

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 June 2024

Public Authority: HM Treasury

Address: 1 Horse Guards Road
Westminster
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant has requested information from HM Treasury (HMT) regarding the application and granting of specific licences by the Office of Financial Sanctions Implementation (OFSI). HMT refused to confirm or deny whether it held any information falling within the scope of the request on the basis of sections 40(5B)(a)(i) (personal data), 41(2) (information provided in confidence) and 43(3) (commercial interests) of FOIA.
2. The Commissioner's decision is that HMT is entitled to rely on sections 40(5B)(a)(i) and 41(2) of FOIA to neither confirm nor deny whether information falling within the scope of the request is held.
3. The Commissioner does not require further steps.

Background

4. The request which is the focus of this complaint follows on from an earlier, related request the complainant had previously submitted to HMT.

5. That request was the subject of decision notice IC-215166-H7J4¹ in which the Commissioner upheld HMT's refusal to confirm or deny whether it held any information falling within the scope of the request on the basis of section 40(5B)(a)(i). That notice also included a background section which is equally relevant to this case, and which for ease, the Commissioner has reproduced here:

"4. The events preceding the request have a lengthy and complex history; the Commissioner has attempted to summarise the matters relevant to his decision below.

5. In a letter to the Commissioner the complainant explained that in 2017 they had sought to purchase land owned by the government of a country currently subject to financial sanctions by the UK government, meaning that the land is under asset freezing restrictions. The sale of the land was never completed. Per the complainant's explanation, in order to facilitate the sale of the land, two conveyancing solicitors working at a large legal partnership claimed that they had been instructed by the government of the designated country to facilitate the sale. In order to act on behalf of the government of the designated country for the purposes of a financial transaction, it is a requirement that solicitors obtain specific licences from the Office of Financial Sanctions Implementation. It is the complainant's position that the representatives did not obtain the required licenses and therefore acted in contravention of UK sanctions legislation.

6. The complainant raised complaints with the Solicitors Regulation Authority ("SRA") and appealed to the Solicitors Disciplinary Tribunal ("SDT") on multiple occasions in the years since the aborted sale. The Commissioner understands that the complainant remains involved in a number of legal disputes in relation to the matter."

Request and response

6. The complainant submitted the following request to HMT on 23 October 2023 under Schedule 2 of the Data Protection Act 1998:

"7. Whether any or all of the following applied for [or] obtained the requisite licence to act as conveyancing solicitors or as agents for the

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4025863/ic-215166-h7j4.pdf>

[name of entities and individuals redacted] in the matter of the proposed sale of the property known as [details of property redacted]

- a. [name of law firm A redacted]
- b. [name of solicitor at law firm A redacted]
- c. [name of solicitor at law firm A redacted]

8. Whether any or all of the following applied for or obtained the requisite licence to act as barristers, counsel or legal advisers to [name of law firm A redacted], [name of solicitor referred to at 7b redacted], [name of solicitor referred to at 7c redacted] in the matter of the proposed sale of the property known as [details of property redacted] and/or in the regulatory investigation by the Solicitors Regulation Authority or the Solicitors Disciplinary Tribunal or court or tribunal cases resulting therefrom and to accept payment for legal services provided to them from any insurer.

- a. [name of barristers chambers A redacted]
- b. [name of barrister at chambers A redacted]
- c. [name of barrister at chambers B redacted]
- d. [name of barristers chambers B redacted]
- e. [name of barrister at chambers B redacted]
- f. [name of barrister at chambers B redacted]

9. Whether any or all of the following applied for or obtained the requisite licence to act as solicitors, counsel or legal advisers of any sort to [name of law firm A redacted], [name of solicitor referred to at 7b redacted], [name of solicitor referred to at 7c redacted] in the matter of the proposed sale of the property known as [details of property redacted] and/or in the regulatory investigation by the Solicitors Regulation Authority or the Solicitors Disciplinary Tribunal or court or tribunal cases resulting therefrom and to accept payment for legal services provided to them from any insurer.

- a. [name of law firm B redacted]
- b. [name of solicitor at law firm B redacted]
- c. [name of solicitor at law firm B redacted]
- d. [name of solicitor at law firm B redacted]
- e. [name of law firm C redacted]
- f. [name of solicitor at law firm C redacted]
- g. [name of solicitor at law firm C redacted]
- h. [name of solicitor at law firm C redacted]

10. Whether any or all of the following applied for or obtained the requisite licence to act as professional indemnity insurers and/or to make advance or final payments for their legal representatives to [name of law firm A redacted], [name of solicitor referred to at 7b redacted],

[name of solicitor referred to at 7c redacted] in the matter of the proposed sale of the property known as [details of property redacted] and/or in the regulatory investigation by the Solicitors Regulation Authority or the Solicitors Disciplinary Tribunal or court or tribunal cases resulting therefrom to make advance payment or final payment for legal defence services provided to [name of law firm A redacted], [name of solicitor referred to at 7b redacted], [name of solicitor referred to at 7c redacted] to aforementioned solicitors and barristers.

[points a to g redacted which listed various insurance companies]"

7. HMT contacted the complainant on 7 November 2023 and explained that the obligations under the data protection legislation he referred to did not arise and sought clarification from him as to whether he intended his letter of 23 October 2023 to be an information request under FOIA.
8. The complainant confirmed that this was the case on 24 November 2023 in the context of a case management hearing regarding his appeal to the First-tier Tribunal in relation to the Commissioner's decision notice referred to above. As a result, HMT logged this as a FOI request on the same day.
9. HMT provided its response to the request on 22 December 2023. It refused to confirm or deny whether it held information falling within the scope of the request on the basis of sections 40(5)(b)(i), 41(2) and 43(3) of FOIA.
10. The complainant contacted HMT on 2 January 2024 and asked it to conduct an internal review of this refusal.
11. HMT informed him of the outcome of the internal review on 26 February 2024. The review upheld the application of the three exemptions cited in the refusal notice.

Scope of the case

12. The complainant contacted the Commissioner on 8 April 2024 in order to complain about HMT's refusal of his request.

Reasons for decision

Section 40 – personal data

13. As noted above, the Commissioner's previous decision notice concluded that HMT were entitled to refuse to confirm or deny whether it held any

information falling within the scope of the complainant's previous request on the basis of section 40(5B)(a)(i). The request in question, as quoted in the decision notice, was:

"I respectfully request you to categorically state whether [redacted] and [redacted] held such Licences during the period they had claimed to have conduct of the purported property transaction and whether [redacted] has ever applied for or held such a licence and if not, what action you propose to take or whether the Government has a policy of failing to implement the law."

14. The names of the first two individuals redacted from this request are the same individuals named at parts 7b and 7c of the request which is the focus of this complaint.
15. Therefore in the Commissioner's view confirmation or denial by HMT in respect of parts 7b and 7c of the request would also reveal whether or not these two individuals had, or had not, applied for or been granted a licence by OFSI for the reasons set out in the request itself, ie the property transaction in question. Consequently, on the basis of arguments set out in his previous decision notice (specifically paragraphs 18 to 46) the Commissioner also considers section 40(5B)(a)(i) of FOIA to apply to parts 7b and 7c of this request.
16. Furthermore, based on the Commissioner's interpretation of the request, if HMT responded to parts 8, 9 and 10 - in so far as these parts of the request relate to the two individuals named at parts 7b and 7c were concerned - this would also reveal whether or not these individuals had applied for or obtained a licence. This is because the relevant aspects of parts 8, 9 and 10 of the request assume, or are dependent on, the individuals named in parts 7b and 7c having applied for and/or been granted a licence by OFSI. As a result the Commissioner also accepts that HMT is entitled to refuse to confirm or deny whether it holds any information on the basis of these parts of the request on the basis of section 40(5B)(a)(i), again for the reasons set out in the previous notice.
17. However, the Commissioner appreciates that part 7a of the request does not concern the personal data of a living individual; rather such information concerns a named law firm. Therefore confirmation or denial as to whether HMT held any such information would not, in the Commissioner's view, necessarily reveal the personal data of an individual, and in particular the personal data of the individuals named at parts 7b and 7c. In such circumstances section 40(5B)(a)(i) cannot provide a basis to refuse to comply with that particular part of the request. It follows that in the Commissioner's view confirmation or denial as to whether information is held by HMT in respect of parts 8, 9

and 10 of the request to the extent that it relates to the law firm named at part 7a – as opposed to the individuals named at parts 7b and 7c – would also not result in the disclosure of personal data of these individuals and thus section 40(5B)(a)(i) cannot also apply to these parts of the request.

18. Instead the Commissioner has gone on to consider whether section 41(2) provides a basis upon which HMT can refuse to confirm or deny whether it holds information falling within the scope of these particular parts of the request.

Section 41 – information provided in confidence

19. Under section 41(1), a public authority is entitled to withhold information if (a) the information was obtained from another person and (b) disclosure would constitute a breach of confidence.
20. Furthermore, section 41(2) states that a public authority may refuse to confirm or deny if any recorded information is held if to do so would itself constitute an actionable breach of confidence.

If the requested information is held, would it have been obtained from another person?

21. HMT explained that it receives applications for licences from third parties, the sources of which could be representatives of designated persons, designated persons themselves, persons wishing to transact with the designated person and their representatives. Therefore, HMT argued that if any information were held in the scope of this request, then this would have been received from another person. The Commissioner agrees with this assessment.

Would confirming or denying whether the requested information is held constitute an actionable breach of confidence?

22. In considering whether confirmation or denial of whether the requested information is held would constitute an actionable breach of confidence, the Commissioner considers the following:
 - Whether the information, if held, has the necessary quality of confidence.
 - Whether the information, if held, was imparted in circumstances importing an obligation of confidence; and
 - Whether a confirmation or denial as to whether the information is held would be detrimental to the confider.

23. With regard to the first criterion, HMT explained that licence applications, and the question of whether they have been submitted, have the necessary quality of confidence. They are clearly more than trivial information; rather they contain transactional information associated with certain individuals and the designated individuals. HMT also explained that licence applications are required to include full information on the parties involved in the proposed transaction, eg the designated persons, any financial institutions involved, and the ultimate beneficiary of the transaction. HMT noted that the information would not otherwise be accessible to the public and confirmation/denial would be revelatory of matters confidential to the legal/natural persons within the scope of the request. The Commissioner agrees with this assessment and accepts that the first criterion above is met.
24. HMT explained that completed licence applications are sent to OFSI with an expectation that they are treated in confidence, and with the expectation that the fact of their submission is also a confidential matter. HMT noted that licence applications are often received from law firms who submit an application on behalf of a designated individual, and therefore contain caveats about the information being subject to legal privilege or confidentiality requirements. As a result, HMT argued that licence applications are imparted in circumstances of confidence and that disclosure could be said to be a breach of such a confidence. The Commissioner also agrees with this assessment and accepts that the second criterion is met.
25. With regard to whether confirmation or denial would be detrimental, HMT argued that (albeit in the context of section 43(3)), that to comply with section 1(1)(a) of FOIA, ie confirm whether or not information is held, in this case could reveal a financial link to a designated person, or an absence of a claimed link. In its view such a link (if it existed) could be commercially sensitive due to the prejudicial assumptions about the compliance of individuals with sanctions, or reveal a sensitive financial connection. Therefore, to reveal such a link (if one existed) could result in commercial or reputational damage for the parties in question.
26. The Commissioner is satisfied that if HMT confirmed whether or not it held information falling within the scope of part 7a of the request then there is a risk of detriment to the party listed at that part of the request for the reasons set out above. Furthermore in relation to parts 8, 9 and 10 of the request so far as they relate to the party named at 7a, the Commissioner is also satisfied that confirmation or denial also risks such a detriment. This is because the relevant aspects of 8, 9 and 10 assume, or are dependent on, the law firm named in part 7a having applied for and/or been granted, a licence by OFSI.

Is there a public interest defence to confirming whether or not the requested information is held?

27. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld (or in this case confirmation or denial not provided) unless the public interest in confirming whether or not information is held outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under FOIA). British courts have historically recognised the importance of maintaining a duty of confidence, so it follows that strong public interest grounds would be required to outweigh such a duty.
28. However, disclosure of confidential information (or again, in this case confirming whether or not information is held) where there is an overriding public interest is a defence to an action for breach of confidence. The Commissioner is therefore required to consider whether HMT could successfully rely on such a public interest defence to an action for breach of confidence in this case.
29. HMT acknowledged that there is a legitimate interest in transparency in relation to the work of OFSI. However, HMT argued this was outweighed by the obligation of confidence it owed to those submitting licence applications to OFSI. It also argued that it was important that OFSI maintains confidentiality when it comes to licence application to ensure their operational duties are not hindered.
30. As set out at paragraph 38 of the previous decision notice, the Commissioner understands that the complainant considers provision of the requested information (if held) for the attention of the regulatory authorities is in the public interest. As also noted in that notice, the Commissioner accepts that there is a legitimate interest in understanding whether solicitors and legal firms have acted in accordance with UK sanctions law.
31. However, the Commissioner is not persuaded that this is a sufficiently compelling argument to support a public interest defence against an action for breach of confidence. In reaching this conclusion the Commissioner has taken into account the potential consequences of disclosure, namely the detriment identified above both in relation to those representing those allegedly subject to sanctions, as well as the impact disclosure could have on OFSI's ability to effectively consider applications in the future. The cumulative negative effects of these outcomes, allied to the general public interest in ensuring that confidences are maintained, has led the Commissioner to conclude that

HMT is entitled to rely on section 41(2) to refuse to confirm or deny whether it holds information falling within the scope of part 7a of the request, and the associated aspects of parts 8, 9 and 10 of the request.

Section 43(3) – commercial interests

32. In light of the above findings, the Commissioner has not considered HMT's application of section 43(3).

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.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.

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF