



**First-tier Tribunal
(General Regulatory Chamber)
Information rights**

Appeal Reference: EA/2015/0224

**Determined without a hearing at Field House
On 19 April 2016**

Before

**JUDGE PETER LANE
MARION SAUNDERS
ROSALIND TATAM**

Between

PROFESSOR TIM CROOK

Appellant

and

THE INFORMATION COMMISSIONER

First Respondent

and

THE FOREIGN AND COMMONWEALTH OFFICE

Second Respondent

DECISION AND REASONS

Introduction

1. Professor Crook has an interest in the late Alexander Joseph Patrick Wilson (1893-1963). Professor Crook wrote a biography of Wilson, which was published in 2010. In October 2014, Professor Crook wrote to the second respondent requesting:-

“ (a) Any information on Alexander Joseph Patrick Wilson (1893-1963) held by the Foreign and Commonwealth Office (FCO), including his time in India between 1925 and 1933;

(b) The Security Service report file FO 1093/263”

2. The second respondent's response was, in effect, that it did not hold the information referred to in paragraph (a) of the request. So far as the security service report was concerned (paragraph (b)), the second respondent said that the file had been withheld in reliance upon section 23(1) of the Freedom of Information Act 2000 (information supplied by, or relating to, bodies dealing with security matters).

3. Professor Crook complained to the first respondent, who issued a decision notice on 7 September 2015, in which he found that the second respondent did not hold the information within the scope of the paragraph (a) request; and that the second respondent was entitled to withhold the material mentioned in part (b) of the request, in reliance on the absolute exemption contained in section 23(1) of FOIA.

4. Professor Crook appealed to the First-tier Tribunal against the first respondent's decision notice. The parties were content for the appeal to be determined without a hearing and in all the circumstances the Tribunal was satisfied that it could properly determine the issues without a hearing.

5. In reaching our unanimous decision, we have had regard to all the materials set out in the open bundle of documents, prepared in connection with the appeal. We have not found it necessary to prepare any “closed” annex to this decision.

Part (a): information held by the second respondent on Patrick Wilson

(i) The searches

6. The first respondent was satisfied, on the balance of probabilities, from information supplied to him by the second respondent, that the second respondent did not hold personnel files relating to Wilson. The second respondent had carried out a search of the National Archives catalogue in order to look for file originating from the FCO, Foreign Office, Colonial Office, Dominions Office and India Office. The search terms used were “Alexander Joseph Patrick Wilson” as a phrase (all dates); “Wilson” in combination with Alexander or Joseph or Patrick (1893-1963); “Indian Political Intelligence” (all dates); “Indian Intelligence Bureau” (all dates); “Islamia College” (all dates); “Indian Intelligence”, “Indian AND Intelligence”; “Indian AND Intelligence Bureau”; and “Islamia”.

7. The second respondent said that none of the above search terms produced results containing information relevant to part (a) of the request. Possible relevant files relating to “Indian Political Intelligence” were identified in the India Office files but those files were transferred to the British Library and the second respondent did not hold any retained material in relation to them. The second respondent's internal inventory was also searched, without positive result.

8. The first respondent was satisfied with the “rigor and adequacy of the search as conducted” by the second respondent. The fact that the second respondent did not hold personnel files for the Secret Intelligence Service explained, according to the first

respondent, why the second respondent was unlikely to hold personnel files relating to the subject of the request, if such a file were to exist.

(ii) Discussion

9. The Tribunal agrees with the first respondent that the grounds of appeal are somewhat unclear. What is, however, evident is that Professor Crook strongly believes that Wilson was vilified by the Security Service (MI5) and the Secret Intelligence Service (MI6) during the Second World War.

10. So far as part (a) of the request is concerned, Professor Crook is, we find, wrong to conclude that the Secret Intelligence Service is part of the second respondent. The second respondent is a “government department” within the meaning of paragraph 1 of Schedule 1 to FOIA. It is, accordingly, a “public body” as defined in section 3. By contrast, the Secret Intelligence Service is a separate body, outside the scope of FOIA. This is made plain by section 23(3). As the second respondent points out, Professor Crook’s interpretation, if correct, would completely undermine section 23 (and section 84) of FOIA. The separate nature of the Secret Intelligence Service is underlined by the fact that the Intelligence Services Act 1994 restricts disclosure of information by the SIS to others (including, specifically, the second respondent).

11. Professor Crook does not appear to take issue with the thoroughness of the searches undertaken by the second respondent, as described in the first respondent’s notice of decision. In any event, we find it more likely than not that the second respondent did undertake such searches. We agree with the first respondent that those steps were, in all the circumstances, entirely reasonable. In conclusion, we find, on balance, that the second respondent does not hold the information within the scope of part (a) of the request.

