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Ms Cordelia Rayner
Hogan Lovells international LLP
Atlantic House
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London
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Our Ref: GIA/2230/2012

Your Ref: C6JDP/PAD/2979402

15 Jul 2015

Dear Ms Rayner,

Re: All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and The Foreign and Commonwealth Office

I enclose a copy of the final decision of the Upper Tribunal. A copy of the decision has been sent to all other parties.

The ways in which the decision may be challenged are set out below.

1. **Right to Appeal.** There is a right of appeal to the Court of Appeal in London **on a question of law only.** If you wish to appeal you must **first ask for permission** from the Upper Tribunal judge. You must do so by writing to the office so that your application is received **within one month** from the date of this letter.

   In your application you must give your reasons for wanting to appeal and **identify the error of law** which you say the Upper Tribunal decision contains. The Upper Tribunal judge may extend the time limit if satisfied that there is a good reason for doing so.

   If the Upper Tribunal judge refuses permission, then you may then ask for permission from the Court of Appeal itself. If necessary, you will be told how to do this at a later stage. You should note that you will only be granted permission if your appeal raises some important point of principle or practice or there is some other compelling reason for the appeal court to hear the appeal.

2. **Set aside.** A decision may be set aside by the Upper Tribunal judge if he considers that it is in the interests of justice **and** there has been some procedural irregularity in the proceedings. If you wish to apply to set aside you must do so in writing with reasons so that your application is received **within one month** from the date of this letter.

Yours sincerely,

A. Czachor

Agnieszka Czachor
Clerk to the Upper Tribunal

THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Upper Tribunal Case No. GIA/2230/2012

PARTIES

All Party Parliamentary Group on Extraordinary Rendition (Appellant)

and

The Information Commissioner (First Respondent)

and

Foreign and Commonwealth Office (Second Respondent)

APPEAL AGAINST A DECISION OF A TRIBUNAL

DECISION OF THE UPPER TRIBUNAL

MR JUSTICE CHARLES

MR JUSTICE MITTING

UPPER TRIBUNAL JUDGE WIKELEY

IN THE UPPER TRIBUNAL
ADMINISTRATIVE APPEALS CHAMBER

Case No.: GIA/2230/2012

Before: Mr Justice Charles Mr Justice Mitting and Upper Tribunal Judge Wikeley

Attendances:

For the Appellant:	Mr Timothy Pitt-Payne QC and Ms Joanne Clement, instructed by Hogan Lovells International LLP
For the First Respondent:	Mr Robin Hopkins, instructed by the Solicitor to the Information Commissioner
For the Second Respondent:	Ms Karen Steyn QC and Mr Julian Blake, instructed by the Treasury Solicitor

FINAL DECISION

The FINAL DECISION of the Upper Tribunal is to allow the appeal in part.

The decision of the First-tier Tribunal (General Regulatory Chamber) (Information Rights) dated 03 May 2012, in relation to the Appellant's appeals against the Information Commissioner's Decision Notices FS50262409, FS50279042 and FS5026953, involved an error on a point of law (in relation to Ground 4 of the original grounds of appeal). The appeal was therefore allowed in part in our Interim Decision of 11 November 2013.

ON OUR RECONSIDERATION of the appeals in relation to specific information requests that remained unresolved as a result of our Interim Decision

Those appeals are all dismissed because:

(1) Documents 12, 13, 14, 16, 30 and 52 are all subject to the absolute exemption in section 23(1) of FOIA.

(2) It is not in the public interest to disclose the documents that are subject to the qualified exemption in section 27 of FOIA (documents 59 and 78).

(3) The information in document 61 has already been disclosed

This decision is given under section 12(2)(a) and 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007

REASONS

Introduction

1. The All Party Parliamentary Group on Extraordinary Rendition ("APPGER") is a cross-party association of MPs, established in 2005 (by Mr Andrew Tyrie MP) in response to allegations that the UK Government had been involved in the US extraordinary rendition programme. As our Interim Decision noted, "extraordinary rendition is a euphemism for an extraordinary practice, namely the extra-judicial transfer of detainees, typically individuals 'of interest to the security services', and usually across state boundaries or between different authorities within them for the purposes of interrogation, often in circumstances where those individuals face a real risk of torture" (*APPGER v IC and FCO* [2013] UKUT 0560 (AAC) ("our Interim Decision") at [3]).

2. APPGER's investigations into this practice have included making a series of requests under the Freedom of Information Act 2000 (FOIA) to Government departments and, where disclosure of information has not been forthcoming, pursuing complaints to the Information Commissioner and onward appeals to the First-tier Tribunal.

3. In May 2008 and February 2009 APPGER made three batches of FOIA requests. The first batch concerned the detention of two British residents, Mr Bisher al-Rawi and Mr Jamil el-Banna, in The Gambia and any UK involvement in their subsequent extraordinary rendition to Guantanamo Bay via Afghanistan. The second and third batches of requests related to information about any UK involvement in the extraordinary rendition of a third British resident, Mr Binyam Mohamed. The Foreign and Commonwealth Office ("the FCO") released some but not all of the information requested. The Information Commissioner ("the Commissioner"), for the most part at least, upheld the FCO's reliance on exemptions in FOIA in response to these requests (see e.g. Decision Notice FS50262409). The First-tier Tribunal, again for the most part, dismissed APPGER's appeals against the three Decision Notices issued by the Commissioner (EA/2011/0049-0051). With the permission of the FTT, APPGER appealed to the Upper Tribunal on five grounds (Interim Decision at [28]).

The course of the Upper Tribunal proceedings

4. The Upper Tribunal (Charles J, Burnett J and Judge Wikeley) first held a substantive hearing of APPGER's appeal between 1 and 4 July 2013. This resulted in our Interim Decision (see [1] above). Grounds 1 and 2 having been stayed, the Upper Tribunal dismissed grounds 3 and 5 but allowed the appeal on ground 4, namely that the FTT had erred in law in its approach to the balancing exercise under section 27(1) of FOIA. It was agreed on all sides that the Upper Tribunal should re-make any decisions on appeals in relation to specific information requests that remained unresolved, rather than have them remitted to the FTT. Further progress on the appeal was delayed pending the outcome of the decision of the Supreme Court in *Kennedy v The Charity Commission* [2014] UKSC 20.

5. On 2 July 2014, following a case management hearing before Charles J, the Upper Tribunal directed that APPGER's appeals against the Commissioner's second and third Decision Notices were dismissed and that the outstanding matters in relation to the first Decision Notice were to be resolved at a further substantive hearing. The FCO was also given permission to raise the application of section 23 to

the information still in dispute. On 23 January 2015 the Upper Tribunal (Charles J, Mitting J and Judge Wikeley; Burnett J by now having been elevated to the Court of Appeal) held a further case management hearing (see *APPGER) v Information Commissioner and FCO (Information rights: Other)* [2015] UKUT 68 (AAC)), as a result of which the issues and procedure were further defined for the second substantive hearing before the Upper Tribunal on 28 and 29 April 2015. By this stage there were, in effect, five issues left to be resolved:

> (1) the proper construction of section 23 (information supplied by, or relating to, bodies dealing with security matters) of FOIA;
>
> (2) the proper application of section 23 to the information in the documents which remain in dispute;
>
> (3) the public interest timing point in the context of section 27 (international relations);
>
> (4) the proper application of the public interest balancing test under section 27 of FOIA to the information in the documents which remain in dispute;
>
> (5) the single document in respect of which the FCO asserts that the relevant information has already been disclosed.

6. We heard oral argument from the parties on 28 April and on the afternoon of 29 April. The morning of 28 April was devoted to us reading the disputed material and holding a closed session (with the Respondents present but APPGER absent) in which we tested Ms Steyn's submissions on each of the documents that remained in dispute between the parties.

The documents and information still in dispute

7. Following the Upper Tribunal's directions of 2 July 2014, the five issues adumbrated above (at [5]) all arose in the context of the Commissioner's Decision Notice on the first batch of FOIA requests, namely those relating to the detention in The Gambia of Mr al-Rawi and Mr el-Banna and their subsequent extraordinary rendition by the US authorities. As Mr Pitt-Payne for APPGER explained, the information requests had been made as APPGER was anxious to establish (i) the extent of any UK contribution or involvement to the chain of events leading to the men's detention and rendition; (ii) what the UK authorities knew of these matters and when; and (iii) when and how the UK responded.

8. The FTT had been concerned with over 120 separate documents (see the Schedule to its decision). By the time the matter reached the final hearing before us the remaining disputed information was contained in nine separate documents (typically telegrams or e-mails), parts of which had already been disclosed. In respect of some documents the FCO argued that the entire contents were exempt from disclosure. In others it was claimed that specific paragraphs were so exempt. In six documents the FCO relied on both sections 23 and 27 (Documents 12, 13, 14, 16, 30 and 52, although section 42 (legal professional privilege) was also claimed for Document 30). In two documents the FCO relied on section 27 alone (Documents 59 and 78). With regard to one document, the FCO contended that the relevant information had already been disclosed to APPGER (Document 61).

Open Judgment

9. This is an open judgment. We have not issued a closed annex or closed decision. Our conclusions appear under the headings that follow.

Issue (1): the proper construction of section 23 of FOIA

10. Section 23(1) of FOIA provides 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)." A number of bodies are listed in subsection (3), including the Security Service, the Secret Intelligence Service and the Government Communications Headquarters. For convenience in this decision we refer to all those so listed collectively as the "section 23 bodies". Section 23(1) is an absolute exemption and so no public interest balancing test applies (see section 2(3)(b)).

11. The proper interpretation of section 23(1) arose as a side-issue in our Interim Decision in the context of APPGER's third ground of appeal against the FTT's decision, which was an unsuccessful reasons challenge (Interim Decision at [30]-[50]). We accept that Mr Pitt-Payne is entitled to revisit the issue of the correct construction of section 23(1) in the light of our direction that the FCO was entitled to raise section 23 in connection with disputed information in documents in respect of which the FTT itself had not found that section 23 applied.

12. Mr Pitt-Payne's first point was that the FCO had consistently refused to identify which limb of the section 23(1) test was relied upon in respect of each piece of disputed information, although he conceded that whether information has been directly or indirectly supplied to a section 23 body is a question of fact. We agree with Ms Steyn (and Mr Hopkins) that there is no obligation on the public authority (here the FCO) to specify to the requester which specific 'limb' of section 23(1) is claimed (although the point may need to be justified to the Commissioner and on appeal to the FTT or the Upper Tribunal). We say that as the statutory language is an omnibus or umbrella description that is not divided into neatly demarcated and separate constituent limbs and, in any event, there may necessarily be some degree of overlap between the scenarios. We also agree that the first two scenarios are questions of fact. Information in an e-mail from the Secret Intelligence Service to the FCO is plainly material "*directly* ... supplied to the public authority by" a section 23 body. Equally, information in an e-mail from the Metropolitan Police to the Home Office but sourced from e.g. the National Criminal Intelligence Service is obviously material "*indirectly* supplied to the public authority by" a section 23 body (by virtue of section 23(3)(k)).

13. The FCO did not rely on any direct or indirect supply and so the construction issue is what is meant by information that "relates to" any of the section 23 bodies. In its own decision the FTT decided that it should adopt a "broad, although purposive approach", subject to a remoteness test (at [70]). In particular, the FTT reasoned as follows:

> "65. Applying the ordinary meaning of the words 'relates to', it is clearly only necessary to show some connection between the information and a s.23(3) security body; or that it touches or stands in some relation to such a body. Relates to does not mean 'refers to'; the latter is a narrower term..."

14. Mr Pitt-Payne sought to persuade us that this was the wrong approach. His submission was that information "relates to" a security body only if the information has that body as "its focus, or main focus" or has an equivalent connection to that body, relying on the Court of Appeal's judgment in *Durant v Financial Services*

Authority [2003] EWCA Civ 1746 (at [24]). This argument had also been unsuccessfully advanced before the FTT. It fares no better before us. As Ms Steyn contended, it is contrary to the language of section 23(1), its statutory purpose and authority. More particularly, there are four reasons why we reject Mr Pitt-Payne's submission on this point.

15. First, it is simply inconsistent with the ordinary meaning of the language. For example in plain English a planning proposal to redevelop Site A may well *relate to* the adjoining property Site B even though its main *focus* is obviously Site A.

16. Second, it is inconsistent with Parliament's clear intention that, because of what they do, there should be no question of using FOIA to obtain information from or about the activities of section 23 bodies at all. There is no point sending a letter making a FOIA request to Thames House. As Ms Steyn put it, Parliament had shut the front door by deliberating omitting the section 23 bodies from the list of public authorities in the Schedule to the Act. Section 23 was a means of shutting the back door to ensure that this exclusion was not circumvented.

17. This broad approach by reference to identified bodies is not narrowed by the qualified exemption in section 24(1), namely that "information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security." This is a safety net provision which recognises that national security issues may arise in respect of information that is not within the absolute section 23 exemption. Rather this safety net provision reinforces the view that Parliament's intention was to put section 23 bodies outside the ambit of the right to information conferred by FOIA and a narrow approach to an absolute exemption would not promote that purpose.

18. Third, Mr Pitt-Payne's proposed narrow construction of section 23(1) is inconsistent both with the approach to date of the FTT (see e.g. *Cabinet Office v Information Commissioner* (EA/2008/0080 at [21]-[23] and [27] and *Commissioner of Police of the Metropolis v Information Commissioner* (EA/2010/0008 at [15]) and Upper Tribunal case law (*University and Colleges Admissions Service v Information Commissioner and The Lord Lucas* [2014] UKUT 0557 (AAC) at [45]-[46] and *Home Office and Information Commissioner v Cobain* [2015] UKUT 27 (AAC) at [19], [28] and [29]).

19. Fourth, Mr Pitt-Payne's reliance on *Durant v Financial Services Authority* is misplaced. *Durant* concerned the proper construction of section 7 of the Data Protection Act 1998 (DPA), not FOIA (let alone section 23). Whilst the DPA and FOIA are both information rights measures in the broadest sense, there is no easy "read across" between the two statutes in this context. In any event, we accept that the term "relates to" is broader than the *Durant* guidance has sometimes been understood to suggest (see e.g. *Edem v Information Commissioner and Financial Services Authority* [2014] EWCA Civ 92). Furthermore, as Mr Hopkins submitted, the policy contexts of section 7 of the DPA and section 23 of FOIA are poles apart. A broad construction of "relating to" in section 7(1) of the DPA would have had the effect of turning a privacy right about information-processing into a tool for the discovery of documents. In contrast a broad approach to "relates to" in section 23(1) is entirely consistent with the underlying legislative intent (as described above).

20. We therefore reject Mr Pitt-Payne's submission that for the purposes of section 23(1) information "relates to" a security body only if the information has that body as "its focus, or main focus" or an equivalent connection to that body. That said, we understand his 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. As Mr Pitt-Payne rightly conceded, the very fact that particular information had been copied to such a body is a matter that can properly be redacted under section 23(1). However, that does not necessarily mean of itself that the information in question in the copied document "relates to" a section 23 body. The illustration given in oral argument was of a general personnel memorandum about privilege days for civil servants (for the purposes of their annual leave). The fact that such a memorandum has been copied to a section 23 body is subject to the absolute exemption, but not the substantive information in the document about privilege days.

21. In the course of oral argument Mitting J suggested that a possible way of benchmarking a decision on the application of section 23(1) was to ask whether it concerned "information, in a record supplied to one or more of the section 23 bodies, which was for the purpose of the discharge of their statutory functions". So, for example, the functions of the Security Service include "the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means" (section 1(2) of the Security Service Act 1989; see also section 1 of Intelligence Services Act 1994 as regards the functions of the Secret Intelligence Service).

22. This suggestion reflects the points that the right given by section 1 of FOIA is to have information communicated and "information" is defined for present purposes as information recorded in any form (see section 84).

23. We agree with Ms Steyn that it is important not to allow a judge-made formulation based on statutory functions to supplant or override the statutory 'relates to' test in section 23(1). However, we also agree with Mr Hopkins that a steer as to the contours of the statutory language may be helpful (not least for the Commissioner, for future FTTs and for future requesters).

24. There are many cases in which Ms Steyn's submission is reinforced by guidance to the effect that the approach taken to the meaning and application of an ordinary English word that can have a range of meaning is best shown by the reasons given in a particular case for the application of the test that contains it. But that solution is not, or is not as readily, available when a FOIA exemption is found to apply to information. This is because an open explanation cannot be given by reference to the actual content of the information.

25. However apart from the steer given in earlier cases and by the FTT in this case to the effect that in section 23(1) "relates to" is used in a wide sense we agree with Ms Steyn that a steer or guidance in general terms is impermissible and unhelpful.

26. Having said that, we acknowledge that information, in a record supplied to one or more of the section 23 bodies for the purpose of the discharge of their statutory functions, is highly likely to be information which relates to an intelligence or security body and so exempt under section 23.

27. Further, in our view this approach is likely to provide an answer in the great majority of cases to the question whether the relevant record (and so here and in many cases the document(s) in question) and so all of the information within it is covered by the section 23 exemption. Also this approach would avoid problems that have bedevilled this case relating to disclosure of parts of documents and the identification of other passages in them in respect of which an exemption is claimed.

This has inevitably involved much time and effort and has led to APPGER asserting that they cannot see why parts are covered by an exemption and cannot help the tribunal on that because they have not seen the document.

28. The approach suggested by Mitting J would accord with Mr Pitt-Payne's correct acceptance that the fact that information had been sent to a section 23 body is exempt information and would avoid the problem that redaction from a document in reliance on section 23 would in many cases reveal that this was the case.

29. However, we agree with Mr Pitt-Payne that because such an approach is to the whole of a record (or a document and its enclosure or a chain of documents) it leaves alive the problems relating to that the points that:

> (i) simply sending information to a section 23 body does not turn information held by a public authority into section 23 exempt information held by it; and
>
> (ii) a FOIA request is for information not for a record or a document

30. One example he gave to illustrate these problems was of a thesis that the FCO had obtained for its own purposes unconnected with national security and later thought might be of interest to a section 23 body and so sent to that body.

31. That example indicates a practical solution to these problems in that it shows that generally the public authority will have the information in a record that is separate from that which it sends to the section 23 body and so, if it falls within the request, that record of it (or its content) can be provided and the section 23 exemption can be claimed on the basis advanced by Mitting J for the whole of the record of the communication with the section 23 body.

32. The problems remain if there is no other record of the information. In our view this is likely to be rare and if it arises it is likely that the better way of dealing with it would be to provide the information rather than a redacted copy of the record sending it to a section 23 body. This would preserve the ability not to confirm or deny pursuant to s. 23(5).

33. So, in our view, the approach suggested by Mitting J has considerable utility in the application of section 23. Firstly, it provides a clear explanation that can be given to the requester and can be checked by the Commissioner and the tribunal. Secondly, information held by the public authority that is included in that record of communication with a section 23 body that falls within the request and for which the section 23 exemption cannot otherwise properly be claimed can and would still be provided. The fact of the supply of that information can be checked by the Commissioner and the tribunal. Thirdly, it would avoid significant detailed work in marking up documents and partial disclosure and the risk that partial disclosure of a document would reveal section 23 exempt information (i.e. that information was provided to a section 23 body for the discharge of its statutory functions or other involvement of a section 23 body for such purposes).

34. The decision of the Court of Appeal in *The Independent Parliamentary Standards Authority v The Information Commissioner and Ben Leapman* [2015] EWCA Civ 388 bears the date of the hearing before us and upholds the decision of the Commissioner and the tribunals. We were told that the issue whether, as had been decided in that case, it was necessary in some cases to disclose the record itself to comply with the duty to communicate information and issues relating to section 11 of FOIA were before the Court of Appeal but the suggestion made by Mitting J was not

debated in that context. In our view, the points covered by that decision are unlikely to arise in the application of that suggestion (see for example paragraph 47 of the judgment of Richards LJ). But, if and when it is applied it should be considered whether they do.

Issue (2): the application of section 23 to the documents that remain in dispute

34. With that understanding of the section 23(1) test in mind, we turn to consider its application in the specific context of documents 12, 13, 14, 16, 30 and 52. It is convenient to consider these documents in three categories.

Documents 12, 13, 14, 16

35. These four documents are all FCO telegrams. There has been partial disclosure of documents 12 and 13. The FTT decided that section 23 applied to paragraph 3 of document 12 and for copying purposes ('cc') as regards documents 12, 13 and 14; by oversight the FTT failed to record whether any exemption applied to document 16. We have read all four telegrams carefully. This is not a situation where the section 23 bodies have been copied in as part of some much longer distribution list. All four telegrams have a tightly defined distribution list. In our view it is quite unrealistic to seek to disentangle those passages in the telegrams which are covered by section 27 and those which are subject to section 23.

36. In our view the approach suggested by Mitting J clearly demonstrates that an appropriate course for the FCO to have adopted would have been to claim that the section 23 exemption applied to the whole of these documents and to have provided the information from them that has been provided in a different way (e.g. through a free standing description or different record of it).

37. So each document and, in the events that have happened, the parts of them that have not been disclosed engage the absolute exemption in section 23 as the information in them relates to the relevant bodies.

Document 30

38. This document has been described in open as "an email from the Deputy Head of the Human Rights, Democracy and Governance Group to a Legal Counsellor at the FCO. The subject of the email is the Judicial Review proceedings brought by Mr Al Rawi and others". In the event much of the text is out of scope of the requests. There has been no partial disclosure. As regards the disputed information, the FTT decided that sections 23, 27 and 42 applied. Whether section 23 applies to one paragraph now remains in issue and we are satisfied that it relates to the work of and so to the section 23 bodies. This is so even if APPGER's narrower approach to the test was to be applied.

39. Given that we have upheld the application of section 23(1), we do not technically need to consider additionally whether or not the qualified exemption in relation to legal professional privilege under section 42 also applies to that paragraph. For the record we simply confirm that (a) the legal professional privilege qualified exemption is obviously engaged; and (b) the public interest balance falls against disclosure, both for the reasons associated with section 27(1) (discussed below) and also because of the weight to be attached to the protection of the client/lawyer confidential relationship in cases of this complexity and sensitivity.

Document 52

40. It is on the public record that this document is a letter from Jack Straw to Condoleezza Rice dated 6 April 2006 requesting the release of Mr al-Rawi from Guantanamo Bay and his return to the UK. It was relevant to both Request 8 (essentially about the security threat posed by Mr al-Rawi and Mr el-Banna) and Request 13 (about the matters enabling the Foreign Secretary to approach the US authorities on Mr al-Rawi's behalf). There has been no partial disclosure of this letter. The FTT decided that both sections 23 and 27 applied. We agree. Section 27 is plainly engaged by the whole document. Again the application of section 23 to one paragraph remains in issue. We are satisfied that it relates to the work of and so to the section 23 bodies. This is so even if APPGER's narrower approach to the test was to be applied.

41. As in our Interim Decision we have concluded that there is no need for a closed decision on the application of the section 23 exemption that we permitted the FCO to raise at this stage.

Our conclusions on documents 12, 13, 14, 16, 30 and 52

42. We therefore conclude that the remaining disputed material in documents 12, 13, 14, 16, 30 and 52 is, in each instance, subject to the absolute exemption in section 23(1) of FOIA.

Issue (3): the public interest timing point in the context of section 27 of FOIA

43. Our conclusion in relation to Issue (2) above on the application of section 23(1) also means that we need not consider the potential application of section 27 to the six documents in question there. This leaves only two documents – Documents 59 and 71 – in respect of which the FCO argues that the disputed information that falls to be reconsidered is covered by the exemption in section 27 (but where section 23(1) is not claimed). Information is exempt information by virtue of section 27(1)(a) "if its disclosure under this Act would, or would be likely to, prejudice" (amongst other matters) "relations between the United Kingdom and any other State". As this is a qualified exemption, the public interest balancing test applies, i.e. whether "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information" (section 2(2)(b)).

44. The issue of principle that arises here is the date at which the public interest balancing test is to be applied (we call this the "public interest timing point"). The question is whether the public interest should be assessed by reference to the circumstances at or around the time when the request was considered by the public authority (including the time of any internal review) or rather by reference to the circumstances as they exist at the time of the tribunal hearing (in this instance the Upper Tribunal reconsideration hearing). In the present case, all parties before the FTT had proceeded on the basis that the applications of the exemptions and the public interest balance were to be considered at or around the time of (at the latest) the date of the FCO's internal review (in June 2009). This shared understanding was in accord with the prevailing orthodoxy.

45. However, in late November 2014 the Upper Tribunal put a cat amongst the pigeons, or at least started a hare running, in the course of its decision in *DEFRA v Information Commissioner and Badger Trust* [2014] UKUT 0526 (AAC). This decision suggested that the issue as to the date at which the public interest balancing exercise should be conducted remains "open" given an apparent "lack of clarity" in the jurisprudence (at [44]-[48]). As the Upper Tribunal observed (at [45]):

> "Early cases looked at the date of the information request; many Tribunals now seem to look at the date of the public authority's final decision on the request. This approach has been doubted in the High Court (see *OGC v IC* [2008] EWHC 774 (Admin), [2010] QB 98) and seems not entirely consistent with the development of the First-tier Tribunal's role of receiving new evidence and conducting what is now well-established as a full merits review."

46. In those circumstances we felt it only right that APPGER should be allowed to raise the public interest timing point in these proceedings. We recognise that APPGER's primary position was that – if, and to the extent that, the section 27 exemption is engaged – then the public interest in maintaining the exemption did not outweigh the public interest in disclosure, even as at 2008 and 2009, but that if the public interest assessment has to be made as at 2015 then the balance tilts still further in favour of disclosure. Mr Pitt-Payne invited us to depart from the traditional understanding (i.e. an assessment at or about the time of the request or at the latest the internal review) for five reasons. These were: (1) the absence of binding Upper Tribunal authority on the public interest timing point; (2) the language of section 50(1) of FOIA (application for decision by Commissioner) was "not conclusively in favour of the traditional understanding"; (3) the practice of the FTT in considering new and fresh evidence was inconsistent with that orthodoxy; (4) the highly inconvenient practical consequences that flow from the traditional view; and (5) the asymmetry, as between requesters and public authorities, that follows on the conventional view in terms of taking into account developments subsequent to the request, given section 50(4) and *Information Commissioner v Gaskell and HMRC* [2011] UKUT 296 (AAC).

47. We had the benefit of detailed written submissions from all three parties on the public interest timing point and additionally oral submissions by Mr Pitt-Payne. In the event we did not feel it necessary to hear Ms Steyn and Mr Hopkins respond in the course of oral argument.

48. After the decision in *DEFRA v Information Commissioner and Badger Trust,* the Supreme Court in *R (Evans) v Attorney-General* [2015] UKSC 21 has provided powerful support for the orthodox approach taken by the FTT and the parties in this case. The Supreme Court observed (and all the parties in that case agreed) that the timing of the assessment of the public interest is the date of the public authority's refusal (and not the date of the Commissioner's Decision Notice, let alone the dates on which the FTT, or the UT or the higher courts hear an appeal and determine the public interest balance (rather than remitting that issue).

49. Obviously we accept that the Supreme Court's observations on the public interest timing point are technically *obiter*. They are, however, at the "almost virtually binding" end of the spectrum of "highly persuasive dicta" from the highest court in the land, not least because, as Mr Hopkins contends, it is very difficult to make sense of Lord Neuberger's leading judgment in *Evans* if APPGER is correct on the public interest timing point.

50. In the light of the guidance given by *Evans*, we can deal with Mr Pitt-Payne's other arguments briefly.

51. First, although we accept that there had been no binding decision of the Upper Tribunal on the point, we are confident that if the judgment of the Supreme Court *Evans* had predated the decision in the *Badger Trust* case the Upper Tribunal would not have raised the question mark it did on the orthodox understanding.

52. Second, the judgment of the Supreme Court confirms and powerfully supports the view that taken as a whole, the language of the statutory scheme indicates that the Commissioner (and the FTT) is charged with assessing past compliance with FOIA, not with monitoring ongoing compliance. That scheme is that a request is made to a public authority and a natural and sensible reading of the language of the provisions relating the application that can be made to the Commissioner and then an appeal of his decisions (see sections 50, 57 and 58) is that they relate to how the public authority dealt with the request and then to whether the Commissioner erred in law on that issue.

53. It is well established that the Commissioner and the FTT can consider evidence that post dates the decisions of the public authority and that on appeal the FTT reconsiders the application to the Commissioner and makes its own decision. But there is nothing unusual about a decision maker taking account of later evidence to inform an historical position.

54. Third, there is room for the view that there may be unfortunate practical consequences whichever construction of the public interest timing point is adopted.

55. In a case such as the *Badger Trust* where a "safe space" argument is raised it is readily understandable why the requester and the FTT would feel frustrated in having to consider a case on an historical basis if by the time the matter is before the FTT there are obvious and powerful arguments supporting the view that the safe space has expired. But as has happened the public authority can accept this and provide the information without a further request being made or pursuant to such a request.

56. In other cases, and this is an example, there are clearly disadvantages in the Commissioner and then the FTT and then further appellate tribunals and courts being faced with a moving target on public interest issues. This is particularly so when one remembers that the trigger to the FOIA jurisdiction is a request to a public authority holding information. Indeed it seems to us that Parliament would not have intended that the public authority would effectively be removed as the decision maker because the passage of time and changes in circumstances even if the last date for appellate tribunals and courts was the hearing before the FTT. Rather it seems to us that Parliament would have intended that the requester should make a further request if he wished to rely on changes over time to the public interest factors.

57. Fourth, this view of Parliamentary intention and the conventional understanding do not result in any asymmetric unfairness as to the relevance of post-assessment developments. Rather, the decision in *Information Commissioner v HMRC and Gaskell* [2011] UKUT 313 (AAC); [2011] 2 Info LR 11, applying earlier authority, that section 50(4) gives the Commissioner a discretion not to order disclosure reflects an overall intention to promote results that reflect the balance of public interest by the making of requests for disclosure from time to time and a residual discretion in exceptional circumstances to avoid a disclosure that should have been made earlier but now should not be because of changes in circumstances. This does not reflect different approaches to the primary arguments whether the request has been dealt with in accordance with Part 1 of FOIA but a residual discretion on remedy if it has not been.

58. It follows logically from what we have decided that APPGER was perfectly entitled to make a further request on 11 March 2015 phrased in the same terms as the original requests that concerned Mr al-Rawi and Mr el-Banna and were the subject matter of the Commissioner's first Decision Notice. That was an entirely sensible approach in terms both of its wider strategy and protecting its own position,

not least as it could not be sure as to (i) what we would decide on the public interest timing point; and (ii) what the Commissioner or any FTT might decide as to the relative assessments of the public interest balance in 2008 and 2015 respectively. In this context we note the terms of section 14(2) of FOIA, which provides that:

> "(2) Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request."

59. It is ultimately a question of fact that may be a matter for decision on another day, but there is an obvious case for saying that the gap between 2008 and 2015 may well amount to a "reasonable interval". The FCO somewhat surprisingly described APPGER's decision both to pursue the current appeal and to make a parallel new but repeat request as "both unreasonable and abusive", reserving the right to seek the costs of this appeal (FCO skeleton argument at §6). In our view Ms Steyn was very wise not to pursue that particular argument at the oral hearing. Had she done so, we venture to think that we would not have needed to hear Mr Pitt-Payne in reply.

Issue (4): the proper application of the public interest balancing test

60. Following our Interim Decision the public interests against disclosure have been formulated in a witness statement of Laurie Bristow ("Dr Bristow") who is a member of the diplomatic service and the senior management structure of the FCO. The FCO made an application under Rule 14 of our rules to present his evidence by an open and closed statement. Aspects of this approach were opposed by APPGER. Our decision on this application is dated 11 February 2011 (our Rule 14 Decision).

61. As appears from that decision, paragraphs 25 to 36 of Dr Bristow's open statement read as follows:

> 25 Whilst the Binyam Mohamed litigation concerned the disclosure of information provided on intelligence channels, one cannot easily distinguish between a response by the US to the release of intelligence liaison material and the release of the type of confidential communications that are contained within the Disputed Information. This is particularly so in light of the subject matter of the Disputed Information, which in all cases concerns the detention of individuals known to the Security Service or the threat they pose and, in six of the eight documents, the information itself clearly relates to a security body (for which the FCO has applied the s. FOIA exemption).
>
> 26 I am able to provide a CLOSED example to support this assessment and would like to assure the Appellant that the release of private communications of the type requested has caused damage in relations with the United States. [REDACTED]
>
> 27 [REDACTED]
>
> 28 [REDACTED]
>
> 29 [REDACTED]
>
> 30 [REDACTED]
>
> 31 [REDACTED]
>
> 32 These concerns regarding the protection of both intelligence material and US diplomatic material following the Binyam Mohamed litigation were reiterated on a visit to Washington by members of the Intelligence and Security Committee between 28 February and 2 March 2011. I am able to describe in CLOSED a conversation from that meeting. [REDACTED]. This visit, though

> not the details of this exchange, is reported in the Open ISC Annual Report 2010-2011, presented to Parliament by the Prime Minister in July 2011 [LB5].
> 33 Prior to the hearing of the appeal in the present case before the First Tier Tribunal my predecessor, Jonathan Sinclair, spoke with Jay Alan Liotta, a senior official in the US Department of Defense. I am able to describe in CLOSED a conversation from that meeting. [REDACTED].
> 34 In light of the above are my own experience as a Senior Civil Servant, I assess that public disclosure of any of the documents containing notes of conversations or actual conversations in respect of which s. 27 has been claimed would further undermine US confidence in its exchanges with the UK, including in the field of intelligence sharing.
> 35 The clearest response from the US would be diplomatic, affecting the frankness and quality of diplomatic exchanges. [REDACTED].
> 36 However I also assess that the release of such documents would complicate the intelligence sharing relationship and give rise to a real risk of a further reduction in the flow of intelligence. I do not suggest that damage to the intelligence sharing relationship would be an inevitable consequence of the release of *any* diplomatic communications with the US, regardless of context and content. However, the risk in the present case arises specifically because the material concerns the fields of intelligence, counter-terrorism and detention of individuals who are assessed to be Islamic extremists. I believe disclosure will be particularly risky in a context such as this which is so closely akin to the Binyam Mohamed litigation.

62. Having cited those paragraphs of Dr Bristow's evidence our Rule 14 Decision continued as follows:

> 7. After we had heard oral submissions in open and closed session and read the redacted parts of Mr Bristow's statement and the relevant exhibits we informed APPGER as follows:
>
> > In closed session we have asked and received answers to the questions you invited us to pose. We are of the view that the redactions shown in paragraphs 26 to 32 and 35 of Mr Bristow's witness statement and the documents supporting them and exhibited thereto are an example that strongly supports the conclusion asserted in paragraph 36 of Mr Bristow's statement and we can give no further gist of the redacted material.
> >
> > The redaction at the end of paragraph 33 of Mr Bristow's statement is an expression of view that does not add to what is in the public domain and the FCO are entitled to withdraw it.
> >
> > The remainder of the redactions and the closed exhibits are or contain a description of the documents that are the subject of this appeal.
>
> 8. *The open argument.* We heard this without reading the material that the FCO wanted to put before us on a closed basis.
>
> 9. It was common ground before us that we had power to make the order sought pursuant to and under Rule 14. We respectfully agree with the opening sentence of paragraph 33 of the judgment of Maurice Kaye LJ in *Browning v Information Commissioner* [2014] EWCA Civ 1050; [2014] 1 WLR 3848 that:
>
> > The crucial task is to devise an approach in the in context of the specific case which reconciles the divergent interests of the various parties.
>
> This passage reflects the overriding objective, the terms of Rule 14 and the wide range of the subject matter of cases under FOIA. The remainder of paragraph 33 of that judgment confirms that the interests of the persons who have provided the

information sought also have to be taken into account in devising the approach to be taken.

10. In our view the cases (see for example *FCO v Information Commissioner* [2013] UKUT 0275 (AAC), the interim decision in this case *APPGER v Information Commissioner* [2013] UKUT 0560 (AAC) at paragraph 154 and *Browning* at paragraphs 24 and 32-36) show that the guiding principle in devising the approach to be taken is that:
(1) Any closed procedure must be justified as being necessary or proportionate to promote the interests of justice in the given case, and
(2) after any closed procedure has taken place the tribunal must ensure that as much as possible of the relevant evidence, argument and material considered in the closed procedure is disclosed or described to the party excluded from the closed procedure.
It follows that we consider that the First-tier Tribunal practice note "Closed Material in Information Rights Cases" gives helpful and appropriate guidance. We comment on this formulation in paragraph 27 below.

11. This two stage approach enables a proportionate approach as expressly envisaged by Rule 14(8) and the overriding objective to be taken by tribunals to the manner in which the proceedings are conducted whilst ensuring at the second stage that the principles of open justice are departed from to the least extent possible.

12. The issues at stake in this case are such that it merits procedural rigour at all stages and so the preliminary and particularised Rule 14 application that was made. That procedural approach also warranted the open argument being conducted on the basis that we had not read the material that the FCO wished to put before us on a closed basis so that we could assess the merits of the application for the open reasons given.

13. The argument identified a difference between the FCO and the Information Commissioner on the one hand and APPGER on the other as to what directions or information the tribunal could make or give about the closed material once we had seen it. The difference arose in the following possible scenarios, namely after the closed material had been examined on a closed basis (a) the Rule 14 application was refused and (b) the Rule 14 application was granted in whole or in part. As to (b) a similar situation could arise after the closed material was considered at the substantive hearing. The FCO and the Information Commissioner submitted that the party advancing the closed material (here the FCO) has a right to withdraw and could exercise that right in both scenarios if the tribunal indicated that the material should be disclosed or gisted and the FCO objected to that disclosure or the terms of the gist. APPGER invited us to look at the material the FCO wanted us to consider on a closed basis and submitted that once we had done so in both scenarios it was open to us to direct its disclosure or that it should be gisted in a particular way. In support of this submission, APPGER relied on Rule 15 and the investigative nature and aspects of the tribunal's jurisdictions and procedure. The FCO and the Information Commissioner argued that a party should at any time be allowed to withdraw evidence it advanced to support its case and the tribunal could and should put it out of its mind if it did so, for example, to observe a duty of confidence to the provider of the information.

14. We expressed a preliminary view that we did not accept the submission of the FCO and the Information Commissioner and that if they invited us to see the closed material the FCO was at risk that we would direct its disclosure or that it be gisted in a way they did not agree with.

15. In the circumstances of this case this exchange prompted a consideration of Rule 14(10) which provides that:

In a case involving matters relating to national security the Upper Tribunal must ensure that information is not disclosed contrary to the interests of national security

16. It is clear from paragraphs 25, 26 and 36 of Mr Bristow's statement that the example referred to in paragraph 26 engages this rule because it is directed to what we referred to in our earlier decision as an Intelligence Information Sharing Risk arising from the disclosure of diplomatic material (see in particular paragraphs 63-69) and the issues we identified at paragraph 82 namely:
(1) existing problems concerning the flow of intelligence material and their cause, and

(2) why disclosure of all of the types of material falling within the two broad categories describing the Section 27 Information on whatever terms, understandings or channels that information was given, would give rise to that risk.

17. It is common ground that our approach to the assessment of a risk to national security made by or on behalf of the Secretary of State should be that set out in *SSHD v Rehman* [2003] 1 AC 153 at paragraph 26 per Lord Slynn and paragraphs 48, 49, 53 and 57 per Lord Hoffmann.

18. It follows that if we accepted the description of the material included in Mr Bristow's evidence Rule 14(10) would apply and absent an arguable rationality challenge we should accept the view of the FCO that disclosure of the description of the example would be contrary to national security.

19. It was therefore agreed that we should look at the closed material on the basis that we would so apply Rule 14(10) and if having done so we considered that any disclosure or gisting of what we had seen should take place we would hear further argument from the parties on whether we had the power to do this and if so what disclosure or gisting should take place.

20. From the open material Mr Pitt-Payne QC for APPGER identified two main strands of information which had been redacted. The first strand concerned statements from the US authorities as to their expectations of confidentiality and the implications of disclosure. He argued that such statements were already in the public domain. If the redacted information was the same, there was no point in it being closed. If it was wider, then it should likewise be in the public domain. The second strand concerned a practical example of what had ensued where there had been past disclosure, apparently in relation to diplomatic material. In the latter context the questions we were invited by APPGER to ask and pursue were whether the disclosure arose in the Binyam Mohammed litigation context and, if not, how close to that national security context? Further, what harm had resulted: was it harm to intelligence sharing or some other harm? Further, and in any event, could the closed material be further gisted?

21. As appears from the statement we made after the closed session we accept that the redacted information identified by the comparison between the open and closed versions of paragraphs 26 to 32 and 35 of Mr Bristow's statement is a description of an example as asserted by Mr Bristow.

22. It follows that no one could describe it without disclosing matters that impact national security and in our view:

(1) No arguable challenge to the FCO view that its disclosure would be contrary to national security could be made, and
(2) the above analysis demonstrates that no further description is necessary or appropriate because if it is to comply with Rule 14(1) it would not add to what Mr Bristow has said.

23. As stated In paragraph 33 of Mr Bristow's statement he is there referring to a conversation. It is not part of the description of the example described. Rather, it is an expression by Mr Liotta of his views in a confidential setting.

24. As we stated at the hearing, this expression of view does not add to what is in the public domain. As invited by APPGER: we considered this material from the viewpoint of whether (a) it could be relied on to support the FCO's case by bolstering or adding to what has been said in public relating to the views and expectations of the US or the reasoning behind them or (b) it could assist APPGER by giving rise a line of questioning or enquiry or argument. It does neither.

25. So, no issue arises on whether the FCO should be permitted to bolster their case on the views, expectations and likely reaction of the US and the reasons for them by reference to confidential communications which the tribunal has considered in a closed procedure or whether APPGER should be shown or given a gist of the redacted material to assist it in advancing its case.

26. In our view, it follows that:

(1) the FCO should not be permitted to introduce this evidence in a closed procedure because it adds nothing to what is in the public domain, and
(2) the FCO are entitled to withdraw it because it was provided to the FCO in confidence and its disclosure or gisting would not assist APPGER.

27. It was therefore not necessary for us to hear further argument on whether the FCO had a right to withdraw this evidence even we were of the view that it should be disclosed or gisted (e.g. because it assisted or informed the case of the party excluded from the closed procedure). If the FCO has such a right the evidence would not be relevant evidence within our formulation of the approach to be applied set out in paragraph 10 above.

28. The remainder of the redactions and the closed exhibits are or contain a description of the documents that are the subject of this appeal and there was no challenge to them being considered on a closed basis.

29. We are not going to give any closed reasons because we see no need for them.

63. Pausing there we comment that:

(i) Dr Bristow's open statement makes it clear that he is asserting that the FCO was asserting that what we referred to as an Intelligence Information Sharing Risk in our Interim Decision would arise from disclosure of the diplomatic exchanges in respect of which the section 27 exemption was claimed (albeit that he recognises that clearest response would affect the frankness and quality of diplomatic exchanges)

(ii) Our Rule 14 Decision was intended to convey and we believe does convey clear messages to APPGER.

(iii) If as we found Rule 14(10) was engaged, and so in the context of this case we must ensure that disclosure does not give rise to the Intelligence Information Sharing Risk (the risk alleged to national security) it was common ground that our approach to the assessment of that risk should be that set out in *SSHD v Rehman* and thus that absent a rationality challenge we should accept the view of the FCO.

64. Our definition of the Intelligence Information Sharing Risk was and is as follows (see Interim Decision at [67]):

> "67. The risk asserted and accepted in the BM litigation was that disclosure of intelligence material provided pursuant to the control principle would give rise to a serious and openly expressed risk evidenced by the BM letter that the US would in the future not share so much intelligence material with the UK. This carries the consequential risk that the ability of the UK to build up a mosaic of information which could be used, for example, to identify and frustrate a terrorist plot or other potential harm to national security would be seriously prejudiced. The FTT concluded that disclosure of any of the information in respect of which the section 27(1)(a) exemption was claimed would give rise to such a risk and its view that there was a very strong public interest against such disclosure (as opposed to a strong one) is based on that conclusion. We shall refer to this risk as an Intelligence Information Sharing Risk."

65. The messages from our Rule 14 Decision include:

> (i) The National Security Risk was engaged and Rule 14(10) precluded disclosure of all the redacted material (other than that referred to in paragraph 33);
> (ii) The example and that redacted material was evidence that there had been harm to intelligence sharing (see paragraphs [20] and [21]);
> (iii) The redacted material (apart from that referred to in paragraph [33]) provided strong support for the conclusion asserted in paragraph [36] and thus for the existence of the Intelligence Information Sharing Risk (see paragraph [7]).

66. So Dr Bristow's open statement cures the defects we concluded existed before the FTT in identifying the risks to the public interest that disclosure of diplomatic exchanges would give rise to and clearly identified that they include an Intelligence Information Sharing Risk, our Rule 14 Decision makes it clear that the assertion of this risk was supported by the example given and disclosure of the redacted material (save that referred to in paragraph 33) would give rise to a risk to national security, and it was common ground that our evaluation of the Intelligence Information Sharing Risk was governed by the approach in *SSHD v Rehman* [2003] 1 AC 153.

67. As stated by one of us in *Department of Health v Information Commissioner and Lewis* [2015] UKUT 0159 (AAC), the reasoning in *Rehman* relating to the weight and respect to be given to the views of the government on public interest issues are founded on two rationales namely (a) democratic accountability (see for example paragraphs 49, 50, 53, 58 of Lord Hoffmann's speech and the postscript at 62), and (b) institutional competence (see, for example, paragraph 57 of Lord Hoffmann's speech). And it is the latter that has direct relevance to qualified exemptions under FOIA.

68. Following our Rule 14 Decision, APPGER:

> (i) confirmed that it intended to pursue the appeal;
> (ii) served a witness statement of Thomas R Pickering, a retired US ambassador and senior diplomat, dated 18 March 2014;
> (iii) served a witness statement of Andrew Guy Tyrie MP dated 20 March 2015 and indicated that his commitments relating to the election would preclude him from giving oral evidence.

69. Mr Tyrie's statement has lengthy exhibits and is directed to the public interests in disclosure. Much of it addresses the present position as opposed to that when the FCO made and then in June 2009 reviewed its decision.

70. Mr Pickering's witness statement challenges the validity and force of Dr Bristow's analysis and assertion of the risks of harm to the pubic interest if the disputed material in respect of which the section 27 exemption was claimed was to be disclosed ("the Section 27 Information"). His focus is on the likely US reaction to such disclosure.

71. On 30 March 2015, the Chamber President directed that the hearing would proceed on the basis that there was to be no oral evidence. By a letter dated 14 April 2015 APPGER asked that this direction be reconsidered and that they be permitted to cross-examine Dr Bristow. The basis for the request was that Mr Pickering puts forward a number of reasons as to why Dr Bristow's assessment of the likely harm is significantly overstated. In particular paragraph 41 of the Chamber President's decision in *Department of Health v Information Commissioner and Lewis* was cited to support their application on the basis that they asserted that there was a dispute as to the objectivity, competence and accuracy of the evidence of Dr Bristow particularly on the existence and likely realisation of the Intelligence Information Sharing Risk.

72. In our view surprisingly Mr Pickering's statement and that application make no reference to our Rule 14 Decision or to the open examples of assessments of US reaction exhibited to Dr Bristow's statement or to the common ground on the approach to be taken by this tribunal based on *Rehman* to an assessment by the UK government (through the FCO) of a risk to national security, and so of the Intelligence Information Sharing Risk.

73. By a further direction, dated 16 April 2015, the Chamber President confirmed the direction made on 30 March 2015 adding that:

> (i) the parties may apply at the hearing for an adjournment so that oral evidence may be heard; and
>
> (ii) he was not satisfied that there should be any oral evidence. In any event he was of the view that if there is to be oral evidence from any of the Second Respondent's witnesses on the public interest issues the Tribunal would at least have to consider whether it should also hear oral evidence from one or both of the Appellant's witnesses on those issues (at least one of whom we have been told is not available on 28 and 29 April) and if there was to be oral evidence it should all be heard at one hearing.

74. No application for an adjournment so that oral evidence could be heard by us was made but we permitted APPGER to file a further statement by Mr Pickering to address points made in the FCO's skeleton argument in reliance of Dr Bristow's statement and to the effect that Mr Pickering's evidence should be treated with great caution. The FCO and the Commissioner did not object to this evidence being put in.

75. As APPGER took this course and so forwent their opportunity to let the three-judge panel reconsider whether there should be oral evidence there is no need for us to rule again on their application for oral evidence for the purpose of testing Dr Bristow's assessment of the risks of harm to the public interest.

76. However wearing our investigative hat we record that:

> (i) we are puzzled by the approach taken by APPGER to the introduction of Mr Pickering's evidence and their application to cross examine Dr Bristow; and
>
> (ii) we are satisfied that oral evidence was unnecessary and inappropriate.

77. It was not suggested that oral evidence would have assisted us in assessing the public interests in favour of disclosure. We agree. Mr Tyrie's statement is full and no point was made that the public interests he described as existing at and before the time of the internal review (June 2009) did not exist or were inappropriately described. The application for oral evidence related to APPGER's wish to challenge the evidence, reasoning and conclusions of Dr Bristow on the public interests against disclosure.

78. As our Rule 14 Decision shows, Dr Bristow's reasoning and conclusions are supported by the closed example he gave.

79. They are also supported by the following open evidence in exhibits to his statement:

> (i) Paragraphs 230 and 231 of the Intelligence and Security Committee Annual Report for 2010–2011 which are in the following terms:
>
> > 230. In March 2011, the Committee visited the United States to discuss these concerns first-hand. We were struck by the force with which certain interlocutors within the US intelligence community voiced their worries about the actions of the UK courts, and we heard from a number of US agencies and departments that they viewed their material as ***
> >
> > 231. *** We have seen in the past how relatively insignificant pieces of background intelligence have, when connected together, provided important clues on individuals involved in extremism or terrorism. This is the fragmentary nature of intelligence: even the smallest piece of background intelligence can provide a critical piece of the jigsaw puzzle.
>
> (ii) Paragraph 157 of the Intelligence and Security Committee Annual Report for 2011 – 2012, which reads:
>
> > 157. The courts did not accept this principle, in the Binyam Mohamed Case and the result has been that the US has re-examined some elements of its bilateral intelligence sharing procedures. The Intelligence and Security Committee has heard some of the US's concerns first hand and is in no doubt that there has been an impact on intelligence cooperation. It is essential that the UK can be trusted: our Agencies must be able to give their word that they will not reveal

> intelligence material that our foreign partners have shared with us, or we will be shut out.

(iii) The evidence of David Anderson QC to the Joint Committee on Human Rights in his evidence in answer to questions 72, 74, 77 and 80. The last of these reads:

> Q I wanted to take you back to something that you said, something that we have heard articulated repeatedly, and that is that if a Government or a court discloses sensitive information received from another Government, then it is unlikely that that Government will provide sensitive information in the future. Do you not think that is a slightly simplistic argument? I know it is made to you, but do you not think it is simplistic, because the reality is that the provision of materials between states is a symbiotic process and terrorism is a process with infinite international ramifications, so is that not a bit of a smoking mirror?
>
> A I quite agree with you that the statement as it is put to me is simplistic. It is not that you pull the lever and this result happens. It is equally clear to me that if our courts were to get into the habit of disclosing information of this kind contrary to the wishes of the US Government, the US Government would wish to reassess the intelligence relationship. And, indeed, on the basis of what I have been shown, there are signs that we are currently on probation and that there has already, in some respects, being a diminution in intelligence sharing.

80. We acknowledge that these passages have a direct link to the control principle and thus to the exchange and disclosure of information on intelligence channels rather than to exchanges on diplomatic channels. But they support Dr Bristow's reasoning concerning the risk of harm arising from US reaction to disclosure of material they do not wish to be disclosed and his evidence that the disclosure in the Binyam Mohamed case has caused harm (see paragraph 22 of his statement).

81. The quoted answer of David Anderson reflects points we made in our Interim Decision concerning the comparison of like with like.

82. However, the point made by Dr Bristow in paragraph 25 of his statement concerning the difficulties of distinguishing between the subject matter of the Section 27 Information and intelligence material cannot be sensibly disputed. And, as our Rule 14 Decision shows the closed material read with his statement and his open exhibits provides strong support for the conclusion expressed in paragraph 36 of his statement on the existence of the Intelligence Information Sharing Risk.

83. It follows that from a sound evidential base Dr Bristow sets out a rational analysis and argument founded on the factors he identifies for his conclusion that disclosure of the Section 27 Information would give rise to the Intelligence Information Sharing Risk.

84. It is not asserted that Dr Bristow has not given a true account of his views or that the examples he gives are false or that he has failed to have regard to relevant factors. Rather the dispute relates to the weight he has given to relevant factors and there is an unparticularised challenge to his objectivity, competence and accuracy.

85. As with Dr Bristow, it is not asserted that Mr Pickering has not given a true account of his views and it is accepted by the FCO and us that he is a distinguished diplomat whose career enables him to give an informed view of the likely US reaction to events and so here disclosure of the Section 27 Information.

86. In his statement he says at paragraph 8 that he finds it "highly unlikely that the Binyam Mohamed case caused any material damage to the US-UK intelligence sharing relationship". At paragraph 20 he says that a suggestion that the received wisdom is that the disclosure ordered in that case caused the US to lessen or complicate its intelligence relationship with the UK highly unlikely and he then refers to an earlier report of his own and the views of an investigative journalist to support that conclusion. But Dr Bristow's open and closed evidence shows that there was some.

87. In his second statement, Mr Pickering addresses some of that evidence, stresses that there is a need to understand how and in what ways there has been a diminution of intelligence sharing but does not address our Rule 14 Decision.

88. A theme of Mr Pickering's evidence is that the US would not or would be very unlikely to act against its own interests and it is not in its interests to hazard the central security of its closest ally by withholding intelligence material. We acknowledge the force of this and his reasoning generally. But we comment that his point on understanding how and what intelligence might be involved and the point made by Mr Anderson in his evidence about apparently insignificant evidence adding to a jigsaw are relevant to the risk that relevant intelligence material would be withheld.

89. Like Dr Bristow, and as one would expect of them both, Mr Pickering presents from the evidence base he identifies a rational and reasoned analysis leading to his conclusion that Dr Bristow has significantly overstated the likelihood and so risk of harm occurring as a result of a diminution of intelligence sharing.

90. Inevitably their reasoning is directed to the reaction of the US to disclosure and so uncertain assessments of the future from a base of their respective experience and the evidence they put forward.

91. In our view a fair overall reading of Mr Pickering's evidence is, as asserted by APPGER's solicitors on the application to cross-examine him, that Dr Bristow has significantly overstated the Intelligence Information Sharing Risk and not that it does not exist or can be discounted. For example, at paragraph 19 in his first statement Mr Pickering says when addressing paragraph 36 of Dr Bristow's evidence (the core assertion of the Intelligence Information Sharing Risk) that:

> ... were a UK court to order disclosure of information, the like of which is described in paragraph 36 of Laurie Bristow's witness statement (page 8), this would not necessarily (his emphasis) result in the US Government reducing or complicating its intelligence relationship ..... Consequently, the US' response to such a scenario is more variable and nuanced (and potentially less damaging to the UK's national interests) that the FCO's assertion suggests (our emphasis).

92. So their evidence establishes a difference of opinion on the risk of harm to national security arising from the reaction of US decision makers to the disclosure sought by APPGER of the Section 27 Information. The challenge to Dr Bristow's conclusion relates to the weight to be given to competing factors rather than a failure

to consider relevant factors or to consider irrelevant ones, So the challenge relates to reasoning.

93. Even if it was properly open to us to choose between the two conclusions on likelihood of harm or to reach a conclusion somewhere between them we do not accept that hearing either or both of them give oral evidence and thereby see how they fared under cross-examination would be of any reliable assistance to us. An approach to undermine some of their "stepping stones" would identify and confirm the uncertainties of the exercise they are involved in relating to the likely reactions of potentially a wide range of people and would not narrow down issues of primary fact. So the issues would return to ones of argument relating to the weight to be given to the competing relevant factors.

94. As was in our view correctly common ground at the Rule 14 hearing that argument has to be directed before us to the rationality of Dr Bristow's view on the existence of the Intelligence Information Sharing Risk. Cross examination would not help on that and nothing that Mr Pickering says founds the view that Dr Bristow's evidence and conclusion is not rational or does not have a sound evidential base or left out of account relevant factors or had regard to irrelevant ones.

The two documents in respect of which only the section 27 exemption is claimed

95. These are documents 59 and 78. It was not in dispute that the qualified section 27 exemption applies to the relevant information in these documents. The dispute related to the public interest balance.

96. Dr Bristow says that document 59 contains detail of communication between HMG and the US and that it is clear that this information concerns terrorist suspects and the threat posed. This is correct. There has been no partial disclosure of this document.

97. There has been part disclosure of document 78 which as Dr Bristow says contains an instruction for the British Embassy in Washington to communicate to the US authorities (paragraph h) and a note of a conversation between the Minister and the British Embassy (paragraph l). These are the paragraphs in issue. At the hearing we informed APPGER that they relate to UK /British nationals. We agree that if the paragraphs nonetheless provided information about British residents they would be in scope. In our view they do not and so they are not covered by the requests.

The public interest balancing exercise in respect of Document 59

98. This is directed to the position in June 2009.

99. The connection between national security issues and the Section 27 Information in document 59 is obvious from Dr Bristow's description that it concerns terrorist suspects and the threat posed.

100. *The public interest in favour of maintaining the exemption*. The connection referred to in the last paragraph plainly engages the last two sentences of paragraph 36 of Dr Bristow's statement and thus the Intelligence Information Sharing Risk. It follows in our view that its disclosure would correct be regarded as a disclosure of intelligence material relating to national security.

101. We agree with the FCO that an important factor in determining the weight to be given to that risk of harm is the gravity of the harm should it occur and this factor

exists, even if the likelihood of harm is small and so if Dr Bristow has overstated the Intelligence Information Sharing Risk (see *R (Lord Carlile of Berriew) v SSHD* [2014] UKSC 60 in particular at paragraph 71, which also reflects the institutional competence rationale referred to above as does paragraph 75).

102. Again as indicated by the cited evidence of David Anderson that grave harm can arise from the withholding of what on its own or in the eyes of the person holding it is insignificant information because it might be an important part of a jigsaw.

103. We accept as submitted by the FCO that a precautionary approach is generally required in dealing with potential threats to national security and public safety (see paragraph 51 of the *Lord Carlile* case).

104. We also agree with the FCO that it is important to draw a distinction between information that the US has or may itself put into the public domain and that which is or may be released by another government or a court or tribunal in that state. This is because there is an obvious difference between the original provider of the information releasing it and its release by another without the permission of the provider.

105. *The public interest in favour of disclosure.* We have already mentioned that APPGER wish to establish (i) the extent of any UK contribution or involvement to the chain of events leading to the men's detention and rendition; (ii) what the UK authorities knew of these matters and when; and (iii) when and how the UK responded. Like the FTT and the FCO we acknowledge and accept that there is a strong public interest in the establishment of those matters which are directed to informing the public of the part played by the UK government through its intelligence services and other agencies in the detention of two British residents, Mr Bisher al-Rawi and Mr Jamil el-Banna, in The Gambia and in their subsequent extraordinary rendition to Guantanamo Bay via Afghanistan.

106. That public interest exists whatever part was so played by the UK government in those events and thus for example whether it assisted or supported them or opposed them and made protests about them.

107. *The weighing or balancing exercise.* This involves an evaluation of different and competing public interests including public interests in ascertaining actions of the security services in the UK and abroad and of others based on the product of their work. It is thus an "apples and pears" exercise that is not capable of an arithmetical analysis.

108. In our view the key to it is to look at:

> (i) the value of the benefits advanced (i.e. the public being informed of the above matters and the impact this would be likely to have or has the potential for having on the future conduct of the UK government and its agencies in the future): and
>
> (ii) the gravity of the harm that would arise if the Intelligence Information Sharing Risk materialised.

109. In our view that approach leads inexorably to the conclusion that the public interest in avoiding the gravity of the harm outweighs the value of those benefits.

110. This is so even if the information would be likely to assist APPGER in achieving its aims. As to that, we accept the jigsaw point applies and we are very aware that we do not know and have not analysed all the pieces held by APPGER. Nonetheless we do not see how this information is likely to assist them.

111. In contrast a diminution in intelligence sharing would give rise to serious and grave harm or a serious risk of such harm.

The public interest balancing exercise in respect of Document 78

112. It is not strictly relevant for us to carry this out. However the point that the information was outside the scope of the request was not taken and we will deal with it. Important factors are that the information in these paragraphs

> (i) is clearly about diplomatic exchanges that are to take place in the near future; and
>
> (ii) does not add to what is already in the public domain.

113. *The pubic interest in maintaining the exemption.* In contrast to document 59 Dr Bristow does not advance a close connection between the content of the two paragraphs in issue to national security and intelligence matters. We agree that it does not exist and so the foundation advanced for the Intelligence Information Sharing Risk in respect of these two paragraphs is the closeness of the subject matter to the Binyam Mohamed case and its fallout and so the last sentence of paragraph 36 of Dr Bristow's statement.

114. Dr Bristow's analysis of the Intelligence Information Sharing Risk founds the conclusion that an order for disclosure by this tribunal of Section 27 Information would have the potential to trigger that risk even if the information was by another route or routes already within the public domain. This is because it covers a reaction to such an order and thus to a disclosure that has not been agreed to by the US. That reaction might not be based on a full report or appreciation of the reasons for the order for disclosure. Also, it might simply discount them and focus on the result of a disclosure being made without US consent, disagreement with and annoyance about that result coupled with a view that it evidences a risk of disclosure of other material.

115. It follows that in respect to these two paragraphs of Section 27 Information the Intelligence Information Sharing Risk is not as high, but still exists.

116. The risk that future diplomatic communications will be curtailed or complicated as described by Dr Bristow is therefore of more relevance and the comments we make as to that also apply to document 59. It too is lowered by the fact that the information is in the public domain.

117. *The public interests in favour of disclosure.* These are the same. However, the point that the information is in the public domain lessens even if it does not eliminate their strength.

118. *The weighing or balancing exercise.* The lowering of the Intelligence Information Sharing Risk does not alter the gravity of the harm if it materialises. Although not so grave, serious harm would result if the US curtailed or complicated diplomatic communications.

119. So the publication of the information has no real effect on the harm if the risks of harm advanced materialise. Its impact is that it lowers the likelihood of the risks materialising but does not eliminate it.

120. On the other hand, that publication greatly reduces even if it does not effectively remove the value of the benefits advanced.

121. This leads to the result that the balance of the public interest is between avoiding what would be grave or serious harm if the risks of harm materialise or conferring minimal or no benefit. This plainly falls in favour of non-disclosure

Issue (5): the document where the information has already been disclosed

122. We can deal with this last issue very shortly. It concerns some allegedly unfinished business. The FCO argues that the requested information in Document 61 has already been disclosed. APPGER questions that but also contends that if that is indeed the case, then the document should be released.

123. Document 61 is known to be a FCO document dated 5 June 2006. It was relevant to the original Request 13 by APPGER, which was a request for information as to "the 'matters' that enabled Jack Straw to approach the US authorities on Bisher al-Rawi's behalf". The information already disclosed by the FCO from Document 61 read as follows: "... Mr Straw decided that he would make representations in the light of Mr al-Rawi's fact-specific claim... The request was made on the basis of shared CT [counter-terrorism] objectives". The FCO and the Commissioner decided that the rest of Document 61 was out of scope. The FTT concluded that the qualified exemption in section 27(1) applied, with the public interest favouring maintaining the exemption.

124. We have studied Document 61. It did not detain us for long. It is actually a draft answer to a Parliamentary Question with a background note comprising three short paragraphs (including the disclosed material). The rest (what little there is) is out of scope. We further agree with Ms Steyn in any event that APPGER's argument that the rest of Document 61 should be released is misconceived, given that the basic principle is that FOIA gives a (qualified) right to information, not to particular documents. That fundamental distinction between the record and the information contained within it remains intact following the Court of Appeal's very recent decision in *The Independent Parliamentary Standards Authority v ICO & Leapman* [2015] EWCA Civ 388, even if there are some nuances at the margins. There is no obligation on the FCO to release the additional material contained in Document 61.

Conclusion

125. Our decision is as set out above.

Signed on the original
on 2 July 2015

Mr Justice Charles

Mr Justice Mitting

Upper Tribunal Judge
Nicholas Wikeley