



# Attorney General's Office

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Christopher Lamb  
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14<sup>th</sup> July 2017

**Re: Internal Review reply to the Attorney General's Office response to requests FOI|54|17 & FOI|60|17**

Dear Mr Lamb

Your email to the Attorney General's Office (AGO) of 18 June requested an internal review of your FOI requests dated 10 April and 14 April 2017 seeking disclosure of information relating to the AGO's legal advice with respect to the 2010 Kampala Amendments to the Rome Statute and the crime of aggression.

Specifically, you stated as follows:

"your reply acknowledges but does not assess in detail the scale of, and reasons underlying, the public interest in disclosing this information, given the complete lack of transparency over the UK government's position toward the crime of aggression and the Kampala Amendments. I would argue that there is a very substantial public interest in the matters dealt with by my request which outweighs arguments to withhold the information.

It has taken over seventy years for a definition to be made in the Statute of the International Criminal Court (ICC) to make it possible to prosecute acts of state aggression; a primary cause of war according to the Nuremberg Tribunals of 1946. Although helpless to prosecute it, state aggression is incorporated as a crime in the 1998 Statute of Rome. There can be no greater public interest than in war and peace and the legal prevention of aggression which causes war.

It is widely acknowledged by experts in international law that the only reason the 2003 invasion of Iraq- which the UK co-initiated- was not prosecuted as an act of state aggression was because the Statute of Rome had no working definition of 'aggression' to bring it to the ICC. There is a substantial public interest in ensuring that, if the crime of aggression is now defined and can be prosecuted in an international court, the UK government as a signatory party to the Statute of Rome and the ICC, must comply with it. These questions, not considered in your reply, must, in my view, outweigh the reasons you give for withholding the information."

"Policy making over negotiating the Kampala Amendments substantively ended in 2010 with the subsequent period- up to this year- taken up with ratification of the Amendments and activation. Activation is due later this summer, one year after the 30th state- the Palestinian Authority- ratified. Therefore, the substance of policy making over the content of the Amendments is not current (as your reply tends to imply). It is seven years old."

"It is notable that the UK has neither ratified the Kampala Amendments and appeared, throughout, pretty ambiguous in its position over whether it supports international efforts to draw up a definition for prosecuting acts of state aggression. There must be a strong public interest in clarifying the ambiguities as the issue of state acts of aggression and the Kampala Amendments themselves have never been publicly discussed and put before the UK electorate for their endorsement. This must be seen in the contexts that it has been almost a decade since work began on the Kampala Amendments and within that decade immense public interest (and outrage) has surrounded the 2003 invasion and occupation of Iraq- not least over the failure to prosecute it as an act of aggression."

"There have already been scholarly reports on the historical negotiations forming the Kampala Amendments. These are available on line and include the setting out of individual state's negotiating positions. I do not see why you appear to argue that these negotiations have to remain secret. There is surely a strong public interest in knowing how different states reach their different views and negotiating positions on addressing and countering state aggression?. There is also a public interest in disclosing which states have been lukewarm or even hostile to the idea of prosecuting state aggression."

### **Internal Review Findings**

In your emails of 10 and 14 April, you set out the following requests under the Freedom of Information Act:

#### **10th April 2017:**

"...I seek;

- i) *confirmation that the UK's obligations, as a signatory state of the Statute of Rome (International Criminal Court), with respect to the Kampala Amendments for prosecuting acts of state aggression, which come into force in 2017, has strongly informed any recent legal advice having a bearing upon the initiation of military force – whether unilateral or in coalition with other state powers – against another sovereign state;*
- ii) *disclosure of the latest legal assessments of how the UK would be affected, as a signatory of the Statute of Rome, under the Kampala Amendments, if its government decided to initiate military force, or join with other powers initiating military force, against another sovereign state outwith the conditions laid down by the above mentioned Amendments which determine the lawfulness or legality of such military force;*
- iii) *Disclosure of any recent legal advice recommending the use of the Kampala Amendments' opt out clause (Article 15) with respect to the exercise of military force which bears the risk of prosecution in the International Criminal Court as 'aggression'.*

**14<sup>th</sup> April 2017:**

*"...I seek...disclosure of all information relating to advice being prepared or submitted to government by the Attorney General's Office concerning any duty or expectation that the UK- as a signatory party to the Statute of Rome- should incorporate 'aggression', as defined by the Kampala Amendments, into UK domestic law, accompanying other war crimes incorporated in such a way. I am also interested in whether this potential advice discusses the issue of incorporating the legal concept of aggression for prosecution retrospectively.*

*I also seek information relating to the current government's policy position with regard to the 'crime of aggression' given that UK governments by choice have not ratified the Kampala Amendments."*

As Craig Hollands' letter of 12 June stated, we hold the information that you have requested. However, I am satisfied following an internal review that Mr Hollands was correct to say it should be withheld under the above sections, for what I consider are the valid reasons set out in the original letter:

Section 35(1)(a) – Notwithstanding the point you make in your email, in particular paragraph (b) regarding the scale of the public interest, I am content with the finding of Mr Hollands that the information held falls within the scope of this exemption. I have considered afresh whether the public interest favours disclosure in light of the points you make in your communication of 18 June, including the gravity of the public interest arguments at stake, and have concluded that for the reasons set out in Mr Hollands' letter, the material should not be disclosed.

Section 27(1) – I am content that some of the information held also falls within section 27(1) for the reasons set out by Mr Hollands, notwithstanding the points in your 18 June communication, in particular, paragraph (d), including your reference to publicly available negotiating positions. I have considered afresh whether the public interest favours disclosure in light of the points you make, and have concluded that for the reasons set out in Mr Hollands' letter, the material should not be disclosed.

Section 40 – I am content that the information held contains personal data, and that in this case, for the reasons set out by Mr Hollands, and in particular that condition under schedule of the Data Protection Act has not been satisfied, this information cannot be disclosed.

Section 35(3) – I agree with Mr Hollands that section 35(3) is engaged, in light of section 35(1)(c) which exempts information relating to the "provision of advice any of the Law Officers or any request for the provision of such advice". I further agree that the public interests favours withholding the information in this case.

Section 42(2) – I agree with Mr Hollands that section 42(2) is also engaged for the reasons he sets out. I further agree that the public interest in disclosure, notwithstanding the points you have made in your 18 June communication, does not outweigh the important doctrine of legal professional privilege in confirming or denying whether information is withheld.

## **Conclusion**

As noted above, the public interest in disclosure must be balanced against the public interest in this case in ensuring that policy development in relation to the Independent Commission's recommendations is fully informed, and in enabling officials to discuss issues freely and frankly without external influence. The conclusion of this internal review is therefore to confirm the approach to and substance of the response conveyed to you by Craig Hollands.

If you are not content with the outcome of the internal review, you have the right, under section 50 of the FOI Act, to apply directly to the Information Commissioner for a decision. The Information Commissioner recommends that applications are made within two months of the public authority's determination in relation to the internal review (i.e. the date on this letter). The Information Commissioner can be contacted at:

Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire SK9 5AF.

Yours sincerely



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