

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 July 2015

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

Decision (including any steps ordered)

1. The complainant has requested information from HM Treasury (the Treasury) concerning the economic research analysis used by the Treasury in preparing the 'Help to Buy' policy which was announced by the Chancellor of the Exchequer in the 2013 Budget. The Treasury initially applied Section 35(1)(a)(formulation and development of government policy) to all of the withheld information and later also applied Section 43(2)(prejudice to commercial interests) to some of the withheld information. During the Commissioner's investigation the Treasury disclosed most of the previously withheld information to the complainant and relied upon the stated exemptions to withhold the remainder of the information.
2. The Commissioner's decision is that the Treasury correctly applied Section 35(1)(a) to the residual withheld information (the only part of the information which was also withheld under Section 43(2)) but that at the time of the request most of the information was not exempt by virtue of Section 35(1)(a). In failing to provide the complainant with this information, the Treasury breached Section 1(1)(b) and Section 10(1) of FOIA. However, as the Treasury has since provided the complainant with the relevant information which was not appropriately withheld, the Commissioner does not require the Treasury to take any further steps in this matter.

Background

3. The Help to Buy initiative was announced by the Chancellor of the Exchequer in the 2013 Budget as part of a package of support to tackle long-term problems in the housing market, by increasing the supply of low-deposit mortgages for credit-worthy households and increasing the supply of new housing. It was designed to stimulate the market against a background of low numbers of transactions in the five years following the 2007 financial crisis. It consists of two separate schemes: the equity loan and mortgage guarantee. Although the introduction of the equity loan scheme was announced by the Chancellor, the lead department for this policy is the Department for Communities and Local Government (DCLG). The Treasury is the lead department for the development of the mortgage guarantee scheme.

Request and response

4. On 7 May 2014, the complainant wrote to the Treasury and requested information in the following terms:

'Please send me the economic research analysis used by the Treasury in preparing the 'Help to Buy' policy (both parts) unveiled in the 2013 Budget. I am particularly interested in those aspects of the analysis related to the expected housing construction supply response to the policies'.

5. On 9 May 2014, the complainant submitted a follow-up request to see, *'the Treasury's internal estimates of Help to Buy take-up (for both parts of the scheme over its total lifetime)'.*
6. The Treasury provided a substantive response to the requests on 27 June 2014 and apologised for the delay, which it said had been necessitated by a consideration of the public interest balance. The Treasury confirmed that Help to Buy comprises two schemes – equity loan and mortgage guarantee, and that the response related to both schemes. The Treasury confirmed that Section 35(1)(a)(formulation and development of government policy) applied to all the information falling within the scope of the requests and that it considered that the public interest balance lay in favour of maintaining the exemption *'at this time'*.
7. In order to be helpful the Treasury provided the complainant with links to statistical information recently published by the (Coalition) Government concerning equity loan scheme supported completions in

the period April 2013 to March 2014, the number of completions by local authority to April 2014, and the number of mortgages to 31 March 2014 supported by Help to Buy.

8. The complainant requested an internal review on 27 June 2014 and this was provided by the Treasury on 15 August 2014. The Treasury advised the complainant that the review had been led by a different group to that which had considered the original requests and apologised for the delay in providing it.
9. The Treasury explained the policy formulation process in relation to Help to Buy and confirmed that it had extrapolated the information that it considered to be 'analysis' from the wider information held in relation to consideration of the scheme. The Treasury confirmed that its searches had not found any held information concerning analysis of the expected housing construction supply response.
10. The review noted that the equity loan part of Help to Buy had been developed by DCLG and that DCLG may have carried out its own analysis. The scheme built on DCLG's experience of Firstbuy¹ and drew upon information about that earlier scheme.
11. The review provided the complainant '*in relation to his request*' with a small amount of information from the pre-Budget advice, comprising extracts from wider papers containing policy advice about measures to support the housing market.
12. In maintaining Section 35(1)(a) to the requested information, the Treasury stated that whilst it recognised the public interest in understanding the analysis that informed Help to Buy, it considered that '*the over-riding public interest lies in maintaining the quality of Budget decisions. In making this decision we note that this information is still very recent and that your request relates to a time when the policy was not fully formed*'.
13. The Treasury advised the complainant that it considered that the information which had been published in relation to the Help to Buy scheme satisfied '*to a great extent*' the public interest in understanding the reasoning behind the scheme. In this context the review provided the complainant with a copy of information (dated 24 March 2014) which had been provided by DCLG to the Communities and Local Government Committee about pre and post-Budget 2013 analysis. The

¹ Launched in 2011 and subsumed into Help to Buy from April 2013

review also provided the complainant with a copy of information produced for the launch of the mortgage guarantee scheme on 8 October 2013 which provided the context and rationale for the scheme.

Scope of the case

14. The complainant contacted the Commissioner on 2 September 2014 to complain about the way his request for information had been handled. He expressed his belief that the reasons given by the Treasury for refusing to provide the information were '*spurious*' and that they represented '*a perversion of the spirit of the FOIA*'. The complainant also complained about what he described as the '*inordinate length of time*' it took the Treasury to respond to his requests and its '*repeated failure*' to keep him informed about the progress of his request.
15. During the course of the Commissioner's investigation, and having reviewed the withheld information, the Treasury was of the view that '*given the passage of time*' the public interest balance favoured releasing further information. The total withheld information within scope of the complainant's requests comprises 17 pages. On 15 January 2015 the Treasury wrote to the complainant and provided him with all the information concerning the equity loan part of the Help to Buy scheme which had previously been withheld under Section 35(1)(a) with the exception of a small amount of information (one line) provided by a third party. The Treasury also provided the complainant with all the information held on the mortgage guarantee part of the scheme with the exception of information concerning the methodology and calculations for the commercial fee charged to organisations participating in the scheme. The Treasury explained that this information was still in use, having been used to calculate the fee for 2015 and would be used to calculate the fee for 2016. The residual information (approximately five and a half pages) remained withheld under *both* Section 35(1)(a) and Section 43(2).
16. In submissions to the Commissioner the complainant stated that it was his view that Section 35(1)(a) had been '*cynically misused*' by the Treasury to delay the release of politically embarrassing documents. He contended that there had been no policy developments in relation to Help to Buy between his requests in May 2014 and the disclosure of much of the previously withheld information in January 2015 and that, '*if the information was safe to release in January 2015 it was surely safe to release in June 2014*'.
17. Ordinarily, in cases where a public authority provides the requested information to a complainant during the course of his investigation, the

Commissioner will adhere to his established position and not issue a decision notice for reasons of proportionality. However, in this specific case, given the complainant's contention that the Treasury deliberately delayed releasing the requested information, the Commissioner has considered whether the Treasury was entitled to withhold all the information within scope of the complainant's requests at the time that the requests were made in May 2014.

Reasons for decision

Section 35(1)(a)

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

'Information held by a government department or by the National Assembly for Wales is exempt information if it relates to –

(a) the formulation or development of government policy'.

19. The Commissioner has considered whether the withheld information relates to the formulation or development of government policy.

20. In the Commissioner's view, the term '*relates to*' should be interpreted broadly to include any information which is concerned with the formulation or development of the relevant policy. It does not have to be information specifically on the formulation or development of that policy.

21. In its internal review of 15 August 2014 the Treasury advised the complainant that:

'During preparation of the (Help to Buy) policy announced at Budget 2013, some analysis was provided to Treasury ministers by Treasury officials as part of policy submissions. The policy was also informed by contacts with a broad range of other individuals that Ministers meet while performing their public duties, as well as by information that is within the public domain including comments made by the Home Builders Federation (HBF), housing developers and independent research'.

22. The Treasury explained that the withheld information previously confirmed in its response of 27 June 2014 included estimates of the take-up of the Help to Buy: equity loan scheme, provided by DCLG and used for budgeting purposes, and of the take-up of the Help to Buy: mortgage guarantee scheme using internal macroeconomic assumptions and judgements. The mortgage guarantee estimates informed the

development of the policy and fed into the calculation of the fees that are charged to lenders for use of the scheme in 2014.

23. In submissions to the Commissioner, the Treasury confirmed that the withheld information consists of extracts from a submission to the Chancellor of the Exchequer prior to the Budget announcement in 2013. The submission formed part of wider advice on measures to support the housing market. The information relates to the methodology and assumptions used in setting the commercial fee for the mortgage guarantee scheme, including estimates of the take-up of the Help to Buy mortgage guarantee scheme using internal macroeconomic assumptions and judgements.
24. The Commissioner notes that the Chancellor of the Exchequer announced the Help to Buy scheme on 20 March 2013 as part of Budget 2013. The Help to Buy: equity loan scheme was opened to the public less than two weeks later on 1 April 2013². The scheme was administered by the Homes and Communities Agency (the Agency) through its network of Help to Buy agents. As noted by the House of Commons Committee of Public Accounts in its report on Help to Buy equity loans, DCLG and the Agency built upon their experience of running previous home equity schemes, such as FirstBuy, to implement to the Help to Buy equity loan scheme. They used delivery and administrative mechanisms already in place from similar schemes, rebranding the existing network of HomeBuy agents as Help to Buy agents.
25. In submissions to the Commissioner the Treasury confirmed that the Help to Buy: mortgage guarantee scheme, '*continued to be developed from Budget 2013 till its launch on 1 October 2013*'.
26. Having viewed the withheld information, the Commissioner is satisfied that it matches the description provided to the complainant (and the Commissioner). The information is related to the development of the Help to Buy policy and therefore Section 35(1)(a) is engaged in respect of all the withheld information.
27. As Section 35(1)(a) is a qualified exemption, the Commissioner has proceeded to consider whether the public interest in maintaining the exemption outweighed the public interest in disclosing the information at the time that the requests were made.

² The National Audit Office report (The Help to Buy equity loan scheme)

Public interest arguments in favour of disclosing the information

28. In its internal review the Treasury recognised that the provision of pre-Budget analysis would lead to greater transparency, making government more accountable to the electorate. It also recognised that release would increase trust and could also increase public awareness of the way government works. That could lead to a more effective and broadly based public contribution to the policy making process.
29. In submissions to the Commissioner the Treasury recognised *'that public interest is particularly acute in relation to matters of economic policy'* and noted that the *'impacts of policy components will mean that different sectors have their own individual interest in those components alongside their interest as citizens in the strategic impact'*.
30. Following the disclosure of much of the previously withheld information by the Treasury, the complainant provided the Commissioner with submissions in which he contended that the information in the released documents was, *'politically embarrassing to the Chancellor because the original Treasury advice was that one part of the Help to Buy scheme would have little impact on the additional supply of new homes (contrary to public claims the Chancellor made in 2014) and also that if the programme pushed up house prices it would reduce the number of expected transactions (which was one of the policy's stated goals)'*.

Public interest arguments in favour of maintaining the exemption

31. In its internal review the Treasury provided arguments in favour of maintaining Section 35(1)(a) to the withheld information. It contended that the disclosure of recent information relating to the formulation or development of sensitive policy advice would impede the effective conduct of Government and good policy making. This is because officials would be likely to feel inhibited from providing advice to Ministers about the range of options available to further develop the scheme and future similar schemes, and would be likely to restrain discussion as part of the process of developing, managing and delivering policies. This could lead to the quality of debate underpinning policy decisions being diminished.
32. More specifically, the Treasury stated that:

'The Budget is the Government's principal economic and fiscal report of the year and there is particular sensitivity about information produced to inform Budget decisions. The Government publishes the conclusions of its work on particular policy streams in considerable detail in the Budget document and other documents including policy costings that are published alongside the Budget report. We consider that the release of

officials' views, analyses and assessments that underpin the Budget report and the associated documents would inhibit officials from expressing their views in a free and frank way. We consider that this would impact upon the Budget decision making process making it less effective and efficient'.

33. The Treasury noted that in his decisions in relation to policy formulation and development the Commissioner has recognised the need to allow space for officials to give frank advice and consider different options. It contended that in relation to Budget decisions *'this space is particularly important'*.
34. The Treasury explained that the modelling information contained within the withheld information inputs directly into the calculations used to set the commercial fee and was used to set the commercial fee in late 2013 that will apply to lenders until the end of 2014. As the same methodology would be used in 2015 to set the fee in 2016, the Treasury stated that this part of the information, *'relates to live policy formulation'*.
35. In detailed submissions to the Commissioner the Treasury contended that:

'The disclosure of sensitive policy advice in itself poses dangers for good decision-making. Taking action to support the housing market is, as public comments have shown, a contentious area and constructing policy is a sensitive process as it always requires a balance of judgements'.
36. The Treasury submitted that in order to enable a package of support for housing to be constructed, Ministers and their officials need to be able to provide advice in confidence on policy matters. The release of sensitive policy information, particularly where policy options are seen to be sensitive, increases the risk that the candour and quality of policy advice may be compromised. In such cases, the Treasury contended that, *'Ministers and officials could become more risk-averse, less innovative in policy formulation, and less likely to challenge accepted wisdom or vested interests. They may be less likely to propose options that 'interest groups' might object to'*.
37. The Treasury opined that judgements in relation to Section 35(1)(a) had generally tended to discount the 'chilling effect' – the contention that disclosure of 'private policy space' information even after the event would stand to prejudice the effectiveness of such work in the future. However, the Treasury argued that the chilling effect was *'a real and significant factor in this case, in part because of the very high profile of this area'*.

38. The Treasury informed the Commissioner that it was not arguing that the information requested should never be released, *'rather that it is still live and release would prejudice the interests of the Treasury'* as described. The Treasury explained that the mortgage guarantee scheme is designed to provide a short-term stimulus to the high loan to value mortgage market and will be in operation until the end of 2016.
39. Finally, the Treasury contended that given the importance of the Budget decisions for the health of the economy, the potential harm from the 'chilling effect' is greater than in day to day policy making. *'There is a strong public interest in the effectiveness of the Budget process, which may be prejudiced by the release of information relating to matters that are likely to continue to be examined and kept under review in relation to future Budgets'*.

Balance of the public interest arguments

40. When applying the public interest test, the Commissioner must consider the circumstances that existed at the time that the request(s) was made. The Commissioner also considers that the timing of a request(s) is of crucial importance when determining whether information that relates to the formulation and development of government policy should be released.
41. The Treasury has essentially advanced two arguments in favour of maintaining the Section 35(1)(a) exemption to the requested information. These are that Ministers and officials need a safe space to consider different options in relation to Budget decisions, and that disclosure of sensitive policy information would inhibit the advice of Ministers and officials and have a 'chilling effect'. The Commissioner will address each argument below.
42. The Commissioner would recognise and accept that information produced to inform Budget decisions, carries significant sensitivity and there is an important public interest in maintaining the quality of advice on Budget decisions. As the Commissioner has noted in previous decisions (FS50503829), there is a strong public interest in allowing the Treasury the safe space to deliberate and candidly discuss policy options without the fear of premature public scrutiny at the formulation and development stage of the policy making process. Premature disclosure of information where a particular policy process was still live could clearly prejudice the Treasury and this would not be in the public interest.
43. However, in this particular case, the Commissioner notes that following the announcement of the Help to Buy policy in March 2013, the equity loan part of the scheme was launched on 1 April 2013 and the mortgage

guarantee part of the scheme was launched on 1 October 2013. By the time that the complainant came to submit his requests in early May 2014 both aspects of the scheme (with the exception of the fee information detailed below) had been opened to the public and the Help to Buy policy had moved from beyond the formulation and development stage to actual (albeit relatively recent) implementation. The Commissioner therefore considers that on the facts of this particular case, the need for the safe space in respect of most aspects of the Help to Buy policy had greatly diminished at the point in time that the complainant made his requests.

44. The Commissioner considers that at the time of the request the position was different in respect of the parts of the withheld information relating to the calculation of the commercial fee charged to organisations participating in the mortgage guarantee scheme. As the same methodology used for setting the fee in 2013 would be used in 2015 for setting the fee for 2016, this particular information (approximately 5 and a half pages) relating to the methodology remained live policy formulation at the time of the request (and indeed at the present time). The Commissioner is of the view that its disclosure would clearly have prejudiced the interests of the Treasury and not been in the public interest. In respect of this specific information, the Commissioner would accept that the need for the safe space contended by the Treasury existed at the time of the complainant's requests.
45. With regard to the 'chilling effect', the Treasury has contended that this is *'a real and significant factor in this case, in part because of the very high profile of this area'*. However, in this particular case, the Commissioner is not persuaded that disclosure of the requested information would increase the risk of compromising the candour and quality of policy advice or cause Ministers and officials to become more risk-averse or less innovative in policy formulation. If this were a real risk in this instance, then he considers it unlikely the Treasury would have chosen to disclose most of the withheld information to the complainant during the Commissioner's investigation. The Commissioner would also note that not much time (seven months) elapsed between the requests and this disclosure, which further weakens the chilling effect contention in this particular case.
46. In its disclosure letter to the complainant, the Treasury explained that given the passage of time, the public interest balance favoured the disclosure of much of the requested information to the complainant. The complainant has opined that there were no developments in respect of the Help to Buy policy in the period between his requests in May 2014 and the disclosure to him by the Treasury of most of the requested information in January 2015. The Treasury has not explained why the chilling effect arguments put forward were applicable in May 2014 but

no longer applicable in January 2015. Nor has it provided details of any changes to the Help to Buy policy in the intervening period which might have significantly affected the balance of the public interest. In the absence of such explanation the Commissioner considers, as the complainant has contended, that the information disclosed in January 2015 was safe to disclose at the time the requests were originally received and should have been so disclosed.

47. The complainant has been critical of the late disclosure by the Treasury and has imputed cynical motives to the same. Whilst it is correct to say, as the complainant does, that the now disclosed portion of the previously withheld information notes that Help to Buy will have '*limited impact on housing supply*' and that if the policy generated a house price increase of more than 10% then the number of additional transactions '*would be more than halved*', the Commissioner does not consider that there would be any advantage to the Treasury in deliberately delaying the release of such information over the period in question. The Commissioner notes that the Treasury chose to release the information to the complainant (and the public domain) only a few months prior to a General Election, which would not support the complainant's thesis.
48. Assessing the appropriate balance of the public interest in Section 35(1)(a) cases requires careful consideration, particularly where some of the requested information (the fee related information in this case) remains sensitive at the time that the request is received. In submissions to the Commissioner the Treasury recognised that public interest is particularly acute in relation to matters of economic policy. The Commissioner considers that given the high profile nature and public accessibility of the Help to Buy schemes, and the fact that both parts of the scheme were already in operation at the time of the complainant's request, the Treasury's assessment of the sensitivity of much of the requested information was overly cautious and did not take due weight of the public interest in disclosure.
49. However, the Commissioner notes that the Treasury provided the complainant with a small amount of the withheld information in its internal review and having reviewed the remaining withheld information in the context of the Commissioner's investigation, subsequently released most of the information (except that relating to the methodology for calculating the commercial fee and a one line reference to a third party) to the complainant. That disclosure should have occurred earlier in the process but the Commissioner considers that the Treasury's correspondence with the complainant clearly evinces a genuine intention to be helpful and a willingness to reassess its position in light of the Commissioner's investigation. Such behaviour on the part of a public authority should be commended rather than criticised.

50. In conclusion, given the high profile and significant public impact nature of the information and the fact that both elements of the Help to Buy scheme were in active implementation at the time the requests were received, the Commissioner is satisfied that at the time of the complainant's requests the public interest in favour of disclosure of the information later provided to the complainant in January 2015 outweighed the public interest in maintaining Section 35(1)(a). In failing to provide this information to the complainant when he originally made his requests, the Treasury breached Section 1(1)(b) and Section 10(1) of FOIA. Had the Treasury not already done so, then the Commissioner would have required it to provide the complainant with this information.
51. However, in respect of the residual withheld information, that relating to the methodology used for the setting of the commercial fee and the one line reference to a third party, the Commissioner is satisfied that at the time of the complainant's requests this information remained sensitive and that the public interest in maintaining Section 35(1)(a) outweighed the public interest in disclosure.
52. The Commissioner has found that the above (residual) information was correctly withheld under Section 35(1)(a). As the Treasury has now disclosed the remaining previously withheld information (the majority of the information as a whole), he has not considered the Treasury's application of Section 43(2) as this exemption was only applied to the residual withheld information exempt by virtue of Section 35(1)(a).

Other matters

53. The complainant has complained about the handling of his requests by the Treasury and the Commissioner would comment as follows.
54. The Treasury initially responded to the complainant's request of 7 May 2014 on the same date and advised him that Section 35(1)(a) was engaged but that further time was needed to consider the public interest balance (the complainant's follow-up request of 9 May 2014 was subsumed within this process).
55. Section 17(1) of FOIA requires a public authority to issue a refusal notice to a requester, stating the exemption(s) it is seeking to rely on, and why such exemption(s) apply. Notices issued under Section 17(1) must be issued within 20 working days of a request. If the public authority is relying on a qualified exemption (as in this case) then it can, by virtue of Section 17(3), take an additional period of time that is reasonable in the circumstances to consider the balance of the public interest test. The Commissioner's view is that in most cases 20 working

days should be an adequate period of time for such consideration and even in complex cases a maximum of 40 working days should be sufficient.

56. In this case, the Treasury provided its substantive response to the complainant's requests within 35 working days. Given the public interest factors relating to the requested information the Commissioner does not regard this length of time as being unduly excessive or unreasonable.
57. The Treasury took 35 working days to provide the complainant with its internal review. The Commissioner's guidance on internal reviews is that public authorities should ensure that they take no longer than 20 working days to complete in most cases or 40 working days in exceptional circumstances. Whilst the Commissioner would not regard the current case as being exceptional he notes that in an email to the complainant on 31 July 2014, the Treasury explained that the delay in providing the internal review was due to resource constraints, specifically the departure of a team member experienced in such reviews. The Commissioner notes that the Treasury apologised to the complainant for the delay in providing the internal review and that the actual internal review was both detailed and helpful.
58. Therefore the Commissioner does not consider that it took the Treasury an '*inordinate length of time*' to respond to these requests and the correspondence shows that the Treasury officials who corresponded with the complainant did so with courtesy and were apologetic for the delays which had occurred. The Commissioner would ask the complainant to reflect on this point in the context of the tone of the communications he sent to the Treasury in this case.

Right of appeal

59. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

60. 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.
61. 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

Alexander Ganotis
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF