**IN THE FIRST-TIER TRIBUNAL** **Appeal No: EA/2011/0225 and 0228**
**GENERAL REGULATORY CHAMBER**
**(INFORMATION RIGHTS)**

**ON APPEAL FROM:**

**The Information Commissioner's Decision Notice No: FS50341647**
**Dated: 13 September 2011**

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| **Appellants:** | **Stephen Plowden (EA2011/0225)** |
| | **Foreign and Commonwealth Office (EA2011/0228)** |
| **Respondent:** | **The Information Commissioner** |

**"Paper re-hearing" at Field House**

**Date of Tribunal Meeting: 21 January 2014**

**Before**

**HH Judge Shanks**

**Judge**

and

**Rosalind Tatam** and **David Wilkinson**

**Tribunal Members**

**Date of Decision: 28 January 2014**

**Subject matter:**

Freedom of Information Act 2000

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| s.27 | Qualified exemption: *International relations* |
| s.35(1)(b) | Qualified exemption: *Ministerial Communications* |
| s.2 | Public interest test |

**Cases referred to:**

*APPGER v IC and Ministry of Defence* [2011] UKUT 135 (AAC)

## DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the Tribunal allows the appeal of the Foreign and Commonwealth Office and dismisses the appeal of Mr Plowden and substitutes the following decision notice in place of the decision notice dated 13 September 2011.

## SUBSTITUTED DECISION NOTICE

**Public authority:** Foreign and Commonwealth Office

**Complainant:** Stephen Plowden

**The Substituted Decision**

For the reasons set out below, the Tribunal finds that the Complainant's request for information dated 11 February 2010 was dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000.

HH Judge Shanks
28 January 2014

## REASONS FOR DECISION

Factual background

1. These appeals concern a request made to the Foreign and Commonwealth Office (FCO) by Stephen Plowden under the Freedom of Information Act 2000 on 11 February 2010 for disclosure to him of the record of a telephone conversation between the Prime Minister Tony Blair and the US President George Bush which took place in the afternoon of Wednesday 12 March 2003 in the "run up" to the invasion of Iraq. As we indicate below he made a number of other related requests for information at the same time, which information was subsequently supplied.

2. In early 2003 the US and UK were seeking to obtain a further UN Security Council resolution against Iraq to give Iraq a final deadline for compliance with previous resolutions (in particular Resolution 1441) and to give clear and express authority for military action if he continued to fail to co-operate. On 10 March 2003 the French President Jacques Chirac gave a television interview in which he stated that France would not support the proposed resolution. It is Mr Plowden's case that the UK and US deliberately misrepresented what President Chirac was saying in the interview in order to justify abandoning further efforts to secure a further UN resolution before taking military action.

3. During the morning of 12 March 2003 Matthew Rycraft, one of Mr Blair's private secretaries, sent a number of officials at 10 Downing St an email entitled "French veto – urgent"; that document was requested by Mr Plowden; although initially withheld it was later supplied to him. Later that day Mr Blair and Mr Bush had the telephone conversation we are concerned with. On 13 March 2003 a number of diplomatic telegrams were sent and the FCO compiled a memo headed "France and Iraq". These documents were likewise requested, initially withheld and subsequently supplied to Mr Plowden. On 14 March 2003 there was a telephone call between Mr Blair and M

Chirac about their respective positions on Iraq; the record of this call was also requested, initially withheld and later supplied to Mr Plowden.

4. On 18 March 2003 Mr Blair proposed to the House of Commons that the UK use all means necessary to uphold UN Resolution 1441 and disarm Iraq's weapons of mass destruction. The motion proposed that the House:

> **… regrets that despite sustained diplomatic efforts by Her Majesty's Government it has not proved possible to secure a second Resolution in the UN because one Permanent Member of the Security Council [clearly a reference to France] made plain in public its intention to use its veto whatever the circumstances.**

The motion was passed.

5. The war started on 20 March 2003. The UK ended formal combat operations in Iraq on 30 April 2009.

6. On 15 October 2009 Gordon Brown, Mr Blair's successor as Prime Minister, announced the establishment of an inquiry to be presided over by Sir John Chilcot to identify lessons to be learnt from the Iraq conflict (the Iraq Inquiry). At the official launch of the inquiry on 30 July 2009 Sir John stated as follows:

> **… Our terms of reference are very broad, but the essential points as set out by the Prime Minister and agreed by the House of Commons, are that this is an Inquiry by a committee of Privy Counsellors. It will consider the period from the summer of 2001 to the end of July 2009, embracing the run-up to the conflict in Iraq, the military action and its aftermath. We will therefore be considering the UK's involvement in Iraq, including the way decisions were made and actions taken, to establish, as accurately as possible, what happened and to identify the lessons that can be learned. Those lessons will help ensure that, if we face similar situations in future, the government of the day is best equipped to respond to those situations in the most effective manner in the best interests of the country.**
>
> **The Inquiry will have access to all the information held by the Government and may ask any British citizen to appear before it. In the Prime Minister's words, "no British document and no British witness will be beyond the scope of the inquiry."**

> **…**
>
> **… The Committee will not shy away from making criticism. If we find that mistakes were made, that there were issues that could have been dealt with better, we will say so frankly.**
>
> **We are all committed to ensuring that our proceedings are as open as possible …**
>
> **…**
>
> **… But if the Inquiry is to succeed in getting to the heart of what happened and what lessons need to be learned for the future, we recognise that some evidence sessions will need to be in private …**

7. Jack Straw MP, who was the Foreign Secretary at the relevant time, gave evidence to the Iraq Inquiry several times. In the course of his evidence on 8 February 2010 he was asked " … whether it had been agreed between Number 10 and the White House on the afternoon of [12 March 2003] that we would, between us, say it was the French who prevented us from securing a resolution?" In his answer Mr Straw referred to the record of the telephone call with which the appeal is concerned and maintained that M Chirac's intervention had made the securing of the necessary Security Council votes "close to impossible".

8. Three days later on 11 February 2010 Mr Plowden made his request under the Freedom of Information Act 2000 (FOIA). In the request he referred to Mr Straw's evidence and expressly asked to see the records of the conversation between the Prime Minister and the President and " … any comments on it made by FCO Ministers or officials". In response the FCO stated in a letter dated 12 April 2010 that they held a record of the conversation of 12 March 2003 but that they were entitled to withhold it under sections 27(1)(a), 27(2) and 35(1)(a) of FOIA. We shall refer to it as the "disputed information." The original FCO decision was upheld on review as set out in a letter from the FCO dated 6 July 2010.

9. July 2010 is therefore the relevant date for the applicability of the exemptions relied on by the FCO and the assessment of the public interest. It is necessary nevertheless

for various reasons to record certain subsequent developments in relation to the Iraq Inquiry.

Subsequent developments

10. The Inquiry continued sitting to hear evidence until 2 February 2011. During this period it heard further evidence from Mr Blair and Mr Straw directly relevant to Mr Plowden's requests for information; in particular, Mr Blair gave evidence on 21 January 2011 about conversations he had with Mr Bush during March 2003 about the attempt to obtain a further UN resolution and the French position on it.

11. In accordance with what Sir John Chilcot had said at the Iraq Inquiry launch, all relevant documents were provided to the members of the Inquiry by the Government but many, including records of exchanges between Mr Blair and Mr Bush, remained "classified" under a protocol agreed between the Inquiry and the Government, so that the Inquiry could not publish them and references to them during open hearings had to be circumspect. In December 2010/January 2011 in anticipation of the resumption of Inquiry sittings in January 2011 there was an exchange of correspondence between Sir John and the Cabinet Secretary in which Sir John sought "declassification" of records of exchanges between Mr Blair and Mr Bush on the basis that the Inquiry regarded it as essential in order to produce a reliable account of events that it should be able to quote extracts from records of such discussions and that it wished to explore such records with witnesses in evidence. The Cabinet Secretary would not agree to declassify these records.

12. One of the points relied on by Sir John in his correspondence with the Cabinet Secretary in December 2010/January 2011 was the fact that Mr Blair and Mr Bush as well as Jonathan Powell, Mr Blair's Chief of Staff, and Alistair Campbell, his chief press secretary, had published memoirs disclosing the contents of discussions between Mr Bush and Mr Blair. Our bundle also includes an extract from Mr Campbell's diaries covering 12 March 2003 (which we are told was published in June 2012) which contains a detailed account of the telephone conversation between Mr Blair and Mr Bush which we are concerned with. It is not disputed that Mr Campbell would

have had to obtain clearance from the Government before such material could have been published.

13. On 13 July 2012 Sir John wrote to the Prime Minister outlining the progress of the Inquiry. He stated that the Inquiry had made extensive progress in drafting its report but that the task was not complete. The final report was likely to be over a million words; there would be significant lessons "… some … specific to the circumstances of Iraq, but most … [of] more general application for the conduct of government." However, in order to complete the report and in particular the "Maxwellisation" process (whereby those who may be criticised are given an opportunity to respond before a report is published) the Inqiry considered it necessary to make further progress with the process of declassification, in particular relating to records of discussions between the Prime Minister and other leaders.

14. We have seen a further exchange between Sir John and the Prime Minister from November 2013. It is clear from this that there were still differences between the Government and the Inquiry as to the "declassification" of various classes of records, in particular records of discussions between Mr Blair and Mr Bush, and that Sir John regarded the lack of agreement as "regrettable". We were informed by the Treasury Solicitor that current discussions between Sir John and the Cabinet Secretary are likely to lead to decisions "over the next few months." We were also provided with press reports from December 2013 which indicated "good progress" was being made with the discussions. They also state that the Inquiry's report is expected to be published sometime in 2014, some five years after it was set up; that may prove unduly optimistic.

Procedural history of the appeals

15. Meanwhile the specific dispute we are concerned with has made its own slow progress through the system.

16. Mr Plowden complained to the Information Commissioner under section 50 of FOIA on 6 August 2010. The Commissioner issued his decision notice on 13 September

2011. He found that sections 27(1)(a) and 35(1)(b) (not (a)) applied to the whole of the record of the discussions of 12 March 2003 but that section 27(2) (which applies to "confidential information obtained from …" a foreign state) applied only to part of the record and not to information passing from Mr Blair to Mr Bush. He also found that the public interest balance required (broadly speaking) that Mr Blair's side of the conversation ("Blair information") should be disclosed but not the balance of the record ("Bush information").

17. Both Mr Plowden and the FCO appealed against this decision. There was a hearing before a differently constituted First-tier Tribunal on 28 and 29 March 2012. The Tribunal issued a decision on 21 May 2012 which largely upheld the Commissioner's decision notice, although it allowed for the withholding of parts of Mr Blair's side of the conversation which would allow inferences to be drawn about what had been said by Mr Bush.

18. The FCO appealed to the Upper Tribunal on 26 July 2012. There were two oral hearings (one for permission to appeal, the second the substantive appeal hearing) and Judge Jacobs issued a decision on 16 June 2013. He found that the First-tier Tribunal had gone wrong in law in that it had not properly considered the public interest in the disclosure of the Blair information on its own and that by adopting a sentence by sentence approach to the record of the conversation it had failed to take account of the information as a package. Judge Jacobs set aside the First-tier Tribunal's decision and remitted the case for re-hearing; he made it clear that at the re-hearing it would be open to any party to raise any issue on the Commissioner's decision notice, and it is thus still open to Mr Plowden to contend that the whole record should have been disclosed to him.

19. Notwithstanding its importance, all parties agreed to the matter being dealt with "on the papers"; in view of the procedural history and the very full and cogent written material that all three parties have put before us, we are satisfied that we can properly determine the appeals in the absence of a such a hearing.

20. For our paper consideration we were provided with an open bundle of documents including witness statements from Mr Plowden, Clare Short, who was Secretary of State for International Development and a member of the Cabinet at the relevant time, Angus Lapsley, a senior civil servant formerly at the FCO and now at the Cabinet Office, and David Quarry, another senior civil servant at the FCO. Unsurprisingly in view of the nature of the issues in the case, we also received a small bundle of "closed material" including closed statements by Mr Lapsley and Mr Quarry; we are satisfied that that material was properly provided on a closed basis. We also received written submissions prepared by counsel for the Commissioner and the FCO and a further statement from Mr Plowden containing comments of the FCO's witness statements as well as closed written submissions from the FCO and the Commissioner relating specifically to the contents of the disputed information. We considered all this material as well as the full record of the disputed information itself at our meeting on 21 January 2014.

Stay

21. Shortly before our meeting the Treasury Solicitor on behalf of the FCO applied by email for the Tribunal to adjourn the meeting and stay the appeal for three months in light of the ongoing discussions concerning "declassification" to which we refer in para 14 above. Mr Plowden strenuously opposed that course.

22. We rejected the FCO's application for a stay for the following reasons:

    (1) The request for information in this case was made four years ago and the appeals were started over two years ago: any further delay is to be avoided unless there are really good reasons for allowing it;

    (2) The outcome of these appeals depends on what ought to have happened in July 2010; subsequent events are only relevant in so far as they throw light on the position as it then was; it seems to us extremely unlikely that any decisions made at the end of the current discussions on declassification (if and when they are made) would have any bearing on the decision we must make: the two processes are of a completely different nature, involve different criteria and relate to a different time and context;

(3) The Treasury Solicitor says in an email of 17 January 2014 that " … the FCO would not wish it to be said that it had taken a position in this appeal which was inconsistent with whatever position may be taken by the Cabinet Secretary on declassification of information under the Inquiry's processes." We have difficulty following that point: not only are the two processes quite different as we have already said, but, in any event, the FCO have already taken a clear public position in these proceedings which they have been maintaining for the last four years.

23. We therefore turn to consider the appeals on their merits.

Relevant legal framework

24. By virtue of section 1 of FOIA Mr Plowden is entitled to disclosure of the disputed information unless (a) it is "exempt" under one or more of provisions and (b) "in all the circumstances of the case, the public interest in maintaining the exemption[s] outweighs the public interest in disclosing the information."

25. The wording of the relevant provisions is as follows:

**27(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice –**

**(a) relations between the United Kingdom and any other State; …**

**(2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom …**

**(3) For the purposes of this section, any information obtained from a State … is confidential at any time … while the circumstances in which it was obtained make it reasonable for the State … to expect that it will be so held.**

**…**

**35(1) Information held by a government department … is exempt information if it relates to –**

…

**(b) Ministerial communications [ie communications between Ministers of the Crown]**

It is rightly not in dispute that these exemptions apply to the disputed information. In relation to section 27(1)(a), we consider below in the context of the public interest balance the nature and extent of the prejudice to our foreign relations likely to flow from disclosure. It is obvious in our view that anything recorded as being said during the conversation by Mr Bush must come within section 27(2); we also agree with the FCO that anything said in response which itself reflects what Mr Bush was saying must also come within that section. As for section 35(1)(b) it is clear from the form of the relevant record itself that it not only relates to but indeed takes the form of a Ministerial communication.

26. The issue that we must address is therefore the public interest balance. There are three legal points to note before we turn to consider the weight of the respective public interests in this case:

    (1) As we have already said the Tribunal (like the Commissioner) must assess the public interest as it stood at the date of the FCO's refusal to supply the information (ie July 2010); any subsequent events are only relevant in so far as they throw light on the situation as at that date. Mr Plowden makes a cogent argument that it would make more sense to consider the position as at today; however, the law on this point is well established in the Tribunal's jurisprudence and is recognised in the case law of the Upper Tribunal (see *APPGER v IC and Ministry of Defence* [2011] UKUT 153 (AAC) at [9]); we do not therefore consider that it is open to us to revisit it.

    (2) It is also well established that where several exemptions apply to requested information the public interests in maintaining each of the exemptions are amalgamated and balanced against the public interest in disclosure and that if the amalgamated public interest in maintaining the exemptions outweighs the public interest in disclosure the information can be withheld.

(3) In considering foreign policy matters the Tribunal must give due respect to the evidence and opinions of the Government and its Ministers and officials who have special experience and expertise in the field, although it will of course carefully scrutinise all evidence and arguments put to it.

Public interest in disclosure

27. It is clear that the disputed information was (and is) intrinsically of great legitimate public interest. It is an official record of a conversation at the highest level relating to an imminent and very controversial war involving this country. It comes at a crucial point in the story and throws light on the decision-making process in relation to that war and on the relationship between the US and the UK and Mr Blair and Mr Bush in particular. It is also relevant to the particular matter concerning Mr Plowden, namely the approach taken by the US and UK in response to the declared French position on the UN resolution. And at a more general level it is likely to be of relevance to the "lessons of general application for the conduct of government" to which Sir John Chilcot refers in his letter to the Prime Minister referred to in para 13 above. It is right to bear in mind, however, that the disputed information is only one part of a much bigger story and that we did not see anything in it which would amount to a "smoking gun" or anything of that kind.

28. Further, the weight of the public interest in the disclosure of the disputed information in July 2010 by the FCO pursuant to this FOIA request had to be considered in the light of the fact that the Iraq Inquiry had been established a year before and was in the process of taking evidence. The disputed information was part of a mass of material which had been provided to the Inquiry by the Government; its existence only emerged because of the Inquiry process; it was still "classified" but the Inquiry had been able to put it to use in its questioning; the Inquiry was considering the whole picture and in due course would be able to make appropriate use of the disputed information in deciding what had happened and what lessons should be drawn and, in so doing, to put it in its proper context. These considerations in our view substantially reduced the weight of the public interest in disclosure of the disputed information in

July 2010 under a FOIA request. It follows that we cannot accept Mr Plowden's submission that the existence of the Iraq Inquiry is irrelevant to our considerations.

Public interest in maintaining the exemptions

29. We have already said that we regard it as obvious that the contents of the record of the conversation in so far as they disclose what Mr Bush said clearly came within section 27(2). But we think it is also important to recognise that the entire record of the conversation was in a more general sense highly confidential; indeed, it is quite hard to think of something more confidential in the field of government than a record of a telephone conversation between a UK Prime Minister and the US President about an imminent war. In this context we are bound to accept the FCO's evidence about the very close and special relationship between the two countries and between the positions of PM and President as their respective leaders. We also accept the evidence that the US have a very strong expectation that an official record of a conversation like this one would remain confidential and not be released to the public and we note in this context the tighter freedom of information regime in relation to such records that applies in the US described at para 31 of the FCO's open submissions. There is clearly a strong public interest in maintaining this confidentiality regardless of any prejudice to our relations with the US.

30. There are a number of points which may tend somewhat to reduce the weight we should ascribe to the public interest in maintaining that confidentiality as at July 2010:

    (1) It is obviously relevant that over seven years had gone by between the Bush/Blair conversation and July 2010 and that by then there was a new President and a new PM; however, we accept that, particularly in the context of a military action in which the US was still involved, seven years was not all that long (indeed, the issues were still quite "raw") and that the identity of the personel is of much less importance than the offices themselves.

    (2) The Commissioner makes the point that the Government had disclosed the disputed information to the Iraq Inquiry and members of the Inquiry had not been prevented from referring to the Bush/Blair conversation in open

hearings and that Mr Straw (who had vast experience in diplomatic relations) had referred in his evidence to the fact that there was a phone call on 12 March 2003 and that there was a record of it and had spoken in broad terms about what was said during the call. In January 2011 Mr Blair also felt free to give open evidence about his discussions with Mr Bush about the proposed UN resolution. This point is we think of some significance but, nevertheless, we bear in mind that the disputed information when supplied to the Inquiry was subject to the protocol agreed with the Government and "classified" (as it remained in July 2010 and, for the moment at least, still remains) and that there is an important distinction between the publication of an official record of a specific conversation and more general oral references to it.

(3) As we say at para 12 above Sir John Chilcot referred in December 2010 to the fact that Mr Blair, Mr Bush and others had by then published memoirs referring to conversations between Mr Blair and Mr Bush; and not very long afterwards Mr Campbell was allowed to publish his diary which included a detailed account of the conversation in question. Again, we think this consideration has some significance but we bear in mind that the Government as such would not be formally responsible for any disclosures in such memoirs or diaries, and that there is a distinction between memoirs or diaries and official records and an element of "deniability" in relation to the former.

(4) It is also perhaps noteworthy that the FCO was prepared to disclose information relating to an important conversation between Mr Blair and President Chirac which took place on 14 March 2003 in the course of Mr Plowden's complaint to the Commissioner; on the other hand, it is said that the whole content of that conversation had by then emerged in the course of the Iraq Inquiry and we acknowledge of course that in July 2010 the FCO had also sought to withhold this information and recognise that there may well have been other considerations in play by the time matters came before the Commissioner.

31. Turning to section 27(1)(a), there is major issue between the FCO and Mr Plowden as to the extent of the prejudice to our relations with the US which would or may have resulted from disclosure of the disputed information. We are inclined to agree with Mr Plowden that it is unlikely that there would have been any concrete identifiable ill effects flowing from disclosure. But we accept the evidence of Mr Lapsley that there would have been a significant risk of a "cooling off" in the extent to which the US would have co-operated with and confided in the UK government in both the diplomatic and security fields and a significant risk that access and candour would have been restricted. In any event, we readily accept that the US would have been upset and somewhat shocked by the disclosure of the disputed information and, to that extent at least, relations between the two countries would have been prejudiced. We do not think there was significant risk, however, that our relations with states other than the US would have been significantly prejudiced by disclosure.

32. As to section 35(1)(b) and the public interest in maintaining the confidentiality of Ministerial communications we do not think this adds anything of substance to the overall picture in this case. This was clearly not a case where there was any continuing need in July 2010 for Ministers to have a "safe space" in which to deliberate before making a decision. Nor are we impressed by any suggestion that disclosure of this disputed information may have had the effect of discouraging Ministers or officials from keeping full and proper records relating to communications between Ministers.

Conclusion on public interest balance

33. Having regard to all the circumstances and in particular the considerations set out in paras 27 to 32 above we have come to the view that, although the public interest on both sides was weighty, the public interest in maintaining the exemptions outweighed that in disclosing the disputed information at the relevant date; the overwhelming considerations are the highly confidential nature of the disputed information and the existence of the Chilcot Inquiry and the stage it had reached. It follows that in our view the FCO was entitled to withhold the disputed information.

Partial disclosure?

34. Although Judge Jacobs found that the First-tier Tribunal had approached the public interest test erroneously when concluding that the Blair information (but not the Bush information) should be disclosed, we have nevertheless considered whether there ought to have been partial disclosure of the disputed information as the Commissioner had found in his decision notice.

35. We have to say we are not attracted by the notion of requiring disclosure of one side of a conversation but not the other. We agree with Judge Jacobs that it is "unrealistic" and would be potentially misleading and problematic in this case for the reasons he gave at para 16 of his decision. Further, we note that Mr Plowden was asking for the record of a whole conversation, not part of that conversation. And, in general, we would not favour a "sentence by sentence" approach in a case where a specific document contains the very information requested; it may be sensible to redact such a document if it contained distinct parts which constituted, for example, personal data, but that is not this case.

36. In any event, we do not consider that the public interest in disclosure of the Blair information was very weighty for the reasons given by the FCO in their closed submissions, while the public interest in maintaining the confidentiality of the written record itself is in our view not much reduced because only part is to be disclosed. We note that the Commissioner no longer favours this solution, accepting in para 65 of his submissions of 27 September 2013 that the public interest narrowly favours maintaining the exemptions in relation to the Blair information alone.

Disposal

37. For all those reasons we conclude that the FCO was entitled to withhold all the disputed information in July 2010 and accordingly that the FCO's appeal succeeds and Mr Plowden's fails.

38. We have stressed throughout this decision and repeat again that it relates back to the situation as it stood in July 2010. Obviously the public interest balance can change over time. Since July 2010, over three years have passed, Alistair Campbell's diaries have been published, and American troops have left Iraq; eventually decisions will be made on "declassification" and the Iraq Inquiry report will be published; all these are matters which may impinge one way or another on that public interest balance in the future should another similar request be made.

39. This decision is unanimous.

HH Judge Shanks
28 January 2014