

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 December 2022

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

Decision (including any steps ordered)

1. The complainant has requested incoming and outgoing messages from a HM Treasury (HMT) smartphone issued to Lord Amyas Morse for use in his capacity leading the independent Loan Charge Review.
2. The Commissioner's decision is that HMT does not hold the requested information.
3. The Commissioner does not require any steps.

Request and response

4. On 7 June 2021, the complainant wrote to HM Treasury and requested information in the following terms:

"Dear HM Treasury

On 10 September 2019 at 13:18 an unnamed official in HM Treasury sent an email to Amyas Morse. The email contained the following sentence:

"We have been able to set you up on HMT IT so that you will have an

email address and a Treasury laptop and smartphone when you come in on Thursday which you will be able to take away with you.”

Amyas Morse confirmed by email at 14:30 on the same day that he would be at HM Treasury at 10am on (Thursday) 12 September 2019.

Please provide all incoming (received) and outgoing (sent) messages of any type or format, from the Treasury smart phone which was supplied to Amyas Morse, from the date he collected the phone to the date it was returned to the Treasury.

5. HMT responded on 5 July 2021. It stated that the information was not held. It explained that the Loan Charge Review was independent to the work of HMT, and any information produced by Lord Morse would have been destroyed at the conclusion of the Review, as per the conditions set out in the report¹.
6. On 1 September 2021 the complainant requested an internal review. The complainant explained that they were requesting incoming and outgoing messages, therefore the smartphone used by Lord Morse would also contain information received rather than solely information produced. The complainant also disputed HMT’s reliance on the conditions of the report, which they state covered the destruction of information received from the public as part of the review and not information produced by Lord Morse.
7. Following an internal review HMT wrote to the complainant on 12 October 2021. In its internal review HMT amended its position and stated that it was refusing the request under section 12(2), anticipating that the cost of complying with the request would exceed the appropriate limit of £600. HMT explained that Lord Morse may have sent messages to HMT staff not seconded to the Review, however to establish this would “require a wide-scale search and examination of information by a large number of officials... it is also unlikely that we would be able to identify whether that device was used to send any such messages.”
8. The complainant contacted the Commissioner on 13 October 2021 to complain about the way their request had been handled. The

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/854387/Independent Loan Charge Review - final report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/854387/Independent_Loan_Charge_Review_-_final_report.pdf) (page 71, D.15)

Commissioner wrote to HMT to establish its position, however, HMT failed to respond within the specified timeframe.

9. On 21 June 2022 the Commissioner issued a decision under IC-134697-P3P3² finding that HMT had failed to demonstrate that section 12(2) was engaged and requiring it to issue a fresh response within 35 calendar days.
10. On 1 July 2022 HMT provided a fresh response. It stated that, on review, it had identified current staff members who may have been contacted by Lord Morse and asked them to perform a search of their records. All officials confirmed that they did not hold any information.
11. HMT concluded that the requested information was not held.

Scope of the case

12. The complainant contacted the Commissioner 5 July 2022 to complain about HMT's fresh response. The complainant outlined their grounds of complaint in a supporting letter.
13. The Commissioner has summarised their grounds of complaint as follows:
 - That the incoming and outgoing messages contained on the smart phone provided to Lord Morse is information held for the purposes of FOIA under section 3(2) and therefore should be retained by HMT and retrievable from HMT servers;
 - That Lord Morse was "clearly, transparently and unquestionably" conducting government business in his role as Reviewer as appointed by the Chancellor of the Exchequer and therefore the review and Lord Morse are subject to section 1.4.2 of the statutory Code of Practice on the management of records issued under section 46 of FOIA;
 - That if the information on the smart phone is considered to be held for the purposes of FOIA that the Commissioner determine whether HMT have correctly disposed of the information in accordance with their

² <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4020837/ico-134697-p3p3.pdf>

records management policy, and whether there is a record of its destruction;

- That HM Treasury have incorrectly cited section D.15 of Annex D of the Loan Charge Review as a reason for information being disposed of, as the 4 evidence referred to was that submitted by the public and not that produced by the review.
- That HM Treasury is incorrect when it says that, as per its review of 1 July 2022, it does not hold any information within the scope of the request; and
- That there is sufficient information to support the complainant's claim that a section 77 criminal offence has occurred. They asked that the Criminal Investigations Team revisit their case³.

14. The scope of this case is to consider whether information was held within the scope of the request.

Reasons for decision

15. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

16. Where there is a dispute between the information located by a public authority, and the information a complainant believes should be held, the Commissioner follows the lead of a number of First-tier Tribunal (Information Rights) decisions in applying the civil standard of the balance of probabilities.

³ <https://www.legislation.gov.uk/ukpga/2000/36/section/77> The ICO's Criminal Investigations Team (CRIT) had previously investigated the complainant's claim that a section 77 offence had occurred and found insufficient evidence to substantiate the allegation. The decision of CRIT is final and the Commissioner did not ask CRIT to revisit the allegation as part of this investigation.

HM Treasury's position

17. The Commissioner wrote to HMT with a series of questions to determine whether it held information within the scope of the request. The Commissioner asked HMT to explain whether it considered the information to be held for the purposes of FOIA in light of the complainant's assertion that the Loan Charge Review constituted government business, as outlined at paragraph 13 above. The Commissioner also asked HMT a series of questions to establish its policies with regards to retention of the requested information, records of destruction and whether there are any business or statutory requirements for the information to be retained.

18. HMT explained their position in the following terms:

"We have now made further enquiries and believe that Lord Morse did not collect the smart phone that was offered to him. We believe this to be the case on the basis that we hold no record of him either collecting or returning it. We have also asked Lord Morse to confirm whether he ever collected the smart phone offered to him but unfortunately he has no recollection.

As we have explained, we are confident that we do not hold any information within scope of the request. We can now state that, on the balance of probabilities we do not believe that any information within scope of this request was ever held."

19. In response to the Commissioner's question on whether HMT considered the requested information, if held, to have been held for the purposes of FOIA, HMT offered the following explanation:

"We consider that for the purposes of the FOI Act any information that in theory may have been in scope of this request would have been considered to have been held by HM Treasury. Although the information requested would have been produced by the Review Secretariat the equipment was provided by HM Treasury and would have been on HM Treasury servers."

20. In response to the Commissioner's questions on retention of the information and records of destruction, HMT offered the following explanation:

"Any received information would have been held on the smart phone itself or in Lord Morse's Loan Charge Review email account. As we have previously stated, we hold no record of Lord Morse collecting or returning a smart phone.

The Loan Charge Review email accounts ceased to be used once the review concluded and are no longer readily accessible. HM Treasury's IT service provider has confirmed that to access these accounts to search for information would exceed the cost limit for central government departments as set out in section 12 of the FOI Act.

In relation to sent information, this in theory could have been held in the email accounts set up for members of the LCR. As explained above these are no longer accessible and it would exceed the cost limit to conduct searches.

Additionally, it could have been held in the email accounts of current HM Treasury staff who Lord Morse may theoretically have contacted using the smart phone. We have established beyond reasonable doubt that we do not hold this as we have asked these individuals to conduct searches for information within scope and they all confirmed that none is held.

We stress that we have no reason to believe that Lord Morse would have communicated with HM Treasury staff outside of the Loan Charge Review team but we took the view that we should request these searches in order to establish a 'not held' response beyond any reasonable doubt.

HM Treasury has no business purpose for the requested information and there are no statutory requirements upon HM Treasury to retain information."

The Commissioner's position

21. The Commissioner's position is that, for the reasons given at paragraph 18, HMT does not hold the requested information. The complainant provided the Commissioner with a copy of HMT's email to Lord Morse in which a smartphone was offered to him, however the Commissioner has not been presented with any evidence to contradict HMT's assertion that the smartphone was not collected. The Commissioner considers the explanation provided to be sufficient for the purposes of the present decision notice. However, the Commissioner recognises that HMT's overall handling of the request has been less than satisfactory and this will be discussed in the Other Matters section below.
22. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
23. The Commissioner has not made a finding on the section 12 matters raised in paragraph 20 as HMT is not relying on this exemption in this

instance. The Commissioner would refer the complainant to the recent decision notice in IC-99461-W7Y6⁴ regarding a similar request for information for the Commissioner's finding the costs incurred in obtaining information from its IT service provider.

Other matters

24. The Commissioner wishes to express his dissatisfaction with HMT's handling of the request and its engagement with the Commissioner's investigation, both of which have been subject to delays of an unacceptable length.
25. The Commissioner finds it particularly disappointing that it has taken HMT a total of 16 months to determine that the information is not held because the smartphone in question was not, in fact, collected or used by Lord Morse. The Commissioner considers that, had HMT established this fact on receipt of the request, public authority time and resource, which is in limited supply, could have been used more effectively and the complainant would have received a comparatively expeditious service.

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022750/ic-99461-w7y6.pdf> served 8 November 2022

Right of appeal

26. 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

27. 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.
28. 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

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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