

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 August 2018

Public Authority: The Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office seeking information about the process Sir Craig Oliver followed in seeking permission for his memoir *Unleashing Demons: The Inside Story of Brexit*. The Cabinet Office's initial response to the complainant confirmed that it held some information falling within the scope of the request, albeit no actual information was disclosed. However, in its internal review response the Cabinet Office stated that it did not hold any information. The complainant argued that the Cabinet Office was likely to hold information falling within the scope his request. During the course of the Commissioner's investigation, it became evident that there was a dispute between the Cabinet Office and the complainant as to how his request should be interpreted. The Commissioner has concluded that the complainant's interpretation of the request, rather than the Cabinet Office's interpretation, is the correct and objective one.
2. As a result, the Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a fresh response to his request based on the complainant's interpretation of it. For the avoidance of doubt, such an interpretation of the request will encompass any and all recorded information the Cabinet Office holds about the process Sir Craig Oliver followed in light of the steps required in paragraph 23 of the Code of Conduct for Special Advisers issued in October 2015. That is to say, the request should be interpreted to cover both information about any permission Sir Craig sought to publish

and/or enter into a contract to publish his memoir **and** any information about Sir Craig sending the draft manuscript for review.

3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. The complainant submitted the following request to the Cabinet Office on 16 October 2016:

'This is a request under section 1 of the Freedom of Information Act 2000.

The information requested is:(1) Whether Sir Craig Oliver, formerly Director of Communications at 10 Downing Street and formerly a Special Adviser to the former Prime Minister, the Rt Hon. David Cameron, sought approval for the publication of his memoir, Unleashing Demons: The Inside Story of Brexit, published by Hodder & Stoughton on 4th October 2016, or approval to enter into a contractual commitment to publish that memoir, in accordance with paragraph 23 of the Code of Conduct for Special Advisers, promulgated by the Cabinet Office in October 2015?

(2) Whether approval (a) to enter into a contractual commitment and (b) to publish was granted under that provision, and if so, by whom and at what time?'

5. The Cabinet Office responded to this request on 3 November 2016:

'I am writing to advise you that following a search of our paper and electronic records, I have established that some of the information you requested is held by the Cabinet Office.

Craig Oliver followed the process for publishing personal memoirs as set out in the Code of Conduct for Special Advisers. This can be found here

www.gov.uk/government/uploads/system/uploads/attachment_data/file/468340/CODE_OF_CONDUCT_FOR_SPECIAL_ADVISERS_15_OCTOBER_2015_FINAL.pdf

6. The complainant contacted the Cabinet Office on the same day and asked it to conduct an internal review. The complainant noted that the Cabinet Office's response failed to confirm which parts of the requested

information were held and furthermore failed to provide any of the requested information to him.

7. The Cabinet Office informed him of the outcome of the internal review on 27 July 2017. It explained that:

'The Cabinet Office does not hold any recorded information to show there was a discussion prior to Mr Oliver signing a contract with a publisher. However, I can confirm that Mr Oliver submitted his manuscript for comment in accordance with paragraph 23 of the Code of Conduct for special advisers.'

Scope of the case

8. The complainant contacted the Commissioner on 18 August 2017 in order to complain about the way his request for information had been handled. He raised the following grounds of complaint:
 - The Cabinet Office has failed to state whether any recorded information is held regarding whether Sir Craig Oliver was granted permission to publish his memoir.
 - The Cabinet Office has inconsistently confirmed whether it holds any recorded information about whether Sir Craig Oliver sought or obtained permission regarding the contractual arrangement to publish. In support of this point the complainant noted that the refusal notice stated that Sir Craig *'followed the process for publishing personal memoirs as set out in the Code of Conduct for Special Advisers'*. The complainant argued that it was implausible that the Cabinet Office would make such a statement without any evidence to support it. However, the complainant noted that in the internal review the Cabinet Office stated it *'does not hold any recorded information to show there was a discussion prior to Mr Oliver signing a contract with a publisher'*. The complainant argued that these two assertions cannot stand together.
 - Finally, the complainant argued that it is very likely that the Cabinet Office did hold some recorded information falling within the scope of his request and as such this information should have been provided to him in response to his request.
9. During the course of the Commissioner's investigation it became evident that there was some disagreement between how the Cabinet Office had interpreted the request and how the complainant interpreted the request.

10. In circumstances such as this where the two parties have a different interpretation of the request the Commissioner will simply issue a decision notice which confirms which interpretation she considers to be the correct one. If the complainant's intended interpretation is an objective reading of the request, then the Commissioner will issue a decision notice which orders the public authority to issue a fresh response based upon the complainant's interpretation of the request. If the complainant's interpretation is not an objective reading, and the public authority's is, then the Commissioner will issue a decision notice which finds that the request has been interpreted correctly by the public authority.

Reasons for decision

How should the request be interpreted?

The Cabinet Office's position

11. The Cabinet Office explained to the Commissioner that there are two points at which a former special adviser is expected to have contact with their former Department and the Cabinet Secretary about publishing their memoirs. These are: (i) seeking permission to publish and/or enter into a contract to publish and (ii) sending the draft manuscript for review. The Cabinet Office explained that both of these stages comprise the proper process for publishing memoirs, as set out in the Code of Conduct for Special Advisers (the Code).¹
12. The Cabinet Office further explained to the Commissioner that regarding the first of these elements it did not hold any recorded information to show that Sir Craig sought permission to publish and/or enter into a contractual agreement to publish his memoir. Rather the Cabinet Office explained that it understands that instead a verbal discussion took place between Sir Craig and the Cabinet Secretary on this point. On the second element, the Cabinet Office explained that it did hold recorded

¹ The relevant part of the Code is contained at paragraph 23 and states: '*Civil servants, including special advisers, must not publish or broadcast personal memoirs reflecting their experience in Government, or enter into commitments to do so, while in Crown employment. The permission of the head of their former Department and the Cabinet Secretary must be sought before publishing, or entering into a contractual commitment to publish such memoirs after leaving the Civil Service. They must submit any draft manuscripts for comment to the head of their former Department and the Cabinet Secretary in good time in advance of publication. Detailed rules are set out in Section 4.2 of the Civil Service Management Code. Separately, they should send a copy of the draft manuscript to the Prime Minister's Chief of Staff in post at the time of their employment.*'

information to show that Sir Craig submitted his manuscript for review before publication.

13. However, the Cabinet Office noted that the request asked '*Whether Sir Craig Oliver....sought approval for the publication of his memoir....or approval to enter into a contractual commitment to publish that memoir in accordance with paragraph 23 of the Code of Conduct for Special Advisers...*' The Cabinet Office argued that this focused specifically on the first element of the process, and as set out above, the Cabinet Office did not hold any recorded information about this element of the process.
14. In its submissions to the Commissioner the Cabinet Office acknowledged that its original response to the request was not as clear as it could have been on this point and it should have specified that the only information it held related to a different element of paragraph 23 of the Code, an element which the Cabinet Office did not consider the complainant's request to cover.

The complainant's position

15. The complainant explained to the Commissioner that he did not agree with the Cabinet Office's interpretation of his request. In summary, he has argued that paragraph 23 of the Code, when read as a whole, imposes three related duties which are relevant to his request, namely:
 - First, if a memoir is to be published pursuant to a contractual commitment, permission to enter into that commitment must be sought and obtained from the Head of the Special Adviser's former Department and the Cabinet Secretary before the former Special Adviser enters into the contract.
 - Secondly, whether or not the memoir is to be published pursuant to a contractual commitment, a draft of the manuscript be submitted for comment in good time in advance of publication to those two individuals for their comments (with a copy to the Prime Minister's Chief of Staff).
 - Thirdly, permission to publish the memoir must be obtained from the two individuals thereafter before publication.
16. The complainant argued that it was self-evident that the grant of any permission to publish pursuant to the third requirement can only happen *after* the draft manuscript's submission to the individuals concerned. He suggested that if it were otherwise, the requirement to submit the draft manuscript 'for comment' would be absurd: permission to publish would have already been given and the evident purpose of the requirement, to enable modifications to be made if necessary so that permission may be

given rather than refused, would be frustrated. Moreover, and fundamentally, the complainant argued that the Cabinet Secretary and/or Head of Department would not be able to consider properly whether to grant permission to publish. On this basis the complainant argued that it is contrary to the wording and purpose of paragraph 23 of the Code for the Cabinet Office to state that the submission of the manuscript is a '*second requirement of the Code*', separate from the requirement to obtain approval to publish. Rather, in the complainant's view, the submission of the manuscript is an integral part of the duty to seek and obtain approval for publication. Therefore, in his view a Special Adviser cannot properly seek approval other than by submitting his draft manuscript for approval.

17. For the above reasons, the complainant argued that he did not accept the Cabinet Office's interpretation of the Code nor its interpretation of his request. Whilst he acknowledged that his request specifically sought information about the requirement to seek and obtain permission to publish, he has argued that it was a matter of logic that this permission to publish would include information about the submission of any manuscript.

The Commissioner's position

18. Having considered the submissions of both parties the Commissioner has concluded that the complainant's interpretation of the request is arguably the more objective one. In reaching this conclusion, the Commissioner understands why the Cabinet Office would consider paragraph 23 of the Code to impose the following obligations on a Special Adviser, namely (i) the need to seek permission to publish and/or enter into a contract to publish and (ii) sending the draft manuscript for review. The Commissioner also accepts that the complainant's request only asked for information about '*the permission to publish*' and did not explicitly or separately state he was also interested in information about the process of reviewing a manuscript.
19. However, in the Commissioner's opinion the complainant makes some compelling arguments in relation to the duties of the Code being related, rather than separate, and in particular the Commissioner agrees that it is difficult – if not impossible – to see how '*permission to publish*' could be given without prior approval of an actual manuscript. In other words, the Commissioner would interpret the phrase in the complainant's request where he sought information about Sir Craig Oliver seeking '*approval for the publication of his memoir*' to encompass all parts of the processes set out in paragraph 23 of the Code. This would of course include information not only about the permission to enter into a contract, but also information about the submission of an actual manuscript.

Other matters

20. In taking the approach which she has in this decision notice, the Commissioner acknowledges that she is not able, in this notice, to address concerns the complainant raised with her – both in his initial complaint and during the course of her investigation – about the Cabinet Office’s failure to locate recorded information which, if held, would fall within the scope of the request (be it the Cabinet Office’s narrower interpretation of the request or the complainant’s broader interpretation). However, given the approach which the Commissioner takes in cases where there is a disagreement about the interpretation of a request, any concerns about the amount of information located by a public authority can only be considered once the Commissioner has issued her preliminary decision notice which sets out her findings on how the request should be interpreted.
21. Furthermore, the Commissioner acknowledges that the complainant has expressed concern about the way in which the Cabinet Office initially handled his request, an approach he suggested was characterised by delay, inconsistency and obfuscation. Moreover, he argued that it could not be right for the Cabinet Office to be allowed to put forward a new – and errant – interpretation of a request to the Commissioner which it had never relied on before. The complainant acknowledged that the two stage approach adopted by the Commissioner – ie an initial decision notice dealing with the interpretation of the request and a second decision notice dealing with any complaint about the public authority’s fresh response to the request - may be appropriate where both parties had *always* disagreed on the interpretation of this request. However, he suggested that in its initial responses to his request the Cabinet Office had tacitly accepted that the recorded information it did hold about the submission of the manuscript was in the scope of the request. The complainant argued that the Cabinet Office’s opportunity to raise any exemptions to withhold such information was at that stage, and the Commissioner should as part of this present investigation have considered whether the recorded information which the Cabinet Office acknowledged holding should be disclosed under FOIA.
22. The Commissioner recognises that the Cabinet Office took over 8 months to complete its internal review. The Cabinet Office explained that this was due to an administrative oversight. The Commissioner accepts that such mistakes can happen. However, such a delay was compounded by the fact that it took the Cabinet Office 3 months to respond to the Commissioner’s initial letter on this case. Such delays are regrettable in any case, but particularly in ones where as a result of the Commissioner’s investigation the public authority has to issue a fresh response to the request thus delaying any final outcome for the complainant.

23. Furthermore, as the Cabinet Office itself acknowledges, its initial response to this request could have been clearer. In the Commissioner's view the same could also be said of the internal review response. However, or indeed perhaps because of the ambiguity of these responses, it has become evident during the course of the Commissioner's investigation that there is clear divergence between the two parties about the interpretation of the request. In the Commissioner's opinion the correct approach to such scenarios is the one adopted in this notice. She accepts that by adopting this approach if the complainant wishes to challenge the Cabinet Office's fresh response – either because it relies on exemptions to withhold information and/or because he considers the Cabinet Office holds further recorded information it has not disclosed or sought to withhold on the basis of exemptions – then he will need to make a further section 50 complaint to the Commissioner. Such an approach of course assumes that the Cabinet Office does not appeal this present decision notice. Either outcome inevitably prolongs this process but in the Commissioner's view there is no way to avoid this.

Right of appeal

24. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

25. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
26. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Jonathan Slee
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