

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 February 2024

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Bank of England (the Bank) seeking the amount it had spent on third party fees in respect of an Employment Tribunal claim which he had brought against the Bank. The Bank confirmed that it held the requested information but refused to provide this as it considered it to be exempt from disclosure on the basis of section 43(2) (commercial interests) of FOIA. During the course of the Commissioner's investigation, the Bank withdrew its reliance on section 43(2) and instead argued that the withheld information was exempt from disclosure on the basis of section 36(2)(c).
2. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of section 36(2)(c) and that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.
3. The Commissioner does not require further steps.

Request and response

4. The complainant submitted the following request to the Bank on 24 May 2023:

'Under the FOI Act, can you please provide the total amount of money spent to date on third parties, broken down by third party, with respect to the following Grievance, Grievance appeal & Employment Tribunal case related to [complainant's name]. Employment Tribunal Case Reference: [complainant's name] v Bank of England Case No: [redacted]'

5. The Bank responded on 21 June 2023 and explained that it did not hold any information about money spent on third parties with respect to his grievance and grievance appeal. The Bank confirmed that it did however hold information regarding money spent to date on third parties in respect of the Employment Tribunal case but it considered this information to be exempt from disclosure on the basis of section 43(2) (commercial interests) of FOIA.
6. The complainant contacted the Bank on the same day and asked it to conduct an internal review in relation to its reliance on section 43(2) of FOIA.
7. The Bank informed him of the outcome of the internal review on 19 July 2023. This upheld the application of section 43(2).

Scope of the case

8. The complainant contacted the Commissioner on 26 July 2023 in order to complain about the Bank's decision to withhold information on the basis of section 43(2) of FOIA. During the course of the Commissioner's investigation of this complaint the Bank withdrew its reliance on section 43(2) and instead sought to rely on section 36(2)(c) on the basis that disclosure would harm its financial interests and in turn prejudice the effective conduct of public affairs.
9. This decision notice therefore considers whether section 36(2)(c) provides a basis for the Bank to withhold the requested information. It is important to note that the Commissioner's role in determining section 50 FOIA complaints is limited to considering the circumstances as they existed at the time of the request.

Reasons for decision

Section 36 – effective conduct of public affairs

10. Section 36(2)(c) of FOIA states that:

“(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act..

...(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

11. In determining whether this section is engaged the Commissioner must determine whether the qualified person’s opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:
 - Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
 - The qualified person’s knowledge of, or involvement in, the issue.
12. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person’s opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person’s position could hold. The qualified person’s opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
13. With regard to the process of seeking this opinion, the Bank sought the opinion of its Chief Operating Officer, Ben Stimson who is a qualified person under section 36(5)(o) of FOIA. Mr Stimson gave his opinion that section 36(2)(c) was engaged on 13 February 2024. The Commissioner is satisfied that the Chief Operating Officer is a qualified person for the purposes of section 36 and although the Bank sought the opinion of the qualified person some time after the request was received, this does not prevent it from relying on this exemption. The Commissioner is therefore satisfied that the process of seeking the opinion was appropriate.

14. Turning to the substance of the opinion, the qualified person argued that disclosure of the withheld information would result in the Bank's financial interests being prejudiced. The qualified person noted that at the time of the request the applicant was in dispute with the Bank (and that the employment tribunal process is still ongoing at this time). The qualified person argued that disclosing the costs incurred could give an indication of the Bank's willingness to settle. It could also lead the complainant to draw their own conclusions as to the level of fees likely to be incurred in the remainder of the case, influencing the level at which they are prepared to settle.
15. Furthermore, the qualified person argued that there is a possibility that disclosure of the figure in this case could also impact on the Bank's ability to settle in other cases. Given the Bank is a public authority with limited resources, the qualified person argued that undermining the Bank's negotiating position in this way would prejudice the effective conduct of public affairs. The qualified person concluded that given the situation and the relationship between the parties, such prejudice is more likely than not – ie disclosure 'would' cause this prejudice.
16. For his part the complainant emphasised that the requested information did not consist of contractual terms or charge rates, rather it was simply the total spent on a tribunal case with third parties and hence it is not commercially sensitive (nor in the context of the Bank's revised position, financially sensitive). Furthermore, the complainant argued that the Bank's logic did not stand up to scrutiny. He argued if the figure is high, then it would not settle for a large amount. If the number is low, the Bank would not need to settle for a large amount. Either way, the complainant argued that it is a sunk cost and the number would not impact any settlement negotiations.
17. The Commissioner is satisfied that the qualified person's opinion was a reasonable one to come to. The Commissioner accepts that it is logical to argue that disclosure of the withheld information, at the time of the request, had the potential to harm the financial interests of the Bank in the context of the complainant's present Employment Tribunal. The Commissioner has reached this decision because in his view it is logical for the Bank to argue that disclosure of the amount incurred could have a direct impact on its decision to consider any potential settlement in this case.
18. The Commissioner considers that it is also logical to argue that disclosure of the withheld information could impact on the Bank's financial interests in the context of other legal actions. Furthermore, the Commissioner accepts that such an impact on the Bank's financial interests can accurately be considered as an 'other' prejudice and thus protected by section 36(2)(c).

19. Section 36(2)(c) is therefore engaged.

Public interest test

20. Section 36 is a qualified exemption and in line with the requirements of section 2 of FOIA the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption cited outweighs the public interest in disclosing the information.

Public interest in maintaining the exemption

21. In addition to the arguments set out by the qualified person, the Bank also provided the Commissioner with additional submissions to support its position that the disclosure of the withheld information would prejudice its financial interests, and therefore why disclosure would not be in the public interest.
22. The Bank argued that one of the key factors in determining a party's desire for agreeing a negotiated settlement is the ongoing costs of the case. The cost of litigation is therefore a fundamental part of deliberations over whether to settle or defend a claim, and the level at which settlement should be offered. The Bank argued that if a party to proceedings is incurring significant costs in a case, for example, it may have a preference to negotiate a settlement to stem the costs being incurred. Conversely, if the costs being incurred by a party during proceedings are not particularly significant, it may not feel the need to settle.
23. The Bank argued that if it were to disclose the amount of legal fees incurred as at the date of the request, this could give an indication to the complainant of the Bank's appetite to settle this case. It also argued that disclosure of this information may also lead the complainant to draw his own conclusions as to the level of legal fees likely to be incurred by the Bank in the remainder of his case, which may influence the level at which he was prepared to settle his case.
24. The Bank argued that the above would, in turn, and as the qualified person had set out, prejudice the Bank's financial interests for the purpose of negotiating a settlement agreement with the complainant.
25. In respect of the impact on other cases, the Bank argued that if an individual contemplating a legal claim against the Bank, be it in the Employment Tribunal or otherwise, knew that it was prepared to spend at least the amount of money represented by the withheld information on external costs they may assume that it is common for the Bank to incur such costs. They may then assume that the Bank is likely to settle any claim for at least this amount on the basis that it would seem

financially sensible to save legal spend, regardless of the merits of the case or other relevant considerations.

26. For its part the Bank acknowledged that there are public accountability considerations in disclosing its expenditure and there may be instances where this is appropriate. However, it argued that in the context of ongoing and live employment proceedings, disclosure of information which would prejudice the Bank's financial interests and lead to it incurring additional costs (for example, in the form of an increased settlement amount) was not an outcome that was in the public interest. Furthermore, the Bank argued that as it is publicly funded, the ultimate impact of these costs would be on the public and so disclosure would be against the public interest. The Bank also noted that the public interest in transparency and accountability is also served by the publication of the Bank's aggregate spend on legal and other professional fees each year in its annual report.¹

Public interest in disclosing the information

27. The complainant argued that the Bank is a public body and the public has a right to know what the Bank's money is spent on, and with whom, and that as a result there was an overriding public interest in disclosure of the information.

Balance of the public interest

28. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur, but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.
29. With regard to the severity, extent and frequency of prejudice occurring the Commissioner accepts that if the Bank disclosed the figure to the complainant he may, as the Bank suggests, assume that it would be prepared to settle for at least this amount given that it had been prepared to spend this amount to date. The Commissioner accepts that this would impact on the Bank's ability to settle for a lower figure. The Commissioner also accepts that disclosure of the figure could be used by

¹ <https://www.bankofengland.co.uk/-/media/boe/files/annual-report/2023/boe-2023.pdf> see page 124

the complainant to estimate the further legal costs incurred by the Bank since the request, and thus provide him with some insight into the Bank's total external legal costs. Again, the Commissioner accepts that this could lead the complainant to infer that the Bank would be willing to settle for this sum, prejudicing the Bank's ability to settle for less.

30. The Commissioner agrees that there is public interest in how the Bank spends public money. Disclosure of the particular information in this case would provide some insight into the costs occurred in respect of this particular case which would arguably contribute towards such transparency and accountability. However, the Commissioner agrees that there is a significant public interest in protecting the Bank's financial interests, and in turn ensuring that public money is used most effectively. In the specific circumstances of this request the Commissioner considers that the public interest attracts particular weight given the that at the time of the request employment proceedings were live and ongoing. Furthermore, in the Commissioner's opinion the public interest in maintaining the exemption attracts additional weight given the risk of prejudicing the Bank's financial interests in other, unrelated legal cases. As a result the Commissioner is satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

Right of appeal

31. 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

32. 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.
33. 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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