

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 May 2013

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

Decision (including any steps ordered)

1. The complainant has requested correspondence exchanged between UK officials (including named military officers) and the International Criminal Tribunal for the former Yugoslavia ("ICTY"). The Cabinet Office argued that it did not hold the requested information. It upheld this position at internal review. The complainant identified some information which was, in his view, held by the Cabinet Office for the purposes of the FOIA. Although the Cabinet Office disputed this view, it identified, during the course of the Commissioner's investigation, other information within the scope of the requests which it accepted it held for the purpose of the FOIA.
2. The Commissioner's decision is that the Cabinet Office should have disclosed the information described in a Confidential Annex to this Notice within 20 working days of receiving the request. It contravened section 1(1) and section 10(1) where it failed to do so. However, the other information that it holds that has been identified as being within the scope of the request is private correspondence that is not held by the Cabinet Office for the purposes of the Act.
3. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation.
 - Disclose all the information which is described in a Confidential Annex to this Notice.
4. 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

5. On 18 July 2012, the complainant wrote to the Cabinet Office and requested information in the following terms:

"1. All and any records of communication (in whatever form) between the following UK military commanders and/or members of the Cabinet Officer[sic] – Major-General Michael Charlton-Weedy (who is a member of the Cabinet Office), [named military officers (retired)], [named military officer] – on the one hand, and the International Criminal Tribunal for the former Yugoslavia ("ICTY") on the other;

2. Any documents, information or material provided by Major-General Charlton-Weedy to the ICTY;

3. Records of any other contacts between the ICTY and the British Government regarding the case of ICTY Prosecutor v. Ante Gotovina and Mladen Mrkac case at the ICTY and any document provided by the UK Government in response to any request from the ICTY Office of the Prosecutor or proprio motu;

4. All documents concerning any communications between any member of the Office of the Prosecutor of the ICTY, including [named individual], and any person employed by the UK, in the last six months concerning the Prosecutor v. Ante Gotovina and Mladen Mrkac case;

5. All communications (including documents, emails, electronic files, notes, etc) prepared by [named official] of the UK Embassy in The Hague concerning the case of the ICTY Prosecutor v. Gotovina and Markac [sic], since 15 April 2012. This request includes records of any meetings between [named official] and any person from the ICTY, in which the case of Prosecutor v. Gotovina and Markac [sic] was discussed."

6. The Cabinet Office responded on 14 August 2012. It denied holding the requested information. It also explained that where the complainant requested correspondence with "the British Government" or "the UK Government" or "any person employed by the UK", it was only able to search for information that it, the Cabinet Office, held, not other public authorities or other individuals. It also stated that although Major-General Charlton-Weedy was employed by the Cabinet Office, he had not communicated with the ICTY as part of his Cabinet Office role and therefore any private communications that he may have had with the ICTY would not be information that is "held" by the Cabinet Office.

7. The complainant requested an internal review on 16 August 2012 focussing his request for correspondence to and from Major-General Charlton-Weedy. The Cabinet Office sent him the outcome of its internal review on 24 October 2013. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 6 November 2012 to complain about the way his request for information had been handled. Unfortunately, he was not in a position to supply copies of all relevant correspondence until 12 February 2013.
9. His complaint focussed on the Cabinet Office's argument that any correspondence it held to or from Major-General Charlton-Weedy that was within the scope of the requests was not held for the purposes of the FOIA.
10. The Commissioner has therefore considered whether any correspondence to or from Major-General Charlton-Weedy that is within the scope of the requests (that is physically retained by the Cabinet Office) is held by the Cabinet Office for the purposes of the FOIA.
11. During the course of the Commissioner's investigation, the Cabinet Office identified an item of correspondence that it acknowledged was within the scope of the request. It also acknowledged that it held this information for the purposes of the FOIA. The Commissioner has considered whether this information should be disclosed under the FOIA in whole or in part.

Reasons for decision

12. Section 1 of FOIA states that any person making a request for information is entitled to be told whether the public authority holds the information requested and, if held, to be provided with it. Section 10(1) of the FOIA states that this should be supplied within 20 working days.
13. Section 3(2) sets out the two legal principles that establish whether information is held for the purposes of FOIA:

"For the purposes of this Act, information is held by a public authority if—
(a) it is held by the authority, otherwise than on behalf of another person, or
(b) it is held by another person on behalf of the authority."

14. The key question in this case is whether correspondence between Major-General Charlton-Weedy and the ICTY is information that is held by the Cabinet Office for its own purposes and not on behalf of another person. The fact that there has been correspondence of this nature is evidenced by copy correspondence obtained legitimately by the complainant during the course of legal proceedings. He submitted this to the Commissioner as part of his complaint.
15. Where this correspondence and similar, or any other information caught by the scope of the requests, is held by the Cabinet Office for its own purposes, this notice will also consider whether it should be disclosed under the FOIA.
16. The complainant drew the Commissioner's attention to his own published guidance.¹ The Commissioner has had regard for this and other related published guidance that he has produced in reaching his decision in this case.²
17. The complainant drew the Commissioner's attention to the following factors for consideration set out in the guidance which were asserted by the Cabinet Office, namely:

"Factors that would indicate that the information is held solely on behalf of another person include:

- the authority has no access to, use for, or interest in the information;
- access to the information is controlled by the other person;
- the authority does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information; or
- the authority is merely providing storage facilities, whether physical or electronic".

1

[http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/information_held_by_a_public_authority_for_purposes_of_foia.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/information_held_by_a_public_authority_for_purposes_of_foia.ashx)

2

http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_12_INFO_CAUGHT_BY_FOI_ACT.ashx

http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Practical_application/determining_whether_information_is_held_foier.ashx

18. The complainant also drew attention to countervailing factors also set out in the guidance as follows:

“Factors that would indicate that the information is also held by the public authority include:

- the authority provides clerical and administrative support for the other person, whether legally required to or not;
- the authority controls access to the information;
- the authority itself decides what information is retained, altered or deleted;
- the authority deals with enquiries about the information; or
- costs arising from holding the information are included in the authority’s overall budget”.

19. The complainant argued that, in light of the above, the Cabinet Office did hold the requested information (specifically the example he was able to provide) for the purposes of the FOIA. He noted that the email address used was an official Cabinet Office email address and that the Cabinet Office would provide clerical and administrative support to the sender. The Cabinet Office would also have control over access to the information – such control would not solely be in the hands of Major-General Charlton-Weedy. It would also have access itself. He asserted that the Cabinet Office, given its position at the heart of government, has a specific interest in communications sent to organisations of international justice such as the ICTY.

20. The Cabinet Office provided considerable detail in support of its position that emails sent to and from Major-General Charlton-Weedy on the subject matter covered by the requests were not held for the purposes of the FOIA. It supplied a copy of its policy regarding the personal use of computers by its staff which allowed occasional personal use. It also provided other information which explained the background to the correspondence identified by the complainant. The Commissioner agrees with the Cabinet Office that this includes an email which, in fact, falls within the scope of the request and the question of access to it under the FOIA will be addressed later in this Notice.

21. Major-General Charlton-Weedy did not clearly mark the email supplied in evidence by the complainant as “private” or “non-work”. There are no other caveats to suggest this. The content appears to be on a subject which, in general terms, might be of interest to the UK government, namely matters relevant to an ICTY case – UK forces were deployed in the former Yugoslavia as part of an international force following the escalation of conflicts there. It is wholly reasonable that the complainant might conclude that the email in question was sent by an official of the UK government was sent at the direction of the UK government. However, having considered the explanation provided by the Cabinet

Office, the Commissioner is satisfied that Major-General Charlton-Weedy was acting in a private and not an official capacity in his communications with the ICTY. More information about this is set out in a Confidential Annex to this Notice.

Correspondence from other officials

22. The Cabinet Office also submitted arguments in support of its position that it did not hold other information described in the request, namely correspondence by other named officials or named military officers. The Commissioner is satisfied that, on the balance of probabilities (the relevant test for this question), the Cabinet Office does not hold any other information described in the request, namely correspondence to and from other named officials or named military officers.

Information held for the purposes of the FOIA – Conclusion

23. The Commissioner has concluded that (save for one item of correspondence addressed below), the Cabinet Office does not hold any information within the scope of the requests for the purposes of the FOIA.

Disclosure of information held for the purposes of the FOIA.

24. The Confidential Annex considers an email which is held by the Cabinet Office and which falls within the scope of the request. For reasons set out in the Confidential Annex, the Commissioner has concluded that information contained in this email which is in the scope of the first of the requests should be disclosed under the FOIA. The Commissioner has concluded that the name of one individual identified in the email can be withheld under section 40 (unfair disclosure of personal data).
25. In failing to provide this information in response to the request within 20 working days, the Cabinet Office contravened the requirements of section 1(1) and section 10(1) of the Act.

Right of appeal

26. 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

27. 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.
28. 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
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF