Reference: FS50583586

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **2 November 2015**

Public Authority: **Bank of England**
Address: **Threadneedle Street**
London
EC2R 8AH

Decision (including any steps ordered)

1. The complainant requested copies of communications between the Treasury Select Committee, Financial Services Authority (as it then was), Financial Conduct Authority and the Prudential Regulation Authority relating to a report into the failure of Halifax Bank of Scotland Plc. The public authority withheld the information held within the scope of the request in reliance on the exemption at section 34(1) FOIA (Parliamentary privilege).

2. The Commissioner's decision is that the public authority was entitled to rely on the exemption at section 34(1).

3. No steps are required.

Request and response

4. On 9 December 2014, the complainant submitted a request for information to the Prudential Regulation Authority[1] in the following terms:

[1] The Prudential Regulation Authority is a subsidiary of the Bank of England, the "public authority" for the purposes of the FOIA in this case.

'*Further to our initial request for copies of communications relating to the draft report on HBOS (the "Report"), we now make the following request……Please provide us with the following:*

1. *communications relating to the Report between the Parliamentary Commission on Banking Standards ("PCBS") and/or the Treasury Select Committee ("TSC") and the Financial Services Authority ("FSA") between 12 September 2012 (the date of the publication of the FSA press release stating work will start on the HBOS report) and 31 March 2013; and*

2. *communications relating to the Report between the PCBS and/or the TSC and the Prudential Services Authority ("PRA") and/or the Financial Conduct Authority ("FCA") from 1 April 2013 to date….'*

5. The public authority initially informed the complainant on 9 January 2015 that it held certain information within the scope of his request which the authority considered exempt from disclosure on the basis of section 36(2)(c) FOIA.

6. However, having considered the position further and consulted with the Treasury Select Committee, the public authority wrote back to the complainant on 28 January 2015 and explained that it considered the information held within the scope of the request exempt on the basis of section 34(1) FOIA. The public authority however also drew the complainant's attention to the fact that the Treasury Select Committee had published a letter dated 28 September 2012 from Lord Turner (Chairman of the then Financial Services Authority) to Andrew Tyrie (Chairman of the TSC). A link to the published letter was included in the public authority's response.

7. The complainant requested an internal review on 4 February 2015 in which he disagreed with the reliance on section 34(1) to withhold the information in scope.

8. On 23 February 2015 the public authority wrote to the complainant with details of the outcome of its review. The authority upheld the decision to withhold the information in scope on the basis of section 34(1).

Scope of the case

9. The complainant contacted the Commissioner on 29 May 2015 to complain about the public authority's decision to withhold the information held within the scope of his request on the basis of the exemption at section 34(1). The Commissioner has addressed the complainant's submissions further below.

10. The scope of the Commissioner's investigation therefore was to determine whether the public authority was entitled to withhold the information held within the scope of the complainant's request (the disputed information) in reliance on the exemption at section 34(1).

Reasons for decision

Section 34(1) – Parliamentary privilege

11. Section 34 states:

> *1) 'Information is exempt information if exemption from section 1(1)(b) is required for the purpose of avoiding an infringement of the privileges of either House of Parliament.*
>
> *2) The duty to confirm or deny does not apply if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of avoiding an infringement of the privileges of either House of Parliament.*
>
> *3) A certificate signed by the appropriate authority certifying that exemption from section 1(1)(b), or from section 1(1)(a) and (b), is, or at any time was, required for the purpose of avoiding an infringement of the privileges of either House of Parliament shall be conclusive evidence of that fact.*
>
> *4) In subsection (3) "the appropriate authority" means—*
>
> *(a) in relation to the House of Commons, the Speaker of that House, and*
>
> *(b) in relation to the House of Lords, the Clerk of the Parliaments.'*

12. The exemption is absolute. It is not qualified by the public interest test set out in section 2(2)(b) FOIA.

13. During the course of the Commissioner's investigation, the public authority obtained a certificate pursuant to section 34(3) which was provided to the Commissioner.

14. The certificate was signed by the Rt Hon John Bercow, Speaker of the House of Commons.

15. The complainant's primary contention is that Parliamentary privilege does not extend to the disputed information. He has also suggested that the public authority could not claim Parliamentary privilege, that being

the prerogative of Parliament alone. The complainant's substantive submissions in support of his position are reproduced below.

16. '*In order for Parliamentary privilege to apply to documents, those documents have to relate to "proceedings in Parliament". …the preparation of the Report has nothing to do with proceedings in Parliament; it involves the preparation of a Report by the FCA and the PRA in their roles as statutory regulators, independent of Parliament. Indeed, the TSC itself has appointed independent reviewers to ensure that the Report is a fair and balanced reflection of the evidence. This demonstrates that its production is not a proceeding in Parliament……we contend that the relevant correspondence, between the PCBS and the TSC on the one hand and the FSA/FCA/PRA on the other, are analogous to a letter from an MP to a Minister and vice versa or a letter from a constituent to an MP and vice versa. In this regard, we would refer to the decision in the Strauss case ((1958) 21 MLR 485).*'

17. '*We would also point to the comments by the Joint Committee on Parliamentary privilege in its Report in 1999. At paragraph 103, in relation to Members' correspondence, it states "Article 9 protects parliamentary proceedings: activities which are recognisably part of the formal collegiate activities of Parliament. Much of the work of a member of Parliament today, does not fall within this description". At paragraph 110, it was indicated "There is another consideration. Article 9 provides an altogether exceptional degree of protection….In principle this exceptional protection should remain confined to the core activities of Parliament, unless a pressing need is shown for extension….."*'

18. '*In the same report at paragraph 129, the Joint Committee recommended the enactment of a definition which extended to all words spoken and acts done in the course of, or for the purposes of, or necessarily incidental to, transacting the business of either House of Parliament or a committee, including but not limited to giving of evidence before a House or a committee of an officer appointed by them, the presentation or submission of a document to a House or a committee or officer to receive it, once the document is accepted, and preparation of a document for the purposes of transacting business of a House or a committee. Once again, correspondence in this case does fall within this scope.*'

19. '*Since Parliament had already published at least one letter passing between the FSA and Mr Tyrie as Chairman of the TSC, that was a clear intention that the communications were not subject to Parliamentary privilege or that if they were ever claimed to be subject to privilege that privilege had been waived. It was not a proper exercise of any claim to apply privilege to select individual items from the chain of*

correspondence to rely on and to maintain a claim for privilege on other items in the same chain.'

20. '*It is important to note that the information in question is not held by Parliament or any of its committees or members but is held by the PRA themselves. It also plainly relates to the work of the PRA, namely the Report. We do not accept, to the extent that there is correspondence with the Chairman of the TSC or the PCBS, that it can justifiably be subject to a claim of Parliamentary privilege in these circumstances……It was not open to the PRA to claim Parliamentary privilege, that being the prerogative of Parliament.'*

21. The Commissioner notes that what constitutes '*proceedings in Parliament*' has never been precisely defined. It is well established that it is for the courts to decide on whether particular activities constitute proceedings in Parliament. At the same time, it is generally accepted that the term embraces some formal action (usually a decision) taken by the House of Commons or the House of Lords in its collective capacity, the forms of business in which the House takes action, and the whole process by which it takes a decision.

22. The Commissioner considers that proceedings in Parliament will include, but are not limited to,

- Proceedings within committees formally appointed by the House (and their subcommittees), including oral and written evidence and deliberations, and

- Work undertaken by officials of either House arising directly out of proceedings of the relevant House or under the authority of that House (eg correspondence with Government departments on behalf of select committees exercising a scrutiny function).

23. The Commissioner is satisfied that the disputed information falls within the descriptions above, and therefore relate to proceedings in Parliament.

24. Furthermore, paragraph 129 of the 1999 report of the *Joint Committee Reports on Parliamentary Privilege*[2] to which the complainant refers, states:

[2] http://www.publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/4306.htm

`The Joint Committee recommends the enactment of a definition on the following lines:

(1) For the purposes of article 9 of the Bill of Rights 1689 `proceedings in Parliament' means all words spoken and acts done in the course of, or for the purposes of, or necessarily incidental to, transacting the business of either House of Parliament or of a committee.

(2) Without limiting (1), this includes:

(a) the giving of evidence before a House or a committee or an officer appointed by a House to receive such evidence

(b) the presentation or submission of a document to a House or a committee or an officer appointed by a House to receive it, once the document is accepted

(c) the preparation of a document for the purposes of transacting the business of a House or a committee, provided any drafts, notes, advice or the like are not circulated more widely than is reasonable for the purposes of preparation

(d) the formulation, making or publication of a document by a House or a committee

(e) the maintenance of any register of the interests of the members of a House and any other register of interests prescribed by resolution of a House.

(3) A `committee' means a committee appointed by either House or a joint committee appointed by both Houses of Parliament and includes a sub-committee.

(4) A document includes any disc, tape or device in which data are embodied so as to be capable of being reproduced therefrom.'

25. The Commissioner does not consider that the scope of activities and information/documents which the Joint Committee recommends should be covered by Parliamentary privilege is as restrictive as the complainant appears to suggest. In any event, he is satisfied that the disputed information falls squarely within the scope of activities mentioned in paragraph 129 of the report.

26. Since privilege belongs to the relevant House, the Commissioner considers that it can choose to voluntary publish privileged information. The fact that a House has published privileged information does not in the Commissioner's view prevent the House from claiming privilege in relation to other similar documents. In any event, he does not share the

view that by publishing the letter of 28 September 2012 from Lord Turner to Andrew Tyrie, the House of Commons had waived its claim to Parliamentary privilege with respect to the disputed information.

27. The Commissioner disagrees that the public authority was not entitled to claim Parliamentary privilege on behalf of the House of Commons in this case. Clearly, wrongly releasing privileged information will infringe on Parliamentary privilege which is why the exemption is not restricted to Parliament and can be claimed by other public authorities if to do otherwise would infringe on Parliamentary privilege.

28. The Commissioner therefore finds that the public authority was entitled to withhold the disputed information in reliance on section 34(1) because Parliamentary privilege applies to the information.

29. He further finds that the certificate issued under section 34(3) acts as conclusive proof of that fact in any event.

Right of appeal

30. 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: 0300 123 4504
    Fax: 0870 739 5836
    Email: GRC@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

31. 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.

32. 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
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