

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 June 2023

Public Authority: HM Treasury
Address: 1 Horse Guards Road
London
SW1 2HQ

Decision (including any steps ordered)

1. The complainant requested from HM Treasury (HMT) information relating to Lord Amyas Morse and a formal agreement/contract concerning his appointment to lead a review of the Loan Charge¹. HMT responded to parts of the request but withheld information relating to part 4 and cited section 40(2) (personal information) and section 43(2) (commercial interests) of FOIA.
2. The Commissioner's decision is that HMT was not entitled to withhold information to part 4 of the request under section 40(2) or section 43(2) of FOIA.
3. The Commissioner also finds HMT breached section 10 (time limits for compliance) of FOIA by not responding to the request within 20 working days.
4. The Commissioner requires HMT to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information – the total gross amount paid to Lord Morse and the amount of tax and national insurance deductions

¹ <https://www.gov.uk/government/publications/loan-schemes-and-the-loan-charge-an-overview/tax-avoidance-loan-schemes-and-the-loan-charge>

5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request, background and response

6. On 8 November 2021, the complainant wrote to HMT and requested information in the following terms:

"1) Confirmation that Sir (now Lord) Morse was required to enter into a formal agreement/contract in order to fulfil his appointment, by the Chancellor, to lead a review of the Loan Charge.

2) All recorded information held by HM Treasury which constitutes the detail(s) of that formal agreement/contract covering Sir (now Lord) Morse's appointment to lead a review of the Loan Charge.

3) The categorisation of that role in relation to the status of his employment - please confirm whether the appointed role was categorised as 'inside' IR35² or 'outside' IR35.

4) The total gross amount paid to Sir (now Lord) Morse for the period he was engaged (as either 'employed' or 'self-employed', as per Q3) and the amount of tax and NI which was deducted from any payment made to Sir (now Lord) Morse.

5) The details and amounts of any bonus payments which were paid to Sir (now Lord) Morse for this role either at the time of the review, immediately following the review or at any date since the review.

6) The details of any agency or any other third-party which had any role in the formal engagement of Sir (now Lord) Morse for the purposes of this appointment."

7. On 14 December 2021 HMT responded. It provided information to some parts of the request but applied section 21 (information reasonably accessible by other means) to part 2 of the request, and section 40(2) of FOIA to parts 4 and 5.

² <https://www.gov.uk/guidance/understanding-off-payroll-working-ir35>

8. On 10 February 2022 the complainant asked for an internal review.
9. On 6 May 2022 HMT provided its review response. HMT maintained its original position regarding its reliance on section 21 to part 2 of the request and section 40(2) to parts 4 and 5. HMT also formed the view that section 43(2) of FOIA is engaged but it did not specify to which part(s) of the request.
10. During the Commissioner's investigation of this case, HMT was asked further questions in support of its position. Having re-examined its original response HMT withdrew reliance on section 21 as it had located the letter of appointment, and therefore was no longer applicable. With regard to part 4 of the request, HMT maintained it was relying on section 40(2) to withhold some of the information requested and additionally clarified it considered section 43(2) was applicable part 4 only.

Reasons for decision

11. This reasoning covers whether HMT was entitled to withhold information to part 4 of the request under sections 40(2) or 43(2) of FOIA.

Section 40(2) – personal information

12. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
13. Section 3(2) of the Data Protection Act 2018 (DPA) defines personal data as: "any information relating to an identified or identifiable living individual." The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
14. The withheld information in this case is the total gross amount paid to Lord Morse for the period he was engaged (as either employed or self-employed), and the amount of tax and national insurance which was deducted from any payment made to him.
15. The Commissioner is satisfied that as the withheld information is payment/remuneration and deductions details, the information constitutes the personal data of the individual concerned.

16. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focused here on principle (a) which states:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”

17. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

18. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider if there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and if these interests override the rights and freedoms of the individuals whose personal information it is.

Legitimate interests

19. The complainant strongly believes there is a legitimate interest in the subjects of the Loan Charge and the associated Lord Morse review, specifically the total gross amount which was paid to Lord Morse. The complainant said this topic has “prompted unprecedented numbers of MPs, peers, tax and legal experts, journalists and media commentators to speak out in opposition...” and they consider a high level of legitimate public concern and “weighty public interest” in the disclosure of the information which they are seeking.

20. HMT accepts that there is a legitimate interest in the disclosure of this information, which is the aim of transparency and accountability in the spending of public funds.

21. The Commissioner considers that in this instance, the complainant is pursuing a legitimate interest, as the request is about payment to Lord Morse for his services concerning his appointment to lead a review of the Loan Charge.

22. Disclosure of the information would serve a legitimate interest, as it would serve the general principles of transparency and accountability. The Commissioner accepts that it would also allow for scrutiny of remuneration details of an individual that is appointed to lead a review of the Loan Charge - a piece of work for HMT that was commissioned by the Chancellor.

Is disclosure necessary?

