

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 August 2018

Public Authority: Cabinet Office

Address: 70 Whitehall

London

SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information on Cabinet minutes, telephone call records and meetings between United Kingdom (UK) Ministers and the United States of America (US) President at the time.
2. The Commissioner's decision is that the Cabinet Office has appropriately withheld the requested information in reliance of the exemptions at FOIA sections 27(1)(a), (c) & (d), 27(2) and 35(1)(a) & (b).
3. The Commissioner does not require the Cabinet Office to take any steps as a result of this notice.

Background

4. Sir Craig Oliver served as a Special Advisor to Prime Minister Cameron between February 2011 and July 2016. Twelve days after Sir Craig had ceased to be a Special Advisor the publisher Hodder and Stoughton announced that it would be publishing a book by Sir Craig.
5. This memoir was published in the UK on 4 October 2016 entitled "Unleashing Demons: The Inside Story of Brexit".
6. The memoir discusses four matters on which the complainant based his request for information.

Request and response

7. On 6 January 2017 the complainant wrote to the Cabinet Office and requested information in the following terms:

"The information requested is:

 - (a) A transcript, or any other records of a telephone conversation between the then Prime Minister, the Rt Hon. David Cameron, and the then President of the United States of America, Barack Obama, held on 2 February 2016.
 - (b) The minutes of the meeting of the Cabinet held on 20 February 2016.
 - (c) A transcript, the minutes or any other record of a meeting held between the then Prime Minister, the Rt. Hon David Cameron, the then Chancellor of the Exchequer, the Rt. Hon. George Osborne MP, the then Secretary of State for the Home Department, the Rt. Hon. Theresa May MP, the then Secretary of State for Foreign and Commonwealth Affairs, the Rt. Hon. Philip Hammond MP, and the then President of the United States of America, Barack Obama, held on 22 April 2016 in the Cabinet Room at 10 Downing Street.
 - (d) The minutes of the meeting of the Cabinet held on 27 June 2016."
8. The Cabinet Office responded on 6 February 2017. It stated that information was available on particular links from Gov.uk and relied on the exemptions at sections 27(1)(a), (c), (d), 27(2) and 35(1)(a) & (b) to withhold other information.
9. Following an internal review the Cabinet Office wrote to the complainant on 28 September 2017. It stated that it upheld the application of the above exemptions and considered that the public interest favoured withholding the information.

Scope of the case

10. The complainant contacted the Commissioner on 29 September 2017 to complain about the way his request for information had been handled. The complainant provided the Commissioner with an extremely detailed submission on his view which concluded as follows:

"(1) The information requested falls outside the scope of any qualified exemption contained in section 27 of FOIA 2000.

- (2) In the alternative, and to the extent that it falls within the scope of section 35(1)(a)-(b) of FOIA 2000, the public interest in disclosure outweighs the public interest in maintaining the applicable exemptions in all the circumstances.
- (3) By withholding the information, the respondent acted unlawfully and in breach of section 6 of the 1998 Act [Human Rights Act] as it violated article 10 (read with article 14) of the Convention.
- (4) The respondent's initial and second decisions, insofar as they refused to release the information requested, were thus contrary to Part 1 of FOIA 2000."
11. The Commissioner considers the scope of her investigation to be the application of the cited exemptions to the requested information.

Reasons for decision

Section 27

12. Section 27 of FOIA states:
- "(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,
 - (b) relations between the United Kingdom and any international organisation or international court,
 - (c) the interests of the United Kingdom abroad,
 - (d) the promotion or protection by the United Kingdom of its interests abroad.
- (2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court."
13. The complainant considers that the requested information falls outside the scope of the section 27 exemption. His reasoning for this is because the Cabinet Office has "consented to a third party publishing materially the same information." In support of this the complainant advised the Commissioner that:
- "If the respondent (Cabinet Office) reasonably considered that prejudice could or would follow from disclosure of the information, it

would not have consented to the publication of Sir Craig's memoirs, which explicitly discuss the substance of the information requested."

14. The complainant also referenced previous Tribunal decisions where the Tribunal has indicated that there must be evidence of some causal relationship between the potential disclosure and the prejudice claimed. The complainant considers that the Cabinet Office did not demonstrate a causal connection and simply asserted the possibility of prejudice.

15. In respect of the reliance on section 27(2) the complainant explained to the Commissioner:

"The respondent (Cabinet Office) appears to be asserting that its agreement to the publication of Sir Craig's memoir amounted to acquiescing in and facilitating a breach of a duty of confidence owed to the United States.In any event, a duty of confidence cannot protect what is already in the public domain: Attorney General v Observer Ltd [1990] 1 AC 109."

16. The Cabinet Office explained to the Commissioner that the material in scope of the section 27(1)(a) (c) & (d) and 27(2) exemptions comprises the transcript of the telephone conversation of 2 February 2016 (request a) and the note of the meeting on 22 April 2016 (request c). Both documents detail free and frank discussions between the UK Prime Minister and the US Head of State on issues of import to both nations. The Cabinet Office reminded the Commissioner that the UK/US relationship has previously been recognised by both the Courts and by the Commissioner, to be a of a close and special nature with the US having:

"very strong expectations that official records of discussions between the two Heads of State would remain confidential."

17. In order for a prejudice based exemption, such as section 27(1), to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied on by the public authority is met – ie, disclosure

'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk.

18. The Commissioner is satisfied that the information identified falls to be considered within the section 27 exemption. The information published in Sir Craig's book cannot be considered to comprise "materially the same information", as the complainant stated. The limited information cited constitutes a small element related to the requested information.
19. The Commissioner notes that this exemption does not necessarily focus on the importance, subject or content of the requested information, but on whether UK interests abroad, or the international relations of the UK would be prejudiced through the disclosure of the information. The timing of the request will also affect the sensitivity of that information. Thus section 27(1) focusses on the effects of the disclosure.
20. The UK has long-standing ties with the US which at the time of the request remained one of the UK's closest allies on the international stage. As highlighted in the Commissioner's previous decision notices (FS50341647) the importance of the so-called 'special relationship' between the US and the UK should not be underestimated, including the need to maintain the trust and confidence referred to by the Cabinet Office. In assessing the prejudice that would be caused to the UK's relations with another state, the Commissioner is required to consider the wider context and long-term consequences in which the disclosure of the requested information would result.
21. With regard to the first criterion of the three limb test described in paragraph 17 above, the Commissioner accepts that the potential prejudice described by the Cabinet Office clearly relates to the interests which the exemption contained at section 27(1)(a),(c) & (d) is designed to protect. With regard to the second criterion, having examined the withheld information, and taken into account the Cabinet Office's submissions to her, the Commissioner is satisfied that there is a causal link between disclosure of this information and prejudice occurring to the UK's international relations. Furthermore, she is satisfied that the resultant prejudice would be real and of substance with more than a hypothetical risk of prejudice occurring which therefore meets the third criteria.
22. Section 27(2) is not subject to a test of prejudice but applies only if the requested information is in fact confidential. No direct evidence has been provided by the Cabinet Office to demonstrate that the US had expressly stated that the matters discussed should be treated as confidential. However, as the Commissioner has previously recognised, information may also be confidential if there is an expectation by a

non-UK state that the information will be held in confidence by the UK. In this case the information requested comprises records of discussions between the Prime Minister and US President which both parties would expect the other to treat confidentially. The information is marked as 'Confidential' which does reflect an expectation of confidentiality.

23. The complainant has stated that the requested information cannot be protected by a duty of confidence, because it is already in the public domain. The Commissioner does not agree that the requested information has entered the public domain. The matters set out in the request are mentioned in Sir Craig's memoirs, however, the Commissioner does not consider that this constitutes disclosure into the public domain of the substantive content of the recorded information held by the Cabinet Office in the scope of the request.
24. The Commissioner accepts that the information requested at points a and c of the complainant's request engages the section 27(1)(a), (c), (d), and 27(2) exemptions. She will consider the public interest test for this exemption alongside the public interest considerations for section 35(1)(a) & (b).

Section 35(1)

25. Section 35 FOIA states:

"(1) 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,
- (b) Ministerial communications,"

26. This exemption is class-based which means that, unlike a prejudice-based exemption, there is no requirement to show harm in order for it to be engaged. The relevant information simply has to fall within the class described, in this case, the formulation of government policy and Ministerial communications.
27. The complainant accepts that some of the requested information falls within the scope of section 35(1)(a)-(b) and focusses his comments on the balance of the public interest, which will be considered later.
28. The Cabinet Office has relied on this exemption to withhold the information requested at items b and d of the request. These comprise two Cabinet meetings' minutes.
29. The Cabinet Office explained its view to the Commissioner that the content of the minutes, which comprises policy development and

discussions relating to the government's approach to and negotiations on leaving the European Union ('EU'), are clearly still ongoing.

30. Item b, the minutes of a pre-referendum Cabinet meeting contain discussions of expectations for, and potential outcomes of the referendum remain a relevant part of the formulation process. The Cabinet Office considers that public knowledge of the referendum vote's outcome or an individual minister's publically expressed personal position, do not 'invalidate' its determination of the minutes being part of the formulation of government policy.
31. The Cabinet Office advised the Commissioner that disclosure of Cabinet meeting minutes which:

"..discuss practical details on a wide range of outstanding issues central to the on-going Brexit negotiation process would have a potentially detrimental effect on the development of those negotiations."
32. The Cabinet Office went on to explain its view that Cabinet meetings are:

"the ultimate form of ministerial communication. The principle of collective responsibility requires that ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached."
33. The Cabinet Office stressed its opinion that ministers must be assured that their discussions on the most sensitive topics can be freely discussed with uninhibited consideration of policy options. Disclosure of these discussions erodes this protection. A failure to maintain the principle of confidentiality would place pressure on those involved in decision making for decisions to be taken at a higher level than required.
34. Having seen the withheld information the Commissioner is satisfied that the Minutes engage the section 35 exemption as they are both ministerial communications and concern the formulation and development of Government policy.

Public interest test

35. Both the section 27 and section 35 exemptions are subject to the public interest test set out in section 2(2)(b) FOIA. The Commissioner has therefore considered the arguments presented by the complainant and the Cabinet Office and determined whether, in all the circumstances of the case, the public interest in maintaining the

exemptions outweighs the public interest in disclosing the withheld information.

The complainant's view

36. The complainant argues that the public interest in maintaining the exemptions should be given 'marginal weight'. His reason for this being that the Cabinet Office 'consented to a third party releasing information materially the same to that requested.'
37. The complainant references the Cabinet Office's comment in its internal review, that a personal memoir is 'very different to a contemporaneous official record'. He concurs, however, as the Government has in the past refused consent to publish memoirs, he considers it to be reasonable to infer from the Cabinet Office's consent to publication of Sir Craig's memoirs:

"..that it did not consider releasing the substance of the information to be contrary to the public interest. If it did, it would have refused consent."
38. The complainant also references previous Tribunal findings:

"..the very fact that certain information constitutes Ministerial communication does not therefore, mean that there is a public interest in non-disclosure." (EA/2007/0070)
39. He also cites the Tribunal finding in *Plowden v FCO & Information Commissioner*[2014]; that a memoir published with the consent of the Government containing materially the same information as information requested under section 1 FOIA carries 'some significance' in reducing the weight to be given to maintaining the exemptions.
40. The complainant further argues that limited weight should be given to maintaining the exemptions because: (1) the change in US administration and its policy means disclosure is unlikely to prejudice international relations; (2) at the time of the request the positions of Ministers during the referendum campaign were well known and therefore there is no public interest in withholding the Minutes of the Cabinet meeting of 20 February 2017 which concerned whether or not the Cabinet would approve the Prime Minister's agreement with other EU member states and what position Cabinet Ministers would take in the subsequent referendum campaign; (3) the request relates to a former administration and therefore the public interest in preserving the candour of ministerial discussions is limited; (4) the documents requested concern EU policy and in a reversal of the previous administration, the current administration favours leaving the EU, and in addition the personal views of Ministers on EU membership before the referendum are public knowledge.

41. Also in considerable detail, the complainant provided the Commissioner with his opinion why the public interest in disclosure should be given 'considerable weight'. His reasons being: (1) the public interest in the openness in public affairs particularly concerning the EU referendum; (2) the public interest in having the ability to evaluate the foreign policy of Government; (3) the strong public interest in being able to assess whether Sir Craig's account is accurate; and (4) the information does not concern sensitive diplomatic correspondence. In reference to this point (4) the complainant states:

"The information in fact concerns the activities of a foreign head of state who engaged in partisan political campaigning in an important United Kingdom referendum. This inevitably exposes the United States to greater public scrutiny than would ordinarily be the case, greatly enhancing the public interest in disclosure."

42. The complainant also considers that the Cabinet Office has acted unlawfully and in breach of section 6 of the Human Rights Act 1998 as it violated article 10 (read with article 14) of the Convention. His reasoning here is as follows:

"By permitting Sir Craig, a former Crown Servant, to publish materially the same information as was requested in this case but which the respondent refused to release, the respondent has engaged in unjustifiable discrimination within the meaning of article 14 of the Convention."

The Cabinet Office view

43. The Commissioner notes that the submission on the balance of the public interest she received from the Cabinet Office adds little to the content of the internal review provided to the complainant.
44. The Cabinet Office explained that it recognises that openness in government may increase public trust and engagement with the Government. It also acknowledges that decisions made by Ministers have a significant impact on the lives of the general public. Furthermore it recognises the public interest in the ability to evaluate the foreign policy of the Government.
45. The Cabinet Office advised that there is a strong public interest in policy-making and its implementation being of the highest quality and informed by a full consideration of all the options, particularly around:
- "a contentious, emotive and far-reaching subject such as withdrawal from the EU."
46. It considers that Ministers must be able to discuss policy freely and frankly, exchange views on available options and understand their

possible implications. It believes that the candour of all involved would be affected by their assessment of whether the content of the discussions will be disclosed prematurely. As a result the quality of debate underlying collective decision making would decline, leading to less informed and poorer decision making which would not serve the public interest.

47. The Cabinet Office further explained that disclosure of information detailing the UK's relationships with other countries, and in particular the relationship with the US, could potentially damage the bilateral relationships between the UK and foreign partners. These relationships are more effectively maintained if the UK conforms to the accepted conventions of international behaviour, avoids giving offence to other nations and retains the trust of the UK's international partners. Disclosure of the withheld information would reduce the UK Government's ability to protect and promote UK interests through its relations with other countries. The Cabinet Office concluded that this would not be in the public interest.

The Commissioner's view

Section 27

48. The complainant provided the Commissioner with some cogent arguments in support of his view that the balance of the public interest favours disclosure. Notwithstanding this, the Commissioner cannot agree with the complainant's conclusions resulting from those arguments.
49. There is a public interest inherent in prejudice-based exemptions, in avoiding the harm specified in that exemption. The fact that a prejudice-based exemption is engaged means that there is automatically some public interest in maintaining it, and this should be taken into account in the public interest test.
50. The Commissioner's guidance explains that there is a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process. FOIA is a means of helping to meet that public interest, similarly this must also be taken into account.
51. An important element, in the Commissioner's view, is the limited content of the material contained in Sir Craig's memoirs in regard to the requested information. The complainant cites the Plowden case in support of his view, however, the Commissioner does not consider that the memoirs contain "materially the same information" as the information requested in this case. This therefore carries little significance in reducing the weight given to maintaining the exemption.

52. The Commissioner notes that Sir Craig's book is a personal recollection of events around the EU Referendum. Personal reflections are undoubtedly distinct from official records. The Commissioner does not agree with the complainant that there is a strong public interest in the disclosure of the requested information, which engages exemptions to disclosure, in order to demonstrate whether Sir Craig's book contains accurate information. Sir Craig's narrative is his own interpretation of events, the Commissioner considers there to be a limited public interest in that view being validated or not, when weighed against the potential detriment to relations between the UK and other States and the interests of the UK abroad.
53. The complainant focusses on the specific detail of the circumstances surrounding his request, however, the Commissioner has considered the broader significance of the points he has made. The fact that the US administration is different does not impact on the principles of maintaining effective international relations. The different US administration may or may not concern itself with disclosures concerning a previous Head of State, nevertheless, such disclosures would not conform to the accepted conventions of international behaviour.
54. The Commissioner notes the complainant's view that the withheld information cannot be classified as sensitive diplomatic correspondence, however, she does not agree that his comments warrant enhanced weight in favour of disclosure.
55. After considering the points argued by the complainant and the Cabinet Office the Commissioner's view is that the public interest favours maintaining the exemption.

Section 35

56. In considering the public interest test here the Commissioner notes the complainant's focus on the change of Prime Minister and Cabinet and the passage of time with regard to the pre-referendum Cabinet minutes. He argues that the change in administration must result in less weight being attributed to the public interest in maintaining the candour of ministerial discussion and safe space for debate.
57. The Commissioner considers that both the change in UK administration and whether the current administration favours leaving or staying in the EU does not result in changing the public interest in preserving the candour of ministerial discussions or the principle of collective responsibility.

58. The Commissioner agrees with the complainant and the Cabinet Office that the public interest in the openness in public affairs particularly concerning the EU referendum and the public interest in having the ability to evaluate the policy of Government hold significant weight in favour of disclosing the withheld information.
59. The Commissioner notes that the public interest is not necessarily the same as what interests the public. The fact that a topic is discussed in the media does not automatically mean that there is a public interest in disclosing the information that has been requested. In this case the media coverage of matters associated with 'Brexit' is intense and interests the public at large. The Commissioner's view is that the complainant's argument, stating the public knowledge of Ministers' views in respect of leaving the EU, does not result in a strong public interest in disclosure of the information requested at points b and d when balanced against the importance of Ministers having the confidence to speak freely about the determination of policy particularly at this time.
60. Consequently the Commissioner considers that the public interest favours maintaining the exemption at section 35(1).
61. In regard to the complainant's reference to the HRA 1998 the following case is relevant, *Kennedy v Charity Commission* 120141 UKSC 201 (Kennedy). One of the issues before the Supreme Court in that case was whether, if section 32(2) of the FOIA contained an absolute exemption which continues after the end of an inquiry, was compatible with Mr Kennedy's rights under Article 10 ECHR. The Commissioner is mindful that the majority of the Supreme Court in *Kennedy* held that there was no Article 10 right of access to state-held information. She considers that that conclusion is binding on inferior courts and tribunals notwithstanding any subsequent decision from the European Court of Human Rights. Furthermore, the Commissioner notes that, even were *Kennedy* not a complete answer, the majority of the Supreme Court further held that if there was an Article 10 ECHR right of access to state-held information, that right was not enforceable through the FOIA by virtue of the relevant exemption (section 32 in that case) read with section 78 of the FOIA.
62. The Commissioner, having considered all of the above, has determined that in all the circumstances of this case the public interest favours withholding the requested information.

Other matters

63. FOIA does not impose a statutory time within which internal reviews must be completed albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days.
64. In this case the complainant submitted his request for an internal review on 7 March 2017. The Cabinet office informed him of the outcome of the internal review on 28 September 2017, almost seven months later. The Commissioner considers this to be an unsatisfactory period of time.

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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