

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 11 June 2012

**Public Authority:** Home Office  
**Address:** 2 Marsham Street  
London  
SW1P 4DF

#### Decision (including any steps ordered)

---

1. The complainant requested copies of communications between Dr Liam Fox, Secretary of Defence (as he then was) and Damian Green, Minister of State at the Home Office in relation to the possible extradition of a British national to South Africa.
2. The Commissioner's decision is that the public authority was entitled to withhold the information within the scope of the request<sup>1</sup> on the basis of the exemption at section 35(1)(b) of the Freedom of Information Act 2000 (the Act).
3. The Commissioner does not require the public authority to take any steps.

#### Request and response

---

4. On 20 July 2011 the complainant wrote to the public authority and requested information in the following terms:  
*'I am writing for full disclosure of all correspondence – letters, emails and any details of telephone calls – between Dr Liam Fox and Damian Green, the immigration minister, in regard to the possible extradition of Mr Dewani.'*
  5. The public authority responded on 11 August 2011. It confirmed it held information within the scope of the request but withheld the relevant
- 

<sup>1</sup> Referred to in the main body of this notice as 'the disputed information'.

information (the disputed information) on the basis of the exemption at section 35(1)(b) of the Act.

6. Following an internal review the public authority wrote to the complainant on 6 September 2011. It upheld the original decision to rely on section 35(1)(b) and further relied on the exemptions at sections 27(1)(a) and 40(2) of the Act to withhold the disputed information.

## Scope of the case

---

7. On 2 December 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The complainant argued generally that disclosing the disputed information was in the public interest because it is vital for MPs to be seen as acting honestly and in good faith and that representations they make on behalf of their constituents are fair and accurate.
9. More specifically, he submitted that in such a case of huge and national importance, it was in the public interest that the nature of the involvement of politicians is made clear.
10. The complainant urged the Commissioner to specifically consider whether the refusal to disclose the disputed information was to avoid embarrassment to the public authority and MPs. He questioned the public authority's contention that disclosure could have a detrimental effect on British citizens living in South Africa given that Dr Fox was meant to have been merely passing on the concerns of his constituents. He argued that if it was indeed the case that disclosure could be detrimental to British citizens in South Africa then it *'raises a matter of huge public interest...'*
11. The scope of the investigation therefore was to determine whether the public authority was entitled to withhold the disputed information on the basis of the exemptions at sections 35(1)(b), 27(1)(a) and 40(2).

## Reasons for decision

---

### Disputed Information

12. The disputed information consists of:
  - A letter from Dr Fox, then Secretary of State for Defence, to Damian Green, Minister of State at the Home Office.

- An e-mail and a letter from Dr Fox's constituents forwarded to Damian Green.

Section 35(1)(b)

13. The Commissioner first considered whether the public authority was entitled to withhold the disputed information on the basis of the exemption at section 35(1)(b). Information held by a government department is exempt from disclosure on the basis of section 35(1)(b) if it relates to Ministerial communications.
14. The public authority acknowledged that Dr Fox wrote to Damian Green in his capacity as a constituency MP rather than as a Minister (as he then was). It however submitted that section 35(1)(b) is a fact based exemption and the relevant consideration therefore was whether or not both Dr Fox and Damian Green were Ministers at the time the former wrote to the latter. In other words, a distinction need not be made in relation to exchanges whereby one of the Ministers was acting in his capacity as a constituency MP only.
15. The Commissioner first considered whether the letter from Dr Fox including the attached correspondence from his constituents constitute 'Ministerial communications' within the meaning of section 35(1)(b) of the Act.
16. Section 35(5) of the Act defines Ministerial communications as including '*any communications....between Ministers of the Crown*'. In the Commissioner's opinion, the definition is clear and unambiguous. It covers any communications without exclusions. The only relevant consideration is that the communication is between Ministers of the Crown. Therefore the letter from Dr Fox is clearly a ministerial communication and the Commissioner finds that the forwarded email and letter are caught because they relate to a ministerial communication. When considering the forwarded letter and email the Commissioner has taken the same approach as the Tribunal in *Department for Culture, Media and Sport v Information Commissioner EA/2009/0038*, making an assessment as to whether the attachment has sufficient connection with the communication.
17. The Commissioner agrees with the public authority and finds that the disputed information constitutes Ministerial communications within the meaning of section 35(1)(b) by virtue of the fact that it was sent by one Minister to another.
18. The Commissioner therefore finds that the public authority was entitled to withhold the disputed information on the basis of the exemption at section 35(1)(b) of the Act.

Public Interest Test

19. The exemption at section 35(1)(b) is subject to a public interest test. The Commissioner must therefore consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the disputed information.
20. In favour of disclosure, the public authority acknowledged the public interest in openness and transparency in all aspects of government, particularly concerning the extradition of a British national to face charges abroad.
21. It recognised that openness could increase public trust and confidence in the deliberation process relating to extraditions and stated that the disclosing the information may provide clarity in relation to the deliberation process.
22. In favour of maintaining the exemption the public authority argued that it would undermine the strong public interest in the freedom to express opinions and have unrestrained discussions that Ministers require in order to fully consider all aspects of a possible extradition. The public interest is therefore best served in this instance by giving Ministers the necessary space to discuss the issue in the knowledge that their deliberations will not be made public, and prematurely subject to public debate.
23. The release of any discussion surrounding an extradition that has yet to take place and may still be subject to appeal is likely to prejudice the eventual outcome. The public authority pointed out that at the time of the request, the outcome of the extradition was not known. It clarified that the position at the time of its submissions to the Commissioner was that an appeal against the extradition had been heard at the High Court in December. However, the judgement was reserved and the outcome was not yet known.
24. The public authority also argued that it was strongly against the public interest for constituency correspondence between an MP and a Minister to be disclosed under the Act. Both the constituent and the MP have a legitimate expectation that such correspondence will remain an essentially private matter between the constituent, the MP and the relevant government department. Disclosure of MPs' constituency correspondence as a matter of routine would undermine the confidential nature of the process and would almost certainly discourage MPs from adding comments reflecting their own views when forwarding a constituent's letter to a Minister. This would be detrimental to the democratic process of accountability and would not be in the public interest.

### Balance of the Public Interest

25. The Commissioner agrees with the public authority that there is a significant public interest in openness and transparency concerning the possible extradition of a British national to face criminal allegations in another jurisdiction. The public interest in being open and transparent is even greater if there are suggestions that the individual might not receive a fair trial.<sup>2</sup> For the same reason, the Commissioner agrees with the complainant that there is a public interest in knowing the nature of involvement of politicians in the extradition process. He also agrees with the public authority that disclosure could increase public trust and confidence in the extradition process.
26. The Commissioner agrees with the complainant that there is a public interest for MPs to be seen as acting honestly and good faith and that the representations they make on behalf of their constituents are fair and accurate. He finds that disclosing the disputed information would enhance the public interest in that regard.
27. On the other hand, the Commissioner considers there is a strong public interest in Ministers, in this case in their capacity as an MP, being able to freely express their opinions in relation to the extradition process. Given the media coverage surrounding the criminal allegation and the possible extradition, it is highly likely that disclosing the disputed information could, in future, restrain their contributions either in their capacity as government Ministers or as MPs acting on behalf of their constituents.
28. Given that at the time of the complainant's request, an extradition hearing was ongoing at the High Court, the Commissioner also considers there was a strong public interest in Ministers being able to privately express their views in relation to the extradition request without fear of prejudicing the ongoing legal proceedings. If the disputed information was disclosed, it could have prejudiced the ongoing extradition hearing. Ministers could consequently be less candid when discussing the matter and possibly when expressing their

---

<sup>2</sup> See for example, <http://www.guardian.co.uk/world/2011/dec/01/dewani-prosecutor-removed-south-africa?INTCMP=SRCH>, <http://www.bbc.co.uk/news/uk-england-bristol-13226067>

opinions in future extradition cases. This would not be in the public interest as it could undermine the integrity of the deliberation process in relation to extradition requests. In the Commissioner's opinion, the disputed information in itself does not provide any clarity specifically in relation to the deliberation process for extraditions. It is the likely prejudicial effect of premature disclosure on the candour of Ministerial communications regarding extraditions that is significant.

29. The Commissioner agrees with the public authority that disclosing the disputed information would undermine the confidential nature of the exchanges between Ministers acting in their capacity as constituency MPs and their constituents. He considers this would most likely discourage Ministers acting in their capacity as constituency MPs from expressing candid views when forwarding a constituent's letter to another Minister in relation to an extradition request. As mentioned, it would not be in the public interest for Ministers to be less than candid in their discussions regarding the possibility of extraditing a British national to face criminal allegations.
30. In terms of the public interest in disclosing the disputed information given the public authority's view that it would likely have a detrimental effect on British citizens resident in South Africa, the Commissioner finds that this argument is not inherent in the exemption at section 35(1)(b). The public authority argued this point under the exemption at section 27(1)(a) of the Act.
31. The Commissioner therefore finds that in all the circumstances of the case, the public interest in maintaining the exemption at section 35(1)(b) outweighed the public interest in disclosing the disputed information.
32. In view of his finding that the public authority was entitled to rely section 35(1)(b), the Commissioner did not have to consider the applicability of the exemptions at sections 27(1)(a) and 40(2). For the same reason, he could not consider the arguments in relation to the detrimental effect of disclosure on British citizens resident in South Africa. As mentioned, those arguments are not inherent in section 35(1)(b).
33. The Commissioner also notes that some of the arguments of the public authority are more general, related to the confidentiality of communications between an MP and his constituents. The arguments focused on this relationship would be relevant to a different exemption such as section 40. He would also like to stress that although he has accepted the need to protect the information in this case under section 35(1)(b) there are likely to be equally strong arguments for protecting constituency correspondence in scenarios where the MP is not a

minister. The Commissioner has issued general guidance on this issue<sup>3</sup>.

---

3

[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/guidance\\_on\\_dealing\\_with\\_requests\\_for\\_mps\\_6\\_august\\_version1.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/guidance_on_dealing_with_requests_for_mps_6_august_version1.pdf)

## Right of appeal

---

34. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

35. 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.
36. 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** .....

**Steve Wood**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**