



Tribunals Service
Information Tribunal

Information Tribunal

Appeal Number: EA/2006/0045

Freedom of Information Act 2000 (FOIA)

Heard on papers at

Procession House, London

Date 12th February 2007

Decision Promulgated

.....

BEFORE

INFORMATION TRIBUNAL CHAIRMAN

John Angel

And

LAY MEMBERS

John Randall and Marion Saunders

Between

NORMAN BAKER MP

Appellant

And

INFORMATION COMMISSIONER

Respondent

And

THE CABINET OFFICE

And

NATIONAL COUNCIL OF CIVIL LIBERTIES

Additional Parties

Decision

The Tribunal upholds the decision notice dated 11th July 2006 and dismisses the appeal.

Reasons for Decision

The request for information

1. On 31st January 2005 Norman Baker MP (Mr Baker) made a request to the Historic Records and Openness Unit of the Cabinet Office (the Request) in the following terms:

“I am writing to you concerning the operation of the Wilson Doctrine, as set out by the Prime Minister, Harold Wilson, in response to a question from a former MP for Lewes, Sir Tufton Beamish, on 17 November 1966.

Can you please inform me whether, since that date, there has been a change of policy which has occurred but has not yet been reported to the House of Commons, and especially if he will state how many MPs have been subjected to telephone tapping or other intrusive surveillance since that date. I am asking for a number to be given, along with the year of intercept, not for the names of the MPs in question.”

2. On 4th March 2005 the Cabinet Office responded as follows (the Refusal Notice):

“In relation to your first request: whether, since 17 November 1966, there has been a change of policy which has occurred but has not yet been reported to the House of Commons; by virtue of section 24(2) of the Act the Cabinet Office can neither confirm nor deny that it holds the information you request.

In relation to your second request; how many MPs have been subjected to telephone tapping or other intrusive surveillance since that date; by

virtue of sections 23(5) and 24(2) of the Act the Cabinet Office can neither confirm nor deny that it holds the information you request.”

3. On 22nd March 2005 Mr Baker requested an internal review of the decision. On 14th July 2005 he received a response from Colin Balmer of the Cabinet Office upholding the Refusal Notice and adding that “I should inform you that when your original request for information was considered a public interest test should have been conducted in relation to section 24(2). Unfortunately at that time it had not, but I can confirm that this has now been done.” The letter continued that “However, in this case, by virtue of section 17(4), the Cabinet Office is under no obligation to state why either exemption applies. Nor are we required to give reasons for claiming that the public interest in maintaining the exclusion of the duty to confirm or deny in relation to section 24(2) outweighs the public interest in disclosing whether or not we hold the information.”

The complaint to the Information Commissioner

4. On 27th July 2005 Mr Baker complained to the Information Commissioner (the Commissioner) who then investigated the complaint and eventually issued a decision notice on 11th July 2006 (the Decision Notice), nearly 12 months later which seems to us to be a very long time to investigate a complaint, particularly after the prolonged dealing with the internal review by the Cabinet Office. The Decision Notice upheld the Refusal Notice.
5. It should be noted that the Commissioner has reached an agreement with the Secretary of State for Constitutional Affairs acting on behalf of central government departments that a Ministerial Certificate under sections 23(2) and 24(3) would only be obtained in the event of a complaint to the Commissioner. In this case no such certificate was issued. In the Decision Notice the Commissioner welcomed the fact that the Cabinet Office had not made use of a Ministerial Certificate but, rather, had chosen to explain the reasons for its refusal in a letter to Mr Baker of 5th May 2006.

Refusal notice

6. During the Commissioner's investigation of the complaint his office pointed out to the Cabinet Office that they were concerned about whether the Cabinet Office was correct to rely on the provisions of section 17(4) – see paragraph 17 below. As a result the Cabinet Office sent the letter of 5th May 2006 explaining to a limited extent why they had applied the section 24 exemption but without really explaining how they had applied the public interest test under section 17(3).
7. Even though the letter of 5th May was regarded as adequate by the Commissioner we do not regard it as such. Having considered the evidence in this case it is clear to us that section 17(4) should not have been relied upon and that it would have been possible to have provided a fuller refusal notice without in any way compromising the exemptions claimed in this case. In addition to properly complying with the statute this would have had the beneficial effect of more adequately informing Mr Baker of the reasons why the Cabinet Office applied the exemptions in the way that it did, which may have effected his decision to appeal to this Tribunal.

The Appeal to the Tribunal

8. Mr Baker appealed to this Tribunal on 18th July 2007 challenging the Commissioner's decision on three grounds:
 - (i) The Commissioner failed to take account of the fact that the Wilson Doctrine established special treatment of MPs, and placed them in a special category in relation to interception.
 - (ii) The Commissioner failed to take proper account of the decision of the National Security Appeals Panel of the Information Tribunal in *Baker v Secretary of State for the Home Office*.
 - (iii) The Commissioner ought to have explored the possibility that the Cabinet Office could have given a partial answer to the Request. For instance it could have given an answer for the years leading up to 2001 only.
9. The Cabinet Office who was not an original party to this appeal has been joined as a party and so has the National Council of Civil Liberties (Liberty).

10. It was agreed by all parties that the appeal did not require an oral hearing and could be dealt with on the basis of the papers before the Tribunal.
11. We have set out the evidence, arguments of the parties and our findings at some length in this decision because of the importance of the issues in the case.

Factual background

12. On 17th November 1966 the then Prime Minister, Harold Wilson, stated in response to questions in the House of Commons that he had given an instruction that there was to be no tapping of the telephones of members of the House of Commons, but that if there was a development of any kind which required a change of policy then he would at such moment as seemed compatible with the national security of the country make a statement in the House about it. This became known as the “Wilson Doctrine”.
13. The Hansard report for 17th November 1966 of the Prime Minister’s answers to questions in which the Wilson Doctrine was stated in its full context are set out below: at columns 634-635 of Hansard

"Q13. Mr RUSSELL KERR: To ask the Prime Minister on how many occasions warrants have been issued for the tapping of Hon Members' private telephones; and if he will give an assurance that no such warrants will be issued.

Q14. Mr DONNELLY: To ask the Prime Minister whether he will state the criteria upon which he has issued his warrant for the tapping of Hon Members' telephones.

Q15. Mr PETER M JACKSON: To ask the Prime Minister if he will bring up to date the statistics of warrants authorising telephone-tapping given to the Committee of Privy Councillors; and whether he will issue an annual return, showing the number of permissions that have been given, the number that have been withdrawn, and the number outstanding at the date of making the return.

Q16. Sir T BEAMISH: To ask the Prime Minister whether he will give an assurance that the issue of warrants giving authority to tap telephone conversations remains under the Home Secretary's sole authority; and in what respects the criteria governing the issue of such warrants have been changed since October 1964.

The Prime Minister (Mr Harold Wilson): With permission, I will now answer Questions Nos Q13, Q14, Q15 and Q16.

The House will know that since the publication of the Report of the 'Committee of Privy Councillors appointed to Inquire into the Interception of Communications' in October 1957, it has been the established practice not to give information on this subject.

Nevertheless, on this one occasion, and exceptionally because these Questions on the Order Paper may be thought to touch the rights and privileges of this House, I feel it right to inform the House that there is no tapping of the telephones of hon Members, nor has there been since this Government came into office.

The House will, I know, understand that the fact that I have felt it right to answer these Questions today in no way detracts from the normal practice whereby my right hon Friend the Home Secretary and myself are unable to answer Questions relating to these matters."

And then at column 639

Mr Driberg: Is my right hon Friend aware that at least two of his answers have implied quite clearly that there was tapping of hon Members' telephones before the present Government came to power in 1964? Would he say anything more about that?

The Prime Minister: I hold no responsibility for what was done in this matter before the present Government came to power, but it is fair to point out that the Privy Councillors' Report itself said that Members of Parliament should not be treated differently from members of the public. It is always a difficult problem. As Mr Macmillan once said, there can only be complete security with a police State, and perhaps not even then, and there is always a difficult balance between the requirements of democracy in a free society and the requirements of security.

With my right hon Friends, I reviewed the practice when we came to office and decided on balance - and the arguments were very fine - that the balance should be tipped the other way and that I should give this instruction that there was to be no tapping of the telephones of Members of Parliament. That was our decision and that is our policy. But if there was any development of any kind which required a change in the general policy, I would, at such moment as seemed compatible with the security of the country, on my own initiative make a statement in the House about it. I am aware of all the considerations which I had to take into account and I felt that it was right to lay down the policy of no tapping of telephones of Members of Parliament."

[emphasis added; the part underlined is what has come to be known as the Wilson Doctrine]

14. From these passages it would appear that questions about telephone tapping of MPs' phones would not normally be answered and it had become the established practice not to give information on the subject. However, as an exception to that rule, the then Prime Minister stated that he had given an instruction that MPs' telephones were not to be tapped.

15. A key element of the Wilson Doctrine is that if there was any development of any kind which required a change in the general policy, the Prime Minister would, at such moments as seemed compatible with the security of the country, make a statement in the House of Commons about it. We are informed that no such statement has been made to the House at any time since then concerning any change of policy. The Wilson Doctrine has been maintained under successive administrations and the current Prime Minister made the announcement in paragraph 16 below to the House on 30th March 2006 that the Wilson Doctrine would be maintained. The announcement followed a review prompted by the circumstances to which the Prime Minister referred in response to a PQ on 15th December 2005::

Hansard : Column 173WS
Wilson Doctrine (Written Ministerial Statement)

The Prime Minister (Mr. Tony Blair): The Government have received advice from the Interception of Communications Commissioner, Sir. Swinton Thomas, on the possible implications for the Wilson Doctrine of the regulatory framework for the interception of communications, under the Regulation of Investigatory Powers Act 2000.

The Government are considering that advice. I shall inform Parliament of the outcome at the earliest opportunity.

16. On 30th March 2006 The Prime Minister provided the following statement to the House of Commons: Hansard 95WS-96WS:

The Rime Minister (Mr. Tony Blair): In answer to questions in the House of Commons on 17 November 1966, the then Prime Minister, the right hon. Harold Wilson MP, said that he had been given instructions that there was to be no tapping of the telephones of Members of Parliament and that if there was a development which required a change of policy he would at such a moment as was compatible with the security of the country make a statement in the House about it. This approach, known as the Wilson Doctrine, has been maintained under successive administrations.

The Regulation of Investigatory Powers Act 2000 updated existing laws and set in place new legal procedures governing the interception of communications carried out on both public and private telecommunications systems. I advised the House in a Written Ministerial Statement on 15 December 2005, *Official Report*, column

173WS, that I had received advice from the Interception of Communications Commissioner, the right hon. Sir Swinton Thomas, on his view of the implications for the Wilson Doctrine of the regulatory framework established under the Act.

It was Sir Swinton's advice, taking into account the new and robust regulatory framework governing interception and the changed circumstances since 1966, that the Wilson Doctrine should not be sustained.

I have considered Sir Swinton's advice very seriously, together with concerns expressed in this House in response to my written ministerial statement on 15 December. I have decided that the Wilson Doctrine should be maintained.

Relevant statutory provisions

17. In relation to the Refusal Notice the Cabinet Office is subject to section 17.

Subsection 1 reads as follows:

(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that the information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

(a) states the fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent)

why any exemption applies.

Subsection 3 provides that, when refusing a request, a public authority

(3)...must... state the reasons for claiming ...that, in all the circumstances of the case, the public interest in maintaining the exclusion if the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information...

Subsection 4 provides that

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

18. In relation to the exemptions claimed by the Cabinet Office the relevant parts of section 23 provide as follows:

- (1) Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)*
- (2) A certificate signed by a Minister of the Crown certifying that the information to which it applies was directly or indirectly supplied by, or relates to, any of the bodies specified in subsection (3) shall, subject to section 60, be conclusive evidence of that fact.*
- (3) the bodies referred to in subsections (1) and (2) are:*
 - (a) the Security Service,*
 - (b) the Secret Intelligence Service,*
 - (c) the Government Communications Headquarters*
 - ...*
- (4) [not relevant to this appeal]*
- (5) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).*

19. The relevant parts of section 24 provide as follows:

- (1) 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.*

(2) The duty to confirm or deny does not arise if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security.

The proper approach to the issues in this appeal

20. The Tribunal's general powers in relation to appeals are set out in section 58 of the Act, as follows.

(1) If on an appeal under section 57 the Tribunal considers-

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

(2) On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

21. Section 23 creates an absolute exemption: see section 2(3). Section 24 creates a qualified prejudice-based exemption requiring the public authority to show that the exemption is required for the purpose of safeguarding national security. Once this has been shown it is necessary for the authority to consider the public interest test under section 2(1)(b). The question whether the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information is a question of law, alternatively of mixed law and fact.

22. In relation to each of these questions, the Tribunal may consider the merits of the Commissioner's decision, and may substitute its own view if it considers that the Commissioner's decision was wrong. The Tribunal is not required to adopt the more limited approach that would be followed by the Administrative Court in carrying out a judicial review of a decision by a public authority.
23. The Tribunal's decision in *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and EA/2005/0030) supports this wide approach to the Tribunal's powers. The *Hogan* case involved the application of the public interest test under section 2(2)(b), in relation to the duty to communicate information under section 1(1)(b). The present case involves the application of the public interest test under section 2(1)(b), in relation to the duty to confirm or deny under section 1(1)(a). We find the approach adopted in *Hogan* to the public interest test should apply here also; there is no reason to treat section 2(1)(b) differently from section 2(2)(b) in this regard.
24. In considering questions of fact the Tribunal may take account of all of the evidence before it, and is not confined to a consideration of the material that was before the Commissioner when he made his decision: see The Tribunal's decisions in *Quinn v Information Commissioner* (EA/2006/0010) at paragraphs 23-27 and *DTI v Information Commissioner* (EA/2006/0007) at paragraphs 34 and 54.
25. The competing public interests should be assessed by reference to the time when the request was made, not by reference to the time when the Commissioner made his decision or the time when the Tribunal hears the appeal: see the *DTI* decision at paragraphs 44 and 46.

Definition of National Security

26. The expression "national security" is not defined in FOIA and we can find no exhaustive definition in any statutes or judicial decisions. However we have been referred to the House of Lords (HL) decision on the topic in *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 AC 153. The HL made a number of findings and observations which we find helpful in this case:

- (i) “national security” means “the security of the United Kingdom and its people.” (para 50 per Lord Hoffman);
- (ii) the interests of national security are not limited to action by an individual which can be said to be “targeted at” the UK, its system of government or its people (para 15 per Lord Slynn);
- (iii) the protection of democracy and the legal and constitutional systems of the state is a part of national security as well as military defence (para 16 per Lord Slynn);
- (iv) “action against a foreign state may be capable indirectly of affecting the security of the United Kingdom” (paras 16-17 Lord Slynn); and
- (v) “reciprocal co-operation between the United Kingdom and other states in combating international terrorism is capable of promoting the United Kingdom’s national security” (para 17 Lord Slynn).

Questions for the Tribunal

27. We are concerned, in effect, with two requests for information, namely:

- (i) A request to confirm whether, since 17th November 1966, there had been a change of policy relating to the interception of MPs’ communications which had not yet been reported to the House of Commons; and
- (ii) The number of MPs who have been subjected to telephone tapping and other intrusive surveillance since that date, broken down by number and year of intercept.

28. There are three principal questions for the Tribunal in relation to these requests, namely:

- (i) Whether the Commissioner was correct to accept that both categories of information sought by the Request fell within the qualified exemption under section 24 and for the second part of the Request the section 24 exemption and/or the absolute exemption under section 23?
- (ii) Whether the Commissioner was correct to accept that the Cabinet Office was entitled to decline to confirm or deny whether such information was held?

(iii) Whether the Commissioner considered the application of the public interest test properly?

29. When considering these questions we need to take into account Mr Baker's grounds of appeal in paragraph 8 above.

Explanation of section 24 FOIA

30. Before considering these questions we consider it necessary to look at how section 24 is designed to be applied and its relationship with section 23, particularly to the second part of the Request where both exemptions have been claimed by the Cabinet Office. Philip Coppel in his book *Information Rights* (at pages 486 and 487) provides an examination of the detailed terms which we find helpful and is set out in paragraphs 31 and 32 below.

31. Section 24(1) renders information that does not fall within section 23(1) (i.e. information which was not directly or indirectly supplied by, and does not relate to, any of the security bodies) exempt information if or to the extent that exemption from the duty to communicate is required for the purpose of safeguarding national security. The exemption is a qualified exemption, so that even if information falls within the description of the exemption (and is thus exempt information) it is then necessary to consider whether in all the circumstances the public interest favours disclosure of the information or maintenance of the exemption. The fact the exemption is qualified implies that there may be instances in which it will be in the public interest to disclose information, notwithstanding that the exemption is required for the purpose of safeguarding national security. Otherwise the exemption will be effectively metamorphosed into an absolute exemption.

32. Section 24(2) provides that "the duty to confirm or deny does not arise if, or to the extent that, the exemption from section 1(1)(a) is required for the purpose of safeguarding national security." Unlike section 24(1), this limb of the national security exemption is not expressed to apply only to "information which does not fall within section 23(1)." Indeed section 24(2) is not expressed to relate to any particular category of information and it does not itself stand as a "provision" which "states that the duty to confirm or deny

does not arise in relation to information” for the purposes of section 2(1). As it was plainly not the intention that section 24(2) should operate independently of section 2(1), section 24(2) must nevertheless be made to interact with section 2(1), so that section 24 is itself a “provision” which “states that the duty to confirm or deny does not arise in relation to any information.” On this basis, section 24 provides that the duty to confirm or deny does not arise in relation to information which does not fall within section 23(1) (i.e. information which was not directly or indirectly supplied by, and does not relate to, any of the security bodies) if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of safeguarding national security. Again the exclusion is a qualified one, so that even if the terms of section 24(2) are satisfied (and thus the duty to confirm or deny does not arise) it is then necessary to consider whether in all the circumstances the public interest favours confirmation or denial or maintenance of the exclusion. The fact that the exclusion is qualified implies that there may be instances in which it will be in the public interest to divulge the existence of information, notwithstanding that exclusion from that duty is required for the purpose of safeguarding national security.

33. We agree with this analysis and find it to be helpful in this case.

The rationale behind the exemptions claimed

34. Christopher Wright (Mr Wright), the Director, Security and Intelligence, at the Cabinet Office gave evidence by way of witness statement. He explained that since the announcement of the Wilson Doctrine the Regulation of Investigatory Powers Act 2000 (RIPA) has been introduced, which regulates telephone tapping and other forms of interception. Mr Wright explained how RIPA would effect whether section 23 and/or section 24 FOIA will be claimed in cases involving the safeguarding of national security and why the Cabinet Office proceeded in the way it did in this case. We have set out his detailed evidence on these matters as they clearly explain the approach taken by the Cabinet Office:

“Interception of communications is governed by the provisions of Part I of the Regulation of Investigatory Powers Act 2000 (RIPA). Section 6 RIPA lists those bodies permitted to carry out communication interception under warrant. Included in that list are four of the bodies listed in section 23(3) of FOIA. However there are other bodies which may be permitted to carry out interception under section 6 of RIPA which are not listed in section 23(3) of FOIA. These include the police, Defence Intelligence Staff and HM Revenue & Customs. It is therefore not possible to say categorically that a section 23 body would be involved in communications interception, were any to have taken place. Any of the bodies listed in section 6 of RIPA could apply for a warrant. As such, it is important that any response provided under FOIA does not allow any deduction as to whether or not there is any involvement by a section 23 body. It is equally important to protect the fact of whether or not an intercepting body which is not listed in section 23 is involved and it is for that purpose the exemption at section 24(2) is claimed.

“It is important to reiterate here that section 23(5) was used in conjunction with section 24(2). The Cabinet Office used the exemptions to protect whether or not there is any relevant information. It was intended to prevent giving any answer to Mr Baker which would constitute a release of exempt information.

“A worked example might help explain the use of the neither confirm nor deny response using 23(5) and 24(2). In the example I will assume that a requestor makes two identical requests one year apart, each asking for the number of MPs who have had their communications intercepted. At the time of the first request no interception has taken place. The Cabinet Office replies that no information is held. During the following year an MP’s communications are intercepted under statutory warrant. The stated reason for which the warrant is sought is to protect national security. The Prime Minister, applying the Wilson Doctrine, determines that it would not, at that time, be compatible with

his remit for protecting national security to announce the interception to the House of Commons. Meanwhile the requestor makes his second request. The Cabinet Office holds information about the interception. The Cabinet Office can no longer answer that it holds no information. Answering that the Cabinet Office can neither confirm nor deny that it holds information will strongly encourage speculation that something has changed since he made his first request. In this example it would encourage speculation that an interception had taken place. This in itself would be damaging to national security.

“For the second part of the Appellant’s request, if the Cabinet Office were to rely solely on either section 23(5) or on section 24(2) in neither confirming nor denying that information was held, in those cases where section 23(5) was relied upon alone that reliance could itself reveal the information that one of the bodies listed in section 23(3) was involved. That in itself would constitute the release of exempt information. Thus it is necessary to rely on both sections 23(5) and 24(2) consistently in order not to reveal exempt information in a particular case.

“If, in the example, the Cabinet Office had given a neither confirm nor deny response to the first request and also to the second request, no exempt information would have been released. It is this consistency of use of the neither confirm nor deny response in reliance on both sections 23(5) and 24(2) that allows public bodies to protect national security. To give substantive replies to certain types of requests would inevitably lead to the release of exempt information through the cross referencing of different replies at different times.

“The neither confirm nor deny reply the Cabinet Office has given the Appellant in this case is consistent with the replies successive Prime Ministers have given to the House about this issue.”

35. The Commissioner appears to concur with this explanation. We find the explanation given by Mr Wright to be very helpful.

Liberty's intervention

35. Liberty submits that the justification advanced by the Cabinet Office for refusing to provide further information as to the first part of the request, namely the modification of the Wilson Doctrine, does not stand up to scrutiny for the following reasons:

- (i) The Wilson Doctrine is two-fold, providing that MPs' communications would not be intercepted, but that any change would be reported when national scrutiny considerations allowed;
- (ii) The carefully worded doctrine means that at any point since 17th November 1966 the policy of non-interception could have been varied, but the point has not yet been reached when the Prime Minister feels that it is appropriate to admit such a change;
- (iii) The announcement made to the House of Commons on 30th March 2006 that the Wilson Doctrine is to be "maintained" does nothing to alter the possibility set out in the previous point i.e. despite the special position in which MPs stand they are in exactly the same position as other members of the public because they have no means of being certain whether or not their communications are being intercepted and no means of finding out subsequently whether or not this has in fact occurred;
- (iv) In these circumstances, admitting that the policy has changed would not necessarily indicate MPs' communications are being intercepted. It would only mean that there was a possibility that this was now happening i.e. that MPs and those who communicate with them are already in exactly the same position as other members of the public.

36. Liberty, therefore, argues that it cannot be said that national security would be damaged by an admission that MPs are in the same position as everyone else. In effect Liberty is arguing that disclosing whether the Wilson Doctrine has changed will not result in the section 24 exemption being engaged.

37. The Cabinet Office and Commissioner both reject Liberty's submission which they say are based on a misunderstanding of the Wilson Doctrine and a non-sequitur consequence of this misunderstanding. They both argue that Liberty incorrectly suggest that the Wilson Doctrine does not place MPs in a position that is any different from that of any other member of the public. The Wilson Doctrine rests on responses to questions given by the then Prime Minister to questions in the House of Commons on 17th November 1966. From these answers it is, they argue, clear that MPs are in a special category in relation to this issue. They are the only group of people in the UK to benefit from a specific instruction that telephone interception should not take place. The doctrine is to be understood as a whole: it comprises: (1) the "usual rule" (i.e. that information about interception of communications will not be given); (2) the exception (i.e. the instruction that MPs' phone communications are not to be intercepted); and (3) the undertaking by the Prime Minister to inform the House of Commons if the exception no longer applied when such a statement was compatible with national security.
38. The Cabinet Office submit that the response given to the first part of Mr. Baker's request (neither confirming or denying that information was held, in reliance on section 24(2) FOIA) was an appropriate response.
39. Liberty's further submits that "admitting that the policy has changed would not, necessarily indicate that MPs' communications are being intercepted. It would only ... confirm the position ... that MPs and those who communicate with them are in exactly the same position as other members of the public."
40. Again the Cabinet Office disagrees. A statement that a change to the Wilson Doctrine had occurred would not simply serve to indicate that MPs were in the same position as other members of the public. As stated above, the Wilson Doctrine places MPs in a special position, and the fact that the Doctrine exists cannot be ignored. Absent any statement by the Prime Minister in accordance with the undertaking that forms part of the Wilson Doctrine, while the doctrine remains in place there are two possible scenarios in relation to the interception of MPs' communications. First, that the policy remains unchanged and no communications have been intercepted; secondly that the policy has changed but the Prime Minister judges that in order to protect national security he cannot yet inform the House of Commons of that fact. Given these two

possibilities, any “[admission] that the policy has changed” (or any response other than one that neither confirms nor denies that information is held) is capable of having the same effect as any statement made by the Prime Minister in accordance with the Wilson Doctrine itself.

41. The Cabinet Office further argues that absent any statement by the Prime Minister in accordance with the undertaking that is part of the Wilson Doctrine, an answer that stated information is held would suggest that the policy had changed and that interception either (a) had taken place; or (b) was taking place; or (c) might be about to take place. As such it would effectively alert any person concerned in activities contrary to the interests of national security to the need to use other forms of communication. An answer stating that no information is held would indicate to any such person that their activities had not been detected. Further, in such circumstances either a positive or a negative answer would tend to indicate the scope of knowledge available to the government, itself a matter capable of undermining the interests of national security. Thus, overall, the response provided to the first part of Mr. Baker’s request was given consistent with a proper application of section 24(2) FOIA.
42. We have considered all these arguments and do not accept Liberty’s contentions.

Are the exemptions engaged?

43. As we have already stated we find Mr Wright’s evidence very helpful and persuasive in relation to dealing with the first question in paragraph 28 above.
44. We are satisfied that the Commissioner was correct to conclude that the Cabinet Office had applied the exemptions properly to both parts of the Request. This means that the Commissioner was correct to find that for the first part of the Request section 24(1) was engaged and for the second part of the Request section 23(1) and section 24(1) were engaged.
45. Also we find that the Commissioner was correct to find that the way sections 23(5) and 24(2) were applied by the Cabinet Office i.e. neither to confirm or deny the information was held, was also correct.

46. In relation to the first part of the Request, i.e. changes in the Wilson Doctrine, as a qualified exemption is engaged we need to consider the application of the public interest test in relation to section 24.
47. However in relation to the second part of the request, i.e. the number of MPs subject to telephone tapping or other intrusive surveillance broken down by number and year of intercept, as there is evidence before us that such disclosure would involve disclosing information supplied by one of the bodies referred to section 23(3) there is no need to consider the matter further as this is an absolute exemption and once it is engaged then the Commissioner need not go on to consider the public interest test. Liberty also accepts this finding. However even if we are wrong here and section 24(1) applies to this part of the Request the application of the public interest test, dealt with below, relates to the Request as a whole.

The Cabinet Office's application of the public interest test

48. We are again indebted to Mr Wright for his very clear explanation of the Cabinet Office's considerations in relation to and application of the public interest test. We set out his explanation in full because it provides a clear analysis of the public interest factors taken into account in favour of disclosure and in maintaining the exemption and how the balancing exercise was undertaken by the Cabinet Office:

“For the purpose of providing its first response to Mr Baker, dated 4 March 2005, the Cabinet Office did not carry out a public interest balancing test in relation to its reliance on section 24(2). This omission was remedied when Mr Baker requested an internal review of the Cabinet Office response to his request, and a full public interest balancing exercise was carried out at that stage. It was concluded that the public interest in maintaining the exclusion of the duty to confirm or deny under section 24(2) outweighed the public interest in disclosing whether the information was held. The view was taken that to provide Mr Baker with a statement of the reasons for so concluding

would in itself involve the disclosure of exempt information, and in reliance on section 17(4) no such statement was given to him. This was explained in the response to Mr Baker dated 14 July 2005.

“In the course of the Information Commissioner’s investigation of Mr Baker’s complaint, I met with the Assistant Information Commissioner, Mr Phil Boyd, and it was agreed that some explanation as to the public interest balance could be given to Mr Baker without disclosing exempt information. That explanation was given in the letter dated 5 May 2006. The factors taken into account in the Cabinet Office’s assessment of the public interest did not change.

“The Cabinet Office took into account the general public interest in disclosing whether it holds information on a particular topic. It also took into account that there was a general public interest in the issue as evidenced by the Prime Minister’s statement in the House of Commons following advice received from Interception of Communications Commissioner. However, in this case there were, and remain, strong countervailing public interest arguments in favour of maintaining the exclusion of the duty to confirm or deny.

“In relation to the first part of Mr Baker’s request, the Wilson Doctrine makes clear that in the matter of interceptions of MP’s communications it is for the Prime Minister to determine whether damage to national security would result from the release of information (including the information that no interception had taken place, as is made clear in the explanation of the use of neither confirm nor deny above) as to whether the Doctrine has changed. The Cabinet Office supports the Prime Minister in this role when judgements on this matter are made. Evaluating the requirements of national security is a weighty responsibility that falls on the executive. The Prime Minister has made announcements on the Wilson Doctrine to the House of Commons on a number of occasions, most recently on 30 March 2006. The Cabinet Office considers the Prime Minister’s

statements fulfil the public interest in relation to this matter. This militates strongly against the release of any information in response to this request because to do so would deny the Prime Minister the discretion to judge what is here in the interests of protecting national security. It is an accepted precept in national security to take a precautionary or “safety first” approach. The use of a neither confirm nor deny response on matters of national security can only secure its purpose if it is applied consistently. This has been the basis on which successive governments have acted. Accordingly, the Cabinet Office held that anything other than a neither confirm nor deny response would damage national security and not be in the public interest.

“Underlying the Cabinet Office’s consideration in relation to the use of section 24(2) for the second part of the Appellant’s request is the damage to national security that could be caused by the release of any information about interceptions. If any particular category of people were engaged in activities that were damaging to national security and the Cabinet Office effectively announced that no interceptions had taken place in relation to that category, any person in that category could continue his or her activities safe in the knowledge that they were not subject to interception and by extension under investigation. The Cabinet Office judges it is strongly against the public interest to permit such an inference to be drawn. Conversely if a particular category of people were engaged in activities which were damaging to national security and the Cabinet Office announced that a certain number of telephones had been tapped, such an announcement would effectively act to alert that person to avoid certain forms of communication to help escape detection. Any specific answer, particularly in relation to a small, defined group of people would be open to potentially damaging interpretation. The timing of any release of information of itself has the potential to damage national security. Requesting information prior and subsequent to particular real or imagined events and getting two different responses would convey much more information than simply that there had been a change in

policy. It could confirm an allegation, place suspicion on particular individuals, or compromise covert sources of information all of which can damage national security.

“The exact same concerns apply to the first part of the Appellant’s request. Any answer about whether the policy has changed would provide any person engaged in activities damaging to national security with information which could help them continue unchecked or evade detection. Again, the timing of such an answer in itself could convey information. Potentially assisting anybody to act in ways which damage national security is strongly against the public interest.

“In relation to the second part of the Appellant’s request it is worth noting that, were it to exist, release of information as to the existence of a statutory interception warrant could, depending on the circumstances amount to an offence under section 19 RIPA, and/or section 4(3) of the Official Secrets Act 1989 (OSA). This underlines the need for the exemption from the duty to confirm or deny the existence of a warrant, because if the Cabinet Office were only ever to deny the existence of a warrant, conclusions could be drawn when we failed to deny it. Confirmation or denial, or use of the exemption under section 44 (statutory bar on release) could also conflict with the provisions of RIPA and OSA.

“In addition sections 15-19 of RIPA set out detailed duties on the part of Ministers and Departments to safeguard information relating to interception. It includes, at section 17, an express exclusion from legal proceedings and prevents questions being asked from which information about interception might be inferred, or even that it has, may have occurred or is going to occur. These complicated and wide ranging provisions reflect the need to prevent not only the disclosure of such information but also speculation and discussion about it. The Cabinet Office judged that it is strongly against the public interest to release any information that might undermine these provisions. It also

follows that any detailed explanation of why we replied as we did would lead us to release exempt information, which is why we initially relied on section 17(4) FOIA, although as set out above some further explanation was subsequently given to Mr Baker.

“In favour of confirming or denying that the information requested by Norman Baker is held, the Cabinet Office acknowledges that it is strongly in the public interest to be able to provide assurance that tools such as telephone interception are used responsibly, lawfully and for the purposes which they are intended. However confirmation or denial about whether information is held would not in itself serve that public interest. This aspect of the public interest is served by the work of the independent Interception of Communications Commissioner. The Commissioner reviews the propriety and legality of all interception warrants and reports annually to the Prime Minister who in turn is under a duty to place the Annual Report, excepting sensitive information, before both Houses of Parliament. If an MP were to be the subject of an interception of communications warrant the Commissioner would view the details of this as he would any other interception. Therefore the protection of this aspect of the public interest is already well served by an independent figure holding, or who has held, high judicial office. Selective releases of information in response to narrow FOIA requests would not add to the protection of the public interest as served by the Interception of Communications Commissioner, indeed it could undermine it by damaging his ability to deliver his opinion to the Prime Minister and through him to Parliament in a manner of his choosing. Cabinet Office officials are not well placed to decide whether fettering the work of the Interception of Communications Commissioner in such a sensitive area would be in the public interest. In addition to the scrutiny of the Commissioner, any individual who believes their communications are being improperly intercepted by a public authority has a route of redress to the independent Investigatory Powers Tribunal which has unrestricted

access to all relevant departments and agencies. Again, the President of the Tribunal must hold, or have held, high judicial office.”

The Commissioner’s application of the public interest test

49. Graham Smith (Mr Smith) the Deputy Commissioner in his witness statement summaries the factors taken into account by the Commissioner in applying the public interest test.

50. He provided the following public interest factors in favour of maintaining the duty to confirm or deny:

- (1) In general there is a strong public interest in being able to provide assurance that tools such as telephone interception are being used responsibly, lawfully and for proper purposes.
- (2) There is a particular public interest in knowing whether the telephones of individual democratically elected MPs are being tapped. The role of MPs, and the ability of individuals to communicate with MPs, is fundamental to the operation of a democratic system of government.

51. He provided the following public interest factors in favour of maintaining the exemption:

- (1) The public interest in the maintenance of national security is a strong one. For the reasons explained by Mr Wright, whether the Cabinet Office were to confirm or deny that it held information falling within the scope of the request, in either case it would assist persons who might be of interest to the security services.
- (2) In addition, disclosure would effectively negate the ability of the Prime Minister to judge at what point it was safe to make any public announcement of change in policy in relation to the tapping of MPs’ telephones. Inherent in the Wilson

Doctrine is that the Prime Minister should be free to judge the timing of any such announcement. There is a public interest in preserving the Prime Minister's freedom of action in that regard.

52. The Commissioner found that in all the circumstances of this case the public interest in maintaining the section 24 exemption outweighed the public interest in disclosing the information.

The Appellant's grounds of appeal

53. The first point made by Mr. Baker is that the Commissioner failed to take account of the special position of MPs.
54. For the reasons already set out above this ground is untenable. The Wilson Doctrine itself makes clear that MPs are in a special position as regards telephone tapping. The Commissioner was aware of and took into account the terms of the Wilson Doctrine in reaching his decision. Also it is accepted by the Commissioner that the particular position of MPs is relevant to an assessment of the public interest which was considered when assessing the balance of public interest in this case.
55. The second point made by Mr. Baker is that the Commissioner ought to have had regard to the decision of the Information Tribunal in *Baker v Home Secretary*. The Commissioner in his reply to the Notice of Appeal maintains that this decision was reached in very different circumstances and does not assist the Tribunal in the present case. The background to that case was that Mr Baker himself had made a subject access request under section 7 of the Data Protection Act 1998 (DPA) addressed to the Security Service. The request required the Security Service to say whether they held or had held data about Mr Baker, and if so to disclose that data. The Security Service refused to confirm or deny whether it held any of the information sought by Mr Baker; it relied upon a certificate dated 22nd July 2000 issued by the Secretary of State for the Home Office (the Certificate) under section 28(2) DPA as being conclusive evidence that any data that it held were exempt from the requirements of section 7 DPA.

56. Mr Baker then appealed to the National Security Appeals Panel of this Tribunal against the Certificate. The Panel quashed the Certificate, in summary, because the Certificate had given a blanket exemption in relation to section 7 DPA, relieving the Security Service of any obligation to give a considered answer to individual requests and thus the Certificate was wider than was necessary to protect national security.
57. The circumstances of the present case are very different and relate to a request under FOIA. The request in the present case is for information relating to policy and to the position of MPs generally, not for personal data in relation to Mr Baker himself. The request in the present case has been considered on its own merits both by the Cabinet Office and the Commissioner. There has been no application of a blanket policy. No certificate has been issued under sections 23(2) or 24(3). Finally, the present case turns in part on section 23(5) FOIA, which creates an absolute exemption from the duty to confirm or deny in respect of information directly or indirectly supplied by or relation to certain specific bodies dealing with security matters. There is no equivalent provision under the DPA.
58. The third ground of appeal is that there should have been consideration of a partial release of information in this case. The Commissioner considered that the various matters set out above in relation to sections 23 and 24 would apply equally to any partial release of information in this case.
59. We accept the Commissioner's arguments in relation to the grounds of appeal and find that the grounds do not support any further challenge to the Commissioner's decision.

The introduction of a new public interest by Liberty

60. Liberty consider that there is a further public interest in favour of disclosure which has not been taken into account by the Commissioner. This is that the rights under the European Convention on Human Rights are directly at stake when the demands of national security are invoked by the Executive to justify interference with those rights. Here Liberty is referring to Article 8(1) of the

Convention which is now incorporated into the Human Rights Act 1998.

Liberty argues that:

- (i) It is axiomatic that MPs, and those who communicate with them by telephone, are prima facie entitled to respect for their right to private communication by virtue of Article 8(1);
- (ii) Requiring the Executive (here the Cabinet Office) to explain by way of response to a FOIA request any interference with those rights is one important way in which the propriety of such interference can be tested by being opened to public scrutiny;
- (iii) In such circumstances, any invocation by the Executive of the requirements of national security under section 24 must therefore be carefully scrutinised by the Commissioner in order to ensure both that FOIA is suitably enforced and that Convention rights of MPs and others are adequately protected.

61. Liberty further argues that by not having taken into account this public interest, the Commissioner has not carried out or been seen to carry out an independent assessment of the application of the public interest test, but rather has just accepted the assessment of the Cabinet office.

62. We have considered the evidence of Mr Smith and the Commissioner's approach to the investigation in this case. We find he has undertaken an independent assessment of the public interest factors even though he has ultimately accepted the position taken by the Cabinet Office. In many cases we are aware he takes a different position. We do not accept, therefore, Liberty's criticism of the Commissioner.

63. However because the Tribunal has wide powers, as set out in paragraph 20 above, we can take into account this new public interest factor introduced by Liberty in favour of disclosure when considering whether the Commissioner was wrong in law to have applied the public interest test in the way he did.

The Tribunal's finding on the public interest balance

64. We have taken into account all the above factors in favour of disclosure and the factors in favour of maintaining the section 24 exemption. We

find that in all the circumstances of this particular case that the public interest in maintaining the exemption outweighs the public interest in disclosing the information and that the duty to confirm or deny does not arise because exemption from section 1(1)(a) is required for the purpose of safeguarding national security.

Conclusion

65. We therefore uphold the Commissioner's Decision Notice and dismiss the appeal.

Signed

JOHN ANGEL

Chairman

Date 28 February 2007

Corrected version signed by

JOHN ANGEL

Chairman

Date 4 April 2007