

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

### **Decision notice**

**Date:** 4 January 2024

**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 10 files which relate to the European Exchange Rate Mechanism from HM Treasury ("HMT"). HMT refused to disclose the requested information on the basis that it was vexatious under section 14(1) of FOIA.
2. The Commissioner's decision is that HMT was not entitled to rely on section 14(1) when refusing to provide the requested information. He requires HMT to take the following step to ensure compliance with the legislation:
  - Provide the requested information or issue an appropriate refusal notice which does not rely on section 14(1).
3. HMT must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

#### **Background**

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4. Regarding the requested files, HMT has explained to the Commissioner:

“ The final stages of the transfer process to TNA [The National Archives] have now been concluded and the requested files will be released to TNA, as agreed by the Advisory Council, with the following details:

- File T668/176 "European Exchange Rate Mechanism (ERM)" has been available at TNA since November 2022 with no redactions applied.
- File T702/63 "Exchange Rate Mechanism (ERM)" will be transferred open to TNA in October 2023 with no redactions applied.
- File T702/1317 "Exchange Rate Mechanism (ERM)" and British pound crisis papers will be transferred open to TNA, in August and September following the usual process of preparation for transfer with the respective redactions applied.
- File T702/685 "Exchange Rate Mechanism (ERM)" will be transferred open to TNA, in August and September following the usual process of preparation for transfer with the respective redactions applied.
- File T448/804 "Exchange rate and intervention reserves 1992" will be transferred closed for public viewing to TNA in October due to sensitivities contained in the files.
- File T448/805 "Exchange rate and intervention reserves 1992" will be transferred closed for public viewing to TNA in October due to sensitivities contained in the files.
- File T448/806 "Exchange rate and intervention reserves 1992" will be transferred closed for public viewing to TNA in October due to sensitivities contained in the files.
- File T448/807 "Exchange rate and intervention reserves 1992" will be transferred closed for public viewing to TNA in October due to sensitivities contained in the files.
- File T448/808 "Exchange rate and intervention reserves 1992" will be transferred closed for public viewing to TNA in October due to sensitivities contained in the files.
- File T673/45 "European Exchange rate mechanism" will be transferred closed for public viewing to TNA in October due to sensitivities contained in the files.

Please be advised that there will be a period before the files are available at TNA as they operate their own publication timelines. Whilst HM Treasury may have transferred these records, there may be a period of waiting as TNA prepare them for public availability. This is called accessioning.

HM Treasury use a third-party contractor to conduct sensitivity review on records requiring transfer to TNA. This contractor also provides offsite storage for HM Treasury paper records. Sensitivity reviewed records go through a workshopping procedure conducted by HM Treasury to determine whether their status is sensitive, and whether information contained in the records should be withheld from release into the public domain. If a record is considered sensitive, it can be transferred to TNA partially or entirely closed utilising FOIA exemptions to withhold the relevant information. Records with high levels of sensitivity are retained by the department under the Public Records Act. Records that are deemed sensitive they are often referred to other government departments for expert assistance. All information considered sensitive that departments wish to withhold requires sign-off by the Advisory Council on National Records and Archives (ACNRA) – who sit quarterly – prior to transfer to the National Archives".

5. As such, the Commissioner understands that the requested files have now all been transferred to TNA, albeit not all the information will be accessible.
6. More details on the process of transferring files to TNA can be found online<sup>1</sup>.

## **Request and response**

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7. In a refined request, on 21 March 2023, the complainant wrote to HMT and requested information in the following terms:

"I have identified the following ten volumes which I would like you to consider for access:

T448/804  
T448/805  
T448/806  
T448/807  
T448/808  
T668/176  
T673/45  
T702/63

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<sup>1</sup> <https://www.nationalarchives.gov.uk/information-management/manage-information/selection-and-transfer/>

T702/685  
T702/1317"

8. HMT responded on 20 April 2023. It stated that it held the requested information, but refused to provide it citing section 14(1) of FOIA.
9. Following an internal review, HMT wrote to the complainant on 10 July 2023. It stated that it was upholding its original position.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 1 August 2023 to complain about the way their request for information had been handled.
11. The Commissioner considers that the scope of his investigation is to consider whether HMT has correctly relied on section 14(1) of FOIA when refusing to provide the requested information.

### **Reasons for decision**

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

12. 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.
13. The word “vexatious” is not defined in FOIA. However, as the Commissioner’s updated guidance on section 14(1)<sup>2</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.
14. 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.
15. However, the ICO recognises that dealing with unreasonable requests can strain resources and get in the way of delivering mainstream

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<sup>2</sup> <https://ico.org.uk/for-organisations/dealing-with-vexatious-requests-section-14/>

services or answering legitimate requests. These requests can also damage the reputation of the legislation itself.

