

F Thompson

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1 December 2021

Dear F Thompson,

Refs: IR2021/25860
FOI2021/22729

Freedom of Information Act 2000 Internal Review

Thank you for your email dated 3 November, requesting an internal review of our response dated 18 October 2021 to your information request made under the Freedom of Information Act 2000 (the FOI Act), under our reference: FOI2021/22729.

The department has now completed its internal review process and has carried out a thorough review of the case overseen by a senior official who was not involved with the original request.

Background

On 10 March 2021, you made the following request under the FOI Act:

"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."

On 12 April 2021 we provided our response (under our reference FOI2021/09786). We confirmed that we held information within the scope of your request. However, your request was broad and we explained that to locate the information we hold would require a number of officials to search their records. We estimated that to search for and locate the information we hold, would exceed a set limit which is known as the appropriate limit, which for central Government is set at £600.

Under section 12 of the FOI Act, departments are not obliged to comply with requests in these circumstances. We advised you that were you to amend your request, for example, by providing a specific start date to your timescale and providing suggested search terms for the topic, we may be able to comply with a future request.

On June 7 2021 you sent the following email:

"Thank you for your reply and for the confirmation that you hold this information.

I am uncertain as to why you would respond by saying that there is a requirement for a number of officials to search their records (which is quite unnecessary), when I have only asked for the recorded communications and evidence that pertain specifically to those exchanged by any individual with one person - Beth Russell. Surely, in any reasoned and sensible interpretation of that request, it therefore only requires Beth Russell's records to be searched and no others?

Perhaps it is because I have used the phrase 'prior to 06 September 2019'. If that is the case, then please search Beth Russell's recorded communications and evidence between 28 June 2019 and 06 September 2019, which amounts to just 50 working days. I fail to accept that a search of one person's records over such a short period of time on the referenced subject would be either onerous, or unachievable within the available time limits.

All other aspects of the request, such as the types of recorded communications and evidence, the details of other potential candidates, criteria used by HM Treasury and government officials etc. remain unchanged."

On 6 July 2021 we wrote to you under our reference FOI2021/15854 and explained that we considered that the information you had requested engaged section 36(2)(b)(ii) of the FOI Act, which applies if the disclosure of the information would, or would be likely to, inhibit the free and frank exchanges of views for the purposes of deliberation. We explained that this is qualified exemption and as such we are required to balance the public interest between disclosure and non-disclosure.

By virtue of the Section 10(3) of the FOI Act, where public authorities have to consider the balance of the public interest in relation to a request, they do not have to comply with the request until such time as it is reasonable under the circumstances. We estimated that we would be able to send you a substantive reply by 3 August 2021, if not sooner.

On 9 August 2021 we sent you an apology for the delay in providing you with a substantive response and explained that we aimed to respond to you by 1 September 2021.

On 1 September 2021 we sent you a substantive reply explaining that we were withholding the information under the following exemptions:

- Section 36(2)(b)(i) exempts information if, in the reasonable opinion of a qualified person, disclosure of the information under the Act, would, or would be likely to, inhibit the free and frank provision of advice.
- Section 36(2)(b)(ii) exempts information if, in the reasonable opinion of a qualified person, disclosure of the information under the Act, would, or would be likely to, inhibit the free and frank discussion of views for the purposes of deliberation.
- Section 36(2)(c) exempts information if, in the reasonable opinion of a qualified person, disclosure under the Act would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs.

We examined the public interest between disclosure and non-disclosure and concluded that the balance of the public interest falls strongly in favour of withholding the information.

We also explained that some of the information within scope also fell under Section 40(2) of the FOI Act. 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. The first data protection principle requires the disclosure of third-party personal data to be lawful, fair and transparent. We believe that releasing the information would breach the first data protection principle, since it would be unlawful and unfair to release the information.

On 24 September 2021 you sent the following email:

"Thank you for your response from 01 September.

I would like to make it clear, from the outset of this follow-up message, that this is NOT a request for an internal review at this stage.

As a point of correction, your reply from 01 September indicates that the initial request in this thread was dated 09 March 2021, when it was actually 10 March 2021. Please would you kindly amend your records to help rectify that mistake.

In order to provide clarity and a mutual understanding on the accuracy of the documented timeline of this request, I have listed the relevant dates below:

10 MAR 2021 - request submitted (delivered to foirequests@hmtreasury.gov.uk on same day)

11 MAR 2021 - FOI reference number confirmed by HM Treasury as FOI2021/09786

09 APR 2021 - FOI2021/09786 refused under Section 12 of the FOIA

07 JUN 2021 - follow-up message submitted to narrow scope of request (delivered to foirequests@hmtreasury.gov.uk on same day)

08 JUN 2021 - new FOI reference number confirmed by HM Treasury as FOI2021/15854

06 JUL 2021 - interim reply provided by HM Treasury, confirming consideration of qualified exemption under Section 36 of the FOIA, with a revised date for substantive reply of 03 AUG 2021

07 JUL 2021 - follow-up message submitted to challenge claimed use of qualified exemption under Section 36 of the FOIA (delivered to foirequests@hmtreasury.gov.uk on same day)

