



Attorney General's Office

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Christopher Lamb
request-400253-d704debe@whatdotheyknow.com

Via email

12th June 2017

Dear Mr Lamb

Freedom of Information requests: FOI|54|17 and FOI|60|17

Dear Mr Lamb,

Thank you for your emails of 10th and 14th April, which set out the following requests for information, made under the Freedom of Information Act 2000 ("FOIA") relating to the crime of aggression:

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'.*

14th 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."

On 15th May 2017 I wrote to you to confirm that certain provisions of section 35 FOIA were likely to apply to this request, and further time was required to consider the balance of the public interest.

I have now had the opportunity to consider in full your requests.

Following a search of our paper and electronic records, I can confirm that this office does hold information relevant to your request. This information is being withheld under section 35(1)(a) of FOIA, which exempts from disclosure information which relates to the formulation and development of government policy.

Section 35(1)(a)

Section 35(1)(a) provides that information may be withheld where it relates to the formulation and development of government policy, and where the public interest in maintaining this exemption would outweigh the public interest in disclosure of the information sought.

The information held within scope falls within scope of this exemption, relating as it does to the Government's policy position in terms of the crime of aggression. I have considered whether the public interest favours disclosure of the information held, and have concluded that this information cannot be disclosed. The information held relates to the formulation and development of the government's position on a significant matter of policy and international law. The policy in question in this case is sensitive and important. I acknowledge the public interest in understanding HMG's position with regard to the crime of aggression but in my view this does not outweigh the significant arguments in favour of withholding this information.

Officials in government require a safe space in which to discuss in depth all possible outcomes and the relative advantages and disadvantages of available options. These considerations rightly take account of a wide range of issues, but should not be affected in any way by public perception or external input. If officials had justifiable cause to think their internal discussions, advice, drafts, or briefings were to be disclosed publicly, particularly with the risk of those being published out of context, their advice would necessarily be presented such as to take account of that risk. This would diminish the quality of the discussions, with an undue focus on presentational issues, which would not be in the public interest. The significant public interest here is in ensuring that government policy is developed in the most effective way, with frank and candid discussions of the risks and benefits of all options, and in my view the public interest would be best served in this case by withholding the information held.

Section 27(1)

Further, some of the information held falls within section 27(1) FOIA. Section 27(1), insofar as relevant, provides that information is exempt if its disclosure would or would be likely to prejudice relations between the UK and any other state, or the interests of the UK abroad. The information held contains discussions of the UK's position in terms of the crime of aggression, which makes reference to the position taken by other countries, and necessarily contains information relating to the International Criminal Court. In my view disclosure of these internal discussions would be likely to prejudice relations between the UK and other states. Sections 27(1)(a) and (c) are therefore engaged.

This exemption is qualified, and so I have considered whether the public interest favours disclosure in this case. I acknowledge the public interest in understanding other states' positions in terms of this issue, but this in my view does not outweigh the public interest in withholding this information.

First, the information only makes reference to other states' positions and does not therefore present a comprehensive or full account of that state's or those states' views on this issue. It

would not be fair, therefore, to release this information and I consider the potential damage to the UK's relationship with those states would not be in the public interest, and is not a risk worth taking. In order to come to a fully considered view on how best to deal with the crime of aggression from the UK's perspective, necessarily the views of and positions taken by other countries will be taken into account. It is imperative to effective policymaking to ensure that the UK is trusted with this type of information from other states, and disclosure in this case risks prejudicing that relationship of trust and confidence, which would be damaging to the UK's reputation, and also to its ability to deal with other states in future, which would not be in the public interest. In conclusion, in my view the public interest favours withholding this information.

Section 40

In addition, the information held contains personal data and this information is being withheld under section 40(2), in reliance on section 40(3)(a)(i). In order for personal data to be disclosable, it must be fair and lawful to make that disclosure, and a Schedule 2 condition (as found in Schedule 2 to the Data Protection Act 1998) must be satisfied. If these conditions cannot be fulfilled, the information cannot be disclosed. In this case it would not be permissible to disclose this personal data. This information contains identifying personal data, as well as views and opinions of individuals. The individuals in question would not expect that information to be disclosed, having engaged in this exchange on the basis that the information would not be shared. They would expect that information to be kept confidential. The only relevant conditions in Schedule 2 would be that the data subjects have given consent, which is not the case here, or that there is a legitimate interest in disclosure of this particular personal data to the public / the requester, and that disclosure is necessary to meet that interest. In my view there is nothing to warrant the disclosure of this information in this case and while I understand the interest in this subject matter, it cannot be said that disclosure of this information is necessary to meet that interest.

Section 35(3)

In addition, I can neither confirm nor deny whether any additional information is held, relying on section 35(3), taken with section 2(1)(b) FOIA. Section 35(1)(c) provides that information is exempt from disclosure if it relates to the provision of advice by any of the Law Officers, or any request for the provision of such advice. To confirm or deny whether information within scope of section 35(1)(c) is held would be to reveal exempt information, namely information as to whether Law Officers' advice was sought or given in relation to the subjects set out in your requests. I have therefore concluded that section 35(3) is engaged.

This exclusion from the duty to confirm or deny whether information is held is qualified, and as such it is necessary for me to consider whether the public interest favours disclosing that information.

Section 35 is statutory recognition of the public interest in allowing government to have a clear space, immune from exposure to public view, in which it can debate matters internally with candour and free from the pressures of public political debate.

As part of this principle, there is a strong public interest in ensuring that a government department is able to act free from external pressure in deciding what sort of legal advice it obtains, at what stage, from whom, and in particular whether it should seek advice from the Law Officers. This strong public interest is reflected in the long-standing Convention, observed by successive Governments, that neither the advice of Law Officers, nor the fact that their advice has been sought, is disclosed outside government. This Convention is recognised in paragraph 2.13 of the Ministerial Code. It is also an interest which is recognised by the particular form of words used in section 35(1)(c), which recognises the sensitivity in disclosing even whether or not such advice was sought in respect of a given matter.

The purpose of this Convention, as recognised in section 35(1)(c), is to provide the fullest guarantee that Government business will be conducted in a way that facilitates fully informed legal advice, where Ministers and the Law Officers are fully open with each other. This protection of the confidentiality of the conditions in which legal advice is sought is essential in allowing the Law Officers to discharge their responsibility to advise the Government on complex legal matters, and in supporting the Government in acting within the rule of law. The Convention also promotes democratic accountability, by ensuring that the focus of public scrutiny and debate is on a decision (which may include a legal position) taken collectively by the elected Government, rather than on the internal process by which that decision is reached. There is thus a strong public interest in protecting the confidence provided by the Convention. The ICO guidance on this subject expressly recognises the strong public interest in maintaining the Convention, acknowledging the 'fundamental importance of the Law Officers' convention to good government.'

I consider that the very strong public interest in maintaining the Law Officers' Convention outweighs the public interest in disclosing whether or not this department holds the information in question.

Section 42(2)

Section 42(2) provides that it is not necessary to disclose whether or not information is held within scope of a request if to do so would itself disclose information that would be legally privileged. Given the way in which your requests are framed (for example, 'disclosure of any recent legal advice recommending the use of the Kampala Amendments' opt out clause'), to confirm or deny whether information is held would point to the content of any such advice, if it were held.

Section 42 is a qualified exemption and is therefore subject to the public interest test. There is a strong public interest in withholding information to which legal professional privilege applies. The Courts have recognised that where a request is received under the Act and reliance is placed on section 42 there is a strong inherent public interest in maintaining legal professional privilege. In order to overcome that public interest there would need to be a countervailing public interest factor of at least equal significance that favoured disclosure. In this case, while I understand the interest in understanding the government's position in relation to these provisions, I consider that this is not sufficient to outweigh the significant public interest in ensuring legal advice is freely sought where necessary, and communicated in confidence in the terms considered most effective by the person drafting it, without fear that its content will be disclosed or alluded to publicly. This would be very damaging to the extremely important relationship of openness and confidence between the lawyer and client. In the circumstances of this case, to confirm or deny whether information is held in response to your request would indicate, potentially erroneously, the content of any such advice, if held, and in this case, I consider that the public interest in protecting the important doctrine of legal professional privilege outweighs the public interest in confirming or denying whether information is held.

If you are dissatisfied with the handling of your request, you have the right to ask for an internal review. Internal review requests should be submitted within two months of the date of receipt of the response to your original letter and should be addressed to the above address.

Please remember to quote the reference number above in any future communications.

If you are not content with the outcome of the internal review, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF.

Yours sincerely

A small, rectangular, light-colored stamp or seal is positioned to the left of a handwritten signature. The signature is written in dark ink and appears to be 'Craig Hollands'.

Craig Hollands
FOI Officer

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