

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 June 2021

Public Authority: Government Actuary's Department
Address: Finlaison House
15-17 Furnival Street
London
EC4A 1AB

Decision (including any steps ordered)

1. The complainant submitted a request to the Government Actuary's Department (GAD) seeking information about the cash flows for the unfunded public sector pension schemes and information about the financial impact on such schemes of shortfalls in actual GDP growth versus assumed growth. The GAD directed the complainant to information falling within the first part of his request that was already in the public domain but sought to withhold information falling within the second part of his request on the basis of section 35(1)(a) (formulation and development of government policy) of FOIA.
2. The Commissioner has concluded that this information is exempt from disclosure on the basis of section 35(1)(a) and that in all the circumstances of the request the public interest favours maintaining exemption.
3. No steps are required.

Background

4. This decision notice concerns a request focusing on public sector pension schemes and more specifically the Superannuation Contributions Adjusted for Past Experience (SCAPE) methodology.
5. The SCAPE methodology is used to set employer contribution rates for public sector pension schemes. It defines a calculation which determines the cost of scheme benefits accrued and the value of the contributions paid. A key part of this calculation is the SCAPE discount rate, which determines the present value assigned to future payments.
6. In 2010 HM Treasury (HMT) consulted on the SCAPE discount rate, and in 2011 set the rate equal to long-term projected GDP growth. It was also set out that this rate would be updated for new assumptions every 5 years, with a methodology review every 10 years. This means that in 2021 there is due to be a SCAPE methodology review and a SCAPE rate review.

Request and response

7. The complainant submitted the following request to the GAD on 17 February 2020:
 1. *I would appreciate copies of the projected unfunded public sector pension scheme cash flows for the next 5 years. The employee/employer contributions and scheme benefit payments are expected to form a key part of the HMT budgets. Underlying projection assumptions are anticipated. Cost cap variations and case law complications (McCloud) may be caveated and excluded if required.*
 2. *I would also appreciate copies of any quantification, analysis or reports considering the financial impact (e.g. WoGA liability) of shortfalls in the SCAPE GDP assumption v actual GDP growth. Quantification might be justified from say 1980, but details from 2000 onwards would be appreciated.*

8. The GAD responded on 17 March 2020. It explained that projected cash flows for the unfunded public service pensions are published as part of the Office for Budget Responsibility's Economic and Fiscal outlook and provided the complainant with a link to the latest version¹. The GAD explained that it held further information falling within the scope of the request but it considered it likely that this was exempt from disclosure on the basis of section 35(1)(a) (formulation or development of government policy) of FOIA and it needed additional time to consider the balance of the public interest test.
9. The GAD contacted the complainant again on 9 April 2020. It confirmed that the further information in the scope of the request was considered to be exempt from disclosure on the basis of section 35(1)(a) of FOIA because it related to the formulation and development of government policy on the financing of the unfunded public service pension schemes. The GAD explained that it had concluded that the public interest favoured maintaining this exemption noting that this is a live area of policy development with a review of the SCAPE methodology due in 2021.
10. The complainant contacted the GAD on 21 April 2020 and asked it to conduct an internal review of this refusal, setting out why he considered the public interest to favour disclosure of the information.
11. The GAD informed him of outcome of the internal review on 21 May 2020. The internal review upheld the decision to withhold the information on the basis of section 35(1)(a) of FOIA.

Scope of the case

12. The complainant contacted the Commissioner on 25 May 2020 in order to complain about the GAD's handling of his request. He argued that the public interest favoured disclosure of the information that it had withheld on the basis of section 35(1)(a) of FOIA.

¹ [Economic and fiscal outlook – March 2019 - Office for Budget Responsibility \(obr.uk\)](https://obr.uk/economic-and-fiscal-outlook-march-2019/)

Reasons for decision

Section 35 – formulation and development of government policy

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

'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'

14. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.

15. 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.

16. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the content of the information in question and its context.

17. 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.

18. In its refusal notice the GAD argued that the withheld information fell within the scope of the exemption because it related to the formulation and development of government policy on the financing of the unfunded public service pension schemes. In its submissions to the Commissioner the GAD further explained that it had been commissioned by HMT to provide supporting analysis for the review of the SCAPE methodology,

due in 2021. As explained in the Background section to this decision notice, the SCAPE defines a calculation which determines the cost of scheme benefits accrued and the value of the contributions paid. The GAD explained that a key part of this calculation is the SCAPE discount rate, which determines the present value assigned to future payments. The GAD explained that the SCAPE methodology is very much analogous to the actuarial valuation process typically found in the private sector for funded pension schemes, except that with the main public sector pension schemes there is no fund of assets and the underlying legislative environment is very different.

19. The Commissioner accepts that the information falls within the scope of the exemption as it relates to the development of the government's policy in relation to the unfunded government pension schemes, and in particular the review of the SCAPE methodology in 2021. The Commissioner also notes that this methodology is only reviewed at ten year intervals which in her view supports the position that the policy around the review is a significant piece of work, ie a policy development, rather than simply continued implementations of an existing policy. Furthermore, the Commissioner accepts that it is clear that any potential decisions concerning this review are likely to be wide ranging and have real world change in terms of these pension schemes.
20. Section 35(1)(a) is therefore engaged.

Public interest test

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

Public interest in maintaining the exemption

22. The GAD argued that the SCAPE methodology is significant as it determines the employer contributions for public sector pension schemes and hence influences current and future Government spending and decision-making. The GAD noted that the complainant had highlighted in correspondence with it, that public sector pension schemes are a 'multi-trillion pound national commitment', with the potential for 'massive intergenerational liability transfer'. As such, the GAD argued that it is important to preserve a 'safe space' to debate this live policy issue and avoid any 'chilling effects' (ie a loss of candour in those policy discussions which could arise in the face of unwarranted or ill-informed external influences).

23. The GAD argued that the policy-making process must afford officials and ministers the opportunity to develop and consider a full range of options to enable a set of balanced decisions to be reached. It argued that when considering more 'controversial' policy options, it is important that officials and ministers feel comfortable that the policy will be presented accurately and without bias. The GAD also emphasised that this is a live policy area, and as a result disclosure of the information sought may cause officials and ministers to narrow their policy considerations in order to avoid the negative effects of any future disclosures. The GAD argued that this would damage the quality of advice and lead to poorer decision-making.
24. Finally, the GAD argued that public disclosure of documents of this nature would undermine the integrity of the policy processes. It explained that it had been working closely – and continues to work closely – with HMT officials to provide actuarial advice and analysis on the SCAPE methodology, and it is important that this work can be developed in confidence without being subject to any conscious or unconscious bias from external influences.

Public interest arguments in favour of disclosing the withheld information

25. The GAD accepted that there was a public interest in the disclosure of the information in order to promote government transparency and accountability and that openness will generally allow more informed debate, and thereby increase trust in the quality of decision-making.
26. The GAD also acknowledged that disclosure of the information may promote wider understanding for the public of this issue and that there is a general public interest in being able to assess the quality of advice being given to policy officials and ministers. Furthermore, the GAD recognised the broad public interest in furthering public understanding of the issues which public authorities deal with. There is a clear public interest in departments being transparent and open to scrutiny in order to increase diligence.
27. The complainant argued that the GAD's decision to withhold the requested information may have been overly influenced by the discrimination in public sector pensions as identified in the McCloud and Sargeant cases². However, he explained that in his view the age

² <https://www.judiciary.uk/wp-content/uploads/2018/12/lord-chancellor-v-mcloud-and-ors-judgment.pdf>

discrimination issue was very separate from the appreciation of the SCAPE discount and historic shortfalls in GDP growth compared to assumed growth.

28. Furthermore, the complainant argued that any shortfall between actual GDP growth and the SCAPE discount rate would result in the shortfall having to be met by future governments. He estimated that as result of GDP growth not meeting expectations this had resulted in shortfall of approximately £100bn, a burden which would be passed onto future generations. He argued that the retirement living standards of over 5 million hard working public servants are being put at risk and that such important benefits should be sustainable and transparently managed. The complainant emphasised that such arguments attracted even further weight in light of the impact on GDP growth as a result of the Covid-19 pandemic. As result of the figures involved and his view of the widespread impact of the short fall in GDP, the complainant argued that the public interest in disclosure of information on this topic exceeded the public interest in protecting the formulation and development of government policy.
29. The complainant also noted that the contractual nature of the pension promises suggested that any 'reforms' would only affect future accrual. As result past service costs or transfers are history and cannot be changed by current or future deliberations, as a result of which he questioned why it was necessary to hide quantification of the historical overestimate.

Balance of the public interest arguments

30. With regard to the arguments advanced by the GAD, the Commissioner considers that these can be categorised as arguments generally known as safe space and chilling effect arguments.
31. With regard to the former, the Commissioner accepts that significant weight should be given to the safe space arguments - ie the concept that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy making process is live and the requested information relates to that policy making. In the circumstances of this case the Commissioner accepts the GAD's position that the policy making is live as the SCAPE methodology review is due to take place in 2021 and furthermore that the withheld information relates directly to that policy making. Furthermore, having considered the content of the withheld information the Commissioner accepts that it clearly has the potential to encroach on the safe space as part of this policy making, especially taking into account the significant financial costs of the

unfunded public sector pension funds and the interest in these from various stakeholders. As a result of this, the Commissioner considers that the safe space arguments attract significant weight.

32. 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. As noted above, the Commissioner accepts that the policy making in relation to this issue was live at the time of the complainant's request. The Commissioner also considers the withheld information, at least in parts, represents a candid assessment of the issues in question and if disclosed, she considers it plausible to argue that those officials working on this area may be likely to reconsider how to draft similar documents in the future. In light of this the Commissioner has concluded that the chilling effect arguments attract notable weight.
33. In attributing such weight to both the safe space and chilling effect arguments, the Commissioner has taken into account the complainant's challenge as to why it is necessary to 'hide' the quantification of the historical over estimate of GDP growth given the contractual nature of the pension promises suggested that any 'reforms' would only affect future accrual. Despite this being the case, the Commissioner remains of the view that disclosure of the withheld information could still undermine the effectiveness of current policy making (via the safe space and chilling effect arguments discussed above) because although information *may* focus on historical estimates of GDP, any discussion of these is still relevant to future policy making in relation future changes to pension schemes. Having had the benefit of reviewing the withheld information the Commissioner is also satisfied that the GAD's concerns regarding the impact on policy making have not been unduly influenced because of concerns about the McCloud judgement and resulting changes to the pension schemes to address the discrimination identified by that judgement.
34. Turning to the public interest arguments in favour of disclosure, the Commissioner recognises that the amounts of funds are huge. The

Commissioner also accepts that there are millions of people who are potentially impacted by policy making decisions in this area, both in respect of individuals who are current and future members of the scheme, and more widely, taxpayers of the future who ultimately fund such schemes. In the Commissioner's view these factors add very significant weight to the public interest in disclosure of this information. In reaching this finding, the Commissioner also agrees that there is considerable public interest in ensuring that the government is transparent and open in relation to the management of these pensions' schemes, including analysis of how accurate and effective previous assumptions about GDP growth have been. In the Commissioner's view the disclosure of the withheld information would assist in meeting these various public interests and as a result the public interest in disclosing this particular information should not be underestimated.

35. Nevertheless, and by a narrow margin, the Commissioner has concluded that the public interest favours maintaining section 35(1)(a) and withholding the information. In reaching this conclusion the Commissioner does not seek to underestimate or undervalue the public interest in disclosure of the information given both the amount of money involved and the number of people affected. However, the Commissioner has been persuaded by the GAD's arguments that disclosure of the information prior to the 2021 SCAPE methodology review would have a significant impact on the effectiveness of policy making directly related to that review. This is particular the case given that the 2021 review is due to take place relatively quickly after the request was submitted, as opposed to taking place at some unspecified point in the future. Ultimately, in the Commissioner's view, the public interest is best served by ensuring the best quality policy making precisely because of the level of the funds involved and potential impact on millions of individuals.

Right of appeal

36. 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

37. 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.
38. 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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