

Freedom of Information Act 2000 (the Act)

Decision notice

Date: 26 October 2018

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

Decision (including any steps ordered)

1. The complainant has requested information from the Cabinet Office regarding the Iraq Inquiry. The Cabinet Office stated that it does not hold any further information to that previously provided to the complainant. In addition it subsequently relied on section 21 (information reasonably accessible to the applicant) since it had provided the complainant with the relevant information it held.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 21 regarding the information held falling within the scope of the request. She also finds that, on the balance of probabilities, no further information is held.
3. The Commissioner finds that the Cabinet Office breached section 10(1) by not complying with section 1(1)(a) within the statutory timeframe. She also finds that the Cabinet Office breached section 17(1) as it did not inform the complainant that it was relying on section 21.

Request and response

4. On 5 March 2017, the complainant wrote to the Cabinet Office and requested information in the following terms:

"Under the terms of reference of the Freedom of Information Act 2000, I request disclosure of all papers which show precisely what former Prime Minister, Gordon Brown, agreed to with respect to 'the timing of the announcement; length of the (Iraq) Inquiry; format and Terms of Reference'.

In relation to this, I make especial reference to the memo/letter sent by Tom Fletcher to Jennifer Hepker (PPS/ Secretary to the Cabinet) dated 29 May 2009 (and disclosed on 16 November 2016 following an Upper Tribunal ruling).

This memo states;

'The Prime Minister was grateful for the Cabinet Secretary's advice of 28 May on the Iraq Inquiry.

The Prime Minister agrees with the recommendations on timing of the announcement; length of the Inquiry; format and Terms of Reference. He would be grateful if plans could proceed on the basis laid out by the Cabinet Secretary...'

On 10 June 2009, former Cabinet Secretary (Lord) Gus O'Donnell sent a memo to Sir Peter Ricketts, Sir Bill Jeffrey KCB and Minouche Shafik reiterating this Prime Ministerial agreement.

My request particularly enquires whether Gordon Brown's agreement with the content of the Cabinet Secretary's advice fully covered 'Annex A- Draft Terms of Reference' for the Iraq Inquiry as sent in a memo to the Prime Minister by Gus O'Donnell on 28 May 2009?'

5. The Cabinet Office responded on 5 April 2017 and confirmed that it held nothing further to that disclosed via a previous request made by the complainant. The Cabinet Office provided an explanation of the content of the Cabinet Secretary's note to the former Prime Minister. The Cabinet Office also provided a link to the statement made by the former Prime Minister in the House of Commons.¹
6. On 6 April 2017, the complainant requested an internal review and clarified the purpose in making his request, that is, to seek disclosure of all information bearing upon the former Prime Minister's response to, and agreement with, a specific element of the Draft Terms of Reference.
7. Following the Commissioner's intervention, the Cabinet Office provided the outcome of its internal review in which it provided a further explanation of the contents of the previously disclosed information.

¹ <https://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090615/debtext/90615-0004.htm>

Background

8. The complainant has previously requested information from the Cabinet Office regarding the Iraq Inquiry.² This was the subject of a decision notice issued by the Commissioner on FS50556426. Following an appeal to the First-tier Tribunal³, the Cabinet Office disclosed information to the complainant, on which the current request is based.

Scope of the case

9. The complainant contacted the Commissioner on 11 September 2017 to complain about the way his request for information had been handled.
10. During the course of the investigation, the Cabinet Office confirmed that it considered that section 21 applied to the information already disclosed to the complainant.
11. The Commissioner considers that the scope of her investigation is to determine whether section 21 applies to the information held by the Cabinet Office and to determine whether, on the balance of probabilities, the Cabinet Office holds further information falling within the scope of the request.

Reasons for decision

Section 21: Information reasonably accessible to the applicant

12. Section 21(1) states:

"Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information"

13. Section 21 provides an absolute exemption, meaning it is not subject to the public interest test.
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<http://webarchive.nationalarchives.gov.uk/20171123123237/http://www.iraqinquiry.org.uk/>

³

<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1796/Lamb,%20Christopher%20EA-2015-0136%20.pdf>

14. Although the information that is requested may be available elsewhere, a public authority will need to consider whether it is actually reasonably accessible to the applicant before it can apply section 21.
15. Unlike consideration of most of the other exemptions under the Act, section 21 allows a public authority to take the individual circumstances of the applicant into account. The inclusion of "*to the applicant*" creates a distinction between information that is reasonably accessible to the particular applicant and the information that is available to the general public.
16. The complainant has provided the Commissioner with the information disclosed to him following the Tribunal decision referred to at paragraph 8 above. The complainant also referred to this information in his request and internal review.
17. The Commissioner notes that the Cabinet Office responded stating "*I can confirm that the Cabinet Office holds no papers related to the first part of your request other than the ones already disclosed to you*". The Commissioner considers that whilst not explicitly stating that the information is exempt under section 21, this statement confirms to the complainant that the requested information is held and has already been disclosed to him.
18. The Commissioner considers that the information provided to the complainant is clearly accessible to him. The Commissioner is therefore satisfied that the exemption at 21 is engaged in relation to the previously disclosed information. The Commissioner has therefore gone on to consider whether the Cabinet Office holds any further information relevant to the request.

Section 1(1): Information held/not held

19. Section 1(1) of the Act states that:

"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"

20. In scenarios where there is some dispute between the public authority and a complainant as to whether the information requested is held by the public authority, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of proof, ie

on the balance of probabilities, in determining whether the information is held.

The Cabinet Office's position

21. The Cabinet Office explained that the Cabinet Secretary advised the former Prime Minister on 28 May 2019 regarding the proposed Inquiry via a memorandum detailing options and the Cabinet Secretary's recommendations. The former Prime Minister's Private Secretary subsequently confirmed in writing that the former Prime Minister wished to follow the recommendations set out in the advisory memorandum. This letter also confirmed that the former Prime Minister preferred a non-political, rather than political, panel. The Cabinet Office confirmed that this information had been provided to the complainant and it held no further information within the scope of the request.
22. The Cabinet Office confirmed that searches were carried out of the relevant paper and electronic files from the Cabinet Secretary's office, the Overseas and Defence Secretariat (the relevant Cabinet Office policy unit), and the Prime Minister's Office. The Cabinet Office also explained that it has confirmed that no information was held by the team co-ordinating the work of Inquiries. The Cabinet Office explained that it had no reason to believe that additional information would be held elsewhere.
23. The Cabinet Office confirmed that its electronic archives were searched for the phrases "Iraq Inquiry" and, separately, "terms of reference".
24. The Cabinet Office explained that for a decision as significant as the 'timing, format and terms of reference' of the Iraq Inquiry, it would expect these documents to be recorded in paper files. The Cabinet Office set out that for Ministerial decisions, the Prime Minister's Office does not rely on email inboxes to provide the record and any emails where decisions such as this are taken are printed off and placed into the paper record. The Cabinet Office confirmed that 10 Downing Street has well established procedures in place for collecting directions that have come from the Prime Minister, usually via the overnight box.
25. The Cabinet Office confirmed that the Key Officials named in the request all ceased to work for the Cabinet Office some years ago and the computers allocated to them, including laptops, have been recycled for use by new members of staff. The Cabinet Office confirmed that the Key Officials, or their support staff, will have printed and filed any emails they determined to be public records or transferred them to the permanent electronic archive.

26. The Cabinet Office confirmed that when a Prime Minister leaves office, their records are transferred to the Cabinet Office archive. The other officials named in the disclosed documents, upon leaving the Cabinet Office and the Civil Service in general, would have had their computers cleaned. It set out that data would have been transferred to the permanent electronic archive and then deleted from the machines. The Cabinet Office confirmed that any relevant information suitable to be retained for the historical record would have been moved to the archives. The Cabinet Office confirmed that any further information would have been deleted.
27. The Cabinet Office confirmed that, at the time of the request, Sir Jeremy Heywood was the only individual included in the correspondence who still worked at the Cabinet Office. At the time of the creation of the memorandum, Sir Jeremy worked at 10 Downing Street and, therefore, all files and information created would have been properly archived, maintained and transferred to the official record as outlined in the Cabinet Manual.⁴
28. The Cabinet Office also confirmed that emails are deleted after three months unless they are deemed to be public records. It again confirmed that public records would either be printed and filed or placed in the permanent electronic archive. The Cabinet Office was confident that nothing relevant to the request had either been deleted or destroyed.
29. The Cabinet Office confirmed that the email accounts of the three individuals named in the request were deleted under the standard retention policy and any emails required for permanent record would have been printed and filed or transferred to the permanent electronic archive.
30. The Cabinet Office confirmed that the record management policy for 10 Downing Street is set out in the Cabinet Manual in order to ensure clarity and accountability in providing a historic record of government. The Cabinet Office provided the Commissioner with a copy of the Cabinet Manual and directed her to chapter 11 of the manual.

⁴ <https://www.gov.uk/government/publications/cabinet-manual>

31. The Cabinet Office also confirmed that its officials are expected to comply with the principles set out in the Lord Chancellor's Code of Practice on the management of records under section 46 of the Act.⁵
32. The Cabinet Office also provided the Commissioner with the current wording available to its employees regarding the retention and deletion of documents.
33. The Cabinet Office confirmed that documents such as the memoranda already disclosed are automatically preserved as historical records for transfer to The National Archives in line with the requirements of the Public Records Act 1958 (the PRA). The Cabinet Office explained that its civil servants know that they are obliged to retain historic records in line with the provisions of the PRA, the then Data Protection Act 1998⁶ and the Act. The Cabinet Office confirmed that these responsibilities are set out in the Civil Service Code.⁷
34. The Cabinet Office explained that teams within the Cabinet Office will keep files for as long as there is a business need, however, it considers that as the Inquiry has now completed its report, it is likely that the only reason for retaining the documents within the scope of the request is that they are required for their preservation under the Public Records Act.
35. The Cabinet Office explained that, given the importance of the topic, it was confident that if additional material falling within the scope of the request had been created, it would be held in the same file as the information already disclosed.
36. The Cabinet Office explained that a submission was put to the former Prime Minister, who responded via his Private Secretary. The Cabinet Office confirmed that this is entirely in line with usual practice and that it would be unusual for more detail to be held further to that already in the complainant's possession.

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<http://webarchive.nationalarchives.gov.uk/20130206150440/https://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section-46-code-of-practice.pdf>

⁶ Now the General Data Protection Regulation and the Data Protection Act 2018

⁷ <https://www.gov.uk/government/publications/civil-service-code>

37. The Cabinet Office considered that the complainant appeared to be trying to ascertain whether the former Prime Minister had read a particular page of the advice he had received on 28 May 2009. The Cabinet Office explained that "Annex A" of the memorandum of 28 May 2009, is an integral part of the advice submitted to the former Prime Minister and appears on the reverse side of the advisory memorandum. The Cabinet Office therefore considers that the complainant's question is answered by the information already disclosed to him and it confirmed that no further information is held falling within the scope of the request.

38. The Cabinet Office explained that the information already disclosed shows that the Cabinet Secretary sent advice to the former Prime Minister on 28 May 2009, recommending options for the format, timing, terms of reference and possible personnel of the Iraq Inquiry. This included Annex A which is titled "Draft Terms of Reference" and states in the second paragraph:

"It will have the following terms of reference: to examine and report on the British Government's policies and their implementation from 2002 to 31 May 2009, relating to the Iraq conflict on and its aftermath."

