

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 July 2014

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the meetings of the Joint Oversight Board (JOB) about the Funding for Lending Scheme (FLS). The Treasury provided some of the requested information but withheld the greater part under sections 29(1)(a) (the economy), 35(1)(a) (formulation and development of government policy), 36(2)(b)(ii) and (c) (prejudice to the effective conduct of public affairs) and 43(2) (commercial interests). The Commissioner's decision is that the Treasury correctly applied section 36(2)(b)(ii) and section 29(1)(a) to different parts of the requested information, finding in each case that the balance of the public interest favoured maintaining the exemption. He does not therefore require any steps to be taken as a result of this notice.

Request and response

2. On 3 June 2013 the complainant wrote to the Treasury and requested information of the following description:
 1. *The names and roles of all members of the HM Treasury/Bank of England Joint Operating Board for the Funding for Lending Scheme (this board has also been called the Oversight Board).*
 2. *All dates on which the Operating/Oversight Board has met.*
 3. *The minutes from all of the meetings of the Operating/Oversight Board.*
 4. *Any other documents held by the Treasury that have been used in connection with the meetings of the Operating/Oversight Board.*
3. The Treasury responded on 2 July 2013 and confirmed that it held information covered by the scope of the requests. It provided the relevant details specified at 1 and 2 but refused to comply with 3 and 4; claiming that the information was exempt from disclosure under variously sections 29(1)(a), 36(2)(c) and 43(2) of FOIA. The Treasury considered the public interest test attached to each of the exemptions and found that, on balance, the public interest favoured maintaining the exemptions.
4. The complainant wrote to the Treasury again on 18 July 2013 and asked it to reconsider its decision to withhold parts of the requested information it held. In doing so, he questioned whether the Treasury had properly identified the harm that could arise from disclosure and also indicated his belief that the Treasury had failed to place sufficient weight on the public interest arguments favouring the release of the information.
5. In light of the complainant's dissatisfaction, the Treasury carried out an internal review into its handling of the requests. The outcome was provided to the complainant on 25 October 2013. The reviewer found that some of the requested information was already available to the complainant and therefore section 21 (information accessible by other means) was engaged. With regard to the withheld information, the reviewer upheld the original application of the exemptions cited and also introduced section 36(2)(b)(ii) as a further ground for refusing disclosure.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his requests for information had been handled. In particular, he asked the Commissioner to consider the Treasury's decision to withhold information that fell under requests 3 and 4. On this basis, the Commissioner has not had to consider to any extent the Treasury's handling of requests 1 and 2 or its application of section 21 of FOIA.
7. At the invitation of the Commissioner, the Treasury provided further submissions in support of the exemptions being relied upon. Having revisited the requests in question, the Treasury also decided that section 35(1)(a) of FOIA applied to some of the withheld information.

Reasons for decision

Background

8. The Commissioner quotes below an extract from the website of the Bank of England (the Bank), which briefly outlines the Funding for Lending Scheme¹:

The Bank and HM Treasury launched the Funding for Lending Scheme (FLS) on 13 July 2012. The FLS is designed to incentivise banks and building societies to boost their lending to the UK real economy. It does this by providing funding to banks and building societies for an extended period, with both the price and quantity of funding provided linked to their lending performance.

[...]

The Bank and HM Treasury announced an extension to the FLS on 24 April 2013. This extends the scheme by one year to allow participants to borrow from the FLS until January 2015, with incentives to boost lending skewed towards small and medium sized enterprises.

¹ <http://www.bankofengland.co.uk/markets/Pages/FLS/default.aspx>

9. The Treasury has explained that the FLS is run by the Bank, with the approval of the government, as part of its remit to maintain monetary and financial stability. The operation of the FLS is overseen by a joint Bank of England / Treasury Oversight Board (JOB), which meets on a quarterly basis. The Treasury has advised that the FLS is not a scheme that would have been undertaken in normal times but instead reflected a response to the exceptional challenges facing the economy.

The exemptions

10. The Treasury has variously applied a number of different exemptions to the withheld information. The Commissioner has initially considered the application of sections 36(2)(b)(ii) and 36(2)(c)

Section 36(2)(b)(ii) and (c) – prejudice to the effective conduct of public affairs

11. The Treasury has applied sections 36(2)(b)(ii) and 36(2)(c) to the greater part of the withheld information. These exemptions state that information is exempt information if, in the reasonable opinion of a qualified person, disclosure under the legislation:
 - (b) would, or would be likely to, inhibit –
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
12. Unlike other exemptions in FOIA, section 36(2) can only be engaged where a public authority has consulted with a qualified person and it is the qualified person's opinion that the harm stated in the exemption would, or would be likely to, arise through disclosure. To find that any limb of section 36(2) has been correctly applied, the Commissioner must be satisfied not only that the qualified person gave an opinion on the likelihood of prejudice occurring but also that the opinion was reasonable in the circumstances. As a prejudice-based exemption, the qualified person must reasonably consider that there is a link between the factor described in the exemption and the prejudice that it considers may arise through disclosure. The risk of prejudice occurring must also be real and significant.

13. With regard to section 36(2)(ii), the Commissioner considers that it is about the process that may be inhibited rather than what is necessarily contained in the requested information itself. The critical consideration is whether disclosure could inhibit the process of exchanging views. Section 36(2)(c), in contrast, refers to the prejudice that may *otherwise* apply. The Commissioner considers that if section 36(2)(c) is used in conjunction with any other exemption, the prejudice envisaged must be different to that covered by the other exemption. Previous Information Tribunals have found that the exemption may potentially apply to situations where disclosure could disrupt a public authority's ability to offer an effective public service.
14. The Treasury contacted the Economic Secretary in post at the time about the request on two separate occasions. The first related to the possible application of section 36(2)(c) and the second to the possible application of section 36(2)(b)(ii).
15. The Commissioner is satisfied that the Economic Secretary satisfies the specification of a 'qualified person' set out at section 36(5) of FOIA. Furthermore, the Commissioner has been provided with a copy of emails evidencing that the qualified person had signed-off the application of the exemption. The next step is therefore to consider whether the opinion given by the qualified person with regard to section 36(2)(b)(ii) and section 36(2)(c) was reasonable in the circumstances.
16. The Commissioner has had sight of the submissions produced by officials at the Treasury. These included an explanation of the relevant section 36(2) exemption and a brief analysis of the issues it decided were relevant to making a decision in the form of public interest considerations for and against disclosure. An annex was also attached that listed the information falling within the scope of the request and the Commissioner understands that the qualified person had sight of the withheld information.
17. In the earlier submissions relating to the application of section 36(2)(c), the Treasury official spoke of the importance of preserving the ability of officials to discuss freely and frankly the working of the FLS. Furthermore, reference was made to the chilling effect that disclosure could have on the robustness of an assessment of the scheme and the possibility that it could make discussion less objective. In the later submissions concerning section 36(2)(b)(ii), the official states that the information is market sensitive and therefore disclosure would be likely to impact on FLS participants if released. The official also mentioned that the information was provided to the Bank of England under an agreement of confidentiality.

18. Turning to the public interest considerations, the submissions repeat those issues referred to in connection with section 36(2)(c). However, they also go on to state that officials should be allowed space to provide open and honest views. Disclosure could weaken confidence in this safe space and therefore undermine the strength and credibility of the JOB.
19. In this case each of the qualified persons contacted about the request has effectively subscribed to the advice set out in the Treasury's submissions. However, the level of prejudice to which the qualified person's opinion refers – namely, 'would' or 'would be likely' – is not obvious. Where there is any doubt about the level of prejudice being designated, the Commissioner will proceed on the basis that the lower threshold of prejudice applies. This still requires that there is a real and significant risk of prejudice.
20. When deciding whether any limb of section 36(2) is engaged, the test to be applied is whether the qualified person's opinion is one that a reasonable person could hold and not whether it is the most reasonable opinion. The arguments supporting the qualified person's opinion are relatively brief, which in the Commissioner's view means that the reasons for applying the exemptions are not as clear as they might be.
21. With regard to the application of section 36(2)(b)(ii), the Commissioner has reflected on the purpose for which the information was produced. In this context, the Commissioner acknowledges the part played by the JOB in governing an initiative designed to address what the Treasury has stated were exceptional challenges facing the economy. He is prepared to accept that the JOB would feel that it needed space away from premature scrutiny and criticism when discussing, and potentially making decisions on, sensitive areas of policy. The Commissioner has therefore decided that the qualified person's opinion is one which a reasonable person could hold and therefore that section 36(2)(b)(ii) of FOIA is engaged.
22. In relation to the application of section 36(2)(c), the Commissioner considers that the reasonableness of the qualified person's opinion is less clear-cut. For the greater part, the arguments endorsed by the qualified person are ones better suited to section 36(2)(b), which refers to the ability of officials to discuss issues freely and frankly, rather than section 36(2)(c) of FOIA. The Commissioner also notes that the submissions make reference to the chilling effect that disclosure could have on the robustness of the objective assessment of the FLS.

23. It is noticeable that the 'chilling effect' argument does not explicitly specify how the prejudice would be likely to manifest itself. The Commissioner will normally adopt the view that arguments will carry less weight, and are therefore less likely to be reasonable, where they point to a relatively wide ranging chilling effect rather than to particular consequences. In any event, he considers that the chilling effect argument is not relevant to the application of section 36(2)(c). Firstly, the Commissioner considers that a chilling effect argument normally relates to the impact that disclosure could have on discussions in the future – an effect that in his experience is more likely to be covered by section 36(2)(b) or perhaps section 35. Secondly, even if this was not the exact point being argued in this case, the Commissioner has not been provided with an explanation that demonstrates a link between the disclosure of the information and any future 'objective assessment' of the FLS.
24. The Commissioner therefore considers that section 36(2)(c) cannot be engaged on the basis of the qualified person's opinion. He has therefore gone on to consider the public interest test in the context of section of 36(2)(b)(ii) alone. When assessing the balance of the public interest, the Commissioner accepts that the qualified person's opinion should be afforded a degree of weight. However, the Commissioner will make up his own mind as to the severity of the prejudice and the weight that should be placed on the arguments in favour of disclosure.

Public interest arguments in favour of disclosure

25. The strength of the public interest in disclosure of information relating to the FLS is particularly strong. The recent downturn in the economy has resulted in serious and far-reaching ramifications for members of the public, not least from the squeeze placed on household budgets. This means that any attempt by the government to respond to the crisis, in this case by incentivising lending by banks to make credit more easily available and at cheaper rates, will rightly attract considerable scrutiny.
26. The complainant has also powerfully argued for disclosure in this case. He acknowledges that there is a significant amount of information about the operation of the FLS already in the public domain. However, he considers that the potentially far-reaching consequences of the FLS mean that the public is entitled to know more about the governance of the scheme. Arising from this, the complainant considers that transparency in the decision-making process of the JOB will lead to greater accountability by ensuring the public is in a position to test the robustness of officials' assessments and the overall performance of the government.

Public interest arguments in favour of maintaining the exemption

27. To place its decision to withhold the information in context, the Treasury has referred to the sensitive area that the JOB operates in, with the volatility of financial markets meaning that great care has to be exercised when deciding what information should be placed in the public domain. In the Treasury's view, the prejudice that would be likely to occur through a premature disclosure would be particularly severe.
28. The Treasury considers that the effectiveness of the JOB's role is dependent on its ability to deliberate on the various sensitive issues relating to the governance of the FLS freely and frankly. This requires space in which the members can debate confidential matters away from public scrutiny and distraction. In the Treasury's view, the fact that the FLS was implemented to assist with the recovery of the economy means that it would clearly not be in the public interest to weaken the integrity of a process meant to provide the effective oversight of the management of the scheme.
29. The Treasury also believes that an important consideration in this case relates to the exclusion of the Bank of England from FOIA for information of the nature requested. It has explained that information within the scope of the request was received from the Bank and would fall within the derogation set out in Part VI of schedule 1 of FOIA. This provides that the Bank is subject to FOIA in respect of information held for purposes *other* than those of its functions with respect to: (a) monetary policy, (b) financial operations intended to support financial institutions for the purposes of maintaining stability, and (c) the provision of private banking services and related services. This position was supported by the Commissioner in an earlier decision notice (FS50511656, 10 October 2013)², in which identical requests were made to the Bank.
30. The Treasury argues that to disclose the same information that would otherwise be derogated if a request was made to the Bank would circumvent the intentions of Parliament in setting aside a protected space for decision-makers to discuss matters relating to the economy.

² http://ico.org.uk/~media/documents/decisionnotices/2013/fs_50511656.ashx

The balance of the public interest

31. The FLS represents an important part of the overall strategy employed by the government and the Bank of England to manage confidence in the market. On the one hand, the potential importance of the scheme reinforces the Treasury's view that there is a significant public interest in allowing the JOB to oversee the operation of the scheme effectively. On the other, it means that the public would have a legitimate interest in knowing what issues were being considered by the JOB, particularly as the wider success of the FLS has been the source of debate.
32. The Commissioner considers that disclosure of the various items of information in the present case would have contributed towards a meaningful debate not only on the effectiveness of the FLS itself but also as part of a wider assessment of the government's attempts at stimulating the economy. However, for the reasons outlined below, the Commissioner has decided that in all the circumstances the balance of the public interest favours maintaining the exemption.
33. When considering where the balance of the public interest lies, the timing of a request will frequently be a critical factor. This reflects the expectation that the sensitivity of information will diminish over time. In this case the date of the meetings covered by the scope of the request go back as far as August 2012, over nine months before the request was made, up to May 2013, which was less than a month before. The Commissioner considers it likely that a number of items raised in the earlier meetings will have been superseded by more recent developments. However, the Commissioner also considers significant both the fact that the FLS was a response to exceptional circumstance and the Treasury's confirmation that the governance issues relating to the FLS remained live at the time of the request. In the Commissioner's view, the length of time that had elapsed between the request and even the older information was not of sufficient length to find that the severity of the prejudice claimed was in all probabilities likely to have lessened to a significant extent.
34. The Commissioner has also placed some weight on the comparison made between the present case and his finding on the same request made to the Bank of England. The Commissioner recognises that the authors of FOIA could have similarly excluded the Treasury from its requirements in respect of the information described at (a) – (c) of Part VI of schedule 1 of FOIA if it meant to place this information permanently outside of the reach of the public. The fact that it has not done so means that the request must be treated on its own merits. However, the Commissioner also considers that the Bank's exclusion does signal the importance that Parliament placed on information of the nature requested and the need for safe space.

35. The Commissioner has further had regard to the amount of information about the FLS that is in the public domain. The Treasury has advised that the JOB publishes, on a quarterly basis, a breakdown of the amounts drawn down from the FLS and the amount of net lending made under the FLS, for each participating bank. In the Treasury's view, this is the first time that such a detailed level of data has been published and reflected the Bank's and the Treasury's commitment to keeping the public informed. The Commissioner accepts the complainant's argument that there will be occasions when the quality of debate will be improved by disclosing information in addition to a public authority's controlled releases. This is because it may allow the public a better glimpse of the way in which decisions have been reached. However, the Commissioner considers that the public interest in the information in this case is offset by the level and nature of prejudice that would be likely to arise.
36. In coming to this decision, the Commissioner has taken into account that, among other records, the exemption has been applied to agenda documents and some draft publication releases. The Commissioner considers that the arguments listed above equally apply to this information. However, the Commissioner is also of the view that the nature of the information itself would lessen its value to the public and therefore the public interest in disclosure. In the case of the agendas, the brief reference to the items to be discussed would contribute little of real benefit to the public debate. Likewise, the Commissioner considers that disclosing incomplete or inaccurate information contained within a draft in this particular situation would not aid the public's understanding of the FLS and the discussions of the JOB in this area.
37. In light of his finding on section 36(2)(b)(ii), the Commissioner has not been required to consider the application of the other exemptions to the same information.

Section 29(1)(a)

38. The Treasury has applied section 29(1)(a) of FOIA to two papers relating to proposals concerning the FLS. It is also relying on section 35(1)(a) and section 43(2) of FOIA to withhold this information.
39. Section 29(1)(a) of FOIA states that information is exempt information if its disclosure would, or would be likely to, prejudice the economic interests of the United Kingdom or any part of the United Kingdom.

40. As a prejudice-based exemption, a public authority seeking to rely on section 29(1)(a) must be able to demonstrate a link between the economic interests described and the harm that it considers may arise through disclosure. Further, the risk of prejudice occurring must be real and significant. The wording of the exemption makes plain that it covers communal interests rather than those of the individual; concerning information that would, or would be likely, to damage the economy of the UK as a whole or a regional or local economy.
41. The FLS represents a scheme intended to help invigorate the UK economy through incentivising banks and building societies to boost lending to the economy by reducing funding costs. The Commissioner accepts that information relating to proposals affecting the coverage of the scheme will potentially fall under the exemption. The Commissioner must therefore next consider whether disclosure of the information would, or would be likely to, prejudice the economic interests of the UK. The Treasury has not clearly specified the level of prejudice that it considers applies. Consequently, the Commissioner has proceeded with his considerations on the basis that the 'would be likely' threshold of prejudice has been applied.
42. The Treasury's arguments for the engagement for the exemption are broadly speaking two-fold. Firstly, it has referred to the possibility that disclosure would discourage participation in the scheme. Secondly, it considers that there is a reputational risk attached to the release of the information. This includes harm to the credibility of the JOB and damage to the trust that parties have in the ability of the government to protect confidential information.
43. The Commissioner accepts that disclosure may cause some dismay to the parties referred to in the information or otherwise affected by the proposals. However, in the absence of any supporting evidence, the Commissioner considers it speculative to suggest that it would discourage participation in the FLS. He therefore respectfully disagrees that there are adequate grounds to find that there is a real of risk of this harm occurring. The Commissioner though considers that the second argument provides a more cogent explanation of how the prejudice stated in section 29(1)(a) of FOIA may arise.

44. He considers that the JOB plays a vital role in overseeing a scheme designed to affect the lending model. The Commissioner acknowledges that a critical part of this role relates to its ability to manage relationships with current or prospective stakeholders in the FLS. In the Commissioner's view, the disclosure of the information in question would risk the credibility of the JOB by demonstrating that it was unable to successfully control confidential information in its possession. This could, in turn, weaken the strength of the JOB's relationship with stakeholders and harm its capacity to administer the FLS. The Commissioner therefore considers that section 29(1)(a) of FOIA is engaged on the basis that disclosure would be likely to prejudice the economic interests of the UK. He has therefore gone on to consider the balance of the public interest.

Public interest arguments in favour of disclosure

45. The Commissioner considers that the same arguments for disclosure outlined in the analysis of section 36(2)(b)(ii) above equally apply to the two papers. As mentioned in that context, the arguments provide a strong case for the release of the information.

Public interest arguments in favour of maintaining the exemption

46. The Treasury considers that the decision to withhold the requested information must be seen in the light of the aim of the FLS, which was meant to encourage bank lending in order to fuel economic growth. Any move that therefore threatened the effectiveness of the FLS would not be in the public interest and disclosure could, in the Treasury's view, potentially lead to some financial instability in the markets.

The balance of the public interest

47. The Commissioner considers that the weights of the respective arguments for and against disclosure are finely balanced. The Commissioner has again found that the timing of the request is a critical factor when deciding where the balance of the public interest lies. In particular, he is aware that the request was made when important decisions relating to the FLS were still being made. Accordingly, the items referred to in the information were still live at that time.

48. As mentioned, there is no doubt that the information relating to the FLS proposals would attract considerable public interest, which goes far beyond mere curiosity. This is because of the depth and severity of the detriment caused by the economic downturn and the weight of interest attributable to attempts to mitigate these effects. However, the Commissioner also recognises that the objective of the FLS to promote greater lending activity was one that should ultimately serve to benefit the public. It is therefore critical that the JOB should be given space not only to consider issues relating to the development of the scheme but also to nurture relationships with organisations that already were signed up, or were considering signing up, with the FLS. Any move that could therefore upset this process would weigh heavily against disclosure.
49. For this reason, the Commissioner has decided that at the time the request was made the public interest in disclosure was outweighed by the public interest in favour of maintaining the exemption. Accordingly, the Commissioner has found that section 29(1)(a) of FOIA applies and he has not gone on to consider the other exemptions cited by the Treasury.

Right of appeal

50. 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

51. 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.
52. 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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