

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 June 2020

Public Authority: Attorney General's Office
Address: 5 - 8 The Sanctuary
London
SW1P 3JS

Decision (including any steps ordered)

1. The complainant requested any information held on the question of whether the UK left the EU on 29 March 2019. In subsequent correspondence with the AGO, he made a further request for specific information.
2. The Attorney General's Office ('the AGO') treated the two as separate requests, which the complainant objected to. In respect of the first request, it disclosed some information, said that some information was exempt from disclosure under section 32(1)(a) (court records) of the FOIA and would neither confirm nor deny whether it held further information, citing section 35(3)(formulation of government policy) by way of section 35(1)(c) of the FOIA. In respect of the second request, it told the complainant that it did not hold the requested information. The complainant disputed that such a response was ever sent to him. He also disputed its claim not to hold the information.
3. The Commissioner's decision is that the AGO was entitled to treat the first and second requests as separate requests for information. In respect of the first request, she found that it cited sections 32(1)(a) and 35(3) correctly, although it breached the timeliness provisions of sections 1 and 10 of the FOIA. In respect of the second request, she found that on the balance of probabilities, the AGO did not hold the information described. She found no breach of sections 1 or 10 of the FOIA in respect of that request.
4. The Commissioner requires no steps.

Background

5. The request concerns the UK's withdrawal from the EU ("Brexit") following a public referendum held in 2016.
6. According to the GOV.UK website, the UK was initially due to leave the EU on 29 March 2019, but did not do so until 31 January 2020. It is currently in a formal period of transition. The current rules on trade, travel and business for the UK and EU will continue to apply during the transition period. New rules will take effect on 1 January 2021¹.

Request and response

7. On 17 September 2019, in correspondence which expressed his view that the UK had, in fact, left the EU on 29 March 2019 without a deal under the specific terms of article 50, the complainant wrote to the AGO and requested information in the following terms:

"...You also will probably have an amount of legal information available to you and may even have constructed an analysis similar to mine of the legal pros and cons of my observation that it appears that we are outside of the EU already. This information may well complete my request to Mrs May even if it did not include an answer to my question and that you would be willing to give me that same information under the Freedom of Information Act 2000 and therefore this communication also acts as a formal request under the FoIA for any and all information available to the AGO regarding the question of whether we left the EU on 29th March or not, this should therefore include any opinions provided by the AGO to any other party in parliament about said question."

8. The AGO responded on 1 October 2019. It would neither confirm nor deny whether it held the requested information, citing section 35(3) of the FOIA, by way of section 35(1)(c).
9. The complainant requested an internal review on 24 October 2019. He expressed the view that no harm could occur by simply confirming or denying whether the requested information was held.

¹ <https://www.gov.uk/transition>

10. The AGO responded on 3 December 2019. It revised its response to the request. It said that it had identified that it held some information (a letter from the Secretary of State for Exiting the EU to a member of parliament ('MP')) which was not exempt from disclosure, and it disclosed it to the complainant. It confirmed that it held further information, in relation to legal proceedings brought by the English Democrats, which was exempt from disclosure under section 32(1)(a) (court records) of the FOIA. It maintained that it could neither confirm nor deny whether it held any further information falling within the scope of the request, citing section 35(3) (formulation of government policy) of the FOIA.
11. The complainant queried the internal review outcome on 5 December 2019. Referring to the letter from the Secretary of State to the MP, he asked for "...*the rest of this line of correspondence*". The AGO responded the same day, stating that this constituted a new request for information and would be treated as such.
12. Although the complainant subsequently challenged this interpretation, expressing the view that the information fell within the scope of his original request for "...*any and all information available to the AGO regarding the question of whether we left the EU on 29th March*", on 16 December 2019 the AGO informed him again that it was a new request for the purposes of the FOIA, and would be treated accordingly.
13. The AGO says that it then wrote to the complainant on 18 December 2019. Its email dealt with the complainant's request to have a copy of the wider exchange of correspondence between the Secretary of State and the MP, of which the disclosed letter formed part. The AGO said that it did not hold this information and suggested that he approach the Department for Exiting the European Union (as it then was), which was responsible for overseeing negotiations to leave the EU and may be able to assist if he had any further queries.
14. The complainant says that he did not receive this communication until it was forwarded to him on 20 March 2020, during the Commissioner's investigation.

