

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 June 2015

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

Decision (including any steps ordered)

1. The complainant requested copies of correspondence between officials and the Secretary to the Sir John Chilcot led Iraq Inquiry.
2. The Commissioner's decision is that the public authority was entitled to rely on the exemptions at sections 22(1), 35(1)(a) and 40(2) FOIA to withhold information within the scope of the request.
3. The Commissioner however finds the public authority in breach of section 17(1)(b) FOIA.
4. No steps required.

Request and response

5. Following a number of attempts at refining his original request to meet the appropriate limit¹, the public authority finally accepted the complainant's request of 3 March 2014 for the following information:
'Ms Aldred's² communications with Cabinet Office officials in the Foreign and Defence Policy Secretariat and officials directly charged with

¹ In section 12(1) FOIA

² Margaret Aldred, Secretary to Sir John Chilcot's Iraq Inquiry

administering the Cabinet Office Protocol relating to the Chilcot Inquiry³ and I also reduce the time frame to the last six months leading up to the date of the request in November of last year [14 November 2013].'

6. The public authority initially responded on 1 April 2014. It explained that it considered the information requested exempt from disclosure on the basis of section 27 FOIA, and that it needed more time to decide on the balance of the public interest.
7. On 25 April 2014 the public authority informed the complainant that it considered most of the information within the scope of his request exempt from disclosure on the basis of section 35(1)(a), and the remaining information exempt on the basis of sections 27(1)(a), (c) and (d), 40(2) and 42(1) FOIA.
8. On 1 May 2014 the complainant requested an internal review. On 1 July 2014 the public authority wrote to the complainant with details of the outcome of the internal review. The original decision was upheld.

Scope of the case

9. On 13 July 2014, the complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically argued that the public interest was in favour of disclosure. The Commissioner has addressed the complainant's arguments further below.
10. During the course of the Commissioner's investigation, the public authority explained that it also considered some of the information within the scope of the request exempt from disclosure on the basis of sections 21(1)⁴ and 22(1) FOIA. The authority subsequently directed the complainant to the information exempt under section 21(1). The applicability of section 21(1) did not therefore form part of the Commissioner's investigation.

³ An Inquiry formally set up by the former Prime Minister Gordon Brown on 30 July 2009 to identify lessons that could be learned from the Iraq conflict. The Inquiry is led by Sir John Chilcot. Details regarding its work can be found at: <http://www.iraquinquiry.org.uk/about.aspx>. Referred to in this notice as 'the Iraq Inquiry' or the 'Inquiry'.

⁴ Information accessible to an applicant by other means.

11. The scope of the Commissioner's investigation was restricted to:

- determining whether the public authority was entitled to withhold information within the scope of the complainant's request of 3 March 2014 in reliance on the exemptions at sections 22(1), 27(1)(a), (c) and (d), 35(1)(a), 40(2) and 42(1) FOIA.

Reasons for decision

Section 22(1)

12. Information is exempt from disclosure if;

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

13. The public authority explained that some of the information in scope is intended for publication by the Iraq Inquiry either in its report or on its website at the same time as the Inquiry's report is published, which the authority anticipates will be in the near future (although that is almost exclusively within the control of the Inquiry).

14. The public authority pointed out that 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 the final report. The authority explained that in his letter of 15 July 2013 Sir John repeated his view that confidentiality was critical during the "Maxwellisation"⁶ stage of the Inquiry's work.⁷ The need for confidentiality and the need to avoid piecemeal disclosure

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

⁶ Whereby individuals subject to provisional criticism by the Inquiry (Maxwellees) are given an opportunity to make representations to the Inquiry.

⁷ http://www.iraqinquiry.org.uk/media/54877/2013-07-15_Chilcot_Cameron.pdf

during this particularly sensitive stage of the Inquiry's work add considerable weight to the justification for using the exemption to withhold the relevant information until its planned publication.

15. The Commissioner is satisfied that at the time of the request, the information withheld on the basis of section 22(1) was held by the public authority with a view to its publication by the Inquiry. For the same reasons given above, the Commissioner is also satisfied that it is reasonable in all the circumstances for the information not to be published before the Iraq Inquiry report is published.
16. The Commissioner therefore finds that the exemption at section 22(1) was correctly engaged by the public authority.

Public interest test

17. The exemption at section 22(1) is qualified by a public interest test. Therefore, the Commissioner has considered whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure at the time of the request.
18. The public authority acknowledged that there is a general public interest in openness and transparency so that the public are able to scrutinise the manner in which public authorities reach important decisions. Specifically, it acknowledged that disclosure of the withheld information may contribute to increasing the transparency and openness and improving the trust and confidence the public has towards the government in relation to the Iraq Inquiry.
19. The public authority however argued that there was a stronger public interest in not disrupting and undermining the work of the Inquiry as a result of prematurely disclosing the information already intended for future publication by the Inquiry.
20. In the circumstances, the Commissioner accepts that there is a stronger public interest in publishing the relevant withheld information at the same time as the Inquiry report. He accepts that piecemeal disclosures of material relevant to the Inquiry's report could potentially disrupt the work of the Inquiry and possibly also undermine it. Therefore it is both reasonable and in the public interest to avoid making piecemeal disclosures in order for the public to have a full picture of the Inquiry's findings.
21. Therefore, the Commissioner finds that, in all the circumstances of the case, the public interest in maintaining the exemption at section 22(1) outweighs the public interest in disclosing the information withheld on that basis.

Section 35(1)(a)

22. The information withheld by the public authority on the basis of section 35(1)(a) consists of correspondence between Ms Aldred and officials relating to the disclosure of government material by the Iraq Inquiry.
23. One of the documents withheld under section 35(1)(a) was additionally withheld on the basis of section 42(1). Seven other documents were additionally withheld on the basis of sections 27(1)(a), (c) and (d).
24. Information held by a government department is exempt from disclosure on the basis of section 35(1)(a) if it relates to the formulation or development of government policy. 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.
25. The public authority explained that the correspondence relates to the formulation or development of government policy because the "documents protocol" agreed between Government and the Iraq Inquiry creates a procedure under which the Cabinet Secretary formulates a view on behalf of the government on disclosure of documents by the Inquiry.
26. The Commissioner normally considers that *government policy* is any policy which has been signed off either by 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 normally constitute government policy.
27. However, in the circumstances of this case and for the reasons explained in the confidential annex, the Commissioner is satisfied that the relevant correspondence does relate to the formulation or development of government policy on the publication of the government material by the Iraq Inquiry. The exemption at section 35(1)(a) was therefore correctly engaged.

Public interest test

28. The exemption at section 35(1)(a) is qualified by a public interest test. Therefore, the Commissioner next considered whether in all the circumstances of the case, the public interest in maintaining the exemption for the information withheld on that basis outweighs the public interest in disclosure.

Complainant's arguments

29. The complainant's arguments in support of the public interest in disclosure are summarised below.
30. There is a continued substantial public interest in disclosure of information about how the decision to invade Iraq was made.
31. In relation to the Iraq Inquiry, there is now a substantial public interest in finding out why the Inquiry has been delayed to such a degree with all the repercussions of significant increased costs to the taxpayer.
32. There is a public interest in the selection and role of Ms Aldred herself. Ms Aldred was selected by personal intervention of the Cabinet Secretary of the time, Sir Gus O'Donnell (as he then was, now Lord O'Donnell) without the post being advertised for external competitive recruitment. Ms Aldred occupied a senior role within the Foreign and Defence Policy Secretariat during part of the period of the invasion and occupation of Iraq. While being seconded to the Iraq Inquiry, she continues as an employee of the Cabinet Office which raises a question of a conflict of interests in carrying out her Iraq Inquiry secretary role.

Public authority's arguments

33. The public authority's submissions on the balance of the public interest are summarised below.
34. The public authority acknowledged the general public interest in openness and transparency in government. The authority also specifically recognised the public interest in understanding how government develops policies on disclosure of documents by the Iraq Inquiry.
35. However, in favour of maintaining the exemption, the public authority argued that there is a very strong public interest that the communications remain confidential while the Iraq Inquiry is still live. Officials, it argued, would be inhibited from communicating their candid and comprehensive views relating to why the government has denied the Inquiry permission to publish government material relevant to the Inquiry.
36. The public authority however pointed out that Lord O'Donnell, then Cabinet Secretary gave a full explanation of the reasons for withholding the correspondence between former Prime Minister, Tony Blair and

former President of the United States, George W Bush, to the Inquiry, and that the letter from Lord O'Donnell was published by the Inquiry on its website.⁸ The authority argued that the public availability of the letter alongside the protocol between the Inquiry and the government regarding documents and other written communication (also available on the Inquiry's website) reduces the weight of the public interest in disclosing the information withheld on the basis of section 35(1)(a).

37. The public authority further pointed out that the Inquiry has been given full access to government material relevant to the Inquiry and will be able to take their contents into account before drafting its report. It argued that this further reduces the public interest in understanding the internal communications between officials relating to why the government denied the Inquiry permission to publish government material relevant to the Inquiry.
38. In addition, the fact that the information relates to a matter of political and diplomatic sensitivity increases the weight of the public interest in maintaining the exemption.
39. The information is of recent provenance and this also strengthens the public interest in maintaining the exemption because disclosure would undermine the presumption that officials can share information and ideas in confidence.
40. The information does not touch upon the circumstances of Ms Aldred's appointment, nor does it provide evidence of, or negate, the suggestion of a conflict of interest.

Balance of the public interest

41. The Commissioner accepts that there is a strong public interest in disclosing information about how the decision to invade Iraq was made. However, he must point out that the withheld information in this case relates to communications in connection with administering the protocol between the Iraq Inquiry and the government on the publication of government material relevant to the Inquiry. Therefore, strictly speaking, the information in scope is not information about how the decision to invade Iraq was made and the public interest arguments for disclosure in that regard do not strictly apply in this case.

⁸ <http://www.iraqinquiry.org.uk/media/50277/O'DonnelltoChilcot-11January2011-letter.pdf>

42. Nevertheless, the Commissioner considers that there is a public interest in disclosure of information which sheds light on how the protocol is being administered, and the withheld information would assist the public in understanding both the government's and the Inquiry's respective positions better. Disclosure would, albeit to a very limited extent, assist the public in understanding why the Inquiry has taken so long to conclude and publish its findings.
43. Furthermore, if there were any concerns about the potential conflict of interests in Ms Aldred's role as Inquiry secretary, then the withheld information would allow those who have concerns (as well as those who do not) to consider the evidence of her contributions so far and make their own judgement. However, the Commissioner has to balance that against the strong public interest in ensuring that while the Inquiry is still live officials do not feel inhibited from communicating candidly with the Inquiry. It would not be in the public interest if officials and the Inquiry did not feel confident enough to communicate freely and frankly for fear that their views could be subjected to premature public scrutiny.
44. The Commissioner accepts that while the Inquiry is still live, the fact that the Inquiry has been given unrestricted access to government material relevant to the Inquiry goes some way towards satisfying the public interest in the operation of the protocol. The likely consequence of disclosing the withheld information at this time is that the Inquiry would not be able to rely on officials communicating freely and frankly, and that would not be in the public interest, given the important and sensitive work that the Inquiry has been tasked with.
45. For all the above reasons, the Commissioner considers that, in all the circumstances of the case, the public interest in maintaining the exemption at section 35(1)(a) in relation to the information withheld on that basis outweighs the public interest in disclosure.

In light of his decision above, the Commissioner did not consider the applicability of the sections 27(1)(a), (c) and (d). He has also not considered the applicability of section 42(1) to the one document which was additionally withheld on that basis.

Section 40(2)

46. The public authority explained that some of the information in scope relates to "*Maxwellees*"⁹ and includes correspondence between the

⁹ Individuals who are subject to provisional criticism by the Inquiry and consequently given the opportunity to make representations to the Inquiry.

Inquiry and individual Maxwellees. The authority relied on the exemptions at sections 40(2) and 42(1) to withhold 3 emails containing the relevant information.

47. Information is exempt from disclosure by virtue of section 40(2) if it constitutes third party personal data (ie not the applicant's own personal data) and either the first or second condition in section 40(3) is satisfied.
48. Personal data is defined in section 1 of the Data Protection Act 1998 (DPA) as follows:

'.....data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into possession of, the data controller; and includes any expression of opinion about the individual and indication of the intentions of the data controller or any person in respect of the individual.'

Is the withheld information personal data?

49. The Commissioner finds that the withheld information constitutes the personal data of the Maxwellees because it is information from which they can be identified.

Would the disclosure of the withheld information contravene any of the data protection principles?

50. As mentioned, for section 40(2) to apply, either the first or second condition in section 40(3) must be satisfied. The first condition in section 40(3) states that disclosure of personal data would contravene any of the data protection principles or section 10 of the DPA.

51. The first data protection principle states:

'Personal data shall be processed fairly and lawfully and, in particular shall not be processed unless –

At least one of the conditions in schedule 2 [DPA] is met.....'

52. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data,
- The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed?

53. Furthermore, notwithstanding the data subjects' reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is an overriding legitimate interest in disclosure to the public.
54. The public authority explained that the Inquiry has made clear that 'Maxwellised' individuals and those providing support to them are bound by a confidentiality agreement, and details of the process will not be made public either during the process or after the Inquiry reports.
55. The Commissioner is therefore satisfied that the data subjects (ie the Maxwelllees) had a reasonable expectation that information relating to their Maxwellisation would not be made public. He is also persuaded that disclosure of the withheld information could cause unjustified damage and/or distress to the individuals it relates to.
56. Given that the Inquiry is going to publish a report which will include its views on decisions taken by Maxwellised individuals, the Commissioner is not persuaded that there was an overriding legitimate interest to the public in disclosing information relating to details of the Maxwellisation process at the time of the request.
57. The Commissioner therefore finds that the disclosure would be unfair and thus breach the first data protection principle.
58. Consequently, the exemption at section 40(2) was correctly engaged in respect of the information to which it was applied.

Procedural Matters

59. A public authority is required by virtue of section 17(1) FOIA to issue a refusal notice specifying the exemptions it is relying upon promptly and in any event no later than 20 working days.
60. The complainant's request was made on 3 March 2014. The public authority did not notify the complainant of all the exemptions it was relying upon until 25 April 2014. It also failed to specify which exemptions under section 27 it considered was engaged. The Commissioner therefore finds the public authority in breach of section 17(1)(b) FOIA.

Other matters

61. Although there is no statutory time limit to complete internal reviews. As a matter of good practice, the Commissioner expects internal reviews

should take no longer than 20 working days and in exceptional circumstances, 40 working days.

62. The complainant requested an internal review on 1 May 2014. It was not completed until 1 July 2014. The Commissioner would therefore like to record his concern at the delay in completing the internal review which, by his calculation, slightly exceeded 40 working days.

Right of appeal

63. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

64. 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.
65. 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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