

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 May 2023

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

Decision (including any steps ordered)

1. The complainant has requested information about the Independent Loan Charge Review. The above public authority ("the public authority")'s final position was to rely on multiple exemptions to withhold some of the information and section 12 of FOIA (cost of compliance exceeds the appropriate limit) to refuse the remainder of the request.
2. The Commissioner's decision is that the public authority is entitled to rely on section 12 to refuse the request in its entirety. The public authority breached section 16 of FOIA as it failed to provide adequate advice and assistance to the complainant. The public authority also breached section 17 of FOIA as it failed to issue a correct refusal notice within 20 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with advice and assistance to help refine his request such that it falls within the appropriate limit.
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 14 October 2021, the complainant wrote to the public authority and requested information in the following terms:

"Please supply the following -

- a) The recorded information which details the exact process (including any part or subset of that process) that was used to consider the range of individuals who might (or did) support the review.
 - b) The recorded information which details the position/role/grade of the person(s) making the decision(s) as to which individuals might be (or were) selected to support the review. If any person(s) is/are SCS (Senior Civil Service) grade, then please provide the name of that person(s).
 - c) The recorded information which details the conflicts of interests that were identified for Heather Self, Graeme Nuttall OBE, and David Goldberg QC, and any other conflicts of interests that were identified for that range of individuals who were being considered in addition or as alternatives, and that might (or did) support the review.
 - d) The recorded information which details how, and why, those conflicts of interests were considered and concluded as 'accounted for' by the person(s) making the determination/selection.
 - e) The recorded information which details all advance drafts of this report, and all comments which the experts named above (Heather Self, Graeme Nuttall OBE, and David Goldberg QC) provided as part of each advance draft."
6. The public authority responded on 6 December 2021. It stated that it only held information within the scope of part c. It provided some of this information, but relied on section 40(2) of FOIA (third party personal data) to withhold the remainder.
7. Following an internal review the public authority wrote to the complainant on 29 April 2022. It upheld its position that it held no information other than that which it had already identified as falling within the scope of part c. It now agreed to disclose one of the documents it held, as the data subject had consented to the disclosure of their personal data – however it upheld its position that it was entitled to rely on section 40(2) of FOIA to withhold the other document.

Scope of the case

8. The complainant contacted the Commissioner on 27 July 2022 to complain about the way his request for information had been handled. He disputed that public authority's assertion that it did not hold the majority of the information that had been requested. He provided extensive submissions as to why the information should be held by, or on behalf of, the public authority. He also considered that the information within part c should be disclosed – even if the name of the individual was withheld.
9. During the course of the investigation, the public authority revised its stance. It had identified additional records which might contain information falling within the scope of the request – but the cost of searching those records for relevant information would, at the point that the request was responded to, have exceeded the appropriate limit and therefore these parts of the request should be refused.
10. In respect of the information falling within the scope of part c that had not already been disclosed, the public authority now relied additionally on sections 41 (breach of confidence) and 43 (commercial interests) of FOIA to withhold the information.
11. Whilst the public authority did not rely on section 12 to refuse the entirety of the request, the Commissioner considers that, if section 12 applies to any part of the request, the public authority would be entitled to refuse the request in its entirety. He has therefore considered this exemption in relation to the request as a whole.

Reasons for decision

12. Section 12 of FOIA allows a central government department to refuse a request for information if the cost of identifying, retrieving, locating and extracting the information would exceed £600.
13. The public authority's original stance was that it did not hold any information within the scope of parts a, b, d and e of the request. However, in its final submission to the Commissioner, it stated that:

“In January 2023, a year after [the complainant]'s request was received, and 10 months months [sic] after the internal review concluded – officials were made aware of the existence of a Sharepoint folder on HMT's server that was created and used exclusively by the Independent Loan Charge Review team. **HMT officials did not have access to this folder or its contents** and could not have reasonably

been expected to know about its existence (especially as our belief was that information held by the Review was meant to have been destroyed following its conclusion, as per the statement above). At the time of the request, searching the Sharepoint folder, extracting the relevant information, and then making it available to HMT officials could only have been done by HMT's IT service provider – under the terms of HMT's contract, doing so would have incurred a fee of more than £600. As this exceeds the statutory cost limit, we are therefore engaging section 12 of the FOI Act.” [original emphasis]

14. In a previous decision notice, the Commissioner accepted that accessing files and emails held originally by the Loan Charge Review would have exceeded the cost limit because the public authority would have needed to pay a fee in excess of £600 to its IT provider.¹ The Commissioner is bound to accept that the same fee would be necessary in this case – not least because there would be a need to search deactivated email accounts as well as the Sharepoint folder.
15. The Commissioner recognises that he is bound to consider that situation as it stood at the point the public authority should have responded to the request (ie. within 20 working days). The Commissioner cannot say definitively whether the public authority did or did not hold further information within the scope of the request at the point it should have responded. All he can say is that determining whether any information was held would, at that point, have exceeded the cost limit.
16. It is not clear from the public authority's answer how it came to discover that it did in fact hold some records relevant to the Review. That would suggest poor management of records by either the Review team, the public authority or both.
17. It is also unclear, from the public authority's response, whether it has now been able to access this folder. If it has, the questions of whether the file contains relevant information and whether that information is disclosable will need to be explored via a fresh request. Whilst the Commissioner recognises that this will be frustrating to the complainant, he (the Commissioner) can only consider the situation as it stood at the point the request ought to have been responded to.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022750/ic-99461-w7y6.pdf>

18. At the point the request ought to have been responded to, the public authority was entitled to rely on section 12 of FOIA to refuse the request.

Procedural matters

Advice and assistance

19. A public authority relying on section 12 to refuse a request must either provide the requester with advice and assistance to help them refine their request such that it falls within the appropriate limit, or must inform the requester that the request cannot be meaningfully refined in this way.
20. The public authority has retrospectively applied section 12 of FOIA to refuse this request, but has failed to explain how the request could have been refined or to state that the request could not be meaningfully refined.
21. The Commissioner therefore considers that the public authority has breached its obligations under section 16 of FOIA.
22. Given the ambiguity over whether the public authority now has easy access to the Sharepoint file, the Commissioner considers that it would be helpful for any advice and assistance to include some further clarity on that situation.

Timeliness

23. The public authority breached section 17 of FOIA as it failed to provide a refusal notice within 20 working days of receiving the request.

Other matters

24. Whilst there is no statutory time limit for carrying out an internal review, the FOIA Section 45 Code of Practice states that these should usually be carried out within 40 working days. Despite having exceeded the statutory time limit in responding to the request, the public authority still failed to respond to the request within 40 working days. The Commissioner considers this to be poor practice.
25. The Commissioner also considers that the public authority should have regard to the section 46 Code of Practice too² – as well as his own guidance.³ When setting up semi-autonomous or autonomous work groups that will share its resources (such as IT servers), for the purpose of accomplishing a specific tasks, or set of tasks, but will disband once the work is complete, proper records management policies should be in place. Both parties should be clear on what records will be held, where they will be held and who will have responsibility for them.
26. There should also be clear policies and procedures in place that govern what happens to records once the work group has finished its work. These should cover the records that will be destroyed, those which will be retained and who takes over responsibility for managing any records that are to be retained. Finally, responsibility for ensuring that the policies and procedures have been correctly followed should be designated to specific individuals – who are then held accountable for any gaps.

2

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1010395/Freedom_Information_Code_Practice_Web_Accessible.pdf

³ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/determining-whether-we-hold-information/#online>

Right of appeal

27. 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

28. 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.
29. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF