Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 October 2015

Public Authority: Foreign and Commonwealth Office
Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign and Commonwealth Office (FCO) seeking correspondence it may have exchanged with a number of named individuals (or their representatives) during the period between November 2013 and March 2015 concerning the Iraq Inquiry. The FCO refused to confirm whether it held any information falling within the scope of the request on the basis of section 41(2) of FOIA. The Commissioner has concluded that the FCO was entitled to rely on this exemption to refuse to confirm or deny whether it holds any of the requested information.

Request and response

2. The complainant submitted the following request to the FCO on 18 March 2015 seeking the following information:

> *'.....correspondence between the Foreign Office and certain individuals who gave evidence to the Chilcot Inquiry into the Iraq War from the period of 1 November 2013 to the present day.*
>
> *1… During the aforementioned period has the Foreign Office met with and or exchanged correspondence and communications (including e-mails) with any of the individuals listed below and or their representatives and or any employees and or legal advisers acting on their behalf? Please note that I am only interested in correspondence and communications and or meetings which relate to the Chilcot enquiry, its remit, the evidence submitted to*

that enquiry, the issue of whether that evidence should be published and in what form and the timing of that publication.

The relevant individuals are….
The Rt Hon Tony Blair. The former Prime Minister.
Alastair Campbell. The former Downing Street Director of Communications.
Lord Goldsmith. The former Attorney General.
Geoff Hoon. The former Defence Secretary.
Jonathan Powell. The former Downing Street Chief of Staff.
John Prescott. The former Deputy Prime Minister.
Jack Straw. The former Foreign Secretary.

2… If the answer to the above question is yes can you please provide a schedule of all relevant documents held. In the case of each individual and or any employees, representatives or legal advisers on their behalf can you please provide a list of all letters, faxes and emails sent by them to the Foreign Office. Can you provide the dates and times of the email exchanges and in each case can you identify if there was a response from the Foreign Office. In the case of each individual and or their representatives and or employees and or legal advisers can you please provide the dates and times of relevant telephone conversations and meetings with the Foreign Office.

3… In the case of each of the aforementioned individuals and or their employees and or their representatives and or their legal advisers can you please provide copies of all relevant correspondence and communications received by the Foreign Office. The correspondence and communications will include but not be limited to letters, faxes, emails as well as notes and or transcripts and or recording of telephone conversations. Can you please also provide copies of any correspondence and communications including emails sent to each of the aforementioned individuals and or their representatives and or their legal advisers by the Foreign Office.'

3. The FCO responded on 27 March 2015 and confirmed that it was relying on the exemption contained at section 41(2) of FOIA to neither confirm nor deny whether it held any information falling within the scope of the request.

4. The complainant contacted the FCO on 21 April 2105 to conduct an internal review of this decision.

5. The FCO informed him of the outcome of the internal review on 7 May 2015. The review upheld the FCO's reliance on section 41(2) of FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 13 May 2015 to complain about the way his request for information had been handled. The complainant argued that there were strong public interest grounds to support the disclosure of the information he had requested.

7. In relation to this complaint it is important to note that the right of access provided by FOIA is set out in section 1(1) and is separated into two parts: Section 1(1)(a) gives an applicant the right to know whether a public authority holds the information that has been requested. Section 1(1)(b) gives an applicant the right to be provided with the requested information, if it is held. Both rights are subject to the application of exemptions.

8. As explained above, the FCO is seeking to rely on section 41(2) to refuse to confirm or deny whether it holds information falling within the scope of the request. Therefore this notice only considers whether the FCO is entitled, on the basis of this exemption, to refuse to confirm or deny whether it holds the requested information. The Commissioner has not considered whether the requested information – if held – should be disclosed.

Reasons for decision

Section 41 – information provided in confidence

9. Section 41 of FOIA states that:

> *'(1) Information is exempt information if—*
>
> *(a) it was obtained by the public authority from any other person (including another public authority), and*
>
> *(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*
>
> *(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.'*

10. Therefore for a public authority to be able to rely on section 41(2), two criteria have to be met; firstly, if the requested information was held

would it have been provided to the public authority by a third party? Secondly, would confirmation or denial as to whether the information is held constitute an actionable breach of confidence?

11. With regard to whether disclosure would constitute an actionable breach of confidence the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:

- Whether the information had the necessary quality of confidence;
- Whether the information was imparted in circumstances importing an obligation of confidence; and
- Whether an unauthorised use of the information would result in detriment to the confider.

