Case No: IPT/06/81/CH

INVESTIGATORY POWERS TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 February 2008

Before :

MR JUSTICE BURTON

Peter Scott QC

Sir Richard Gaskell

- -

Between :

Vincent C Frank-Steiner — **Complainant**

- and -

The Data Controller of the Secret Intelligence Service — **Respondent**

- -
- -

Ms Cherie Booth QC (instructed by **Bindman and Partners**) for the **Complainant**
Mr Jonathan Crow QC and **Mr Ben Hooper** (instructed by **Treasury Solicitor**) for the **Respondent**

Hearing dates: 21 September 2007, 5 February 2008

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JUDGMENT

Mr Justice Burton :

1. The Complainant, Dr Vincent Frank-Steiner, issued a complaint with the Tribunal on 29 November 2006 against the Data Controller of the Secret Intelligence Service (SIS) formerly colloquially known as MI6 (the Respondent). The Complainant claims that his uncle by marriage Mr Rosbaud (married to his father's sister), who died in 1963 and who was a German citizen, who remained in Germany throughout the war as an editor of a scientific journal in contact with the German scientific establishment, was a spy for Britain. A book written by a Mr Arnold Kramish published in 1986 made this claim, and that Mr Rosbaud was codenamed "The Griffin". The Complainant would like to know whether this is true and, if it is, to have it confirmed by the Respondent, by disclosure of any documents to that effect which SIS may have on their files: and if it be true he would like to have the opportunity for the family to claim reflected credit (to enable the Complainant's family better to understand and preserve its heritage), and no doubt himself to co-operate in a book or other publication about his uncle's life, if there is more which he is able to learn about it.

2. His complaint against the Respondent was under ss65(2)(b), (4) and (5) of the Regulation of Investigatory Powers Act 2000 ("RIPA"). By those subsections, this Tribunal is the appropriate forum for the bringing of any complaint by "*a person who is aggrieved by any conduct … which he believes to have taken place in relation to him … by or on behalf of the Intelligence Services*". There is no issue taken by the Respondent that he is, for the purposes of this complaint, a *person aggrieved*.

3. The Complainant had sent a letter to the Chief of the SIS on 22 December 2005, to which there was only a somewhat unsatisfactory temporising reply. He then sent a solicitor's letter dated 12 July 2006, which asserted the existence in the power of the Respondent of files relating to Mr Rosbaud and seeking their release to him. The Respondent's substantive reply was by letter dated 25 September 2006 to the following effect:

> "*It is not SIS practice to confirm or deny whether a person who is alleged to have been an agent of SIS was in fact an agent, as*

such a practice would be damaging to the work of SIS. The policy applies equally where the individual concerned has died or has been the subject of speculative comment in the media or in Intelligence literature.

To clarify, as you use the term 'spies' interchangeably for SIS officers and SIS agents, an agent is an individual from outside the Service who works covertly for SIS, whilst an officer is a member of staff.

With regard to your comments on the Public Records Act, SIS's records are public records for the purposes of the Act. SIS has a duty to have arrangements in place to ensure that those of its records which ought to be permanently preserved have been selected and kept safely. If SIS did hold any records on Mr Rosbaud, and they were selected for permanent preservation under section 3(1) of the Public Records Act, they would have been retained by SIS under section 3(4) and the Lord Chancellor's blanket approval for the retention of security and intelligence material which was renewed in February 1992.

It therefore follows that we are unable to provide your Client with any information in response to his request, including whether or not Mr Rosbaud was an agent of SIS."

4. The standard response in a case where it is not desired to disclose whether or not a requested party is in possession of any documents or knowledge was thus given, namely such as to "neither confirm nor deny" ("NCND") that any such documents exist. This NCND response, if appropriate, is well established and lawful. Its legitimate and significant purpose and value has been discussed and ratified by the courts, as explained and reiterated by this Tribunal in **IPT/01/62** and **IPT/01/77** Judgment of 23 January 2003 at paragraphs 46-54 and in **IPT/03/01** Judgment of 31 March 2004 at paragraphs 15-18. It is essential for there to be a consistent response in such a situation. If, in a hypothetical case, whether or not it might be legitimate not to disclose any documents that do exist, no documents in fact exist, an answer is given to an applicant that "there are no documents", then an NCND response given to a different applicant in another case will reasonably lead that other applicant to conclude that, because he has <u>not</u> been told that the documents do <u>not</u> exist, he is entitled to assume that they do. Similarly if the documents do exist, the very disclosure of their existence, though coupled with a justification for retaining them, may be itself damaging, depending upon the identity and purpose of the

applicant, and may indeed be all that the applicant wants to know. This Tribunal itself is bound by a similar regime and a similar requirement. S68(4) provides that where a complainant fails before the Tribunal, the Tribunal, in determining any such proceedings, complaint or reference, shall give notice to the unsuccessful complainant which "*... shall be confined ... to ... a statement that no determination has been made in his favour*". Even without considering the specific statutory framework in issue before us, to which we shall return, it is obvious that this protection is needed for the security services, subject of course to the statutory supervision by this Tribunal.

5. After an initial challenge to the jurisdiction of this Tribunal by the Respondent upon the basis that the Complainant's then claim was understood as a challenge to the alleged failure by the Respondent to transfer files, alleged to exist, under the Public Records Act, which would not be justiciable by this Tribunal, the grounds of complaint were amended and clarified by the Complainant. The Rules of this Tribunal provided by Rule 9(6) that all hearings should be in private. However in our judgment in **IPT/01/62** and **IPT/01/77** (referred to above) we concluded that there could and should be a public hearing in an appropriate case, for example where preliminary points of law were being canvassed, or where both parties wish to make submissions to the Tribunal, upon the basis of a hypothetical assumption of facts, which thus give away no actual information, as to what the Tribunal's approach should be to a given question. In accordance with that practice, we held a hearing on 21 September, at which Cherie Booth QC represented the Complainant and Jonathan Crow QC, leading Ben Hooper of Counsel, represented the Respondent. At that hearing it was assumed, for the purpose of that hearing only, that there are documents relating to Mr Rosbaud within the Respondent's files, and the arguments were presented on that basis. The Respondent had the opportunity to explain, on that hypothetical basis, not only the statutory scheme, but also why it is that the Respondent believes it has an obligation of confidence to an agent who has worked for or with the security services (as was assumed to be the case for the purposes of the argument), and that such confidence, absent any indication to the contrary, was not absolved by the death of the assumed agent. It is common ground in this case that if Mr

Rosbaud was an agent he never disclosed this, even to his family, during his lifetime.

6. This Tribunal has the power and duty, if application is made to it pursuant to s65(4), as the Complainant has done, to consider and supervise the conduct of the Respondent pursuant to the subsections referred to in paragraph 2 above.

7. At the hearing, by virtue of the assumption that there are documents which have not been disclosed, it was agreed that such conduct by way of non-disclosure was conduct which could be supervised by the Tribunal. There was no challenge, and rightly so, by the Complainant, to the propriety of the NCND policy. What was argued was that, if the documents exist and ought to be disclosed, then it was inappropriate and unlawful to have given an NCND response. If there are no documents, or if there are documents which ought not to be disclosed, it is conceded by the Complainant that the NCND response is then lawful and appropriate. The issue therefore for our consideration at the hearing, at which documents were assumed to exist, was whether, if they did exist, they would be lawfully withheld. The Tribunal has the right to inspect any files in the possession of the Respondent: where there is an oral hearing, such as occurred here, such inspection occurs after the hearing, informed by the arguments by both parties, as resolved by the Tribunal's judgment.

8. The Complainant put forward his case on two bases:

   i) He made a claim pursuant to s65(2)(a) by reference to Article 8 of the European Convention on Human Rights.

   ii) He made a claim pursuant to s65(2)(b) by way of judicial review to challenge the decision to make an NCND response. If the Complainant has an Article 8 right, then that would create a more intense scrutiny by way of judicial review (see e.g. **R (Daly) v Secretary of State for Home Department** [2001] 2 AC 532).

9. Article 8. It was common ground before us that Article 8 does not apply if in fact there are no files or documents (see paragraphs 29(2) and 30 of the **IPT/03/01** judgment referred to above). Hence the contention by the

Complainant of a breach of his Article 8 rights was made on the assumption that there are such files. The Complainant's case is that his Article 8 rights are infringed by the Respondent's refusal to release to him information which (on the accepted assumption) it holds on his family, such that he is unable to complete a full picture of his origins and identity. Ms Booth QC submits that the concept of private and family life is a broad one, encompassing many facts relating to a person's identity and not capable of exhaustive definition (see **Pretty v UK** [2002] 35 EHRR 1), that the refusal by the state to release information held by it which is relevant to the personal identity of an individual can engage Article 8 (**Gaskin v United Kingdom** [1989] 12 EHRR 36) and that there is a "*vital interest protected by the Convention in obtaining information necessary to discover the truth concerning important aspects of one's personal identity*" (**Odievre v France** [2004] 38 EHRR 43 at paragraph 29), irrespective of the age of the person now seeking such information. She submitted that Article 8 is not so restricted in its ambit as to exclude from private and family life the relationship of uncle and nephew by marriage. In relation to the seminal passage in the judgment of the Court in **Mikulic v Croatia** [2002] 1 FCR 727 at paragraph 54, whereby

> "*... respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality ...*",

she submitted, in relation to the Complainant's position, that "*the desire to be able to stand up and be proud of what actually happened in this context is formative, and is sufficient to make Article 8 engage*".

10. We are satisfied that the cogent and convincing submissions of Mr Crow QC and Mr Hooper, which we set out and adopt below, render the Complainant's Article 8 case wholly unsustainable. The Respondent's starting point, which we accept, is that, by reference to the established jurisprudence of Article 8, there is no breach of Article 8(1) alleged here in the sense of breach of a negative obligation, an obligation upon the state not to interfere with the Complainant's privacy by way of, for example, covert surveillance, but only

of an alleged inferred positive obligation to disclose information which the state has been entitled to collect in the first place: for the distinction between such negative and such assumed positive obligation see **Gaskin** at paras 40-41 and **Botta v Italy** 26 EHRR 241 at para 33. This is clearly a more difficult stepping off point for the establishment of an Article 8 duty. His submissions were then as follows:

i) Article 8 is dealing with essentially core issues relating to a person's identity and his own individual autonomy – his physical and psychological wellbeing, his relationship with living people: **Pretty** at para 61, **R (Rose) v Secretary of State for Health** [2002] 3 FCR 731 at para 33, **Mikulic** at paras 51-54 and **Gaskin** at paras 36-37.

ii) As between adult members, even of the same nuclear family, Article 8 can only be invoked where there is some "*further element of dependency involving more than the normal emotional ties*": this applies even between a mother and her own adult son: **S v United Kingdom** Commission Application 10375/83. See also **Coretti v Germany** ECHR Application No 46689/99.

iii) Disclosure of information about someone other than the applicant can only be sought in reliance on Article 8 to the extent that it helps the applicant build up a picture about himself (**Rose** para 37).

iv) Where an applicant is seeking information about another person, the fact that it was supplied to the record keeper in confidence will be highly material to the question of whether it should be disclosed (**Rose** para 17).

v) Even where an applicant is seeking information about himself, he cannot necessarily invoke Article 8, unless he can show that the information concerns his identity or personal history or has formative implications for him: **Mikulic** at para 54 cited in paragraph 9 above, **Smith v United Kingdom** ECHR Application No 39658/05.

11. On the facts of this case, Mr Crow QC relies upon the following factors as conclusively rebutting the existence of any positive obligation owed to this Complainant:

i) The information that is being sought is not information about the Complainant but about someone else.

ii) It is information about a relation by marriage, not in any sense genetic, familial information.

iii) Information is being sought by someone who is now a grown man, a man of mature years: a relevant factor because of the added interest which has to be demonstrated if Article 8 is to be invoked as between adults.

iv) The information that is being sought is information about matters that occurred a very long time ago.

v) It is information about someone who is long dead. It is not information that is in any way relevant to this Complainant's developing human relations with the person about whom he is seeking information or with anyone.

vi) The information relates to the alleged 'professional' activities of the uncle by marriage; not information about family life, about how the Complainant was treated at home, how he was brought up, what was done to him or to any close member of his family, but information about activities in a non-family sphere.

vii) The information that is being sought, assuming that any events occurred, relates to alleged events having no impact on the Complainant at the time. The Complainant was a child living in a different country. It falls to be contrasted with cases where an applicant is seeking the records of what was done in relation to him when he was in care, or where a request is made for information about matters which

may have impacted on an applicant at an earlier time without his knowing about them.

viii) The information that is sought is about someone who never did in fact live with the Complainant, nor was in any way part of his household.

ix) On the available evidence, the Complainant and Mr Rosbaud saw each other very infrequently, having lived in different countries from each other from the time that the Complainant was young.

x) In sum, the information sought is not to enable the Complainant to achieve personal autonomy or identity. The desire for reflected glory does not begin to establish an Article 8 right in law to be in any way formative for a complainant who is now himself elderly, 45 years after the death of his uncle by marriage.

12. We dismiss the Complainant's Article 8 complaint.

13. Reference was made to what was said by this Tribunal in its judgment in **IPT/03/01** at paragraphs 36 and 37, which we set out below:

> "*36. We glean from the authorities the following general guidance which will be relevant to the Tribunal's consideration of the justification available under Article 8(2) for the Respondent's conduct:*
>
> ...
>
> *(2) It will not normally be sufficient for the Respondent simply to assert to the Tribunal in general terms that the interests of national security justify the holding, use or withholding of personal data or the giving of the NCND response to a subject data request. The Respondent must address the facts and context of the particular case and satisfy the Tribunal that its conduct is not arbitrary, but rational and proportionate.*
>
> ...
>
> *37. The Complainant is right to remind the Tribunal of the relevance of the unique character of its jurisdiction and of its special responsibilities in scrutinising the conduct of those alleged to have interfered with the right conferred by Article 8, usually without the benefit of the normal adversarial procedures of the judicial process as a guarantee of fairness.*

> *The Tribunal is a judicial body which fully appreciates the importance of its not allowing the plea of national security to be used by public authorities as an unjustified shield against the independent scrutiny which the Tribunal was establish to conduct.*"

14. Of course the existence of this Tribunal is an important bulwark for the citizen, and it has powers to inspect and supervise not available to the ordinary courts. But, that apart, what we said in that judgment is not, in the circumstances, of assistance to the Complainant:

    i) As can be seen from its full quotation, it was in the context of the applicability of Article 8. We have found that Article 8 has no application in this case.

    ii) Further it is emphasised by Mr Crow QC, and Mr Hooper who appeared in **IPT/03/01**, that **IPT/03/01** was an entirely different case. The complaint in that case arose after an NCND response was given to a request for information under s7 of the Data Protection Act. The application was (i) by the complainant himself (ii) to seek knowledge as to whether there were any files kept in relation to him (iii) to enforce an asserted right under s7 of the Data Protection Act 1998, which was indeed available to him, unless ousted by a national security exemption under s28 of that Act.

15. Save therefore for emphasising this Tribunal's natural reluctance to accept blanket assertions by any party, particularly in the concept of an Article 8 claim (which we have of course just concluded is not this case), the Tribunal's words in **IPT/03/01** are of no materiality.

16. We turn to the judicial review claim, which, as Ms Booth QC accepted in the course of argument was, while she did not abandon the Article 8 claim, the real thrust of her case. Originally she put her judicial review claim on the basis of a case that the decision by the Respondent not to disclose any hypothetical documents was an unreasonable one, i.e. that, in the context of open government, there needed to be some justification not to disclose. This plainly cannot stand simplistically, given the express exemption of the SIS from the

general right of access to information held by a public authority provided by the Freedom of Information Act 2000: see s84 of that Act, which excludes the SIS from the definition of a relevant public authority within s3 and Schedule I. But, more significantly, it wholly ignores the central aspect of this case, namely the impact, effect and construction of the Intelligence Services Act 1994 ("ISA"). Subject to the Article 8 point, which is now disposed of, the Complainant's claim depended upon a construction favourable to him of ss 1 and 2 of that Act.

17. Those sections read in material part as follows:

> "***1 The Secret Intelligence Service***
>
> *(1) There shall continue to be a Secret Intelligence Service (in this Act referred to as "the Intelligence Service") under the authority of the Secretary of State; and, subject to subsection (2) below, its functions shall be—*
>
> > *(a) to obtain and provide information relating to the actions or intentions of persons outside the British Islands; and*
> >
> > *(b) to perform other tasks relating to the actions or intentions of such persons.*
>
> *(2) The functions of the Intelligence Service shall be exercisable only—*
>
> > *(a) in the interests of national security, with particular reference to the defence and foreign policies of Her Majesty's Government in the United Kingdom; or*
> >
> > *(b) in the interests of the economic well-being of the United Kingdom; or*
> >
> > *(c) in support of the prevention or detection of serious crime.*
>
> ***2 The Chief of the Intelligence Service***
>
> *(1) The operations of the Intelligence Service shall continue to be under the control of a Chief of that Service appointed by the Secretary of State.*
>
> *(2) The Chief of the Intelligence Service shall be responsible for the efficiency of that Service and it shall be his duty to ensure—*

> *(a) that there are arrangements for securing that no information is obtained by the Intelligence Service except so far as necessary for the proper discharge of its functions and that no information is disclosed by it except so far as necessary—*
>
> > *(i) for that purpose;*
> >
> > *(ii) in the interests of national security;*
> >
> > *(iii) for the purpose of the prevention or detection of serious crime; or*
> >
> > *(iv) for the purpose of any criminal proceedings; and*
>
> …
>
> *(3) Without prejudice to the generality of subsection (2)(a) above, the disclosure of information shall be regarded as necessary for the proper discharge of the functions of the Intelligence Service if it consists of—*
>
> > *(a) the disclosure of records subject to and in accordance with the Public Records Act 1958; or*
> >
> > *(b) the disclosure of records subject to and in accordance with arrangements approved by the Secretary of State, of information to the Comptroller and Auditor General for the purposes of his functions.*"

18. Ms Booth QC put forward two arguments:

    i) The obligation in s2(3) of ISA overrides and in any event colours the powers and duties in s2(2).

    ii) In any event s2(2) of ISA should be so construed that the SIS has a duty or a power to disclose documents if it is <u>not contrary</u> to national security to do so.

    We take this latter argument first.

19. It was first necessary for us, with Mr Crow QC's assistance, to understand the relationship of the two sections, which at first sight seem to an extent duplicative. S1(2) provides that the functions of the SIS should be exercisable only in the respects set out in (a) to (c), while the recited obligations of SIS,

which it is the duty of the Chief of the SIS to ensure are complied with, in relation to obtaining and disclosing information, appear not only to set out, by cross-reference in subsection s2(a)(i), the purposes set out in s1(2), but then to repeat two of them in subsection (a)(ii) and (iii). On analysis, however, the position is straightforward and, once understood, facilitates a full and clear comprehension of the duties and obligations of the SIS. The SIS is dedicated towards the obtaining and provision of information relating to events abroad (s1(1)(a)). Its functions in obtaining and providing such information are only exercisable (inter alia) in the interests of national security (s1(2)(a) – (c)). That information gathering and supplying function is then overlaid by the obligations imposed under s2. No information can be obtained except insofar as is necessary for the proper discharge of those functions. No information can be disclosed except, again, insofar as is necessary for the proper discharge of those functions, as prescribed in s1(2). However s2(2)(a)(ii) – (iv) then provide additionally for a limited further power for the SIS to disclose information, over and above its primary function as a foreign security service. It can (but must not except so far as necessary for such purpose) disclose, e.g. to the relevant law enforcement agency within the UK, information so far as necessary in the interests of national security, for the purpose of the prevention or detection of serious crime or for the purpose of any criminal proceedings (but not, as per s1(2)(b), in the interests of the economic wellbeing of the United Kingdom).

20. It is wholly clear on that analysis, which we accept, and which makes entire sense of the statutory scheme, that the provisions do not say that the power to disclose information or, indeed, the power to obtain information, shall only be exercised if it is not contrary to the interests of national security. It provides that the power of obtaining and disclosing information is only exercisable if it is necessary in the interests of national security (or one of the other permitted purposes).

21. It is thus not at all a question of the SIS being in a position to disclose anything they have obtained unless it is in the public interest not to disclose it, or unless it would be contrary to the public interest to disclose it. That would,

as Mr Crow QC submitted, not only defeat the purpose of excluding SIS from the Freedom of Information Act, but turn the Respondent into an information bureau capable of disclosing any information it may have learned in the course of its duty or power to obtain information under s1, unless it was contrary to the national interest to do so. The interpretation is quite plain. One of the permitted purposes must be the reason for disclosure, and the disclosure must be necessary for that purpose. Subject therefore to the effect of s2(3), to which we shall turn, the basis for any judicial review of the Respondent's failure to disclose the documents, assumed for this purpose to exist, by giving its NCND response must be that it was Wednesbury unreasonable of the Respondent not to conclude that it was necessary in the interests of national security to disclose such documents.

22. Ms Booth QC submits that such a construction of ss1 and 2(2) of ISA would make s2(3) entirely redundant because "*it is not easy to envisage disclosure for the purposes of the Public Records Act 1958 or the National Audit Act 1983* [to which s2(3)(b) relates] *positively serving e.g. a present national security purpose*". However this misunderstands the role which s2(3) plays. S2(3)(a) simply provides an extra situation in which the Respondent can disclose documents i.e. for the purpose of complying with, and when required by, the Public Records Act (PRA). Without that subsection, disclosure of records under the PRA, or the provision of information to the Comptroller and Auditor General, would not be permitted unless it fell within one of the purposes specified in s2(2). The subsection was therefore necessary to legitimise any such disclosures, and the very existence of the need for statutory provision for the SIS to comply with obligations under, e.g. the PRA, emphasises that disclosure by the SIS cannot be made except under express statutory authorisation.

23. The PRA addresses the preservation of public records at the Public Records Office ("PRO"), now the National Archive ("TNA"): we shall hereinafter refer to TNA as appropriate where the original reference was to PRO.

24. S3 of the PRA reads in material part:

"*S3 Selection and preservation of public records.*

(1) It shall be the duty of every person responsible for public records of any description which are not in the Public Record Office or a place of deposit appointed by the Lord Chancellor under this Act to make arrangements for the selection of those records which ought to be permanently preserved and for their safe-keeping.

…

(4) Public records selected for permanent preservation under this section shall be transferred not later than thirty years after their creation either to the Public Record Office or to such other place of deposit appointed by the Lord Chancellor under this Act as the Lord Chancellor may direct:

Provided that any records may be retained after the said period if, in the opinion of the person who is responsible for them, they are required for administrative purposes or ought to be retained for any other special reasons and, where that person is not the Lord Chancellor, the Lord Chancellor has been informed of the facts and given his approval."

25. Relevance of the PRA. Ms Booth QC concedes (and has done so since the amendment referred to in paragraph 5 above) that she cannot seek, and is not seeking, in this application to enforce an alleged or asserted duty of the Respondent under the PRA – it is the Respondent's conduct in not disclosing to the Complainant whether the documents exist that is being supervised by the Tribunal under s65 of RIPA. However, her assertion is that she can use the statutory obligations under the PRA by analogy. What we interpreted that to mean would be that, if it could be shown (or concluded by the Tribunal on inspection) that there were documents which plainly ought to have been disclosed by the Respondent, pursuant to a duty under the PRA, by their transfer to TNA, where they would then be in the public domain, then it might be said to be Wednesbury unreasonable for the Respondent not to take the view that they should be disclosed also to the Complainant. This is the "PRA analogy argument".

26. Ms Booth QC at the hearing relied upon the White Paper CMND 2290 of July 1993 "Open Government". It is plain that the power of the Lord Chancellor to exempt documents from transfer to TNA under s3(4) of the PRA creates and

created a substantial exemption from any general principle of disclosure, and paragraph 9.23 of the White Paper made that clear:

> "*There are … records whose sensitivity is such that no date can be put on their potential release, most of which fall into one of the categories for which the Lord Chancellor has given 'blanket approval' to retain. Those categories are* [and top of the list is] *Security and intelligence material [renewed in February 1992]*."

27. Mr Crow QC placed heavy reliance upon s3(4) and that blanket exemption. He referred to a number of passages in Hansard. The first antedated the White Paper, being a statement by the then Lord Chancellor, Lord Mackay of Clashfern, on Friday 14 February 1992 under the heading "SECURITY AND INTELLIGENCE RECORDS: RETENTION". The passage reads:

> "*The emphasis of the Government's policy, in accordance with the provisions of the Public Records Act, is on release rather than retention of records. However, it has long been accepted that certain security and intelligence related records cannot be released automatically after 30 years because this would pose a continuing risk to national security. In 1967 my predecessor gave approval to the retention of such records under Section 3(4) of the Public Records Act 1958.*
>
> *I have now reviewed this approval … As a result of the review and following consultation with Ministers concerned, I am satisfied that the records concerned are properly retained in their departments and the "blanket" exemption remains the most efficient way of providing the necessary protection. I have accordingly approved their retention for a further period of 20 years.*
>
> *The "blanket" approval is permissive, not mandatory. Departments have therefore been asked to keep their records under review and to release them at the first opportunity. All records retained by departments under the "blanket" approval will be re-reviewed at least every 10 years.*"

28. The next and important Hansard reference is a recorded statement by the then Foreign and Commonwealth Secretary Mr Robin Cook on 12 February 1998 under the heading "MI6":

> "*The records of the Secret Intelligence Service are not released: they are retained under Section 3(4) of the Public Records Act 1958. Having reviewed the arguments, I recognise*

> *that there is an overwhelmingly strong reason for this policy. When individuals or organisations co-operate with the service, they do so because an unshakeable commitment is given never to reveal their identities. This essential trust would be undermined by a perception that undertakings of confidentiality were honoured for only a limited duration. In many cases, the risk of retribution against individuals can extend beyond a single generation.*"

29. Mr Crow QC placed heavy emphasis on this "*unshakeable commitment*". The final Hansard reference was to a statement of Mr Cook's successor, Mr Straw, on 28 April 2003:

> "*The policy set out in the first part of that answer has not changed.*"

30. This exemption appeared to mean that the Respondent has no obligation to transfer any documents to TNA under the PRA. At the hearing, we were told that the terms of the exemption itself were not in the public domain. Since the hearing, the Respondent has agreed, after request from this Tribunal, that the terms of the exemptions made in 1992 and 2002 are discloseable, and they have been supplied.

31. They read as follows:

i) 7 February 1992: Instrument No 25 RETENTION OF PUBLIC RECORDS:

> "*The Lord Chancellor, in exercise of the powers conferred on him by the proviso to section 3(4) of the Public Records Act 1958, and having received the opinions of the persons responsible for the records and been informed of the facts, hereby approves the retention of the public records specified in the attached schedule, being security, intelligence and related records created up to the end of 1971, until the end of the year 2011.*"

Subparagraph (B) in the Schedule attached reads "*records held by or on behalf of the … SIS*".

The Instrument is signed by Lord Mackay of Clashfern.

ii) 3rd September 2002 Instrument No 66: RETENTION OF PUBLIC RECORDS.

> "*The Lord Chancellor, in exercise of the power conferred on him by the proviso to section 3(4) of the Public Records Act 1958, and having received the opinion of the persons responsible for the records and been informed of the facts, hereby approved the retention of the public records specified in the attached schedule (B), being security, intelligence and related records created between 1972 and 1981, until the end of the year 2022.*"
>
> Subparagraph (B) in the Schedule attached reads as above. The Instrument is signed by Lord Irvine of Lairg.

32. It is plain that the exemptions are on their face blanket or absolute, although they are, as anticipated by the wording of s3(4) of the PRA itself, and as stated by Lord Mackay in Hansard in 1992, permissive and not mandatory. There is thus an exemption for the Respondent from the obligation to transfer to TNA under s3(4) of the PRA, but no exemption from the obligation to preserve under s3(1).

33. Prior to the disclosure of the exemptions, and subsequent to the hearing, the Claimant drew attention, in a supplementary submission, to the terms of the 2004 Report by the Intelligence Services Commissioner, in which the Commissioner set out the following passage relating to the Security Service (SS) (formerly MI5) - it is suggested (and not contested) that there could have been a similar approach by him to the SIS, which is in no different statutory position:

> "*40. That said, the Security Service is required to comply with the requirements of the Public Records Act 1958 in identifying records of historical interest for permanent retention and eventual transfer to the national archives … In practice, this means selecting files for retention that would otherwise have been destroyed as obsolete. …*
>
> *41. I believe the Security Service has an equitable file management system in place that not only allows it to meet fully its statutory obligations under existing legislation (e.g. the Security Service Acts of 1989 and 1996 and RIPA) but also allows it to be as open as possible in putting in to the public*

domain more of its gathered material. I am satisfied that the Security Service has struck the correct balance and that it reasonably achieves its aim of retaining only those records that it needs in order to meet its legal responsibilities."

34. The Tribunal itself has noted the following on the respective websites of the SS and the SIS:

    i) SS: "*We also comply with the requirements of the Public Records Act 1958 in identifying records of historical interest for permanent retention and eventual transfer to the national archives. … When we consider the release of historical papers, we have to take into account the need to protect former staff and agents. It remains a fundamental principle that we provide a commitment of confidentiality for the identities of such individuals indefinitely.*"

    ii) SIS: "*The Public Records Act of 1958 places a legal obligation on Government bodies to transfer records to The National Archive. The intelligence and security agencies all have a blanket exemption from this obligation for reasons of national security.*

    The Security Service and GCHQ place some of their records in The National Archive. Because of the importance of protecting the identity of our sources, SIS maintains a policy of not releasing its records into the public domain. It is Service policy not to disclose the identities of individuals working for or co-operating with it."

