

## **Freedom of Information Act 2000 (FOIA)**

### **Decision Notice**

**Date:** 8 November 2022

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

#### **Decision (including any steps ordered)**

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1. The complainant requested a draft version of a report produced by the Independent Loan Charge Review. HM Treasury stated that it did not hold the requested information. During the course of the Commissioner's investigation HM Treasury accepted that in theory it could conduct further searches, but estimated that to do so would exceed the appropriate limit at section 12 of FOIA.
2. The Commissioner's decision is that HM Treasury was entitled to rely on section 12 of FOIA to refuse the request. Accordingly no further steps are required.

#### **Background**

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3. In September 2019, the Chancellor commissioned Sir Amyas Morse (now Lord Morse) to lead an independent review into the disguised remuneration loan charge. Lord Morse was asked to consider whether the policy is an appropriate response to the tax avoidance behaviour in question, and whether the changes the government has announced to support individuals to meet their tax liabilities have addressed any legitimate concerns raised.

4. The review was completed and a report published in December 2019.<sup>1</sup>
5. On 3 December 2020 HMRC published a report on the actions it had taken in response to the accepted recommendations arising from the review.<sup>2</sup>

## **Request and response**

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6. The complainant submitted the following request to HM Treasury on 16 December 2020:

"I would like to ask HMT to share the Amyas Morse Loan Charge Review draft that was shared with a small number of HMRC staff under "strictly controlled conditions" and was (apparently) marked-up by hand before being returned to Loan Charge Review Secretariat for factual errors to be corrected.

I originally made an FOI under the following request: [web link]<sup>3</sup>

In the response to this, HMRC confirmed that they received a printed draft of the Morse Review which was marked-up by hand and returned to the Loan Charge Review Secretariat. I am asking that the supplied draft be shared so that the "factual errors" corrected by the small HMRC team can be ascertained.

Please publish the review draft document in full and in the state it was in before being printed and handed over to the small HMRC team who manually checked it. Unfortunately, HMRC didn't keep a record of the marked-up version they handed back to LCR Secretariat but an electronic version of the draft is obviously available from the computer systems supplied to the

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<sup>1</sup>

[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)

<sup>2</sup> <https://www.gov.uk/government/publications/independent-loan-charge-review-hmrc-report-on-implementation>

<sup>3</sup> The Commissioner has redacted details of the request so as to avoid identifying the complainant.

HMC [sic] staff who were seconded to the independent LCR team.

The paragraph on page 2 of the FOIA response I received from HMRC makes clear that LCR Secretariat has the relevant document version: "A small number of government officials in HMRC and HM Treasury were provided early sight of the Independent Loan Charge Review under strict and controlled conditions. This was to correct any factual errors ahead of publication and was provided in hard copy. All copies were returned to Sir Amyas Morse and the Review team and HMRC did not retain any copies."

I am asking for the electronic version of the document draft that produced this hard copy to be produced in full."

7. HM Treasury responded on 18 January 2021. It explained to the complainant that the draft document was produced by the Independent Loan Review (the Review) and not by HM Treasury. HM Treasury advised the complainant that the role of any HM Treasury staff seconded to the Review was separate from their Treasury roles. In addition HM Treasury stated that any draft documents, such as the one described in the request, would have been destroyed. Therefore HM Treasury did not hold the requested information.
8. On 19 January 2021 the complainant requested an internal review, challenging the conclusion that no information was held within the scope of his request.
9. HM Treasury provided the complainant with the outcome of the internal review on 15 February 2021. HM Treasury maintained that it did not hold any information relevant to the request.

### **Scope of the case**

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10. On 11 April 2021 the complainant contacted the Commissioner to complain about HM Treasury's response to his request. The complainant did not accept that HM Treasury's explanation that it did not hold the requested information.
11. During the course of the Commissioner's investigation HM Treasury sought to rely on section 12 since it estimated that compliance with the request would exceed the appropriate limit.
12. The Commissioner acknowledges that public authorities may at any stage seek to rely on an exemption or exclusion not previously

claimed. This was confirmed by the Upper Tribunal in the case of *McInerney v IC and Department for Education* [2015] UKUT 0047 (AAC).<sup>4</sup>

13. In light of this the Commissioner has considered HM Treasury's reliance on section 12 in addition to its overarching position that it does not hold the requested information.

## **Reasons for decision**

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### **Information not held**

14. Section 1 of FOIA says that a public authority is required to confirm or deny that it holds the requested information, and disclose relevant information that it holds, unless an exemption or exclusion applies. If a public authority does not hold recorded information that falls within the scope of the request, the Commissioner cannot require the authority to take any further action.
15. In cases where there is a dispute as to the information held by a public authority, the Commissioner will use the civil standard of proof, ie the balance of probabilities. Accordingly the investigation will consider the public authority's reasons for stating that it does not hold the information in question, as well as the extent and reasonableness of any search conducted. The Commissioner will also consider any arguments put forward by the complainant as to why the information is held (as opposed to why it ought to be held). Finally, the Commissioner will consider whether there are any further steps the public authority could be required to take if the complaint were upheld.
16. In this case the complainant's request for internal review explained why he expected the information in question to be held. The complainant referred to other FOIA requests relating to the Review that had resulted in the disclosure of documents containing drafting

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<sup>4</sup> <https://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=4420>

changes made by HM Revenue and Customs (HMRC) or HM Treasury staff.<sup>5</sup> He also stated:

"I am satisfied that, on the balance of probability, HMT holds an electronic draft of the report (as an Email attachment or stored on a file system or data backup service) that was allegedly marked-up by hand".

17. The complainant stated to the Commissioner:

"It's obvious to any reasonable person that LCR [the Loan Charge Review] would have had it's [sic] services delivered by Gov IT staff, and that the Email domain and laptop/other assets would have been established and managed on secure gov IT infrastructure which would include backup and archiving as per Gov policies and standards. The information requested does exist".

18. The Commissioner asked HM Treasury to explain how it had searched for the requested information, and how it had concluded that it did not hold it.

19. HM Treasury clarified that it had not carried out a search because it did not consider that it would hold any relevant information. HM Treasury confirmed that the Review was independent, with five members of HM Treasury staff seconded to the Review team. Review work was kept wholly separate from their Treasury roles both before and after the Review was complete.

20. HM Treasury further confirmed that the secondees were provided with their own IT equipment and email addresses for the purposes of the Review, to be used while performing their duties on the Review. Therefore HM Treasury officials did not have access to information that was held exclusively by the Review in their capacity as Treasury officials.

21. HM Treasury acknowledged that a small number of Treasury officials had viewed the draft report under strictly controlled conditions. No paper or digital copy of the Review report was held by any HM Treasury official.

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<sup>5</sup> For example, [https://www.whatdotheyknow.com/request/internal\\_treasury\\_and\\_hmrc\\_commu#incoming-1678266](https://www.whatdotheyknow.com/request/internal_treasury_and_hmrc_commu#incoming-1678266)

22. HM Treasury advised that it had undertaken new, bespoke searches of officials' inboxes, as well as HM Treasury's information storage site, but no relevant information had been identified.
23. The Commissioner has not made a finding on section 1(1)(a) of FOIA because HM Treasury subsequently sought to rely on section 12 as a basis for refusal.

### **Section 12: costs exceed the appropriate limit**

24. During the course of the Commissioner's investigation the complainant advised that he was aware that at least one email address used for the Review remained operational. He sent an email to [named official]@loanchargereview.org.uk and received an automated response which stated that the account was not monitored. The complainant was of the opinion that this meant relevant information may still be held within "@loanchargereview.org.uk" email accounts.
25. HM Treasury subsequently sought advice from its IT provider, an external contractor, since it was unable to access these email accounts, or mailboxes. The IT provider confirmed that an additional charge would be required to conduct searches of these mailboxes. HM Treasury estimated that the searches would take one working day, and the cost would exceed the appropriate limit set out at section 12 of FOIA.
26. Section 12(1) of FOIA provides that a public authority is not obliged to comply with a request for information if the authority estimates that complying with the request would exceed the appropriate limit, also known as the cost limit.
27. A public authority may rely on section 12 in respect of the duty to confirm or deny that the requested information is held, or the duty to communicate information to the requester.
28. Section 12 of FOIA should be considered with the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004.<sup>6</sup> The "Fees Regulations" set the appropriate limit at £600 for central government and £450 for all other authorities. Regulation 4(4) states that authorities should calculate the cost of

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<sup>6</sup> <https://www.legislation.gov.uk/uksi/2004/3244/contents/made>

complying with a request by multiplying the time estimated by £25 per hour.

29. When estimating whether complying with a request would exceed the appropriate limit the public authority may only take into account the following activities:
- (a) determining whether it holds the information,
  - (b) locating the information, or a document which may contain the information,
  - (c) retrieving the information, or a document which may contain the information, and
  - (d) extracting the information from a document containing it.
30. If the authority considers that complying with the request would therefore cost more than the appropriate limit, it is not obliged to comply with the request. In the case of HM Treasury, the £600 limit applies, which equates to 24 hours.
31. The Commissioner is mindful of the First-tier Tribunal's view in the case of *Randall v IC and MHPRA*<sup>7</sup> that a reasonable estimate, in relation to the costs of complying with a request, is one that is
- "...sensible, realistic and supported by cogent evidence".
32. The Commissioner considers that a sensible and realistic estimate must be informed by the circumstances of the case. The Commissioner asked HM Treasury to explain why its officials did not have access to the mailboxes in question.
33. HM Treasury clarified that the individuals did not need access to them after their secondments ended, therefore access was removed and HM Treasury was unable to restore access to the mailboxes. This would need to be enabled by the external IT service provider (the IT provider).
34. HM Treasury explained to the Commissioner that the IT provider was responsible for carrying out all administrative tasks associated with mailbox access and permissions. In order to comply with the request

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<sup>7</sup> Appeal no EA/2006/0004

HM Treasury would need to submit a formal request to the IT provider to scope the work and produce a detailed cost estimate.

35. HM Treasury said that it was unable to produce an estimate without submitting a formal requests. However it was able to confirm the minimum rate charged by the IT provider. The Commissioner has not set out the cost in this decision notice because it is commercially sensitive to HM Treasury, but can confirm that it would exceed the cost limit of £600.
36. The Commissioner understands that costs other than staff time may only be included in the section 12 estimate if it would be reasonable to include those charges. In this case the Commissioner is prepared to accept that it is reasonable to include the cost, on the basis that HM Treasury does not have any business need to access the mailboxes other than for the purpose of responding to this particular information request.
37. Furthermore the Commissioner has seen no evidence to suggest that the requested information would be likely to be located even if such a search was conducted. The Commissioner is mindful that the requested information, as described by the complainant, is a "printed draft of the Morse Review which was marked-up by hand". The complainant has assumed that an electronic draft was produced from this document, but there is no evidence to suggest that it is likely to be held in any of the mailboxes.
38. In light of the above the Commissioner is satisfied that the cost estimate provided by HM Treasury is sensible and realistic. He finds that HM Treasury was entitled to rely on section 12 of FOIA in order to refuse the request.



## Right of appeal

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39. 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: 0203 936 8963

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

40. 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.
41. 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 .....**

**Sarah O’Cathain  
Senior Case Officer  
Information Commissioner’s Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**