39. The Cabinet Office set out that the next paragraph begins "I will ask the Committee to begin work...". The Cabinet Office explained that the use of the personal pronoun makes clear that this is not part of the Terms of Reference. The Cabinet Office further explained that it had undertaken a small amount of research into the Terms of Reference of other Inquiries and ascertained that this form of language, ie speaking in the first person, is never used. The Cabinet Office therefore considers that it is clear that the annex is a draft of the statement to the House of Commons which the former Prime Minister made on 15 June 2009.

40. The Cabinet Office explained that it is easy to see how the mistaken inference was made that the Annex in its entirety represents a draft Terms of Reference, due to its title. However the Cabinet Office considers that the text of the Annex does not bear this out.

41. The Cabinet Office also explained that it considers that the complainant is particularly interested in the passage of the draft statement that states:

"In its report, the Committee should not reach any conclusion on questions of law or fact which create circumstances which expose organisations, departments and/or individuals to criminal or civil proceedings or judicial review."

42. The Cabinet Office considers that this should be compared to the final version of the statement which was delivered to the House of Commons on 15 June 2009⁸ and stated:

"The Committee will not set out to apportion blame or to consider issues of civil or criminal liability."

43. The Cabinet Office referred to the letter from the Private Secretary, dated 29 May 2009, which states:

"As discussed with the Cabinet Secretary..."

44. The Cabinet Office considered that this phrase may have led the complainant to infer that there are further records around this discussion. The Cabinet Office confirmed that it is common practice where Ministers seek clarification on minor issues for them to have informal phone calls or other conversations. The Cabinet Office explained that the letter recorded the outcome of any discussion.

The complainant's position

45. In his request for internal review, the complainant stated:

"The reference to 'Annex A- Draft Terms of Reference' appended to the memo sent from Cabinet Secretary, Gus O'Donnell, to Gordon Brown was less concerned with paragraph 2 than paragraph 5⁹. I am assuming that as this paragraph is inserted under 'Draft Terms of Reference', its substance is intended as part of the Inquiry's terms of reference. In any case, if the (former) Cabinet Secretary did not consider and advise the (former) Prime Minister that the Iraq Inquiry should be bound by this 'primary objective', he would not have included it within the 'Draft Terms of Reference'.

My purpose in submitting this request is to seek disclosure of all information bearing upon Gordon Brown's response to, and agreement with, paragraph 5 of 'Annex A- Draft Terms of Reference'."

46. The complainant confirmed to the Commissioner that he considered further information was held by the Cabinet Office. The complainant believed that his request covered disclosure of *"further papers or*

⁸ <https://publications.parliament.uk/pa/cm200809/cmhansrd/cm090615/debtext/90615-0004.htm>

⁹ Quoted at paragraph 41 of this notice.

electronic communications” showing the former Prime Minister’s acceptance or approval of paragraph 5 of ‘Annex A’ appended to the memorandum of 28 May 2009. The complainant further considered the scope of his request covered disclosures about how the substance of paragraph 5 of the Annex was taken forward in planning for the Inquiry.

47. The complainant also explained that the Cabinet Office refers to paragraph 10 of the memorandum and then to the open quotation marks at the start of Annex A. The complainant pointed out that there are no quotation marks closing paragraph 2 of the Annex. The complainant considered that this leaves an open question of where the Terms of Reference come to an end and that the Annex being described as “*Draft Terms of Reference*” makes the issue “*even more perplexing*”.

The Commissioner’s position

48. The Commissioner considers that the Cabinet Office has undertaken reasonable and logical searches to locate information falling within the scope of the request. Both paper and electronic records related to the Iraq Inquiry have been searched and the keywords used are ones that, in the Commissioner’s view, would be expected to have returned material relating to the request. The Cabinet Office has identified the file and departments most likely to hold information within the scope of the request.
49. The Commissioner considers that the searches conducted were adequate and proportionate in view of how such records would have been retained and archived by the public authority.
50. The Commissioner considers that any non-trivial information within the scope of the request would have been retained by the Cabinet Office as an official record in accordance with its policies and the PRA, and would have been found in the searches conducted by the Cabinet Office.
51. The Commissioner considers that it is possible that further recorded information relating to the former Prime Minister’s acceptance of the advice of 28 May 2009 may once have been held, for example, a note or dictation to the Private Secretary requesting the letter of 29 May 2009 be created. However, given the time between this event and the date of the request, the Commissioner considers that it is entirely explicable that this information is no longer held, particularly in light of the fact that a formal record of the former Prime Minister’s views had been created and retained as a public record.
52. The Commissioner recognises that the complainant is firmly of the view that there must be further records regarding the former Prime Minister’s agreement and approval of the advisory memorandum of 28 May 2009.

However, the Cabinet Office has confirmed that the private secretary's correspondence is the official documentation of the former Prime Minister's agreement.

53. The complainant explained to the Commissioner that he considers that the scope of his request for information includes information about how the substance of a specific element of the annex was taken forward in planning for the Inquiry.
54. The Commissioner considers that the scope of this request does not include information regarding how the recommendations were taken forward. The request clearly states that it is for information regarding what the former Prime Minister agreed to with respect to the announcement, length of inquiry, format and terms of reference. The complainant specifically drew attention to the advisory memorandum and its annex.
55. The Commissioner did, however, ask the Cabinet Office if information relating to 'plans' to take forward the recommendations were held. The Cabinet Office confirmed that these plans were as set out in the advisory memorandum of 28 May 2009 which the former Prime Minister agreed to.
56. The Commissioner notes the confusion caused by the mistitling of the annex as "*Draft Terms of Reference*", however, she does not consider that this apparent error is evidence that further information must be held. On reading the Annex, it is clear that this is a statement which includes the Terms of Reference rather than a document solely setting out the Terms of Reference. The Commissioner's jurisdiction does not extend to considering the accuracy of information held by public authorities, the Act provides a right to recorded information, regardless of whether or not the information is accurate.
57. For the reasons set out in this section, the Commissioner considers that, on the balance of probabilities, no further information is held beyond that provided to the complainant in response to his previous request.

Procedural requirements

Section 10: Time for compliance

58. Section 1(1) of the Act states:

"(1) 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 communication to him"*

59. Section 10(1) of the Act states:

"Subject to sections (2) and (3), 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."

60. The Cabinet Office received the request on 5 March 2017 and provided its response on 5 April 2017, a period of 22 working days. As the Cabinet Office did not confirm or deny whether it held information within the scope of the request within twenty working days, it breached section 1(1)(a) and section 10(1) of the Act.

Section 17: Refusal notice

61. As the Cabinet Office did not specify that it was refusing to provide the information held as it was exempt under section 21, the Commissioner finds that the Cabinet Office has breached section 17(1)¹⁰ of the Act.

Other matters

62. In his request for internal review, the complainant also requested further information. The Cabinet Office advised the complainant that he should submit this as a fresh request.

63. During the course of the investigation, the Commissioner advised the Cabinet Office that it ought to have accepted the complainant's further request as a valid without requiring him to resubmit it. Following the Commissioner's intervention the Cabinet Office provided a response. As

¹⁰ A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—
(a) states that fact,
(b) specifies the exemption in question, and
(c) states (if that would not otherwise be apparent) why the exemption applies.

the Cabinet Office has now provided a response to the request, the Commissioner has not proceeded to decision notice as this would be academic. However, she has recorded the breach of section 10 as part of her intelligence gathering efforts to ensure compliance with the Act.

64. The Commissioner reminds the Cabinet Office that applicants are not required to make requests to specific addresses or in specified formats. Should the Cabinet Office consider a request for internal review contains a fresh request for information, the Commissioner expects the Cabinet Office to handle it in accordance with the Act at the point of receipt.

Right of appeal

65. 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

66. 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.
67. 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

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