35. It is quite apparent that, contrary to the Complainant's suggestion, there is no inconsistency between the two Services, nor any inconsistency between the policies operated by them and the requirements of the PRA. As set out above, the blanket exemption does not exempt them from a duty of preservation, but only from the duty to transfer: and both services emphasise the "*unshakeable*" policy in relation to disclosure of the identity of agents.

36. In those circumstances, there is no obligation on the Respondent to place into the public domain any documents by virtue of the PRA, and hence under S2(3)(a) of ISA.

37. We decided to hold a further short hearing to give the parties the opportunity to make final submissions both in the light of the disclosure of the exemptions and to allow oral expansion of the supplementary submissions put in by both sides since the 21 September hearing. The most significant question was what if anything remained of the PRA analogy argument.

38. Mr Crow QC submitted that there was no room at all for any such argument. He submits that:

i) The Complainant cannot complain about any failure by the Respondent to transfer documents to TNA (see paragraphs 5 and 25 above).

ii) The Respondent in any event is entirely exempted from any duty to transfer any documents of the kind alleged to exist by the Complainant, by virtue of the Lord Chancellor's exercise of his powers under s3(4) of the PRA, now fully disclosed.

iii) There is no obligation upon the Respondent to exercise a discretion as to whether to disclose any documents such as are alleged to exist and such as are, if they exist, now sought to be disclosed by the Complainant, and he has exercised no such discretion.

iv) Insofar as the Respondent has exercised a discretion to decide whether, notwithstanding the exemptions, to transfer documents to TNA, that discretion has been exercised in relation to the entire category of documents within which any such documents as are now alleged to exist would fall, namely pursuant to the commitment not to disclose any documents which may disclose the identity of any alleged agents.

39. Having heard the submissions of both sides, we are satisfied that the PRA analogy argument can exist to the following limited extent, namely as follows. The SIS has been given a blanket exemption by the Lord Chancellor in respect of transfer to the PRA. If we were to conclude that, having considered any documents that do exist such as are sought by the Complainant, a decision not to transfer them to the TNA, notwithstanding their exemption from doing so by the SIS would be Wednesbury unreasonable, then we would conclude that

the documents ought to have been disclosed to TNA. In that case, given that the documents ought to be in the public domain, it would be Wednesbury unreasonable of the SIS to give an NCND response to the Complainant. Such consideration by us would however be informed by the great weight to be given to the views of the Respondent as to what the interests of national security require (see **Secretary of State for the Home Department v Rehman** [2003] 1 AC 153 especially at para 62).

40. In the light of the submissions we have heard, both in writing and at the two hearings, we are satisfied that the proper approach to be adopted by us is as follows. Our first step would be to investigate whether there are any relevant files such as suggested by the Complainant. If there are none, then it is common ground that a 'no determination' (NCND) reply by the Tribunal is appropriate.

41. If there are any such files, they must be examined by the Tribunal. The questions for us to ask are whether:

    i) it was Wednesbury unreasonable of the Respondent not to conclude that it was necessary in the interests of national security to disclose such documents (paragraph 21 above); or

    ii) it was Wednesbury unreasonable of the Respondent not to conclude that such documents ought to have been transferred to TNA and thus into the public domain, notwithstanding the Lord Chancellor's exemption from the obligation so to do, such that the documents ought to have been put in the public domain (paragraph 39 above).

    If our answer to both these questions is no, we would uphold the NCND reply.

42. Plainly this a very high hurdle for the Complainant to surmount, but that is as it should be, given the statutory structure of:

    i) exemption of SIS from the Freedom of Information Act:

ii) extremely limited obligations and indeed powers for the SIS to disclose under ISA:

iii) express exemption of SIS under s3(4) of the PRA.

43. In carrying out such investigation, if there were documents, and on the basis of such limited tests, we would bear in mind the following submissions which have been made to us, insofar as they remain relevant.

44. The Complainant relied upon:

a) the passage of time since any alleged documents were created:

b) the fact that Mr Rosbaud is dead and that the Claimant is the sole relevant representative of the family of Mr Rosbaud:

c) if he was a spy for this country against the Nazis, the asserted public interest in the disclosure of that fact:

d) any alleged inconsistency in the treatment by the Respondent of others, reference being made to the fact that the Respondent has admitted that a Mr Frank Foley, with whom it is alleged that Mr Rosbaud had some contact, was an officer (not a foreign agent) of MI6 at the material time:

e) the alleged fact that some information in relation to Mr Rosbaud is in the public domain by virtue of the book by Mr Kramish referred to in paragraph 1 above.

45. The Respondent denied the materiality of much if not all of the above, when set against the following propositions:

i) As to (e), Mr Crow QC described the book as, even on the Complainant's case, substantially a work of fiction, and he certainly denied that, unless and until there were confirmation of any part of the book or of Mr Kramish's assertions or allegations, any of those matters could be said to be in the public domain. Indeed it is evident that by his request the Complainant is now seeking that the alleged fact that Mr

Rosbaud was a British spy is to be brought into the public domain and confirmed.

ii) With regard to (d), the "*unshakeable*" policy of the Respondent towards its agents is reiterated, and Mr Crow QC submits that there is no inconsistency as between the stance taken in these proceedings by the Respondent and the giving of information about Mr Foley, because Mr Foley was an officer and British citizen "employed" by the Secret Intelligence Service, and the confidentiality being relied upon in these proceedings by the Respondent relates to foreign nationals who may have acted as agents while owing their loyalties to foreign countries.

iii) With regard to (a) and (b), the Complainant placed some reliance in Ms Booth QC's supplementary submissions, expanded on in the second hearing, by reference to the case of **Bluck v The Information Commissioner and Epsom and St Helier University NHS Trust**, a decision of the Information Tribunal dated 17 September 2007. That was a case in which the mother of a patient failed to obtain disclosure of information held by the NHS Trust in relation to her daughter, on the basis of a conclusion that (paragraph 21) "*a duty of confidence is capable of surviving the death of the confider and … in the circumstances of this case it does survive.*" In that case, the patient's mother was not the personal representative of the deceased, who was her widower. Ms Booth QC submitted that, albeit that the case was unhelpful to her in showing that the duty of confidence, upon which the Respondent relies as owed to alleged agents, could survive death, it was not the deceased's next of kin in that case who was making an application for such information, whereas such is the case here. We agree with Mr Crow QC that the case of **Bluck** does not assist Ms Booth QC. The Complainant here is not the PR of Mr Rosbaud, who died 45 years ago. But even if he were, all that **Bluck** decided was that, where the PR did not support the claim for disclosure of information, the duty of confidence, which could survive death, was not to be breached. It did not decide that a PR could waive the duty or could

obtain the information. In this case, Mr Rosbaud died without revealing any alleged information himself, or giving, or seeking from the Respondent, any waiver in respect of any such alleged information. On the Respondent's case, the "*unshakeable commitment of confidentiality for the identities of such individuals indefinitely*" remains.

iv) As to the importance of NCND in this regard, Mr Crow QC repeated orally at the second hearing the powerful submission which he made in paragraphs 69 to 72 of his reply submissions for the original hearing, which we set out below and which are both convincing and entirely consistent with the approval of the NCND policy by this Tribunal and by the Courts, referred to in paragraph 4 above:

> "*69. … If it were the case that Mr Rosbaud had been an SIS agent, the NCND policy would require the Response to be in NCND terms irrespective of whether, in the particular circumstances of the present case, the revelation of Mr Rosbaud's role might do any harm either to his interests or to those of his family (including descendants). This is because an NCND policy is not simply concerned with maintaining secrecy in individual cases. Such a policy must necessarily also operate generally so as to ensure that an official statement in any given case is not capable of becoming an illuminating point of reference when that case is compared with others.*
>
> *70. The point can be illustrated by the following hypothetical example. Mr X and Mr Y acted as agents for SIS 60 years ago. Let it be assumed that there are some materials in the public domain (albeit not emanating from official sources) suggesting this to be the case. Mr X and Mr Y are both now deceased. Two requests are made of SIS to confirm the role of Mr X and Mr Y, respectively. Mr X's role could be revealed without harming any of Mr X's interests, or the interests of Mr X's descendants. By contrast, if Mr Y's role were publicly revealed, there is a risk, in all the circumstances, that Mr Y's descendants might suffer reprisals (whether at the hands of a State or from private individuals or non-governmental organisations or groups).*
>
> *71. It would clearly be justifiable for SIS to provide an NCND response in relation to the request concerning Mr Y. What of the request in relation to Mr X? Considered alone, it might be thought that it would be safe to confirm that Mr*

> *X was an SIS agent, as no harm would flow as regards Mr X's interests, or those of his descendants. But, a positive confirmation in Mr X's case would provide an illuminating point of reference as regards the NCND response in Mr Y's case. In particular, the NCND response in Mr Y's case would no longer in practice have the effect of neither confirming nor denying that Mr Y was an agent: it would, by comparison with the positive response in Mr X's case, suggest that Mr Y was in fact an agent (to the potential detriment of Mr Y's descendants). In particular, if Mr Y had not in fact been an SIS agent then it would be difficult to see why SIS would not publicly confirm that to be the case, rather than issue an NCND response, given that (i) no harm could flow to Mr Y's descendants to issue such a confirmation and (ii) it would be clear from Mr X's case that SIS was content to provide public for information of Mr X's status in similar circumstances.*
>
> *72. Thus, for an NCND policy to be effective in ensuring that information is not revealed about individual cases, the NCND response must be provided invariably. This is not a novel point: it lies at the heart of the NCND policy as it is, and always has been, applied by the security and intelligence agencies.*"

46. In carrying out its inspection of any documents that may exist, and applying the tests above set out, the Tribunal bears in mind all the above submissions.