



Tribunals Service
Information Tribunal

Information Tribunal Appeal Number: EA/2007/0047
Information Commissioner's Ref: FS50072316

Heard at Field House, London, EC4
On 7 and 8 December 2007

Decision Promulgated
22 January 2008

BEFORE

CHAIRMAN

CHRIS RYAN

and

LAY MEMBERS

MALCOLM CLARKE
PAUL TAYLOR

Between

FOREIGN AND COMMONWEALTH OFFICE

Appellant

and

INFORMATION COMMISSIONER

Respondent

Representation:

For the Appellant: James Eadie
For the Respondent: Timothy Pitt Payne

Decision

The Tribunal upholds the decision notice dated 3 May 2007 and dismisses the appeal save that it directs a minor redaction to be made to the information to be disclosed.

Reasons

Introduction.

1. The issue arising on this appeal is whether public disclosure should have been made under Section 1 of the Freedom of Information Act 2000 (FOIA), of a previously unpublished early draft of the dossier published by the Government on 24 September 2002 entitled "Iraq's Weapons of Mass Destruction: The Assessment of the British Government" (the Dossier). The Foreign and Commonwealth Office (FCO) has objected to disclosure on the basis that the draft is exempt information under FOIA section 36 (prejudice to the effective conduct of public affairs) and the public interest in maintaining that exemption at the time when the request was refused outweighed the public interest in disclosure. The FCO has also argued that, even if the draft as a whole should be disclosed, certain manuscript annotation applied to it should be redacted because it constitutes exempt information under both FOIA section 36 and section 27 (prejudice to international relations).

The Request for Information and Complaint to the Information Commissioner

2. On 9 February 2005 Mr Christopher Ames made a Freedom of Information request to the FCO in the following terms:

"I would like to make a request under the Freedom of Information Act to see a draft of the September Dossier on 'Iraq's Weapons of Mass Destruction' which according to John Scarlett, was produced by John Williams. It was referred to in an e-mail from Daniel Pruce as 'John's draft of [9 September 2002]'".

We will refer to the document requested as "the Williams draft".

3. The request was refused by a letter from the FCO dated 20 May 2005 on the basis that the information requested fell under the exemption in section 36(2) of FOIA because it was the reasonable opinion of a qualified person (in this case the Foreign Secretary) that release would, or would be likely to, inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. It was said that the balance of public interest in maintaining that exemption outweighed the public interest in disclosure. The refusal was maintained, following an internal review, the results of which were communicated to Mr Ames by a letter dated 11 August 2005.
4. Mr Ames complained to the Information Commissioner on 9 September 2005 who, having investigated the complaint, issued a Decision Notice dated 3 May 2007. In it the Information Commissioner decided that the section 36(2) exemption was

engaged (a point that is not challenged on this Appeal) but that the public interest in maintaining that exemption did not outweigh the public interest in disclosure. He concluded, in particular, that the risk of civil servants being deprived in the future of the necessary space for deliberation as the result of publication of draft documents was reduced, in the circumstances of Mr Ames' request, by two factors. First, the time that had elapsed since the preparation of the Williams draft. Between the Dossier being published in September 2002 and Mr Ames making his request in February 2005 coalition forces had invaded Iraq in March 2003 and in May 2003 the US President had announced the end of major combat operations. The second factor was the amount of information that was already in the public domain in relation to the process of preparing the Dossier. This was largely as a result of the Inquiry into the Circumstances surrounding the death of Dr David Kelly CMG conducted by Lord Hutton in September and October 2003 and the publication of his report and accompanying evidence in January 2004 (the Hutton Report).

5. The Information Commissioner concluded that there was a strong public interest in disclosure in order better to inform the public as to the process followed in preparing the Dossier and that the balance was in favour of disclosure.

