

Using the UK FOIA, part III

Nick Must

It seems that we will never know for certain who took part in the discussions at two meetings of the Western Union Clandestine Committee (WUCC) over 65 years ago. On 31 July I finally received notification from the First Tier Tribunal (which heard my appeal under the Freedom of Information Act) of the result of their deliberations: it has been denied. I know every minuted word from those meetings but, according to the Tribunal, who said those words is actually more secret.

In two previous editions of *Lobster* I have charted the course of my appeal under the FOIA.¹ I included my original *Lobster* article on the WUCC as a part of that appeal and I take some comfort that the Tribunal have read it. How else would they have been able to state that 'On 8 March 2016 Nick Must, who describes himself as *an independent researcher with a particular interest in Special Forces*, made a request for information under FOIA addressed to the Foreign and Commonwealth Office?' [Emphasis added] That description of myself was only in the WUCC article.

In denying the appeal, the Tribunal has allowed the Foreign and Commonwealth Office (FCO) to use two caveats from the FOIA. The first is Section 27 which, in this case, covers the names of foreign intelligence officers. As the judgement rightly notes, a reliance on Section 27 requires that there be:

' . . . a real and significant risk that disclosure would make relations between the UK and a foreign country more difficult or call for a particular diplomatic response to contain or limit damage which would not otherwise have been necessary'.

How have the FCO established that there is this 'real and significant risk'? I will quote extensively from the judgement at this point:

'The main theme of his Notice of Appeal . . . is his suggestion that the FCO ought to consult with the other governments concerned and seek their

¹ 'Using the UK FOIA'

<<https://www.lobster-magazine.co.uk/free/lobster74/lob74-uk-foia.pdf>>
and 'Using the UK FOIA, part II'

<<https://www.lobster-magazine.co.uk/free/lobster75/lob75-uk-foia.pdf>>.

consent to the disclosure of the names of their agents. We note that the FCO has not expressly responded to this point but, on reflection, we are not persuaded it assists him. It is clear that the FCO are not under any kind of duty to take this step and they need only establish that there is a real and significant risk that disclosure would cause relevant damage to the UK's relationship with the foreign government. Further, we can well see that seeking consent would in any event involve the FCO and the foreign government in expending time, resources and diplomatic goodwill that could be better expended on other diplomatic priorities.'

But the main theme of my appeal was *not* that the FCO should consult with the foreign governments. A very much larger part of my appeal was showing how the extensive list of intelligence officers' names that could be gleaned from the official history of SIS by Professor Keith Jeffery² illustrated that, when it suits them, the FCO are quite happy for names to be in the public domain. I will return to this point shortly.

The main question that arises from the statement that the FCO 'need only establish that there is a real and significant risk that disclosure would cause relevant damage to the UK's relationship with the foreign government' is: how do they establish this? It would seem that plain guesswork is an allowable process, as there has been no actual evidence to support this, except the word of the FCO. Further more, I find it quite farcical that the Tribunal judgement additionally states: 'bearing in mind the FCO's expertise in the field, we are inclined to accept their position on section 27(1)'. So, if the FCO wish to withhold information, the FCO are the people to provide advice as to whether that's the right thing to do!

In the early part of the lengthy appeal process, I pointed out that the documents I had received had three British names redacted. This seemed to be contrary to the then reliance by the FCO solely on Section 27. In response to this, the Information Commissioner actually agreed with me that, if those three names were indeed of British persons, then those names should be released to me. Suddenly, however, the FCO relied on a new caveat – Section 23, which covers UK intelligence agencies and personnel and has no 'public interest test'.

As the judgement states:

'When it was rightly pointed out that the FCO had also redacted the names of three British citizens, one of whom was a representative on the Committee and two of whom were members of the Committee's

² <<https://www.bloomsbury.com/uk/mi6-9780747591832/>> Jeffery's book contains a total of 196 names of MI6 officers, 10 MI6 staff (administration), 57 agents of MI6 and 30 officers of foreign intelligence organisations.

secretariat, the FCO sought to rely on section 23(1) of FOIA. [. . . .] Although this exemption was raised somewhat late in the day, we can see no possible answer to it: it cannot be disputed that the names of SIS members or staff are covered by the exemption and no question of public interest or the age of the information arises; the fact that the exemption is not always relied on in practice is of no relevance.'

Please note the admission that 'the exemption is not always relied on in practice', which is indisputable. As I said earlier, a significant part of my appeal was showing how the official history of SIS included many intelligence officer's names. (I included a list of all of these names in my appeal submission.) The response to this from the FCO has been that there is an 'established policy' not to name agents/officers – a denial of the obvious truth: that the FCO will name names when it suits them.

I additionally argued that, as everything that was discussed has been released, the names could not be more sensitive than the discussions. In response, the judgement states:

' . . . there must be special sensitivities involved in the identification of agents which can last for a very long time and that it is not necessarily right to say that the contents of discussions of the Committee in 1949 and 1950 are more sensitive than the identity of those who worked for the various secret intelligence services in those years.'

Which is akin to a non-denial denial. There may be circumstances where the identity of intelligence officers remains sensitive for more than half a century but whether this is one of them or not hasn't been explicitly stated. As I have shown with my original article on the WUCC, a examination of the minuted discussions at those two meetings clearly indicates a direct connection between the WUCC and the development of the 'Gladio' stay-behind networks in Europe. Many of the 'Gladios' lacked any form of proper control in the 70s and 80s, ultimately carrying out 'false flag' terrorist attacks that were blamed on the political left-wing. As I said in my appeal, there will be material that is sensitive and there will be material that is embarrassing. Those two things are not one and the same.

My case was presided over by His Honour Judge Murray Shanks who, about a month before, passed judgement in a similar FOIA appeal. In June it was decided that the journalist Phil Miller should be allowed access to previously secret information related to the involvement of a British SAS officer who, in the summer of 1984, provided advice to the Indian government during the siege of the Golden Temple at Amritsar. The Cabinet Office had opposed Mr Miller's appeal, claiming a reliance on the same two caveats of the FOIA

(sections 23 and 27) that the FCO have used in my case.³

In defence of not releasing the information related to Amritsar, Owen Jenkins – the former FCO director for South Asia and Afghanistan – ‘insisted that only a “small sub-section of the file” had not been released’.⁴ Much the same argument that was used by the FCO in my case: effectively that ‘the vast majority of the information has been released, so there can be little public interest in seeing the rest’. When Counsel for the Government also claimed that, ‘the passage of time does not diminish the significance of this information in this case’, Phil Miller’s legal team countered that, ‘Britain’s failure to consult India on the [initial] 2014 disclosures. . . had no negative impact on diplomatic relations.’

Working pro bono on the appeal, the Irish law firm KRW Law, states:

‘Matters of National Security/International Relations/Commerce should not be a barrier when seeking clarity about the moral certainty of a British Government policy and operation leading to massacre of civilians.’⁵

Reporting on the outcome of the case, a Press Trust of India wire report quoted extensively from the judgement:

‘We recognise that the period we are concerned with was a highly sensitive one in India’s recent history and the strength of feeling it continues to evoke. . . it should also be remembered that the fact that 30 years has gone by is bound to have reduced any prejudice that may have resulted from release of the withheld material.’⁶

The decision in my case may well be legally binding but, if any part of the appeal in the Golden Temple case can be allowed but mine is completely denied, as many people much greater than myself have noted before: the law is an ass.

³ I should clarify that, in the Phil Miller appeal, it is the use of Section 27 (relations with overseas governments) that has been over-ruled. That part of the information where the Cabinet Office were reliant on Section 23 (UK intelligence agencies) will continue to remain secret.

⁴ See ‘Operation Blue Star Hearings: The Big Cover-Up?’ by Sajeda Momin for India Legal at <<https://tinyurl.com/yebaql3>> or <<http://www.indialegallive.com/world-news/global-trends-news/operation-blue-star-hearings-the-big-cover-up-45574>>.

⁵ See the web page at <<http://krw-law.ie/amritsar-massacre-1984/>>.

⁶ The story was carried under the headline ‘Make Operation Bluestar files public: UK judge to British govt’ in the *Hindustan Times* at <<https://tinyurl.com/y8rjfy94>> or <<https://www.hindustantimes.com/india-news/make-operation-bluestar-files-public-uk-judge-to-british-govt/story-m7BsTYq9uIpIsJnnuaBG9N.html>>

