

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 August 2016

Public Authority: Attorney General's Office
Address: 20 Victoria Street
London
SW1H 0NF

Decision (including any steps ordered)

1. The complainant submitted a request to the public authority for information relating to the RAF drone strike in Syria which targeted and killed two British citizens fighting with the so called Islamic State.
2. The Commissioner has concluded that the public authority was entitled to withhold the information held within the scope of the request on the basis of the exemptions at sections 23(1) and 35(1)(c).
3. No steps are required.

Background, request and response

4. On 7 September 2015 the Prime Minister, David Cameron MP announced in the House of Commons that two British citizens had been targeted and killed by an RAF drone strike in Syria on 21 August 2015. The Prime Minister explained that the action was entirely lawful and had been taken in consultation with the Attorney General who made it clear that

there would be a legal basis for action in international law.¹ Since that statement there have been debates as to the legal basis for the action.²

5. The complainant wrote to the public authority on 9 September 2015 and requested information in the following terms:

"....My request relates to the RAF drone attack in Syria which killed two Britons fighting with the Islamic State.

I would like to request the following information:

Correspondence and communications between the Attorney General's Office and Cabinet Office relating to the approval of the RAF drone attack which killed two Britons, Reyaad Khan and Ruhul Amin.

Correspondence and communications between the Attorney General 's Office and the Ministry of Defence relating to the approval of the RAF drone attack which killed two Britons, Reyaad Khan and Ruhul Amin.

By 'correspondence and communications', I expect this to include, although not limited, to the following:

- *Briefings*
- *Letters*
- *Emails*
- *Memos*
- *Minutes taken during meetings*
- *Notes taken during telephone conversations*

I would like to receive the information electronically, or granted access to inspect the records in their original format..."

¹

<http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm150907/debtext/150907-0001.htm>

² See for example: <http://www.bbc.co.uk/news/uk-34178998>
<http://www.theguardian.com/commentisfree/2015/sep/07/lawful-uk-forces-british-isis-fighters-syria> <http://www.bbc.co.uk/news/uk-politics-34339925>

6. On 7 October 2015 the public authority explained to the complainant that it was withholding the information requested on the basis of the exemptions at sections 23(1) (Information supplied by, or relating to bodies dealing with security matters), 26(1) (Defence), 27(1) (International Relations), 35(1)(c) (Information relating to the provision of advice by any of the Law Officers or any request for the provision of such advice), 40(2) (Protection of personal data) and 42(1) (Legal Professional Privilege) FOIA.
7. On 13 October 2015 the complainant requested an internal review of the public authority's decision.
8. On 24 November 2015 the public authority wrote to the complainant with details of the outcome of the review. It clarified that the request had been interpreted as a request for the Attorney General's legal advice as well as for correspondence and communications on the process for approving the strike. It upheld the original decision in full.

Scope of the case

9. On 20 January 2015, the complainant contacted the Commissioner to complain about the way her request for information had been handled. She challenged the application of exemptions on a number of grounds, some of which the Commissioner has summarised further below.
10. The scope of the Commissioner's investigation therefore was to determine whether the public authority was entitled to rely on the exemptions at sections 23(1), 26(1), 27(1), 35(1)(c), 40(2) and 42(1).

Reasons for decision

Section 23(1)

11. This exemption was applied to most of the information within the scope of the request.

12. Section 23 (1) states:

'Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3).'

13. To successfully engage the exemption at section 23(1), a public authority must be able to demonstrate that the relevant information was

directly or indirectly supplied by, or relates to any of the bodies listed at section 23(3).

Complainant's submissions

14. The Commissioner has summarised the complainant's submissions challenging the application of this exemption below.
15. The complainant disagrees that this exemption applies to all the information withheld on that basis. She has argued that the exemption has been applied too broadly. She has therefore invited the Commissioner to apply the remoteness test to each type of correspondence and communications sought to assess whether the connection between the requested information and a security body is too remote to engage the exemption.

Public authority's submissions

16. The public authority provided the Commissioner with a letter from a very senior official in the Cabinet Office (SO) with the experience and authority to validate the provenance of the withheld information. The SO assured the Commissioner that most of the withheld information was either received from one of the bodies listed in section 23(3) or is directly related to them.

Commissioner's conclusions

17. The Commissioner has considered all of the submissions from both parties in respect of the application of this exemption. She accepts that in the circumstances of this case, the assurance provided by the SO with regards to the application of section 23(1) to most of the withheld information and the additional explanation provided by the public authority are sufficient.
18. The Commissioner therefore finds that most of the withheld information is exempt from disclosure on the basis of section 23(1) because it was supplied by, or relates to, one of the bodies listed in section 23(3).
19. Section 23(1) is an absolute exemption which means that there is no requirement to carry out a public interest test to determine whether or not the information withheld on that basis should have been disclosed in any event in the public interest.

Section 35(1)(c)

20. The public authority considers the remaining withheld information exempt from disclosure on the basis of this exemption in addition to the exemptions at sections 40(2) and 42(1).

21. Section 35(1)(c) states:

'Information held by a government department is exempt information if it relates to the provision of advice by any of the Law Officers or any request for the provision of such advice.....'

Complainant's submissions

22. The complainant considers that the public authority failed to differentiate between factual information and advice, the former of which she argues is not exempt under section 35.

Commissioner's conclusions

23. Having considered the public authority's explanation and inspected the relevant withheld information, the Commissioner has concluded that the information relates to the provision of advice by a Law Officer and a request for the provision of such advice. The public authority was therefore entitled to engage the exemption at section 35(1)(c) in respect of the remaining withheld information.

24. The provision in section 35(4) FOIA which the complainant has alluded to actually states that in making any determination on the balance of the public interest in relation to information which is exempt by virtue of section 35(1)(a) FOIA, a public authority should consider the particular public interest in the disclosure of factual information used or which is intended to be used to provide an informed background to decision-taking. The provision does not technically therefore apply to information which is considered exempt on the basis of section 35(1)(c).

Public interest test

25. The exemption is however subject to the public interest test set out in section 2(2)(b) FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the remaining withheld information.

Complainant's submissions

26. The Commissioner has summarised the complainant's submissions in support of her view that on balance the public interest in disclosing the information withheld on the basis of this exemption is stronger than the public interest in maintaining the exemption.

27. The complainant has argued that there is a public interest in disclosing the withheld information because some academics and legal

commentators had raised serious questions as to “the legal basis for [the Government’s] action” and the “inherent right to self-defence”

28. She has further argued that there is a significant public interest in disclosing the withheld information because as the Prime Minister has acknowledged, it was “the first time in modern times that a British asset has been used to conduct a strike in a country where we’re not involved in a war.”³ She argued that this was therefore an unprecedented case where the withheld information needs to be scrutinised by the public.
29. She submitted that the Prime Minister had departed from the long-standing Law Officers’ convention by revealing the essence of the legal advice that the Government received from the Attorney General pursuant to the drone strike. She therefore argued that the strong public interest in withholding the Attorney General’s advice in particular had been considerably weakened as result. She further argued that there was a strong public interest in holding the Government to account in light of “the extreme, unprecedented and controversial military action that was taken....”
30. She has also argued that “the usual non-disclosure” should not be maintained in cases involving the use of force abroad in light of the likely recommendation by the Chilcot Inquiry to that effect.⁴

Public authority’s submissions

31. The Commissioner has summarised the public authority’s submissions on the balance of the public interest below.
32. It recognised the public interest in demonstrating to the public that the Government sought and received appropriate professional legal advice, and that the military action was in accordance with the rule of law.
33. It also acknowledged that there is a public interest in society being able, as far as possible, to understand and debate the decision to use force in the circumstances set out in the Prime Minister’s statement to Parliament on 7 September 2015. It submitted that the Government had

3

<http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm150907/debtext/150907-0001.htm>

⁴ An Inquiry set up by the former Prime Minister Gordon Brown on 30 July 2009 to identify lessons that could be learned from the Iraq conflict. It is led by Sir John Chilcot. Further details in relation to its work can be found at: <http://www.iraqinquiry.org.uk/about.aspx>.

further to the Prime Minister's statement publicly explained the legal basis for the action in Syria. This was done in a Memorandum from the Ministry of Defence to the Joint Committee on Human rights dated 3 December 2015⁵, the Government's response to the Foreign Affairs Committee in November 2015⁶, and in a written answer to a Parliamentary Question on Military intervention in Syria given by the Prime Minister on 21 April 2016⁷.

34. The public authority however argued that there is a strong public interest in the Prime Minister, Secretary of State for Defence and government more broadly being able to seek legal advice in confidence. It noted that the particular importance of maintaining the confidentiality of advice given by the Law Officers is reflected in the Law Officer's convention observed by successive governments that their advice should not be disclosed outside government.
35. It explained that in this case, the Prime Minister, with the consent of the Attorney General, disclosed to Parliament in the statement he gave on 7 September the fact that the Attorney General's advice had been sought and given. This was disclosed by the Prime Minister in recognition of the public interest in enabling the public to understand that appropriate professional legal advice was taken before the military action took place. It however emphasised that the long-standing Law Officers' convention has been observed, and the legal advice has not been disclosed.
36. It further argued that it is exceptionally important in the context of matters of importance and sensitivity such as those relevant to this case – intelligence, defence, national security and foreign relations - that the Government should be able to ask its most senior legal adviser for full and careful advice with confidence that it will remain confidential.
37. It noted that the advice given by the Attorney General represents the definitive legal position of the Government and has a special status in terms of the requirement for the Cabinet to have regard to it in coming to a decision. It therefore argued that whether the Law Officers have advised and the content of that advice is part of the collective Cabinet

⁵ http://www.parliament.uk/documents/joint-committees/human-rights/Government_Memorandum_on_Drones.pdf

⁶ <http://www.parliament.uk/documents/commons-committees/foreign-affairs/PM-Response-to-FAC-Report-Extension-of-Offensive-British-Military-Operations-to-Syria.pdf>

⁷ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-04-15/34186/>

decision-making process and must be treated in the same way as other material subject to Cabinet confidentiality. The public authority consequently concluded that the public interest in maintaining the exemption is substantial and clearly outweighs those in favour of disclosing the withheld information.

Commissioner's conclusions

38. The Commissioner has considered the submissions on the balance of the public interest from both parties and has summarised her conclusions below.
39. The Commissioner accepts that there is a public interest in disclosing the withheld information in view of the unprecedented nature of the military action taken by the Government in Syria on 21 August 2015. She considers that the withheld information would increase public understanding of the nature of the advice and the process it involved. It would also further the debate in relation to the legal basis for the action. She does not consider that the Government's public explanations justifying the legal basis for action in Syria reduce the public interest in disclosing the withheld information which contains free and frank discussions in relation to the military action taken on 21 August.
40. The exemption at section 35(1)(c) reflects the long-standing constitutional convention that government does not reveal whether Law Officers have or have not advised on a particular issue, or the content of any advice. The underlying purpose of this confidentiality is to protect fully informed decision making by allowing government to seek legal advice in private, without fear of any adverse inferences being drawn from either the content of the advice or the fact that it was sought. It ensures that government is neither discouraged from seeking advice in appropriate cases, nor pressured to seek advice in inappropriate cases. There is clearly a strong public interest therefore in maintaining the exemption and the Commissioner has given that inherent strong public interest in maintaining the exemption appropriate weight in the circumstances of this case.
41. She does not share the view that the Prime Minister's revelation that the military action on 21 August was pursuant to the Attorney General's advice had considerably weakened the public interest in maintaining the exemption. The advice itself has not been published even though its broad premise could reasonably be inferred from the Prime Minister's statement. Nevertheless, revealing the advice provided by the Law Officers in the context of matters which are extremely important to the security and defence of the United Kingdom is highly likely to adversely affect the ability of government to take fully informed decisions in relation to similar matters in future, and that would not be in the public

interest. She shares the view that whether the Law Officers have advised and the content of that advice is part of the collective Cabinet decision-making process and consequently vital to the operation of good government. In the context of matters relevant to this case, there is a strong public interest in not releasing information which is highly likely to undermine the collective Cabinet decision-making process and consequently affect the ability of the Government to take fully informed decisions in relation to defence, national security and foreign relations.

42. Although, as noted above, section 35(4) does not technically apply to section 35(1)(c) the Commissioner in line with her guidance has also carefully considered the nature and content of the information in weighing up the public interest.
43. With regard to the "likely recommendation" of the Chilcot Inquiry, the Inquiry has only just recently published its report and it is too soon to draw any wider conclusions from it in the context of this case. Nonetheless, the Commissioner considers that the public interest in not revealing the withheld information is stronger than the public interest in disclosure in the circumstances of this case.
44. The Commissioner has therefore concluded that on balance the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information in all the circumstances of this case.
45. In view of his decision that the public authority was entitled to rely on the exemptions at sections 23(1) and 35(1)(c), the Commissioner has not considered the applicability of the remaining exemptions (and therefore the complainant's submissions in that regard) relied on by the public authority.

Right of appeal

46. 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

47. 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.
48. 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
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF