



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2011/0036

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50286465

Dated: 15 December 2010

Appellant: GREG MUTTITT

First Respondent: INFORMATION COMMISSIONER

Second Respondent: THE CABINET OFFICE

Heard at Bedford Square, London

Date of hearing: 14 September 2011

Date of decision: 31 January 2012

Before

Andrew Bartlett QC (Judge)
Gareth Jones
Steve Shaw

Attendances:

For the Appellant: in person

For the 1st Respondent: Ben Hooper

For the 2nd Respondent: Julian Milford

Cases:

All Party Parliamentary Group on Extraordinary Rendition v IC and Ministry of Defence [2011] UKUT 153 (AAC)

Campaign Against the Arms Trade v IC and Ministry of Defence EA/2006/040

Foreign and Commonwealth Office v IC and Friends of the Earth EA/2006/065

Gilby v IC and Foreign and Commonwealth Office EA/2007/071

Hogan and Oxford City Council v IC EA/2005/026

Subject matter:

FOIA s27 – whether disclosure of information likely to prejudice international relations – whether information was confidential information obtained from another State – public interest balance

FOIA s12 – nature of searches required by public authority

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal allows the appeal in part and substitutes the following decision notice in place of the decision notice dated 15 December 2010.

SUBSTITUTED DECISION NOTICE

Public authority: The Cabinet Office

Address of Public authority: 70 Whitehall, London, SW1A 2AS

Name of Complainant: Greg Muttitt

The Substituted Decision

For the reasons set out in the Tribunal's determination, the substituted decision is that the public authority did not deal with the complainant's request in accordance with the requirements of Part I of the Freedom of Information Act 2000. In regard to the four documents within the scope of the request identified in the Table below at paragraph 53, the exemptions relied upon by the public authority were only engaged to the extent set out in the Table. However, where the exemptions were engaged, the public interest in the maintenance of the exemptions outweighed the public interest in disclosure.

Action Required

Within 28 days from the date when this Decision is sent to the parties, the Cabinet Office shall disclose to Mr Muttitt the four documents identified in the Table below, subject to redactions of those parts protected by exemptions as set out in the Table.

REASONS FOR DECISION

Introduction

1. This appeal is concerned with Mr Muttitt's attempts to obtain disclosure under the Freedom of Information Act ("FOIA") of information concerning the visit to Iraq made by Prime Minister Tony Blair in May 2006, on the day after the formation of Iraq's first post-Saddam permanent government.

The request

2. Mr Muttitt submitted the following request to the Cabinet Office on 24 April 2009:

"Please send me documents relating to the meetings of former Prime Minister Tony Blair, during his visit to Iraq in May 2006. Please include the minutes, preparatory notes, agendas and other substantive supporting documents.

If you decide to withhold any of these records (or portions thereof), please explain the basis for your exemption claims, and (as appropriate) your assessment of the balance of the public interest. Additionally, please release all sections of the records that do not meet an exemption.

I prefer to receive documents in their original form (with redactions if necessary), rather than a digest of extracted portions, in order to judge the context of the information."

3. The Cabinet Office responded on 23 June 2009 with its conclusion that all of the information it held was exempt from disclosure on the basis of one or more of the following FOIA exemptions: ss27(1)(a), 27(1)(c), 27(1)(d), 27(2) and 35(1)(a), and that the public interest balancing exercise required by s2(2)(b) favoured maintaining the exemptions.
4. Mr Muttitt asked on 18 August 2009, with detailed reasons, for internal review. Over the next year the attitude displayed by the Cabinet Office to compliance with its legal obligations, to put it mildly, left a great deal to be desired. In October, November and December 2009 Mr Muttitt chased for a response. The internal review did not conclude until 17 August 2010, after intervention by the Information Commissioner, service upon the Cabinet

Office of an Information Notice under s51, and threats by the Commissioner of enforcement through the High Court. The internal review decided that information from seven of the relevant documents could be released but from no others. The information was provided in the form of extracts and not in the form requested.

The complaint to the Information Commissioner

5. Mr Muttitt originally complained to the Commissioner on 29 December 2009. After the conclusion of the internal review by the Cabinet Office, with which he was dissatisfied, he asked the Commissioner to continue to deal with his complaint. Concerning the seven documents from which information was released he wrote:

“The released information comprises a schedule of media appearances, the (already published) statement issued by Messrs Blair and Maliki and a series of letters in June 2006 relating to the International Compact with Iraq. Given the non-sensitive nature of these documents, it is unclear why they were considered exempt in the first place.”

6. The Commissioner decided that the Cabinet Office held 16 documents falling within the scope of the request. He ordered the Cabinet Office to provide to Mr Muttitt full copies of the seven documents which had been extracted. He decided that document 15 fell within the scope of the exemption in s35(1)(a) but that the public interest in maintaining the exemption did not outweigh the public interest in disclosure. Thus document 15 was also to be disclosed. In relation to the remaining eight documents (numbers 8 to 14 and 16) the Commissioner held that they were exempt from disclosure on the basis of s27(1)(a) and that “by a relatively narrow margin” the public interest balance was in favour of maintaining the exemption.

The appeal to the Tribunal

7. Mr Muttitt appealed against the Commissioner’s decision. In summary his grounds were:
 - a. The Commissioner could not be right in this case to regard whole documents as exempt, since most documents of the kinds that were sought would contain some information of a non-sensitive nature.

- b. In relation to s27, the Commissioner's reasoning was flawed in concluding that the public interest in maintaining the exemption was greater than the public interest in disclosure.
8. The Commissioner opposed the appeal. His contention on the first ground was that the s27(1)(a) exemption was engaged even for seemingly anodyne information (such as the dates of the documents that contained the disputed information), as disclosure of such information would cause other States to fear that other more sensitive material might equally not be kept confidential. As to the second ground, the Commissioner defended his approach, and also maintained that, even if some of his reasoning could be criticised, his conclusion was correct.
9. The Cabinet Office supported the Commissioner's reasons and further contended:
 - a. at the time of the request the eight withheld documents were exempt also under ss27(1)(c) and 27(1)(d);
 - b. documents 9, 10, 12, 14 and 16 were exempt under s27(2);
 - c. the public interest in maintaining the exemptions strongly outweighed the public interest in disclosure at the time of the request, and continued to do so.
10. In late July 2011, while the appeal was pending, four documents, out of the eight withheld, were disclosed by the Cabinet Office.
11. The four documents then remaining for consideration in the appeal were the following:
 - a. 18 May 2006 Minute Sheinwald to Banner entitled PM/Iraq
 - b. 19 May 2006 Minute Sheinwald to Banner entitled PM/Iraq
 - c. 22 May 2006 Letter from Banner to FCO entitled Iraq: Prime Minister's Meeting with Talabani
 - d. 22 June 2006 Letter from Republic of Iraq to PM of Canada.

12. The day before the hearing the Cabinet Office found a further document by following up a cross-reference in one of the documents. This was a 22 May 2006 letter from Banner to FCO entitled 'Iraq: Prime Minister's Meeting with Nouri Al-Maliki'. This was disclosed to the Commissioner and the Tribunal, and exemption was claimed for it by the Cabinet Office on the same basis as the other documents.
13. At the oral hearing on 14 September 2011 the time allotted proved insufficient for the parties to make closing submissions. We gave directions for the provision of written closing submissions, the last of which was a response submission from Mr Muttitt on 13 October 2011.
14. Between the date of the hearing and the delivery of its closing the Cabinet Office decided to disclose the fourth of the disputed documents. The explanation given was:

"R2 [ie, the Cabinet Office] has spoken to Canada (the third party State in question) about its view on the disclosure of document (4). Canada has now confirmed that it is content for document (4) to be released under FOIA. R2 continues to consider that the balance of public interest at the time of the request was in favour of withholding the document. However, in light of Canada's views, R2 is content to release document (4) in the light of circumstances as they currently stand."
15. In the same period the Cabinet Office also found two further documents, which it disclosed, subject to some redactions.
16. In the event the final subject matter of the appeal was the following four documents:
 - a. 18 May 2006 Minute Sheinwald to Banner entitled PM/Iraq
 - b. 19 May 2006 Minute Sheinwald to Banner entitled PM/Iraq
 - c. 22 May 2006 Letter from Banner to FCO entitled Iraq: Prime Minister's Meeting with Talabani
 - d. 22 May 2006 Letter from Banner to FCO entitled Iraq: Prime Minister's Meeting with Nouri Al-Maliki.

17. These were all marked “Confidential”. At our request the Cabinet Office provided details of the UK’s system of protective markings. We were informed that the levels at the time were Restricted, Confidential, Secret, and Top Secret and that, while a new level has been introduced below Restricted, the definitions have not materially changed. One element of the definition of documents for which a Confidential protective marking is appropriate is that their disclosure would be likely to “materially damage diplomatic relations, that is, cause formal protest or other sanctions”. (For comparison, a Restricted document may be one where disclosure is likely to “adversely affect diplomatic relations”, and a Secret document may be one where disclosure would be likely to “raise international tension” or “seriously damage relations with friendly governments”.)
18. For all four documents the Cabinet Office relied upon ss27(1)(a), 27(1)(c), 27(1)(d) and 27(2). Section 27 provides, so far as relevant:
- “(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-
- (a) relations between the United Kingdom and any other State,
 - (c) the interests of the United Kingdom abroad, or
 - (d) the promotion or protection by the United Kingdom of its interests abroad.
- (2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom
- (3) For the purposes of this section, any information obtained from a State is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State to expect that it will be so held.”
19. We draw attention to the express recognition in s27(3) that confidentiality may alter over time.
20. For each of the four documents the issues were (a) whether the exemptions relied upon were engaged and (b) whether the public interest in maintaining the exemption or exemptions outweighed the public interest in disclosure.
21. The time that is primarily relevant for the decision of these issues is the time when the information request was dealt with by the Cabinet Office in 2009-2010: see *All Party Parliamentary Group on Extraordinary Rendition v Information Commissioner and Ministry of Defence* [2011] UKUT 153 (AAC) at [9].
22. Since the fourth of the documents listed above was found just before the hearing and exemption was claimed for it at that time, it would arguably be

relevant for us to consider, for that document, the time when the exemption was claimed, rather than the time the request was originally dealt with. The parties made no specific submissions on this point and in the circumstances of this case it is not necessary for us to decide it.

23. Mr Muttitt in his closing submissions rightly contended that the closed material in the case (ie, the material provided by the public authority only to the Tribunal and the Commissioner and not to the appellant) should be kept to an absolute minimum; and he presented arguments which questioned whether information included in the closed material presented to the Tribunal was correctly so included or should have been included in the open material. We found his arguments persuasive and as a result the Tribunal issued an order on 14 November 2011 requiring the Cabinet Office to justify the protection of certain parts of the closed material. The Cabinet Office conceded on 1 December that parts of the closed statement of Mr Miller ought to be made available to Mr Muttitt. These were provided to him on 6 December, and we permitted him to make further written submissions in the light of the additional material. His additional submissions were received on 19 December 2011.

Evidence

24. Mr Muttitt gave evidence. He is an expert in Iraqi politics, especially the politics of oil, and published a book on the subject in 2011. In outline, we derived from his evidence, taking into account the criticisms made of it, the following:

- a. The decision to go to war in Iraq was at odds with the views of the vast majority of British citizens. The decision, and its execution, led to the resignations of two Ministers, and caused a loss of trust in Government, including within the armed forces. It is a very common view among the general public, in the light of events in Iraq, that on foreign policy issues the government tells lies to the public as a matter of course. It has been openly acknowledged by some politicians, including Mr Cameron when leader of the Opposition in June 2009, that there is a pressing need for restoration of trust.
- b. Mr Blair's May 2006 visit to Baghdad took place the day after the formation of Iraq's first post-Saddam permanent government. This was a vital moment in Iraqi state-building, in the sectarian conflict, and in Britain's role. Information about this visit could bear upon three important questions: (1) What level of influence did the UK still have in Iraq in 2006?

(2) Did the UK exacerbate the country's collapse into sectarian conflict?
(3) To what extent did the UK influence Iraqi decisions about oil policy? Mr Muttitt provided us with broader factual context for each of these three questions.

- c. Mr Blair's visit was apparently closely coordinated with the USA, which he visited three days later.
- d. The expectations of the US Government regarding confidentiality of documents revealing discussions with foreign states should be assessed in light of its own practice. The US Government had released to Mr Muttitt information concerning its relations with Iraq, including minutes of meetings with government ministers, and including meeting notes recording strong criticisms by Iraqi ministers of colleagues in the Iraqi Government. The US Government had also released to him briefing notes for a US meeting with the UK's Economic Secretary to the Treasury in July 2006. However, none of the examples produced by Mr Muttitt was a meeting between heads of State, and Mr Muttitt acknowledged that the right of access under the US legislation was disapplied where an agency classified matter as national security information, which could include information supplied in confidence by foreign governments.
- e. At the time of the information request in 2009, the relations of the UK Government with Iraq were not what they might have been. The British operations in Basra were regarded by the Iraqi Government as a catastrophic failure. In 2008 Mr al-Maliki had asked the UK to accelerate its withdrawal timetable, in part because he was angered by deals struck between British forces and Basra militias. He said in an interview given to 'The Times' in October 2008, "They [the British forces] stayed away from the confrontation, which gave the gangs and the militias the chance to control the city the situation deteriorated so badly that corrupted youths were carrying swords and cutting the throats of women and children." But in the same interview he said, "From our side what happened before will not affect a positive relationship between us and Britain ... Our relationship now is good." The continuation of a somewhat fraught relationship was illustrated by the delay in the ratification of the arrangements for British naval trainers in 2009, but other contacts continued, such as Lord Mandelson's visit to Iraq in April 2009 with representatives from 23 UK companies, and Mr al-Maliki's visit to an investment conference in London in the same month.
- f. Mr al-Maliki had been seen as a thoroughly sectarian politician in 2006 but after 2008 was seen as a nationalist. This suggested to Mr Muttitt that the

Iraqi Government would be unlikely to be embarrassed by exchanges that took place in 2006 in very different circumstances. This does not seem to us necessarily to follow; it may well be right, given that Mr al-Maliki's public position had changed, but it could equally be said that, given Mr al-Maliki's change of political positioning, disclosure of matters from 2006 might be more likely to cause him embarrassment. The evidence did not satisfy us on this, one way or the other.

- g. The Foreign and Commonwealth Office had permitted the disclosure of records of other meetings with Iraqi leaders, including the Vice Presidents and the oil minister, being meetings held in July 2006, with only limited redactions. The records released included an Iraqi minister's opinions, including of his own colleagues, and UK assessment that one of the ministers was "typically apocalyptic in his views". However, these records were marked "Restricted", which is a lower category of protection than "Confidential".

25. In his evidence concerning the public interest in disclosure, Mr Muttitt was keen to stress that the public interest would be served by disclosure irrespective of the specifics of what the disputed information showed about Britain's role. For example if, contrary to various suspicions, Mr Blair did not raise the issue of oil with Mr al-Maliki in the May 2006 visit, that would be significant evidence that the electorate should trust the Government more, and would significantly change public understanding. However, he also accepted that there was an issue of relative weight: the public interest in disclosure would be greater if the information showed mistakes or impropriety than if it did not.

26. Mr Muttitt called as a witness Mr Christopher Ames, a freelance journalist and editor of the Iraq Inquiry Digest Website, which monitors and comments on the Chilcot Inquiry. He considered that the Chilcot Inquiry proceedings had provided little information on Mr Blair's visit to Iraq in 2006, and that very few documents had been released by the Cabinet Office to the Inquiry. He also claimed: "In my experience, government departments invariably exaggerate the damage that would be caused by disclosure of information under FOI, particularly when citing Section 27. They do this both by exaggerating the impact of individual disclosures and by overlooking the context in which equally damaging information routinely comes into the public domain from other FOI disclosures and leaks, whether officially sanctioned or otherwise, and inquiries." When cross-examined on this, he accepted that he had no experience of dealing with the fall-out from disclosures, but in re-examination he provided some examples to back up his opinion. We accept that in some instances Government departments may

over-estimate the potential damage from disclosures, but Mr Ames' choice of the word "invariably" was plainly inappropriate.

