

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 March 2012

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

Decision (including any steps ordered)

1. The complainant requested information relating to discussions between the then UK Prime Minister Tony Blair and the then US President George Bush – papers referred to by Sir John Chilcot of the Chilcot Inquiry.
2. The Cabinet Office withheld the information citing international relations (section 27), formulation of government policy (section 35) and prejudice to the effective conduct of public affairs (section 36).
3. The Information Commissioner's decision is that the Cabinet Office correctly applied section 27 in relation to the majority of the information. However, he finds that the exemption cited in relation to one document is not engaged.
4. The Information Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant the information identified in the confidential annex to this decision notice.
5. 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

6. On 24 January 2011, the complainant wrote to the Cabinet Office and requested information in the following terms:

"Please disclose under the FOI Act:

Copies of communications and records of discussions between Tony Blair and George Bush which were submitted to the Chilcot inquiry".

7. The Cabinet Office responded on 8 April 2011. It confirmed that it held information relevant to the request, but withheld it citing the exemptions concerning international relations, the formulation of government policy and information provided in confidence (sections 27, 35 and 41).
8. Following an internal review the Cabinet Office wrote to the complainant on 4 July 2011. It clarified that it was relying on sections 27 and 36 (international relations and prejudice to the effective conduct of public affairs) to withhold the requested information. It told the complainant that it was no longer relying on the exemptions in sections 35, 26 and 41. Despite the reference to having previously relied on section 26 (defence), the Commissioner has not been provided with any evidence that the Cabinet Office cited that exemption in previous correspondence with the complainant.

Scope of the case

9. The complainant contacted the Information Commissioner to complain about the way her request for information had been handled. She specifically asked the Commissioner to determine where the public interest lies.
10. During the course of the Commissioner's investigation, the Cabinet Office variously argued that it was relying on the exemptions in sections 27 (international relations), 35 (formulation of government policy), 36 (prejudice to the effective conduct of public affairs) and 23 (information supplied by or relating to bodies dealing with security matters).
11. Not only does the Commissioner consider that this latter exemption was raised at a late stage, he also has concerns about the standard of the submission the Cabinet Office provided in relation to its withholding of the information for national security reasons. In his view, the arguments put forward by the Cabinet Office about security issues were generally weak and, furthermore, did not specify which element(s) of the withheld information the Cabinet Office considered the exemption applied to.
12. The Commissioner is aware that the context of the request is the decision of the then Cabinet Secretary to refuse permission for the Iraq Inquiry to refer to limited extracts of the exchanges between Mr Blair and President Bush. He considers that to be a matter for the Iraq

Inquiry. The Commissioner is making his decision in this case with respect to a complaint made to him under section 50 of FOIA.

13. The Commissioner considers the scope of his investigation to be with respect to the Cabinet Office's refusal to disclose the requested information on the basis that the public interest in maintaining the exemptions in sections 27, 35 and 36 outweighs the public interest in disclosure. The information within the scope of the request in this case includes information which the Commissioner considered in a previous decision notice, reference FS50341647. Consistent with the decision in that case, the Commissioner orders disclosure of some of that information. In relation to that part of the information, the Commissioner does not propose to repeat his reasoning for his decision here as it is explained in that decision notice. (That decision notice is currently the subject of an appeal to the First-tier Tribunal).

Reasons for decision

14. The information in this case consists of documents recording conversations and meetings between senior UK and US officials and Ministers including the then Prime Minister of the UK, Tony Blair, and the US President at the time, President Bush, as well as personal notes.

Section 27 International relations

15. The Commissioner has first considered the Cabinet Office's citing of section 27 (international relations). During the course of the Commissioner's investigation, the Cabinet Office confirmed that it is relying on section 27(1)(a), (c), and (d), and section 27(2) of FOIA to withhold all the requested information.
16. Information is exempt under the parts of subsection 27(1) cited by the Cabinet Office if its disclosure would, or would be likely to, prejudice the international relations or interests of the United Kingdom or the promotion or protection by the United Kingdom of those interests.
17. Information is exempt by virtue of subsection (2) of section 27 if it is confidential information obtained from a state other than the UK or from an international organisation or international court.
18. In other words, section 27(1) focuses on the effects of the disclosure of the information, while section 27(2) relates to the circumstances under which it was obtained and the conditions placed on it by its supplier, and does not relate primarily to the subject of the information or the harm that may result from its disclosure. In the Commissioner's view, such

information is confidential for as long as the state, organisation or court expects it to be so held.

19. The Commissioner considers that the Cabinet Office failed, in its correspondence with the complainant, to identify the particular harm that may arise from disclosure of the withheld information in this case. However, the Cabinet Office did provide its arguments about the likelihood of the prejudice that disclosure of the withheld information might cause in subsequent correspondence with the Commissioner.
20. It told the Commissioner that Her Majesty's government protects and promotes the UK's interests abroad in partnership with other states and that just as disclosure in this case:

"would prejudice relations with other states it would also prejudice our ability to protect and promote our interests abroad".

21. Although the Cabinet Office argued generally that, in its view, disclosure would be likely to prejudice relations with other international partners, it argued particularly that disclosure would prejudice relations with the United States – *"this most important international partner"*. In support of its arguments, it explained to the Commissioner the ways in which it considered disclosure may cause prejudice.
22. Having viewed the withheld information at issue in this case, and considered the arguments put forward by the Cabinet Office, the Commissioner is not satisfied that, in the case of one document, UK interests abroad, or the international relations of the UK, would be prejudiced through the disclosure of the information. Nor is he satisfied that it is confidential information within the meaning of section 27(2).
23. With respect to the remainder, the Commissioner is satisfied either that UK interests abroad, or the international relations of the UK, would be prejudiced through disclosure or that such information is confidential information within the meaning of section 27(2).
24. He therefore finds the exemption engaged in relation to all the withheld information apart from that one document. As section 27 is a qualified exemption, the Commissioner has next considered the public interest in relation to the withheld information which he considers engages that exemption.

The public interest test

25. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public

interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.

Public interest arguments in favour of disclosing the requested information

26. The complainant told the Information Commissioner:

"The controversial decision to go to war in Iraq has had far reaching and very serious consequences and has affected the lives of hundreds of thousands of people in the UK, US and Iraq. It is imperative that the reasons behind this decision are subject to public scrutiny. There is a far greater public interest in disclosing the information than withholding it".

27. Similarly, she told the Cabinet Office:

"These documents relate to a matter of huge significance to the general public – the Iraq war has been a controversial issue since the onset, especially the motives for reaching the decision to go war. Releasing these documents into the public domain would add greatly to the public debate on this matter".

28. The Cabinet Office recognised the public interest in openness

"in order to ensure that the public are able to scrutinise the manner in which public authorities reach important decisions".

29. It acknowledged that this in turn makes for greater accountability, increases public confidence in government decision making and helps to encourage greater public engagement with political life.

30. With respect to matters of foreign policy, the Cabinet Office also recognised the public interest in understanding how government arrives at strategic decisions, particularly those decisions that result in the commitment of British forces. In correspondence with the Commissioner it acknowledged the continuing public debate about the UK's involvement in, and policies towards, Iraq, noting that:

"access to good quality information about these issues could ensure that the debate is well-informed".

Public interest arguments in favour of maintaining the exemption

31. In the Cabinet Office's view, disclosure of the information in this case is likely to prejudice relations with international partners on the basis that they may be less inclined to engage in discussions with the UK if there is a risk that records of such discussions might be made public at a later

date. In its view, this would make communication and cooperation more difficult.

32. Arguing in favour of maintaining the exemption, the Cabinet Office told the complainant that there was strong public interest in the UK being able to pursue its national interests successfully. It argued:

"We are more likely to do so [successfully pursue our national interests] if we conform to the conventions of international behaviour, avoid giving offence to other nations and retain the trust of our international partners".

33. With respect to retaining the trust of international partners, the Cabinet Office argued generally that the generic public interest in maintaining good relations with allies and with other nations carries considerable weight. More specifically, it said that:

"the UK has a uniquely close relationship with the US...Damaging that relationship would strike at the heart of the UK's national interest".

34. It also argued strongly during the Commissioner's investigation that it is not in the public interest to prejudice relations between the UK and other states and international partners, particularly:

"where the state is an important global partner, such as the USA".

35. The Cabinet Office also maintained that, given the circumstances of the discussions in this case and the sensitivity and exceptional gravity of the subject under discussion, there is a very strong public interest in maintaining the confidentiality of the information. In its view, the importance of the relationship between the UK and the US, and the necessity of ensuring that the Prime Minister and President can converse frankly and with a high degree of trust, are public interest factors of the most considerable weight. It expressed the view that disclosure would undermine the effective sharing of opinion and constrain the UK's ability to engage with the US by introducing a chilling effect upon the freedom which any UK Prime Minister expressed himself with the US President.
36. Similarly, it argued that there is a strong public interest in the government being able to consult and consider the advice *"of one of its most important international partners"*, free from the pressures and distortions that could be introduced were the subject of their discussions to become public.
37. With respect to information received in confidence from other States, the Cabinet Office considers that there is a weighty public interest in maintaining the confidentiality of such information. In correspondence

with the Commissioner, it described the impact of disclosure in respect of this information as being a "*betrayal of trust*". More generally, it argued that disclosure in this case could result in other states and governments disclosing information the UK had provided to them in confidence, and/or to the reluctance of partners sharing information. The effect of this would, in its view, be to "*inhibit frankness on both sides*", something it argued would not be in the public interest.

Balance of the public interest arguments

38. In considering the opposing public interest arguments in this case, the Commissioner must decide whether it serves the interests of the public better to withhold or to disclose the requested information. In deciding where the balance lies, the Commissioner has taken into account the presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest.
39. In his view, there are a number of powerful public interest arguments in favour of disclosure. The most powerful is the public interest in accountability for the decision to go to war in Iraq. There is also a strong public interest in the transparency and openness of decision making in a case where the issue relates to a controversial decision to go to war and where the decisions taken had far-reaching consequences.
40. In considering the public interest in furthering the understanding of, and participation in, the public debate of issues of the day, the Commissioner has taken into account the fact that the Government decided to hold a public inquiry, the Chilcot inquiry, into the circumstances of, and lessons to be learned from, the UK's engagement in Iraq. He notes that the terms of reference of the inquiry have been described by its Chair, Sir John Chilcot, as being "*very broad*".
41. In its internal review correspondence, the Cabinet Office suggested that the public interest in the Iraq War is being comprehensively addressed by the Chilcot inquiry. In that respect, the Commissioner accepts that the Chilcot inquiry is, to a greater or lesser extent, an important means by which the public interest is served.
42. The Cabinet Office has argued that the disclosure of the information:

"would make the US President and others less willing to provide advice or to engage in the frank exchange of views with the Prime Minister and other representatives of HM Government".
43. The Commissioner recognises the public interest in maintaining good international relations: he accepts that it is strongly in the public interest that the UK enjoys effective relations with foreign States. The public interest would obviously be harmed if these relationships were

negatively impacted, through either information ceasing to be provided or the nature of discussions becoming less candid. He considers this to be especially true given the issues involved in this case and the likely harm if disclosure compromises foreign policy issues or makes international relations more difficult.

44. He therefore considers it appropriate to take into account the context in which the information was generated. In this case the requested information records detailed bilateral discussions including what the parties were thinking about how matters may progress. He considers that the exchanges are frank and candid.
45. In considering the public interest factors in this case, the Commissioner has not only taken into account the immediate impact on US relations, but also the potential adverse effect across the world if the UK was seen to be disclosing information considered to have been shared/imparted in confidence.
46. In the Commissioner's view, the more important and controversial the topic of discussion, for example between the UK Prime Minister and the US President, the greater the expectation of confidentiality in the discussion, and the more the damage to the UK's relations with other states if it were to be released. In this case, the Commissioner accepts that disclosure could have considerable negative and detrimental effects to the UK's long-term interests and relations with the US in particular. In his view, the gravity and controversy of the subject-matter of the disputed information is a factor positively and strongly in favour of maintaining the exemption.
47. Having balanced the opposing public interests in this case with respect to the information he considers engages the exemption, the Commissioner has concluded that the Cabinet Office correctly applied section 27 and was therefore entitled to withhold the information.

Section 35 Formulation of government policy

48. As the Commissioner has concluded that the Cabinet Office correctly applied section 27, he has not gone on to consider section 35 which the Cabinet Office also cited in relation to one document.

Section 36 Prejudice to effective conduct of public affairs

49. The Commissioner has next considered the Cabinet Office's citing of section 36 in relation to the information he does not find engages section 27.
50. The Cabinet Office cited section 36(2)(b)(i), (ii) and (c), arguing that disclosure of the information would be likely to inhibit the free and frank

provision of advice, the free and frank exchange of views for the purposes of deliberation or would be otherwise likely to prejudice the effective conduct of public affairs.

51. As the information relates to a previous administration, the Cabinet Office consulted the Attorney General as the "qualified person". The Commissioner has viewed the submissions provided to the qualified person and the qualified person's response.
52. In the Commissioner's view, the exemptions in section 36(2)(b) are about the processes that may be inhibited, rather than what is in the information. The qualified person must therefore consider whether disclosure would inhibit the processes of providing advice or exchanging views. With respect to the Cabinet Office's argument in respect of section 36(2)(c), that disclosure would otherwise prejudice the effective conduct of public affairs, the Commissioner does not consider that it has provided evidence of prejudice not covered by section 36(2)(b).
53. The Commissioner accepts that the opinion given was with respect to the information taken as a whole. However, with respect to the small amount of information at issue, having considered the content of the information and taken into account the circumstances of the case, the Commissioner is not satisfied that the opinion given is reasonable. It follows that he does not find the exemption engaged.
54. As the Cabinet Office has not cited any other exemption in relation to the information, and as the Commissioner does not find it engages section 36, he orders disclosure of the information, which he has identified in a confidential annex to this decision notice.

Other matters

55. The Commissioner has expressed concerns in the past about the Cabinet Office's broader performance. In particular, he considered that the Cabinet Office was not demonstrating satisfactory performance in relation to the timeliness of its handling of requests made under the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (the "Regulations"). In this respect, the Cabinet Office signed a formal undertaking in June 2011, committing it to making improvements to the way in which it deals with requests for information.
56. The Commissioner is disappointed to note that delays were experienced in this case despite the fact that the request was being dealt with by the Cabinet Office against a background of intervention and monitoring prior to that undertaking being signed.

57. In this case, the complainant specifically complained about the length of time the Cabinet Office took to respond to his request. The Commissioner considers that, when the initial response and the internal review correspondence were finally provided to the complainant, they were not only late but also that the arguments advanced for refusing to disclose the requested information were poor or non-existent.

Right of appeal

58. 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

59. 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.
60. 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
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