

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 October 2015

**Public Authority:** Cabinet Office

**Address:** 70 Whitehall  
London  
SW1A 2AS

### Decision (including any steps ordered)

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1. The complainant has requested information about whether certain named individuals, including former Prime Minister Tony Blair, have been contacted by the Chilcot Inquiry as part of the Maxwellisation process. The Cabinet Office refused to confirm or deny whether it held any information within the scope of the request citing section 41(2) (information provided in confidence) as its basis for doing so. It upheld this at internal review.
2. The Commissioner's decision is that the Cabinet Office is not obliged to provide confirmation or denial in response to the complainant's request by virtue of section of 41(2).
3. No steps are required.

### Request and response

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4. On 29 December 2014, the complainant requested information of the following description:

*"I would like to request the following information under the Freedom of Information Act [he then provided contact details].*

*My enquiry concerns correspondence between the Cabinet Office and certain individuals who gave evidence to the Chilcot inquiry into the Iraq War.*

*I understand the Cabinet Office is now the main government department dealing with issues relating to both the enquiry [sic] and or the publication of the report.*

*Please let me know if I have misunderstood the position.*

*Please note that in each case I am only interested in information which relates to the 1 November 2013 to the present day.*

*Some of the relevant correspondence and communication will relate to a process commonly referred to as Maxwellisation. As you know this process allows individuals at the centre of a public enquiry [sic] to have an advance copy of any findings and conclusions. They can then comment as they see fit on those findings and how those findings might appear.*

*1. During the period 1 November 2013 – 29 December 2014 has the Cabinet Office met with and or exchanged correspondence and communications (including emails) with any of the individuals listed below and or their representatives or any employees and or legal advisers acting on their behalf? Please note that I am only interested in correspondence and communications and or meetings which relate to the Chilcot Enquiry [sic], its remit, the evidence submitted to that enquiry, the issue of whether that evidence should be published and in what form and the timing of that publication.*

*The relevant individuals are .....*

*The Rt Hon Tony Blair. The former Prime Minister  
Alastair Campbell. The former Downing Street Director of Communications*

*Lord Goldsmith. The former Attorney General.*

*Geoff Hoon. The former Defence Secretary.*

*Jonathan Powell. The former Downing Street Chief of Staff.*

*John Prescott, the former Deputy Prime Minister.*

*Jack Straw. The former Foreign Secretary.*

*2. If the answer to the above questions is yes can you please provide a schedule of all relevant documents held. In the case of each individual or any employees and or legal advisers acting on their behalf can you please provide a list of all letters, faxes and emails sent by them to the Cabinet Office. Can you provide the dates and times of the email exchanges and in each case can you identify if there was a response from the Cabinet Office. In the case of each individual and or their representatives or any employees and or legal advisers can you please provide the dates and times of relevant telephone conversations and meetings with the Cabinet Office.*

*3. In the case of each of the aforementioned individuals and or their representatives or any employees and or legal advisers can you please*

*provide copies of all relevant correspondence and communications received by the Cabinet Office. This correspondence and communication will include but will not be limited to letters, faxes, emails as well as notes and or transcripts and or recordings of telephone conversations. Can you please also provide copies of any correspondence and communications including emails sent to each of the aforementioned individuals and or their representatives and or their legal advisers by the Cabinet Office."*

5. On 29 January 2015, the Cabinet Office responded. It refused to confirm or deny that it held the requested information and cited section 41(2) (information in confidence) as its basis for doing so.
6. The complainant requested an internal review on 3 February 2015. The Cabinet Office sent him the outcome of its internal review on 18 March 2015. It upheld its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 8 April 2015 to complain about the way his request for information had been handled. He objected to the Cabinet Office's use of section 41(2).
8. The Commissioner has considered whether the Cabinet Office is entitled to rely on section 41(2) as a basis for refusing to confirm or deny whether the requested information is held.