<u>If the requested information was held, would it have been provided to the FCO by a third party?</u>

12. Given the manner in which the first and second part of the complainant's request is phrased – seeking as they do correspondence the FCO has *received from* named individuals or material which evidences information provided by them – it is clear that if information were held failing within the scope of these parts of the request it would have been provided to the FCO by a third party.

13. In respect of the third part of the request the Commissioner notes that this solely seeks information created by the FCO. Furthermore, any such information may not evidence information provided to it by any of the named individuals. However, in the Commissioner's view if such information were held, it would be logical to assume that this would be because previous correspondence had been received by the FCO originating from the Inquiry indicating that one or more of the individuals were to be subjected to the Maxwellisation process.

14. Thus if the FCO confirmed whether or not it held information falling within the scope of the third part of the request it would in effect be confirming whether or not it held information falling within the scope of the first two parts of the request. Consequently, in the circumstances of this particular request, although the FCO would not have received the information that is sought by the third part of the request (if indeed any such information is held), confirmation as to whether or not it held such information would nevertheless still confirm whether or not the FCO had actually received information from a third party.

If the requested information was held would it have the necessary quality of confidence?

15. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.

16. The Commissioner accepts that the requested information (if held) would not be available elsewhere. Furthermore, given the nature of the requested information – communications between the FCO and particular individuals or their representatives concerning the Iraq Inquiry - if such information were held it would clearly not be of a trivial nature.

If the information was held would it have been obtained in circumstances importing an obligation of confidence?

17. The Commissioner considers that an obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself, and/or the relationship between the parties.

18. In terms of the circumstances of this case, during the period covered by the complainant's request the Commissioner recognises that the Iraq Inquiry was undertaking its 'Maxwellisation' process whereby any individual that the Inquiry intended to criticise would be informed of the Inquiry's views and offered the opportunity to make representations. The Commissioner notes that Sir John Chilcot had made it clear that he considered the Maxwellisation process to be confidential stating in a letter to the Cabinet Secretary, Sir Jeremey Heywood, dated 28 May 2014 'Maxwellisation remains a confidential process; the Inquiry does not intend to make public the specific details of timing, content, or recipients'.[1]

19. In such circumstances the Commissioner is satisfied that should the FCO hold any information falling within the scope of this request – which covers the period November 2013 to March 2015 - it would appear plausible to conclude that it was in some way related to the aforementioned Maxwellisation process. Given that, the Commissioner is satisfied that should the FCO hold any such information it is reasonable to conclude that such information would be subject to an obligation of confidence.

[1] http://www.iraqinquiry.org.uk/media/55103/2014-05-28_Chilcot_Heywood.pdf

Would confirming whether or not the withheld information is held - be detrimental to the confider?

20. Given the emphasis Sir John Chilcot has placed on the confidential nature of the Maxwellisation process, the Commissioner accepts that confirmation as to whether information falling within the scope of the request is held by the FCO would damage the reputation and credibility of the Inquiry and also the individuals named in the request.

21. The Commissioner is therefore satisfied that confirmation as to whether the FCO holds information falling within the scope of this request would represent an actionable breach of confidence.

Public interest defence

22. However, although section 41 is an absolute exemption, the law of confidence contains its own built in public interest test with one defence to an action being that disclosure is in the public interest.

23. The complainant argued that the failure of the Inquiry to publish any findings more than four years after its last public session has been the subject of a great deal of public concern. He noted that the failure to publish any report has led to allegations of a cover up. Moreover, he argued that there have also been concerns that leading figures have used the Maxwellisation process to water down or delay publication of the report. Consequently, the complainant argued that there was therefore a compelling public interest in disclosing the information he had requested.

24. The Commissioner acknowledges that delays in the publication of the Inquiry's report have been a source of significant public concern. Confirmation as to whether particular figures (or their representatives) had been in correspondence with FCO about the Inquiry in the period covered by the request could provide some insight into the progress of the Inquiry's work during this period. However, the Commissioner believes that any such interest is significantly outweighed by the public interest in ensuring that the Inquiry is allowed to complete its work without hindrance or outside interference in order to ensure that the Inquiry is as full and frank as possible. A significant aspect of this is in ensuring that the confidential nature of the Maxwellisation process is not undermined. The Commissioner has therefore concluded that the FCO would not be able to defend the provision of confirmation or denial under the FOIA as being in the public interest.

Right of appeal

25. 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 123 4504
    Fax: 0870 739 5836
    Email: GRC@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

26. 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.

27. 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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SK9 5AF