

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 October 2020

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

Decision (including any steps ordered)

1. The complainant submitted a request to HM Treasury (HMT) about a Ministerial statement concerning the cost to public pension schemes as a result of a recent court case. The statement estimated that the cost would be £4bn per annum and the complainant sought a breakdown of this figure by pension scheme. HMT withheld this information on the basis of section 35(1)(a) (formulation and development of government policy).
2. The Commissioner's decision is that the requested information is exempt from disclosure on the basis of section 35(1)(a) of FOIA and that in all the circumstances of the request the public interest favours maintaining the exemption.
3. No steps are required.

Background

4. This request relates to the judgment by the Court of Appeal in December 2018 on public service pensions in the case of *Lord Chancellor v McCloud* [2018] EWCA Civ 2844. The Coalition Government introduced reformed pension schemes across all of the main public service workforces in 2015. When this was done, transitional protection meant that those within 10 years of retirement age remained in their legacy scheme while younger members moved to the reformed schemes. In the

McCloud case, the Court of Appeal found this system of transitional protection to be unlawfully discriminatory.

5. The government announced a public consultation on 16 July 2020 on proposals to address the discrimination identified in the policy of transitional protection that was part of the 2015 reforms. The consultation closes on 11 October 2020.

Request and response

6. The complainant submitted the following request to HMT on 7 August 2019:

'In the Statement [Pensions: Written Statement HCWS1286], the Chief Secretary to the Treasury said "given the potentially significant but uncertain impact of the Court of Appeal judgment [in McCloud & Sargeant], it is not now possible to assess the value of the current public service pension arrangements with any certainty. The provisional estimate is that the potential impact of the judgment could cost the equivalent of around £4 billion per annum".

Please confirm by return how this £4bn is broken down by pension scheme.¹

7. HMT responded on 4 September 2019 and confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of section 35(1)(a) (formulation and development of government policy) of FOIA.
8. The complainant contacted HMT on 20 September 2019 and asked it to conduct an internal review of this refusal.
9. HMT informed her of the outcome of the review on 20 December 2019. The review upheld the application of section 35(1)(a) to the requested information.

Scope of the case

¹ The written statement cited in the request can be viewed below. It was made on 30 January 2019.

<https://questions-statements.parliament.uk/written-statements/detail/2019-01-30/HCWS1286>

10. The complainant contacted the Commissioner on 2 February 2020 in order to complain about HMT's decision to withhold the information she had requested on the basis of section 35(1)(a). The complainant disputed HMT's position that the withheld information was caught by this exemption and even if it was, then she argued that the public interest favoured disclosure of this information.

Reasons for decision

Section 35(1)(a) – formulation and development of government policy

11. Section 35(1)(a) of FOIA states that:

'Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

(a) the formulation or development of government policy'

12. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
13. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
14. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the content of the information in question and its context.
15. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - the final decision will be made either by the Cabinet or the relevant Minister;
 - the government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.

16. HMT argued that the exemption was engaged because the withheld information related to the formulation and development of the government's public service pensions policy.
17. HMT noted that on 15 July 2019 a Written Ministerial Statement was made which explained that following the Supreme Court decision of 27 June 2019, the government must fully engage with the Employment Tribunal to agree how the discriminatory effects of these protections will be remedied. HMT noted that Statement explained that:

*'Alongside this process, government will be engaging with employer and member representatives, as well as the devolved administrations, to help inform our proposals to the Tribunal and in respect of the other public service pension schemes.'*²

18. HMT explained that the withheld information was created to inform decision making in respect of public sector pensions policy in connection with the legal challenge, but also more widely and, as such, clearly relates to the formulation and development of live policy.
19. The complainant argued that the withheld information did not fall within the scope of the exemption, noting that it was simply a breakdown of the £4bn figure and that this did not in itself relate to the policy formulation or development.
20. The Commissioner notes that the phrase 'relates to' in section 35 needs to be interpreted broadly. However, in her view even without this broad interpretation, it is clear that the estimated additional costs per pension scheme are directly linked to the government's formulation and development of public service pensions policy following the *McCloud* judgement. Section 35(1)(a) is therefore engaged.

Public interest test

21. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

² <https://questions-statements.parliament.uk/written-statements/detail/2019-07-15/hcws1725>

22. The complainant argued that simply releasing the figures or calculations behind a total figure which HMT had put into the public domain would not cause damage to policy making. More specifically, she argued that there would be no impact whatsoever on the 'safe space' to debate issues nor any 'chilling effect' on views if this information was released. Consequently, in her view there was no strong public interest for refusing this request.
23. In contrast she argued that there was a significant public interest in disclosing the information. She noted that the transitional protection was offered to members of all the main public service pension schemes and therefore all of these schemes are affected.
24. The complainant argued that releasing the information will increase public understanding of the 2015 pension reforms and enable public scrutiny and more informed debate. She also argued that there is a public interest in promoting government transparency and accountability.
25. The complainant also argued that it was not right that HMT could put the figure of £4bn into the public domain but was not prepared to share how it had arrived at this figure. The complainant suggested that if nothing else the public interest favoured disclosure in order to show the public that HMT are capable of substantiation.
26. HMT recognised that there is a general public interest in promoting openness in the way in which public authorities manage high profile policy areas, including public spending and public service pensions. HMT also acknowledged that there was a clear public interest in the work of government departments being transparent and open to scrutiny to increase diligence.

Public interest arguments in favour of maintaining the exemption

27. HMT acknowledged that the information was factual information. It also explained that it had taken into account section 35(4) of FOIA which states that in balancing the public interest test, there is a particular public interest in the disclosure of factual information which had been used, or is intended to be used, to provide an informed background to decision making.
28. However, HMT explained that whilst the withheld information was factual it was based on a set out assumptions regarding the expected additional costs for each scheme. HMT explained that it was concerned that disclosure of these figures could result in stakeholders making assumptions about policy choices still to be finalised by Ministers. It argued that this could interfere with the safe space the government needed as it could lead to external commentary which would inhibit

deliberation of outstanding policy decisions and potentially constrain options open to Ministers.

29. HMT explained that this was particularly true in relation to the cost control mechanism process. HMT explained that the government had recently announced that the mechanism would take into account the increased value of schemes following the *McCloud* judgment when completing the cost control element of the 2016 valuations. HMT argued that there is a risk that details of the early estimate, including the breakdown by scheme, could be used by external stakeholders to draw inaccurate conclusions on the final results of the cost control element of the 2016 valuations process where there are still policy decisions to be made. HMT suggested that such assumptions could lead to unhelpful, and potentially misleading, external commentary which would likely inhibit deliberation of policy options and potentially constrain the options available to Ministers, or force the government to make a policy announcement before it was ready.
30. HMT emphasised that the policy making process was live and ongoing at the point that the complainant submitted the request, and moreover was still at the early stages. It also explained that the withheld information related to its ongoing engagement with the Employment Tribunals concerning how discrimination will be rectified. (The Employment Tribunals will oversee the process of agreeing a remedy for claimants and the government has agreed an interim declaration with claimants in a number of cases.)
31. HMT argued that there was a strong public interest in protecting the policy-making process. and that the exemption in section 35(1)(a) is intended to ensure that the release of information does not deter from full and proper deliberation of policy formulation and development, which is especially relevant in this area given it has stemmed from a court ruling identifying discrimination. HMT explained that this includes the exploration of all options and taking the necessary time to thoroughly consider all the issues.
32. HMT acknowledged that the potential impact of changes necessitated by the legal challenge will be far reaching. However, it argued that this fact increased the importance of ensuring that Ministers and officials are able to conduct rigorous and candid assessment to inform the decision making process.
33. HMT also noted that the complainant had argued that there was a public interest in the disclosure of the withheld information in order to further public debate. However, it argued that this public interest had already

been addressed to some degree by the information already in the public domain, for example this report which was published on 5 July 2019.³

34. Furthermore, HMT explained that as indicated by the Ministerial Statement, it fully expected that as policy thinking progresses, there will be opportunities for key stakeholders, as well as the general public, to participate in consultation exercises or calls for evidence in order to explore options, consider practical issues and flag concerns. HMT also noted that any policies involving potential legislative changes would require public consultation and the drafting of new legislation, which would be subject to additional scrutiny.
35. On balance, HMT therefore concluded that the public interest favoured withholding the information as it continued to be pertinent to live policy questions still to be decided by Ministers and release of the information could negatively impact their ability to make objective decisions.

Balance of the public interest arguments

36. The Commissioner accepts that significant weight should be given to safe space arguments - ie the concept that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy making process is live and the requested information relates to that policy making. Clearly, in the circumstances of this case the policy making is live. Furthermore, the Commissioner accepts that the withheld information relates to that policy making. The Commissioner is conscious that the withheld information only consists of factual information, and indeed simply compromises a breakdown of a total figure which has already been placed into the public domain. Nevertheless, the Commissioner accepts HMT's position that the disclosure of the figures could lead to assumptions being drawn about the basis of these figures and thus the policy implications and decisions to be made in response to the *McCloud* judgment. Consequently, the Commissioner is satisfied that the safe space arguments advanced by HMT are valid ones despite the factual nature of the information, and moreover are ones that attract particular weight given the fact that the policy making at the time of the complainant's request was at its early stages.

³ The report cited by HMT in its response to the complainant appears to have been superseded by later version of the report published in August 2020 - <https://commonslibrary.parliament.uk/research-briefings/sn05768/>

37. With regard to attributing weight to the public interest in favour of disclosure, the Commissioner agrees that there is a public interest in the government being open and transparent about its response to the *McCloud* judgment and how it intends to address the discrimination identified. The Commissioner accepts that disclosure of the withheld information would inform the public as to how the figure of £4bn as quoted in the Ministerial statement was arrived at. Given the number of pension scheme members affected by this court decision, and the likely impact of any policy changes, the Commissioner accepts that this public interest should be not underestimated. Furthermore, she is also conscious of the affect of section 35(4) of FOIA, which adds further weight to the public interest in disclosure.
38. However, the Commissioner has concluded that by a relatively narrow margin the public interest favours maintaining the exemption. In reaching this decision she has been particularly persuaded by the fact that the policy making was at the early stages of formulation at the time of the request, which in her view, ultimately adds compelling weight to the safe space arguments.

Right of appeal

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: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: 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

Jonathan Slee
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