16. 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>3</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.
17. The four broad themes considered by the UT 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
  - any harassment or distress (of and to staff).
18. 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).

### **The Complainant's arguments**

19. The complainant advised that the requested information is dated from 1990-2 and should have already been reviewed in line with the 20-year rule which exists within the Public Records Act ("PRA"), and either released or been withheld subject to exemptions.
20. The complainant also explained that they had significantly reduced the scale of their request, in order to support HMT with responding. The complainant argued that HMT has already had at least ten years to carry out the necessary reviews.

### **HMT arguments**

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<sup>3</sup><https://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=3680>

21. HMT acknowledged that the requested information was overdue for consideration under the PRA, which was due to the lasting impact of the Covid-19 pandemic, which continued to delay transfer of records.
22. HMT explained to the Commissioner that, at the time of the request, the information was in the process of being transferred to TNA. Due to this transfer, the requested information was not accessible to HMT staff as all files were prepared and caged for transfer. Since the Commissioner's investigation, as noted in "Background" above, the requested information has now all been transferred to TNA.
23. HMT explained to the Commissioner:

"The files requested are over 30 years old, and the quality of the pages can be poor. Unfortunately, we are unable to ascertain the exact condition and volume of the 9 historical files requested. This is because the files have now been prepared and caged for transfer to TNA. This means that they are no longer accessible to staff. However, we do hold approximate volumes for the files based on the subject matter:

- 5 of the files are policy and administrative function files and would therefore be approximately 200 – 300 pages. This would result in a total of 1,000 – 1,500 pages.
- 4 of the files are from the private office collection and would therefore be 500 – 600 pages each.

This would result in a total of 2,000 – 2,400 pages. We know from previous experience of reviewing our records that the approximate page numbers for the file types quoted above are correct. We are therefore confident in these approximate page numbers: HM Treasury's arrangement with our third-party contractor is ultimately based on these numbers and the throughput that said contractor are contracted to maintain...relies on these approximate numbers. Therefore, there are approximately 3,000 – 3,900 pages across 9 of the requested files within scope of [the] request. The final file (file T668/176) has not been accounted for since this is now available at TNA without any redactions<sup>4</sup>".

24. HMT advised that its third-party contractor had reviewed the records for sensitivity in preparation for their transfer to TNA. HMT concluded that due to this work taking place it was confident in its approximated page numbers for the file requested. It also explained that when reviewing

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<sup>4</sup> <https://discovery.nationalarchives.gov.uk/details/r/C17564889>

the files for sensitivity, its contractor had identified over 500 pages of sensitive information where the exemptions at sections 40(2) (Personal information) and 44 (1) (Prohibition of disclosure) of FOIA would have applied.

25. HMT explained that, whilst sensitivity checks had been undertaken previously, these checks could not be relied on for this request. This was because:

“As the files are now prepared for transfer, the flags indicating where sensitive information has been identified have now been removed. In addition, when files are transferred closed to TNA, meaning that they will not be accessible at all, no physical redaction is needed.

Our contractor conduct a sensitivity review for the purposes of reviewing access to historical files differently to how HM Treasury would be required to conduct a sensitivity review of those same files under the FOI Act. Our contractor are only contracted for sensitivity reviews to help HM Treasury in complying with the Public Records Act 1958. They are not contracted in relation to the FOI Act and are also not trained on the FOI Act. Our contractor conducts their sensitivity review of the necessary files and will redact on a page-by-page basis. In practice, this means that a single sensitivity on one page will result in that full page being redacted. This is in line with the Public Records Act 1959, and our third-party contractor are contracted to comply with only this legislation. When responding to FOI requests, however, HM Treasury are required to conduct a line-by-line sensitivity review and redact specific sensitivities.”

26. This meant that HMT could not easily or quickly identify any sensitive information. Therefore the files would require a full review and to have appropriate redactions made.
27. HMT stated that in order to provide a substantive response to this request it would initially need to prepare each historical record for processing by making copies of the original paper records, thereby allowing the original document to be preserved.
28. HMT advised that it was not possible for the files to be fed through a photocopier without manual assistance, as the documents are over 30 years old and may be of poor quality. If any pages were identified to be of poor quality, pages would need to be scanned individually.
29. HMT informed the Commissioner that the requested information has been selected as culturally or historically significant and access to the records requested is limited to a specific small team with security clearance.



30. The requested information has also undergone conservation. Therefore, in order for HMT to comply with the request, a small team would have to undertake the burden as they are the only officials with the necessary knowledge on handling these paper records. HMT advised that, even if it were to employ other officials to support with the request, the dedicated team would need to undertake a large amount of training.
31. HMT advised that as there are approximately 3000 to 3900 pages, this process would take a substantial amount of time. It stated that, if the pages were of good quality, it would take a minimum of 8 hours to scan 3000 pages with each page taking 10 seconds to scan; if the documents numbered 3900, this would take longer.
32. HMT advised that it would take approximately 30 seconds to scan each page if it were of poor quality. This could amount to 25 hours' worth of work for 3000. If there were more pages, this would again take longer.
33. HMT explained it would then need to review each record to identify any information that would be harmful to release. If information was deemed to be harmful, it would then need to redact this information and apply appropriate exemptions. A final quality check to ensure all harmful information was redacted would then be required.
34. HMT stated that, in an estimate that is based on the review rate that is agreed between itself and its contractor, it would take around 1.5 hours to review a file which contains 200-300 pages. For the five files concerned, this would amount to 7.5 hours.
35. HMT advised that, for the larger files which were made up of 500-600 pages, it would take approximately 2 hours to review each file. Therefore, it would take a total of 8 hours to review the four relevant files.
36. HMT concluded to comply with the request it would take between 8 and 25 hours to scan and copy each document and an additional 15.5 hours' worth of work to review the content. This would amount to around 23.5 hours – 40.5 hours' worth of work. This is without the additional cost of training any staff members to support with the request.

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

37. Whilst it is noted that the files have now been transferred to TNA, and that a further two are to be fully disclosed without any redactions or further assessment, the Commissioner must take into account the circumstances at the time when the internal review was provided.
38. 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.

39. In order to refuse a single request under section 14(1), HMT must demonstrate that compliance with the request would impose a grossly oppressive burden.
40. It is a high bar to engage and the Commissioner considers it is most likely to be the case where public authorities can demonstrate:
  - the requester has asked for a substantial volume of information; and
  - there are real concerns about potentially exempt information, which it is able to substantiate, if asked to do so by the Commissioner; and
  - the potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.
41. In considering this case, the Commissioner has taken account of both HMT's and the complainant's submissions, and his own guidance. He recognises that section 14(1) may apply if a significant burden is imposed on a public authority for which it cannot claim section 12 (cost of compliance) of FOIA.
42. The Commissioner recognises that, based on its estimates, HMT would be required to conduct around 23.5 to 40.5 hours of work to comply with the request on the basis of preparing, copying and redacting information held within the requested files. This 'burden' is the crux of its arguments for finding the request to be vexatious as this work falls outside the remit of the tasks allowed for in section 12 of FOIA.
43. In this respect, the Commissioner notes that, had it been able to cite the cost limit at section 12 of FOIA, HMT would have been required to comply with the request were the estimate found to fall at the lower end of the scale, ie it would be required to undertake work up to 24 hours as provided for in The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004<sup>5</sup>. The Commissioner considers that this evidences an acceptable 'burden' of this amount of work, and that the additional 17 hours (if, indeed, it would take that long to undertake) are all that HMT could reasonably expect to be considered as 'overly burdensome'. As HMT has not undertaken an actual physical assessment of the files, rather it has relied on

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<sup>5</sup> <https://www.legislation.gov.uk/ukxi/2004/3244/made>

experience, the Commissioner finds that it is not possible to reasonably estimate where to 'draw the line' between the suggested hours given.

44. Countering this, the Commissioner notes the genuine motive of the complainant and the genuine public interest in disclosure of the requested information, as it relates to the sterling's withdrawal from the European Exchange Rate Mechanism (ERM).
45. The Commissioner considers that, although the request imposes a burden upon HMT's resources, HMT has not evidenced that this would be disproportionate to the inherent purpose and value of the request. The files have clearly been deemed to be of wider public interest, hence their having met the criteria for transfer to TNA.
46. Having reviewed HMT's submissions and estimates, the Commissioner does not consider that the evidence provided has passed the 'high hurdle' that he would expect in such a case. Had HMT properly considered its files prior to transfer then it may have been able to provide more convincing arguments to support its position, but it did not do so and it has therefore failed to convince the Commissioner that compliance would cause a grossly oppressive burden.
47. In light of the above, the Commissioner is not satisfied that HMT was entitled to rely on section 14(1) of FOIA to refuse the request. He requires the HMT to either disclose the requested information, or issue a refusal notice which does not rely on section 14.

## **Other matters**

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48. The Commissioner would like to remind HMT that, whilst internal reviews are not a legal requirement under FOIA, they are still considered to be good practice. The Commissioner expects that an internal review should be conducted within 20 working days, but absolutely should be completed by 40 working days.
49. In the circumstances of this case, HMT did not complete its internal review within 40 working days. The Commissioner considers this to be a sign of poor practice.
50. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of

systemic non-compliance, consistent with the approaches set out in our FOI and Transparency Regulatory Manual<sup>6</sup>.

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<sup>6</sup> [https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v1\\_0.pdf](https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v1_0.pdf)

## Right of appeal

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51. 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)

52. 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.

53. 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 .....**

**Carolyn Howes  
Senior Case Officer  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**