

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 March 2023

Public Authority: HM Treasury
Address: 1 Horse Guards Road
London SW1A 2HQ

Decision (including any steps ordered)

1. The complainant has requested from HM Treasury ("HMT") information exchanged between a named official and any other individual which led to the decision to select Sir Amyas Morse to head the government's review into its Loan Charge policy over a specific timeframe. It relied on provisions of section 36 (effective conduct of public affairs) and section 40 (contravention of data protection law) as its basis for doing so. It upheld this at internal review.
2. The Commissioner's decision is that HMT is entitled to rely on the exemptions it cited as its basis for refusing this request with respect to most of the withheld information. However, it is not entitled to withhold the number of other potential candidates that were considered for the role of heading the aforementioned review. This information is not exempt from disclosure.
3. The Commissioner requires HMT to take the following steps to ensure compliance with the legislation.
 - Disclose the number of potential candidates that were initially considered for the role of heading the government's review into its Loan Charge policy.

4. 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 and response

5. On 10 March 2021, the complainant wrote to HMT and requested information in the following terms:

"Information released within FOI2020/00559 shows that an unnamed official in HM Treasury wrote to Tom Scholar, Permanent Secretary to the Treasury, on 06 September 2019, copying in Beth Russell, Director General, Tax and Welfare. This email to Tom Scholar started 'I understand Beth spoke to you yesterday about the decision to approach Amayas Morse and ask him if he would be willing to take on the role of leading the review of the loan charge. We've drafted a script for you to use in the call.'

Please provide full and comprehensive details of all recorded communications and evidence (including, but not limited to reports, documents, notes, meeting minutes, emails, SMS messages, WhatsApp messages, computer files, letters and any sound or video recordings) between Beth Russell and any other individual prior to 06 September 2019 containing any reference to this subject, and which culminated in the final decision to select and approach Sir Amyas Morse to head the government's review into the Loan Charge.

Please also provide similar details (noting that individual names can be redacted whilst enabling the substance of the debate around their suitability or otherwise to be published) of how many other potential candidates were considered for this role, and specifically what criteria was used by HM Treasury and government officials to determine how Sir Amyas Morse was considered as more suitable in experience than a wholly independent and qualified tax judge, or indeed any other possible candidates for the appointed task."

6. On 9 April 2021 HMT responded. It confirmed that it held the requested information but argued that it would exceed the appropriate cost limit set by regulation to comply with the request (section 12).
7. The complainant sought to narrow the time frame to 28 June 2019 and 6 September 2019 in a letter to HMT of 7 June 2021.

8. HMT (in relation to section 10(3)) wrote to the complainant on 6 July 2021 to explain that it intended to rely on section 36(2)(b)(ii) (inhibition of free and frank exchange of views for deliberation) but it needed further time to consider the balance of public interest. It said it intended to reply by 3 August 2021.
9. HMT eventually provided a response on 1 September 2021 and cited section 36(2)(b)(i) & (ii) and section 36(2)(c) (prejudice to the effective conduct of public affairs) as its basis for refusing to provide the requested information. It also cited section 40 (contravention of data protection law) as its additional basis for refusing to provide some of the information.
10. The complainant wrote to HMT on 24 September 2021 and stated explicitly that they were not seeking an internal review. They set out why they believed HMT failed to comply with its FOIA timeliness obligations and asked it to respond to their request immediately.
11. The Commissioner would note at this point that if a public authority fails to comply with its timeliness obligations under FOIA (and HMT failed to do so here), that does not invalidate any exemptions they seek to rely on. The Commissioner would also note that where a person disputes a public authority's initial response, they should request an internal review of that response rather than enter into a protracted correspondence about it.
12. HMT responded to the letter of 24 September 2021 on 18 October 2021 to say that its position in respect of the request was unchanged. On 3 November 2021, the complainant made a formal request to HMT for an internal review of its refusal. HMT responded the following day and said it aimed to respond within 20 working days. It responded on 1 December 2021. While acknowledging its failure to meet statutory timescales, it nevertheless upheld its use of section 36(2)(b)(i) and (ii), section 36(2)(c) and section 40.

Scope of the case

13. The complainant contacted the Commissioner on 23 February 2022 to complain about the way their request for information had been handled.
14. The Commissioner considers that the scope of his investigation is to decide whether HMT is entitled to rely on section 36(2)(b)(i) and (ii), section 36(2)(c) and section 40 as its basis for withholding the information described in the complainant's narrowed request of 7 June 2021.

Reasons for decision

15. HMT has relied on sections 36(2)(b)(i), (ii) and (c) to withhold most of the requested information.
16. Sections 36(2)(b)(i), (ii) and 36(2)(c) of FOIA state that:

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

 - (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs.'
17. In determining whether sections 36(2)(b)(i), (ii) and (c) are engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one.
18. In doing so the Commissioner has considered all of the relevant factors including:
 - Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
 - The qualified person's knowledge of, or involvement in, the issue.
19. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an

opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

20. With regard to the process of seeking this opinion, HMT sought the opinion of Kemi Badenoch MP, who was at the time (5 August 2021) Exchequer Secretary to the Treasury, with regard to whether sections 36(2)(b)(i), (ii) and (c) of FOIA were engaged.
21. The qualified person was provided with a brief rationale as to why the exemptions could apply and copies of the withheld information.
22. The qualified person provided her opinion that the exemptions were engaged on the same day, 5 August 2021.
23. Whilst the rationale as to why the exemption applies is contained in the recommendation to the qualified person, to which the latter's opinion simply agreed, the Commissioner is satisfied that this is an appropriate process to follow (and is in line with the approach taken by other central government departments).
24. Turning to the substance of the opinion, the information being withheld falls within the scope of the two categories in the request, namely
 - "evidence (including, but not limited to reports, documents, notes, meeting minutes, emails, SMS messages, WhatsApp messages, computer files, letters and any sound or video recordings) between Beth Russell and any other individual prior to 06 September 2019 containing any reference to [the appointment of Sir Amyas Morse], and which culminated in the final decision to select and approach Sir Amyas Morse to head the government's review into the Loan Charge"; and
 - information which addresses "how many other potential candidates were considered for this role, and specifically what criteria was used by HM Treasury and government officials to determine how Sir Amyas Morse was considered as more suitable in experience than a wholly independent and qualified tax judge, or indeed any other possible candidates for the appointed task".
25. The qualified person was asked to consider whether disclosure would mean that disclosure would be likely to inhibit the free and frank provision of advice and exchange of views "in regard to future discussions on appointments". She was asked to consider whether officials "would be less willing to discuss in a free and frank manner the suitability of candidates in a future selection process if they believed those discussions would be released under the FOI Act". They were also asked to consider whether the effective conduct of public affairs would

be prejudiced if, as a result of disclosure, "the effective evaluation of candidates in a future selection process was impeded and therefore less robust that would otherwise have been the case".

26. The qualified person was also asked to consider the likelihood of these prejudicial outcomes arising. It was explained that "would prejudice" meant that there was more than a 50% chance that the prejudice would occur. It was further explained that "would be likely" was a "lower standard" but that prejudice "must be significant and weighty but it does not have to be more likely than not that it would occur".
27. The qualified person concluded that disclosure "would prejudice the effective conduct of public affairs". The Commissioner has concluded from the papers that the qualified person meant that the higher threshold of likelihood applied in respect of all three provisions in section 36 which HMT sought to rely upon.
28. Noting the relevant factors for consideration set out in paragraph 18 above, the Commissioner accepts that it is not unreasonable to conclude that the prejudicial outcomes envisaged would be likely to occur. As explained above, this does not mean the Commissioner accepts that this is the only reasonable opinion that could be held on this subject or that it is the most reasonable opinion.
29. Sections 36(2)(b)(i), (ii) and (c) are therefore engaged.

The public interest test

30. Section 36 is a qualified exemption which means it is subject to a balance of public interest test. A public authority can only rely on section 36, even if it is engaged, where the public interest in doing so outweighs the public interest in disclosure.

The public interest in disclosure

31. The complainant made a number of points they considered to be in favour of disclosure including the following:
 - The Loan Charge All-Party Parliamentary Group had raised concerns about the lack of independence in the Morse review.¹
 - The now Lord Morse had not responded to, or even acknowledged, any letters submitted to him by the Loan Charge Action Group about

¹ [Loan-Charge-APPG-Report-into-the-Morse-Review-FINAL.pdf \(loanchargeappg.co.uk\)](#) (see, in particular, the Key Findings)

what it saw as the flawed and unsound conclusions of his report. These argued that, contrary to what the report asserts, the law was not clear around this mechanism since December 2010. The complainant provided links to these letters, although not all predated this request.²

- There has been considerable resistance by HMRC and HMT to FOI requests.
- There had, tragically, been a number of suicides where the impact of Loan Charge legislation – which has operated retrospectively and resulted in large tax bills for individuals – may have been a factor.
- If HMT was entirely confident that the selection process referred to in the request was impartial, why would they have concerns about transparency.

32. HMT identified the following as factors favouring disclosure:

- There is a public interest in openness and transparency to aid the public's understanding the appointment process for the Independent Reviewer.

The public interest in maintaining the exemptions

33. HMT set out a number of arguments considered in favour of maintaining the exemption:

- There is a strong public interest in maintaining a safe space for officials to seek advice, discuss issues and reach well-formed conclusions, including discussions around senior appointments. Inhibiting those discussions would be contrary to the public interest.
- If officials were less free and frank in providing their advice out of concerns about disclosure, this would undermine any future appointment process, "potentially limiting the department's ability to appoint the most suitable candidate".
- The public interest in accountability and transparency regarding the appointment of the Independent Reviewer of the Loan Charge review is "to some extent already satisfied due to the abundance of publicly available information regarding the Loan Charge Review in general

² [LCAG-letter-to-Lord-Morse-21st-October-2021-1.pdf \(hmrclloancharge.info\)](#)
[2022-02-04-LCAG-further-letter-to-Lord-Morse-February-2022-final.pdf \(hmrclloancharge.info\)](#)

and the appointment more specifically". It provided a link to an earlier and, in its view, similar request where it had made a partial disclosure after internal review.³ This is the disclosure referenced in the original request.

The Commissioner's decision

34. The Commissioner notes that the complainant and others have raised concerns around the process by which the Loan Charge Review operated including the extent to which the review was independent of government. The Commissioner notes the report of the All- Party Parliamentary Group linked at Note 1. The Commissioner recognises a public interest in greater transparency around the process by which Sir Amayas (now Lord) Morse was selected. This includes learning more about who else was considered.
35. The Commissioner also recognises the strong public interest in protecting the safe space around which the selection process is conducted to ensure a free and frank provision of advice and exchange of views. It is in the public interest that similar selection processes in the future are undertaken within a safe space.
36. However, and with both competing positions in mind, the Commissioner thinks that the public in disclosing certain information caught by section 36 here overrides the public interest in maintaining the relevant provisions of that exemption. The Commissioner notes that the request included "how many other potential candidates were considered for this role". He believes that the public interest in disclosing this number is more weighty. It would give a clearer indication of the extent to which the selection process was thorough. The Commissioner recognises that this number is not, of itself, specifically recorded in the withheld information. However, it can clearly be obtained from the information and the Commissioner does not consider it to be onerous for HMT to count the number of records in the withheld information which would allow it to disclose this number. He also does not consider that it would undermine the safe space for officials' discussion to any significant extent.
37. Similarly, the Commissioner does not consider that this number would be personal data caught by the provisions of section 40 because no individual could be identified from it. Section 40 (which will be addressed later in this notice) only applies to information which is

³ [All correspondence between Sir Amyas Morse and HM Treasury on the Loan Charge Independent review - a Freedom of Information request to HM Treasury - WhatDoTheyKnow](#)

personal data. This number is not, of itself, personal data and therefore it cannot be exempt by virtue of section 40.

Section 36 - conclusion

38. In respect of most of the information to which HMT has applied provisions of section 36, the Commissioner is satisfied that the public interest favours maintaining that exemption. However, in respect of the number of "other potential candidates were considered for [the] role [of leading the Loan Charge Review]", the Commissioner has concluded that the public interest favours disclosure. This is the number of people and not their names or any other identifiers. In reaching this view, he has had regard for the public interest in learning more about the selection process and has balanced this against the public interest in protecting the safe space in which the selection process is undertaken.

Section 40 – personal data

39. HMT has argued that the names of junior officials contained in the withheld information are exempt from disclosure on the basis of section 40(2) of FOIA.
40. It has also argued that the names of those considered for the role of heading the Loan Charge Review were also exempt under section 40. The Commissioner is already satisfied that those names are exempt under section 36 for reasons outlined above.
41. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
42. In this case the relevant condition is contained in section 40(3A)(a)⁴. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
43. It is common practice for a public authority to argue that the names of junior officials are exempt from disclosure under FOIA on the basis of section 40(2) as disclosure would contravene the principles set out in Article 5 of the UK GDPR. Furthermore, unless there are very case specific circumstances, the Commissioner accepts that the names of the

⁴ As amended by Schedule 19 Paragraph 58(3) DPA.

junior officials are exempt from disclosure on the basis of section 40(2) of FOIA. This is in line with approach taken in the Commissioner's section 40 guidance.⁵ In this case the Commissioner adopts the reasoning set out in these previous decision notices which found that the names of junior officials were exempt from disclosure on the basis of section 40(2) of FOIA.⁶

Procedural matters

44. Section 10(1) of the FOIA requires a public authority to respond to a request within 20 working days. Under section 10(3) a public authority can extend the time for response to consider the balance of public interest in respect of any qualified exemption it seeks to rely on. However, it must tell the requester within 20 working days which exemption(s) it has applied and provide details of the exemption(s) under which it requires more time to consider the balance of the public interest. This extension must be a "reasonable" period of time. The Commissioner expects a public authority to take a maximum of a further 20 working days. He recognises that in exceptional circumstances it may take longer.
45. In this case, HMT sent a section 10(3) letter on 6 July 2021 but did not provide its actual refusal notice which set out all the exemptions it was relying upon under 1 September 2021. It promised to provide a refusal notice by 3 August 2021.
46. The Commissioner finds that HMT failed to provide a refusal notice within the relevant time limits even exceeding its own self-imposed extension under section 10(3). In doing so, it contravened the requirements of both section 17(1) and section 17(3) of the FOIA.

⁵ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf (see page 12)

⁶IC-114449-B7P7 <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022310/ic-114449-b7p7.pdf> (paragraphs 49-71) and IC-110922-T9R1 <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022447/ic-110922-t9r1.pdf> paragraphs 39-62

Right of appeal

47. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

48. 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.
49. 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

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