

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 October 2014

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the sale of the Bradford & Bingley Building Society (B&B) in 2008.
2. The Commissioner's decision is as follows:
 - HM Treasury (HMT) has correctly applied section 44(1)(a) to the Information Memorandum (except the Disclaimer and section 7) and process letters.
 - Section 43(2) is not engaged in relation to the information memorandum disclaimer and section 7 of the information memorandum.
 - Section 41 is engaged in relation to the final bids.
 - Section 35(1)(a) was correctly applied to the advice extracts.
3. The Commissioner requires HMT to disclose the 'Disclaimer' in the Information Memorandum and section 7.
4. The public authority must take these steps 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 22 July 2013, the complainant wrote to HMT and requested information in the following terms:

"Details of the competitive process of the sale of the retail deposit book of Bradford & Bingley immediately after nationalisation."
6. HMT responded on 16 August 2013 and refused to provide the requested information. It cited sections 35(1)(a), 29(1)(a) and (b) and section 43(2) of the FOIA as its basis for doing so.
7. Following an internal review HMT wrote to the complainant on 19 December 2013. It maintained its original position.

Scope of the case

8. The complainant contacted the Commissioner on 7 January 2014 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of this case to be to determine if HMT have correctly applied the exemptions it has cited to the withheld information.
10. In its response to the Commissioner HMT also sought to rely on sections 41 and 44(1)(a) of the FOIA for some of the withheld information.
11. HMT initially stated that it considered Section 35(1)(a) applied to all the withheld information. However, in further correspondence with the Commissioner it confirmed the following exemptions applied to each piece of information:

Information	Exemption(s) Applied
Extracts from advice to the Chancellor and Prime Minister	27(1)(b), 29(1)(a), 29(1)(b), 35(1)(a), 41, 44(1)(a) and 43(2)
Final bids	29(1)(a), 29(1)(b), 41, 43(2)
Sales process letters	41, 43(2), 44(1)(a)
Information Memorandum	43(2), 44(1)(a)
Information Memorandum Disclaimer	43(2)

Reasons for decision

12. The Commissioner has first considered the application of section 44(1)(a) to the sales process letters, Extracts from advice to the Chancellor and Prime Minister, and the information memorandum.

Section 44(1)(a)

13. Section 44 FOIA provides that:

"(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it-

*(a) is prohibited by or under any enactment,
(b) is incompatible with any Community obligation, or
(c) would constitute or be punishable as a contempt of court."*

Section 44 is an absolute exemption and therefore not subject to a public interest test.

14. HMT has explained that the information that falls within section 44(1)(a) is information received by the HMT from the Financial Services Authority (FSA) – now the Financial Conduct Authority (FCA) during the sale process of B & B and is therefore confidential information, the release of which is prohibited by section 348 of the FSMA.
15. Section 348(1) of the Financial Services and Markets Act 2000 (FSMA) states that –

"Confidential information must not be disclosed by a primary recipient, or by any person obtaining the information directly or indirectly from a primary recipient, without the consent of –

*(a) the person from whom the primary recipient obtained the information; and
(b) if different, the person to whom it relates.*

Is the FCA a primary recipient?

16. A primary recipient is defined at section 348(5) of the FSMA and includes the FCA. The Commissioner therefore accepts that the FCA is a primary recipient for the purposes of the FSMA. He also accepts that the information in the Information Memorandum, apart from the Disclaimer and section 7 has been provided to the HMT by the FCA. With regard to the process letters, HMT has stated that they are based on information

provided by the FCA, and therefore consider they are also exempt by virtue of section 44(1)(a).

17. HMT must consider section 348 because they obtained the information directly from a primary recipient.
18. HMT also considers the extracts from advice to the Chancellor and Prime Minister to be exempt by virtue of section 44(1)(a) however it has not provided any specific details or arguments in support of the application of this exemption relating to this particular information. Therefore, the Commissioner has decided, in the absence of further supporting details, that this part of the withheld information is not covered by the section 44 exemption. He has considered other exemptions applied later in this decision notice.

Is the request for confidential information?

19. Confidential information is defined by section 348(2) of the FSMA and means information which:
 - relates to the business or other affairs of any person
 - was received by the primary recipient (FSA) for the purposes of, or in the discharge of:
 - a. any functions of the FSA (the FSA's functions are its functions as conferred on it by or under FSMA (section 1) and, pursuant to s249 Banking Act 2009, include its function under s250 Banking Act 2009 to gather information relating to financial stability);
 - b. the competent authority for the purposes of Part VI FSMN (official listing); or
 - c. the Secretary of State under any provision made by or under FSMA
20. The Commissioner has first considered if the information relates to the business or affairs of another person. A person is not defined by FOIA, thus the Commissioner has adopted the usual legal interpretation of a person, namely any entity that is recognised as having legal personality to enter into legal relations.
21. The Commissioner is satisfied that the information does relate to the business or affairs of another person. He has therefore gone on to consider whether the information was received by the FCA for the purposes of, or in the discharge of, any of its functions.

22. The FSMA is concerned with the regulation of financial services and markets in the UK. The Commissioner is satisfied that the information would have been received by the FCA for the purposes of discharging the FCA's function of regulating the financial services and markets in the UK.
23. He has also not been provided with any evidence that indicates the withheld information has been made available to the public in circumstances which would mean the information was not confidential under section 348(4) of FSMA.
24. The FSMA allows that information may be disclosed if consent has been received from the person that provided the FCA with the information. The Commissioner understands that no consent has been given to the release of the requested information. As such he considers that the information remains confidential information for the purposes of the statutory bar provided by section 348 of the FSMA.
25. Having reviewed the withheld information the Commissioner is satisfied that where the exemption has been applied the information was obtained by HMT or else reflects information obtained by HMT in the course of the sale of B&B and the information clearly relates to that business.
26. Therefore the information withheld by virtue of section 44(1)(a) is 'confidential' as described in paragraph 16. Consequently it is prohibited from disclosure under the FSMA.
27. The Commissioner's decision is that HMT has correctly applied section 44(1)(a) to the Information Memorandum (except the Disclaimer and section 7) and process letters.

Section 43(2) – commercial interests

28. The Commissioner has next considered the disclaimer in the information memorandum and section 7 withheld by virtue of section 43(2). Section 43(2) of FOIA states that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).'

29. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43. This comments that:

"...a commercial interest relates to a person's ability to participate

*competitively in a commercial activity, i.e. the purchase and sale of goods or services.*¹

30. The Commissioner has reviewed the withheld information and considers that it relates to the potential sale and/or acquisition of a banking service. This is clearly a commercial activity and therefore falls within the scope of the exemption.
31. Having concluded that the withheld information falls within the scope of the exemption the Commissioner has gone on to consider the prejudice which disclosure would cause and the relevant party or parties which would be affected.
32. In order for a prejudice based exemption, such as section 43(2), to be engaged three criteria must be met.
 - Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. whether disclosure 'would be likely to' or 'would' result in prejudice.
33. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.
34. HMT considered that disclosure of the disclaimer would prejudice the commercial interests of the parties engaged by HMT to advise on the process.

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http://www.ico.gov.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

35. In relation to the commercial interests of third parties, the Commissioner does not consider it appropriate to take into account wholly speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects that arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.
36. In its response to the Commissioner HMT explained that although this information relates to events in 2008 it considered that release of the information covered by this exemption would still be likely to prejudice the commercial interests of the parties involved.
37. As HMT did not appear to consult with the relevant parties, the Commissioner has considered whether HMT has sufficient prior knowledge of those parties concerns to reach this conclusion without consultation.
38. Given the circumstances of the case and the information requested the Commissioner accepts that HMT would have sufficient prior knowledge of the third parties to be able to highlight its concerns.
39. HMT stated that if the disclaimer was released this would be prejudicial to the commercial interests of the companies who were engaged to advise HMT on this process. They and other companies who provide such specialist advice may be less willing to advise on future rescue operations, asset sales or auctions. HMT provided little explanation in the context of the specific information in the disclaimer which does not appear to contain specific details.

Is the exemption engaged?

40. In determining whether or not the effect of disclosure in this case would be detrimental or damaging in some way to the commercial interests of the relevant parties, the Commissioner has considered the nature and likelihood of harm that would be caused.
41. In the Commissioner's view, a commercial interest relates to a person's ability to participate competitively in a commercial activity. Disclosure of information which shows a negative analysis of a company's financial situation is likely to have a negative impact on any other parties' assessment of that company, for example, to engage them as a contractor; to supply them; to work for them.
42. The Commissioner's guidance and many previous decision notices have accepted the general principles that information relating to a commercial

activity is more likely to be sensitive when the activity in question is live².

43. The Commissioner considers that the prejudice test is not a weak test, and that an evidential burden rests with public authorities to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, real, actual or of substance. In the Commissioner's view, if a public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected.
44. The Commissioner is not satisfied that HMT has demonstrated sufficient prejudice to the third parties involved in the process related to the disclaimer and section 7 , and therefore does not accept that section 43(2) has been correctly applied.
45. It therefore follows that the Commissioner does not find the exemption is engaged. Having established that the section 43 exemption is not engaged with regard to this information the Commissioner is not required to consider the public interest test.

Section 41 – information provided in confidence

46. Section 41(1) is an absolute exemption under FOIA and provides that information is exempt from disclosure if it was obtained by the public authority holding it from any other person (including another public authority) and the disclosure of the information to the public by the public authority would constitute an actionable breach of confidence.
47. HMT has withheld the process letters, final bids and advice to the Chancellor by virtue of this exemption. The Commissioner has already found that the process letters are exempt by virtue of section 44(1)(a) and therefore has not considered these with this exemption. The information under consideration here is the extracts from advice to the Chancellor and Prime Minister and the final bids.
48. The Commissioner first considers whether the application of section 41(1) is correct by asking the following questions:-

² See, for example, this decision notice relating to the London Borough of Newham:
http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50431421.ashx
Reference: FS50533613

- Was the information obtained by the public authority from a third party? **and**
 - Would the disclosure of the information constitute an actionable breach of confidence?
49. The Commissioner is satisfied that the information contained in the final bids was obtained from a third party, as it was provided by the two banks bidding for B&B. With regard to the extracts from advice to the Chancellor and Prime Minister, HMT argued that this was based on information received from the FSA, despite several opportunities it did not explain which sections of the information were covered by section 41 on this basis. The Commissioner has therefore considered this information under section 35(1)(a) below rather than section 41.
50. HMT stated that the two banks had entered into a Confidentiality Undertaking with HMT and that the information provided by the two banks bidding for the B&B retail deposit book was provided in the strictest confidence. HMT considered that disclosure would constitute a breach of confidence, actionable by the providers.
51. HMT further stated that, as in any private transaction, the circumstances of the sale and the confidentiality around potential purchasers would have led the parties to believe that information provided by them would be held in confidence. Further, the bid from one bank was marked strictly private and confidential and was sent "*subject to the condition that its contents will not without prior written agreement from [redacted]. To be disclosed to any other person..*"
52. There is no evidence that the third parties have consented to disclosure.
53. With regard to section 41(1)(b), in most cases the approach adopted by the Commissioner in assessing whether disclosure would constitute an actionable breach of confidence is to follow the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three limbed test should be considered in order to determine if information was confidential:
- Whether the information had the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence; and
 - Whether an unauthorised use of the information would result in detriment to the confider.

However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

Does the information have the necessary quality of confidence?

54. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.
55. After viewing the withheld information and taking into account the submissions made by HMT, the Commissioner considers that the information withheld under section 41 is not trivial and is not publicly available. This is not considered to be trivial information to the third parties involved.

Was the information communicated in circumstances giving rise to an obligation of confidence?

56. HMT has argued that both banks entered into a confidentiality undertaking, and one bank had clearly marked the information as 'strictly private and confidential'. The Commissioner has not been provided with a copy of the confidentiality undertaking and therefore is not in a position to consider what provisions were contained in the undertaking.
57. At the time the banks provided the information to HMT, they had an expectation, due to the nature of the information, that it would not be disclosed to the public. Having viewed the withheld information, the Commissioner accepts that, given the nature of the information, the banks would not expect HMT to disclose it to the public at that time. Therefore he accepts that the information was communicated in circumstances importing an obligation of confidence.

Would disclosure of the information cause detriment to any party?

58. In its submissions to the Commissioner HMT also argued that disclosure of the withheld information would be detrimental to the Government as well as the banks concerned. The Commissioner does not consider such alleged detriment to be relevant; this is because the public authority must demonstrate some level of detriment to the *confider* of information not another third party. In this case the confiders are the FSA (now FCA) and the banks involved in the bidding process. Given the magnitude of the issues exposed by the banking crisis in 2008, and role of the B & B sale in the process of stabilisation, the Commissioner accepts that detriment to the banks involved in the final bids was likely if the

information was disclosed at the time of the request. The Commissioner acknowledges that the passage of time and changes circumstances of the bidders weakens the arguments about the scale and the extent of detriment, but he still accepts the detriment is likely to have been caused. He accepts the arguments that HMT have provided about the sensitivity of the markets that still existed at the time of the request.

Is there a public interest defence for disclosure?

59. Although section 41 of the FOIA is an absolute exemption and is therefore not subject to the public interest test outlined in the FOIA, case law on the common law concept of confidence suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence.
60. The Commissioner must therefore now consider whether there is a public interest defence on which HMT could rely. Public interest considerations under section 41 are different to the considerations of the public interest test outlined in the FOIA. In the FOIA a presumption in favour of disclosure must always be applied. However, under section 41 the starting point is that the information must not be disclosed unless the public interest arguments in favour of disclosure exceed the public interest arguments in favour of maintaining the confidence.
61. In correspondence to the Commissioner the complainant has argued that the UK banking crisis was caused by a government engineered credit bubble; the introduction of the IFRS in 2005 enabled the banks to indulge in false accounting, and the failure of the tripartite regulatory authorities to protect the interests of savers and investors.
62. The complainant further argues that the B&B nationalisation was a flawed decision, made in haste for political reasons. He argues that the confiscation of B&B and the immediate sale of its £20 billion savings unit and branches, which destroyed it as an ongoing business, is probably the best example of what went wrong due to government failures at the time.
63. Prior to *Derry City Council v The Information Commissioner* it was generally understood that for there to be a successful public interest defence against a breach of confidence, there would have to be an exceptional public interest in disclosure, usually revealing some wrong doing or preventing some public harm.
64. In Derry the Tribunal interpreted a Court of Appeal decision (*London Regional Transport v The Mayor of London*).

65. In the LRT case the judge at first instance said an exceptional case had to be shown to justify a disclosure which would otherwise breach a contractual obligation of confidence. The Court of Appeal did not expressly overturn this view but left the question open. Its final decision was to allow the disclosure in that case.
66. The Tribunal interpreted this as meaning :
 - No exceptional case has to be made to override the duty of confidence that would otherwise exist.
 - All that is required is a balancing of the public interest in putting the information into the public domain and the public interest in maintaining the confidence.
67. The Derry case was considered in the context of commercial confidentiality and the Tribunal identified a particular circumstance in which, in its view, the public interest in maintaining a confidence could be set aside. This should not be taken to mean that this will always be the case for commercial confidentiality.
68. The view of the Commissioner is that an express obligation of confidence should not be overridden on public interest grounds lightly and that a balancing test based on the individual circumstances of the case will always be required.
69. In weighing up the public interest arguments in favour of upholding an obligation of confidence, consideration should be given to the wider public interest in preserving the principle of confidentiality and the impact that disclosure would have on the interests of the confider. The weight of the consideration will depend on the context.
70. The consequence of any disclosure of confidential information will be, to some degree, to undermine the principle of confidentiality which is really to do with the relationship of trust between confider and confidant. People would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected.
71. The Commissioner has carefully considered the public interest arguments in favour of disclosure and the public interest arguments in favour of maintaining the confidence.
 - There is an obvious public interest in maintaining trust and preserving a free flow of information to a public authority where this is necessary for the public authority to perform its functions in the public interest.

- The banking sector remains of great general public interest with regard to 'bail-outs' and bonus payments;
 - The public will always have an interest in holding its government to account, especially at times when difficult decisions have to be made. This includes ensuring that a government has indeed done the best it could in the circumstances, such as obtaining the best price for the sale of an asset, for the benefit of the tax payers;
 - The public will always have an interest in ensuring that due process has been followed in order to obtain the best deal. The Commissioner notes that in this case the nationalisation and sale of the retail bank took place within a very short time period, whilst acknowledging that this may have been necessary in the circumstances;
 - The Commissioner considers that there is a public interest in openness and accountability in the activity of public bodies and government and also in allowing individuals to understand decisions made by public bodies and potentially allowing the same to be challenged.
 - Finally the Commissioner has considered the extent to which the confidential information informs the public interests above.
72. There are strong arguments in favour of disclosure however the Commissioner finds that these are not strong enough to overcome the importance of maintaining confidence in this case.
73. The Commissioner therefore considers that section 41(1) was correctly applied by HMT to the final bids in this case.

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

74. The Commissioner has considered application of the section 35(1)(a) to the extracts of advice.
75. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation and development of government policy.
76. Section 35 is a class based exemption, therefore if the 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.
77. 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.

78. At the very least 'formulation or development' suggests something dynamic i.e. something that is actually happening to policy. Once a decision has been taken on a policy line and it is not under review or analysis, then it is no longer in the formulation or development stage. Although section 35(1)(a) can be applied to information relating to the formulation or development stage of a policy that has been decided and is currently being implemented, it cannot apply to information which purely relates to the implementation stage.
79. Furthermore, the Commissioner does not accept that there is inevitably a continuous process or 'seamless web' of policy review and development. In most cases, the formulation or development of policy is likely to happen as a series of discrete stages, each with a beginning and end, with periods of implementation in between. This was confirmed by the Information Tribunal in *DfES v Information Commissioner & the Evening Standard* (EA/2006/0006, 19 February 2007) at paragraph 75(v), and *DWP v Information Commissioner* (EA/2006/0040, 5 March 2007) at paragraph 56.
80. In describing these general principles the Commissioner fully recognises that policymaking can take place in a variety of ways: there is no uniform process. 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 precise context and timing of the information in question.
81. Nevertheless, 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.
82. Given the variety of different ways in which policy can be made, it is not always easy to identify exactly when a policy is finalised so that formulation ends and implementation begins. Again, there is no single rule: this will depend on the facts of each case.

83. The classic and most formal policy process involves turning a White Paper into legislation. The government produces a White Paper setting out its proposals. After a period of consultation, it presents draft legislation in the form of a bill, which is then debated and amended in Parliament. In such cases, policy formulation can continue all the way up to the point the bill finally receives royal assent and becomes legislation.
84. In other cases where legislation is not required, a public announcement of the decision is likely to mark the end of the policy formulation process.
85. Once a policy decision has been finalised and the policy process is complete, the sensitivity of information relating to that policy will generally start to wane, and public interest arguments for protecting the policy process become weaker. If the request is made after the policy process is complete, that particular process can no longer be harmed.
86. HMT stated that the information it considered in scope of this request relates solely to the information created ahead of the sale itself – when the decision to sell was implemented.
87. It is clear that this part of the withheld information meets the 'key indicators' set out above and the information related to the formulation and development of government policy. The Government decisions made related to the sale of Bradford and Bingley were clearly policy decisions and the information relates to that policy decision. The Commissioner considers that the exemption is engaged and has gone on to consider the public interest test. Public interest arguments under section 35(1)(a) should focus on protecting the policymaking process. This reflects the underlying purpose of the exemption. Arguments about other issues (e.g. the personal impact on individuals, or the commercial interests of stakeholders) are not relevant.

Public interest arguments in favour of disclosing the withheld information

88. The Commissioner has considered the public interest arguments considered above.
89. The Commissioner has also considered the counter argument to 'chilling effect' – that disclosure may not lead to poorer quality advice and decision making, knowing that advice might be subject to future disclosure under FOIA, but could actually lead to better quality advice being provided from the external scrutiny

Public interest arguments in favour of maintaining the exemption

90. HMT argued that the release of the information held is not in the public interest as it sets out officials' free and frank views (reflecting the views of the FSA based on information provided to HMT under s.348(1) of FSMA) on the merits of selling the retail deposit book, including legal risks. This was advice that had to be prepared during a fast moving emergency. It also contains views on the relative merits of the bidding organisation, which if released, would be taken as the Government's view of them and could cause reputational and commercial damage to the organisations.
91. HMT further argued that if this information was to be released there would be a chilling effect on the candour and conciseness of advice given to Ministers on banking. These views are formed on the basis of advice given to HMT in the strictest confidence from the supervisor, under FSMA.
92. HMT considered that the release of details would mean that officials would be less willing to give frank views in future which would mean that Ministers were less well-informed when taking decisions. This would not be in the public interest.
93. The purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a safe space to consider policy options in private.

Balance of the public interest

94. With regard to the safe space arguments, the Commissioner accepts that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This will carry significant weight in some cases. The need for a safe space will be strongest when the issue is still live. Once the government has made a decision, a safe space for deliberation will no longer be required and this argument will carry little weight. Nevertheless, the Commissioner does accept that the government may also need a safe space for a short time after a decision is made in order to properly promote, explain and defend its key points. However, this safe space will only last for a short time, and once an initial announcement has been made there is also likely to be increasing public interest in scrutinising and debating the details of the decision. The timing of the request will therefore be an important factor in determining the weight that should be given to safe space arguments.

95. In the circumstances of this case the Commissioner is satisfied that by the time of the request the government's policy formulation and development regarding B&B was complete, and indeed had been implemented. Therefore in the Commissioner's view there was no need for the government to have a space safe in which to discuss the formulation or development of its policy on the sale of B&B. Furthermore, although the Commissioner recognises that this was clearly a high profile issue which attracted significant interest, he is satisfied that by the time of the request the government's need to have a safe space in which to explain and defend its decision had weakened considerably given that the sale took place five years earlier.
96. With regard to attributing weight to the chilling effect arguments, the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.
97. As discussed above, the Commissioner is of the opinion that the policy making in question was not live at the time of the request and thus he does not accept that disclosure of the withheld information would have a chilling effect the specific policy issue the information relates to. Nevertheless, although rejecting the concept of a seamless web of policy making, the Commissioner does recognise that disclosure of information such as this has the potential to have a chilling effect on future contributions to similar policy making discussions in the future which focus on similar issues. Having considered the content of the information that has been withheld on the basis of this exemption the Commissioner recognises that it consists of considerations of the various policy options, including the assessment of the potential bids, and thus given the nature of the content the Commissioner accepts that some weight should be given to the chilling effect arguments. The Commissioner also recognises the HMT's argument about ongoing market sensitivity and this could create a chilling effect if the information was disclosed. The case is therefore unusual in terms of sensitivity remaining over five years later. This is due to the uniqueness of the events of 2008 and interconnection of the sale of B & B with other matters of national importance in the financial sector. Whilst the Commissioner accepts

that the passage of time has reduced the risk and severity of chilling effect to some extent he still gives the chilling effect arguments weight.

98. Arguments regarding transparency and accountability, and furthering the public debate about the merits of the sale, attract notable weight. With regard to the information that has been withheld on the basis of section 35(1)(a), the Commissioner acknowledges that the information would enable the public to better understand the background to the sale and how Ministers were advised.
99. There are weighty arguments on both sides however the Commissioner has decided that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Right of appeal

100. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

101. 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.

102. 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

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