Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 7 June 2011

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

Summary

The Complainant made a request to HM Treasury ("the Treasury") for information about plans drawn up by the Treasury in 2008 or 2009 to set up a bank to acquire toxic/bad assets from UK financial institutions and for details of assessments of the cost of such plans. He also asked for information about meetings with Lloyds TSB, the Royal Bank of Scotland and Barclays Bank in November and December 2008 and 2009. In relation to the request for information about the meetings set out above, the Treasury explained that this information was already publicly available and provided the complainant with a link to this information. In relation to the remainder of the request, the Treasury refused to disclose this information under section 29(1)(a), section 29(1)(b), section 27(1)(a), section 35(1)(a) and section 42(1). The Commissioner considers that the section 35(1)(a) exemption was correctly engaged in this case. The Commissioner has not therefore considered the other exemptions applied.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The Treasury has explained that the requests which relate to the creation of a bank to purchase toxic assets would include information created in response to a recent economic crisis in the financial sector.

3. It explained that in summer 2007 the world's financial markets entered a period of turbulence triggered by fears over the exposure to American sub-prime mortgages. Consequently the value of such assets started falling. Banks began to re-price risk and retain cash to meet their own liquidity requirements. This resulted in a shortage of liquidity across the global financial system, undermining the financial health of institutions that used wholesale markets to fund their activities. From autumn 2007 the focus of the Authorities, including the Treasury, the Bank of England and the Financial Services Authority, was to support the liquidity of the banking system as a whole and identify failing institutions and manage orderly resolution. During 2008, a number of vulnerable firms were taken over by stronger institutions.

4. It went on to explain that following the collapse of Lehman Brothers in September 2008 market confidence in all banks rapidly weakened. In handling this, the Authorities reviewed two options to improve solvency. The first was a scheme under which the public sector would purchase non-performing assets from the banks (sometimes known as a good bank/bad bank option). The second would involve injections of additional capital into the banks by existing shareholders or by new shareholders, including if necessary the Government (known as a recapitalisation). Both approaches had been used by governments in previous financial crises. It explained that the recapitalisation had the advantage in the circumstances prevailing that it could be implemented sooner than a scheme involving asset purchases, which is inherently more complex. In the first two weeks of October 2008 the Authorities put together a recapitalisation scheme that was used by the Royal Bank of Scotland and the merged Lloyds/HBOS bank. Other banks undertook private capital raising exercises. The Treasury recognised at that time that an asset purchase scheme or other means of dealing with impaired assets on the balance sheets of banks might also be needed.

5. By January 2009 the Treasury believed that it was necessary to deal with the impaired assets of troubled financial institutions to address systematic weaknesses. By taking responsibility for the assets the Government could set a limit on the losses borne by the banks. Previous crises suggested that impaired assets could be resolved in one of two ways. One option was to buy back the assets from the bank, commonly by splitting a bank into a good bank and bad bank. The second option was to provide protection against losses on a specific set of assets.

6. The Treasury concluded that a well designed and implemented asset purchase scheme offered some attractions, including a potentially decisive break from the past and a cleansing of the balance sheets. However, it was concerned that it would take too long to implement in the circumstances at the time and that it would crystallise loss in the banks. It decided the advantage of the Asset Protection Scheme better served its purposes. On 19 January 2009, the Chancellor announced that an Asset Protection Scheme would be developed as part of a wider package of measures to address capital shortfalls and maintain lending to the economy.

7. It explained that the information requested consists of extracts from submissions to Treasury Ministers at various stages in late 2008 and early 2009 as part of advice on measures to support the UK's financial system. There is also some information from the autumn of 2009, when officials undertook a broad review of options available ahead of finalising the Asset Protection Scheme.

8. The Treasury further explained that it confirmed to the complainant in a letter dated 18 May 2010, that it had considered the creation of a body or 'bad bank' to acquire 'toxic' assets from UK financial institutions as an alternative to the announcement of the Asset Protection Scheme (APS). The details of the APS, including an explanation of the policy background and the 'bad bank' option, were set out in a document published by the Treasury in February 2009.It explained that it was published on the Treasury's website and provided the complainant with a link to this.

The Request

9. The complainant made a request to HM Treasury on 18 April 2010. The request was for the following information:

    1. *Details of any plans, documents, or any other information drawn up by HM Treasury in 2008 or 2009 regarding plans to set up a bank which would acquire toxic/bad assets from UK financial institutions.*
    2. *Details of assessment of the costs of such a plan to set up a bank which would acquire toxic/bad assets from UK financial institutions.*
    3. *Details of the date, duration and agenda of any face-to-face meeting between an HM Treasury Minister and representatives from Lloyds TSB in November and December 2008 and November and December 2009?*
    4. *Details of the date, duration and agenda of any face-to-face meeting between and HM Treasury Minister and representatives from RBS in November and December 2008 and November and December 2009?*
    5. *Details of the date, duration and agenda of any face-to-face meeting between an HM Treasury Minister and representatives from Barclays Bank in November and December 2008 and November and December 2009?*

10. On 18 May 2010 HM Treasury responded to the request. It confirmed that it held information relevant to the request. However it refused to disclose this information as it stated some was exempt from disclosure under section 35(1)(a) (policy formulation), section 29(1)(a) (the economy), section 42(1) (legal professional privilege) and section 43(2) (commercial interests). It did however state that it required further time to consider the public interest test.

11. On 28 May 2010 HM Treasury wrote to the complainant, in relation to points 3, 4 and 5 of the request it explained that this information was already in the public domain and provided the complainant with links to this information. It also detailed the public interest considerations it had taken into account in relation to each of the exemptions it had applied to points 1 and 2 of the request. It concluded that the public interest favoured maintaining the exemptions.

12. As the complainant was dissatisfied with the response he had received in relation to points 1 and 2 of the request, on the same date he asked HM Treasury to conduct an internal review of its decision to apply section 29(1)(a), section 35(1)(a), section 42(1) and section 43(2).

13. On 18 October 2010 HM Treasury wrote to the complainant with the result of the internal review it had carried out. For the most part it upheld its application of sections 35(1)(a), 29(1)(a), 42(1) and 43(2), however some further information was provided to the complainant that had originally been withheld. It also applied section 27(1)(a) and (b) and section 29(1)(b) to some of the withheld information.

The Investigation

Scope of the case

14. On 21 October 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:

- The application of sections 27(1)(a) and (b), 29(1)(a) and (b), 35(1)(a), 42(1) and 43(2) to the information withheld relevant to points 1 and 2 of the request.

- The delay in the Treasury conducting the internal review.

Chronology

15. The Commissioner wrote to the Treasury on 26 November 2010 to ask it to provide the Commissioner with a copy of the withheld information.

16. On 18 January 2011 the Treasury provided the Commissioner with a copy of the withheld information.

17. On 26 January 2011 the Commissioner wrote to the Treasury to ask it for further submissions in support of its application of the exemptions in relation to points 1 and 2 of the request.

18. On 7 March the Treasury responded to the Commissioner and provided its further submissions in support of the exemptions applied to points 1 and 2 of the request.

Analysis

Exemptions

Section 35(1)(a)

19. Section 35(1)(a) of the Act provides that information is exempt from disclosure if it relates to the formulation or development of government policy. This is a qualified exemption and is therefore subject to the public interest test. The full text of section 35 is detailed in the attached Legal Annex.

20. The Commissioner has first considered whether the information in question relates to the formulation or development of government policy.

21. The Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a minister. Development may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.

22. The Treasury has explained that the requested information relates to the formulation and development of the government's policy on the managing of the economy and planning actions that were necessary for the continuance of economic viability during periods of instability in 2008 and 2009 in the banking sector. It has explained that the information consists of extracts from submissions to Treasury Ministers at various stages in late 2008 and early 2009 as part of advice on measures that could be adopted to support the UK's financial system. It explained that there are also some submissions dated in the autumn of 2009, when officials undertook a broad review of options available ahead of finalising the Asset Protection Scheme which was one of the chosen measures.

