

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 March 2018

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

Decision (including any steps ordered)

1. The complainant has requested the agenda and minutes of a meeting which he believes took place after 14 May 2009 regarding the Iraq Inquiry. This meeting is referred to in other information that the Cabinet Office has disclosed under FOIA. The Cabinet Office initially confirmed holding this information but said it needed further time to consider the balance of public interest in relation to section 36 (prejudice to the effective conduct of public affairs). It subsequently corrected what it considered to be an erroneous position and argued that it did not hold information within the scope of the request.
2. The Commissioner's decision is that the Cabinet Office does not hold any information within the scope of the request but that it contravened the requirements of section 10(1) of the Act by failing to provide a response within 20 working days of the date of the request.
3. No steps are required.

Request and response

4. On 8 December 2016, the complainant requested information of the following description:

"Recently disclosed official papers by the Cabinet Office relating to advice given former Prime Minister Gordon Brown in setting up an Iraq Inquiry contain a memo written by Ben Lyon (F&DP Secretary) to former Cabinet Secretary, Gus O'Donnell dated 14 May 2009.

This paper contains recommendations for a possible agenda for a meeting between select senior civil servants over issues in the setting up of an Inquiry.

Paragraph 2 of the section marked 'Background' refers to requests for the convening of a Permanent Secretaries meeting 'to discuss options for an Inquiry'.

Under the terms of the FoI Act 2000, I request;

- a) confirmation of whether, and when, such a meeting took place and whether it was hosted by the Cabinet Office, and;
- b) disclosure of any agenda and minutes recorded for this meeting."

5. On 11 January 2017, the Cabinet Office wrote to tell the complainant that it held information within the scope of the request but needed further time to consider the balance of public interest in respect of section 36 (effective conduct of public affairs exemption). It said it aimed to respond to him by 8 February 2017.
6. The Cabinet Office further responded to the complainant's request on 8 February 2017 but now said that it did not hold information within the scope of the request. Further comment is made about this later in this Notice.
7. The complainant requested an internal review on 11 February 2017. On 7 March 2017, the Cabinet Office sent him the outcome of its internal review. It upheld its position that it did not hold any information within the scope of the request. It also sent a second letter setting out the outcome of an internal review on 8 June 2017. However, this letter related to a separate if broadly similar request that the Cabinet Office and the complainant had been in correspondence about.

Scope of the case

8. The complainant contacted the Commissioner on 13 March 2017 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether the Cabinet Office is correct when it states that it does not hold any information within the scope of the request.

Reasons for decision

10. Section 1(1) of the FOIA states:

Any person making a request for information to a public authority is entitled

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

11. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes might be held, including cases where an "information not held" response is disputed, the Commissioner – in accordance with a number of First Tier Tribunal decisions – applies the civil standard of the balance of probabilities.

12. The Commissioner will consider the scope, quality and thoroughness of the searches performed, and whether the searches were appropriate and adequate. She will consider any other explanations provided by the public authority for why the information is not held. The Commissioner will also consider the arguments or evidence provided by the complainant as to why they consider the requested information must be held.

13. On 1 April 2017, the complainant made a further request as follows:

"With reference to the Cabinet Office memo from Ben Lyon to former Cabinet Secretary, Gus O'Donnell dated 14 May 2009, disclosed as a result of a successful freedom of information request on 16 November 2016, I request disclosure of minutes and records for the meeting held on 15 May 2009 to discuss 'next steps' in the setting up of the Iraq Inquiry; attended by Jeremy Heywood, Bill Jeffrey, Peter Ricketts, Minouche Shafik, John Scarlett, Simon McDonald and Margaret Aldred. This meeting was, according to the record, chaired by Gus O'Donnell."

14. In the Commissioner's view, any information held that was caught by the scope of the first request would be caught by the scope of the second request. The Commissioner notes that the Cabinet Office's response to this request was the same as its response to the first request. Namely, that it did not hold any information within the scope of the request. The information described in the second request was minutes and records of a meeting held after 14 May 2009 (the complainant specified 15 May 2009) to discuss the setting up of the Iraq Inquiry and the proposed attendees (according to the request) included several Permanent Secretaries. This is virtually identical, in the Commissioner's view, to the first request. The complainant, while conceding up to a point that this was correct, remained unconvinced

that no information was held. He referred to repeated reference in other documents that had been disclosed under FOIA that a meeting took place.

15. The Commissioner asked the Cabinet Office a number of questions regarding eg, the searches it undertook including the search terms, the locations it searched, its retention policies, any business reason or statutory obligation it might have for keeping the information. The Commissioner also asked the Cabinet Office specifically if the meeting referred to in the request took place.
16. In addition, she asked for an explanation as to why the Cabinet Office had erroneously confirmed information was held and that reliance on section 36 was being considered.
17. The Commissioner also asked for an explanation as to why a second internal review letter was sent on 8 June 2017. The Cabinet Office said that this referred to a separate but broadly similar request that the complainant had also made.
18. The Cabinet Office explained that it had "located no recorded information to indicate the meeting referred to took place or any information regarding its cancellation. We are unable to say categorically whether it occurred or not. However given the lack of record it seems more likely than not it did not occur."
19. It identified the areas it had searched and, in the case of electronic records, the search terms it used. When asked about its records management policy for information of this kind, it said that "[if] the meeting was held as outlined it would have been likely that a minute would have been taken and this minute would now be held by the Archives team." No information was found.
20. The Commissioner had asked if there may be more than one location for such information. The Cabinet Office explained that "[g]iven the nature of the meeting it is unlikely there would have been multiple copies of any minute".
21. The complainant supplied a copy of a memo dated 10 June 2009 sent by Sir Gus O'Donnell (then Secretary of the Cabinet and Head of the Home Service) to Sir Peter Ricketts KCB (then Permanent Secretary at the Foreign and Commonwealth Office) and Sir Bill Jeffries (then Permanent Secretary at the Ministry of Defence). The complainant had obtained this memo under a previous FOIA disclosure. The opening sentences of this memo say "On 15 May we met to discuss advice to the Prime Minister about an Iraq Inquiry. I submitted advice to him in line with our discussion and taking account of your comments on the draft".

22. This does seem to suggest that these three individuals met and had a discussion which was significant enough to warrant yield conclusions or suggestions to the Prime Minister. The question here is, not whether the meeting took place but, whether it was recorded.
23. The Cabinet Office also explained that it had looked for diary entries of any of the potential invitees to the meeting to see if they had been retained. The Cabinet Office confirmed these had not been retained.
24. As regards the letter to the complainant of 11 January 2017, it explained that this did not appear to follow normal procedure. It had an internal note about the request acknowledging that the response was likely to be in breach of the FOIA requirement as regards timeliness but that detailed searches were needed in order to provide the response.¹
25. It accepted that it was inappropriate to use a section 10(3) letter (see Note 1) in this case and was uncertain as to why it had been used. It explained that it had given additional internal training now regarding the circumstances in which section 36 (the exemption specified in the letter of 11 January 2017) can be cited. Further information about the use of section 36 and the use of section 10(3) can be found on the Commissioner's website.²

The Commissioner's conclusion

26. The Commissioner is satisfied that, on the balance of probabilities, no information within the scope of the request is held. She is satisfied that the Cabinet Office conducted adequate searches for the information. The search terms it used were also adequate – these were “the date, likely subject heading ('Iraq', 'next steps)', names of attendees, 'Ben Lyon.' The words, 'note' and 'meeting' and all the previous key-words combined with variations of the date format”.

¹ Section 10(1) requires “Subject to subsections (2) [payment of permitted fees] and (3) [notice that the public interest is being considered before relying on a specified exemption], a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

² <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/> and https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

27. The Commissioner recognises that the complainant is firmly of the view that there must be a record of a meeting to discuss the “next steps” in the Iraq Inquiry that was held on or shortly after the 14 May 2009 (including the following day). However, judging the matter to the civil standard, the Commissioner has seen no evidence to indicate that there is a record of this meeting. She has formed no view as to whether meeting actually took place. She notes the Cabinet Office’s comment that this is unlikely because, it would have recorded it. The Commissioner would observe that the meeting, if it were held, should have resulted in the generation of formal records.
28. In light of the above, the Commissioner concludes, therefore, that the Cabinet Office does not hold information within the scope of the complainant’s request.
29. She does, however, find that the Cabinet Office contravened the requirements of section 10(1) – see Note 1 – in failing to respond properly to the request within 20 working days. It did not deny holding the information within that timeframe.
30. The Commissioner acknowledges that the complainant would find the Cabinet Office’s initial, albeit erroneous, confirmation that it held information within the scope of the request to be confusing and reasonable grounds for scepticism.

Right of appeal

31. 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

32. 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.
33. 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

Gerrard Tracey
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