Appeal to the Information Tribunal

6. On 30 May 2007 the FCO appealed to this Tribunal. The basis of its appeal was that the Information Commissioner had been correct in finding that the Williams draft constituted exempt information under FOIA section 36(2) but that he had been wrong to conclude that the public interest in maintaining that exemption did not outweigh the public interest in disclosure. The FCO also argued, in the alternative, that if the Williams draft as a whole should be disclosed manuscript annotation that had been added to it at a certain point should not be disclosed. On this issue it relied on FOIA section 27, as well as section 36(2). The nature of the information under consideration necessitated some of the parties' submissions being set out in confidential documents and part of the hearing of the Appeal on 6 December 2007 being held in private session. This decision has annexed to it a confidential schedule which deals with information and argument in relation to the section 27 issue, which may not be made public, for the same reason.
7. The relevant parts of FOIA section 36 read as follows:

“(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –

(a)...

(b) would, or would be likely to, inhibit –

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation ..”

8. As it is conceded that the exemption is engaged, and that it is a qualified exemption, we must consider FOIA section 2(2), which provides that the obligation to communicate information to a person requesting it:

*“...does not apply if or to the extent that –
 (a)...
 (b) in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”*

9. There is, therefore, an assumption in favour of disclosure in that the factors in favour of maintaining the exemption must outweigh those in favour of disclosure. However, before considering those factors, and the arguments we heard in relation to them, we summarise the evidence we received about the circumstances in which the Williams draft came to be prepared and the contribution it made, if any, to the preparation of the Dossier.

The History of the Williams draft

10. The FCO relied on a witness statement signed by Stephen Pattison. He holds the position in the FCO of Director, International Security. He supplemented his witness statement, and was cross examined on it, at the hearing. He told us that he had been closely involved in the collation and submission of the FCO evidence to the Hutton Inquiry. However, he also made it clear that he had not been involved in the preparation of the Dossier. The summary set out in his witness statement of the circumstances in which the Williams draft came to be created and its role in the preparation of the Dossier was necessarily second hand, therefore.
11. The following events, covering a period of time before the time when Mr Pattison's evidence takes up the story, are recorded in the Hutton Report:
- (i) In February 2002 the Cabinet Office commissioned a paper on weapons of mass destruction in four countries, to be prepared by the assessment staff in the Cabinet Office (a group which prepares intelligence assessments for the Joint Intelligence Committee (JIC)).
 - (ii) In March 2002 the scope of that paper was reduced to cover Iraq only.
 - (iii) On 21 March 2002 the paper was confirmed by the JIC and passed to the Prime Minister's office.
 - (iv) In April 2002 the Counter-Proliferation Department of the FCO was asked by the Cabinet Office to prepare a short paper for possible eventual publication, on the history of weapons inspections in Iraq.
 - (v) By 20 June 2002 the work started in April had developed into a draft dossier covering Iraq's WMD programmes, the history of UN inspections in Iraq and material on human rights abuses.
12. On 3 September the Prime Minister announced that the Government would publish a paper on Iraq's capability in weapons of mass destruction and on the following day the previously prepared materials were circulated to relevant officials in order to remind them of the current state of knowledge on those issues.

13. On 5 September a meeting took place in the Cabinet Office to discuss the overall presentation of the Government assessment announced by the Prime Minister. It was chaired by Alastair Campbell from the Prime Minister's office and was attended by, among others, John Scarlett, then the Chairman of the Joint Intelligence Committee.

14. Mr Pattison's witness statement related that, following this meeting:

"...Mr Williams, working on his own initiative, produced the [Williams draft]. The document was not requested by the dossier drafting group, or any of its members. Once produced it was put to one side and was not fed into the iterative dossier drafting process."

Mr Pattison did not give any source for his information on this part of the history and we received no evidence from any person directly involved. Mr Pattison exhibited to his witness statement a letter written to a member of the Hutton Inquiry staff by a Ms P Diggle on 12 September 2003 (the Diggle letter). The letter apparently accompanied a copy of the Williams draft and stated that Mr Williams had prepared it over the weekend of 7 and 8 September 2002 "on his own initiative, working from an electronic file sent to him by the CIC".