23. The Commissioner has considered the case of DfES v The Information Commissioner & Evening Standard (EA/2006/0006) in which the Tribunal suggested that whether an item of information can be accurately characterised as relating to government policy should be considered on the basis of the overall purpose and nature of the information rather than on a line by line dissection. The Commissioner has therefore looked at whether the overall purpose and nature of the information supports the characterisation of relating to formulation or development of government policy, rather than on a minute dissection of the content of the information. When considering whether the exemption is engaged he has also applied a broad interpretation of the term 'relates to' bearing in mind the Tribunal's comments in the aforementioned decision (paragraphs 50 to 59).

24. The Commissioner has also looked at the findings of the UCL report 'Understanding the Formulation and Development of Government Policy in the Context of FOI'[1]. This report to the Information Commissioner's Office (ICO) was commissioned in October 2008 to provide amongst other 'deliverables', an exploration of what is meant by the term 'government policy' and incorporate case studies that track the evolution of government policy from initiation to completion and examples of subsequent development. This report indicated that the type of information which could be classed as relating to the formulation and development of government policy was broad. An example of one of the categories of information which the report found could fall under section 35(1)(a) was actions taken in response to external events. The Commissioner considers that developing and formulating policies in response to the banking crisis would be classed as actions taken in response to external events.

25. The Commissioner considers that the more wide ranging the consequences of the ministerial decision and the more politically sensitive the decision is, the more likely it is that we would accept it to be policy making. In this case the decisions taken by

1 http://www.ico.gov.uk/upload/documents/library/freedom_of_information/research_and_reports/ucl_report_government_policy_in_the_context_of_foi.pdf

the government in response to the banking crisis had wide ranging consequences and were extremely politically sensitive.

26. Upon considering the above the Commissioner considers that the withheld information relates to the formulation or development of Government policy and therefore falls within the exemption contained at section 35(1)(a) of the Act.

Public Interest Test

27. As noted above section 35(1)(a) is a qualified exemption and accordingly subject to the public interest test. The Commissioner has therefore gone on to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In DfES v The Information Commissioner and the Evening Standard (EA/2006/0006) the Tribunal set out 11 principles that should be used as a guide when weighing up the balance of the public interest in connection with section 35(1)(a). The Commissioner has considered the principles that are relevant to this case.

Public interest arguments in favour of disclosing the requested information

28. The Treasury has explained that it recognises that the following public interest arguments favour disclosure of the requested information:

- There is a public interest in transparency surrounding policy decisions.
- There is a public interest in promoting accountability in relation to decisions made by the government.
- There is a public interest in disclosing information which will increase public understanding and engagement which helps to ensure the quality and successful implementation of policy.
- The public interest in openness, transparency and accountability is particularly acute in relation to matters of public finance and taxation and even more so as the

information relates to periods of economic and financial instability.

Information in the public domain

- As explained at paragraph 8 above, some information relating to this issue has been disclosed by the Treasury, this therefore goes some way to meeting the public interest arguments in favour of disclosure.

Public interest arguments in favour of maintaining the exemption

29. The Treasury has explained that it believes the following public interest arguments favour maintaining the exemption:

Chilling Effect

- The Treasury has argued that it is of unique importance that in crisis situations the candour and quality of advice provided to ministers is not compromised. It explained that release of the requested information would be likely to result in Ministers and their officials drafting more narrowly in response to similar situations in the future which may inhibit innovative policy formulation and make Ministers and officials less likely to challenge accepted wisdom or vested interests. It suggested that this could mean worthwhile ideas may not be considered. In the context of the banks and the financial sector, which is of critical importance to the health of the economy, it considers that the potential harm as a result of the described chilling effect is greater than in 'day to day' policy making.

Timing

- At the time of the request the financial markets remained fragile. It explained that in early 2010 there was growing concern about a sovereign debt crisis in certain member states in the Euro Zone. This led to a crisis of confidence over the year, manifesting itself in a widening government bond yield spreads and risk insurance on credit default swaps between EU member states. As the markets remained volatile at that time there was potential for further policy development in relation to the management of toxic assets.

The nature of the information

- The Treasury has argued that the discussion of options of support or change in relation to the banking sector is, by its nature, always sensitive, particularly where options that were not selected may need to be revised or revisited at a later date. Furthermore it explained that discussions of technical policy options often remain sensitive after a decision has been made because of the impact that release of these discussions/options may have on the government's ability, including in this case a change of administration, to effectively implement these options in the future. It explained that the requested information relates to policy decisions taken in 2008 and 2009, and whilst the extreme volatility in the financial and banking sector might be a thing of the past, there remains considerable potential instability. It explained that the recent sovereign debt crisis in Greece and Ireland highlights the uncertainties that still exist. It explained that it is therefore of ongoing importance that the government is able to discuss and develop future policy options which may include developing future contingency plans similar to those discussed in 2008 and 2009.

Balance of the public interest arguments

30. The Commissioner considers that there is a public interest in transparency, openness and accountability in relation to policy decisions taken by the government. In this case he considers that the public interest is particularly acute due to the far reaching implications of the policy decisions taken. The Commissioner also considers that there is a public interest in the public being informed on this issue to enable the public to engage in debate and discussion. The Commissioner also considers that there is a very strong public interest in understanding how and why it was decided that public money should be spent in response to the financial crisis in 2008 and 2009.

31. The Commissioner considers that at the time of the request the formulation and development of the policies which the requested information related to were complete. However he considers that due to the ongoing fragility of the economy at the time of the request, there was a real possibility that similar policy options may need to be considered again in the future. He also considers

that due to the highly sensitive nature of the requested information and its wide reaching effects, disclosure would be likely to cause a chilling effect in relation to the deliberation of future policies in this area. In particular the Commissioner considers that when responding to crisis situations such as in this case, it is important that the government is not inhibited in debating fully all policy options as expediently as possible. In considering the weight to attach to this 'chilling effect' argument the Commissioner has considered the views of the Tribunal in *DFES v ICO & The Evening Standard* [EA/2006/0006] which stated that,

"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case."

32. The Commissioner has therefore been very mindful of the contents of the withheld information in reaching a view on the potential chilling effects of disclosure and considered whether these chilling effects are specifically related to the information in question. He is satisfied that this is the case and has therefore given significant weight to this argument. Furthermore he is mindful that the government has publicised some information to provide some explanation and background to the policy decisions it made in response to the financial crisis in 2008 and 2009 which goes some way to meeting the public interest arguments in favour of disclosure.

33. The Commissioner has balanced the arguments for maintaining section 35(1)(a) against the arguments in favour of disclosure. He considers that whilst there is a very strong public interest in understanding how and why it was decided that public money should be spent in response to the financial crisis in 2008 and 2009, there is a very significant public interest in avoiding the chilling effect described at paragraph 31 above. He considers that the balance of public interest in this case favours maintaining the exemption.

The Decision

34. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Requires

35. The Commissioner requires no steps to be taken.

Other matters

36. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

    Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 40 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Right of Appeal

37. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

38. 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.

39. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 7th day of June 2011

Signed ……
Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

(a) section 21

(b) section 23

(c) section 32

(d) section 34

(e) section 36 so far as relating to information held by the House of Commons or the House of Lords

(f) in section 40 –

(i) subsection (1), and

(ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,

(iii) section 41, and

(iv) section 44"

Formulation of government policy

Section 35 provides that -

(1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—

(a) the formulation or development of government policy,

(b) Ministerial communications,

(c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or

(d) the operation of any Ministerial private office.

(2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded—

(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or

(b) for the purposes of subsection (1)(b), as relating to Ministerial communications.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

(4) In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.

(5) In this section—

- "government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the Welsh Assembly Government;

- “the Law Officers” means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland, the Counsel General to the Welsh Assembly Government and the Attorney General for Northern Ireland;
- “Ministerial communications” means any communications—

  (a) between Ministers of the Crown,
  (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
  (c) between members of the Welsh Assembly Government

  and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the Cabinet or any committee of the Cabinet of the Welsh Assembly Government;
- “Ministerial private office” means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the Welsh Assembly Government providing personal administrative support to the members of the Welsh Assembly Government;
- “Northern Ireland junior Minister” means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998.