### **Reasons for decision**

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#### *Background*

9. The former Prime Minister, Gordon Brown, announced on 15 June 2009 that an Inquiry would be conducted to identify lessons that can be learned from the Iraq conflict. Headed by Sir John Chilcot, the Inquiry is commonly referred to as the "Chilcot Inquiry" although its official title is the "Iraq Inquiry".<sup>1</sup> A large number of individuals gave evidence including those named in the request.

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<sup>1</sup> <http://www.iraquinquiry.org.uk/>

10. On 4 November 2013, Sir John Chilcot wrote to the Prime Minister on the subject of Maxwellisation – where those criticised in an Inquiry have an opportunity to comment on proposed criticism prior to publication of any report.<sup>2</sup>
11. As at the date of this notice, the Chilcot Inquiry has yet to report. The continued delay is the subject of regular comment and speculation. The Commissioner recognises that the ongoing delay is particularly agonising for those whose family members lost their lives or suffered injury in the conflict. Updates as to the latest position with regard to the report of the Inquiry's findings can be found on its website.

*Neither confirm nor deny*

12. Section 1 of the FOIA sets out a two-part right to know. In accordance with the first part (section 1(1)(a)), a public authority must confirm or deny whether it holds information that is described in a request made to it. In accordance with the second part (section 1(1)(b)), a public authority must provide that information. Exemptions can apply to both parts.

*Section 41(2) – Would confirmation or denial give rise to an actionable breach of confidence?*

13. Section 41(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”

14. In other words, if providing confirmation or denial would, of itself, constitute an actionable breach of confidence, the Cabinet Office is not obliged to do it.
15. Section 41(2) should be read in conjunction with section 41(1) which applies where disclosure of requested information would constitute an actionable breach of confidence. It explains more about the circumstances in which a disclosure can be actionable.
16. Section 41(1) provides that “Information is exempt information if-

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<sup>2</sup> [http://www.iraquinquiry.org.uk/media/54976/2013-11-04\\_Chilcot\\_Cameron.pdf](http://www.iraquinquiry.org.uk/media/54976/2013-11-04_Chilcot_Cameron.pdf)

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) 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.”
17. Section 41(2) is an absolute exemption so the Commissioner does not have to consider the balance of the public interest to determine whether the information can be disclosed. However, the common law duty of confidence contains an inherent public interest test. The Commissioner has therefore also considered this in order to decide if the Cabinet Office can rely on section 41(2).
18. To reach a decision on whether section 41(2) applies, the Commissioner will first determine whether the requested information, if held, would have been obtained by the Cabinet Office from a third party as described in section 41(1)(a). The Commissioner did not seek to ascertain whether the requested information is actually held, nor did the Cabinet Office provide confirmation or denial on this point. In the Commissioner's view, the Cabinet Office's position depends on the merits of its arguments. The Commissioner does not need to know whether the information is held or not in order to make a decision.

Was the information obtained from a third party?

19. Given the manner in which the first and second part of the complainant's request is phrased – seeking as they do correspondence the Cabinet Office has *received from* named individuals or material which evidences information provided by them – it is clear that if information were held falling within the scope of these parts of the request it would have been provided to the Cabinet Office by a third party.
20. In respect of the third part of the request the Commissioner notes that this solely seeks information created by the Cabinet Office. Furthermore, any such information may not evidence information provided to it by any of the named individuals. However, in the Commissioner's view if such information were held, it would be logical to assume that this would be because previous correspondence had been received by the Cabinet Office originating from the Inquiry indicating that one or more of the individuals were to be subjected to the Maxwellisation process.
21. Thus if the Cabinet Office confirmed whether or not it held information falling within the scope of the third part of the request it would in effect be confirming whether or not it held information falling within the scope of the first two parts of the request. Consequently, in the circumstances

of this particular request, although the Cabinet Office would not have received the information that is sought by the third part of the request (if indeed any such information is held), confirmation as to whether or not it held such information would nevertheless still confirm whether or not the Cabinet Office had actually received information from a third party.

Would confirmation or denial that information is held constitute a breach of confidence?

22. The test of confidence was established in the High Court case of *Coco v A N Clark (Engineers) Limited [1968] FSR 415* ("Coco vs Clarke"). For the Commissioner to find that provision of confirmation or denial that the requested information is held would, of itself, constitute a breach of confidence, it must be shown that:

- the requested information would have the necessary quality of confidence,
- if it had been imparted, the requested information would have been imparted in circumstances importing an obligation of confidence, and
- unauthorised use of the information, if held, would be of detriment to the confider.

*Information has the necessary quality of confidence*

23. Information will have the quality of confidence if it is more than trivial and not otherwise accessible. The information does not have to be particularly sensitive, but it must be more than trivial.

24. It is not inevitable that any of the individuals listed would only have an exchange of correspondence with the Chilcot Inquiry as part of the process of Maxwellisation, that is, only if they were provisionally criticised. There may have been trivial reasons for an exchange of correspondence, for example, checking spelling. However, the clear implication would be that the Cabinet Office would only hold the requested information where the named individual had been provisionally criticised in the report and was being contacted as part of the Maxwellisation process. Confirmation or denial in respect of each individual would, by implication, provide a check list of who has and who has not been provisionally criticised in the Chilcot Inquiry's report. The report is not yet available and therefore whether or not a person has been contacted as part of the Maxwellisation process would not be widely known.

25. The Commissioner is satisfied that this information – whether or not an individual has been provisionally criticised by the report (which is an inevitable conclusion where confirmation or denial is provided) - has the necessary quality of confidence. It is far from trivial and is not widely known.
26. That said, the Commissioner put it to the Cabinet Office that former Prime Minister, Tony Blair, has made public statements to the effect that it is not he who is causing a delay in the Chilcot Inquiry publishing its findings. From this statement, it is possible to speculate that he has been contacted by the Chilcot Inquiry as part of the Maxwellisation process, that is, that he has been provisionally criticised.<sup>3</sup>
27. The Cabinet Office firmly refuted the suggestion Mr Blair's statement amounted to confirmation or denial that he had been engaging with the Chilcot Inquiry as part of the Maxwellisation process. It said that the statement is a short comment from Tony Blair's office that Mr Blair is not behind the delays.
28. The Commissioner accepts that the statement from Tony Blair's office is a brief commentary on Mr Blair's regret at the ongoing delay and a repetition of denial that he is the cause of it. The statement also says that: "Incorrect allegations and politically motivated speculation do nothing to shine a light on the issues involved. It is an independent inquiry and it should be allowed to proceed with its work."
29. The Commissioner accepts that Mr Blair's statement is not evidence that he has been contacted as part of the Maxwellisation process. To consider it evidence of such contact would be speculation.

*Information would have been imparted in circumstances importing an obligation of confidence*

30. The Cabinet Office drew the Commissioner's attention to a section of the Chilcot Inquiry website on the subject of Maxwellisation.<sup>4</sup> The Commissioner also notes the detail of Sir John Chilcot's letter to the

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<sup>3</sup> <http://www.tonyblairoffice.org/news/entry/statement-on-the-delay-of-the-chilcot-report/>

<sup>4</sup> <http://www.iraqinquiry.org.uk/background/protocols/witnesses.aspx> (paragraph 30)

Prime Minister dated 15 July 2013. The confidentiality of the Maxwellisation process is expressly set out.<sup>5</sup> Sir John states in his letter:

"The Inquiry will not comment on either the number of or the identity of the individuals it intends to criticise".

31. The Commissioner concludes that the question of contact with the Chilcot Inquiry as part of the Maxwellisation process is covered by a clear expectation of confidentiality. The requested information, where it is held, would be imparted from the persons listed in the request in circumstances importing an obligation of confidentiality. This includes an obligation of confidentiality as to whether a person has submitted correspondence at all as part of the Maxwellisation process.

*Unauthorised use of the information would be of detriment to the confider*

32. The Cabinet Office's approach is to refuse to confirm or deny whether it holds information in respect of any of the listed persons. It would be absurd to deny that some of the listed persons are in contact with the Chilcot Inquiry as part of the Maxwellisation process but to refuse to confirm or deny whether information about such contact is held in respect of others. The clear implication would be that where there is a refusal to confirm or deny for others, the person to whom that relates is, in fact, in correspondence with the Chilcot Inquiry because they have been provisionally criticised. Failure to maintain a consistent approach with regard to confirmation or denial would undermine its use. It would be of detriment to those, if any, on the list who had provided comment on proposed criticism and who had done so with the expectation of confidentiality during the Maxwellisation process.
33. The Commissioner is mindful of the First-Tier Tribunal's decision in the case of *Bluck v ICO & Epsom and St Helier University Hospital NGHS Trust [EA/2006/0090]*<sup>6</sup>. Paragraph 15 states that the loss of privacy can be a detriment in its own right. There is no need therefore for there to be any detriment to the confider in terms of tangible loss in order for information to be protected by the law of confidence because the loss of privacy in its own right is sufficient.

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<sup>5</sup> [http://www.iraqinquiry.org.uk/media/54877/2013-07-15\\_Chilcot\\_Cameron.pdf](http://www.iraqinquiry.org.uk/media/54877/2013-07-15_Chilcot_Cameron.pdf)

<sup>6</sup>

<http://www.informationtribunal.gov.uk/DBFiles/Decision/i25/mrspbluckvinformationcommissioner17sept07.pdf#page=8>

34. Over and above this is the effect of provisional criticism in this case. Where anyone is criticised by the Chilcot Inquiry, even provisionally, their reputation will suffer considerable damage, regardless of whether or how they defend themselves following publication.
35. In light of the above, the Commissioner is satisfied that unauthorised use of the information would be of detriment to the confiders, where they have confided. The Cabinet Office argues that it must hold a "neither confirm nor deny" line in respect of all those listed in the request to avoid differentiation between those who have and those who have not been contacted about provisional criticism. The Commissioner accepts this.
36. As noted above, although the three steps identified in *Coco vs Clarke* have been satisfied, the Commissioner must now consider the inherent public interest test within the common law duty of confidence.

*Inherent public interest test*

37. The Commissioner acknowledges that there is a public interest in knowing whether any of the persons listed in the request have been provisionally criticised. The Chilcot Inquiry has yet to report and the delay is, itself, the subject of much comment and criticism. Arguably there is a public interest in "forcing the issue" through confirmation or denial in this case, in order to negate the effects of the ongoing delay. The Commissioner believes that there remains a compelling public interest in learning as much as possible about the decision making process which led to the invasion of Iraq in 2003.
38. The Cabinet Office acknowledged this latter point but argued that this considerable public interest will be served once the Inquiry issues its report.
39. The Cabinet Office also argued that there is a stronger public interest in preserving the confidentiality of the process of Maxwellisation. It said that Sir John Chilcot was clear from the outset that this process may well be needed and, where it is, it should be carried out in confidence. To undermine that confidence would be contrary to the public interest.
40. The Commissioner considers that the public interest in providing confirmation or denial does not outweigh the public interest in maintaining the confidentiality of the process of Maxwellisation. There is a public interest in pressing for the report to be published which could be served by confirmation or denial in this case. The role of many of the individuals listed in the request has been called into question and there is considerable speculation about who will be criticised in the report and to what extent they will be criticised. However, the Commissioner does

not think that the Cabinet Office would have a public interest defence for breaching its duty of confidence. The process of Maxwellisation must remain confidential. The Cabinet Office is therefore not obliged to comply with section 1(1)(a) by virtue of section 41(2).

41. The Commissioner understands the frustration and distress that continued delay has caused. However, he is aware of no evidence (as opposed to speculation) which indicates that the Inquiry will not provide a comprehensive report when it is in a position to do so. The process of Maxwellisation would be circumvented by confirmation or denial under FOIA. The Commissioner has decided that the Cabinet Office would not be able to defend the provision of confirmation or denial under the FOIA as being in the public interest.

## Right of appeal

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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 123 4504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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 .....**

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**