

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 25 April 2016

**Public Authority:** Cabinet Office

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested 13 March and 17 March 2003 Cabinet minutes. The Cabinet Office cited section 22 (information intended for future publication) as its basis for refusal and upheld this at internal review. During the Commissioner's investigation, the Cabinet Office introduced reliance on section 35 (ministerial communications) for that information in the minutes which did not cover the subject of Iraq.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 22(1) as its basis for withholding the 13 March and 17 March 2003 minutes where they relate to the subject of Iraq. The Cabinet Office is entitled to rely on section 35(1)(b) as its basis for withholding the remainder of the requested information.
3. No steps are required.

#### **Request and response**

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4. On 12 February 2015, the complainant requested information of the following description:
5. "I have previously made Freedom of Information requests for disclosure of the minutes of Cabinet meetings held on 13 and 17 March 2003 preceding the invasion of Iraq. These requests, which gained the support of the Information Commissioner and, in the first case, the majority of the Information Tribunal, were subject to the Ministerial Veto in 2009 and 2012.

In the context that the Cabinet Office, under its Protocol with the Chilcot Inquiry, has agreed to the declassification of Cabinet minutes amongst a larger tranche of Cabinet records, I make a third request for the disclosure of minutes for the Cabinet meetings referred to above.

I make this request, firstly, to test and challenge the reasons for refusal to disclose in the cases of the two previous requests and the grounds for applying the Ministerial Veto. Central to both remains the argument that any form of public disclosure of such minutes would irreparably damage the constitutional convention of Cabinet collective responsibility and its confidentiality principle.

The decision to declassify these documents, or parts there-from, I argue countermands the contention that disclosure threatens to irreparably damage Cabinet collective responsibility. I further argue that the decision to declassify casts substantive doubt on the veracity of this contention when it was first used in order to refuse disclosure.

I submit the view in support of this new Freedom of Information request that the public interest in disclosure of these minutes remains as strong as ever. For example, the minutes of the Cabinet meeting of 13 March 2003 could show whether Prime Minister Tony Blair consulted and took the views of his Cabinet before declaring Saddam Hussein in further material breach of UNSCR1441 on 14-15 March, a unilateral action without a majority decision of the UN Security Council, which effectively set this country on the road to war. This Cabinet meeting was the last opportunity for such deliberation. There can be no guarantee that the Chilcot Report will address this specific question.

Disclosure of the Cabinet minutes for 17 March 2003, far from endangering the principle, would reveal whether the free and frank debate requisite for Cabinet collective responsibility was effectively ruled out by how the meeting was managed by senior Cabinet ministers.

If so, such a failure of the Cabinet to check and balance the Prime Ministerial Office and its sofa government is strongly in the public interest to expose."

6. On 19 March 2015, the Cabinet Office responded. It refused to provide the requested information. It cited the following exemptions as its basis

for doing so: section 22 (1)(a), (b) and (c) (Information intended for future publication).

7. The complainant requested an internal review on 23 March 2015. He wrote to the Cabinet Office again on 25 March 2015 to draw attention to the Supreme Court ruling on the use of the ministerial veto regarding disclosure of Prince Charles' correspondence. The Cabinet Office sent him the outcome of its internal review on 11 May 2015. It upheld its original position.

### Scope of the case

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8. The complainant contacted the Commissioner on 24 May 2015 to complain about the Cabinet Office's refusal of his request. Specifically, he raised concerns about the likelihood that the Chilcot Inquiry would only publish part of the requested minutes. He said:

"The problem with the first passage [of the Cabinet Office's letter to him] is that it remains very unclear just how much of 'the information on Iraq contained in the minutes of Cabinet of 13 and 17 March 2003.' will be published in the Report or on its website. In the evidence of Sir John Chilcot before the Foreign Affairs Select Committee on 4 February 2015, he discloses that the Inquiry had seen and digested 150,000 government documents- no doubt accounting for some of the delay in publishing the Report- but that only 7,000 documents- or 5 per cent- would be published in part or as 'gists'. He later clarified that only 1,500 documents- or 1 percent of the total seen by the Inquiry panel- would be published in full. The 200 Cabinet and Cabinet committee papers referred to by Chilcot relate to the 150,000 documents the Inquiry has seen not to the very substantially smaller percentage which will be published in the Report.

The greater part of what is published will appear in such a way as to endorse the 'narrative' of the Report.

I have an extreme scepticism, therefore, that these minutes will be published unexpurgated [sic] and in full".

9. During the Commissioner's investigation, the Cabinet Office sought reliance on the exemptions at section 35(1)(a),(b) in relation to that information in the minutes which did not cover matters relating to the invasion of Iraq. It had, at first, considered these outside the scope of the complainant's request. The Commissioner had insisted that the request was clearly for the minutes in their entirety and, as such,

everything in the minutes regardless of whether it related to or referred to Cabinet discussions on Iraq.

10. The Commissioner has considered whether the Cabinet Office is entitled to rely on section 22(1) and section 35(1)(a) and (b) as its basis for withholding the requested information.

## Reasons for decision

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### Background

11. 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>
12. 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.
13. Requests similar, though more specific, to the one under consideration here have been made before under the FOIA. A ministerial veto was issued in February 2009 to prevent the disclosure of the minutes.<sup>2</sup> A ministerial veto was also issued in response to a similar request in 2012.<sup>3</sup>

### Section 22(1)

14. Section 22(1) states that information is exempt from disclosure if;
  - (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

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

<sup>2</sup> [http://news.bbc.co.uk/1/hi/uk\\_politics/7907991.stm](http://news.bbc.co.uk/1/hi/uk_politics/7907991.stm)

<sup>3</sup> <https://www.gov.uk/government/news/attorney-general-vetoes-release-of-cabinet-meeting-minutes-discussing-iraq-war--4>

(b) the information was already held with a view to such publication at the time when the request for information was made, and  
(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

15. The Cabinet Office explained that the information in the minutes which relates to Iraq is intended for publication by the Iraq Inquiry. It explained that on 22 January 2014, the Cabinet Office wrote to the Chilcot Inquiry confirming agreement to the publication by the Chilcot Inquiry of "the 'full extract' from the 13 March 2003 and 17 March 2003 Cabinet Conclusions. In the case of the 17 March 2003 document, this amounted to the whole document (Iraq was the only topic discussed on 17 March 2003)".<sup>4</sup>

16. The term "Cabinet Conclusions" is explained on the website of The National Archives as follows:

"What are normally considered 'minutes' are called 'conclusions' in the Cabinet papers. Conclusions show what was decided and also a summary of opinions and ideas discussed. They are phrased to emphasise agreement rather than division. Detail of discussion on the pros and cons of a particular policy may be included, but it was not the purpose of the secretary to record the viewpoint of individuals. Conclusions do not contain records of voting and decisions were presented as unanimous, in accordance with the principle of the unity of Cabinet. A fuller account of who-said-what can be found in the Cabinet Secretary's notebook record for that particular meeting."<sup>5</sup>

17. The Commissioner is satisfied that "the 'full extract' from the 13 March 2003 and 17 March 2003 Cabinet Conclusions" means the requested minutes insofar as they relate to the matter of Iraq, that is, "the minutes of Cabinet meetings held on 13 and 17 March 2003 preceding the invasion of Iraq" as set out in the complainant's request.

18. The Cabinet Office explained to the Commissioner that 13 March 2003 minutes included a section unrelated to Iraq which is not to be published because it is not within the scope of the Inquiry's work – this section will be addressed later in this notice. It also explained that the 17 March 2003 minutes are solely on the subject of Iraq.

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<sup>4</sup> [http://www.iraqinquiry.org.uk/media/55103/2014-05-28\\_Chilcot\\_Heywood.pdf](http://www.iraqinquiry.org.uk/media/55103/2014-05-28_Chilcot_Heywood.pdf)

<sup>5</sup> <http://www.nationalarchives.gov.uk/cabinetpapers/cabinet-gov/how-the-records-work.htm>

19. In order to correctly rely on section 22, there must have been a settled intention to publish the requested information prior to the request being received.
20. The Commissioner is aware of the 'Protocol between the Iraq Inquiry and Her Majesty's Government regarding Documents and Other Written and Electronic Information' which deals with the declassification of government documents.<sup>6</sup> In the light of this Protocol, the letter at Note 4 and the assertions of the Cabinet Office in its correspondence on this particular case, the Commissioner is satisfied that there is a settled intention to publish the requested minutes insofar as they relate to Iraq. He is also satisfied that this intention to publish predates the request itself.
21. As regards the question of whether it was reasonable in all the circumstances of the request to withhold the information until it is to be published, the Cabinet Office supplied a somewhat circular argument. It said that it was reasonable to apply the exemption because there is a settled intention to publish. It provided no further submissions on this point.
22. The Commissioner notes that at end of page 3 of a letter from Sir John Chilcot to Prime Minister David Cameron dated 13 July 2012, he spoke of the intention to avoid "piecemeal" disclosure of information.<sup>7</sup> He reiterated this point when giving evidence the Foreign Affairs Select Committee on 4 February 2015.<sup>8</sup> The Cabinet Office made reference to this as part of its arguments regarding the balance of public interest – addressed later in this notice. However, the Commissioner believes it is pertinent to the question of reasonableness. The Cabinet Office should also have advanced it at this point. Where the established approach is to avoid "piecemeal" disclosure, the Cabinet Office could have advanced an argument as to reasonableness where it maintains this approach.

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/61337/protocol.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61337/protocol.pdf)

<sup>7</sup> <http://www.iraqinquiry.org.uk/media/54266/2012-07-13%20chilcot%20cameron.pdf>

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<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/progress-of-the-iraq-inquiry/oral/17950.html> (Q30)

23. In the circumstances, the Commissioner accepts that there was a settled intention to publish the information prior to the request and that accordingly section 22(1) is engaged. He also considers that it was reasonable for the CO to maintain its reliance on future publication, rather than publish the information in response to the request, given the stated approach of the Chilcot Inquiry to avoid "piecemeal" disclosure of information. The Commissioner accepts that it could be construed as unreasonable to undermine this approach. The Commissioner's conclusion is consistent with other decisions taken by the Commissioner in relation to documents intended for release in due course by the Iraq Inquiry.

### **Public interest test**

24. The exemption at section 22(1) is qualified by a public interest test. Therefore, the Commissioner has considered whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosure at the time of the request.
25. In favour of the public interest in disclosing the requested information, the Cabinet Office acknowledged a "clear public interest in understanding how UK decision making evolved in the run-up to the war in Iraq". It argued that this public interest would be met when the Chilcot Inquiry publishes its report. It said that this was likely to be June or July 2016.
26. The Cabinet Office argued that the greater public interest lies in allowing the Chilcot Inquiry to complete its work without hindrance or outside interference. Premature disclosure of documents, without the context provided by the Inquiry's report would not assist the public understanding of the issues involved and would be likely to undermine the conclusions of the Inquiry before it is able to report.
27. The Cabinet Office also stressed that successive UK governments placed considerable importance in the confidentiality of Cabinet discussions in order to maintain a safe space for government decision making. Although disclosure of the requested minutes had been agreed as part of the publication of the Chilcot Inquiry's report, it implied that this did not set a precedent for the disclosure of Cabinet minutes.
28. The complainant, on the other hand, has expressed considerable scepticism as to whether the full minutes will ever be published. He has drawn attention to what he views as semantic nuances in Sir John Chilcot's published letters to the Prime Minister which suggest that disclosure will be not be as extensive as promised. The Commissioner

acknowledges this point. However, he does not consider that it carries sufficient weight to override maintenance of the exemption at section 22 in this case.

29. The Commissioner also acknowledges that there has been a longer than expected wait for publication of the Chilcot Inquiry's report. He accepts that there is a public interest in "forcing the issue" and making public information which may be key to the decision making process on this matter.
30. However, in the circumstances, the Commissioner accepts that there is a stronger public interest in publishing the relevant withheld information at the same time as the Chilcot Inquiry's report. He accepts that piecemeal disclosures of material relevant to the Inquiry's report could potentially disrupt the work of the Inquiry and possibly also undermine it. Therefore it is both reasonable and in the public interest to avoid making piecemeal disclosures in order for the public to have a full picture of the Inquiry's findings.

## **Section 22 - Conclusion**

31. Therefore, the Commissioner finds that, in all the circumstances of the case, the public interest in maintaining the exemption at section 22(1) outweighs the public interest in disclosing the information withheld on that basis.

## **Section 35**

32. Section 35 is a class-based exemption. This means that if, as a matter of fact, information falls within any of the categories listed in that section, it is exempt. It has been applied, in this case, to information in the 13 March 2003 minutes which did not cover matters relating to the invasion of Iraq.
33. Section 35(1)(b) states that information held by a government department is exempt if it relates to ministerial communications. Self-evidently, the information relates to ministerial communications – minutes of a meeting between ministers clearly relate to ministerial communications.
34. The Commissioner is therefore satisfied that the requested information which is not related to Iraq falls within the category of ministerial communications and that, therefore, it is exempt information under section 35(1)(b).



## Balance of public interest

35. Having found that the exemption is engaged, the next step is to consider the balance of the public interest. As with section 22 above, when balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.
36. Arguably, there is a public interest in knowing the extent to which matters other than Iraq were discussed at Cabinet and whether those matters in some way had an impact on any discussion of Iraq. There is also a public interest in understanding whether and to what extent the question of Iraq impacted on discussion of matters unrelated to it. In addition, there is a general public interest in openness and transparency which could be served by disclosure in this case.
37. However, the Commissioner thinks there is a stronger public interest in preserving the integrity of the collective decision making process in Cabinet and the safe space in which such discussions are held. This is usually described as preserving the convention of collective responsibility.
38. Collective responsibility is the longstanding convention that all ministers are bound by the decisions of the Cabinet and carry joint responsibility for all government policy and decisions. It is a central feature of the UK's constitutional system of government. Ministers may express their own views freely and frankly in Cabinet and committees and in private, but once a decision is made they are all bound to uphold and promote that agreed position to Parliament and the public. This principle is set out at paragraph 2.1 of the Ministerial Code (May 2010):

"The principle of collective responsibility, save where it is explicitly set aside, requires that ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and ministerial committees, including in correspondence, should be maintained."
39. While the Commissioner notes that the information in question is over 12 years old (as at the date of this notice), he does not consider that the public interest in protecting this convention has diminished in relation to the information in question.

## **Section 35 - conclusion**

40. The Commissioner is therefore satisfied that the public interest in maintaining the exemption at section 35(1)(b) outweighs the public interest in disclosing those parts of the requested minutes which do not relate to Iraq. In reaching this view, he has given particular weight to the public interest in preserving the convention of ministerial collective responsibility.
41. Given the Commissioner's decision as regards section 35(1)(b), he has not gone on to consider section 35(1)(a) which the Cabinet Office also applied to this information.

## 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 1234504

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** .....

**Gerrard Tracey**  
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