation, as reflected in the Decision Notice. In reaching this conclusion we take into account that, if the final part is not restricted in scope by the earlier parts, the effect would be to create a request of such width that it would be impossible to comply with it, certainly within any sensible cost limit. We therefore conclude that the clarification provided to Mr Jones in the 21 January letter covered both the specific elements in the earlier parts of the request and the general or "omnibus" final part. It follows that the conclusion we have reached on the general principle in paragraph 26 above, applies to all parts of the original request.

31. Our decision is unanimous.

Signed

Chris Ryan

Deputy Chairman Date: 4 June 2009