Part (b): the Security Service report from file FO1093/263

12. So far as material, section 23 of FOIA provides as follows:

“Information supplied by, or relating to, bodies dealing with security matters

23(1) Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).

...

(3) The bodies referred to in subsections (1) and (2) are-

- (a) the Security Service,
- (b) the Secret Intelligence Service,

.....”

(i) Does section 23 apply?

13. Having examined the report, we are satisfied that “it was directly or indirectly supplied to the public authority by, or relates to” a body specified in section 23(3) of FOIA; namely, the Security Service (section 23(3)(a)).

At bundle, page 6, Professor Crook, commenting on section 84 of FOIA said:-

“ This means that FOIA is recognising the statutory existence of the Secret Intelligence Service as a public authority described elsewhere as part of the list of “bodies dealing with security matters” (see section 23(3)). SIS, the Security Service and GCHQ did not exist as statutory security bodies until the enactment of legislation describing them as such, and, indeed, in law, constituting them as such. This did not happen until 1989 (in respect of the Security Service) and 1994 (in respect of the Secret Intelligence Service and Government Communications Headquarters).

I do not believe that FOIA has any retrospective provision recognising “security bodies” or government departments prior to their legal constitution.”

14. With respect to Professor Crook, the Tribunal regards this submission as misconceived. There is nothing in FOIA to suggest that references to the Security Service and the Secret Intelligence Service were intended by Parliament to cover those bodies, only from the time when they became formally recognised “statutory” bodies. If that had been the intention, FOIA would have said so; for instance, by defining the bodies by reference to their statutory constitutions. Professor Crook is wrong to suggest that the Secret Intelligence Service was not constituted in any legally recognisable form until the coming into force of the Intelligence Services Act 1994. Section 1 of that Act provides that there “shall continue to be a Secret Intelligence Service” (our emphasis).

15. In any event, even on Professor Crook’s analysis, the words in section 23(1) – “supplied to the public authority by, or relates to, any of the bodies specified...” – mean that if the Security Service or the Secret Intelligence Service supplies a public authority with a security document that is contained in that Service’s files, then the exemption in section 23(1) is triggered, whether or not the document was produced by the Service before the coming into force of the 1994 Act.

(ii) Effect of section 23

16. The real issue in relation to part (b) of the request is that the report has not been transferred to the Public Record Office at Kew. If it had been, then the absolute exemption in section 23 would not apply. The information could be withheld under FOIA only if the public interest in withholding it was greater than the interest in disclosing. This is because of section 64(2):-

“ (2) In relation to any information falling within section 23(1) which is contained in a historical record in the Public Record Office or the Public

Record Office of Northern Ireland, section 2(3) [absolute exemptions] shall have effect with the omission of the reference to section 23.”

17. The report was written during the Second World War. Ordinarily, as Professor Crook indicates, it might have been expected that the report would have been transferred to Kew. It is, however, plain that this has not occurred. Having regard to the age and subject matter of the information, we are puzzled by this fact. The Tribunal does not, however, have power under FOIA to require the transfer of the file.

18. Professor Crook asks we should find that Articles 8 and 10 of the ECHR must override the absolute prohibition. So far as Article 10 (freedom of expression) is concerned, the Supreme Court majority judgments in Kennedy v Information Commissioner [2014] UKSC 20 form an impassable barrier. We do not consider Professor Crook can derive any material assistance from the fact that Kennedy concerned an absolute exemption in section 32, as opposed to section 23. The case for not “reading down” the absolute exemption for information held by security bodies must be, on any view, at least as strong as it is in respect of court records. Whilst we accept Professor Crook firmly believes Wilson was “framed” for fabricating intelligence, the strength of that feeling does not enable the Tribunal to treat the section 23 exemption as a qualified one.

19. So far as Article 8 (private and family life) is concerned, the same conclusion must be reached even if Article 8 is, on the facts, engaged. We do not, however, consider that this Article is in play. It is not possible to conclude that the family life of Wilson’s surviving family members is being interfered with simply by their not knowing everything there might be to know about him.

20. Accordingly, the only positive thing we can say to Professor Crook is to suggest that he may wish to pursue with the second respondent the suggestion that the file in question could, in fact, now be transferred to the Public Record Office.

Decision

21. For the reasons we have given, the Tribunal finds the first respondent’s notice of decision was in accordance with the law. The appeal is, accordingly, dismissed.

Judge Peter Lane

20 June 2016