15. The Hutton Report records that a further meeting took place in the Cabinet Office on 9 September, again chaired by Alastair Campbell. Mr Williams was one of those in attendance. In his evidence to the Hutton Inquiry John Scarlett stated that he had a conversation with Alastair Campbell before the start of the meeting in which he stressed that it was important that he, Scarlett, should have "ownership and command and control" of the project and that this should be stated clearly in writing. Later on the same day Alastair Campbell circulated a memorandum confirming that arrangement although it included, towards the end, what John Scarlett described in his evidence to the Hutton Inquiry as an "ambiguity" suggesting that, once all the intelligence material had been prepared and recommendations on presentational issues had been contributed, a judgment would be needed as to who should be appointed to write the final version. However, it was clear from the evidence to the Hutton Inquiry that, as events unfurled, John Scarlett remained the person who had "ownership" of the drafting process. The Alastair Campbell memorandum recorded that the team which would review the document from a presentational viewpoint, and would make recommendations to John Scarlett, would include John Williams. On this Mr Pattison's witness statement reads:

"Only John Scarlett (the Chairman of the JIC and line manager of the Chief of the Assessments Staff) and his team could [draft the Dossier]. John Williams was not part of the JIC machinery, nor was he part of the intelligence community throughout Whitehall whose ideas contributed to JIC assessments. However, Mr Williams did attend meetings at which presentational issues were discussed and played a role in advising the drafters from a communications professional's point of view."

We comment, again, that Mr Pattison was not involved at the time and volunteered no information about the source of his information on this point.

16. On 10 September a Government official called Daniel Pruce wrote a memorandum to a colleague, copied to Alastair Campbell, headed "DOSSIER". It opened with this sentence:

"I promised some quick thoughts on John's draft of 9 September"

It then set out a number of comments under headings "On content", "On presentation" and "On mechanics". The section on presentation recommended that the document being commented on be broken up into "the sections set out in Alastair's note of yesterday". The e-mail concluded with this sentence:

*"we also need to think, once we have **John's further draft tomorrow**, how we prepare the ground for the launch of the text to get expectations in the right place"* (emphasis added).

The words emphasised in the second quote from the Pruce e-mail were put to Mr Pattison in cross examination but he was not able to provide assistance as to whether they might have been intended to refer to John Williams (despite the fact that Mr Pattison's evidence was that the Williams draft played no part in the process of drafting the Dossier, so that no "further" draft would have been contemplated) or to John Scarlett (who only took command of the drafting as a result of the meeting on the same day) or to another person with the first name John.

17. The Hutton Report records that a draft of the Dossier was prepared dated 10/11 September. A copy is annexed to the Report. Our examination of this document confirms that is not the Williams draft. Further drafts were prepared dated 16, 19 and 20 September and copies are annexed to the Hutton report. Mr Pattison's witness statement states that each of these drafts had been circulated and approved by the JIC, whereas the Williams draft was not. His evidence on that is supported by the Hutton Report itself which makes no mention of the Williams draft and does not include it among the documents annexed to it.
18. When Alastair Campbell himself gave evidence to the Hutton Inquiry he suggested that, following the distribution of his memorandum of 9 September, all the papers that had come into existence previously became "redundant". He said that, from that date:

"There is a new dossier to be done by John Scarlett and for him to take all of this information, all of this material, and to turn it into a new dossier".

That is consistent with the Diggle letter. Although Ms Diggle gives no indication about the source of her information the relevant part of her letter reads:

"This draft was rapidly overtaken by the decision recorded in Alastair Campbell's minute of 9 September 2002.... Instead it was decided to make a fresh start on preparing a dossier for publication, under John Scarlett's direction. John Williams 'draft' was therefore not taken forward"

However, one of the documents presented to the Hutton Inquiry was a memorandum from Mr Scarlett dated 10 September 2002, addressed to Alastair Campbell and copied to, among others, John Williams. It evidently accompanied what it referred to as a “revised draft of the dossier on Iraq's weapons of mass destruction” and makes direct reference to Mr William’s contribution in the following passage:

“This has been significantly recast, with considerable help from John Williams and others in the Foreign Office. It still needs further work and I cannot yet confirm that I am content with the overall tone of the paper and the balance between the main text and the annexes. This applies especially to the initial sections on the history of the regime which I will wish to amend substantially. But we have now reached the stage where it would be helpful to have your advice on presentation. I know that John Williams is also looking at the text, and may offer further views from New York”.

The significance of the Williams draft

19. During cross examination in closed session Mr Pattison was invited to agree that some sections of the published version of the Dossier did bear a resemblance to parts of the Williams draft. However, we can say in the open part of this decision that the similarities were not such as to lead on easily to the conclusion that one had been based on the other. Mr Pattison also pointed out that the written style was very different and that such similarities in content as could be discerned probably resulted from the fact that both authors had been forced to base their writing on the relatively few sources of intelligence that were available at the time.

20. Mr Pattison’s witness statement concluded with an assertion that the Williams draft did not fit into the history of the drafting of the dossier. He went on:

“It was a separate exercise, taken under one person’s initiative, which was not used in the dossier drafting process. The Williams proposals were a communications specialist’s attempt to explain the threat posed by Iraq. ...I can understand that there may be a question in the minds of those who wish to see this text that since it was written by a communications expert, it somehow set the tone for the whole exercise and, even, the final product. But it did not.”

21. Although we are satisfied that Mr Pattison was an honest and careful witness, we are concerned, as previously mentioned, that we did not receive evidence from anyone who was involved in the drafting process and that Mr Pattison was apparently unable to identify any source for the assertion quoted above among either those who were so involved or from any contemporaneous document. Our concern stems from the fact that a number of factors have been brought to our attention that may be capable of supporting an argument that the Williams draft in fact played a more significant role in the process. They include the following:

- (i) The D Pruce e-mail referred to above.

- (ii) A letter written to the Information Commissioner's office in the course of his investigation by a member of the F&CO staff. The letter is dated 22 November 2005 and was apparently written in response to a request from the Information Commissioner for a more detailed explanation of the FCO's reasons for reaching the conclusion it had in relation to the public interest in favour of maintaining the section 36(2)(b)(ii) exemption. It referred to the fact that Mr Williams had been present at a meeting on 9 September 2002 *"where he was a member of a group tasked with drafting a preliminary document described by that meeting as 'a draft assessment' to be used in the production of a draft Dossier"*. It then included the following:

"You should appreciate that Williams' 'draft assessment' was prepared at the request of the JIC Chairman to provide an expert's view of how the confidential JIC prepared draft might be presented in a published document. It was designed to give a communication professional's perspective and was not an integral part of the iterative drafting process. Neither the substance nor the form of the draft was deployed in the published dossier, as they were not deemed suitable.

Contrary to Mr Pattison's evidence and the Diggle letter this suggests that the Williams draft was prepared after 9 September (and not over the weekend of 7/8 September), and that it was prepared at the request of the JIC Chairman. Of course, the letter was written two years after the Hutton Inquiry hearings had ended and was clearly not material that Lord Hutton could have considered when apparently deciding that the Williams draft was of so little significance that it did not need to be referred to in his report or annexed to it. Mr Pattison suggested that the letter had perhaps been prepared without sufficient care, but he had not been involved himself in FCO's responses to the Information Commissioner, and was unable to explain the discrepancy. We comment, in passing, that it is a matter of concern that the information given to the Information Commissioner on the very nature of the information in dispute was apparently different to the evidence given to us.

22. Although the content of the Williams draft must remain confidential at this stage it is appropriate to mention in the open part of this decision the following features of it which are also of at least some relevance to the questions that have arisen about its significance:

- (i) It runs to 32 pages whereas in a letter from the FCO to the Information Commissioner on 17 July 2006 it was said to comprise 108 pages. Mr Pattison was invited to explain this disparity but said that he could not.
- (ii) It appears to start at page 3 and to have a "header" or title block description of "JIC Two Document Version 24 July 2002". Mr Pattison expressed the view that the reference to "JIC" was a mistake for "CIC". We received no evidence on the point from any witness able to make that statement as evidence rather than speculation. The Diggle letter states that:

“The headings on each page reflect internal CIC labelling of their electronic files. They do not indicate the existence of additional JIC drafts”

- (iii) Unlike other documents shown to us it did not include the unique reference number applied by the Hutton Inquiry staff to all documents filed with it. No evidence was given as to any computer record or hard copy file that might throw light on the date when it was created or worked on and Mr Pattison was unable to throw any light on this area of uncertainty.
- (iv) It has been annotated in two different persons' handwriting, suggesting that at least one person other than the author had reviewed and commented on it despite Mr Pattison's statement that it was put aside the moment it was first presented. The commentary in Mr Pruce's email supports this impression.

23. It may be that each of these perceived discrepancies could have been easily and authoritatively explained by a witness directly involved in the events at the time. However, the FCO was apparently unable or unwilling to present evidence from such a witness and Mr Pattison very fairly stated that he was not able to throw any light on several of them. In those unfortunate circumstances we inevitably carry into our assessment of the competing public interest factors a degree of uncertainty on precisely what role the Williams draft played and what was its true significance.

Factors in favour of maintaining the exemption

24. Mr Eadie, counsel for the FCO, argued that, when considering the balance of public interest we should treat the scales as already having some weight in favour of maintaining the exemption. He said that this stemmed from FOIA section 36(2) itself, the terms of which recognise the general importance of decision making processes not being inhibited by the knowledge of those involved that the exploration of options, the testing of ideas and the proffering of advice might subsequently be disclosed in public. He also said that the fact that the Foreign Secretary had given his opinion did not merely operate as the trigger that brought section 36 into play but should also be treated as a factor of weight when the Tribunal came to balance the public interest factors. Mr Eadie suggested that these factors had particular impact where, as in this case, the information requested was a draft. He argued that the impact was not reduced by the fact that the decision making process in this case led, not to a policy decision, but to the equally important and complex process of translating intelligence into a presentation to the public.

25. We believe that in considering the factors in favour of maintaining the exemption we should not start with any assumption other than the one inherent in the language of FOIA section 2(2)(b) mentioned above. We set our task as identifying the information in dispute (regardless of the nature of the document in which it is recorded), and then applying the test to that information. Clearly a reasoned

opinion from a Government Minister may help us to focus on the perceived importance of maintaining secrecy of specific information in a particular context. However, that is just one of a number of factors that we must evaluate and we believe that we would risk distorting our assessment of the overall balance to be achieved if we started from the premise that its very existence had particular inherent significance. The opinion, like any opinion, draws its authority from the reasoning that lies behind it. The assistance it may have provided was very substantially reduced by the fact that no evidence was placed before us as to its the form or content, let alone any reasoning that it may have contained. (We comment, in passing, that it would be preferable in future for the qualified person's opinion to be made available to the Tribunal so that its reasonableness for the purposes of FOIA section 36(2) may be tested effectively.) Similarly, we take account of the fact that the disputed information is to be found in a draft. This identifies it as being part of the decision making process provided for by section 36(2), but leaves us to assess the likely impact of its disclosure on that process more by reference to its content, (as well as the context in which it was created), than its status as a draft.

26. Counsel for the Information Commissioner, Mr Pitt Payne, argued that we should consider these and all other relevant factors against the background of the Hutton Report, which by the date when the information request was made had already put into the public domain the main drafts of the Dossier, as well as a great deal of information about the process by which it was created. He says that in those circumstances we should consider what detriment to the decision-making process was likely to have resulted from the public disclosure of this one additional piece of information, beyond that which was already in the public domain. We agree that the additional effect of disclosure over what had already taken place is significantly less than if the requested information were the first information on the drafting process to be put into the public domain. We think that this is a factor which differentiates this case from the facts of earlier Information Tribunal decisions in which the so called "chilling effect" on civil servants' relationships with ministers, caused by the fear of the future disclosure of advice, recommendations and opinions, was considered. However, we adopt two points of general principle which were expressed in the decision in *HM Treasury v Information Commissioner EA/2007/0001*. These were, first, that it was the passing into law of the FOIA that generated any chilling effect - no Civil Servant could thereafter expect that all information affecting government decision making would necessarily remain confidential. He or she would be aware from then that its privacy or disclosure would depend on whether it fell within the terms of an exemption, absolute or qualified, and, if the latter, how the public interest balance would be applied. Secondly, the Tribunal could place some reliance on the courage and independence of Civil Servants, especially senior ones, in continuing to give robust and independent advice even in the face of a risk of publicity (a point that has been made in other Information Tribunal cases including, in particular, *Department for Education and Skills v Information Commissioner EA/2006/0006*). We add that Civil Servants must have been aware at the time that there was at least a possibility of an inquiry being ordered into events surrounding any decision to take the nation to war, (there have been at least three on various aspects of the process, in addition to the one conducted by Lord Hutton), and that this may itself have contributed to any perceived "chilling effect" on the advice given at the relevant time.

Factors in favour of disclosure

27. The Information Commissioner's case is that there is a strong public interest in disclosure in order better to inform the public about the full process of drafting the Dossier, in particular given the public debate surrounding its production. He stressed that the Dossier represented part of the process that led up to a decision to take the nation to war and that there has been a great deal of public debate at the time and since about the events that led to that very serious outcome. Against that, it is said on behalf of the FCO that much of the information on the Dossier is already in the public domain and that, as the Hutton Report was issued at the end of a detailed investigation into the drafting process, the public interest in the issue has been served either in full or at least to a degree that reduces significantly the public interest in seeing an additional document which was not central to the process by which the Dossier was developed. We were also invited to conclude that the disclosure of an early draft, developed by someone who was not an intelligence specialist, and who was operating on his own initiative, might in fact mislead the public into believing that it represented government views, which Counsel for the FCO said it did not.

Our conclusions on the balance of public interest

28. We limit ourselves to deciding the extent to which the disclosure in May or August 2005 of the Williams draft, in the circumstances of this case, would have had the detrimental effects which Mr Eadie has suggested. We conclude that the "chilling effect" would have been quite limited, given that the Hutton Report had not only put into the public domain a great deal of information on the subject but had also provided a detailed description of the circumstances in which the Dossier had been prepared, so that the public was in a good position to place the Williams draft into its correct context. We do not accept that we should, in effect, treat the Hutton Report as the final word on the subject; that we should proceed on the basis that, if Lord Hutton did not think that the Williams draft formed a part of the process, we should not order disclosure. First, the Hutton Report does not expressly state that the Williams draft is an irrelevance, although it may be inferred from the fact that it did not form part of the recorded narrative of the drafting process, and was not included in an annexe, that Lord Hutton did not regard it as being of direct relevance to the questions he was asked to consider. Secondly, the issue which we are required to consider, namely whether the FCO ought to have disclosed the Williams draft, is different from those that the Hutton Report addressed. Thirdly, as explained above information has been placed before us, which was not before Lord Hutton, which may lead to questions as to whether the Williams draft in fact played a greater part in influencing the drafting of the Dossier than has previously been supposed. We make no comment on whether it did so in fact. But we believe that the existence of those possible questions is a relevant factor in evaluating the public interest in disclosure. It also leads us to decline Mr Eadie's invitation to follow the approach adopted by a differently constituted panel of the Information Tribunal in *Foreign and Commonwealth Office v Information Commissioner and Friends of the Earth EA/2006/0065* because, unlike that case, we believe that the Williams draft might be capable of adding to the public's understanding of the issues in question.

29. For the reasons set out above we have concluded that the factors in favour of maintaining the exemption did not, at the date when disclosure was refused, outweigh the public interest in disclosure. We accordingly dismiss the appeal and direct that disclosure be made in accordance with the terms of the Decision Notice, subject only to a very small redaction in the manuscript annotations. This is not central to the purpose or content of the substantive document. Our reasons for directing it to be made are set out in the confidential schedule to this decision.

Deputy Chairman

Date 22 January 2008