27. Evidence on behalf of the Cabinet Office was provided by Mr Julian Miller, the UK Deputy National Security Adviser responsible for foreign and defence policy. While he did not have direct knowledge concerning Mr Blair's visit, his evidence was based on information and documentation made available to him from the Cabinet Office case file, from consultations with other Government departments, and from his own knowledge of foreign relations.
28. We summarise the most pertinent matters from Mr Miller's evidence in open session as follows:
 - a. The four documents released in July 2011 were released because Mr Miller took the view, when preparing his witness statement, that the documents were not sensitive enough to outweigh the public interest in their release. We noted that paragraph 11 of his witness statement implied that there had been a change of circumstances, but when cross-examined he 'suspected' that his view of the documents would have been the same in 2009. This rather undermined the earlier assessments by the Cabinet Office and the Information Commissioner concerning "profound" prejudice to international relations if these documents were released, and it corroborated Mr Ames' experience of a tendency by officials to make over-cautious assessments.
 - b. Mr Miller did not know whether the documents remaining in dispute had been provided in confidence to the Chilcot Inquiry. (But the Cabinet Office stated in closing submissions that the documents had been provided to the Inquiry, in confidence.)
 - c. Unlike Mr Muttitt, Mr Miller had not visited Iraq or met senior members of the Iraqi Government. He said that from 2003 to 2009 he was only peripherally involved in Iraq issues. (This contrasted with his close personal involvement in the preparation of the September 2002 Iraq dossier, before the war.)
 - d. After the Basra debacle the strained relationship between Iraq and the UK Government gradually recovered over a period of time. The UK continues to play a role in military training for Iraqi officers.

- e. In 2009 UK interests in Iraq were large, the commercial interests and the interest in stability being of equal weight. BP and Shell provide expertise and investment to increase production and efficiency of Iraq's oil and gas reserves. While BP and Shell had their own direct relationships with the oil ministry, the conduct of good relations at Government level remained an important means of facilitating commercial relations. Strong relations with Iraq are important for UK political and security interests in the wider Middle East.
- f. Mr al-Maliki remains the Iraqi Prime Minister and Mr Talabani remains the President. They remain able to affect the development of the UK's bilateral relations with the Iraqi Government on issues affecting UK national interests.
- g. The US remains the UK's most important bilateral ally and the UK has a uniquely close relationship with the US in the scope of the cooperation between the two countries, including on security, global energy and other matters.
- h. Mr Miller stated that high level meetings, certainly at Head of State level, carry a presumption that they are conducted in confidence. Relations at Head of State level have a special sensitivity. In the present case the immediacy of the exchanges between officials at a very high level, the frankness of the exchanges reported, and the informality with which they were reported, all pointed to a presumption of confidentiality. But see our qualification to this evidence at subparagraph k below.
- i. He said that disclosure in this case would damage trust because of the importance that all Governments place on the principle that consultations are confidential in nature: a betrayal of diplomatic etiquette would undermine communication and cooperation with the US and with Iraq. We indicate below the extent to which we felt able to accept this evidence.
- j. He suggested that the disputed documents could encourage anti-British sentiment in some sections of the Iraqi public because the comments in them were controversial or not in accordance with their self-image.
- k. One of the documents released was a letter dated 18 May 2006 from Nigel Sheinwald at 10 Downing Street, writing as Foreign Policy Adviser to the Prime Minister and Head of the Defence and Overseas Secretariat, to the Hon Stephen J Hadley, National Security Adviser at the White House, enclosing a first draft of the proposed joint statement of Prime

Ministers (Blair and Maliki) during the visit, and seeking comments, particularly on the language on security transition. The letter was marked "UK CONFIDENTIAL". The letter referred to Mr Blair's desire, as discussed with the US President, that the joint statement should set a clear direction and be helpful in the Iraqi, UK and US political contexts. Mr Miller had taken the view that given the passage of time it was hard to maintain that this letter should not be disclosed, despite its being sent on behalf of the Prime Minister, seeking further reaction on behalf of the President of the US. It seemed to us that this example seriously undermined Mr Miller's evidence about the blanket maintenance of confidentiality of exchanges on behalf of Heads of State. In addition, while the letter may have been appropriately marked at the time it was sent, which was prior to the joint statement being made, its release was an acknowledgment that in changed circumstances it did not retain the same character of confidentiality.

- l. Disagreement between Governments is not itself an indication of confidentiality of exchanges. Governments do have reasonably mature discussions and disagree over issues and are often ready to say so.
 - m. The UK Government accepts that there is a heightened public interest in matters surrounding Iraq and the policy of the UK post-invasion in the light of the controversial nature of the UK's involvement, and that the release of the information would provide additional detail about the UK's conduct in Iraq and its relationships with the USA and Iraq. Mr Miller nevertheless considered that the public interest in disclosure was diminishing over time and that the need for public understanding would be addressed by the Chilcot Inquiry.
29. As regards the Chilcot Inquiry, it was not shown to our satisfaction that the need for public understanding of the issues lying behind Mr Muttitt's information request would be addressed by the Inquiry. At the time of the request the Inquiry had not been announced. When the request was actually dealt with, the report of the Inquiry was a future prospect of uncertain timing; two and a half years later that remains the case. Moreover, while the terms of reference of the Inquiry appear to be wide enough¹ to cover Mr Muttitt's areas of interest, the evidence did not enable us to conclude that the report will actually deal with them, whether in detail or at all. Accordingly, the existence of the Chilcot Inquiry does not in our view affect the public interest balance as between disclosure and maintaining applicable exemptions, at any time from the making of the request up to the present.

