

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 October 2018

Public Authority: Foreign & Commonwealth Office

Address: King Charles Street

London

SW1A 2AH

Decision (including any steps ordered)

1. The complainant has requested a copy of a letter he believes was sent to the European Commission by the then-Foreign Secretary.
2. The Commissioner's decision is that, on the balance of probabilities, the Foreign & Commonwealth Office ("the FCO") does not hold the requested information and has therefore complied with its duties under Section 1 of the FOIA.
3. The Commissioner does not require any further steps.

Background

4. The background to this case relates to the UK Government's nationalisation of Bradford & Bingley plc in 2008. As part of that process, the Government was required to seek state aid approval, for the takeover, from the European Commission as it involved the use of taxpayers' money to support a private enterprise.
 5. On 1 October 2008, Neelie Kroes, the then European Commissioner for Competition, wrote a letter, addressed to the then-Foreign Secretary David Miliband, notifying him that approval had been granted.¹
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¹ http://ec.europa.eu/competition/state_aid/cases/227662/227662_884717_21_2.pdf

Request and response

6. On 7 February 2018, the complainant wrote to the FCO and requested information in the following terms:

"I would appreciate details of correspondence between David Miliband and the EC from the 26-09-2008 to the 1-10-2008"

7. The FCO responded on 23 February 2018. It stated that it held no information within the scope of the request.
8. Following an internal review the FCO wrote to the complainant on 27 March 2018. It stated that it had carried out extensive searches but had been unable to locate information within the scope of the request.

Scope of the case

9. The complainant contacted the Commissioner on 28 March 2018 to complain about the way his request for information had been handled.
10. As Ms Kroes' letter is already in the public domain and the complainant already has a copy, the Commissioner has not considered this document as part of her analysis.
11. The analysis that follows considers whether further information was held within the scope of the request.

Reasons for decision

Held/Not Held

12. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled –

- (a) *to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) *if that is the case, to have that information communicated to him.*

The complainant's position

13. The complainant has cited Ms Kroes' letter of 1 October 2008 as evidence that the FCO holds (or, at least, should hold) correspondence to the Commission. Ms Kroes' letter was clearly responding to earlier correspondence and therefore, he argues, it stands to sense that the earlier correspondence must have existed (and therefore been held).
14. The complainant also believes that the UK Government in general is attempting to prevent "the truth" about the process of nationalisation from being known.
15. The complainant represents numerous former shareholders of Bradford & Bingley who saw the value of their shares plummet in 2008.² He argues that there is a pressing public interest in understanding why that decision was taken and whether there are lessons that can be learnt, should a similar situation occur.

The FCO's position

16. The FCO has stated to the Commissioner that it holds no records of any correspondence from Mr Miliband to the European Commission in that time period and that, in all likelihood, none ever existed.
17. The FCO carried out searches of the relevant business areas within the Foreign Office building in London and the offices of the Permanent Representative of the United Kingdom to the European Union (UKREP). The searches have been both of manual files and electronic keyword searches. No information has been located.
18. In accordance with the FCO's internal guidance and the Public Records Act, important items of correspondence should normally be preserved so that they can eventually be transferred to the National Archives. Correspondence emanating from the Secretary of State would not normally be kept within the Private Office, but would be retained by the appropriate business area.
19. After some prompting, the FCO eventually informed the Commissioner that all correspondence from the European Commission to a member government is sent to the Permanent Representative for that member state and, as a courtesy, addressed to the most senior Foreign Minister

² The shareholders argue that most of the loss in value occurred because of nationalisation (and the forced dismantling that followed). The Government argues that the shares had already lost most of their value before it stepped in.

(or equivalent) in the government of that member state. This process occurs regardless of which part of the government the correspondence is aimed at and regardless of which part of a government the Commission is responding to correspondence from.

20. Whilst the FCO cannot categorically rule out the correspondence originating within the FCO, it believes it to be unlikely given the nature of the issue. According to the FCO, the most likely department would be either the Treasury or from the then-Department for Business, Enterprise & Regulatory Reform (now Department for Business, Enterprise & Industrial Strategy). Even if the correspondence did originate from the FCO, the FCO no longer holds it.

The Commissioner's view

21. The Commissioner's view is that, on the balance of probabilities, the FCO does not hold the requested information.
22. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, she will consider any reason why it is inherently likely or unlikely that information is not held.
23. 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 the balance of probabilities.
24. The Commissioner considers that the FCO has carried out thorough and relevant searches for the requested information. She considers it likely that these searches would have uncovered the requested information – if it were held.
25. Ms Kroes' letter refers to correspondence having been received from "UK authorities" in general and not Mr Miliband specifically. Regardless of which part of the UK Government the correspondence to which Ms Kroes was replying to came from, her response would have been addressed to Mr Miliband. Therefore the Commissioner considers that, whilst there is almost certain to have been some correspondence which preceded the letter, there is no reason to believe that this correspondence must have come from Mr Miliband.
26. Given the nature of the matter being discussed (ie. the health of financial institutions in the UK), the Commissioner considers that it is

much more likely that any correspondence would have come from another department, such as the Treasury, although she takes no position in this decision notice as to whether any other department may hold the requested information.

27. The Commissioner therefore concludes that the information requested (ie. a letter from David Miliband) most likely never existed.

Other matters

28. Whilst not amounting to a statutory breach of Section 16 (Advice & Assistance), the Commissioner considers that, had the FCO handled the request differently, a complaint to the Commissioner might have been avoided.
29. It is clear from the complainant's request for an internal review (and, the Commissioner is led to believe, from an earlier exchange of correspondence between the complainant and the FCO) that the complainant's assertion that the FCO should hold a copy of a letter from Mr Miliband was based on the fact that Ms Kroes' letter was addressed to David Miliband and clearly referenced previous correspondence. This was an entirely reasonable assumption for someone unfamiliar with the customs of the European Commission to make.
30. Had the FCO pointed out to the complainant, at an earlier stage the process, the courtesies that are set out in paragraph 19, the Commissioner considers it likely that this matter could have been resolved at an earlier stage. She is therefore surprised that the FCO did not mention them to the complainant in any of its correspondence and only mentioned it to her after prompting.

Right of appeal

31. 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

32. 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.
33. 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

Ben Tomes
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