

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 December 2013

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

Decision (including any steps ordered)

1. The complainant requested information about the Private Office files of Sir Geoffrey Howe for 1982, when Sir Howe was Chancellor of the Exchequer.
2. HM Treasury refused to disclose the information, citing the exemption under section 22 of the FOIA (intended for future publication). In the course of the Commissioner's investigation, the Treasury also re-applied the exemption under section 14(1) (vexatious request) that it had previously applied to the request and subsequently withdrawn.
3. The Commissioner's decision is that HM Treasury has correctly applied the exemption at section 14(1) but that the section 22 exemption is not engaged.
4. The Commissioner does not require the public authority to take any further steps.

Background

5. The complainant works on behalf of a charity concerned with Margaret Thatcher's life and career – the Margaret Thatcher Foundation. The Foundation manages a website that publishes historical documents relating to Baroness Thatcher's political career.
6. The complainant had previously made a successful request for information relating to Baroness Thatcher to the Foreign and Commonwealth Office (FCO).
7. In addition, the complainant had made a request to HMT in 2012 for information relating to Private Office files from 1981. On that occasion, the information had been electronically scanned, and the complainant had made a financial contribution towards the cost of this.

Request and response

8. On 8 January 2013, the complainant wrote to HM Treasury (HMT) and requested information in the following terms:

You previously released to me a list of Chancellor and Chief Secretary's Private Office files in Excel, via Mr Nick Dippie. Last year you reviewed for release all files in that collection dated up to the end of 1981. An agreement was reached between us to cover the cost of scanning the files, which has only been partially completed.

Please now review for release all files from that list dated up to the end of December 1982.

You hold also some Private Office filing for other ministers, not listed in the main spreadsheet. Could you say please whether any of these relate to Nigel Lawson's tenure as Financial Secretary, May 1979 - September 1981?

9. On 5 February, HMT asked the complainant whether they were able to narrow down the scope of their request and on the same date the complainant provided HMT with clarification about one aspect of it, in the following terms:
10. *Please provide me with information as to what files you hold from Nigel Lawson's tenure as Financial Secretary, May 1979 - September 1981.*

11. The complainant clarified their request further on 14 February when they provided HMT with a spreadsheet that listed specific files of interest – 66 in all - taken from the larger spreadsheet mentioned in their original request.
12. In correspondence dated 8 March 2013, HMT provided information related to the complainant's 5 February request (files related to Nigel Lawson). The complainant is satisfied with HMT's response to this part of the request.
13. On 21 March, HMT provided the complainant with a further response. It refused to provide the remainder of the requested information, citing the exemption under section 14 of the FOIA as its basis for doing so.
14. HMT sent the complainant the outcome of its internal review on 17 May 2013. It revised its position; withdrawing the section 14 exemption it had cited previously and applying the section 22 exemption. During the Commissioner's investigation, HMT re-applied the section 14 exemption to the request in addition to section 22.

Scope of the case

15. The complainant contacted the Commissioner on 5 June 2013 to complain about the way their request for information had been handled.
16. They were concerned that not all the files from 1982 would physically survive for transfer, that no date had been specified by which the material would be transferred to the National Archives (TNA) and that it was not clear that transfer to TNA constituted 'publication'.
17. On being informed that HMT had re-applied the section 14 exemption during the investigation, and maintained the section 22 exemption, the complainant put forward five counter arguments.
18. First, HMT had complied with the similar request made in 2012 and the complainant had offered to film the information that is the subject of this request, as a measure that might reduce the resource burden to HMT.
19. The complainant also considered that if, as HMT said, it intends to publish the information, then it should have already reviewed and prepared the information (see paragraph 30 - 32) and it should already be publicly available through TNA.
20. Explaining that the charity they work for has the support of former ministers and officials, the complainant refuted that their request was vexatious, arguing that it had a serious, educational purpose.

21. Finally, the complainant said that they had received substantial amounts of Private Office information from other government departments, citing the FCO. They observed that there seemed to be no consistency across government as to how departments handled information requests.
22. The Commissioner has focussed his investigation on HMT's re-application of the exemption at section 14(1) of the FOIA to the remainder of the withheld information. He has also considered the application of section 22.

Reasons for decision

Section 14(1)

23. Section 14(1) of the FOIA states that a public authority is not obliged to comply with a request that is vexatious.
24. The Commissioner has recently issued new guidance¹ on the application of section 14(1). It refers to a recent Upper Tribunal decision² which establishes the concepts of 'proportionality' and 'justification' as central to any consideration of whether a request is vexatious.
25. The new guidance therefore suggests that the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. Where this is not clear, the Commissioner considers that public authorities should weigh the impact on the authority and balance this against the purpose and value of the request.

Burden and impact on the authority

26. In its submission to the Commissioner, HMT based its argument that the present request would cause a disproportionate level of disruption, on its experience dealing with the complainant's 2012 request.

¹http://www.ico.org.uk/for_organisations/guidance_index/~//media/documents/library/Freedom_of_Information/Detailed_specialist_guides/dealing-with-vexatious-requests.ashx

² [http://www.osspsc.gov.uk/judgmentfiles/j3680/\[2013\]%20AACR%2028ws.doc](http://www.osspsc.gov.uk/judgmentfiles/j3680/[2013]%20AACR%2028ws.doc)

27. HMT says that providing the information on that occasion placed a significant burden on the team's resources, with the response delayed until additional, internal resource could be identified to manage such a large ad hoc request. It anticipated it would face a similar burden managing this request.
28. In part this is because the 1982 Private Office files contain information such as meeting readouts (ie summaries), responses to invitations and letters to MPs. HMT categorises it as information that concerns the "day to day running of the Private Office" rather than formal policy information which, according to HMT, was held separately in departmental policy files until 1987. HMT argues that the Private Office files could be better described as unstructured papers contained in boxes, rather than structured files. HMT estimates there are on average three files in one box.
29. Consequently, HMT has estimated that to organise and review the 66 files covered by the request would take approximately 198 hours. In addition, the same files would then need to be prepared. HMT has provided the rationale behind the estimates it has provided. The Commissioner is satisfied that its estimates are credible and that to review and prepare all 66 files would be a major drain on HMT.
30. The complainant has argued that HMT will need to go through this process anyway since it intends to transfer the files to TNA under the thirty-year rule; indeed, that this process is now overdue.
31. Under the Public Record Act's thirty-year rule, the cabinet papers of a government are released publicly, via TNA, thirty years after they were created.
32. The FOIA still allows citizens to request a wide range of information before any time limit has expired. However, in this case the Commissioner considers that HMT should be permitted to manage the transfer of the files in question on its own terms.
33. HMT is focussing its limited resources on preparing the departmental policy files for transfer to TNA – which it expects to take place in March 2014. It considers these to be the definitive record of the department's activities, and consequently of higher priority. It does however intend to transfer the Private Office files in due course, once they too have been reviewed and prepared.
34. Since it must also manage its day to day activities and other corporate projects and priorities, the Commissioner is satisfied that HMT's small Records Management Unit does not have the additional resource needed to bring forward the review and preparation of the Private Office files. To do so would create a significant burden and distraction for the authority.

35. As with their previous request, the complainant has requested the information in electronic form. HMT has provided the Commissioner with details of the cost that was involved in scanning documents on the earlier occasion. This was considerably higher than the financial contribution that the complainant had made. HMT has argued that the cost of scanning material to comply with this request will be similar and the Commissioner agrees.
36. The complainant has suggested coming to HMT's office and filming the information that is the subject of the request, rather than have documents scanned. However, the Commissioner also agrees with HMT that there would be an indirect cost incurred in redeploying staff to escort a visitor to the office. Neither would such a measure eliminate the drain on resources involved in first having to review the files concerned – see paragraph 29.

Purpose and value of the request

37. The Commissioner appreciates that the information is of interest to the complainant and the Thatcher Foundation's supporters and followers. He also agrees that there is a serious, educational purpose behind the request. However, the Commissioner considers that this particular information – as outlined in paragraph 28 – is not of sufficient wider, public interest to justify the burden to HMT.
38. On balance therefore, the Commissioner agrees that this request is vexatious and that HMT has correctly applied the section 14(1) exemption.

Section 22

39. Although the Commissioner is satisfied that section 14(1) has been correctly engaged, for the sake of completeness he has gone on to consider the application of section 22.
40. Section 22 of FOIA says that information is exempt from disclosure if, at the time of the request, it is held with a view to being published at a future date, and it is reasonable in all the circumstances not to disclose it until that future date.
41. Despite being unstructured files that are concerned with the day to day running of the Private Office, TNA has agreed to the transfer of HMT's collection of Private Office files. Consequently, HMT considered that it is holding the information in question with a view to it being published at a future date. HMT has therefore argued that the section 22 exemption is engaged.

42. The collection was due to be transferred to TNA in 2012, and HMT is aware that the release is now overdue. As has been discussed, HMT needs to review and prepare the collection prior to transferring it but is focussing its limited resources on preparing the departmental policy files for transferral.
43. At the time of the information request therefore, the Private Office files that are the subject of the request had still to be reviewed and prepared for release.
44. HMT's expectation is that some of the information will be sifted out and not transferred to TNA as a result of the review and preparation process it intends to carry out. Because HMT had therefore not decided, at the time of the request, exactly which elements of the information it was going to publish at a future date, the exemption at section 22 of the FOIA cannot, in fact, be applied.
45. In a similar case, FS0121803³, the public authority had refused a request for prison-related information about several notorious convicted murderers. One of the exemptions upon which it relied was section 22, on the grounds that it intended to place **some** of the requested information into the public domain via the National Archives. To do this, it planned to review all the information prior to transfer to TNA at some future date.
46. The Commissioner rejected the authority's view that section 22 was engaged. Although it was clear that some of the information was destined for future publication, the authority could not specify which information that was. It therefore could not be said that, as at the date of the request, the authority had an intention or settled expectation that all the information for which it had claimed section 22 would be published.
47. The Commissioner has therefore concluded that HMT has incorrectly applied section 22.

³ http://www.ico.org.uk/upload/documents/decisionnotices/2009/fs_50121803.pdf

Right of appeal

48. 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: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

49. 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.
50. 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

**Pamela Clements
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