¹ We were not provided with the actual terms of reference, but only with a short summary of them, as announced by Sir John Chilcot. There was no evidence before us that the full terms had been placed in the public domain.

30. Mr Miller's evidence in closed session dealt with (among other things) the 22 June 2006 letter from the Republic of Iraq to the Prime Minister of Canada, which has subsequently been released. We are therefore at liberty to mention that part of his evidence. The Cabinet Office submitted to us that the copy letter was provided by the Government of Iraq, and that this circumstance carried a presumption of confidence under generally accepted diplomatic principles, but Mr Miller, when questioned, was unable to point to any indication that the letter was confidential. We assume it was this inability that led to the subsequent inquiry made of Canada and the belated disclosure of the letter. Mr Miller in his closed witness statement had asserted that its disclosure without permission from both Canada and Iraq would be likely to damage the relations between the UK Government and the Governments of Iraq and Canada, and would also be likely to have a damaging effect on the UK Government's relationship with other countries' administrations more generally, because it would diminish their trust in the UK's adherence to 'generally recognised norms of diplomatic confidentiality'. We found this evidence incredible, bearing in mind that (a) as Mr Miller acknowledged, the substance of the letter had been copied to a range of other countries and international organisations, (b) as Mr Miller further acknowledged, the content of the letter was of an uncontroversial nature, (c) as Mr Miller yet further acknowledged, the letter discussed an international compact which was a matter of public record, including Canada's role in it, (d) similar letters to other recipients (the World Bank, Prime Minister Blair, and the UN) had already been disclosed to Mr Muttitt in response to his request, and (e) there was no suggestion that permission was sought or obtained from Iraq before the letter to Canada was ultimately disclosed. With this example in mind, we felt unable to take at face value the sweeping assertions in Mr Miller's evidence about damage to the UK's international relations.
31. There were some further points in Mr Miller's evidence in closed session which we found less than convincing, in particular where he identified in the disputed documents some topics that were matters in the public domain, arguing that damage would occur to international relations simply because the release of the documents might draw fresh attention to those topics. One of these topics was even addressed in the joint public statement of the two Prime Ministers, made by Mr Blair and Mr al-Maliki during Mr Blair's visit.
32. There was some debate in the evidence and in submissions concerning the nature of the fall-out from the Wikileaks release of US diplomatic communications. While of interest, we did not find that it particularly helped us with assessment of the potential effect of release of the disputed information in the present case.

33. We should add that it was originally contended by the Cabinet Office and decided by the Commissioner that the seemingly anodyne basic details of each document (ie, its date, sender, etc) could not be disclosed because the s27(1)(a) exemption was engaged by the damage that would be done thereby to international relations. As can be seen from our descriptions above, all those details were in due course supplied to Mr Muttitt, ultimately without objection and without any evidence of damage done. This is a yet further reminder to us of the need to approach with a significant degree of caution the claims that have been made in this case by the Cabinet Office, and partly accepted by the Commissioner, about the likelihood of disclosure causing damage to international relations.
34. In short, the unrealistic and inconsistent positions adopted by the Cabinet Office and by Mr Miller severely damaged the credibility of the Cabinet Office's case, and of Mr Miller's evidence, in regard to the documents remaining in dispute. We accept Mr Miller's general point, that high level meetings, certainly at Head of State level, carry a presumption that they are conducted in confidence. But the extent to which the subject matter remains confidential after the event, and after the passage of some length of time, must depend upon the particular circumstances. Some discussions may remain confidential for a very long period. Others may not, for the circumstances which rendered the discussion confidential may cease to exist, particularly where the meeting is followed by public statements which reveal the subject matter.
35. The first disputed document, the 18 May 2006 Minute Sheinwald to Banner entitled 'PM/Iraq', records a discussion between Mr Sheinwald (Mr Blair's Foreign Policy Adviser) and Mr Hadley (US National Security Adviser) relating to the proposed text for the joint statement to be made by the UK Prime Minister and the Iraqi Prime Minister. The minute contains five paragraphs. There are some comments in it of an informal nature that we accept may be regarded as remaining sensitive and confidential in the context of international relations, or at least were such in 2009-2010, because of the frankness with which they were expressed. These are in the third to fifth sentences of the first paragraph and in the last paragraph. It does not appear to us that the middle three paragraphs contain anything which by the time of the request remained of particular sensitivity. We bear in mind what has already been put into the public domain without adverse consequence, including the earlier letter of 18 May 2006 in the same series of correspondence, two drafts of the Prime Ministers' joint statement, and the final version of the statement as issued. The nature of the discussion recorded in the three middle paragraphs simply reflects the US President's position at the time, which was well known, having previously been stated by him in public.

