

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 June 2015

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

#### Decision (including any steps ordered)

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1. The complainant submitted a request to the Cabinet Office seeking information about the establishment of the Iraq Inquiry, including how its remit was decided, how members were selected and why the format of a Privy Councillor-led inquiry was chosen. The Cabinet Office argued that the withheld information was exempt from disclosure on the basis of section 35(1)(a) of FOIA, the government policy exemption. The Commissioner is satisfied that the requested information falls within the scope of the exemption. He has also concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

#### Request and response

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2. On 4 August 2014 the complainant wrote to the Cabinet Office and requested information in the following terms:

*'Under the terms of the FoI Act 2000, I request disclosure of all information held by the Cabinet Office relating to how the selection criteria used in recruiting the individual members of the Iraq Inquiry Panel was decided upon. This should include information in electronic and paper form appertaining to the choice of a Privy Councillor led 'lessons for government' Inquiry rather than any other type of Inquiry and the criteria governing the selection of the four Privy Councillor members chosen.'*

3. The Cabinet Office responded on 22 August 2014. It confirmed that it held information falling within the scope of this request but considered it to be exempt from disclosure on the basis of section 35(1)(a) of FOIA.
4. The complainant contacted the Cabinet Office on 25 August 2014 and asked for an internal review of this response. He questioned whether this information fell within the scope of the exemption provided by section 35(1)(a) and also argued that the public interest favoured disclosure of the information.
5. The Cabinet Office informed him of the outcome of internal review on 24 September 2014. The review provided some clarification as to why section 35(1)(a) was considered to apply and also concluded that the public interest favoured maintaining the exemption.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 29 September 2014 to complain about the way his request for information had been handled. His grounds of complaint effectively mirrored those raised in his request for an internal review, ie he questioned the Cabinet Office's basis for engaging 35(1)(a) and even if it was engaged he argued that the public interest favoured disclosure of the information.

### **Reasons for decision**

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#### **Section 35(1)(a) – formulation and development of policy**

7. Section 35(1)(a) of FOIA states that:

*'Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-*

*(a) the formulation or development of government policy'*

8. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
9. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and

recommendations/submissions are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.

10. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
11. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
  - the final decision will be made either by the Cabinet or the relevant minister;
  - the government intends to achieve a particular outcome or change in the real world; and
  - the consequences of the decision will be wide-ranging.
12. The Cabinet Office explained that the information in scope of the request comprised advice provided by officials in No 10 Downing Street and the Cabinet Office about the formulation of policy towards establishing the Iraq Inquiry. The Cabinet Office argued that this advice clearly had a Ministerial dimension given that this advice was provided to the then Prime Minister.
13. The Commissioner has reviewed the withheld information and is satisfied that it falls within the scope of the exemption provided by section 35(1)(a) of FOIA. This is on the basis that it concerns a decision making process in relation to a specific and significant policy issue, handled at Prime Ministerial level, namely the establishment of the Iraq Inquiry.

### **Public interest test**

14. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

### **Public interest arguments in favour of maintaining the exemption**

15. The Cabinet Office argued that it was very strongly in the public interest that officials are not inhibited from communicating their advice on policy as this ensures that Ministers have access to candid and comprehensive views on all of the policy options available. If officials had cause to be concerned that their advice might be made public, these briefings may

become deficient, in that the officials might be unwilling to communicate frankly in writing for fear that their views could be subject to undue public scrutiny or could embarrass Ministers and senior officials on the event of their release into the public domain. Furthermore, the Cabinet Office also argued that it would not be in the public interest for officials to adopt a precautionary approach and qualify their views in such a way as to make it more difficult for Ministers to absorb their advice quickly. The Cabinet Office emphasised that such concerns were particularly relevant when the policy making in question concerned such a serious matter as the setting up of an important, high profile inquiry, such as the Iraq Inquiry.

16. Furthermore the Cabinet Office argued that it considered the policy in question to be live and ongoing at the time of the request given the current position of the Inquiry, which has yet to deliver its report. Moreover, the Cabinet Office argued that although the withheld information relates to the criteria for appointing Inquiry members and the decision to have a Privy Councillor led Inquiry (and so does not address matters of substance under consideration by the Inquiry itself), the Cabinet Office believed that disclosure of information related to the Inquiry would risk undermining the Inquiry before it publishes its report.

### **Public interest arguments in favour of disclosing the withheld information**

17. The Cabinet Office recognised that there is a public interest in the openness of government and acknowledged that transparency may contribute to a greater understanding of participation in public affairs. More specifically it recognised the public interest in understanding how the government developed policies on establishing the Iraq Inquiry and that there is a strong public interest in an independent, full and frank Iraq Inquiry. However, it believed that this interest would be met when the Inquiry's report is published.
18. The complainant argued that there was a compelling public interest in the disclosure of the withheld information for the following reasons:
19. Firstly, he argued that the 'lessons to be learnt' approach of the Inquiry would appear to have been thoroughly undermined by the extreme delays in the Inquiry publishing its report. The complainant argued that since the Inquiry was set up, controversial interventions by the government in international conflicts have taken place – for example in Libya in 2011 – without any 'lessons' from the Inquiry being forthcoming. Consequently the complainant argued that the Inquiry itself had failed to meet the need for urgent analysis and feedback on the 2003 invasion of Iraq so that government policy on foreign intervention could be deliberated and discussed with a better

background of knowledge and greater forethought. He suggested that disclosure of the withheld information would bring to light and enable a learning process in itself about these failures.

20. Secondly, the complainant argued that certain members had brought with them some political baggage – connecting them to the main political actors of the 2003 invasion – which may cast something of a shadow over their strict impartiality. He explained that he was thinking in particular but not exclusively of Sir Lawrence Freedman and the drafting of Tony Blair's 'Chicago speech' which laid the groundwork for his 'liberal interventionist' ideology. The complainant argued that it was important for the public to be aware of how the selection process took place for members of the Inquiry so they can be assured that impartiality and independence were strictly observed.
21. Thirdly, the complainant emphasised that his request encompassed information about how the remit of the Inquiry had been chosen and devised. He argued that in the planning of this remit certain areas of significant concern from which 'lessons' could – and many argued should – have been drawn were excluded from the scope of the Inquiry. The complainant explained that he was referring primarily to the area of compliance with international law and the UK's obligations as a signatory to the UN Charter and as a permanent member of the UN Security Council to adhere to the path laid down by the Charter. The complainant alleged that the Inquiry was deliberately created by senior ministers in the Brown government in deliberation with the most senior civil servants to rule out an inquiry which would make judgments on the legality of intervention in the Iraq. The complainant therefore argued that the public have a clear right to know why a non-judicial privy councillor Inquiry – as opposed to an independent judicial inquiry – was chosen and why the Inquiry was effectively prohibited from looking at this highly important area of public concern.
22. Fourthly, the complainant argued that it was in the public interest to disclose information which revealed why the decision had been taken not to employ legal counsel for the Inquiry or to include a practising lawyer on the panel itself to better facilitate an inquisitorial approach to questioning witnesses and getting at the truth. He noted that The House of Lords Committee (Session 2013-14) looking into the Inquiries Act 2005 made the recommendation (chapter 7) that 'for an inquiry of any length the appointment of counsel is essential'.<sup>1</sup> The complainant

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<sup>1</sup> <http://www.publications.parliament.uk/pa/ld201314/ldselect/ldinquiries/143/14313.htm>

suggested that this recommendation was arrived at after hearing evidence from Sir Stephen Sedley on the lack of an independent legal practitioner on the Iraq Inquiry and how it made him and his colleagues when 'reading the daily reports of what was going on...weep at the questions that were not being asked'<sup>2</sup>. The complainant argued that "as the inquiry was set up as a Privy Counsellor inquiry with an inquisitorial brief for the purpose of 'learning lessons', this denial of independent legal counsel and the appointment instead of a Secretariat by the Cabinet Office can only be seen as a liability for the Inquiry panel and the production of its report."

23. The complainant argued that such arguments attracted further weight given "the increasingly parlous state of compliance with international treaty law in the way that international conflicts have been dealt with since the 2003 invasion of Iraq and the more noted tendency for corporate voting within the UN Security Council to be circumvented before military force is authorised."

### **Balance of the public interest arguments**

24. In considering the balance of the public interest arguments outlined above, the Commissioner has taken into account the comments made in a key Information Tribunal decision involving the application of the section 35(1)(a). In that case the Tribunal confirmed that there were two key principles that had to be taken into account when considering the balance of the public interest test: firstly the timing of the request and secondly the content of the requested information itself.<sup>3</sup>
25. The Commissioner has initially considered the weight that should be attributed to the public interest arguments in favour of maintaining the exemption.
26. With regard to attributing weight to the chilling effect arguments, the Commissioner recognises 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. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy making in question is still live, the Commissioner accepts that arguments about a chilling

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<sup>2</sup> [http://www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA\\_Written\\_Oral\\_evidencevol.pdf](http://www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf) , p420

<sup>3</sup> *DFES v Information Commissioner and Evening Standard* (EA/2006/0006)

effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.

27. In the circumstances of this case the Commissioner is not prepared to accept that the policy formulation and development in question was live at the time of the complainant's request. Whilst it is clear that the Iraq Inquiry was, at the time of the request, still ongoing, in the Commissioner's view the withheld information simply relates to the policy formulation regarding the establishment and composition of the Inquiry itself. At the point the complainant submitted his request in 2014 such decisions had clearly been taken and acted upon.
28. Nevertheless the Commissioner accepts that disclosure of the withheld information would be very likely to result in a significant and notable chilling effect on the way in which officials advise Ministers on matters of similar importance in the future. This is because the information (which he has inspected) comprises a detailed and candid examination of the various issues and options associated with the establishment of the Inquiry. Consequently in the Commissioner's opinion disclosure of this information would be very likely to have an adverse effect on the way in which the officials advise Ministers in other such high profile matters. In the circumstances of this case, the Commissioner believes that the chilling effect arguments attract particular weight given the high profile and potentially controversial nature of the subject matter and the level at which such advice was provided and discussed, being the highest level in government.
29. Having considered the content of the withheld information the Commissioner also accepts that there is some merit in the Cabinet Office's argument that disclosure of the withheld information could undermine the Inquiry itself. Again, the Commissioner cannot give details of his reasoning in this decision notice without revealing some of the content of the withheld information itself. However, based on what he has seen and the arguments put before him, he accepts, on balance, that disclosure of such information and the inevitable public discussion of its content which would follow would distract from the Inquiry to a significant degree.
30. Turning to the arguments in favour of disclosure, the Commissioner accepts that it would genuinely inform the public as to why the government decided to establish a Privy Councillor led inquiry as well as providing some insight into how the remit and composition of Inquiry was decided upon. The withheld information is very detailed in that

respect. Disclosure would therefore provide some insight into the questions posed by the complainant regarding the decisions taken. Furthermore, the Commissioner considers that the wider points made by the complainant regarding the delays in the Inquiry publishing its report - and as a result the consequences of not having a 'lessons learned' report available sooner - are valid ones which add further weight to public interest arguments in favour of disclosure.

31. More broadly, the disclosure of the withheld information would provide the public with some insight into how the government formulates policy at this level and indeed on matters of such significance.
32. On balance, the Commissioner has decided that the public interest favours maintaining the exemption. In reaching this conclusion the Commissioner recognises the significant benefits in disclosing this information not least because of the understandable public interest and concern in the Inquiry and matters associated with it. However, he believes that such benefits are outweighed by the greater harm to the public interest which would arise from the disclosure of the withheld information in the form of both a significant chilling effect on policy making in the future and the danger of distracting from the ongoing Inquiry itself.



## Right to appeal

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33. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

34. 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.
35. 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**