

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 May 2022

Public Authority: HM Revenue & Customs
Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested copies of a business case on staff pay put to HM Treasury. HM Revenue & Customs ("HMRC") withheld the requested information and relied on section 36 of FOIA (prejudice to the effective conduct of public affairs) in order to do so.
2. The Commissioner's decision is that HMRC is entitled to rely on section 36(2)(b)(ii) of FOIA to withhold the information and that the public interest favours maintaining the exemption.
3. The Commissioner does not require further steps.

Request and response

4. On 4 January 2021, referring to a statement from the HMRC Chief People Officer which mentioned a pay business case, the complainant requested information of the following description:

"Under the Freedom of Information Act I am requesting a copy of the pay business case referred to in the intranet message that was approved by the Cabinet Office and Treasury Ministers."
5. On 29 January 2021, HMRC responded. It refused to provide the requested information. It relied on section 36(2)(b)(ii) and 36(2)(c) of FOIA as its basis for doing so.

6. The complainant requested an internal review on 3 February 2021. HMRC sent the outcome of its internal review on 13 July 2021. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner 3 June 2021 to complain about the way his request for information had been handled. At that point HMRC had yet to complete its internal review.
8. In line with his customary practice, the Commissioner wrote to HMRC, highlighting the delayed internal review and asked for it to be completed within 10 working days. When HMRC failed to meet this deadline, the Commissioner decided that it would be unfair to the complainant and contrary to the spirit of FOIA to delay accepting the complaint simply because HMRC had failed to complete an internal review within a reasonable time period. The Commissioner therefore exercised his discretion and accepted the complaint without waiting for the outcome of HMRC's internal review.
9. Shortly after the complaint was accepted, HMRC completed its internal review. However, the complainant remained dissatisfied and asked the Commissioner to proceed with an investigation.
10. The Commissioner considers that the scope of his investigation is to determine whether HMRC is entitled to rely on section 36 of FOIA to withhold the requested information.

Reasons for decision

11. Section 36(2) of FOIA states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of the information:
 - “(a) would, or would be likely to, prejudice—
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the Cabinet of the Welsh Assembly Government.
 - (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.
- (3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).
- (4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words 'in the reasonable opinion of a qualified person'."
12. Section 36 is a unique exemption within FOIA in that it relies on a particular individual (the Qualified Person) within the public authority giving an opinion on the likelihood of prejudice occurring. It is not for the Commissioner to stand in the shoes of that individual and provide his own opinion. The Commissioner's role is to: establish that an opinion has been provided by the Qualified Person; to assure himself that that opinion is "reasonable" and; to make a determination as to whether there are public interest considerations which might outweigh any prejudice.

Who is the Qualified Person and have they given an opinion?

13. Section 36(5)(c) of FOIA states that, for non-ministerial government departments, the Qualified Person is:
- "the commissioners or other person in charge of that department"
14. HMRC noted that it had consulted Mr Jim Harra, its Chief Executive and First Permanent Secretary and also Ms Angela MacDonald, its Deputy Chief Executive and Second Permanent Secretary – both of whom are commissioners of HMRC.¹
15. HMRC provided copies of the submissions that were provided to both Mr Harra and Ms MacDonald. Mr Harra responded and agreed with the

¹ HMRC's eight current commissioners can be found here:
<https://www.gov.uk/government/organisations/hm-revenue-customs/about/our-governance>

submission on 19 January 2021. Ms MacDonald responded and agreed the following day. Both commissioners' views were sought again during the internal review stage and both again agreed that the exemption was engaged.

16. The Commissioner accepts that both Mr Harra and Ms MacDonald are entitled to act as the Qualified Person for the purposes of section 36(5) of FOIA. As Mr Harra is more senior than Ms MacDonald and provided his opinion first, the Commissioner will rely on his opinion, provided on 19 January 2021, as being that of the Qualified Person for the purposes of this complaint. However, given that Ms MacDonald was in agreement, the Commissioner considers that it would make little difference as to whose opinion was chosen.

What was the Qualified Person's opinion and was it reasonable?

17. It is not the role of the Commissioner to substitute his own opinion for that of the Qualified Person. The Qualified Person is best placed to know the circumstances of their organisation and the significance of the information concerned. It thus follows that the bar for finding that an opinion is "reasonable" is not a high one.
18. A "reasonable" opinion need not be the most reasonable opinion available. It need only be within the spectrum of opinions that a reasonable person might hold and must not be irrational or absurd.
19. The Commissioner considers that an opinion is likely to be unreasonable if it fails to make out the grounds for the exemption or if the information is already in the public domain.
20. The submission provided to the Qualified Person (and with which the Qualified Person agreed) stated that:

"It is important that strategy, policy and HMT officials are able to freely exchange their views on a range of potentially sensitive and speculative scenarios in a protected space, without fear of the full details of such views being disclosed, and without external interference and distraction. Where officials must take into consideration the potential disclosure of these discussions, and the ensuing risks, this will inhibit the free and frank exchange of views. Therefore, if the information were to be disclosed, there would be a detrimental impact on the quality and scope of future discussions.

"This, in turn, would prejudice the effective conduct of public affairs as defined in section 36(2)(c) by negatively impacting on HMT's role in approving and reviewing spending proposals, and HMRC's ability to develop and consider a full range of options to enable a set of balanced decisions to be reached."

21. As background to the complaint, HMRC noted that:

"The HMRC pay business case was made under a process for departments to submit pay flexibility business cases to Cabinet Office and HM Treasury in accordance with the Civil Service pay remit guidance. The document set out HMRC's views, key arguments for reform to HMRC's pay and working arrangements, as well as associated risks, negotiation and implementation options, with detail incorporated throughout to support the views presented. The document was framed and positioned for an HM Treasury and ministerial audience with stark hypothetical and technical content... The case was approved in July 2020 by HM Treasury and Cabinet Office and provided a broad remit from which to negotiate with the trade unions.

"On conclusion of the negotiations with the trade unions a 13% pay deal was agreed to take forward to ballot covering pay years 2019/20, 2020/21 and 2021/22 with funding stretching across a wider period and a significant programme of contract reform. The negotiated offer went to ballot, and the result was a majority vote to accept. Whilst there was an overwhelming vote to accept the offer some staff have expressed concerns that the negotiated reforms were less favourable to pre-existing terms and conditions."

22. Whilst the Commissioner notes that the negotiations in question appear to have been completed before the request was submitted, it is not unreasonable to think that disclosing the document from one round of pay negotiations may affect the willingness of officials to express their views freely and frankly in future negotiations. He also notes that, whilst the main negotiations have been completed, there are further ongoing discussions taking place between HMRC and its recognised trade unions to implement the pay and conditions deal that the unions' members have voted to support. It is not unreasonable to suppose that disclosure of the business case, whilst such negotiations are ongoing, might harm the ability of the parties to deliberate. The Commissioner thus considers that the Qualified Person's opinion is reasonable and therefore section 36(2)(b)(ii) of FOIA is engaged.

Public interest test

23. Even where the Qualified Person has identified that disclosure of information would be likely to cause prejudice, the public authority must still disclose that information unless it can demonstrate that the public interest favours maintaining the exemption.

24. Given that the Commissioner has accepted the possibility that disclosure might cause prejudice, there will always be an inherent public interest in

preventing that from occurring. However, the weight that should be attached to that public interest will be determined by the severity of the prejudice and the likelihood of it occurring.

25. The Commissioner has accepted as reasonable that the lower bar of prejudice is engaged. This means that that the chance of prejudice occurring doesn't have to be more likely than not, but there must still be more than a remote or hypothetical chance. Whilst it is easier to demonstrate that the lower bar of likelihood is met, the weight to be attached to that prejudice is also lower.
26. The complainant argued that there was a strong public interest in transparency due to the number of staff affected by the changes to their pay and working conditions.
27. The complainant recognised that there might sometimes need to be a "safe space" to discuss sensitive matters, but that it was implausible to claim that one was still required when the negotiations had been completed and the offer approved in a ballot.
28. The complainant also noted that HMRC had not shared its business case with its recognised trade unions.
29. For its part, HMRC argued that the public interest should favour maintaining the exemption because:

"we feel in this case transparency in the public interest has been met by the process of negotiation and engagement with the trade unions (where a significant amount of the pay business case was shared). The [final pay and conditions] offer was negotiated in good faith with departmental trade unions voted for by their General Executive Committee and National Executive Committee. The full offer (reached during negotiations) was communicated and shared across HMRC and all trade union members were able to participate in the vote to accept or reject the deal supporting the commitment to being open and transparent.

"We believe there is a strong public interest argument in the exemption being maintained as disclosure of HMRC's pay business cases would pose a strong likelihood of having a chilling effect on free and frank exchanges in decision-making and analysis processes in future pay discussions across central government. This we believe would equally apply to the 'without prejudice' negotiations that took place between HMRC and its two recognised trade unions (PCS and ARC) during 2020 Pay negotiations. These negotiations with the trade unions needed to take place too without fear of the full details of views being disclosed, and external interference or distraction. If they

hadn't, the quality of these discussions would have been significantly impacted."

The Commissioner's view

30. In the Commissioner's view, the balance of the public interest favours maintaining the exemption.
31. The Commissioner recognises that any negotiations around pay and working conditions tend to be of deep importance to those affected. HMRC is a large employer and the number of staff that would have been affected by alterations is potentially large. There would therefore be a strong public interest in understanding whether the offer HMRC made to its staff represented a fair deal.
32. During the course of this investigation, the Upper Tribunal handed down its ruling in the case of *Montague v Information Commissioner and Department for International Trade* [2022] UKUT 104 (AAC) that ruling (which is binding on the Commissioner) states that the correct point at which to assess the balance of the public interest is the point at which the public authority issued its refusal notice.
33. In this case, HMRC has confirmed that details of its pay offer were not posted on the staff intranet until 1 February 2021 – two days after it issued its refusal notice. The Commissioner recognises that, at the time of the refusal, very little information was available to staff and this does increase the public interest in disclosure of the withheld information.
34. However, in the Commissioner's view, that public interest lay in HMRC publishing the details of what it was actually offering to staff – not the details of what it originally suggested to HM Treasury that it intended to offer.
35. The Commissioner recognises that any central government pay offer arises as a result of negotiations. Government departments must negotiate with their recognised trade unions and must also negotiate with HM Treasury – which ultimately holds the purse strings.
36. As in any negotiation, it is rare that any party gets everything that they want. Unions will wish to extract the best possible terms for their members, the Treasury will try to minimise the cost to the public purse and HMRC will need to balance those competing demands alongside trying to achieve its own strategic objectives.
37. During the course of negotiations, each side will make offers and counter-offers based on what they are prepared to accept (or, in the case of a trade union, what its members are prepared to accept) and

what they believe will be necessary to reach an agreement. Each party is usually required to make compromises (and depart from their opening offer) in order to reach mutual agreement.

38. In the Commissioner's view, disclosing HMRC's starting point in those negotiations is likely to have a chilling effect on its ability to conduct further rounds of pay negotiations. Officials are less likely to offer candid assessments of the merits of various pay packages if they fear that those assessments are likely to become public knowledge whilst matters are either live or recently concluded.
39. The Commissioner always approaches chilling effect arguments with scepticism as he considers that civil servants should not be easily dissuaded from offering robust views. However, he recognises in this particular case, such is the sensitivity of matters relating to pay, that there is a real and significant danger of future pay cases being of lower quality or more rigidly kept-to in future if they are written with half an eye on publication.
40. Section 36 does not require the particular information to be noticeably free and frank in order for the exemption to apply. It is sufficient for a public authority to demonstrate that disclosure of information could inhibit deliberations which are either ongoing or are likely to take place in future. However, the Commissioner notes that the withheld information in this case does contain sections which offer robust assessments of various scenarios and risks relating to pay and conditions. This adds to the public interest in maintaining the exemption.
41. HMRC's starting position should not affect ability of unions and their members to decide whether the deal that was ultimately offered is one that represents good or fair value. With the published pay offer, each member was able to make their own assessment of whether the 13% offered by HMRC was a fair value for their labour. Whether HMRC initially asked the Treasury for 13%, 15% or 50% is irrelevant. 13% is what was offered. The fact that members voted (apparently comprehensively) in favour of accepting the overall package would suggest that members were broadly content with what had been proposed.
42. Disclosing the withheld information at the time of the request may not have affected the negotiations to agree the broad terms of the pay offer that was presented to staff, but it would affect the ability of HMRC to deliberate on and negotiate the precise implementation of the deal – which the Commissioner understands to be ongoing. There is an element to which this matter is still "live" and therefore still deserving of

a safe space in which HMRC can deliberate matters both internally and with its recognised trade unions.

43. One of HMRC's arguments was that disclosing this particular document would set a precedent for disclosure across government. This is not an attractive argument. Firstly, if there are strong public interest reasons for disclosing information of a particular type, those same reasons are likely to apply similarly to other departments. Secondly, the Commissioner will always judge each complaint on its own individual merits so that, if there are particular circumstances affecting a department, those can still be taken into account.
44. However, in the circumstances of the present case, the Commissioner is satisfied that the balance of the public interest favours maintaining the exemption.

Other matters

45. Whilst there is no statutory time limit for carrying out an internal review, the FOIA Code of Practice, issued under section 45 of FOIA, states that internal reviews should normally take no longer than 20 working days – although it recognises that there are circumstances in which an additional 20 working days might be necessary.
46. In this case, the Commissioner notes that it took HMRC five months to complete its internal review and inform the complainant of the outcome. Whilst the Commissioner makes allowance for the fact that the complainant requested an internal review whilst lockdown restrictions were in force (and restrictions of some sort remained in place throughout), he (the Commissioner) still considers that five months is excessive and represents poor practice by HMRC on this occasion.

Right of appeal

47. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

48. 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.
49. 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

Roger Cawthorne
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