

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 November 2023

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

Decision (including any steps ordered)

1. The complainant has requested information related to a specific meeting regarding the Loan Charge Review. Initially HM Treasury ("HMT") took an excessive amount of time to consider the public interest in reliance upon section 35 (formulation/development of government policy). It concluded the public interest favoured disclosure and disclosed most of the information but withheld some under section 40 (personal data). It disclosed further information during the Commissioner's investigation. The complainant argued HMT held further information within the scope of the request and that it had incorrectly deemed certain information marked within the disclosed information as being "out of scope". They did not dispute the use of section 40.
2. The Commissioner's decision is that HMT holds no further information within the scope of the complainant's request. However, it contravened its obligations under section 1(1)(b), section 10(1) and section 10(3) in failing to provide all the disclosed information within 20 working days or following a permitted extension of time to consider the balance of public interest.
3. The Commissioner does not require further steps.

Request and response

4. On 21 February 2022 the complainant submitted a request entitled "Meeting between Jesse Norman [MP] and [Individual A] about the Loan Charge on 6 June 2019".

5. HMT had previously refused a related request citing section 14(1) (vexatious request) as its basis for doing so. The complainant narrowed their request to specify the following:

"Please therefore provide:

- all briefings/documents (received from HMT and/or HMRC)
- all minutes of such meetings
- all follow-up correspondence to/from HMT and/or HMRC officials
- all memoranda (for file and/or as sent to other individuals including any retained drafts) from Mr Norman or members of his office for this single meeting only: 6th June 2019: [Individual A].

As you have already successfully located and identified this information as part of my previous (unsuccessful) request, I feel confident that you will be able to respond to this new and revised request well before any statutory deadline is reached".

6. On 21 March 2022 HMT responded. It confirmed it held information within the scope of the request but argued that it needed more information to consider the balance of public interest in respect of section 35 – formulation/development of government policy.

7. HMT stated that it aimed to reply in full by 21 April 2022. When it did not provide a response by that date, the complainant wrote on 13 May 2022 to ask it to do so.

8. HMT wrote again on 19 May 2022 to advise that it still needed further time to consider the balance of public interest in relying on section 35. It said it aimed to provide a full response by 20 June 2022. It responded on 27 June 2022 and disclosed most of the requested information to the complainant.

9. It withheld some information under section 40(2) – personal data and disclosed other information. It confirmed that [Individual A] had consented to the disclosure of their personal data.

10. The complainant submitted a request for internal review dated 28 June 2022. They made three key points:

1. They argued that HMT had not explained its consideration of section 35 as it had promised to do and that it had used this as a delaying tactic.
 2. They disputed whether 11 items redacted were, in fact, out of scope. They asked HMT to consider whether these items were out of scope as part of its internal review. They gave examples of how they had deduced they were not out of scope.
 3. They identified what appeared to be missing attachments.
11. On 25 July 2022, HMT sent the complainant the outcome of its internal review. It explained that it had concluded that it could not rely on section 35. It said that although the exemption was engaged, the public interest favoured disclosure. It apologised for its delay in providing a response. It explained that it had properly excluded from disclosure any information that was out of scope. It explained that FOIA entitled requesters to access information and not documents and that it was standard practice to show where out of scope redactions had been made by marking these as "Redacted". Regarding the attachments, it explained that they had not been brought forward as attachments to the emails provided. The original emails to which they were attached were no longer held.

Scope of the case

12. The complainant contacted the Commissioner on 23 October 2022 to complain about the way their request for information had been handled.
13. The complainant asserted that HMT holds further information within the scope of their request. They were also sceptical that information marked as "Out of Scope" is genuinely out of scope. They are also not satisfied that HMT does not hold the attachments to emails which have been disclosed to them and that HMT did not hold these attachments at the time of the request. The complainant did not dispute HMT's use of section 40.
14. The Commissioner considers that the scope of his investigation is to
 - a. decide whether information marked out of scope is, in fact, within the scope of the request;
 - b. decide whether HMT still holds attachments to emails that were disclosed to him; and

- c. decide whether HMT holds further information within the scope of the request.

Reasons for decision

Is information marked "out of scope" within the scope of the request?

15. Section 1 of the FOIA states

"(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

16. FOIA gives an individual access to information and not to documents. If the information in a document is not "information of the description specified in the request" (see section 1(1)(a) above) it can be described as "out of scope".

17. The Commissioner recognises that sometimes it is easier for a public authority to denote a space in the text where a document contains "out of scope" information next to information in that document which is within the scope of a request. This is particularly useful to a public authority where part of a sentence falls within the scope of a request but the remainder does not. However, it can also be confused with information that is being redacted because it is within the scope of the request but is exempt from disclosure. HMT argued that it included reference to there being information out of scope "to aid transparency".

18. The Commissioner recognises that it is perfectly feasible for a document to contain information about more than one issue. In this case, the complainant specified that they were seeking to access information about a specific meeting held on a specific date with a specific person. Information which does not fall within that description is out of scope.

19. The Commissioner asked HMT to explain why certain information was deemed out of scope. It did so and it provided the Commissioner with a copy of the information deemed out of scope. The Commissioner is satisfied that HMT considered the matter carefully and is satisfied with its explanation as to why the information is out of the scope of the request. It drew a distinction between any information which related to the meeting described in the request, namely the "meeting between

Jesse Norman [MP] and [Individual A] about the Loan Charge on 6 June 2019" and information which did not.

20. It also said: "If [the complainant] wished to see the email chains and corresponding attachments in full, they should submit a new request asking for the specific email chain and/or attachment".

Are the email attachments still held?

21. HMT explained to the Commissioner that it still held all the attachments to the emails in question and the original emails. In response to two specific questions on this it said:

"1. Please confirm whether or not [HMT] still hold the original emails to which this information was attached.

HM Treasury does still hold the original emails within scope of this request, including any attachments.

2. If the original emails and their attachments were held but are no longer held, when did the HMT cease to retain this information.

As above we have no reason to believe that any information in addition to that already identified has been destroyed/deleted and we have no record of any such destruction."

22. This contradicted what it said to the complainant in its letter of 22 July 2022 as follows:

23. "Finally, you have requested that we release two attachments mentioned in the information that we have released. We have double checked the information that we hold and can confirm that these attachments are not held. This is because they were not copied into the email chains that are held. The original emails that contained these attachments are not held."

24. HMT's clear position is that it had only disclosed information to the complainant, including attachments, which was within the scope of the request. It reiterated that if information in the emails or their attachments did not relate the meeting described in the request, then that information was outside the scope of the request. It explained that the complainant, or any other person, was entitled to ask for such information in a separate FOIA request.

25. The Commissioner is satisfied with this explanation although he is disappointed that HMT was not sufficiently clear on this point to the complainant.

Is any other information held?

26. The Commissioner asked HMT to describe and explain what searches it had undertaken to determine whether any further information within the scope of the request was held. The Commissioner used his standard questions to ascertain whether this was the case.¹
27. In summary, HMT explained that it had searched its electronic records management system as well as relevant inboxes and personal drives. These were those of relevant policy officials. It was satisfied that, having made the thorough searches described above, that there were no manual records.
28. The Commissioner is satisfied from HMT's explanation that no further information within the scope of the request is held. It has been sufficiently thorough in considering this point as evidenced by the answers it gave to him in its submission. In reaching this view, the Commissioner also notes that during the course of his investigation HMT identified further information and disclosed it to the complainant in a letter of 9 October 2023. It made the disclosure via the What Do They Know website as requested by the complainant and, for technical reasons, it took a further eight days until this disclosure was made via this website.

Conclusion

29. It is reasonable for the complainant to assume that information adjacent to the information described in their request is also within the scope of their request. For example, the complainant experienced a number of delays – HMT asserted the requested information was likely to be exempt and extended its time for providing a response to an unacceptable extent in order to consider whether this was the case. Furthermore, the Commissioner notes that HMT only found additional information to disclose during the course of his investigation. However, that reasonable scepticism is not, in this case, proof that HMT is incorrect when it states that certain information is outside the scope of their request or that it does not hold any further information within the scope of the request.
30. HMT was, however, therefore in error when it told the complainant at internal review that it did not hold further information within the scope

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/key-questions-for-public-authorities-foi-act-2000/#1>

of the request. It found further information during the Commissioner's investigation and disclosed it to the complainant.

Procedural matters

31. Section 1 states that

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

32. Section 10(1) requires public authorities to provide a full response to a request within 20 working days.

33. Section 10(3) states:

"If, and to the extent that—

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given."

34. HMT did not provide the complainant with all the information it held within the scope of the request within 20 working days. Although it did make some disclosures to the complainant prior to their complaint to the Commissioner it did not make its full disclosure until October 2023 during the Commissioner's investigation of their complaint.

35. HMT relied on section 10(3) as its basis for extending the time for compliance with the complainant's 21 February 2022 request. It missed its own deadlines and did not provide a response until 27 June 2022. The Commissioner is pleased that it revised its initial position that the information it held was exempt from disclosure. However, the Commissioner normally expects public authorities to take no longer than

an additional 20 working days to consider the balance of public interest test or, in exceptional circumstances, 40 working days.²

36. In this case, HMT took 86 working days to respond to the request. The Commissioner does not consider this a reasonable time in the circumstances.
37. The Commissioner has therefore concluded that HMT contravened its obligations under section 10(3) of the FOIA. It did not extend the time to consider the balance of public interest to an extent that was reasonable in the circumstances.
38. In addition, in failing to provide all the information within the scope of the request within 20 working days (or following a reasonable extension of time to consider the balance of public), it contravened its obligations under section 10(1) and section 1(1)(b).

² <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/time-limits-for-compliance-under-the-freedom-of-information-act-section-10/#canwehave>

Right of appeal

39. 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

40. 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.
41. 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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