

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 November 2018

Public Authority: HM Revenue and Customs

Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested copies of project assurance review reports for 3 major government projects namely, Tax-Free Childcare, Columbus (IT delivery project) and, Customs Declaration Service. The public authority considers the requested information exempt on the basis of the exemptions at section 36(2)(b)(ii) and section 36(2)(c) FOIA.
2. The Commissioner's decision is that public authority was entitled to rely on sections 36(2)(b)(ii) and 36(2)(c) FOIA to withhold the requested information.
3. No steps required.

Background

4. The request relates to reviews of projects which fall under the ambit of the Government Major Projects Portfolio (GMPP). The public authority helpfully provided the explanation below to set the request in context.
5. The GMPP covers around 150 major projects with a total whole life cost approaching £450 billion. Major projects are defined as those which: require spending over and above departmental expenditure limits, require primary legislation and are innovative or contentious.
6. The Infrastructure and Projects Authority (IPA) oversees and provides support to the GMPP. This includes arranging and managing more than 200 independent expert assurance reviews of major government projects¹ each year and providing bespoke project support throughout each project's lifecycle.
7. Independent assurance from the IPA (in the form of a PAR or CFR) is normally commissioned by the Senior Responsible Owner (SRO) of the project with one of the primary purposes being to provide findings and recommendations to the SRO. Alternatively, a PAR can be instigated by senior officials outside of the project or department and even by Ministers to inform investment board and/or HM Treasury approval point.
8. Assurance reviews are commissioned for the purpose of furthering the project in question, concentrating on the 'bespoke Terms of Reference' and are not prepared with a view to publication. To ensure a consistent and professional approach throughout the review, a Code of Conduct or statement of principles is adopted. Typical items in a Code of Conduct include: open and honest contributions, maintaining confidentiality, comments will be non-attributable, independence and objectivity, and a commitment to providing a report that gives value to the project and its stakeholders.
9. The review takes the format of a series of confidential and non-attributable interviews with project team members, stakeholders and suppliers. The IPA guidance states that it is essential for open and honest dialogue to be maintained during an assurance review and, that the review is a partnership between the SRO and the review team to

¹ These reviews are generally conducted in the form of "Project Assessment Reviews (PARs)" and "Critical Friend Reviews (CFRs)".

increase the project's chances of success. Publicly available standard letters sent to those to be interviewed highlight that they can speak freely and frankly because everything in the review report is non-attributable, confidential and will not be quoted in the report.

Request and response

10. On 6 November 2017, the complainant submitted a request for information to the public authority in the following terms:

"Would you be able to forward the GMPP assurance (sometimes referred to as a PAR) and any lessons identified/learned on the following please. - Customs declaration services programme - Columbus - Tax free childcare. Noting that these are all part of the GMPP it would appear reasonable to assume that this information is readily discoverable".
11. The public authority issued a response on 4 December 2017. It considered the requested information exempt on the basis of section 35(1)(a) FOIA.
12. The complainant requested an internal review of this decision on 4 December 2017.
13. The public authority wrote back to the complainant with details of the outcome of the internal review on 13 March 2018. The review revised the decision to rely on section 35(1)(a). It accepted that the requested information should be withheld but on the basis of the exemptions at section 36(2)(b)(ii) and section 36(2)(c) FOIA.

Scope of the case

14. The complainant contacted the Commissioner on 14 March 2018 to complain about the public authority's decision to withhold the requested information. The Commissioner has referred to his submissions at the relevant parts of her analysis below.
15. 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) and 36(2)(c) FOIA.

Reasons for decision

Withheld information

16. The withheld information comprises of PARs and CFRs for the Customs declaration services project, the Columbus project and the Tax- Free Childcare project.

Sections 36(2)(b)(ii) and 36(2)(c)

- 17 Section 36(2) partly states² –

“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, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

18. The exemptions can be engaged if, in the reasonable opinion of a qualified person, disclosure would or would be likely to result in any of the effects set out above in section 36(2).

Complainant's submissions

19. The complainant's submissions which are pertinent to the investigation are reproduced below. To be clear, the Commissioner does not consider that the rest of the submissions fall within the remit of her enforcement powers pursuant to section 50 FOIA.

20. “These are the reports that the public and other parts of government can learn most from. In extremis, these reports are released on enquiries such as the Edinburgh tram because it is a matter of public interest. Therefore, why can't they be released on other projects, particularly the major projects portfolio.
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² The full text of section 36 FOIA can be found here:
<http://www.legislation.gov.uk/ukpga/2000/36/section/36>

21. "The public interest is not just in holding government accountable for effective project delivery; the biggest prize for our society is leveraging the insights from the data from these projects. If we are able to apply data analytics effectively we should be able to improve project delivery across every sector for the benefit of all, thereby improving productivity whilst reducing the costs of public projects."
22. "There is also an opportunity for the UK to become world leaders in project data analytics and forecasting, which offers a tremendous economic opportunity for UK industry, with the additional benefits of tax revenue and employment. The public interest is huge."
23. "Assurance reports examine the delivery of a project. I acknowledge that there should be a safe space for projects to have discussions and maybe the report should be locked down for 18 months after issue. But I fundamentally disagree that such reports should be locked down forever."
24. "The major projects portfolio represents £450 billion of public investment. Surely the public have a right to know what went wrong, what went well and how we should be improving for the future? Citizens have a role in leveraging this information."

Public authority's submissions

25. The public authority's submissions are summarised below.
26. The Director-General who is also a Commissioner of HMRC gave his opinion that disclosure of the withheld information would be likely to prejudice the free and frank exchange of views for the purposes of deliberation and the effective conduct of public affairs.³
27. According to the Director-General, with respect to the application of section 36(2)(b)(ii), the PAR process is dependent upon the confidence of reviewers and interviewees to be candid with each other. This confidence derives from the expectation of the interviewees that any frank comments made will be treated in confidence. Where officials must take into consideration the potential disclosure of these discussions, and the ensuing risks, this would be likely to inhibit the

³ The public authority explained that it was the initial opinion of the Director-General that disclosure **would** be prejudicial but that opinion was reconsidered pursuant to the complaint to the ICO.

free and frank exchange of views and consequently have a detrimental effect on the quality and scope of future discussions.

28. With respect to the application of section 36(2)(c), if interviewees felt that what they said was liable to be published, even on a non-attributable basis, they would be far less likely to be forthright about problems and solutions. This would make the PAR process more difficult to carry out and potentially undermine its effectiveness. This is because the value of a PAR's findings will in no small way be dependent on the frank contributions of interviewees, something it is possible to imagine could be constrained if views were made available to public criticism. This would be likely to prejudice the effective conduct of public affairs.
29. In its submissions to the Commissioner, the public authority added that assurance reviews are integral to the successful delivery of complex projects. They are internally facing, providing invaluable and candid views of those involved. This allows stakeholders to identify potential concerns and implement remedial action.
30. It also submitted that the Commissioner's view expressed in her guidance is that section 36 concerns the process, in this instance the process of the PAR that may be inhibited rather than the information itself. The information requested does not necessarily have to contain views and advice that are in themselves notably free and frank.
31. With respect to the balance of the public interest, the public authority acknowledged the public interest in transparency and accountability in government and in promoting public understanding of the decisions taken by government. In this respect disclosure of the withheld information would allow scrutiny and in doing so may inform public debate in relation to aspects of the UK's tax system now and in the future.
32. However, there is a strong public interest in the implementation of successful projects, delivering high quality, value for money public services. The PAR process, reliant upon the open and honest contributions of stakeholders interviewed, is an essential part of a project's success. The value of the PAR process extends beyond the recommendations of the review team, providing invaluable insight to both short term and long term issues affecting the project. The process and document is an asset to all government major projects, the value and sensitivity of which will extend throughout and beyond the lifespan of the project itself. The inhibiting effects of disclosure must therefore be considered likely to extend beyond just the project in question to other projects within the public authority and across government.

There is therefore a strong public interest in not prejudicing the PAR process.

33. Notwithstanding its view on the public interest in protecting the assurance review process generally, the public authority set out the public interest factors it considered relevant to the requested projects.
34. With respect to the Customs Declaration Service (CDS), the public authority explained that the Customs Handling of Import and Export Freight service (CHIEF), the current service delivery system for import and export, is set to be replaced with CDS. Each year this essential service handles 60 million declarations and collects £34 billion in VAT and Customs and Excise duties. The most recent review of CDS was via a CFR roughly six months prior to the complainant's request. The project is still ongoing. In addition, the decision to replace CHIEF with CDS was taken prior to the UK's decision to leave the European Union. However, the successful implementation of CDS is integral to the success of Brexit. There is therefore a significant public interest in preserving a safe space for the CDS project team to consider all possible options without external distraction.
35. The Columbus programme was created to deliver a phased exit strategy from the public authority's outsourced IT contract known as ASPIRE. The public authority has the largest IT estate in the UK and one of the 15 largest in the world, utilising over 400 different tax systems, 5,000 servers and nearly 600 different IT applications. The Columbus programme is the largest public or private sector IT transformation programme anywhere in Europe with net savings for the taxpayer of £750 million over five years. The success of the Columbus is clearly in the public interest.
36. Columbus itself is actually a series of many smaller projects moving away from long term contracts with single suppliers to smaller, more flexible, contracts which allow the flexibility needed to innovate and look for efficiencies that benefit customers. The programme is moving into a period of review and procurement. It is reliant upon contract and supplier management which will over time require an increased level of independent assurance. In order to ensure that contracts secured deliver the best service to the public and the best value to the public purse, it is essential to preserve the safe space for discussions afforded by the PAR process.
37. The most recent PAR for the Tax-Free Childcare project was issued roughly 9 months prior to the complainant's request. Early implementation to a small number of local authorities began in April 2017 with the service fully opened from 14 February 2018. There was

therefore a strong public interest in preserving a safe space for discussions free from external interference.

38. In response to the complainant's submissions, the public authority submitted that the information provided in a PAR and CFR is qualitative and descriptive by nature rather than quantifiable. Therefore, it was not clear on the viability or value of data analytics conducted on such assurance review reports. It was not in the public interest to undermine an independent assurance process upon which the success of major government projects rely in order to disclose information which will likely not be of use to the complainant.

Commissioner's considerations

Was the qualified person's opinion reasonable?

39. As mentioned, the exemptions can only be engaged if, in the reasonable opinion of a qualified person, disclosure would or would be likely to result in any of the effects set out in section 36(2)(b)(ii) and 36(2)(c).
40. "Qualified Persons" are described in section 36(5) FOIA. The Commissioner is satisfied that at the time of the request, Nick Lodge HMRC Director-General and a Commissioner of HMRC was the appropriate qualified person for the public authority by virtue of section 36(5)(c) FOIA.
41. In keeping with the requirement of the exemption, the Commissioner has considered whether the qualified person's opinion was reasonable.
42. 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.
43. 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.

44. The Commissioner is satisfied that the qualified person's opinion relates to the prejudice in section 36(2)(b) and section 36(2)(c) and also that the qualified person had an adequate level of knowledge of the issue.
45. Having inspected the withheld information, the Commissioner is satisfied that in the circumstances, it was reasonable for the qualified person to conclude that disclosure would pose a real and significant risk to the free and frank exchange of views between project teams and reviewers. Interviewees expect that their contributions to project assurance reviews would be held in confidence so it is reasonable to hold the view that disclosure would pose a significant risk to the frank contributions of interviewees.
46. Consequently, it was reasonable for the qualified person to conclude that disclosure would pose a real and significant risk to the assurance review process by making it difficult to carry out and potentially undermining its effectiveness. The Commissioner is satisfied that assurance reviews for major government projects falls within the ambit of the effective conduct of public affairs envisaged in section 36 FOIA.
47. The Commissioner therefore finds that the exemptions at sections 36(2)(b) and 36(2)(c) were correctly engaged.

Public interest test

48. The Commissioner next applied the public interest test set out in section 2(2)(b) FOIA. The Commissioner therefore considered whether in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosing the withheld information.
49. Although the request is for assurance review reports in relation to named projects, the complainant has argued more broadly that there is a public interest in making these reports in general publicly accessible. Conversely, notwithstanding it has argued that assurance review reports for the requested projects should not be disclosed in the public interest, the public authority has argued more broadly that these

reports in general should be withheld in order to protect the assurance review process.

50. However, the Commissioner's consideration of the public interest factors has been restricted to the circumstances of this case. Each case must be considered on its own merits. There will be cases where the Commissioner considers that the public interest in disclosing assurance review reports in relation to a project is stronger and others where the public interest in withholding the reports is stronger.
51. In terms of the public interest in disclosure, in addition to the general public interest in transparency and accountability, the Commissioner considers that there is a public interest in disclosing assurance review reports for these projects given their scale and huge impact on the delivery of public services. Furthermore, the insights from the data from projects of such scale and importance would be useful in her view in analysing trends in project delivery in the public sector and that is in the public interest.
52. The public authority however drew attention to the fact that there are publicly available reports regarding the requested projects by the National Audit Office (NAO) and the Public Accounts Committee (PAC).⁴

⁴ <https://www.nao.org.uk/wp-content/uploads/2017/07/The-Customs-Declaration-Service.pdf>

<https://publications.parliament.uk/pa/cm201719/cmselect/cmpubacc/401/401.pdf>

<https://www.nao.org.uk/report/replacing-the-aspire-contract/>

<https://www.nao.org.uk/wp-content/uploads/2016/06/11130-001-Replacing-the-Aspirecontract.pdf>

<https://www.nao.org.uk/wp-content/uploads/2014/07/Managing-and-replacing-the-Aspirecontract.pdf>

<https://www.parliament.uk/business/committees/committees-a-z/commons-select/publicaccounts-committee/inquiries/parliament-2015/aspire-contract-progress-review-16-17/>

<https://www.nao.org.uk/report/entitlement-to-free-early-education-and-childcare/>

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/337894/tfc_response_to_consultation_on_childcare_account_provision.pdf

<https://publications.parliament.uk/pa/cm201719/cmselect/cmpubacc/456/456.pdf>

It also drew attention to a non-project specific public scrutiny by the NAO targeted at the government major projects process as a whole.⁵

53. The public authority considers that the public interest in proper scrutiny and transparency in relation to the requested projects and the government major projects process more broadly is met by the publicly available information.
54. There is clearly always a case for disclosing more information in the public interest in the Commissioner's view. However, the Commissioner accepts that the publicly available information regarding the requested projects is of significance with respect to the public interest in transparency and accountability.
55. In any event, the Commissioner considers that the public interest in preserving a safe space for discussions regarding the requested projects is significant in the circumstances. The CDS and Columbus projects are still ongoing and the Tax-Free Childcare project was ongoing at the time of the request. The Commissioner considers the need for safe space will be strongest when an issue is still live. There is a strong public interest in not disclosing information which could become a source of distraction and side-track officials from the substantive task of delivering the requested projects.
56. Furthermore, the Commissioner considers that there is a strong public interest in preventing a chilling effect on free and frank exchange of views regarding the requested projects in particular in relation to the assurance reviews. Clearly, since the introduction of the FOIA officials are aware that the confidentiality of opinions can never be guaranteed. Nevertheless, given the expectations of interviewees that their contributions will be non-attributable, the severity of the chilling effect on free and frank exchanges pursuant to assurance reviews of the requested projects should not be underestimated. These are major projects with significant impact and it is not unreasonable therefore to assume that the contributions of interviewees would become much more constrained if they felt that it would leave them open to blame or premature criticism.
57. The Commissioner has therefore concluded that in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosure.

⁵ <https://www.nao.org.uk/wp-content/uploads/2016/01/Delivering-major-projects-in-government-a-briefing-for-the-Committee-of-Public-Accounts.pdf>

Right of appeal

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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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.

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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