



IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
(INFORMATION RIGHTS)

Appeal No: EA/2013/0251

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50498917
Dated: 22 October 2013

Appellant: Donnie Mackenzie

Respondent: The Information Commissioner

Heard on the papers: Field House

Date of Hearing: 23 May 2014

Before

Chris Hughes

Judge

and

Suzanne Cosgrave and John Randall

Tribunal Members

Date of Decision: 7 July 2014

Date of Promulgation: 8 July 2014

Subject matter:

Freedom of Information Act 2000

REASONS FOR DECISION

Introduction

1. On 4 December 2012 the Appellant in these proceedings, Mr Mackenzie, made a request under the Freedom of Information Act (“FOIA”) of the Ministry of Defence (“MOD”) concerning “directed energy weapons”:-

Emerging Technology includes the use of directed energy weapons such as Radio Frequency, Laser and acoustic and other non-lethal weapons.

Please could you supply an inventory list of all of these assets which MOD has access to. I would define access as something which MOD has the ability to use or initiate the use of by others, either directly, through proxy, or in any other fashion.

If this exceeds the total amount of hours please prioritise in this order:

Space based payloads,

Land based payloads

Air and Sea based payloads

2. In essence Mr Mackenzie was asking for a detailed list of the technologically most advanced weapons which the MOD might, or might not, possess.
3. The MoD responded by providing a limited amount of information and with respect to other information responded by neither confirming nor denying that information was held and relying on s26(3) FOIA.
4. In his decision notice the Respondent in these proceedings the Information Commissioner “ICO” upheld the stance of the MOD. The MOD stated that:-

Confirming or denying whether the MOD has, or has not, any access to directed energy weapons would provide hostile forces with a clear indication of the capability of the Armed Forces. This information could be exploited by individuals or organisations to either take advantage of a perceived weakness or develop tactics and techniques to counter this capability. The response should not be taken as conclusive

evidence that the information you have requested is or is not held by the Ministry of Defence.

The MoD further stated that:-

MOD's position is that not only would it be harmful to confirm or deny whether it has access to specific types of DE weapons, it would be harmful for us to disclose whether or not the Department has access to use of any DE weapon since this would be avowing (or otherwise) a generic equipment capability which hitherto has not been the subject of public disclosure

5. Mr Mackenzie submitted that in his view the use of these devices in peacetime would be unlawful and that *"foreign powers are unlikely to benefit from such knowledge.. since they have the capability to detect such devices as well resources to protect themselves"*. He argued that the British public *deserve to know what is happening and the scale of such transgressions.*
6. The ICO noted that his task was only to consider whether the MOD was correct in asserting that FOIA did not require it to confirm or deny that it held information. He noted that the possible use of such devices was of a significant and legitimate public interest however such confirmation or denial would give hostile forces an indication of the capability of British forces which would enable them to exploit any perceived weaknesses. There was exceptionally strong public interest in maintaining the safety and security of British forces and he concluded that the public interest firmly favoured maintaining the policy of neither confirm nor deny.

Mr Mackenzie's appeal

7. In his appeal Mr Mackenzie claimed a distinction between asking for an inventory i.e. the titles of weapons, and the details of weapon capabilities. He made a series of assertions as to the existence and capability of these weapons and his view that it is a technology which is dangerous to humanity. He asserted that the ICO had struck the balance of public interest incorrectly.

The ICO's response

8. The ICO maintained the position set out in his decision notice. He considered that the MOD position of even confirming or denying that there was a list of directed energy

weapons to which it had access would cause prejudice and submitted that significant weight should be accorded to the evidence of the MoD as to the prejudice which would be caused. With respect to the balance of public interest he submitted in argument a passage from a FTT decision (*Cole v IC and MOD EA/2013/0042,0043*):-

The public interest in maintaining the exemption in section 26(1)(b) is exceptionally weighty. There is an exceptionally strong public interest in preventing harm to the UK's capabilities in an ongoing armed conflict. The security and safety implications carry very strong public interest weight.

We agree with the Commissioner that there would need to be very weighty countervailing considerations to outweigh a risk to security and safety of the forces which was of sufficient severity to have engaged section 26(1)(b)

Consideration

9. The exemption relied on this case is contained in s26 FOIA:-

26 Defence.

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(a) the defence of the British Islands or of any colony, or

(b) the capability, effectiveness or security of any relevant forces.

(2) In subsection (1)(b) "relevant forces" means—

(a) the armed forces of the Crown, and

(b) any forces co-operating with those forces, or any part of any of those forces.

(3) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

10. The evidence before the Tribunal is very clear. Details of any UK capability in this area or the absence of capability in this area would be of considerable interest to any hostile power and would assist that power in devising counter-measures or give it reassurance that no counter measures were necessary. It would remove uncertainty and assist in the planning or execution of any hostile action. This would therefore prejudice the capability effectiveness and security of British forces. While Mr

Mackenzie appears to believe that the technology is widespread he has not produced any evidence of substance to weigh against the prejudice to the public interest which has been fairly described by the MOD in its submissions to the ICO, adopted by the ICO and summarised in the passage from *Cole*.

11. The Tribunal has considered whether the ICO's decision notice is in accordance with the law. Mr Mackenzie has not produced any evidence or argument which indicates that the ICO has erred. The Tribunal is satisfied that the notice is in accordance with the law and the appeal is dismissed.

12. Our decision is unanimous

Judge Hughes

[Signed on original]

Date: 7 July 2014