

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 March 2014

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested internal and external communications relating to the government's decision not to grant the Iraq Inquiry permission to publish letters between former Prime Minister, Tony Blair and former President of the United States, George Bush.
2. The Commissioner's decision is that:
 - the public authority was entitled to withhold the information within the scope of Part 1 of the request (the disputed information) on the basis of section 35(1)(a) FOIA, and
 - on the balance of probabilities, the public authority did not hold any information within the scope of Parts 2 and 3 of the request.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 31 May 2013, the complainant wrote to the public authority and requested information in the following terms:

'Please provide copies of all internal communications and correspondence involving Sir Jeremy Heywood relating to letters between Tony Blair and George Bush. [1]

In this article: <http://www.dailymail.co.uk/news/article-2333649/Cameron-Blair-grubby-deal-censor-Iraq-inquiry-Key-evidence-held-return-ex-PMs-neutrality-election-claims-foreign-secretary.html> the Cabinet Office is reported to have said permission to publish the letters had been rejected.

Please provide copies of all internal correspondence and communications involving Sir Jeremy Heywood relating to this issue. [2]

Please provide copies of all external communications and correspondence involving Sir Jeremy Heywood relating to the letters.'
[3]

5. The public authority responded on 25 June 2013. The public authority claimed that the information within the scope of the request was exempt from disclosure on the basis of sections 27(1) (a), (c) and (d), 35(1)(a), 35(1)(b) and 42 FOIA.
6. On 26 June 2013 the complainant requested an internal review.
7. On 22 July 2013 the public authority wrote to the complainant with details of the outcome of the internal review. It clarified that it did not hold any information within the scope of Parts 2 and 3 of the request. All of the information held was however withheld from disclosure on the basis of section 35(1)(a). The remaining exemptions at sections 27(1) (a), (c) and (d), 35(1)(b) and 42 were relied on to withhold some of the information held.

Scope of the case

8. On 23 July 2013 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He challenged the public authority's claim that the information held within the scope of Part 1 of his request (the disputed information) was exempt from disclosure on a number of grounds which are addressed

further below. The complainant also disagreed with the public authority's claim that it did not hold any information within the scope of Parts 2 and 3. For the avoidance of doubt, the Commissioner considers that the disputed information includes attachments to emails.

9. In its initial submission to the Commissioner, the public authority specified that it was relying on section 42(2).¹ In a further submission, the public authority additionally relied on the exemptions at sections 36(2)(b)(i) and (ii) and 36(2)(c) in the alternative to section 35(1)(a).
10. The scope of the Commissioner's investigation therefore was:
 - To determine whether the public authority was entitled to rely on the exemption at section 35(1)(a) (and in the alternative, the exemptions at sections 36(2)(b)(i) and (ii) and 36(2)(c)) to withhold the disputed information. If necessary, to also determine whether the public authority was entitled to rely on the exemptions at sections 27(1) (a), (c) and (d), 35(1)(b) and 42(2)² to withhold some of the disputed information, and
 - To determine whether the public authority held any information within the scope of Parts 2 and 3 of the request.
11. The public authority requested that some of its submissions should not be reproduced in a decision notice. Therefore, although the Commissioner has fully considered the public authority's submissions, not all of them are reproduced in the open part of this notice.
12. The public authority did not supply the Commissioner with copies of the disputed information. However, it granted a representative of the Commissioner access to inspect the disputed information at its office in London.

¹ Section 42(2) is available to a public authority if it would not like to confirm or deny whether it holds information because to do otherwise would involve the disclosure of any information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. It is unclear why the public authority applied this exemption to some parts of the disputed information.

² Section 27 – international relations, section 35(1)(a) – formulation or development of government policy, section 35(1)(b) – ministerial communications.