36. The second disputed document is the 19 May 2006 Minute Sheinwald to Banner entitled 'PM/Iraq'. It briefly records a further discussion between Mr Sheinwald and Mr Hadley concerning the proposed text for the joint statement. The first paragraph is on the same topic as the three middle paragraphs of the first document, and does not appear to us to be of any particular sensitivity. The second paragraph contains a passing comment concerning the nature of the earlier discussion. The third paragraph is on a different topic, and concerns US views on a particular political issue in Iraq. The nature of the issue was itself well known, but we accept that by its nature this particular expression of US views on how it should best be addressed was and remained confidential as Mr Miller states. The fourth paragraph refers to US-UK cooperation.
37. The third disputed document is the 22 May 2006 Letter from Banner to FCO entitled 'Iraq: Prime Minister's Meeting with Talabani'. This letter records in nine paragraphs a meeting on that day between Mr Blair and the Iraqi President Jalal Talabani, with others, including Mr Talabani's Vice Presidents, covering a range of political and bilateral issues. The last 11 words of the fifth paragraph touch on a topic which Mr Miller identified to us as remaining somewhat sensitive, albeit a well-known and much commented upon matter. With that exception, the evidence did not satisfy us that there was anything in the letter which remained sensitive by 2009/2010. As Mr Miller said, at the time there may even have been some form of public statement summarising the substance of the meeting.
38. The fourth disputed document is the 22 May 2006 letter from Banner to FCO entitled 'Iraq: Prime Minister's Meeting with Nouri Al-Maliki'. This was found on the day before the hearing. It records over three and a half pages a meeting between Mr Blair and Mr al-Maliki on 22 May 2006. Mr Miller's evidence did not persuade us that this contained anything of particular sensitivity, except for the final paragraph on page 3, which concerned matters sensitive for the Iraqis. The Information Commissioner adopted a neutral stance on whether this document should be disclosed.

Analysis: application of exemptions

39. We have set out above the relevant text of FOIA ss27(1)(a), 27(1)(c), 27(1)(d) and 27(2). These are the exemptions relied upon. The first question is whether they were engaged, given our factual findings as set out above. The second question is the judgment, in the light of those findings, whether the public interest in maintaining the exemption or exemptions outweighed the public interest in disclosure. In the circumstances of this case we consider that in relation to these issues there is no material difference

between the present time and the time when the Cabinet Office completed its internal review in 2010. Our analysis of both questions is informed by our views of the evidence as set out above.

40. In regard to the risk of prejudice in relation to s27(1), we adopt the familiar meaning of the statutory phrase “would, or would be likely to, prejudice” explained in a number of other tribunal decisions, as referred to in paragraphs 9-10 of Mr Milford’s open skeleton argument on behalf of the Cabinet Office dated 31 August 2011.² In summary, relevant prejudice is prejudice that is real, actual or of substance; the exemption is engaged if disclosure is more likely than not to cause such prejudice, or if there is a very significant and weighty chance of it, even if falling short of being more probable than not.
41. Section 27(2) exempts information “if it is confidential information obtained from a State other than the United Kingdom ...”. Based on the statutory language of s27(2) and s27(3), to assess whether the exemption applies we need to consider not simply whether the information was confidential at the time when it was obtained but whether it is confidential at the time when the request is dealt with (here, 2009-2010).
42. In our analysis we deal first with s27(1)(a) (likelihood of prejudice to relations between the UK and any other State) and s27(2) (confidential information obtained from another State). That is because in the particular circumstances of this case, which are concerned primarily with relations between States, those two provisions are the most apt.

(1) The 18 May 2006 Minute Sheinwald to Banner entitled ‘PM/Iraq’

43. In our view s27(1)(a) is engaged in relation to the third to fifth sentences of the first paragraph and in relation to the last paragraph (except its heading), because of a sufficient prospect of damage to relations with the United States if these elements of the information were released. The third to fifth sentences of the first paragraph are protected additionally by s27(2) as being confidential information supplied by the US (confidential chiefly because of the manner of expression rather than because of the subject matter).
44. Given the contents of the second to fourth paragraphs, the evidence has not satisfied us on the balance of probabilities that the second to fourth

² referring to *Hogan and Oxford CC v IC* EA/2005/026, *FCO v IC and Friends of the Earth* EA/2006/065, *Campaign Against the Arms Trade v IC and MOD* EA/2006/040, *Gilby v IC and FCO* EA/2007/071.

paragraphs are protected by an exemption, whether under s27(1) or 27(2). In respect of the US, Mr Miller stated: "our relationship is predicated on the fact that what is said will remain private". Mr Muttitt responded: "This is clearly not true in the indiscriminating way in which it is implied. Certain conversations between the USA and the UK will be considered sensitive and confidential; others not." The evidence of other disclosures, both by the US and by the UK, leads us to agree with Mr Muttitt's response.

(2) The 19 May 2006 Minute Sheinwald to Banner entitled 'PM/Iraq'

45. The first paragraph, being on the same topic as the three middle paragraphs of the first document, is not protected by an exemption. The same is true of the second sentence of the second paragraph. (To make sense of this sentence, the first word of the first sentence of the second paragraph needs to be disclosed as the referent of the third person singular personal pronoun.)

46. The substance of the first sentence of the second paragraph is a confidential comment. It is protected by s27(2) as a comment made by the US in confidence. We think that the chance of prejudice to UK-US relations if it were published is not great but with some hesitation we judge it is just sufficient to place it within the protection of s27(1)(a).

47. The third paragraph is on a different topic, and concerns US views on a particular political issue within Iraq. As indicated above, the nature of the issue was itself well known, but we accept that this particular expression of US views on how it should best be addressed was by its nature confidential as Mr Miller states, and that disclosure would be likely to prejudice UK-US relations. This paragraph is protected by a combination of s27(1)(a) and s27(2).

48. The evidence did not satisfy us that the fourth paragraph was protected by an exemption.

(3) The 22 May 2006 Letter from Banner to FCO entitled 'Iraq: Prime Minister's Meeting with Talabani'

49. In our view this letter does not in general engage any exemption. While this was a meeting at the highest level, much of what was said consisted of general statements of view or of policy such as would be made in a public forum, and nearly all those parts of the letter which were sensitive at the time when it was written were no longer sensitive by the time the information

request was dealt with, which was after British combat operations in Iraq had finished and British troops had been withdrawn.

50. On the view we take of the evidence, the only item in this letter which remains (or remained in 2010) of a potentially sensitive nature is the phrase which constitutes the last 11 words of the fifth paragraph. The matter with which it deals is a matter which is well-known and much commented upon. While we can see a possibility of slight prejudice if the phrase were disclosed, the evidence has not persuaded us that disclosure would or would be likely to prejudice relations between the United Kingdom and Iraq (or any other State) within the accepted meaning of the statutory language. We nevertheless accept that its sensitive nature is sufficient that it should be regarded as confidential to Iraq within s27(2). Disclosure would constitute a minor breach of diplomatic etiquette.

(4) The 22 May 2006 letter from Banner to FCO entitled 'Iraq: Prime Minister's Meeting with Nouri Al-Maliki'

51. We take generally the same view of this letter as of the similar letter relating to the meeting with President Talabani. As regards the last paragraph on the third page, we consider that the last two sentences on the page, which touch on Iraq's relations with another State, engage s27(2), but not s27(1)(a), for the same reasons as mentioned above. In addition, there is a sensitive internal Iraqi political item in the first two sentences of the paragraph. We accept Mr Milford's submission that disclosure of this item by the UK would have damaged UK relations with Iraq and that it was (and remains) protected by s27(1)(a) and s27(2).

52. Consideration of s27(1)(c) and s27(1)(d) adds nothing material to the above analysis. These subsections are concerned with the interests of the United Kingdom abroad. In principle, damage to relations between the UK and Iraq could affect the interests of the UK in the success of commercial activities by UK companies. However, in this context we do not consider that the statutory threshold of a likelihood of real prejudice is reached.

53. We summarise our findings on the application of exemptions in the following table:

Document	Information	Exemptions
<i>(1) The 18 May 2006 Minute Sheinwald to Banner entitled 'PM/Iraq'</i>	1 st paragraph, 3 rd to 5 th sentences	s27(1)(a), US s27(2), US
	2 nd to 4 th paras Heading of last para	None
	Text of last para	s27(1)(a), US
<i>(2) The 19 May 2006 Minute Sheinwald to Banner entitled 'PM/Iraq'</i>	1 st para, 2 nd sentence of 2 nd para	None
	2 nd para, 1 st sentence, except first word	s27(1)(a) US s27(2), US
	3 rd para	s27(1)(a), US s27(2), US
	4 th para	None
<i>(3) The 22 May 2006 Letter from Banner to FCO entitled 'Iraq: Prime Minister's Meeting with Talabani'</i>	5 th para, last 11 words	s27(2), Iraq
	Remainder	None
<i>(4) The 22 May 2006 letter from Banner to FCO entitled 'Iraq: Prime Minister's Meeting with Nouri Al-Maliki'</i>	Last para of third page, 1 st and 2 nd sentences	s27(1)(a), Iraq s27(2), Iraq
	Last para of third page, last two sentences	s27(2), Iraq
	Remainder	None

Analysis: public interest balance

54. We turn next to consideration of whether the public interest in maintaining the exemptions, where they apply, outweighs the public interest in the disclosure of the information.
55. We have found as a fact on the evidence presented to us that the decision to go to war in Iraq, and its execution, caused a loss of public trust in Government, including within the armed forces. Upon that evidence, we do not consider that Mr Muttitt was exaggerating when he submitted: "These are issues of profound public interest. Trust can only begin to be restored through a transparent process of learning the lessons, and disclosure of government actions."
56. He further submitted that release of the information would "help answer questions of the level of British influence in Iraq in 2006, the UK's role in exacerbating or mitigating the sectarian conflict and whether the UK intervened in Iraqi oil policy ... Not only would its release enhance public understanding, it relates to issues of major public interest, including casualties in the armed forces, national security, relations with other States and the perceived honesty of government public statements". The extent to which the contents of the disputed information shed light on these particular questions varies, but we accept the general thrust of his submission. We do not consider that in order to succeed on this appeal Mr Muttitt has to guess the precise questions to which documents which he has not seen may help to provide answers. Where disclosure of the documents would serve the public interests relating to UK involvement in Iraq, it is nothing to the point that the other parties were able to make submissions that particular documents did not address one or more of the particular questions which Mr Muttitt formulated.
57. A further argument addressed to us was that the information, if disclosed, would not add greatly to public knowledge concerning the UK's involvement in Iraq, because of its limited extent. We are not impressed by this argument when applied to the information as a whole. We acknowledge that the information is not wide-ranging in its content. However, if disclosed, it will be available to be considered by the public not in isolation but in the context of other available information on the same topics, and will help serve the interests of transparency and accountability in addition to increasing public understanding. Moreover, as Mr Muttitt pointed out, what was not said may be as significant as what was said.

58. Mr Miller expressly recognised that there was a heightened public interest in matters surrounding Iraq and the policy of the UK post-invasion in the light of the controversial nature of the UK's involvement. The Commissioner agreed that the arguments in favour of disclosure deserved to be given significant and notable weight. In the circumstances, and having regard to the content of the disputed information, we consider that the public interest in disclosure is very substantial.
59. Section 27(2) is a class-based exemption, reflecting the fact that there is an inherent public interest in not breaching another State's confidences. The exemptions in s27(1) depend upon the risk of prejudice. It was common ground that it was in the public interest for the UK to maintain good relations with both the US and Iraq, and that the relationship with the US was of very special importance to the UK. As we have found, strong relations with Iraq are important for UK political and security interests in the wider Middle East; and the UK has a uniquely close relationship with the US, which is its most important bilateral ally, in the scope of the cooperation between the two countries, including on security, global energy and other matters. In weighing the public interest balance we need to consider the degree of likelihood and the degree of seriousness of prejudice to the interests protected by s27(1).
60. In our judgment disclosure of the exempt material in document (1) and in the first sentence of the second paragraph of document (2) would add nothing material to public knowledge concerning UK involvement in Iraq. The very substantial public interest in disclosure which we have identified above is not applicable. The public interest in maintaining the exemptions for the sake of good relations with the US outweighs such public interest as exists in the disclosure of that material.
61. Assessing the balance of public interest in regard to the 3rd paragraph of document (2) is much more difficult. The strong public interest in disclosure identified above is fully engaged. On the other hand, the paragraph records a confidential statement of view by the US Government, disclosure of which might well prejudice relations with the US. On balance we are just persuaded that in relation to this paragraph the public interest in the maintenance of the exemption outweighs the public interest in disclosure. This is not simply because of the nature of the information but also because of the wider implications of releasing material obtained from another State which remains of a genuinely confidential nature.
62. The exempt material in documents (3) and (4) is exempt because of its sensitivity to the Iraqi Government. We are conscious that Mr Talabani and Mr al-Maliki were still in post at the time when the request was dealt with

(and remain so). The public interest in disclosure of documents (3) and (4) taken as a whole is strong, but the redactions necessary to give effect to the exemptions are very limited. In the circumstances we are persuaded that the public interest in the maintenance of the exemptions applicable to these very short passages outweighs the public interest in disclosure, because the brevity of the redactions reduces the public interest in disclosure to a low level.

63. The evidence adduced by the Cabinet Office has failed to satisfy us that much of the material in the four documents is protected by any exemption. In case we are wrong in that finding, we go on to consider the balance of public interest in relation to disclosure of that material, on the basis that we ought to have found that the evidence from the Cabinet Office was just sufficient to show that the exemptions relied upon were engaged. Bearing in mind the very strong nature of the public interest in disclosure concerning UK involvement in Iraq as referred to above, we consider that, if we had had to strike the balance on that material, we would have found that the public interest in disclosure outweighed the public interest in maintaining the exemptions.

64. We would not wish unjustified conclusions to be drawn from our decision in this case. We acknowledge that diplomatic communications between Governments are often confidential in nature. We acknowledge also that communications between heads of State should normally be presumed to be confidential. Our decision does not mean that such confidentiality may be disregarded. FOIA requires information to be considered on a case by case basis, to see whether the exemption still applies at the time the request is dealt with and, in the case of qualified exemptions, to assess the balance of public interests on the basis of the available evidence.

Conclusions and remedy

65. We conclude that the Cabinet Office did not deal with the request correctly under Part I of FOIA and that the Commissioner's decision was not in accordance with law, in that exemptions were only engaged to the extent set out in the table above. Subject to the redactions identified in the table, the four documents should be released to Mr Muttitt. Our decision is unanimous.

Nature of searches by the public authority

66. In paragraphs 4-15 we have recounted the unsatisfactory history of the Cabinet Office's response to Mr Muttitt's request and the belated finding of

additional documents. The Cabinet Office's written closing submission dated 4 October 2011 proffered an apology and stated that the Cabinet Office had put in place two new steps, subject to FOIA s12 (which is the costs limit on searches):

"The first is carefully to read through the documents identified to be within the scope of the request, to see whether they mention further documents which may also be within scope: and to make reasonable efforts to locate those further documents as part of the initial case. ...

The second is to make reasonable efforts to comb through documentation falling generally outside scope, in order to assess whether it contains isolated passages that may fall within the scope of the request (recognizing the effect that this will have on the calculation of the costs limit).

Both these points will be included in R2's internal guidance on responding to freedom of information requests."

67. The first of these two steps is elementary. We find it astonishing that it was not already taken as a matter of routine.
68. The second step raises concerns. We are unsure what the Cabinet Office meant in context by the expression "reasonable efforts to comb through documentation falling generally outside scope". A search should be conducted intelligently and reasonably. If the Cabinet Office or any other public authority maintains a refusal of FOIA disclosure based on s12, where the costs estimate includes the costs of looking in unlikely places where the information is not expected to be held, we would expect the Commissioner and the Tribunal to decide that s12 is not properly engaged and does not justify the refusal. As Mr Muttitt pertinently observed, in line with the policy of the Act, requesters would generally prefer a good search which delivered most relevant documents to a hypothetical exhaustive search which would deliver none because it would exceed the costs limit.

Signed: Andrew Bartlett QC
Judge
[signed on original]