

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 05 May 2011

Public Authority: Foreign and Commonwealth Office
Address: Old Admiralty Building
London
SW1A 2PA

Summary

The complainant made a request under the Freedom of Information Act 2000 to the Foreign and Commonwealth Office as to whether it held any information on, and whether it had sought legal advice about, alleged felonious practices by the World Bank Group. The public authority responded that it did not hold information in respect of the request.

The Commissioner investigated and has concluded that, on the balance of probabilities, the information requested was not held by the public authority and it therefore complied with section 1(1)(a) in denying that it held the requested information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant made a request to the Foreign and Commonwealth Office (the 'FCO') on 10 February 2010 for the following information:

"Recognising 1) that the Foreign Office retains primary responsibility for relations with foreign governments and coordinates the relations of other Departments with them, directly or through international organisations; 2) that the Legal Adviser to the Foreign Office has the

function of advising, in an international, legal regard, all central Departments; 3) that the Legal Adviser to the foreign Office has also to apply to the Law Officers of the Crown for opinions in a matter of international law; and 4) that the function of the Treasury Solicitor is of advising on litigation where Departments do not have a legal adviser; to ask for the following information:

a) Whether the Treasury Solicitor, on behalf of the Department for International Development (DfID), stated a case for the opinion of the Legal Adviser to the Foreign Office founded upon international questions of 'felonious misconduct' shown to have been committed by officials of the World Bank Group (WBG) as raised with Douglas Alexander, International Development Secretary and UK Governor to the WBG by Alex Gibbs, British Executive Director to the WBG and Nigel Griffiths MP (Labour, Edinburgh South), in or about October 2007, in which case, on what dates the Treasury Solicitor asked for the opinion and when it was given?

b) Whether in relation to a) the Legal Adviser to the Foreign Office made a précis of the international questions in regard to the 'felonious misconduct' allegations and submitted actual questions upon them to the Law Officers and/or the Queen's Advocate only, in which case, on what dates the Legal Adviser asked for the opinion and when it was given?

c) Whether in relation to a) and b), the Legal Adviser to the Foreign Office, the Law Officers and/or the Queen's Advocate, to judge for themselves, asked to see the papers and documents on which the opinion was to be founded, then if abridged by a person in whose judgment they might not have entire confidence?

d) Recognising that in international law the Specialised Agencies Convention have provisions that emphasise the point that whilst the immunity from national jurisdiction of both organization and officials precludes that particular jurisdiction, the principle of liability remains and an alternative jurisdiction or procedure must be established so as to enable claims against the organization to be dealt with justly, whether the Foreign Office can take up a case with the International Court of Justice on behalf of a British citizen who has been the victim of serious (felonious) misconduct and denial of justice at the hands of an international organization? If not, what alternative jurisdiction procedure must be established?

e) In relation to UK contributions to trusts administered on behalf of donors by any of the constituent parts of the World Bank Group: (i) which law or legal provisions, policies and rules govern the trusts in terms of acceptance criteria; (ii) is there an obligation on DfID or any

other central UK Department making trust fund contributions to the WBG to adhere to the acceptance criteria established in WBG policies following adoption by resolution as may be amended from time to time by the boards of executive directors and governors to the WBG; and (iii) in circumstances where the WBG, DfID and/or other central Departments breach acceptance criteria for mobilization and use of UK contributions to WBG administered trust funds, what action must be taken, and by whom, to investigate the breach and make restitution for any wrongs and losses arising?"

3. The FCO provided a response to the complainant on 10 March 2010 in which it confirmed it did not hold any information in relation to (a), (b), (c) and (e). It suggested that she may wish to contact the DFID in relation to (d) and (e); in relation to the questions in (d), it explained that it is not possible for the United Kingdom to bring a case against an international organisation in the International Court of Justice and that DFID is the government department which takes responsibility for issues relating to the World Bank.
4. The complainant requested an internal review of the public authority's decision on 22 July 2010.
5. On 20 August 2010 the public authority wrote to her with the details of the result of the internal review it had carried out. It stated that it had understood her review request to be in relation to point (d) and reiterated its initial decision, including restating that it held no information about alternative dispute settlement mechanisms.

The Investigation

Scope of the case

6. On 24 August 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled.
7. The focus of the Commissioner's investigation was to consider whether, on the balance of probabilities, the FCO held any information which fell within the scope of the request.

Chronology

8. The Commissioner wrote to the FCO on 11 January 2011 seeking further information which included questions about the searches it had undertaken in relation to this request.

9. After contacting the FCO to query the whereabouts of its response, the FCO provided the Commissioner with further details on 22 February 2011.
10. On 22 March 2011 the Commissioner wrote to the complainant outlining his preliminary view that, on the balance of probabilities, the requested information was not held by the FCO and invited the complainant to withdraw her complaint.
11. The complainant confirmed she wished to pursue her complaint on 23 March 2011.

Analysis

Substantive Procedural Matters

Section 1 – Is the requested information held?

12. Section 1(1) of the Act states that:

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.”*

The full text of section 1 can be found in the Legal Annex at the end of this Notice.

13. In this case, the Commissioner has considered whether the FCO has complied with section 1(1)(a) of the Act in stating that it did not hold any information as per the request. In order to do this the Commissioner has considered whether any information is held by the FCO.
14. The Commissioner is mindful of the Tribunal's decision in *Bromley v the Information Commissioner and the Environment Agency (EA/2006/0072)* in which it was stated that *“there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records”*. It was clarified in that case that the test to be applied as to whether or not information is held was not certainty but the balance of

probabilities. This is therefore the test the Commissioner will apply in this case.

15. In discussing the application of the balance of probabilities test in the above case, the Tribunal stated that:

"We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed."

The Commissioner has therefore taken this into account in determining whether or not the requested information is held on the balance of probabilities.

16. The Commissioner asked the FCO what searches it had carried out for information falling within the scope of this request and why these searches would have been likely to retrieve any relevant information, should it have been held.
17. In response to the complainant's questions a), b) and c), the FCO advised it had searched the Legal Advisers' electronic folder on the shared computer hard drive for relevant information pertaining to the request. It explained that it had sent an email to all lawyers in the department asking them to search for any information relating to any legal advice which may have been provided in relation to the subject of the request in October 2007. The FCO has confirmed that no relevant information was found. It also advised that the legal adviser with responsibility for DFID matters at that time had confirmed that he had no record of such advice having ever being given.
18. The FCO advised the Commissioner that if legal advice were to have been provided, it is likely that it would have been saved in the Legal Advisers' shared drive. It explained that if a lawyer had dealt with this matter and had a paper file, the lawyer would keep this file and would be able to locate it by searching through their local files.
19. The FCO's Policy teams were also asked to search their records as part of the search process. The FCO has explained that its Policy teams are

essentially the political and geographical teams responsible for bi-lateral and multi-lateral work, who deal with actual foreign policy and international relations on a daily basis, as opposed to departments such as Legal Advisers who provide a support service.

20. In response to the complainant's question d) in her request, the FCO commented the Act did not seem to apply to this question as it asks what action the FCO would be able to take in a theoretical set of circumstances rather than for any specific information it holds. However, the FCO chose to respond to this alongside the other questions as a matter of courtesy. It consulted with its Consular Directorate, Global Economic Group and Legal Advisers and was informed that the FCO would not be able to take up a case against an international organisation at the International Court of Justice as only States can be parties before the court. The individuals who were consulted also informed the Legal Advisers Department that they held no information about what alternative jurisdictions could be established.
21. In relation to the complainant's question e) the FCO has explained that the Global Economic Group leads on matters relating the World Bank Group and so is the team who would hold any information relevant to this part of the request. For this reason, the FCO sought advice from the relevant officer at the World Bank in Global Economic Group in the FCO. The FCO has explained that, on 4 March 2010, this officer sent an email to confirm that her team had searched their shared drive and iRecords and had been unable to find any relevant information.
22. The Commissioner asked the FCO to provide further details about the electronic searches it had undertaken in order to respond to the request. In response, the FCO has advised that the Global Economic Group ('GEG') searches were of the shared drive, iRecords and the relevant officer's personal folders and inbox. The FCO has confirmed that its lawyers working in Legal Advisers were also asked to search their own records for any relevant information. Whilst the FCO did not keep a record of the search terms used, it has stated that there is an assumption that search terms such as 'World Bank Group' and 'felonious misconduct' were used when searching the Legal Advisers shared area.
23. The Commissioner queried whether the FCO ever held any recorded information relevant to the scope of the request but which was either deleted or destroyed. In response, the FCO confirmed that it found no information to indicate that information relevant to the scope of the request was ever held by the FCO.

24. The FCO advised the Commissioner that there is no specific guidance on the retention and deletion of legal advice, explaining that the policy for keeping legal case files is for them to be retained by Legal Advisers for six years and then shredded or incinerated. Case files dating from 2007 would therefore still be retained by the department.
25. The FCO explained that, whilst there are no statutory requirements upon it to retain the requested information, its legal advisers would keep a copy of legal advice so that they could refer to this if asked to provide an opinion on a similar matter in future.
26. The Commissioner asked the FCO to explain in what circumstances its Legal Advisers would get involved in allegations of 'felonious misconduct'. In reply, the FCO stated that its Legal Advisers would only consider any allegations of misconduct where its advice was sought on the question by DFID. At that stage, FCO Legal Advisers would need to make a decision as to whether the instructions fell within its remit of providing DFID with advice on issues concerning international and EU law. If the issue did not fall into those categories FCO Legal Advisers would advise DFID to consider instructing the Treasury Solicitor's Department or private sector lawyers as appropriate.
27. The Commissioner enquired whether the FCO's Legal Advisers would only get involved in issues if requested to do so or if asked to provide a legal opinion. In response, the FCO confirmed that its Legal Advisers provide DFID with legal advice on issues of international and EU law only where its advice is specifically requested by DFID.
28. The Commissioner asked what records would normally be retained by the FCO if its Legal Advisers were to be involved in providing legal advice/opinion on any given issue. The FCO explained that it is the responsibility of its policy teams, rather than Legal Advisers, to retain and register legal advice which follows the FCO's Legal Matters guidance. In this case, if advice were provided to DFID, then DFID would be responsible for retaining this. The FCO has stated that its Legal Advisers do generally keep a record of the advice they have provided in local files or in the Legal Advisers folder in the shared drive.

Conclusion

29. In coming to a conclusion upon this case the Commissioner has taken into account the explanations provided by the FCO as well as the Tribunal decision highlighted above. The Commissioner considers that on the balance of probabilities the requested information is not held by the FCO.

The Decision

30. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

31. The Commissioner requires no steps to be taken.

Right of Appeal

32. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

33. 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.
34. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 5th day of May 2011

Signed

**Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
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Cheshire
SK9 5AF**

Legal Annex

The Act - General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Section 1(2) provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Section 1(3) provides that –

"Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

Section 1(4) provides that –

"The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”