06 AUG 2021 - follow-up message submitted to note failure to meet deadline of 03 AUG 2021 alongside request to provide information immediately (delivered to foirequests@hmtreasury.gov.uk on same day)

09 AUG 2021 - another interim reply provided by HM Treasury, confirming continued consideration of qualified exemption under Section 36 of the FOIA, with a revised date for substantive reply of 01 SEP 2021

01 SEP 2021 - FOI2021/15854 refused under Section 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of the FOIA

It is clear from the above timeline that you responded to my initial FOI request (FOI2021/09786) on the 20th working day following receipt. The ICO guidance on Section 10 (Time for compliance with request) of the FOIA states that authorities should regard the 20 working day limit as a 'long stop', in other words the latest possible date on which they may issue a response. The guidance continues by stating that when an authority which provides its response close to, or on, the final day of the 20 working day limit, it ought to be able to both account for, and justify, the length of time taken to comply with the request.

On that occasion, you simply replied on the 20th working day following receipt, thereby meeting your statutory obligation on the last possible date.

It is also clear from the above timeline that you responded to my next request (narrowed by date range and thus allocated a completely new FOI reference) on the 21st working day following receipt. This breaches the FOIA and indicates a failure to meet your statutory obligation. You included in this reply the information that you were considering the use of a qualified exemption under Section 36(2)(b)(ii) of the FOIA and a revised date for substantive reply of 03 August 2021 (a further 20 working days later).

The ICO guidance is very clear on the time limits available to public authorities in this regard. Please see the relevant extracts below:

63. As section 10(3) only permits extensions for further consideration of the public interest, the additional time cannot be used to determine whether the exemptions themselves are engaged.

64. This means that the authority should have identified the relevant exemptions, and satisfied itself that they are applicable, *WITHIN THE INITIAL 20 WORKING DAY LIMIT*.

65. Any authority claiming an extension will still be obliged to issue a refusal notice explaining which exemption applies and why *WITHIN 20 WORKING DAYS*. This notice must explain that it requires more time to consider the public interest test, and provide an estimate of the date on which a final decision is likely to be made.

As you failed to meet the statutory deadline for responding to this request, it is clear that the request for an extension to consider the public interest test and the qualified exemptions you claim are engaged was therefore invalid - and subsequently cannot be invoked. As you will be aware, section 10(3) has a reliance on the time by which any notice under section 17(1) must be given, which is within the time for complying with section 1(1) - not later than the twentieth working day following the date of receipt.

Expanding this point yet further, the ICO guidance includes the following:

62. The Act does not define what might constitute a 'reasonable' extension of time. However, our view is that an authority should normally take no more than an additional 20 working days to consider the public interest, meaning that the total time spent dealing with the request should not exceed 40 working days. An extension beyond this should be exceptional. Examples of such circumstances could include extreme pressures placed on the public authority by a major incident or exceptional levels of complexity involving a number of external parties. Public authorities will need to demonstrate that the length of any time extension is justified.

Not only have you failed to meet the initial statutory deadline in this case, you have then proceeded to exceed what the ICO define as an 'exceptional' time limit of 40 working days whilst in the process of considering that public interest test. Your most recent response on 01 September 2021 was a full 61 working days after the request was submitted, which falls far beyond what the ICO define as 'exceptional' and which would require the authority to evidence and justify such a delay - which in this instance amounts to an extended duration of more than fifty percent beyond what is already (and clearly) defined as 'exceptional'.

Furthermore, the ICO guidance confirms the rules covering the authority's use of Part II exemptions:

11. If an authority is relying on one of the exemptions in Part II of the Act to either refuse to confirm or deny whether information is held or to refuse to provide information, then under section 17(1) it has a duty to issue the requester with a refusal notice within the time for compliance with section 1(1).

On this occasion, you did not.

12. As outlined earlier, the time for compliance with section 1(1) is defined by section 10(1), which means that the notice must be issued promptly and within 20 working days of the date of receipt of the request.

Again, on this occasion, you did not.

I now reiterate the comments from my follow-up message of 07 July 2021, where my challenges to your proposed use of this exemption were explicitly outlined and summarised - which now undeniably hold an even greater weight and appear even more significant and important in the context of this evidential timeline. Although these points were ignored and quite obviously set aside by your own one-sided considerations with regard to the public interest test, your subsequent failure to meet your statutory obligations has therefore negated the citation of this (or indeed any Part II) exemption in any response you make.

Based on this clear and unambiguous set of rules from the ICO and the law as laid out by the Freedom of Information Act, I now request that you provide all the information (which you have already confirmed you hold) as requested - immediately, and without any further delay.

HMT set up the above case as an IR but the requester corrected us with this message, sent 29 Sept:

I did NOT - repeat DID NOT - request an internal review. I refer you to my comments at the start of my most recent message, which you could not possibly misinterpret:

"I would like to make it clear, from the outset of this follow-up message, that this is NOT a request for an internal review at this stage".

Please therefore withdraw the internal review, confirm that you have done so and deal with it in accordance with the statutory timescales as laid out in the Freedom of Information Act."

While we acknowledged that set out in our request that you did not wish for an internal review, we considered that it would be more effective to treat it as one. However, on 28 September you confirmed that you wished this latest Freedom of Information request should not be treated as an internal review.

On 18 October 2021 we replied under our reference FOI2021/22729 and explained that as it was your wish that we did not treat your latest enquiry as an internal review we would not address all the points you have made above other than to explain that we consider our response of 1 September 2021 (under our reference FOI2021/15854) to be correct and valid under the FOI Act. We confirmed that we continued to withhold the information requested for the reasons we previously explained.

On 3 November 2021, you requested an internal review as follows:

"I am writing to request an internal review of Her Majesty's Treasury's handling of my FOI request 'Evidence of the decision-making process which led to the selection and appointment of Sir Amyas Morse'.

Thank you for your reply from 18 October, where you belatedly confirm that you refuse to consider or address any of the points I made in my follow-up communication dated 24 September using the Freedom of Information reference you subsequently supplied on 29 September, in response to that very communication.

Your clear intention to force me to internal review in order that you address those points is noted. I therefore request that all comments contained within that communication of 24 September are considered and addressed as an integral part of this internal review. Given the nature of the wording and the intransigence demonstrated in your most recent response, it is highly likely - perhaps one could even claim as guaranteed - that this will be nothing more than a charade, and something which you will treat as a mere formality prior to this request being escalated to the Information Commissioner's Office. You will also know that the Information Commissioner's Office are attempting to deal with a backlog of some 2000 cases (according to evidence given at a recent PACAC session), which will further hinder any legitimate attempt by a member of the public to expedite disclosure of this important and significant information.

It would be reasonable to conclude, following the unacceptable duration of 61 working days which it took you to provide your response dated 01 September, that this internal review request might well be deliberately subjected to the same lengthy delays by those responsible for these continued obstructions within HM Treasury. I await this process with little, if any optimism that the principles, ethics, standards and intentions of the Freedom of Information Act, as passed by Parliament and enshrined in UK law are being upheld by HM Treasury, and are instead, simply being eroded, sidestepped and ignored."

The Review

I have considered the responses we provided to you and whether our handling was compliant with our obligations under the FOI Act. I have concluded that it was, for the following reasons.

You correctly note that our letter of 6 July explaining that we needed more time to consider the balance of the public interest between disclosure and non-disclosure was sent to you outside of the required 20 working days and we apologise for this.

We would like to repeat our apology made on 9 August for our failure to meet the extended deadline and to keep you updated on progress. We understand the frustration and inconvenience this may have caused you.

However, the fact that we failed to meet our statutory deadline and the Information Commissioner's Office's guidelines on the extra time allowed to public bodies to conduct a public interest test does not invalidate HM Treasury's ability to consider that the public interest is best served by withholding the information requested.

- Section 36(2)(b)(i) exempts information if, in the reasonable opinion of a qualified person, disclosure of the information under the Act, would, or would be likely to, inhibit the free and frank provision of advice.
- Section 36(2)(b)(ii) exempts information if, in the reasonable opinion of a qualified person, disclosure of the information under the Act, would, or would be likely to, inhibit the free and frank discussion of views for the purposes of deliberation.
- Section 36(2)(c) exempts information if, in the reasonable opinion of a qualified person, disclosure under the Act.

The information requested relates to the appointment of the head of the Loan Charge Review. We continue to maintain that this information is exempt from release under sections 36(2)(b)(i),(ii) and (c) as in the reasonable opinion of a qualified person, disclosure of the information under the Act, would, or would be likely to: inhibit the free and frank provision of advice; the free and frank discussion of views for the purposes of deliberation; and would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs.

I have re-examined the balance of the public interest between disclosure and non-disclosure. We continue to acknowledge the public interest in openness and transparency in the workings of government.

Balanced against this, we continue to maintain there is a strong public interest in protecting a safe space for officials to seek advice and to discuss issues and reach well-formed conclusions. This includes discussion relating to senior appointments. It is clear that the public interest would not be met by the suppression of officials' opportunities to make deliberations about candidates in a safe space. This inhibition could impair the quality of judgement made by a department. We have concluded we correctly determined that the balance of the public interest falls strongly in favour of withholding the information.

Clearly, given the nature of your request, some information we hold engages section 40(2) of the FOI Act – third-party personal data. As previously explained 40(2) of the FOI Act, 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. The first data protection principle requires the disclosure of third-party personal data to be lawful, fair and transparent. We continue to withhold the information on that basis that disclosure would breach the first data protection principle, since it would be unlawful and unfair to release the information.

I hope that by setting out the basis of the review, its findings and conclusions above, you will be assured that the Treasury has, on your behalf, carried out a thorough and considered review of the request you made and the responses that the Treasury gave under the FOI Act.

If you are not content with the outcome of this internal review you have the right to apply directly to the Information Commissioner for a decision. The Commissioner can be contacted at: The Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow SK9 5AF.

Yours sincerely

Head of Information Rights Unit