

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 March 2023

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

Decision (including any steps ordered)

1. The complainant submitted a request to HM Treasury (HMT) seeking emails sent or received by a named Director General containing the term 'loan charge' for a seventeen day period in January 2020. HMT disclosed some information in response to the request but redacted parts of it on the basis of section 40(2) (personal data) of FOIA and withheld information on the basis of section 35(1)(a) (formulation and development of government policy). During the course of the Commissioner's investigation HMT disclosed the majority of the information previously withheld on the basis of section 35(1)(a). It also located further information which it disclosed, with some redactions on the basis of sections 35(1)(a), 36(2)(b)(ii) (effective conduct of public affairs) and 40(2).
2. The Commissioner's decision is that HMT is entitled to rely on sections 35(1)(a) and 36(2)(b)(ii) to withhold information in the manner in which it has. For both sections, the Commissioner is satisfied that the balance of the public interest favours maintaining the exemption. However, the Commissioner has also concluded that HMT breached section 10(1) of FOIA by failing to disclose information falling within the scope of the request within 20 working days.
3. The Commissioner does not require any steps to be taken.

Request and response

4. The complainant submitted the following request to HMT on 14 November 2021:
 - '1) A count of the emails written by Beth Russell's [Director General, Tax and Welfare] secretary, personal assistant or Beth Russell's office support team containing the terms "LOAN CHARGE" or "LC". Of course please include emails that contain both terms. Please break this count down into a table showing the number written each month and the role of the author (secretary, PA, office).
 - 2) Copies of any emails written by Beth Russell's secretary, personal assistant or Beth Russell's office support team containing the terms "LOAN CHARGE" or "LC". Of course I do not need to know the names of any member of staff not classified as a senior civil servant.'
5. HMT responded on 10 December 2021 and explained that it did not hold any information falling within the scope of the request.
6. In reply, the complainant sought the following information on 11 December 2021:

"Question 1

I do wonder whether you are misinterpreting my request to exclude emails that she may have written/sent where she herself or her team did not write the specified words in a response, but that they responded to an email chain containing these words. Please confirm whether or not this is the case. I ask as it seems very unusual for any individual to receive more than 500 emails without responding to any one of them.

Question 2

If the response to question 1 is that there are some email chains of the 515 received by Beth Russell or her office/PA/secretary that she or they responded to without actually writing either the words "Loan Charge" or its abbreviation "LC" then please provide copies of the email chains to which they responded.

Question 3

If the response to question 1 is that Beth Russell or her office/PA/secretary did not respond to any of the 515 emails then please supply copies of the emails received by Beth Russell or her support office/PA/secretary containing the terms either "Loan Charge"

or its abbreviation "LC" during the period between 1/1/2020 and 17/1/2020.

I have deliberately limited this request following your guidance to ensure that it does not either exceed the limitations of section 12 or have such a wide scope that you may want to invoke section 14."

7. HMT responded on 14 February 2022. It confirmed that it did not hold any information falling within the scope of parts 1 and 2 of the request. In relation to part 3 of the request it released some information, albeit that it explained that some parts of it had been redacted on the basis of section 40(2) (personal data) of FOIA. HMT also explained that it was withholding additional information on the basis of section 35(1)(a) (formulation or development of government policy).
8. The complainant contacted HMT on 14 February 2022 and asked it conduct an internal review of this response.
9. HMT informed her of the outcome of the internal review on 14 March 2022. The review upheld the position adopted in the refusal notice.
10. During the course of the Commissioner's investigation HMT explained that due to the passage of time and progress of policy development in relation to the Loan Charge, it now considered the public interest balance in relation to the majority of information previously withheld to now favour disclosure. HMT provided the complainant with this information on 31 January 2023. However, it noted that it was still withholding some information on the basis of section 35(1)(a) because it considered its release would be harmful to the development of government policy in areas unrelated to the Loan Charge. HMT also redacted information on the basis of section 40(2). HMT also advised the complainant at this stage that as part of its consideration of this complaint it had reconducted the searches that were made and located additional information within the scope of the request and that it was assessing this to determine whether it is appropriate for release.
11. HMT contacted the complainant on 28 March 2023 and provided her with redacted copies of this additional information. The redacted material had been removed on the basis of section 35(1)(a), section 36(2)(b)(ii) (effective conduct of public affairs) and section 40(2) of FOIA.

Scope of the case

12. The complainant initially contacted the Commissioner on 18 March 2022 in order to complain about HMT's decision to withhold information falling within the scope of her request on the basis of section 35(1)(a).

13. Following HMT's further disclosures of information on 31 January 2023 and 28 March 2023, this decision notice simply considers whether the remaining information which has been withheld on the basis of sections 35(1)(a) and 36(2)(b)(i) is exempt from disclosure. The complainant has not sought to contest HMT's application of section 40(2).
14. With regard to the additional information located by HMT, it advised that a lot of the information located, specifically that contained within 'Email 1, Attachment 1', which is part of advice to Ministers about the broader Budget 2020 package, does not reference the terms the requester specifically asked about and does not relate in any way to the wider Loan Charge policy area. (HMT noted that this broadly covered disguised remuneration schemes; tackling tax avoidance and evasion and promoters of this). HMT explained that if it had to consider such information for disclosure it would have sought to rely on section 14(1) (vexatious) because of the burden of doing so. Instead it deemed such information to be out of scope and focused instead on the information relating to the Loan Charge contained with the additional information as it knew that this is where the requester's interest was. The Commissioner accepts that this is a proportionate and sensible approach in the particular and specific circumstances of this request.

Reasons for decision

Section 35(1)(a) – formulation or development of government policy

15. HMT withheld a small amount of information from its disclosures of 31 January 2023 and 28 March 2023 on the basis of section 35(1)(a) of FOIA. This states that:

'Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-

(a) the formulation or development of government policy'
16. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
17. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers.

18. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
19. Ultimately whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
20. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - the final decision will be made either by the Cabinet or the relevant minister;
 - the Government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.
21. In submissions to the Commissioner, HMT explained that the information being withheld on the basis of section 35(1)(a) did not relate to the formulation or development of policy making in relation to the Loan Charge but instead to other policy areas that remain under formulation and active development by the Government today. More specifically, HMT advised that the policy areas in question in relation to the redactions applied to the information disclosed on 31 January 2023 were as follows:
 - Policy making about the reform of the tax system;
 - Future policy options, such as strategies to tackle promoters of tax avoidance schemes, are discussed and remain in development (a consultation on proposed approaches to this was published at Spring Budget 2023); and
 - Discussions about off-payroll working rules reform, a live policy area where specific policy development continues.¹
22. In relation to the information redacted from the information disclosed on 28 March 2023, HMT explained that this concerned the following policy areas:
 - Options for reform of the tax administration system;

¹ There was a further policy area also covered, but HMT has requested that reference to this is not included in the decision notice. The Commissioner can confirm though that this also does not relate the Loan Charge.

- A number of named policy approaches still under active development (HMT asked the Commissioner not to name these in the decision notice, but the Commissioner can confirm that none relate to the Loan Charge); and
 - Options to prevent fraud and legal approaches to tackling this; and
 - Further reference to off-payroll working.
23. Having reviewed the information withheld on the basis of this exemption, the Commissioner is satisfied that it clearly relates to the formulation or development of policy making across a number of different policy areas. Furthermore, the Commissioner can reassure the complainant that none of the information relates directly to the Loan Charge.

Public interest test

24. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

Public interest in favour of disclosure

25. HMT acknowledged that in favour of disclosure, it recognised the broad public interest in transparency in the work of the government and how policies are developed. It also acknowledged that there is a clear public interest in the work of Government departments being transparent and open to scrutiny.
26. HMT also recognised that there is considerable interest from the public in the Loan Charge, especially amongst those who have been impacted by it. In recognition of this, it noted that both it and HMRC have released a substantial amount of information through FOI requests over recent years, and it had released nearly 200 pages of material in total in response to this request.
27. The complainant argued that the public were understandably concerned about the impact of the Loan Charge policy which impacted on 50,000 individuals. The complainant also suggested that this policy had led to a number of individuals taking their own lives.² In light of this the complainant argued that there was a far greater public interest in the

² See <https://www.theguardian.com/politics/2021/nov/27/suicides-linked-to-hmrc-cash-demands-in-loan-charge-tax-bills>

disclosure of the information than in ensuring the effectiveness of policy making.

Public interest in favour of maintaining the exemption

28. HMT argued that there was a clear public interest in protecting the Government's ability to discuss and develop policy and reach well-formed conclusions, and that such considerations applied in the small number of places it was continuing to withhold information and therefore maintain the exemption.
29. HMT argued that release would undermine the safe space that Government officials require in order to freely discuss the policy and conduct the policy making process in private. Release of the information could risk closing-off discussions and prevent the development of better options now and in the future, potentially leading to worse policy outcomes. It also argued that there is a strong public interest in ensuring policy making, and its formulation and development, are of the highest quality and informed by a full and candid consideration of all possible approaches.
30. Furthermore, HMT argued that protecting good government and ensuring the policy making process can be as effective as possible, whilst preventing encroachment on the ability of Ministers and officials to formulate policy, is critical. This is especially pertinent ahead of fiscal and legislative events. Premature release of information prior to potential future official announcements could cause unwanted market effects, pre-empt future official consultations (and their Government responses) and impinge on the Government's ability to enact reform. HMT also argued that there is also a risk that release of the information withheld could render subsequent compliance activity less effective in the event that the policies discussed are introduced.
31. Finally, HMT emphasised that the policy making in various areas remained under active consideration in line with fiscal and legislative events this year, and in other cases, are under live consultation. In its view, this added to the public interest in maintaining the exemption.

Balance of the public interest test

32. The Commissioner accepts that significant weight should be given to safe space arguments - ie the concept that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy making process is live and the requested information relates to that policy making. In the circumstances of this case the Commissioner accepts

that policy making in relation to the various policies to which the withheld information relates was ongoing at the point of the request.

33. Furthermore, having considered the content of the withheld information the Commissioner accepts that it clearly has the potential to encroach on the safe space of this policy making. The Commissioner accepts that disclosure of the information at the point of the request could have led the government to have to defend, justify or explain various aspects of financial policy making, prior to more formal announcements or fiscal events. In the Commissioner's view it is therefore reasonable to argue that disclosure of this information would encroach on the safe space the government needed to consider and debate its policies across the range of HMT's remit. The safe space arguments therefore attract significant weight.
34. With regard to attributing weight to the chilling effect arguments to which HMT submissions also referred, as a general approach the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.
35. As noted above, the Commissioner accepts that the policy making in relation to the issues covered in the information were live at the time of the complainant's request. Furthermore, having considered the withheld information the Commissioner accepts that disclosure of parts of some of it could result in some risk of a chilling effect, albeit a relatively marginal one.
36. Turning to the public interest arguments in favour of disclosure, the Commissioner recognises that there is a public interest in the disclosure of information which would allow the public to better understand how government policy making, in this case in the context of financial policy, making works. Disclosure of the information could provide some insight into this. The Commissioner recognises that the complainant considers there to be a significant public interest in the disclosure of information about the Loan Charge. However, as noted above the small amount of information withheld on the basis of section 35(1)(a) does not relate to this policy.

37. Taking these factors into account, and given the significant weight the Commissioner considers should be given the safe space arguments, he has concluded that the public interest favours maintaining the exemption.

Section 36 – effective conduct of public affairs

38. HMT also withheld a small amount of information on the basis of section 36(2)(b)(ii) of FOIA. This states 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—...

- (ii) the free and frank exchange of views for the purposes of deliberation'

39. In determining whether section 36(2)(b)(ii) is engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one. 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.

40. 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.

41. With regard to the process of seeking this opinion, HMRC³ sought the opinion of the Exchequer Secretary to the Treasury on 22 February 2023 with regard to whether section 36(2)(b)(ii) of FOIA was engaged. Qualified persons are described in section 36(5) of FOIA with section 36(5)(a) stating that 'qualified person' means 'in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown'. The Commissioner is therefore satisfied that the Exchequer Secretary to the Treasury was an appropriate qualified person.
42. The qualified person was provided with a rationale as to why the exemption could apply and copies of the withheld information. The qualified person provided their opinion that the exemption was engaged on 24 February 2023 on the basis that disclosure would have a prejudicial effect on the free and frank exchange of views for the process of deliberation. 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).
43. Turning to the substance of the opinion, the information that has been withheld on the basis of section 36(2)(b)(ii) consists of a reference to parliamentary stakeholders in the context of a wider discussion about handling concerns about the Loan Charge. HMT noted that an official had provided candid steers about continuing to engage with MPs to try and understand more about their views on the Loan Charge.
44. The qualified person argued that in this case disclosure of the withheld information would inhibit the free and frank exchange of views for the purpose of deliberation because releasing this information would undermine HMT's ability to make balanced judgements about the presentational handling of sensitive issues, in this case the Loan Charge. Furthermore, they argued that if officials are unable to candidly share views, there would be a clear chilling effect, leading to less well-considered advice, decision making and potentially detrimental outcomes for the department.
45. In addition, the qualified person noted that the Loan Charge still receives significant attention from external stakeholders, including some in Parliament. Given this, they argued that releasing this information

³ The signed version of the decision notice contained a typographical error as it referred to 'HMRC' seeking the qualified person's opinion. This should have read that it was 'HMT' that sought the opinion.

might result in unhelpful media attention and harm the Government's relationship with these stakeholders.

46. Finally, the qualified person argued that there was also a risk that releasing the information could deter other stakeholders from engaging with HMT and HMRC. Engagement with and feedback from stakeholders are central to the effective conduct of the civil service, and so is the ability to reflect on this engagement in a safe space with an honest exchange of views.
47. The Commissioner is satisfied that the qualified person's opinion was a reasonable one to come to. In reaching this conclusion the Commissioner accepts that it is rational to argue that given the context of the withheld information, ie the controversy surrounding the Loan Charge policy, and the content of the withheld information, that disclosure would impinge on the safe space needed to deliberate how to liaise and manage stakeholders and other handling issues in respect of this policy. Furthermore, taking these factors into account the Commissioner is also satisfied that it is logical to argue that disclosure of this information risks having a chilling effect on the contribution of officials in similar circumstances in the future.
48. Section 36(2)(b)(ii) is therefore engaged.

Public interest test

49. Section 36 is a qualified exemption and in line with the requirements of section 2 of FOIA the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption cited outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

50. The complainant's public interest arguments are set out above at paragraph 27.
51. For its part HMT acknowledged the broad public interest in transparency in the work of government and accountability of public authorities. HMT also recognised the broad public interest in furthering public understanding of the issue with which public authorities deal with.

Public interest arguments in favour of maintaining the exemption

52. However, HMT argued that there is a strong public interest in protecting government officials' ability to hold work-related discussions and freely and frankly exchange and discuss their views. If this freedom was undermined by the release of this information then this could result in

less robust, well-considered options for officials and Ministers to consider and implement for maximum effectiveness.

Balance of the public interest

53. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur, but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.
54. The Commissioner agrees that there is public interest in HMT being open and transparent about how it makes the decisions it takes in respect of presentational and handling issues about government policies. In the particular circumstances of this case the Commissioner recognises that implementation of the Loan Charge in 2019 has been one that has attracted both press and political attention, not least because the Commissioner is aware that this policy affects a large number of people and has caused financial hardship for some. (See, for example, the press article at footnote 2 above). In view of this context, the Commissioner accepts that this adds weight to the disclosure of the withheld information given that it concerns a controversial area of tax policy. In the Commissioner's view disclosure of the information would provide some insight into HMT's handling of one aspect of this policy, albeit a rather limited one given the small amount of information actually being withheld.
55. However, the Commissioner agrees that there is a clear public interest in HMT officials being able to candidly deliberate how to handle sensitive issues. Furthermore, the Commissioner accepts there is also a clear public interest in HMT being able to consider such issues in a safe space, and moreover preserve its ability to protect relations with key stakeholders. In the Commissioner's opinion, disclosure of the particular information that has been withheld at the time of the request would have a direct impact on HMT's ability to manage handling issues in relation to a controversial policy area and this in turn could undermine the effectiveness of decision making in similar scenarios in the future. The Commissioner considers such an outcome to be firmly against the public interest. The Commissioner also accepts that there is clear public interest in guiding against the risk of chilling effect that in the circumstances of this case there is real risk of this occurring should the withheld information be released.

56. In considering the weight that should be attributed to such arguments the Commissioner has considered the age of the information (the email containing information redacted on the basis of section 36(2)(b)(ii) is dated 13 January 2020; the request was submitted on 11 December 2021) and the fact that, as the complainant has highlighted, the Loan Charge is established government policy. Despite the age of the information at the point of the request, the Commissioner recognises that at that point, and indeed beyond, HMT still had to manage relations with stakeholders on this issue as result of continuing attention the Loan Charge policy brought. Therefore, the Commissioner considers that the weight that should be attributed to the public interest arguments in favour of maintaining the information is not materially reduced despite the age of the information. Albeit, as noted above the continuing controversy of the policy arguably adds weight to the public interest in disclosure.
57. On balance, and by a relatively narrow margin, the Commissioner has concluded that the balance of the public interest favours maintaining the exemption. In reaching this conclusion the Commissioner does not seek to underestimate the concerns that have been raised about the Loan Charge policy and he accepts that such concerns increase the public interest in disclosure of the withheld information. However, he considers that the risks of disclosure both in terms of safe space and chilling effect are notable, and although disclosure would provide some insight into HMT's handling of this issue, such insight is arguably not significant.

Procedural matters

58. Section 1(1) of FOIA states:

'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.'

59. Section 10(1) of FOIA requires authorities to comply with section 1(1) within 20 working days.
60. In this case HMT failed to disclose information falling within the scope of the request within this time period and therefore breached section 10(1) of FOIA.

Other matters

61. The Commissioner notes that in the circumstances of this request HMT located additional information falling within the scope of the request

during the course of his investigation of this complaint. The Commissioner would use this opportunity to emphasise to HMT (and indeed to all public authorities) the importance of ensuring that sufficiently detailed searches are conducted when a request is first processed to ensure that all relevant information is located at that stage.

Right of appeal

62. 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

63. 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.
64. 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

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF