

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 November 2015

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

Decision (including any steps ordered)

1. The complainant submitted a request to the public authority for emails relating to the government's handling of tax evasion and avoidance allegations made against HSBC Suisse. The public authority withheld the information held in reliance on the exemptions at sections 36(2)(b)(ii), 40(2) and 41(1) FOIA.
2. The Commissioner's decision is that the public authority was entitled to withhold the information referred to as "the disputed information" in the body of this notice in reliance on the exemption at section 36(2)(b)(ii).
3. No steps are required.

Request and response

4. On 12 February 2015, the complainant submitted a request for information to the public authority in the following terms:

'Please provide copies of all emails sent and received by Indra Morris from (and including) February 9 to (and including) today's date relating to HSBC. This includes all "copied in" communications and attached documents.'

Please provide copies of all emails sent and received by Sir Nicholas Macpherson from (and including) February 9 to (and including) today's date relating to HSBC. This includes all "copied in" communications and attached documents.'

5. The public authority provided its response on 29 April 2015 following an extension to consider the balance of the public interest. The authority explained that the information held within the scope of the request engaged the exemptions at sections 27(1)(a), 36(2)(b)(ii), 40, 42(1) and 43(2) FOIA.
6. The complainant requested an internal review on the same day (29 April 2015) challenging the application of exemptions.
7. On 18 June 2015 the public authority wrote back to the complainant with details of the outcome of the review. It upheld the application of the exemptions at sections 36(2)(b)(ii), 40(2) and 41(1).

Scope of the case

8. On 19 June 2015 the complainant wrote to the Commissioner to complain about the public authority's decision to withhold the information held by the authority within the scope of his request.
9. The scope of the investigation therefore was to determine whether the public authority was entitled to rely on the exemptions at sections 36(2)(b)(ii), 40(2) and 41(1) to withhold information within the scope of the complainant's request above (the disputed information).

Reasons for decision

Disputed information

10. In December 2008, Herve Falciani, an HSBC IT expert was arrested by the Swiss authorities on allegations of stealing data from the bank. In early 2015, the Guardian and the BBC obtained information from the data leak showing the alleged facilitation of tax evasion by HSBC Suisse. Over the course of the week of 9 February 2015, they published a series of news stories which raised questions about the government's handling of the files. Key questions included the extent of Ministerial awareness of the data; whether the government had prosecuted all those alleged to have been involved in tax evasion; whether the bank itself had committed any crime; and what action the government was now taking.
11. The disputed information comprise of email exchanges between officials including Indra Morris (director general, tax and welfare at HM Treasury). Sir Nicholas Macpherson's (Permanent Secretary at HM Treasury) office was copied into some of the emails. It relates to the period when the Guardian and the BBC published stories raising

questions about the government's handling of the files leaked to HM Revenue & Customs alleging tax evasion activities by HSBC Suisse. The exchanges show that officials were urgently collecting and compiling information in order to address the questions being raised publicly about the handling of the files.

Section 36(2)(b)(ii)

12. Section 36(2)(b) states:

'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-

(i) the free and frank provision of advice, or

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

13. Section 36(5) FOIA identifies who may act as each public authority's 'qualified person' for the purposes of section 36(2). The Commissioner is satisfied that Andrea Leadsom MP (then Economic Secretary to HM Treasury) who issued the opinion engaging the exemption at section 36(2)(b)(ii) was the appropriate qualified person by virtue of section 36(5)(a).¹

14. In determining whether this exemption 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.

¹ A qualified person 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 qualified person's knowledge of, or involvement in, the issue.
15. 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 unreasonable 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.
 16. The Commissioner accepts that it was reasonable for the qualified person to hold the view that disclosure of the disputed information at the time of the request would have made officials more circumspect in responding to enquiries in future for fear that they could be published while the process of establishing facts was effectively still ongoing.
 17. The public authority explained that the exchanges were extremely free and frank as officials sought to establish facts to address concerns about the handling of the leaked files.
 18. The Commissioner therefore finds that the exemption at section 36(2)(b)(ii) was correctly engaged because in the circumstances, it was reasonable for the qualified person to hold the view that disclosure of the disputed information would inhibit the free and frank exchange of view for the purpose of deliberation.

Public interest test

19. The exemptions at section 36(2) are subject to the public interest test set out in section 2(2)(b) FOIA.² Therefore, the Commissioner has to decide whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the disputed information.
20. The complainant argued that there is a compelling public interest in the disclosure of information which could show how the public authority should respond to '*a scandal*'. Such disclosure, he argued, is capable of

² <http://www.legislation.gov.uk/ukpga/2000/36/section/2>

demonstrating how open and transparent the public authority is about its knowledge of these matters.

21. He further argued that there is no evidence that transparency results in officials becoming more circumspect in responding to questions and scandals. In his view, the officials would be neglecting their duties to the public if they did.
22. The public authority acknowledged the general public interest in openness and in the release of information to inform public debate. It acknowledged that tax avoidance and evasion are matters of significant public interest and disclosure of the disputed information would inform relevant debates.
23. The public authority however argued that there was a strong public interest in not inhibiting the future provision of open and frank advice in relation to tax avoidance and evasion.
24. It argued that it would be difficult for the authority to react effectively to future allegations that potentially implicate the authority if the disputed information was disclosed, and that would not be in the public interest. Without freely and frankly being able to test views and challenge each other, officials would not have been able to do their job of identifying the truth of the allegations and transparently presenting what actually happened. There is a strong public interest in allowing officials the space to produce timely and accurate information.
25. The public authority submitted that the public interest in making information available in relation to the government's handling of the allegations against HSBC Suisse has been met through its public comments on the matter. For example, statements made by Ministers in Parliament, and statements made by Indra Morris before the Public Accounts Committee as well as other Committees.

Balance of the public interest

26. The Commissioner considers that there is a strong public interest in disclosing information which will enhance public understanding of how officials handled the allegations received against HSBC Suisse in the leaked files. In view of the nature of the allegations (relating to tax evasion and tax avoidance), he considers that there is a strong public interest in disclosing information such as the disputed information in the interests of transparency and accountability.
27. However, in view of the timing of the request, the Commissioner has attached more weight to the significant public interest in officials being able to exchange views with regards to the handling of the allegations against HSBC Suisse and responding to questions raised thereof in a

free and frank manner without fear that their views could be disclosed whilst such discussions are ongoing.

28. It is highly likely that disclosure of the disputed information at the time of the request while officials were still trying to establish the facts would have generated additional media interest. Clearly, experienced officials would be expected to manage such media attention on a matter of significant public interest. However, the consequential effect on their candour at such a crucial period would have affected the quality and timeliness of the government's response to the questions that were being posed, and that would not be in the public interest.
29. The Commissioner does not disagree with the view that, generally, transparency is unlikely to result in officials being more circumspect when carrying out their duties. However, the issue in this case is not whether or not transparency is generally likely to have that effect. The question is whether, given the level of media attention on such a matter of significant public interest, it was reasonable to hold the view that disclosure of the disputed information at the time of the request while discussions were ongoing would have made officials more circumspect while expressing views in relation to the matter. As previously mentioned, the Commissioner considers that it was reasonable to hold that view in the circumstances.
30. The Commissioner does not share the view that the public interest in making information available in relation to the government's handling of the allegations has been met by the public authority's public statements. The disputed information would inform the public's understanding of the public statements made by officials. In any event, the statements appear to have been made subsequent to the complainant's request and were not therefore available at the time of his request.
31. However, in the circumstances, the Commissioner finds that there was a stronger public interest in maintaining the exemption at section 36(2)(b)(ii) for the reasons he has identified above.
32. Having found that the public authority was entitled to rely on section 36(2)(b)(ii), the Commissioner did not consider the applicability of the remaining exemptions.

Right of appeal

33. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

34. 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.
35. 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

Alexander Ganotis
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