

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 August 2012

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

Decision (including any steps ordered)

1. The complainant requested copies of correspondence between former Prime Minister, Tony Blair and former President of Libya, Colonel Muammar Qadhafi.
2. The Commissioner's decision is that:
 - The public authority was entitled to withhold the disputed information on the basis of the exemption at section 27(1)(a).
 - The public authority was entitled to rely on sections 23(5) and 24(2) FOIA to neither confirm nor deny it held information within the scope of the request exempt from disclosure on the basis of sections 23(1) and 24(1) FOIA.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 8 September 2011, the complainant wrote to the public authority and requested information in the following terms:

'Please could you provide me with copies of all letters signed by Tony Blair and sent to Colonel Gadaffi of Libya.'

Please could you provide me with copies of all letters sent to Tony Blair that were sent to him by Colonel Gadaffi of Libya.'

5. The public authority responded on 29 November 2011. It withheld the information within the scope of the request above (the disputed information) on the basis of the exemptions at sections 27(1) (a), (b), (c) & (d), 27(2), 29(1)(a), 38(1) (a) & (b), 40(2), 41(1), 42(1) and 43(2) FOIA.
6. Relying on the exclusions at sections 23(5) and 24(2) FOIA, the public authority also refused to confirm or deny whether any of the disputed information was subject to the exemptions at sections 23(1) or 24(1) FOIA
7. The complainant requested an internal review of the decision on 20 December 2011. The public authority wrote to the complainant on 16 February 2012. It stated that it had '*conducted a thorough review of the original response, the exemptions which were used under the Freedom of Information Act were correctly applied and tested...*' and consequently upheld the original decision.

Scope of the case

8. On 3 March 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He submitted that the exemptions had been applied without a proper consideration of the disputed information. He had previously argued in correspondence with the public authority that disclosure was unlikely to prejudice the UK's relations with Libya in light of the age of the disputed information, the regime change in Libya, the death of Muammar Qadhafi, and the fact that the Labour party was no longer in power. He also submitted that there was a strong public interest in disclosure because '*Col Gaddafi was a man reviled by many*'.
9. The public authority withdrew its reliance on the exemptions at sections 38(1) (a) and (b). It also argued that the complainant had not challenged the application of the exemptions at sections 40(2), 41(1), 42(1), and the exclusions at sections 23(5) and 24(2). It was therefore of the view that any investigation by the Commissioner regarding the application of those exemptions would be premature as the complainant had not exhausted its complaints procedure in relation to their application.
10. The public authority however made submissions to the Commissioner in relation to the application of sections 40(2), 41(1), 42(1), 23(5) and 24(2) without prejudice to its view that the investigation should be confined to the application of the exemptions at sections 27(1) (a), (b), (c) & (d), 27(2), 29(1)(a) and 43(2).

11. The complainant strongly argued that he challenged all the exemptions cited by the public authority in his request for an internal review. Regarding the application of sections 23(5) and 24(2), he stated: *'I did concede that the NCND exemptions may apply to certain of the information but almost certainly not all of it and obviously there is some correspondence between the parties otherwise all the other exemptions would not have been cited.'*
12. The Commissioner considers the scope of his investigation extends to the application of the exemptions at sections 40(2), 41(1), 42(1) and the exclusions at sections 23(5) and 24(2).
13. In the Commissioner's view, the complainant questioned the application of each of the exemptions including sections 23(5) and 24(2) in his request for an internal review on 20 December 2011. He argued that the disputed information could be sufficiently redacted to negate the exemptions that were engaged. He summed up his dissatisfaction with the decision to withhold the disputed information in the following words:

*'In short, I do not believe that **all** of the correspondence between Tony Blair and Col Gadaffi, that was actually signed by them, would attract any, or all, of the exemptions cited in the response. As such, given the government's desire to be seen as open and transparent, the public interest in the disclosure of those documents, redacted where necessary, would outweigh the public interest in withholding them.'*
14. There is nothing to suggest that in carrying out the review, the public authority restricted itself only to the application of the exemptions it considered the complainant had challenged. In fact, as mentioned above, the public authority concluded that all the exemptions had been correctly engaged and consequently upheld the original decision.
15. Further, the public authority did not ask to revisit the request with a view to disclosure. Rather, it provided the Commissioner with submissions to justify the application of all the exemptions including sections 23(5) and 24(2) without prejudice to its view that the investigation should be confined to some of the exemptions. There was therefore hardly any point in the public authority conducting another review at that stage.
16. The Commissioner is satisfied that, in his request for an internal review, the complainant expressed dissatisfaction with the application of the exemptions and exclusions cited by the public authority in the refusal notice of 29 November 2011.
17. The scope of the investigation therefore was to determine whether the public authority was entitled to rely on the exemptions at sections 27(1)

(a), (b), (c) & (d), 27(2), 29(1)(a), 40(2), 41(1), 42(1), 43(2), 23(5) and 24(2) FOIA.

Reasons for decision

18. The public authority claimed that all of the disputed information was exempt from disclosure on the basis of the exemption at section 27(1)(a). It was however keen to stress that in the circumstances of this case, the arguments for the application of the exemptions at sections 27(1) (a), (b), (c), (d), 27(2), 29(1)(a) and 43(2) are intertwined. For instance, the disclosure of information exempt by virtue of section 27(1)(b) is likely to have a corresponding prejudicial effect on the UK's relations with other countries. The disclosure of information exempt by virtue of section 27(2) is likely to damage relations with the State to which the confidence is owed. Similarly, the commercial and economic interest covered by sections 29(1)(a) and 43(2) are closely related to and in some cases identical with the interests at sections 27(1) (c) and (d). The Commissioner accepts that in the circumstances of this case, arguments in relation to the exemptions at sections 27(1) (b), (c), (d), 27(2), 29(1)(a) and 43(2) could be linked to arguments in relation to the prejudice envisaged under section 27(1)(a). In other words, the prejudicial effect of disclosure in relation to those exemptions is likely to also have a consequent wider prejudicial effect on relations between the United Kingdom (UK) and other countries.

Section 27(1)(a)

19. Information is exempt from disclosure by virtue of section 27(1)(a) if it would, or would be likely to, prejudice relations between the UK and any other State.
20. In order for a prejudice based exemption, such as section 27(1)(a) to be engaged the Commissioner believes that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.
21. The public authority explained that it considered the damage to the UK's relations with other States on three levels. First, the prejudice to relations with Libya and other States directly mentioned in the disputed information. Second, there is the prejudice to relations with individual States occasioned by prejudice to the UK's relations with the international organisations (mentioned in the disputed information) of which the States concerned are members. Although prejudice to relations with international organisations is an argument inherent in section 27(1)(b), the public authority was keen to point out the consequential prejudice to relations with individual member States. Third but not least is what the public authority referred to as the '*general psychological effect*': how all the other States with which the UK interacts will construe the disclosure of information such as the disputed information, how they will act towards the UK as a result and how the UK will have to adapt.
 22. The public authority submitted that the exemption was engaged because at the time of the request in September 2011, and at all times since, there was a definite risk of an adverse reaction from the Libyan authorities, although the precise form of the reaction was unpredictable. At the time of the request, the situation in Libya was volatile. Muammar Qadhafi, although no longer recognised by the international community as Libyan leader, remained at large and retained significant support in some major cities in Libya. It was uncertain whether he, or at least his former supporters, would reach some form of power-sharing agreement with opposition forces. The possibility of a counter insurgency could also not be excluded. Disclosure of sensitive diplomatic exchanges (i.e. the disputed information) '*was certain*' to offend pro-Qadhafi elements. Disclosure '*would certainly*' have damaged relations with the opposition forces which the UK government was seeking to work with to restore the rule of law in Libya.
 23. The public authority further argued that disclosure at the time of the internal review in December 2011 (completed in February 2012) and at present would have the same damaging effect on relations between the UK and the still fragile transitional authorities in Libya.

24. In terms of the prejudice to relations with other States mentioned in the disputed information, the public authority referred to specific parts of the disputed information, the disclosure of which it considered '*would*' be prejudicial to relations with the countries concerned. The public authority also made reference to specific parts of the disputed information with regard to prejudice to other States by virtue of them being Member States of international organisations mentioned in the disputed information.
25. The public authority further argued that the prejudicial effect of disclosure was not confined to relations with Libya and the other States mentioned in the disputed information. It explained that this constituent of the prejudicial effect of disclosure (the 'general psychological effect') does not arise from the content of the disputed information but from the type of information it is, an account of direct diplomatic exchange at the very highest level of government. That type of information it explained is intrinsically sensitive and all heads of government are alive to the sensitivity of such exchanges. Disclosure '*would*' therefore prejudice relations with all States as they are likely to take it into account in future exchanges with the Prime Minister. It conceded that the damage to relations with other States was unlikely to be uniform across the international community but argued that the effect on other States' calculation of the degree of trust that can be placed on the UK in relation to diplomatic exchanges at that level was not remote or hypothetical.
26. The public authority submitted that disclosing the disputed information '*would or would be likely*' to result in the prejudicial effects mentioned above. It concluded that the risk of prejudice was real and significant, and not merely speculative. It was also of the view that the risk of prejudice was real and of substance in the sense approved by the Information Tribunal (Tribunal) in Campaign Against Arms Trade v Information and Ministry of Defence EA/2006/0065 (CAAT) at paragraph 81.
27. The Commissioner accepts that the alleged prejudicial effect (i.e. damage to the UK's relations with Libya and other States) of disclosing the disputed information relates to the applicable interests within the exemption at section 27(1)(a).
28. The Commissioner further accepts that there is a causal link between prejudice to the UK's relations with Libya and other States and the disclosure of correspondence between former Prime Minister Tony Blair and former Libyan President, Muammar Qadhafi. He is satisfied that the nature of the prejudice that could occur in the circumstances is real and of substance.

29. With regard the third criterion, the public authority did not specify the level of likelihood of prejudice and submitted instead that disclosure '*would or would be likely to*' prejudice relations with Libya and other States. It was however keen to stress that it considered the risk of the prejudice occurring real and significant, and not merely speculative. Where a public authority has not specified the level of prejudice, the Commissioner will assess the public authority's arguments on the basis of the lower threshold of prejudice (would be likely) unless there is clear evidence that it should be at the higher level.
30. The Commissioner considers '*would be likely to prejudice*' means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. '*Would prejudice*' places a much stronger evidential burden on a public authority and must be at least more probable than not. In light of the disputed information and public authority's submissions, the Commissioner decided to consider whether the lower threshold of prejudice had been met.
31. The Commissioner notes that there is a long-standing international convention on the confidentiality of exchanges conducted through diplomatic channels. He agrees with the public authority that correspondence exchanged at the highest level of government, in this case between two former heads of government, would be regarded as highly sensitive. He accepts that the former Libyan President, Muammar Qadhafi and the government in Libya at the time would have considered the exchanges (within the scope of the request) as highly confidential. At the time of the request in September 2011, the Qadhafi led government was no longer in complete control of Libya but it had not been effectively removed from power. The Commissioner accepts that disclosure at the time of the request could have led to an adverse reaction from pro-Qadhafi elements as well as the opposition forces seeking to oust the former Libyan President from office.
32. Muammar Qadhafi was reportedly captured and killed by opposition forces in October 2011.¹ The Commissioner however agrees that at the time of the request for an internal review in December 2011 and upon its completion in February 2012, the situation in Libya remained fragile and disclosure would have required the UK government to respond to any adverse reaction from the transitional authorities. He shares the Tribunal's view in the CAAT case (at paragraph 81) that prejudice can be

¹ See BBC News Africa: <http://www.bbc.co.uk/news/world-africa-12537524>

real and of substance if it makes international relations more difficult or calls for a particular diplomatic response to contain or limit damage which would not otherwise be necessary. The Commissioner agrees that the risk of an adverse reaction by the transitional authorities in Libya would suffice and it is not necessary to predict the precise form of the reaction either as a matter of probability or certainty (paragraph 81 CAAT case).

33. With regard to the general psychological effect which the public authority argued could be a consequence of disclosing the disputed information, the Commissioner is generally sceptical of arguments which envisage a wide impact from the disclosure of information on the future candour of public officials. However, in the context of diplomatic exchanges at the highest level of inter-governmental relations, as in the circumstances of this case, the situation is different. Therefore, the Commissioner has given particular weight to the prejudicial effect disclosure could have in respect of the particular issue at play, i.e. the long standing convention whereby exchanges between heads of government are held to be private and confidential. Further, as mentioned, prejudice can be real and of substance if it makes international relations more difficult. The risk of that occurring is sufficient, predicting the precise form of reaction is not necessary.
34. It is for the same reason above that the Commissioner is prepared to accept that disclosure would be likely to prejudice relations with other States mentioned in the disputed information and also like to prejudice relations with States by virtue of them being Member States of international organisations mentioned in the disputed information. There was a real risk of an adverse reaction by the States concerned in light of the ongoing situation in Libya, especially the sudden power shift from the Qadhafi led government which had been in power for 42 years to the opposition forces.
35. For the above reasons and having also taking into account the complainant's submissions, the Commissioner finds that the exemption at section 27(1)(a) FOIA did apply to the disputed information.

Public Interest Test

36. Section 27(1)(a) is a qualified exemption subject to a public interest test. The Commissioner must therefore also consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the disputed information.

37. In favour of disclosure, the public authority acknowledged the general public interest in openness, accountability, and public engagement and participation in government.
38. More specifically, it recognised the public interest in understanding British diplomacy in terms of relations with the Qadhafi regime and the Middle East in general. There was also a public interest in being able to evaluate the foreign policy of the previous government.
39. In favour of maintaining the exemption, the public authority argued there was a stronger public interest in the UK being able successfully to pursue its national interests. The UK was more likely to do so if it conformed to the conventions of international behaviour, avoided giving offence to other nations and retained the trust of international partners.
40. There is a very strong public interest in maintaining the UK's extensive interests throughout the Middle East and dealing sensitively with the region's governments and its peoples is crucial to maintaining the UK's interests. It was particularly important that the UK remains sensitive to how its present and past actions will be perceived in the region.
41. There was a very strong public interest in protecting the ability of the Prime Minister to speak candidly with any head of government and for heads of government of other countries to be able to speak candidly to the Prime Minister. If that was not the case, it would be more difficult for the UK to contribute to the development of a stable Middle East and a very important trading partner in Libya.

Balance of the Public Interest

42. The Commissioner agrees with the public interest arguments in favour of disclosure. He also considers there is a strong public interest in fully understanding the nature of the Blair-led Labour government's relationship with the Qadhafi regime which could be said to have been regarded with suspicion by some States in the international community. In the Commissioner's view, the disputed information would shed considerable light on the relationship.
43. However, that has to be balanced against the very strong public interest in not prejudicing relations between the governments of the UK and Libya. As mentioned, disclosure is likely to have serious consequences for the UK's interests in Libya and the wider Middle East. The Commissioner therefore accepts that there is a significant public interest in protecting the ability of the Prime Minister to speak candidly with his counterparts in other countries. It is also in the public interest that other

heads of governments can be candid in their exchanges with the Prime Minister.

44. Given the fragile nature of the situation in Libya at the time of the request, the Commissioner considers there was a very strong public interest in not creating an atmosphere that would not be conducive to the UK government's ability to exert its influence to stabilise the situation as quickly as possible to minimise the loss of life and property.
45. Although in the Commissioner's view the disputed information would shed light on the Blair-led Labour government's relationship with the Qadhafi regime, he does not consider it is of such significance that the public interest in disclosing it outweighs the very strong public interest in maintaining the confidentiality of communications at the highest level of government in the circumstances of this case.
46. The public interest in maintaining relations with other States mentioned and not mentioned in the disputed information is also strong in the circumstances of this case. It would not be in the public interest if other States were no longer willing to share information with the UK government at the highest level. It would have a significant effect on the UK's influence in international affairs and its ability to protect its interests abroad.
47. In light of the above reasons, the Commissioner finds that in all the circumstances of the case, the public interest in maintaining the exemption at section 27(1)(a) FOIA outweighed the public interest in disclosing the disputed information.
48. In view of the Commissioner's finding that section 27(1)(a) was correctly engaged, he did not consider the applicability of the remaining exemptions the public authority relied on, other than sections 23(5) and 24(2).

Sections 23(2) and 24(2)

49. Information relating to security bodies specified in section 23(3) FOIA is exempt from disclosure on the basis of section 23(1) FOIA. Information which does not fall under section 23(1) is exempt from disclosure on the basis of section 24(1) FOIA if it is required for the purpose of safeguarding national security. Sections 23(5) and 24(2) FOIA exclude a

public authority from the duty to confirm or deny² if it holds information subject to the exemptions at sections 23(1) and 24(2).

50. By virtue of section 23(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 section 23(3).
51. By virtue of section 24(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.
52. According to the public authority, it was *'jointly'* relying on sections 23(5) and 24(2) *'in conjunction to protect the involvement or non-involvement of section 23 bodies.'* The Commissioner does not consider the exclusions at sections 23(5) and 24(2) are mutually exclusive and he accepts that they can be relied on independently or jointly.
53. The public authority explained that it could neither confirm nor deny whether it held any information within the scope of the request which would be subject to the exemptions at sections 23(1) and 24(1). It submitted that to confirm or deny whether this was the case would involve the disclosure of exempt information, and may damage national security. It further submitted that confirming or denying whether intelligence material is included in information within the scope of the request could in itself disclose exempt information about the bodies listed in section 23(3), specifically, whether or not any of them advised the then Prime Minister about relations with Muammar Qadhafi.
54. The Commissioner is satisfied that the public authority is entitled to rely on sections 23(5) and 24(2) in the circumstances of this case. He accepts that revealing whether or not it holds information within the scope of the request which relates to security bodies would reveal information relating to the role of the security bodies. It would consequentially also undermine national security and for that reason section 24(2) also applies because neither confirming nor denying the relevant information is held is required for the purpose of safeguarding national security.

² Duty imposed by section 1(1)(a) FOIA. It states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request

55. The Commissioner wishes to emphasise that nothing should be inferred in this Notice as to whether the public authority actually holds any information within the scope of the request which is in fact exempt on the basis of sections 23(1) or 24(1).

Public Interest Test – Section 24(2)

56. Section 24(2) is a qualified exemption subject to a public interest test. The Commissioner must therefore also consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in confirming or denying whether the public authority held information in scope which would have been exempt on the basis of section 24(1).
57. The public authority acknowledged that openness increases public trust in, and engagement with, the government. It however argued that the public interest in safeguarding national security very strongly outweighed the public interest in confirming or denying if it held information in scope required for the purposes of safeguarding national security.
58. As mentioned, the Commissioner considers there is a strong public interest in understanding the nature of the Blair-led Labour government's relationship with Qadhafi regime. Whether or not the former Prime Minister, Tony Blair had, pursuant to the letters within the scope of the request, received advice from those charged with protecting national security would shed further light on the nature of the relationship.
59. The Commissioner however accepts that in the circumstances of this case, protecting information required for the purposes of safeguarding national security outweighs the strong public interest in openness and transparency.
60. The Commissioner finds that in all the circumstances of the case, the public interest in maintaining the exemption at section 24(2) outweighed the public interest in complying with the duty imposed by section 1(1)(a).

Right of appeal

61. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

62. 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.
63. 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

Graham Smith
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