Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 August 2016

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the RAF drone strike in Syria which killed two Britons fighting with so-called Islamic State. The Cabinet Office refused to provide this citing a number of exemptions as its basis for doing so: section 23 (security bodies); section 26 (defence); section 27 (international relations); section 35 (Law Officer advice); section 40 (unfair disclosure of personal data); section 42 (legal advice). It upheld this position at internal review.

2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 23(1) and section 35(1)(c) as its basis for refusing to provide the requested information.

3. No steps are required.

Request and response

4. On 7 September 2015, the then 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. On 9 September 2015, the complainant requested information of the following description:

"This is a request for information under the Freedom of Information Act. 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:

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

- Correspondence and communications between the Cabinet Office and the Ministry of Defence relating to the approval of the RAF drone attack which killed two Britons Reyaard Khan and Ruhul Amin.

By "correspondence and communications", I expect this to include, although not be 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. If you feel that a substantive response to this request isn't possible within a reasonable time frame or the request is too broad, I would be grateful if you could contact me by email or phone and provide assistance."

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[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 Cabinet Office responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:

   - Section 23(1) (Security bodies information)

   - Section 26(1) (Defence)

   - Section 27(1) (International Relations)

   - Section 35(1)(c) (Law officers' advice)

   - Section 40(2) (Unfair disclosure of personal data)

   - Section 42 (Legal professional privilege)

7. The complainant requested an internal review on 13 October 2015. The Cabinet Office sent the outcome of its internal review on 4 December 2015. It upheld its original position.

The scope of the case

8. The complainant contacted the Commissioner on 2 March 2016 to complain about the way her request for information had been handled.

9. The Commissioner has considered whether the Cabinet Office is entitled to rely on the exemptions it has cited as its basis for refusing to provide the requested information.

Reasons for decision

Section 23(1)

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

11. 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).*'

12. 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

13. The Commissioner has summarised the complainant's submissions challenging the application of this exemption below.

14. The complainant 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. She cited a 2012 ruling of the First-tier Tribunal (Information Rights) in support of her position on the matter of *All-Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and FCO* (EA/2011/0049-0051)[3].

Cabinet Office's submissions

15. The Cabinet Office provided the Commissioner with a letter from a very senior official (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

16. 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 Cabinet Office are sufficient.

17. 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).

18. 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.

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[3] http://www.informationtribunal.gov.uk/DBFiles/Decision/i749/20120503%20APPGER%20final%20decision%20correction.pdf

Section 35(1)(c)

19. The Cabinet Office 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).

20. 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

21. The complainant considers that the Cabinet Office failed to differentiate between factual information and advice, the former of which she argued is not exempt under section 35.

Commissioner's conclusions

22. Having considered the Cabinet Office'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 Cabinet Office was therefore entitled to engage the exemption at section 35(1)(c) in respect of the remaining withheld information.

23. 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 [the Commissioner's emphasis], 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 therefore technically apply to information which is considered exempt on the basis of section 35(1)(c).

Public interest test

24. 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

25. The complainant has argued that there is a stronger public interest in disclosing the withheld information because there is considerable concern as to the legality of the use of drone strikes and how this links to the UK's right to self-defence.

26. 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."[4] She argued that this was therefore an unprecedented case where the withheld information needs to be scrutinised by the public.

27. 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 cited a number of examples where the convention had also not been observed and argued that the strong public interest in withholding the Attorney General's advice in particular had been considerably weakened by both the Prime Minister's statement and by other examples. 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....".

Cabinet Office's submissions

28. The Cabinet Office 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.

29. The Cabinet Office 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.

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

30. 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. It added that this convention reflected the convention of Cabinet collective responsibility and was of constitutional significance, setting it apart from other legal advice.

31. 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.

Commissioner's conclusions

32. The Commissioner has considered the submissions on the balance of the public interest from both parties and has summarised her conclusions below.

33. 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.

34. 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.

35. 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 affect adversely 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.

36. In the Commissioner's view, there is also not only a public interest in protecting the process surrounding the request for or provision of advice. The Commissioner notes that the exemption applies to information which *"relates to the provision of advice by any of the Law Officers or any request for the provision of such advice".* Such information would clearly satisfy the definition of "relate to".

37. 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.

38. The Commissioner has 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.

39. In view of her decision that the Cabinet Office 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 Cabinet Office.

Right of appeal

40. 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

41. 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.

42. 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
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