

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 July 2016

Public Authority: Government Legal Department
Address: One Kemble Street
London
WC2B 4TS

Decision (including any steps ordered)

1. The complainant submitted a request to the Government Legal Department (GLD) seeking information about the legal costs incurred by the government in relation to the proceedings in the Investigatory Powers Tribunal brought by Abdulhakim Belhaj. The GLD argued that the requested information was exempt from disclosure under FOIA on the basis of section 23(1) (security bodies). The Commissioner has concluded that the information is exempt from disclosure on the basis of this exemption.

Request and response

2. The complainant submitted the following request to the GLD on 28 August 2015:

'In relation [to the] proceedings in the Investigatory Powers Tribunal brought by Abdulhakim Belhaj (IPT/13/132-9/H):

- *What the total spend by the Government has been on (a) internal and (b) external legal services.*
 - *What the hourly rate has been of each of the barristers instructed by the Government.¹*
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¹ The Investigatory Powers Tribunal investigates complaints about the alleged conduct of public bodies in relation to members of the public under the Regulation of Investigatory Powers Act (RIPA) 2000. This includes complaints about the use of intrusive powers such as phone-tapping by intelligence services, law enforcement agencies and public authorities.

3. The GLD responded on 23 September 2015 and confirmed that it held the requested information. However, it considered it to be exempt from disclosure on the basis of section 23(1) of FOIA because it related to the Investigatory Powers Tribunal (IPT), ie the body established under section 65 of the Regulation of Investigatory Powers Act 2000, listed in section 23(3)(e) of FOIA.
4. The complainant contacted the GLD on 30 October 2015 in order to ask for an internal review of this decision. He challenged the GLD's reliance on section 23(1) of FOIA on two grounds. Firstly, he argued that the requested information did not relate to the IPT and secondly he argued that withholding the information on the basis of section 23(1) was a contravention of the purposive interpretation of section 23.
5. The GLD informed him of the outcome of the internal review on 24 December 2015. The review concluded that section 23(1) had been correctly applied because the withheld information clearly related to the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000 and listed in section 23(3)(e) of FOIA. The review also concluded that the withheld information also related to other bodies specified in section 23(3), namely the Security Service, Secret Intelligence Service and the Government Communications Headquarters.

Scope of the case

6. The complainant contacted the Commissioner on 24 February 2016 to complain about the way his request for information had been handled. He disputed the GLD's reliance on section 23(1) of FOIA to withhold the information he had requested. His grounds of complaint are considered below in the Commissioner's analysis of the GLD's reliance on this exemption.

Reasons for decision

Section 23(1) – information supplied by or relating to bodies dealing with security matters

7. Section 23(1) of FOIA provides an exemption which states that:

'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).'

8. To successfully engage the exemption at section 23(1), a public authority needs only to demonstrate that the relevant information was directly or indirectly supplied to it by, or relates to any of the bodies listed at section 23(3). This means that if the requested information falls within this class it is absolutely exempt from disclosure under FOIA. This exemption is not subject to a balance of public interests test.
9. For the purposes of this request the relevant section 23(3) bodies are the following:
 - '(a) the Security Service,*
 - (b) the Secret Intelligence Service,*
 - (c) the Government Communications Headquarters...*
 - ...(e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000'*

The GLD's position

10. The GLD explained that in order to deal with the proper construction of the words 'relates to' in section 23(1), it referred to a number of decisions of the Upper Tribunal.² It argued that it was clear from those decisions that 'relates to' is to be construed broadly. In relation to the complainant's request, the GLD argued that it is plain that the withheld information relates to the IPT given that the request begins 'In relation to the proceedings in the Investigatory Powers Tribunal...'. Furthermore, the GLD argued that the information on the total amount spent by the government on internal and external legal services in proceedings before the IPT, and the hourly rate charged by barristers instructed by the government in proceedings before the IPT, fall within the broad construction of the information that relates to the IPT.
11. The GLD argued that the withheld information also related to the bodies listed at sections 23(3)(a) to (c) as they were three of the five named respondents in the proceedings. As such, the GLD explained that these bodies were responsible for meeting a proportion of the cost of the internal and external legal services. The GLD explained that they also provided instructions on the barristers used to represent the

² The GLD cited *APPGER v Information Commissioner and FCO* [2015] UKUT 377 (paragraph 13 and following); *University and Colleges Admissions Service v Information Commissioner and The Lord Lucas* [2014] UKUT 557 (paragraphs 45 and 46); *Home Office and Information Commissioner v Cobain* [2015] UKUT 27 (paragraphs 19, 28 and 29) and *Maya Foya obo Reprieve v Information Commissioner and FCO EA/2014/0233* (paragraphs 36 to 39).

government in the proceedings and that this implicitly involved an acceptance by those bodies of the hourly rate payable by them to each of the barristers. The GLD argued that consequently there is a sufficient nexus between the withheld information and the bodies listed at sections 23(3)(a) to (c) such that the information can be said to 'relate to' those bodies.

12. The GLD also argued that its reliance on this exemption was in line with a purposive interpretation of section 23(1). In reaching this view it explained that it had paid particular attention to paragraphs 14 to 20 of the APPGER decision cited at footnote 1 above. The GLD noted that at these paragraphs the Tribunal explained that Parliament's intention was to put information from or about the activities of the section 23 bodies beyond the reach of FOIA, that section 23(1) is complementary to Parliament's decision to omit those bodies from the scheduled list of public bodies, and that a narrow interpretation of the exemption would be inconsistent with this approach.
13. The GLD argued that as section 23 operates if the requested information relates to the listed bodies, and without the requirement to show prejudice, then Parliament can be said to have adopted an approach that ensures that seemingly anodyne information falls within the scope of the exemption. The GLD argued that this was in recognition of both the nature and the strength of the public interests served by non-disclosure in relation to section 23 bodies and on this reading, it suggested that withholding the requested information is not contrary to any purposive interpretation of section 23(1) of FOIA.

The complainant's position

14. The complainant argued that the GLD's reliance on section 23(1) was unsustainable for two reasons. Firstly, the withheld information did not relate to any of the section 23(1) bodies. Secondly, the reliance on section 23(1) in this case is contrary to the purpose of the exemption which seeks to protect the work of the intelligence agencies, not withhold embarrassing information from the public.
15. In relation to the first ground of complaint, the complainant argued that the financial figures that had been requested had been incurred by the government, not by the IPT or the intelligence services, by instructing the GLD, external solicitors and/or external barristers. The complainant argued therefore that to suggest that those bald figures in any way related to the IPT or intelligence services is linguistically unsound and far-fetched.
16. With regard to the GLD's suggestion that the wording of the request suggested that the information relates to the IPT, the complainant

argued that this argument placed form over substance; its logic was flawed. Rather, the complainant argued that the requested information was about the GLD, its lawyers and their costs. The words 'in relation to' in the request were explanatory; they provide the context in which the substantive information is sought, ie the proceedings in the IPT. It does not, follow the complainant argued, that the costs information relates to the IPT.

17. Furthermore, the complainant argued that aside from those ordinary principles of interpretation, it is clear from case law that section 23(1) was not applicable.

18. The complainant referred to paragraph 70 of the APPGER judgment which stated that:

*'To sum up we consider that the Tribunal should adopt a broad, although purposive approach to the interpretation of s.23(1). **However this should be subject to a remoteness test so that we must ask ourselves whether the disputed information is so remote from the security bodies that s.23(1) does not apply.**'*
(Emphasis added by complainant)

19. The complainant noted that this 'remoteness test' is reflected in the Commissioner's guidance on this exemption which acknowledges the breadth of that test, but also the fact that not all information potentially linked to the bodies referred to in section 23(3) will engage the exemption:

*'The exemption is also engaged where information "relates to" a security body. The term "relates to" is interpreted widely and includes any information concerning or linked to the activities of a security body. **However there will be a point when the connection between the requested information and a security body is too remote to engage the exemption.**'* (Again, emphasis added by the complainant)

20. In applying this test, the complainant argued that the withheld information was simply too remote from either the IPT or the intelligence services to be said to 'relate to' them.

21. In support of this position the complainant made the following points:

- The only connection to the IPT is that it was the body that had jurisdiction over the *Belhaj* proceedings. As the Tribunal noted in APPGER, *'"related to" is about contents'*. The complainant argued that in this case, the 'contents' of the withheld information – bald expenditure figures – in no way concerns the IPT or the intelligence

services. Even adopting the 'wide' test to which the Commissioner refers in the section 23 guidance, the complainant argued that the withheld information is not 'concerned' with, or 'linked to' the IPT.

- Similarly, the only link to the intelligence services is that their actions were the subject matter of the *Belhaj* proceedings. The withheld information is not about that subject matter; it is merely financial data. The complainant argued that a recipient of the withheld information unfamiliar with the request would not be able to discern any information relating to the intelligence services were the information to be disclosed to them.
 - Instead, it is to the government and the GLD that the withheld information 'relates'. Neither of those bodies is listed in section 23(3) FOIA.
22. With regard to the second ground of complaint, the complainant argued that the Tribunal in APPGER had stated that a purposive approach should be adopted when interpreting section 23(1). Furthermore, he noted that the Commissioner's guidance explained that:
- '[T]he work of the security bodies is to protect national security and revealing information about their work or involvement in particular issues may well undermine national security.'*
23. The complainant explained that it was public knowledge that the intelligence services were Respondents in the *Belhaj* proceedings. The public is also aware that proceedings took place before the IPT. Therefore, he argued that releasing the information would not reveal 'information about the work or involvement [of the IPT or intelligence services] in particular issues'. Rather the complainant argued that the information related strictly to litigation spending and that the only consequence of disclosure is that the tax-payer will be informed of how much money was spent on the *Belhaj* proceedings.
24. Furthermore, the complainant argued that the GLD had misinterpreted section 23(1). He noted that at paragraph 16 of the APPGER judgment the Tribunal defined Parliament's intention in relation to section 23 as follows:
- 'there should be no question of using FOIA to obtain information from or about the activities of section 23 bodies at all.'*
25. However, he argued that his request was not directed to any section 23 body. Nor did it concern the activities of any these bodies. Rather the complainant emphasised that it is information about the lawyers and their costs, and concerns only the activities of the GLD and the

barristers they instructed. Therefore, the complainant argued that there was no question of this request infringing the principle set out by the Tribunal in APPGER and thus on this basis, section 23 did not apply to the information sought.

26. Further, the complainant noted that at paragraph 20 the Tribunal raised the concern that 'an overly generous approach to this test might involve disputed information being exempted merely because it had been copied to a section 23 body'. The Tribunal added that the fact information has been copied may be withheld, but it does not necessarily follow that the information itself can be withheld.
27. The complainant argued that this is precisely what has occurred in this case. The GLD will have recorded how much they spent on this case. Indeed, in their response dated 23 September 2015, the GLD confirmed they hold this information. He emphasised that the GLD are dealing with public money and that they have a duty to document how every penny is spent, regardless of who their clients are. This information will exist independently of who they send it to. The complainant argued that whether this information was copied to any other body - including a section 23 body - is irrelevant. This is not what the information that he had asked for. In light of this the complainant emphasised that the requested information fell outside of the remit of section 23.

The Commissioner's position

28. Having considered the submissions by both bodies carefully, the Commissioner has concluded that the withheld information falls within the scope of section 23(1). In reaching this finding the Commissioner of course recognises that, as stated in his guidance, the term 'relates to' is not without its limits. However, in the circumstances of this case he is persuaded that there is a sufficient connection between the withheld information and both the IPT and the bodies listed at section 23(3)(a) to (c) of FOIA.
29. In respect of the IPT, in the Commissioner's view the amount of money the government spent defending proceedings brought *before* the IPT can be said to be information clearly linked to the IPT itself. The Commissioner does not accept that it is far-fetched or linguistically unsound to argue that the amount of money a party spent on its legal costs defending itself before a tribunal can be said to be linked to the tribunal in question. On the contrary Commissioner believes that it is reasonable to conclude that there is a sufficiently close connection between such costs and the IPT itself. For example, if the proceedings had not been heard by the IPT such costs would not have incurred; moreover, the approach taken IPT by the hearings in question will have had an impact on the legal costs incurred by the defending parties.

30. In respect of the bodies listed at section 23(3)(a) to (c), the Commissioner is satisfied that there is a clear connection between the withheld information and such bodies given that, as explained by the GLD, these bodies were responsible for meeting some of these costs. Indeed, the Commissioner notes that as the GLD explained, these bodies provided instructions to the barristers and thus implicitly accepted the hourly rates payable to them. Consequently, in the Commissioner's opinion on the basis of such facts the withheld information does therefore concern the bodies listed at section 23(3)(a) and (c) and thus relates to them.
31. The Commissioner recognises that the Tribunal found that a purposive interpretation of section 23(1) was required. However, the Commissioner is satisfied that, for the reasons set out above, there is a sufficient connection between both the IPT and the bodies listed at sections 23(3)(a) to (c). In the Commissioner's view such connections are sufficiently strong to make it sustainable to conclude that the application of section 23(1) to the withheld information is consistent with a purposive interpretation of the legislation. In reaching this conclusion the Commissioner, like the GLD and the complainant, has considered the wording of paragraphs 14 to 20 of the APPGER decision. In the Commissioner's view, whilst the request may not have been directed at the section 23 bodies, the requested information does still relate in some ways to the activities of those bodies. Thus the conclusion that section 23(1) is engaged is not inconsistent with a purposive interpretation of the legislation.

Right of appeal

32. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

33. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
34. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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