

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 March 2015

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the public authority for the cost of the legal assistance provided to witnesses for the Leveson Inquiry.
2. The Commissioner's decision is that the public authority was not entitled to withhold the information requested on the basis of section 22(1) FOIA (information intended for future publication).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant the cost of the legal assistance provided by the public authority (through Treasury Solicitors) to witnesses for the Leveson Inquiry.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 21 March 2013 the complainant wrote to the public authority and requested information in the following terms:

'I am sending this request under the Freedom of Information Act to ask for the following information:

- 1) *Whether ministers, special advisers, civil servants and other government personnel were coached or in any way given preparation for their testimony to the Leveson enquiry.*
- 2) *Whether any such coaching/preparation was provided to non-government witnesses, and if so, to whom?*
- 3) *How any such coaching or preparation was funded?*
- 4) *The cost of any such training or coaching.*
- 5) *By whom the training/coaching was carried out.*
- 6) *Any emails (including attachments) texts sent from the private or official email accounts and mobile phones of private or officials and other agents regarding the above.*

Please send me this information by e-mail.

6. The public authority responded on 2 August 2013. It explained that no coaching was provided to witnesses for the Leveson Inquiry and therefore no information relevant to that part of the request was held. However, legal assistance was provided to witnesses for the Inquiry through the Treasury Solicitor's Department. The cost of providing the legal assistance was withheld on the basis of the exemption at section 22(1) FOIA (information intended for future publication).
7. On 20 August 2013 the complainant requested an internal review in which she challenged the decision to withhold the cost of the legal assistance provided by the public authority to witnesses for the Leveson Inquiry. On 31 December 2013 the public authority wrote back with details of the outcome of the internal review. It upheld the application of section 22(1).

Scope of the case

8. On 20 December 2013, the complainant contacted the Commissioner to complain about the way her request for information had been handled, prior to receiving a response from the public authority to her request for an internal review. She subsequently provided relevant documentation in support of her complaint on 15 January 2014, following receipt of the outcome of the internal review.
9. The scope of the Commissioner's investigation was to determine whether the public authority was entitled to withhold *the cost of the*

legal assistance provided by the public authority (through Treasury Solicitors) to witnesses for the Leveson Inquiry on the basis of the exemption at section 22(1) FOIA¹ (requested information).

Reasons for decision

Section 22(1)

10. By virtue of section 22(1), information is exempt from disclosure if -

'(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a)'.

11. The public authority explained that, on 21 June 2012, the former Secretary of State for Culture, Media and Sport, the Rt Hon Jeremy Hunt MP, in response to a written Parliamentary question, confirmed that Government witnesses had been provided with "support from Treasury Counsel and Solicitors and other officials in the preparation for the part of their evidence to the Leveson Inquiry relating to Government business." He further announced in that response that the Government would publish "the cost of Treasury Solicitors and Counsel at the end of part 1 of the Inquiry."²

12. At the time of the Secretary of State's announcement, Lord Leveson had not yet reported and no fixed date had been established for publication of the costs but the intention to do so remained. Subsequently, Lord Leveson published his report on part 1 of the Inquiry on 29 November 2012. However, because at the time of the request the Government had

¹ The Commissioner set out the scope of his investigation above to the complainant on 11 February 2014.

²

<http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm120621/text/120621w0001.htm#12062>

not completed its consultations on measures to take forward the Inquiry's recommendations, no date had been fixed for publication.

