

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 July 2016

Public Authority: HM Treasury
Address: 1 Horse Guards Road
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant submitted a request to the public authority for copies of correspondence and records of oral conversations between the former Prime Minister Tony Blair (and his representatives) and the public authority within a specified period. The public authority confirmed that it held a record of a phone conversation between Tony Blair and Lord Deighton, the former Commercial Secretary. It disclosed some information from the record of the conversation and withheld the remainder on the basis of the exemptions at sections 27(1)(a), 40(2), 41(1) and 43(2) FOIA.
2. The Commissioner has concluded that the public authority was entitled to rely on the exemptions at sections 40(2) and 41(1) to withhold the information redacted from the record of the phone conversation between Tony Blair and Lord Deighton.
3. No steps are required.

Request and response

4. The Commissioner understands that the complainant originally submitted the following request for information to the public authority in April 2015:

'.....copies of all correspondence, or records of oral conversations, between Tony Blair and the Treasury between April 2011 and today.'

Please include all correspondence between the Treasury and any representatives of Mr Blair's organisations:

*Tony Blair Associates
Office of Tony Blair
Tony Blair Africa Governance Initiative
Tony Blair Faith Foundation
Government Advisory Practice*

If this request is deemed likely to exceed the cost limit please restrict it to communications between Mr Blair/the above organisations and:

- a) Ministers/ministerial officer*
- b) Senior civil servants*

Please also include any internal Treasury communications within this period held by ministerial offices relating to Mr Blair and the work of any of his organisations.

5. He subsequently asked the public authority on 21 May 2015 to:
'.....restrict the request to communications with ministerial offices

As per the original request [ie above] please include any internal Treasury communications relating to Tony Blair from this period held by ministerial offices.'

6. The public authority acknowledged the request on 14 July 2015 nearly two months after it was first submitted in May 2015. It explained that the request had not been processed at the time it was initially submitted due to administrative error.
7. The public authority consequently issued its substantive response to the request on 10 August 2015. It explained that complying with the request (of May 2015) would exceed £600, the cost limit for complying with requests under the FOIA.¹ It advised the complainant that he could significantly narrow both the amount of information and the time frame of his request and re-submit it to the authority.
8. The complainant subsequently submitted the following refined request to the public authority on 10 August 2015:

¹ For central government bodies, and £400 for other public authorities.

'a) as far as Mr Blair's office goes please restrict your searches to communications with Mr Blair, representatives of Tony Blair Associates and representatives of the office of Tony Blair

b) in relation to ministerial offices please restrict your searches to Lord Deighton and any of his staff, including private secretaries and any special advisors (even if the special advisors were not solely attached to his office). Please also use this restriction to your search for internal Treasury communications held by ministerial offices.

As for guidance about topics, please include, but do not restrict your searches to, any communications relating to Mr Blair's meeting with Lord Deighton in July 2013, as well as a) his clients Mubadala and b) the Abu Dhabi United Group.'

9. The public authority provided its substantive response to the refined request above on 9 October 2015. It explained that it had interpreted the timescale of the refined request to cover April 2011 to 21 May 2015 when he submitted his previous request. It considered the information held within the scope of the request exempt from disclosure on the basis of sections 27(1)(a) (international relations) and 43(2) (commercial interests) FOIA.
10. On 9 October 2015 the complainant asked the public authority to carry out an internal review into its application of the exemptions at sections 27(1)(a) and 43(2).
11. The public authority provided its response on 11 November 2015. It upheld the exemptions at sections 27(1) and 43(2) and additionally relied on the exemption at section 40(2) (personal data) FOIA.

Scope of the case

12. On 2 December 2015 the complainant wrote to the Commissioner to complain about the public authority's handling of his request. He asked the Commissioner to consider whether the authority ought to have disclosed the withheld information.
13. During the course of the Commissioner's investigation, the public authority clarified that the information in scope comprises of a record of a telephone conversation between Lord Deighton, former Commercial Secretary to HM Treasury and Tony Blair dated 19 July 2013. Having reconsidered the information, it concluded that the exemptions relied on did not apply to all of the information contained in the record of the phone conversation. It consequently provided a copy of the record of the phone conversation to the complainant redacting the information it still

considered exempt. This was provided to the complainant on 8 March 2016.

14. The complainant wrote to the Commissioner on 14 March 2016 and submitted that the information redacted from a copy of the record of the phone conversation provided to him on 8 March ought to have been disclosed.
15. In response to queries from the Commissioner on the application of the exemptions to the redacted information, the public authority agreed to disclose additional information from the record of the phone conversation. Another version which included the additional disclosures was subsequently provided to the complainant on 6 June 2016.
16. The public authority also explained on 6 June 2016 that it considered the remaining redacted information exempt on the basis of section 41(1) FOIA.² The Commissioner understands that the public authority is no longer relying on the exemptions at sections 27(1)(a) and 43(2).
17. The decision in this notice is therefore limited to the public authority's application of the exemptions at sections 40(2) and 41(1) to the information redacted from the record of the phone conversation between Lord Deighton and Tony Blair dated 19 July 2013.

Reasons for decision

Section 41(1)

18. Section 41(1) states:

'Information is exempt information if it was obtained by the public authority from any other person (including another public authority), and the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.'

19. Therefore, in order to engage section 41 a public authority must have obtained the withheld information from another person, and its disclosure must constitute a breach of confidence actionable by the confider.
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² This was the first time that this exemption had been applied to the information in scope by the public authority.

20. The Commissioner is satisfied that the information redacted from the record of the phone conversation in reliance on this exemption was provided by Tony Blair to the former Commercial Secretary, Lord Deighton. He has therefore concluded that the information was provided to the public authority by another person.
21. Adopting the test set out by Judge Megarry in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415, the Commissioner considers that a breach of confidence will be actionable if:
 - The information has the necessary quality of confidence,
 - The information was communicated in circumstances importing an obligation of confidence, and
 - Unauthorised disclosure would cause a specific detriment to either party.
22. The Commissioner considers that information will possess the necessary quality of confidence if it is more than trivial and not otherwise accessible. This means that the information should be worthy of protection in the sense that someone has a genuine interest in the contents remaining confidential. The Commissioner is satisfied that the redacted information is not trivial and is also not otherwise accessible.
23. The Commissioner considers that there are essentially two circumstances in which an obligation of confidence may apply; the confider has attached explicit conditions to any subsequent use or disclosure, or the confider has not set any explicit conditions but the restrictions on use are obvious or implicit from the circumstances.
24. The public authority has stated that the redacted information was provided in confidence for the purpose of advising the Commercial Secretary. It argued that the duty of confidence was not just owed to Mr Blair but also to the Abu Dhabi Group and the Abu Dhabi Government. It did not explain whether the information was provided with an explicit obligation of confidence, and the Commissioner notes that the record of the conversation itself has not been classified. Nevertheless, he is persuaded that in the circumstances there was an implicit understanding that the conversation was being held in confidence and consequently that there was an implied obligation of confidence. Given the subject matter of the conversation – in relation to possible investments in the UK - and the fact that it was between a Government Minister and a former Prime Minister, it would have been reasonably assumed that the matter was being discussed in confidence and that the information that was revealed thereof would be held in confidence. The Commissioner is

therefore satisfied that the redacted information was communicated in circumstances importing an obligation of confidence.

25. The public authority has argued that disclosure would have a negative impact on Mr Blair's role as an adviser to the Abu Dhabi Group, a role which it argued, depends on maintaining the trust and confidence of Governments and organisations. The Commissioner finds this argument persuasive. He also considers that disclosure is likely to negatively impact on the commercial interests of the Abu Dhabi Group and arguably that of the Government. He has therefore concluded that disclosure would be detrimental to Mr Blair's role and likely to be detrimental to the economic interests of the UK and the Abu Dhabi Group.

Public interest test

26. Section 41 is an absolute exemption which means that there is no requirement for a public authority relying on the exemption to carry out the public interest test set out in section 2(2)(b) FOIA. However, the public authority will need to carry out a test to determine whether it would have a public interest defence for the breach of confidence. This is because case law on the common law of confidence suggests that a breach of confidence won't succeed, and therefore won't be actionable, in circumstances where a public authority can rely on a public interest defence. The public interest test set out in section 2(2)(b) requires a public authority to determine whether the public interest in disclosure outweighs the public interest in maintaining the exemption. The reverse is the case with regard to the consideration required under section 41. The test in relation to section 41 is whether there is a public interest in disclosure which overrides the competing public interest in maintaining the duty of confidence. It assumes that the public interest in maintaining confidentiality will prevail unless the public interest in disclosure outweighs the public interest in maintaining the confidence.
27. The complainant has argued that there is a public interest in transparency in relation to a meeting between a former Prime Minister and the Government which discusses development schemes involving vast sums of money. He noted that Mr Blair's business dealings particularly involving foreign governments are the subject of repeated calls by MPs and others for transparency. He argued that there was an overarching public interest in full transparency in relation to Mr Blair's dealings with the UK Government on behalf of the Abu Dhabi Government. This is because in his view it is only when there is full transparency that the public would be able to make an informed judgement about whether or not there is wrong doing and if, for example, they agree with the statements by some MPs that former

Prime Ministers should be banned from acting as paid advocates for other countries.

28. The public authority has argued that the public interest in transparency has been served by the disclosure of a redacted version of the record of the conversation. Moreover, disclosure would constitute an actionable breach of confidence especially in light of the detriment to Mr Blair in his advisory roles.
29. The Commissioner agrees with the complainant that there is a public interest in transparency regarding dealings between the Government and former MPs, including Prime Ministers where those individuals are now acting as paid advocates on behalf of others. Nevertheless, it must be emphasised that there is nothing to suggest that Mr Blair was not acting legally in the context of his discussion with Lord Deighton nor was there any evidence of misconduct on the part of Lord Deighton. It is perfectly reasonable in the Commissioner's view to question whether Mr Blair should be allowed to lobby the Government on behalf of some of the organisations that he now represents, however, the fact that there is no evidence of wrongdoing on his part or any credible allegation to that effect significantly reduces the weight of the public interest in disclosing the withheld information in the circumstances of this case.
30. On the other hand, the Commissioner considers that there is an inherent strong public interest in preserving the principle of confidentiality. Any disclosure of confidential information will to some degree undermine the principle of confidentiality and the relationship of trust between public authorities and confiders of information. It would not be in the public interest if individuals and organisations are discouraged in confiding in the Government if they don't have a degree of certainty that this trust will be respected. It is important from an economic perspective that the Government can command the trust of those seeking to invest in the UK that information they provide in confidence in relation to their commercial interests would not be revealed in the absence of a significant public interest in doing so. There is therefore a strong public interest in not revealing information which could negatively impact on the interest of the confider.
31. The Commissioner has therefore concluded that on balance, in all the circumstances of the case, the public interest in maintaining confidentiality outweighs the public interest in disclosing the withheld information. Consequently, he is satisfied that the public authority would not be able to successfully rely on a public interest defence in an action for breach of confidence in relation to the disclosure of the relevant withheld information in this case.

Section 40(2)

32. The public authority has also redacted the names and contact details of junior civil servants from the record of the phone conversation.

33. A public authority may withhold information in reliance on this exemption if it constitutes third party personal data (ie other than the applicant's) and either the first and second condition in section 40(3) FOIA is satisfied.

34. Personal data is described in section 1 of the Data Protection Act 1998 (DPA) as:

'.....data which relate to a living individual who can be identified from those data or from those data and other information which is likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.'

35. The Commissioner is satisfied that the redacted names and contact details constitute personal data within the meaning in the DPA because it is information from which the data subjects could be identified.

36. As mentioned, personal data cannot be disclosed under the FOIA unless either of the conditions in section 40(3) is satisfied. The first condition in section 40(3) is that disclosure of personal data would not contravene any of the data protection principles or section 10 of the DPA. The public authority considers that disclosing the names and contact details of junior officials redacted from the record of the phone conversation would contravene the first data protection principle.

37. The first data protection principle states:

'Personal data shall be processed fairly and lawfully and, in particular shall not be processed unless-

At least one of the conditions in schedule 2 [DPA] is met...'

38. In considering whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual (ie the data subject) in terms of what would happen to their personal data and the consequences of disclosing personal data, ie what damage or distress would the data subjects suffer?

- Furthermore, notwithstanding the data subjects' reasonable expectations or any damage caused to them, it may still be fair to disclose their personal data if it can be argued that there is an overriding legitimate interest to the public in doing so.
39. The Commissioner considers that the junior officials in question would not reasonably expect their identities to be revealed pursuant to the disclosure of discussions at such a very senior level. They are not accountable for any of the matters discussed and it would be unfair to reveal their identities in that context. In the circumstances, it is likely that revealing their identities would cause them some distress. In addition, the Commissioner considers that revealing their identities would be unwarranted because as far as he can see there is no overriding legitimate interest to the public in doing so in the circumstances of this case.
40. The Commissioner has concluded that disclosing the redacted names and contact details of the junior officials would be unfair and therefore in contravention of the first data protection principle.
41. He is consequently satisfied that the public authority was entitled to rely on the exemption at section 40(2).

Right of appeal

42. 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

43. 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.
44. 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