Reasons for decision

Part 1 of the request

Section 35(1)(a) – formulation or development of government policy

13. The Commissioner first considered the applicability of section 35(1)(a). Information held by a government department is exempt information if it relates to the formation or development of government policy.
 14. Section 35(1)(a) is a class based exemption which means there is no need to show any harm in order to engage the exemption. The information simply has to fall within the class described.
 15. The public authority explained that all of the disputed information relates to the formulation or development of government policy on whether to give permission to the Iraq Inquiry³ to publish correspondence between former Prime Minister Tony Blair and former President of the United States, George Bush. The policy was also live at the time the complainant made his request.
 16. The Commissioner considers that *government policy* is any policy which has been signed off either by the Cabinet or the relevant Minister. This is because only Ministers have the mandate to make policy on behalf of the government. If the final decision is taken by someone other than a Minister, that decision will not in itself constitute government policy. In view of the explanation given by the public authority (reproduced in the confidential annex to this notice), the Commissioner is satisfied that the policy on whether or not to give the Iraq Inquiry permission to publish Her Majesty's Government's documents is *government policy* within the meaning in section 35(1)(a).
 17. The Commissioner is satisfied that the disputed information relates to the formulation or development of the government's policy on whether to allow the Iraq Inquiry to publish the letters between Mr Blair and President Bush.
 18. The exemption at section 35(1)(a) was therefore correctly engaged.
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³ An Inquiry formally set up by the former Prime Minister Gordon Brown on 30 July 2009 to identify lessons that can be learned from the Iraq conflict. The Inquiry is led by Sir John Chilcot. Details about its work can be found at: <http://www.iraqinquiry.org.uk/about.aspx>

Public interest test

19. Section 35(1)(a) is a qualified exemption. Therefore, the Commissioner must also consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the disputed information.

Complainant's arguments

20. The arguments submitted by the complainant in support of his position are reproduced below.
21. Important decisions – either about going to war or deciding that letters between two world leaders cannot be published – must be subject to scrutiny.
22. There is no evidence that Ministers and their advisers may feel inhibited if their discussions were to be made public. The Commissioner has stated that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. The Commissioner has also stated that once the policy in question is finalised, the arguments become more and more speculative as time passes and it will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.

Public authority's arguments

23. The arguments submitted by the public authority in support of its position are reproduced below.
24. The public authority recognised that there is a general public interest in openness and acknowledges that transparency may contribute to greater public understanding of and participation in public affairs. There is a strong public interest in understanding how government develops policies and the role that senior civil servants play in advising Ministers on policy.
25. There is a specific public interest in understanding how the government reached the decision to maintain its policy of denying the Iraq Inquiry permission to publish the disputed information and the role of that advice from senior officials in that process.
26. It is very strongly in the public interest that Ministers and their advisers are able to consider policy and related to this, that senior civil servants are able to give and receive free and frank advice in confidence on the reasons for and against disclosure of sensitive information. It is

therefore very strongly in the public interest that officials (in this case the Cabinet Secretary) and Ministers have access to candid and comprehensive views on all the policy options available.

27. If officials had cause to be concerned that their advice might be made public, these briefings may become deficient, in that these officials may be unwilling to communicate frankly in writing for fear that their views could be subject to public scrutiny, or could embarrass senior officials and Ministers in the event of their release into the public domain. This would not be in the public interest. Nor is it in the public interest that officials adopt a precautionary approach and qualify their views in such a way as to make it more difficult for senior officials and Ministers to absorb their advice quickly. Prejudice to internal communications on policy would make it more difficult for government to devise effective policies.
28. In his letter to Sir John Chilcot of 11 January 2011, Sir Gus O'Donnell, then Cabinet Secretary, gave a full explanation of the reasons for withholding the correspondence between Mr Blair and President Bush. The Iraq Inquiry has published this letter on its website.⁴ The public availability of this explanation reduces the weight of the public interest in disclosure of the disputed information.
29. The Iraq Inquiry has been given full access to the letters and will be able to take their contents into account in drafting its report. This reduces the weight of the public interest in understanding the internal communications between officials relating to why the government has denied the Inquiry permission to publish the letters and therefore reduces the public interest in disclosure of the disputed information.
30. In a letter to the Prime Minister dated 13 July 2012,⁵ Sir John Chilcot explained that to ensure that the evidence was seen in its full context and to ensure the fair treatment of individuals, the Inquiry did not intend to publish further material piecemeal in advance of its final report. Sir John repeated his view that confidentiality was critical during the 'Maxwellisation' stage of the Inquiry's work in his letter of 15 July 2013.⁶ The need for confidentiality and the need to avoid piecemeal

⁴ <http://www.iraqinquiry.org.uk/media/50277/O'DonnelltoChilcot-11January2011-letter.pdf>

⁵ <http://www.iraqinquiry.org.uk/media/54266/2012-07-13%20chilcot%20cameron.pdf>

⁶ http://www.iraqinquiry.org.uk/media/54877/2013-07-15_Chilcot_Cameron.pdf

disclosure during this particularly sensitive stage of the Inquiry's work adds considerable weight to the public interest in maintaining the exemption.

31. The disputed information is of very recent provenance and this strengthens the public interest in maintaining the exemption. Disclosure of such recent information would do significant and lasting damage to the flow of information between officials, senior officials and Ministers since it would undermine the presumption that individuals can share information and ideas within government in confidence. Disclosing the disputed information would deter officials from committing their advice to paper, because it would create uncertainty about whether it would remain confidential and about when it might be disclosed. The policy was also live at the time of the request.

Balance of the public interest

32. The Commissioner agrees that there is a public interest in disclosing information which may shed light on how and why the government decided not to allow publication of the letters between Tony Blair and George Bush in the lead up to the war in Iraq. He shares the view that the decision on such an important issue should be subject to scrutiny. The Commissioner is however also of the view that the letter of 11 January 2011 from Sir Gus O'Donnell to Sir John Chilcot clearly sets out the rationale for the government's position.
33. The Commissioner shares the scepticism expressed by the complainant regarding the impact of disclosures under the FOIA on the impartiality and robustness of civil servants when giving advice in future. However, he is equally not dismissive of the public authority's view that disclosure could result in officials adopting a precautionary approach and qualifying their advice in such a way that would make it more difficult to absorb. The Commissioner believes that the circumstances of each case would determine the likelihood of the anticipated chilling effect.
34. The Commissioner is mindful that the request relates to internal communications involving the Cabinet Secretary regarding the disclosure of letters between two former heads of government in connection with the decision to take their countries to war, an important and significant decision for any nation. The request was made in the context of the decision not to grant the ongoing Iraq Inquiry permission to publish the letters. Therefore, the Commissioner accepts that given the significance of the subject matter to which the request relates and the ongoing Iraq Inquiry, it is very likely that disclosure could result in officials adopting an unduly precautionary approach in future when providing advice particularly in relation to the declassification of government documents

supplied to the Iraq Inquiry and more generally when providing advice in relation to any other subject matter regarding the Inquiry. That would not be in the public interest. He notes that the Inquiry has been given full access to the letters so there is no suggestion that the government is undermining the work of the Inquiry. In these circumstances, there is a strong public interest in not disclosing the disputed information.

35. The Commissioner is not persuaded by the view that disclosure would have the general effect of deterring officials from keeping written records of their advice. He does not consider that civil servants should or would generally resort to such behaviour to undermine the FOIA which includes adequate protection for information that should not be made publicly available.
36. However, on balance, in all the circumstances of the case, the Commissioner considers that the public interest in maintaining the exemption outweighs the public interest in disclosure.
37. In light of his decision, the Commissioner did not consider the applicability of the remaining exemptions relied on by the public authority.

Parts 2 and 3 of the request

38. The public authority explained that it understood parts 2 and 3 of the request to be for internal and external communications involving Sir Jeremy Heywood in relation to the Iraq Inquiry's request that it be permitted to publish letters between Tony Blair and George Bush. However, the public authority explained that at the time of the request, the Iraq Inquiry had not entered into correspondence with Sir Jeremy Heywood on the question of the letters, rather the previous correspondence referred to had been with Sir Jeremy's predecessor, Sir Gus O'Donnell.
39. The Commissioner therefore finds that, on the balance of probabilities,⁷ the public authority did not hold information within the scope of parts 2 and 3 of the request.

⁷ The Commissioner generally relies on the civil standard of proof which is *on the balance of probabilities* in determining whether or not information is held by a public authority.

Right of appeal

40. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. 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.
42. 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

Alexander Ganotis
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