

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

### **Decision notice**

**Date:** 6 July 2023

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

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

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1. The complainant has requested emails within a specific time frame using specific search terms related to the Loan Charge Review. HM Treasury ("HMT") initially argued that the information was exempt under section 35 (formulation/development of government policy) and on two occasions argued it needed further time to consider the balance of public interest in relying upon that exemption. However, when it finally issued a refusal notice it argued that it was relying on section 14(1) (vexatious request). It upheld this position after internal review.
2. The Commissioner's decision is that HMT is entitled to rely on section 14(1) as its basis for refusing to comply with this request.
3. The Commissioner does not require further steps.

#### **Request and response**

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4. On 4 November 2021, the complainant requested information of the following description:

"Please provide all sent and all received emails - including email attachments - containing the search terms 'Morse' and/or 'Amyas' and/or 'LCAG' and/or 'Loan Charge Action Group' between the period 21

October 2021 to 04 November 2021 inclusive (which equates to a period of eleven working days) from the mailboxes of the following senior HM Treasury officials:

Tom Scholar - Permanent Secretary

Charles Roxburgh - Second Permanent Secretary

Beth Russell - Director General, Tax and Welfare

Clare Lombardelli - Director General, Chief Economic Adviser.

If the department holds recorded information of any other kind and/or in any other format (including, but not limited to SMS text messages, WhatsApp messages, Signal messages, internal memos, documents etc.), which includes reference(s) to any of the search terms listed above and was received or sent by one or more of the four named individuals between the dates specified, please also disclose and provide this data".

5. On 2 December 2021, HMT wrote to advise it needed more time to consider the public interest in reliance on section 35. It gave a target date of 5 January 2022. It wrote again on 5 January 2022 to advise the same thing and gave a target date of 2 February 2022.
6. On 2 February 2022, HMT sent a substantive response. It refused to provide the requested information; it argued that it was not obliged to do so and cited section 14 as its basis for refusal. HMT apologised for not citing this until that letter.
7. The complainant requested an internal review on 21 March 2022. HMT sent them the outcome of its internal review on 20 April 2022. It upheld its position.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 16 July 2022 to complain about the way their request for information had been handled.
9. This notice covers whether HMT correctly determined that the request was vexatious.

### **Reasons for decision**

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#### **Section 14(1) – vexatious requests**

10. Section 14(1) of FOIA states that a public authority is not obliged to comply with a request for information if the request is vexatious.
11. The word "vexatious" is not defined in FOIA. However, as the Commissioner's updated guidance on section 14(1)<sup>1</sup> states, it is established that section 14(1) is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress.
12. FOIA gives individuals a greater right of access to official information in order to make bodies more transparent and accountable. As such, it is an important constitutional right. Therefore, engaging section 14(1) is a high hurdle.
13. However, the Commissioner recognises that dealing with unreasonable requests can strain resources and get in the way of delivering mainstream services or answering legitimate requests. These requests can also damage the reputation of the legislation itself.
14. The emphasis on protecting public authorities' resources from unreasonable requests was acknowledged by the Upper Tribunal (UT) in the leading case on section 14(1), *Information Commissioner vs Devon County Council & Dransfield* [2012] UKUT 440 (AAC), (28 January 2013) ("*Dransfield*")<sup>2</sup>. Although the case was subsequently appealed to the Court of Appeal, the UT's general guidance was supported, and established the Commissioner's approach.
15. *Dransfield* established that the key question for a public authority to ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
16. The four broad themes considered by the Upper Tribunal in *Dransfield* were:
  - the burden (on the public authority and its staff);
  - the motive (of the requester);
  - the value or serious purpose (of the request); and

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<sup>1</sup> <https://ico.org.uk/for-organisations/dealing-with-vexatious-requests-section-14/>

<sup>2</sup> <https://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=3680>

- any harassment or distress (of and to staff).
17. However, the UT emphasised that these four broad themes are not a checklist, and are not exhaustive. They stated:

“all the circumstances need to be considered in reaching what is ultimately a value judgement as to whether the request in issue is vexatious in the sense of being a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA” (paragraph 82).

### **HMT's view**

18. HMT explained in some detail what it saw as the burden involved in responding to the request. It referred to the large volume of information generated by using the search terms set out in the request.
19. It said “When we received the request reasonable searches of email accounts (Part 1 of [their] request) were conducted by officials which returned 19 email strings that were identified to contain information within scope of the request. These contained a large number of attached documents and links to documents. These emails in the main were sent to multiple ‘To’ and ‘CC’ lists.”
20. It explained that the search “returned emails containing information relating to policies other than the loan charge”. It went on to say that this was “why s35(1)(a) was engaged and why we cited it when we wrote to [the complainant] when we extended the time limit”. It clarified that:

“The s35(1)(a) exemption was not engaged in relation to loan charge policy but to other live ongoing policy that happened to be mentioned in emails that contained the specified search terms. And thus it follows that it would also be the case for documents attached to emails during that period.

Focusing on the other aspects of this second part of [the complainant's] request, further effort would be needed to search mobile phone devices and to download and transfer potential messages, thus creating more burden across the offices of the four named individuals and for the policy team who would have to assess any information identified on whether it was potentially within scope of the request and to assess it for sensitivities”.

21. It also observed that:

“While searches of mailboxes are on the face of it seemingly simple searches to carry out, they take time to conduct – setting up search terms, checking Boolean operators, identifying the folders to be

searched, date limiting and ensuring searches of each individual mailbox is conducted in the same way. These searches are often conducted by junior staff who are not involved in or have any understanding of the policy. They need to submit their returns to a policy official who then has to spend time reading, extracting and highlighting information, as well as other tasks such as checking grades of officials and redacting personal data”.

22. It also explained that “The request [in this case] was submitted on the same day that [the complainant] submitted a meta request asking for all information related to three FOI requests and one internal review request”.<sup>3</sup>
23. It also referred to other requests from other individuals which generated significant work of a similar nature. It expressly did not seek to argue that the other requesters were acting in concert with the complainant in this case. However, it was seeking to illustrate the volume of work it was dealing with and the finite staffing resources that were available to it in order to do this. It also acknowledged that it was a large public authority but asserted that, nevertheless, it did not have unlimited resource to deal with large numbers of requests or requests which covered large volumes of information.
24. The Commissioner would observe, at this point, that he has some sympathy with a public authority upon whom considerable demand is made when seeking to comply with FOIA obligations. However, any resourcing issues a large public authority may or may not have cannot be a weighty deciding factor when considering the application of section 14.
25. A public authority that is facing a high volume of requests from a number of parties should, in the Commissioner’s view, consider whether it needs to put more information about a popular topic proactively into the public domain.
26. HMT addressed this point by listing the considerable disclosure it had made regarding the Loan Charge Review. It provided links to information it had provided following a number of requests made via the

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<sup>3</sup> A meta request is where a requester seeks information generated by a public authority when responding to a previous request.

What Do They Know website including one that disclosed some 500 pages<sup>4</sup>.

27. HMT also explained that "When this request was received, the collective burden of dealing with this, the meta request received on the same day and a subsequent request made four days later, all requiring detailed searches reached a tipping point. The pattern of requests – made through the "What Do They Know" website, where it can be seen other requesters were making equally as burdensome requests – was overwhelming. A clear pattern to [the complainant's] had already become evident [it provided details of this] – repeated requests, avoiding internal reviews and accusatory in nature".
28. HMT observed that "While we appreciate the frustration a requester may feel when they do not receive the answer they would like, [the complainant's] requests have become longer and longer and more focused on finding a 'smoking gun' in relation to the appointment of Lord Morse and his recommendations. An entrenched position seems to have been taken by [the complainant] and the attritious nature of [their] requests, – e.g. repeated requests, unwillingness to refine the scope, refusal to move to internal review stage all serve to create a collective burden on the two small teams who on the main have to deal with the requests and have to read the accusations made by [the complainant].
29. It said that the complainant had accused HMT staff of "a shameful dereliction of public duty and service to demonstrate such an overt unwillingness to be transparent and open to members of the public". It acknowledged that although public servants should "have to expect a certain amount of criticism from the public they serve, statements such as these become difficult for staff to deal with when they work hard to ensure that the department are compliant with their statutory duties and are open and transparent". It added that "It is difficult to continuously be drawn away from policy work or other FOI requests to be asked to conduct repeated searches and repeated admin work for requests that appear to be fishing expeditions attempting to find a smoking gun".

### **The complainant's view**

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<sup>4</sup> The Commissioner has not provided links in this notice because requests on that website include the names of the individual requesters. A person making a request via that website knows that their name is being put into the public domain. However, they would not necessarily expect the Commissioner to use their names and requests as part of a decision notice.

30. The complainant expressed considerable scepticism at HMT's initial use of section 35 where it had argued that that it needed further time to consider the balance of public interest in relying on that exemption. They felt that this was indicative of a delaying tactic and of an overall refusal to provide information that had reasonably been requested.
31. The complainant argued that, contrary to HMT's assertions, they had narrowed their requests productively and helpfully. They drew attention to the Commissioner's own guidance which said that engaging section 14 required a public authority to overcome a high hurdle which had, in their view, not been met in this case.
32. They drew attention to the fact that there was an All-Party Parliamentary Group on the subject of the Loan Charge Review and there remained ongoing concerns about how HMT (and the UK government in general) had dealt with matters relating to the Loan Charge Review<sup>5</sup>. This, in their view, evidenced their assertion of a serious purpose to their requests.
33. They also stressed the importance of a public authority being applicant blind when responding to requests.
34. Quoting an HMT legal official (whose statement they had obtained from another request), the complainant noted the view that "*I would say that the requested time period of this request sets it apart from the others and demonstrates a serious purpose.*"
35. The complainant asserted "There is a predictable, dilatory pattern to HM Treasury's refusal to disclose information on this related subject, and I will assiduously pursue its eventual release using all mechanisms at my disposal, however long that might take". They urged the Commissioner to see what they considered to be mishandling and obfuscation by HMT and to disclose the information that had been requested.

### **The Commissioner's decision**

36. In cases where a public authority is relying on section 14(1), it is for the public authority to demonstrate why it considers that a request is a disproportionate, manifestly unjustified, inappropriate or improper use of FOIA.

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<sup>5</sup> <https://www.loanchargeappg.co.uk/#:~:text=The%20All-Party%20Parliamentary%20Loan%20Charge%20and%20Taxpayer%20Fairness,tax%20legislation%20and%20HMRC%E2%80%99s%20conduct%20in%20enforcing%20it.>

37. The Commissioner recognises that the complainant is seeking to obtain as much information as possible about how HMT has handled the Loan Charge Review. The All-Party Parliamentary Group ("APPG") (referred to in Note 5) has conducted enquiries on this matter and continues to work. However, the Commissioner notes that it published its inquiry report on 3 April 2019 and has published several reports and submissions since then. While the complainant remains concerned that there is more to discover, the Commissioner observes that the APPG has already conducted a thorough investigation.
38. HMT has explained that, contrary to any intention the requester may have had, the search terms set out in the request initially yielded a large volume of information to which section 35 may have been applicable. The complainant's request sought "all sent and all received emails - including email attachments - containing [specific] search terms". This therefore means all information contained in those emails regardless of whether they are on the subject of the Loan Charge Review and Sir Amyas Morse or whether that topic is mentioned in passing or as an adjunct to another unrelated matter. The Commissioner considers that this is a reasonable explanation as to why so much information was generated by the search. He is also satisfied that, as a consequence and in the circumstances of this case, collating this information and then determining how much, if any, of it is exempt creates an oppressive burden which HMT is not obliged to bear.
39. The Commissioner has no doubt of the seriousness of the complainant's purpose. The Loan Charge Review has had a negative financial and, consequentially, personal impact on a lot of people. The complainant is determined to find out as much as possible about the government's decision making process.
40. While identifying search terms and a limited time frame may appear to be helpful and reasonable on the complainant's part, the Commissioner has some sympathy with HMT's characterisation of the request as a fishing exercise without focus. The Commissioner recognises that when making enquiries into a matter which concerns them, an individual may need to conduct something of a fishing exercise to find a path for further enquiries. However, in the context of the other requests that the complainant has made - HMT supplied a list - the Commissioner is satisfied that this request could reasonably be characterised as vexatious. As a consequence, the effort required to respond to it is disproportionate to the value of it. The Commissioner notes that the complainant also expected HMT to respond to a meta request submitted on the same day.
41. The complainant also made allegations against HMT officials which go beyond what might reasonably be considered appropriate when



expressing frustration. They referred to staff as displaying “a shameful dereliction of public duty and service to demonstrate such an overt unwillingness to be transparent and open to members of the public”.

42. The Commissioner would not describe HMT as having been unwilling to be transparent as evidenced by disclosures it has already made. While the time it took to provide a response to this request was longer than ideally it should have been, the Commissioner has seen no evidence to support the assertion that this was a deliberate attempt at delay. As noted, it did not seek to apply section 35 to Loan Charge Review information but to the other information caught within the broad scope of the request. HMT spent time and resource considering whether other unrelated information (which was nevertheless caught by the scope of the request) was exempt under section 35. It did not immediately assert that this request was vexatious. It first sought to determine whether there was some way that it could reasonably provide the requested information.
43. The Commissioner recognises that the complainant is frustrated firstly by HMT invoking section 10(3)<sup>6</sup> and secondly by HMT concluding (after this period of deliberation) that it was entitled, instead, to rely on section 14. The Commissioner acknowledges that where a requester is sceptical about a public authority’s use of FOIA they would naturally be sceptical about such a change of stance. However, the Commissioner has seen no evidence to suggest that such a change was a delaying tactic by HMT even though the complainant may believe that it was. HMT is entitled to change its position about reliance on section 35 even if it initially thought it applied. HMT could, for example, have revised its position at internal review rather than after it had invoked section 10(3). This would have been wholly in accordance with the requirements of FOIA.
44. In light of the above, the Commissioner has concluded that HMT is entitled to rely on section 14 as its basis for refusing this request. The Commissioner has had particular regard for the complainant’s other requests. While these are not numerous they do capture a lot of information and require considerable effort to respond. The Commissioner has already noted that a meta request was made on the same day. In assessing those points the Commissioner has also taken into account that the work of the APPG shows that the complainant’s concerns have already been considered by elected representatives and

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<sup>6</sup> Section 10(3) allows a public authority to take further time to consider the public interest in reliance on an exemption it believes may be applicable

that the APPG continues to operate. The important matter that the complainant is concerned about therefore already has the attention of Parliament.

## **Other matters**

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45. The Commissioner would draw the complainant's attention to his guidance on making effective requests.<sup>7</sup>

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<sup>7</sup> <https://ico.org.uk/for-the-public/official-information/how-to-write-an-effective-request-for-information/>

## Right of appeal

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46. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

47. 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.
48. 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 .....**

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**Cheshire**  
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