Scope of the case

15. The complainant initially contacted the Commissioner on 16 December 2019 to complain about the way his request for information had been handled. He subsequently provided further information about his concerns.
16. The complainant has asked the Commissioner to consider the following matters:

- the AGO's decision to apply sections 32(1)(a) to withhold information in respect of the initial request;
- the AGO's decision to apply section 35(3) to neither confirm nor deny whether further information was held in respect of the initial request;
- the AGO's delay in disclosing information in response to the initial request;
- the AGO's decision to treat his request for the chain of correspondence surrounding the letter from the Secretary of State to the MP as a new request;
- whether the AGO responded in accordance with the FOIA as regards that request; and,
- whether the AGO held the information requested.

Reasons for decision

Request dated 17 September 2019

Section 1 – general right of access **Section 10 - time for compliance**

17. Section 1(1) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
18. Section 10(1) of the FOIA states that on receipt of a request for information, a public authority should respond to the applicant within 20 working days.
19. The complainant submitted the request to the AGO on 17 September 2019, and the AGO responded to the request on 1 October 2019, 8 working days later.
20. It subsequently identified that it held some information which should have been disclosed, which it disclosed to the complainant on 3 December 2019. This was 55 working days after the request was received.
21. Therefore, by failing to disclose information which it held within 20 working days of receiving a request for it, the AGO breached sections 1(1) and 10(1) of the FOIA.

22. The Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function. This aligns with the goal in her draft "Openness by design"² strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"³.

Was the AGO entitled to treat the request for wider correspondence between the Secretary of State and the MP as a new request for information?

23. The request of 17 September 2019 asked for:

"...any and all information available to the AGO regarding the question of whether we left the EU on 29th March or not".

24. In his email of 5 December 2019, having had a copy of a letter from the Secretary of State to the MP disclosed to him, the complainant asked:

"I appreciate that I can now go to the ICO but do not want to proceed to [sic] hastily as I feel that the additional information I am seeking here may be the subject of an unfortunate oversight on the AGO's part or may be deemed not to fit within my earlier request for some reason, so I take this opportunity to ask you directly for it.

I am very interested, though not particularly convinced, by the document which you have kindly disclosed. It does to some extent pertain to my request though of course it is couched heavily in political rhetoric and falls somewhat from an honest and legal opinion on the matter in hand, what is more it paints only half of the picture of the argument at hand. It is the other half of the argument which I should appreciate seeing, and indeed which I am somewhat confused by the AGO's reluctance to disclose together with this document. It is plain that the Right Honourable Mr Bill Cash MP (whom I believe is a lawyer himself) wrote to the government presenting a different argument on the matter which provoked the disclosed reply and I could imagine that he may indeed have responded to the attached letter countering the view presented by the government, indeed had

² <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

³ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

this argument been presented to me by RH Barclay or even the Prime Minister, I can see a number of areas where I would immediately have had cause to question the government's interpretation of the legal situation.

Hence I am asking now that the AGO supply me with the rest of this line of correspondence so that I can fully understand the position and opinions of these two members of the country's government of the time."

25. The complainant disagreed with the AGO's decision to treat this as a new request for information, accusing the AGO of "*deliberately lift[ing] the communication to Mr Cash MP out of the line of communication - all of which must surely have been on the subject*".

26. The AGO explained to the Commissioner that:

"Whilst [the complainant]'s original request is clearly relevant to his later request, in light of the language used by [the complainant] (i.e. 'I am asking now that AGO supply me with...') and the specific nature of the request, AGO determined it more appropriate for this to be treated as a separate request."

27. Having looked at the specific wording of the email of 5 December 2019, the Commissioner is of the view that it does constitute a new request for information. It asks to see the correspondence leading to, and proceeding from, the letter disclosed to the complainant. The correspondence might conceivably touch on a variety of topics, not just the matter which was the focus of the original request. The complainant does not specify that only those parts of any correspondence relevant to the Brexit question should be disclosed, or that non-Brexit related information may be excluded. By implication, the request is for the surrounding correspondence in its entirety, regardless of its subject matter. It therefore has the potential to include within its scope information which was outside of the scope of the original request.

28. Furthermore, the Commissioner notes that the complainant himself seems to acknowledge that the information being requested may fall outside of the scope of the original request, stating as he does:

"...the additional information I am seeking ... may be deemed not to fit within my earlier request for some reason".

29. The Commissioner is therefore satisfied that the AGO's interpretation of the request in the email of 5 December 2019 as constituting a new request for information, was reasonable, and that its decision to treat it as such did not breach section 1 of the FOIA.

30. The Commissioner has further considered the AGO's handling of the request of 5 December 2019, at paragraphs 60 - 78, below.

Section 32 – court records

31. Section 32(1) of the FOIA states:

“Information held by a public authority is exempt information if it is held only by virtue of being contained in—

(a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter”.

32. The information withheld by the AGO under section 32(1)(a) comprises documents relating to legal proceedings brought by the English Democrats. It said that this information was created specifically in response to the High Court case in *R (on the application of the English Democrats) v the Prime Minister and DExEU*.
33. The AGO has provided the Commissioner with a copy of the withheld information and has confirmed that it holds this information only by virtue of it being contained in a relevant document filed with the court solely for the purposes of the above proceedings.
34. Section 32(1) is a class based exemption. This means that any information falling within the category described is automatically exempt from disclosure, regardless of whether or not there is a likelihood of harm or prejudice if it is disclosed. It is therefore conceivable that the exemption could apply to information which may otherwise be available to an applicant via other means, or to information which is already widely available.
35. There are two main tests in considering whether information falls within this exemption. First, is the requested information contained within a relevant document? Secondly, is this information held by the public authority only by virtue of being held in such a document?
36. In the Commissioner's view, the phrase 'only by virtue of' implies that if the public authority also holds the information elsewhere it may not rely upon the exemption.

Is the information contained in a relevant document created for the purposes of proceedings in a particular cause or matter?

37. What is important in this context is whether the information meets the criteria set out in section 32(1)(a) of the FOIA. As the wording of the exemption implies, it is not only the reason for holding the information which is relevant, but also the type of document it is contained in.

38. From the evidence she has seen, the Commissioner is satisfied that the information withheld by virtue of section 32(1)(a) is contained in a document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter ie *R (on the application of the English Democrats) v the Prime Minister and DExEU*.

Is this information held by the public authority only by virtue of being held in such a document?

39. As noted above, the AGO has confirmed to the Commissioner that it holds this information only by virtue of it being contained in a relevant document filed with the court solely for the purposes of particular proceedings. The complainant has not presented any evidence to suggest this is not the case.
40. As section 32 of the FOIA is an absolute exemption, there is no requirement to consider whether there is a public interest in disclosure.
41. Therefore, the Commissioner's decision is that the withheld information falls within the scope of section 32(1)(a) of the FOIA and the AGO is entitled to rely on that section to withhold the information.

Section 35 – formulation of government policy (neither confirm nor deny – 'NCND')

42. Section 1(1)(a) of the FOIA requires a public authority to inform a requester whether it holds the information specified in a request.
43. The decision to use a NCND response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point (and the main focus for NCND in most cases), will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
44. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication as to whether or not information is in fact held.
45. Having already disclosed some information, the AGO has issued a NCND response regarding whether it holds further information falling within scope of the request, citing section 35(3) of the FOIA. The issue for the Commissioner to consider is not that of the actual disclosure of any further information that may be held, it is solely the issue of whether or not the AGO is entitled to NCND whether it holds any further information which would come within the scope of section 35(1)(c).

46. In reaching a decision, the Commissioner has not been made aware as to whether the AGO does or does not hold further information, as it is not necessary for her consideration of this exemption.

47. Section 35(1)(c) of the FOIA states:

"Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to

...

c) The provision of advice by any of the Law Officers or any request for the provision of such advice".

48. Section 35(3) states:

"The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1) [ie section 35(1) of the FOIA]".

49. The AGO explained that to the extent the requested information could potentially include advice provided to the Law Officers, or requests for such advice, it was relying on section 35(3), by virtue of section 35(1)(c), to NCND whether such information was held.

50. Based on the wording of the request and the type of information being requested ("*... any and all information available to the AGO regarding the question of whether we left the EU on 29th March*"), the Commissioner has concluded that the exemption at section 35(3) of the FOIA is engaged because information within the scope of the request, if held, could reasonably be expected to include advice provided by the Law Officers or requests for such advice.

Public interest test

51. Section 35(3) of the FOIA is subject to the public interest test set out in section 2(1)(b) of the FOIA. This means that the Commissioner must determine whether, in all the circumstances of the case, the public interest in maintaining the exemption from the duty to confirm or deny, outweighs the public interest in complying with the duty to confirm or deny whether the AGO holds information, which would be exempt on the basis of section 35(1)(c).

Arguments in favour of confirming or denying whether further information is held

52. The AGO acknowledged that there is a public interest in being aware whether important matters such as those relevant to this request, have

been considered with the benefit of sound legal advice, including advice from the Law Officers.

53. The Commissioner considers that the public interest in public authorities being transparent and accountable with regard to the way they make decisions would be served by confirming or denying whether information of this type is held.

Arguments in favour of maintaining the exemption

54. The AGO argued:

"... the Law Officers' Convention protects fully informed decision making by allowing Government to seek, and Law Officers to prepare, 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. It is also important to note that Law Officer advice is different from other legal advice within Government, not in its fundamental underpinnings, but because it may be sought in relation to issues of particular complexity, sensitivity and constitutional importance. It is of obvious pressing importance that the seeking of and provision of legal advice in such circumstances should be facilitated and protected in the public interest. The Convention is recognised in paragraph 2.13 of the Ministerial Code and the Information Commissioner's guidance recognises the fundamental importance of the Law Officers' Convention to good government.

As such, while recognising that there is a public interest in citizens knowing whether matters have been considered with the benefit of sound legal advice, on balance this does not outweigh the very strong public interest in maintaining the Law Officers' Convention."

Balance of the public interest

55. The Commissioner accepts that there will always be a strong public interest in NCND'ing whether the government has asked for, or obtained advice from, the Law Officers in relation to an issue. The Commissioner recognises the weight that the exemption at section 35(1)(c) of the FOIA attracts from the way it has been drafted by Parliament – providing a specific exemption for a particular type of legal advice. The weight is reinforced by the convention of non-disclosure adopted by successive governments.
56. Furthermore, the Commissioner recognises that it would be impossible for the Law Officers to advise on every aspect of government policy that has legal implications, given the range of legal advice that government

requires. If the government routinely disclosed occasions on which the Law Officers had, or had not, given advice, this could give rise to questions as why they had advised in some cases and not in others. This, in turn, could put pressure on the government to seek their advice in cases where their involvement would not be justified. The risk of creating an impression that the government is not confident of its legal position regarding a particular issue could also deter it from seeking Law Officers' advice in cases where their involvement would be justified. Consequently, the Commissioner accepts that confirming or denying whether such information is held creates a potential risk which could undermine effective government.

57. Having said that, the exemption is not absolute, and the strong public interest in protecting Law Officers' advice may be overridden if there are particularly strong factors in favour of confirmation or denial. The Commissioner recognises that the issue of the UK's exit from the EU remains the subject of significant public debate. Confirmation or denial as to whether Law Officers' advice was sought, or obtained, by the government in relation to this matter, could add important detail to the public debate on Brexit.
58. However, the Commissioner considers that the public interest in protecting the longstanding convention of confidentiality with regard to Law Officers' advice is particularly strong in the circumstances of this case in view of the fact that discussions regarding the precise details of the UK's exit from the EU were ongoing at the time of the request, and remain so now.
59. The Commissioner has therefore concluded that on balance, the public interest in maintaining the exemption provided by section 35(3) outweighs the public interest in confirming or denying whether the AGO holds information falling within the scope of the request, which would be exempt by virtue of section 35(1)(c).

Request dated 5 December 2019

Section 1 – general right of access
Section 10 - time for compliance

60. The AGO says that it responded to the new request dated 5 December 2019, on 18 December 2019.
61. The complainant says that he did not receive this communication until it was forwarded to him by the AGO, on 20 March 2020. He questioned whether the AGO had truly sent it on 18 December 2019.
62. He highlighted what he believed to be a discrepancy in the email address contained in the forwarded email, which suggested to him that the email may have been fabricated at a later date:

"... there is a marked difference in regard to the 'To:' field in the alleged email of the 18th Dec.

In the mails of 1st Oct and 3rd December the To: field is shown as "To: [complainant's name]<[complainant's name]@aol.com>" vitally this includes the email address of the recipient, without which the server would assume that the recipient's root address was the same as the sender's server root ie @attorneygeneral.gov.uk. The alleged email of the 18th December shows the To: field as "To: [complainant's name]". Hence if this email had been sent, which I very much doubt, it would have been delivered to [complainant's name]@attorneygeneral.gov.uk if such a user exists (which also seems extremely unlikely) and if not then the sender would have received an undelivered notification."

63. The Commissioner asked the AGO whether it was able to offer an explanation for why the complainant's email address was shown differently in different emails to him. It responded:

"The email software we use – Microsoft Outlook – will often abbreviate email addresses once they have been typed into the 'To', 'Cc' or 'Bcc' fields, and display only the name of the recipient. I can confirm that [the complainant's] full email address was typed into the 'To' field at the time and our email dated 18 December 2019 was sent to [the complainant's] full email address. When using Outlook, this can be verified by hovering over his name in the email itself, which brings up an information window from which it can clearly be seen that the email was sent to [complainant's name]@aol.com. I have provided a screenshot depicting this".

64. The Commissioner is satisfied that the AGO has provided a cogent and reasonable explanation for the variation in the email address. In view of the evidence it has provided, she has no reason to disbelieve the AGO when it says that the email was sent on 18 December 2019. She is therefore satisfied that it complied with its obligations under sections 1 and 10 of the FOIA, albeit she also accepts that unfortunately, and for unknown reasons, the complainant did not receive its emailed response.

Section 1 – general right of access

65. The complainant considered that the AGO must hold copies of the wider correspondence between the Secretary of State and the MP, surrounding the letter which was disclosed to him on 3 December 2019. The AGO's position is that it does not.
66. In cases where there is some dispute about the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – following the

lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.

67. The Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.

The complainant's position

68. The complainant argued:

"In regard to the excuses posed in that alleged email by the AGO I do not accept any of them, in particular the idea that the AGO held the SoS's [Secretary of State] letter to Bill Cash and did not hold the forerunning correspondence from Bill Cash or the subsequent correspondence from Bill Cash is nonsense unless the letter to Bill Cash was specifically given to the AGO by the SoS as an attempt to placate my request for information. Patently the AGO held this information for a reason. I would guess that the reason was that they drafted the correspondence which they have disclosed and patently to do that they needed to have the forerunning correspondence."

The AGO's position

69. The AGO maintained that it did not hold wider correspondence in the chain.
70. As is her custom in such cases, the Commissioner asked the AGO a series of questions to assist her understanding of this position.
71. The AGO provided a detailed explanation of the searches it had conducted to locate any further correspondence.
72. It explained that searches were carried out in the email folders of key officials leading on EU Exit matters using the Outlook search function. The AGO's electronic filing system on the shared network was also searched, covering all teams within the AGO, including those leading on EU Exit matters. As the correspondence which had already been disclosed related to EU Exit, searching in those areas was likely to retrieve any further correspondence in the chain if held by the AGO.

73. Searches were also conducted on the individual laptop computers of key officials leading on EU Exit matters and on the AGO's shared network. The AGO provided the Commissioner with the search terms used.
74. The AGO found no evidence that the requested information had at any time been held and then destroyed. It said that under the AGO's current retention policy, ministerial correspondence is kept for at least three years from the date of the last piece of correspondence sent/received in the relevant thread of correspondence (the implication being that, in line with that policy, if it had at been held, the requested information would be retained until at least 2022).
75. When asked if it had any other specific reason for believing that it did not hold any further correspondence in the chain, the AGO said:

"Officials in the AGO will often be kept informed of significant or controversial pieces of litigation in light of the Law Officers' role as chief legal advisers to Government. This was the basis for the information being shared with the AGO on this occasion, as the substance of the letter was relevant to an ongoing piece of litigation (see below). There is no business purpose for which the requested information should be held beyond this.

...

The relevant letter was held in a file regarding the litigation of R (on the application of the English Democrats) v the Prime Minister and the DExEU (referred to in our earlier response). From reviewing an email chain, I can see that officials considered the arguments raised in that case were similar to those raised by a group of MPs ... The response to that group, i.e. the letter that has already been disclosed to [the complainant], was shared on the litigation email chain by DExEU, but I can see no indication that the original letter was ever shared. AGO came to hold a copy of the correspondence as they were included in the email chain.

The Law Officers were not listed as being copied into the Secretary of State for ExEU's response, as would be usual if ministerial correspondence was being copied to other ministers. As such, it is unlikely that AGO received a copy of the letter disclosed to [the complainant], or other related correspondence, by other means."

The Commissioner's conclusion

76. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set

out in paragraphs 66 and 67, above, the Commissioner is required to make a finding on the civil standard of the balance of probabilities.

77. The Commissioner is satisfied that the AGO has provided a detailed explanation of the searches it conducted and why they would be likely to locate the wider correspondence, if it was held. It has also set out credible reasons for believing that it has never held the information.
78. Having taken all the above into account, the Commissioner is satisfied, on the civil standard of the balance of probabilities, that the AGO does not hold the wider correspondence requested on 5 December 2019 and, therefore, that it has complied with the requirements of section 1 of the FOIA in respect of that request.

Right of appeal

79. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

80. 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.

81. 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

Samantha Bracegirdle
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