13. In terms of whether it was reasonable in all the circumstances to withhold the cost of the legal assistance provided to witnesses for the Inquiry until the planned publication takes place, the public authority explained that it wanted to ensure that the publication process was planned and managed properly. This was to include verification of any data to ensure that it is accurate before it was placed into the public domain as well as taking into account the wider context and the need to avoid any risk of prejudice to the continuing consultations on implementation of Lord Leveson's recommendations. The most important consideration was that, the Government having made a commitment to Parliament to publish the information, it would be improper to disclose it to the complainant first, before an announcement to the House of Commons.
14. The complainant argued that the cost of providing legal assistance should be published without delay because the *'final report from the Leveson inquiry was published in November 2012 – which would seem ample time for this information to be published in a planned and managed process.'*
15. The public authority however pointed out that the complainant's statement above is not strictly accurate because the November 2012 report is the report on part 1 of the Inquiry and part 2 of the inquiry will commence when the police investigation and all relevant criminal proceedings are completed. Nevertheless, the Government's commitment was to publish the cost of providing legal assistance at the end of part 1. The public authority said that the report was, in fact, published less than three months before the date of the request, part of which time was taken up with Christmas and New Year holidays. The issue was not primarily one of time but one of timing. The orderliness of the publication process included taking into account consultations between the Government, opposition and others who had an interest in the prospective measures to implement the Inquiry's recommendations.
16. In order to consider whether the requirements in sections 22(1) (a) and (b) are satisfied, the Commissioner first has to determine, whether the requested information was at the time of the request on 21 March 2013 held with a view to future publication.
17. The public authority has explained that the issue was not whether to disclose the information but when. It was clear from the statement to Parliament in June 2012 that the Government intended to publish the requested information at the end of part 1 of the Leveson Inquiry.

Therefore, at the time of the request, there was a clear, settled intention to publish the relevant information. The fact that there was no actual date fixed for publication does not matter.

18. The Commissioner next has to consider whether at the time of the request, it was reasonable in all the circumstances for the requested information to be withheld pending publication. This is a requirement under section 22(1)(c).
19. As mentioned, the Leveson Report, from part 1 of the Inquiry, was published on 29 November 2012. The request was made more than three months later on 21 March 2013. The public authority issued its refusal notice on 2 August 2013, more than four months following the request. The internal review was completed on 31 December 2013, a further four months following the complainant's request for a review. Given the Government's commitment to publish the requested information after the publication of the report, which happened in November 2012, it was not reasonable, in the Commissioner's view, for the public authority to continue to rely on the intention of future publication in August (when the refusal notice was issued) or indeed in December 2013 (when the internal review was concluded.)
20. The Commissioner notes that the request was made in March 2013, more than three months after part 1 of the Inquiry was published. In his view, the question whether it was reasonable for the Cabinet Office to continue to withhold the information as at the date the request was made is less clear cut. The desire for an orderly planned and managed release of the information as part of the wider process is understandable. However, there was no obvious connection between the factual information requested and the policy response to the recommendations of the Leveson report which might well take some time to formulate. It would not have been unreasonable to separate the two.
21. Also, there was nothing to prevent the Government from disclosing the requested information to Parliament before providing it to the complainant in response to the request. This could have been done at any time during 2013, up to the time of the internal review, or indeed subsequently.
22. The Commissioner is mindful of the fact that Parliament, in passing the Freedom of Information Act, has given citizens a right to information, subject to certain exemptions. Where the issue is, as the public authority has stated in this case, not whether the information should be published, but when, a denial of that right through procrastination is contrary to the spirit of the legislation.

23. On balance, the Commissioner does not consider that the requirement in section 22(1)(c) was satisfied in this case.
24. In view of the above, the Commissioner finds that the exemption provided by section 22(1) was not engaged and the public authority was therefore not entitled to rely on the exemption at section 22(1) to withhold the requested information.

Procedural Matters

25. A public authority is required by virtue of section 10(1) FOIA to respond to a request promptly and in any event no later than 20 working days.
26. The complainant's request was made on 21 March 2013. The public authority did not respond until 2 August 2013. The Commissioner therefore finds the public authority in breach of section 10(1) FOIA.

Other matters

27. Although there is no statutory time limit to complete internal reviews. As a matter of good practice, the Commissioner expects internal reviews should take no longer than 20 working days and in exceptional circumstances, 40 working days.
28. The complainant requested an internal review on 20 August 2013. It was not completed until 31 December 2013, well over 40 working days. The Commissioner would therefore like to record his concern at the lengthy and unjustified delay in completing the internal review in this case. He further notes the lengthy delay in responding to the original request for information which was made in March 2013.
29. The Commissioner also acknowledges and apologises for the delay in issuing this Decision Notice. The unusual circumstances and novel issues raised by this complaint have required some deliberation. However, the long delay from the date of receipt of the complaint and the issuing of this notice is regrettable, albeit the Commissioner notes that neither the complainant nor the public authority have been pressing for resolution of the matter.

Right of appeal

30. 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

31. 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.
32. 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.....

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**