23. "Necessary" means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
24. Whilst the Commissioner notes the spending of public funds has been met in part by the previous release of information³ which was published on 23 April 2020, he is not aware that the information requested at part 4 (the total gross amount paid to Lord Morse) has been published or can be accessed by the complainant. Therefore, the Commissioner is satisfied disclosure under the FOIA would be necessary to meet the legitimate interests identified. He has therefore gone on to conduct the balancing test.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

25. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
26. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern about the disclosure; and
 - the reasonable expectations of the individuals.

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https://www.whatdotheyknow.com/request/633519/response/1563550/attach/4/FOI2020%2000559%20Attachment%201%20of%202.pdf?cookie_passthrough=1

HMT's position

27. HMT applied section 40(2) of FOIA to part 4 of the request. It referred to the Commissioner's guidance and said "section 40(2), by virtue of section 40(3A), provides an absolute exemption for third-party personal data, where disclosure would contravene any of the data protection principles set out in article 5 of the General Data Protection Regulation (GDPR)." HMT believes that releasing the information would breach the first data protection principle, since it would be unlawful and unfair to disclose it.
28. HMT said this must be balanced against the individual's right to privacy, and in this case HMT does not have the consent of the data subject to release this information. HMT confirmed that Lord Morse was not paid any expenses or overtime.

The complainant's position

29. The complainant challenged HMT's refusal to disclose the information at part 4 of the request on the basis that it believed it would be unlawful and unfair.
30. The complainant said public funds would have been sourced and used to pay Lord Morse for his work on this review, and they consider it to be in the public interest to know "how much an employee or worker (even a short-term employee/worker) would have been paid to carry out a significant, high profile and highly-visible piece of work for HMT, as publicly commissioned by the Chancellor."
31. The complainant further argued that "Amyas Morse, when freely consenting to enter into a formal agreement/contract with HMT and being paid using funds from the public purse for his work whilst engaged/employed, would have understood that this payment(s) would then be subject to full public disclosure and scrutiny in order to demonstrate fiscal accountability by the engaging authority to the general public."
32. The complainant referred to Article 5 of the GDPR, and said that further processing of personal data for archiving purposes in the public interest, scientific or historical research purposes, or statistical purposes, shall not be considered to be incompatible with the initial purposes described as 'purpose limitation'. The complainant therefore considers this request fulfils the public interest element and meets the criteria for historical research.

33. The complainant highlighted the fact that HMT had not provided an explanation for citing section 40(2) to part 5 of the request, instead, HMT stated that Lord Morse was not paid any expenses or overtime. The complainant had asked for "details/amounts of any bonus payments..." but this information had not been addressed, the wording within HMT's response referred only to 'expenses' and 'overtime'. The response to the complainant excludes any reference to the 'bonus' payments which they had asked for.

The Commissioner's position

34. With regard to the complainant's arguments, the Commissioner is not persuaded that the request meets the criteria for historical research, or that Lord Morse would have understood the details of his remuneration would be subjected to full public disclosure.
35. Furthermore, HMT confirmed to the Commissioner that no bonus payments were made and he is satisfied that this is the case.
36. Turning now to the main issue, in the event of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
37. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as a private individual, and the purpose for which they provided their personal data.
38. It is important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
39. Disclosure under the FOIA is tantamount to publication to the world at large. The Commissioner must therefore balance the legitimate interests with the data subject's interests when determining whether the information can be disclosed into the public domain and not just to the complainant.
40. The Commissioner considers employees of public authorities should reasonably expect some information about their salaries/remuneration to be made available to the public.
41. HMT has not produced any evidence to demonstrate that it has approached Lord Morse to see whether he had any objection to the disclosure of information relating to his remuneration, or whether he believed that any such disclosure would cause him any distress or harm.

42. Having considered HMT's submissions on the application of this exemption, the Commissioner does not consider its arguments are sufficiently detailed or robust to support the engagement of section 40(2) of FOIA. HMT has not provided arguments on how disclosure would compromise the rights and freedoms of the individual concerned, or whether disclosure would cause the individual any distress or harm. HMT has not provided any tangible evidence to strengthen its position, it merely referred to some parts of the Commissioner's guidance on personal data.
43. The Commissioner accepts there is a significant legitimate interest in transparency and accountability in respect of information which would demonstrate fiscal accountability. Particularly in allowing the public to scrutinise the amount paid out of public funds to an individual for leading a review.
44. Having taken into account all the circumstances of this case, and considered the reasonable expectations of the individual in question, also the potential consequences of disclosure, the Commissioner is satisfied that there is sufficient legitimate interest in disclosure of the information requested to outweigh the data subjects' fundamental rights and freedoms. There is therefore an Article 6 basis for processing this personal data and it would be lawful.
45. Although it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
46. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
47. The requirement for transparency is met because as a public authority, HMT is subject to the FOIA.
48. The Commissioner has therefore determined that HMT was not entitled to apply section 40(2) of FOIA to part 4 of the request. The Commissioner will now go on to consider HMT's reliance on section 43(2) of FOIA.

Section 43 – commercial interests

49. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.

50. HMT stated the release of the information requested (part 4 of the request), could potentially prejudice future negotiations for the third party relating to payment for similar work. It explained that disclosure would be likely to undermine the negotiating position of HMT in any future negotiations on contracts of this type.
51. HMT said it recognises there is a public interest in knowing that the Government is achieving value for money and that the spending of public funds is transparent.
52. However, HMT said there is a strong public interest in the Government not undermining the commercial position of private companies or individuals by releasing information which would normally remain confidential. It explained that the release of this information could potentially prejudice future negotiations for the third party relating to payment for similar work.

The complainant's arguments

53. The complainant believes that the public should know how much it cost the taxpayer for the appointment of Lord Morse, and "what deductions, and on what basis, were made by the engaging authority." They said the public are deprived of the opportunity to know with certainty the cost, without full knowledge of the gross amount paid by HMT.
54. The complainant pointed out to the Commissioner that the daily rate paid under contract to Lord Morse has already been disclosed (link 3 page 4 above) and the duration of this exercise was set at 10 weeks by the terms of his letter of appointment. Therefore, the complainant disputed HMT's response that this could "potentially prejudice future negotiations" or "undermine the negotiating position" when this information is already in the public domain. The complainant emphasised their main point which is exactly "how much" money has been paid out of public funds to Lord Morse (as a gross amount)? Also, how much tax and national insurance was deducted by HMT whilst Lord Morse was on its payroll? The complainant added another concern; the amount of "employer's national insurance which was paid and by whom?"

55. The complainant referred to HMT's correspondence sent to Lord Morse (HMT had provided a copy to the complainant). The complainant stated that there was no "negotiation" and quoted a line from the email to emphasise this point; "We think that a payment of £560 per day worked is a suitable rate, but would be happy to discuss that with you further if you have any concerns." The complainant also made reference to Lord Morse's response email to HMT in which he accepted this daily rate. The complainant considered this does not constitute the type of 'negotiation' which 'might' be prejudiced in future.

The Commissioner's position

56. The Commissioner considered HMT's arguments on the application of section 43(2) of FOIA, and specifically the claimed prejudice. However, he does not consider HMT's arguments are sufficiently detailed or robust to support the engagement of prejudice to its commercial interests. HMT have not provided any tangible evidence to strengthen its position. In the absence of any arguments in support of prejudice to the commercial interests of the third party, the Commissioner is not persuaded that disclosure would result in the prejudice specified.

57. The Commissioner notes the information already disclosed on the WhatDoTheyKnow website on 23 April 2020. However, the Commissioner is not convinced disclosure of information to part 4 of the request (the 'total gross' amount paid to Lord Morse and the amount of tax and national insurance deducted from any payment made to him) could potentially prejudice future negotiations for the third party on contracts of this type.

Conclusion

58. As the Commissioner is not persuaded by HMT's arguments to demonstrate that disclosure of the requested information would be likely to prejudice the commercial interests of the third party, his conclusion is the exemption is not engaged.

59. There is no requirement for the Commissioner to proceed any further and therefore he has not considered the public interest test. HMT was not entitled to withhold the information relating to part 4 of the request under section 43(2) of FOIA. At paragraph 4 of this notice HMT is now required to disclose the withheld information.

Procedural matters

60. Section 10(1) of FOIA says that a public authority should comply with section 1(1) promptly and no later than the twentieth working day following the date of receipt of the request.
61. In this case, HMT provided its response to the request of 8 November 2021 on 14 December 2021, which is outside the 20 working day time limit. Therefore, HMT breached section 10(1) of FOIA.
62. The Commissioner acknowledges HMT's apology to the complainant for the delay in responding to this request. HMT said it takes its obligations under the FOIA seriously and that it endeavours to respond to requests within the 20 working day statutory deadline whenever possible. In this case, HMT recognised that it did not achieve this target. However, the Commissioner still finds that HMT breached section 10(1) of FOIA.

Other matters

63. The Commissioner notes the time taken for HMT to respond to the complainant's internal review request of 10 February 2022 exceeded 40 working days. HMT provided its review response on 6 May 2022. Although there is no statutory time limit for carrying out a review, it is best practice⁴ to do so within 20 working days, or in exceptional circumstances, 40 working days.
64. The delayed and poor responses from HMT have been noted, the Commissioner considers 58 working days from receiving the internal review request is unreasonable. Furthermore, the follow-up communication from the complainant asking for a reply and an explanation for why HMT needed an extended period, HMT had simply replied that it aimed to respond "as soon as possible". It had not supplied a reasonable target date within the 40 day period or an explanation for needing additional time.
65. The Commissioner would not expect this form of customer service from a central government department, he has therefore recorded the delays in this case.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

66. HMT should ensure that future reviews conform to the recommendations of the section 45⁵ Code of Practice.
67. Finally, the complainant should be aware that if Lord Morse was not an employee of HMT it is highly unlikely it will hold information detailing any tax or national insurance contributions.

⁵ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-45-code-of-practice-request-handling/>

Right of appeal

68. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk.

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

69. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
70. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Susan Duffy
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