

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 June 2014

Public Authority: Department for Business Innovation and Skills
Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant has requested information relating to an investigation into a loan made under the Small Firms Loan Guarantee Scheme. This included communications within the Department for Business Innovation and Skills (BIS) together with communications with the bank that provided the loan. The Department provided some information. Other information was withheld under section 40(2) – third party personal data, section 35(1)(a) – formulation and development of government policy and section 42 – legal professional privilege. Further information emerged during the Commissioner’s investigation which BIS withheld under section 40(2) and 42(1).
2. The Commissioner’s decision is that section 35 cannot be relied on to withhold one document, however personal data can be reacted from its contents. Section 42(1) is engaged in respect of most but not all of the information it has been claimed for. Where the section 42(1) is engaged the Commissioner finds that the public interest favours maintaining the exemption. Section 40(2) is engaged in respect of some of the information to which it has been applied but not to other.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information which the Commissioner finds either does not engage an exemption or cannot be withheld in the public interest.

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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 25 April 2013, the complainant wrote to BIS and requested information in the following terms:

“1) Copies of all information that the Department holds (to include diary entries, email correspondence, meeting notes and records of telephone conversations) that record any discussions, considerations, meetings and communication between the Department (to include its officials, ministers and advisers) and [the named bank] (to include its directors, staff, advisers, consultants and lobbyists) for the period between 1st September 2012 and 25th April 2013 which relate to the loan made by [the named bank] to [the named company] in 2006 under the Small Firms Loan Guarantee scheme and the subsequent investigation of that loan by [the auditors]; and

2) Copies of all information that the Department holds (to include diary entries, email correspondence, meeting notes and records of telephone conversations) that record any discussions, considerations, meetings and communication within the Department, its subsidiaries and associates (to include its officials, ministers and advisers) for the period between 1st September 2012 and 25th April 2013 which relate to the loan made by [the bank] to [the company] in 2006 under the Small Firms Loan Guarantee scheme and the subsequent investigation of that loan by [the auditors]. In particular this should include, but is not restricted to, information relating to correspondence from [the named owner of the company] and his advisers and information relating to queries from the Guardian.”
6. BIS responded on 22 July 2013. It provided some of the requested information but withheld the remainder. BIS stated that the withheld information was exempt under section 40(2) – third party personal data, section 35(1)(a) – formulation and development of government policy and section 42 – legal professional privilege.
7. Following an internal review BIS wrote to the complainant on 27 August 2013. It stated that it maintained its original position.

Scope of the case

8. The complainant contacted the Commissioner on 4 October 2013 to complain about the way his request for information had been handled. His complaint focussed on whether sections 35 or 42 were engaged and if so whether the public interest favoured maintaining those exemptions.
9. Personal data, for example the names of staff, had been redacted from the information which had been provided to the complainant. The complainant did not challenge these redactions which were made under section 40(2).
10. However during the course of the Commissioner's investigation it became apparent that when BIS looked at the information it believed fell within the scope of request, it had not considered the attachments to the emails. It disclosed a limited number of the attachments but withheld the remainder under sections 40(2) and section 42.
11. The Commissioner considers that the scope of the investigations is whether sections 35(1)(a) and 42(1) applies to any of the withheld information and in addition whether section 40(2) applies to any of the attachments which only came to light during the Commissioner's investigation.

Background

12. The request relates to a loan made under the Small Firms Loan Guarantee scheme. This scheme operated from 1981 to 2009 when it was replaced by the Enterprise Finance Guarantee scheme. Under the scheme the government would guarantee loans to small companies which had sound business plans but no security. This enabled them to obtain loans from the banks. The owner of one company which had received such a loan later argued that the loan did not comply with the rules of the scheme. His allegations were of interest to the press which were concerned that banks were abusing the scheme at a cost to public finances. Due to the nature of the allegations BIS instructed a firm of auditors to investigate the particular loan. The auditors produced a report in November 2012 which concluded that there was no clear evidence that the bank concerned had failed to follow its normal procedures when making the loan. This report was then the subject a freedom of information request. The owner of the company then provided additional information to BIS which prompted a review of the investigation. The review was concluded in March 2013 and upheld the original findings. The owner of the company then sought a judicial

review of how the investigation was conducted. Ultimately the courts refused permission for a judicial review. The request being considered in this notice was made after the conclusion of the second investigation but before permission to seek a judicial review had been refused.

Reasons for decision

Section 35(1)(a)

13. Section 35(1)(a) provides that information held by a government department can be withheld if it relates to the formulation or development of government policy.
14. The exemption has been applied to one document, a ministerial submission.
15. For the exemption to apply the information only has to 'relate' to the formulation or development of government policy. It is not necessary for the information in question to have been produced as part of the process of formulating or developing policy. However there does have to be some connection between the information and the policy process.
16. The exemption can apply to either the formulation of government policy, ie the creation of new policy, or the development of government policy, ie the review or amendment of an existing policy.

Ministerial brief

17. FOIA does not define what constitutes government policy. In general though it can be thought of as the means by which the government plans to achieve a particular outcome or a change in the real world. For it to be the **government's** policy it has to involve an element of political decision making. This does not mean that the policy has to have been decided by the cabinet but there does have to be the involvement of at least a minister. This is because only ministers have the mandate to make policy on behalf of the government.
18. In broad of terms, the document in question briefs a minister on the outcome of the investigation into a loan that was made to the named company some years ago. The loan was made under the Small Firms Loans Guarantee scheme. Under the scheme the government guaranteed loans made to small firms which had sound business proposals but lacked the necessary security to obtain finance. The investigation was prompted by allegations from the borrower that the loan did not comply with the rules of the scheme. The operation of the

scheme had attracted press interest. Concern had been expressed that the scheme could have been abused at a cost to public finances.

19. The Commissioner accepts that the Small Firms Loans Guarantee scheme was an example of government policy. It aimed to support small firms by making it easier for them to borrow money. The scheme was replaced in 2009 by the Enterprise Finance Guarantee Scheme. Therefore when the loan was initially investigated in 2012 and that investigation reviewed in early 2013, the policy had already been superseded.
20. At first glance it is difficult to see how there is any scope for there to be any policy development in respect of an already obsolete policy. However the Commissioner understands BIS to be arguing that there was still a live policy issue under consideration relating to its responsibilities under the scheme. BIS had always maintained that the government did not have a duty to investigate individual complaints about the Small Firms Loan Guarantee scheme and that the investigation that was conducted was the exception rather than the rule. It believed that any problems between the borrower and the lender needed to be resolved through the borrower's own complaints procedure and, if needs be, the Financial Ombudsman Service.
21. At the time of the request the owner of the named company was seeking a judicial review of BIS's handling of his complaint. This could have had implications for whether BIS had a duty to carry out independent investigations into such complaints and therefore its responsibilities in respect of other loans that had been made under the scheme. BIS has advised the Commissioner that a small number of other complaints had been received. Although ultimately the courts refused the application to seek a judicial review, at the time of the request there was the prospect of a judicial review. Therefore the Commissioner accepts that although the Small Firms Loans Guarantee scheme was no longer operating at the time the ministerial brief was written, there were still live issues relating to the government's responsibilities under that scheme. The contents of the brief were pertinent to those issues.
22. However not every change or refinement to an existing policy or, in the case of the Small Firms Loans Guarantee scheme, an obsolete policy, can be characterised as part of the government policy making process. Some changes will be made at an administrative level and lack the necessary element of ministerial decision making.
23. Therefore the Commissioner has carefully reflected on the extent to which BIS's consideration of how to respond to complaints and the outcome of a possible judicial review involved ministerial decision

making. In doing so he has considered all the information falling within the scope of the request as this should include any recorded information that revealed ministerial involvement. The only document which possibly suggests ministerial involvement in the process is the briefing note itself.

24. The briefing document simply informs the minister of the outcome of the second investigation into the loan. It is clear from its content that it is for information only. Therefore there is a good argument for finding that BIS's consideration of how to deal with complaints about the scheme lacked real ministerial involvement. It can be argued that the note simply briefs the minister about administrative or operational issues. In which case the exemption would not be engaged.
25. However BIS has stated in its submission to the Commissioner that its policy on how to respond to the allegations and complaints about the scheme were taking place in "a complex factual and political context". The Commissioner also recognises that in a busy working environment it is unrealistic to expect all ministerial input to be documented. Furthermore the Commissioner can understand how in the current climate both the behaviour of banks and the effectiveness of policies to promote economic growth, are politically sensitive issues. That sensitivity would be heightened by the press's interest. The Commissioner is also aware that the issues could have implications for the operation of the scheme that replaced the Small Firms Loan Guarantee scheme, ie the Enterprise Finance Guarantee scheme. In light of this the Commissioner accepts that the information in the briefing document does relate to the development of government policy.
26. Section 35(1)(a) is a qualified exemption which means that it is subject to the public interest test.

Public interest test

27. The public interest test is set out in section 2 of the FOIA. It provides that information can only be withheld if the public interest in maintaining the exemption that has been applied is greater than the public interest in disclosing the information.
28. BIS has argued that there is a powerful public interest in ensuring that ministers and officials have space in which to discuss sensitive policy options freely and frankly. It has stressed the importance of this safe space when considering its response to serious allegations about abuse of the Small Firms Loan Guarantee Scheme.
29. The Commissioner acknowledges that at the time of the request there was active consideration of how best to respond to allegations relating

to the scheme. He also acknowledges that those tasked with policy making often require safe space in which they can properly explore all policy options and debate them fully.

30. However it is important to focus on the information itself when considering what weight to give this argument. Having examined the information the Commissioner finds that there is little merit to the argument that its disclosure would undermine the safe space required. The reasons for reaching this conclusion are set out in the confidential annex which accompanies this notice. This is because they reference the withheld information itself.
31. The Commissioner gives very little weight to BIS's argument that disclosing the information at the time of the request would have undermined the safe space required.
32. In favour of disclosure BIS has recognised the public interest in increasing transparency. It has also recognised the value in disclosing information about the expenditure of public money.
33. The Commissioner gives some weight to both these arguments. However, the information would add little to the public's understanding of the circumstances in which any findings or decisions about the issue were made. However there is still a value in disclosing information that reveals the policy making process. There is a public interest in having the full picture of what was presented to the Minister. Furthermore there is a value in disclosing information which would reassure the public that the government is being as open as possible where there are allegations that banks are abusing government policy. This serves to promote confidence in the integrity of our financial institutions.
34. Having considered the issues above the Commissioner finds there is very little public interest in withholding the information because there is little prospect of it undermining the policy making process. As a consequence the public interest in disclosing the information easily outweighs that in favour of maintaining the exemption
35. The Commissioner finds that the information should be disclosed in the public interest. The only exception being the information which constitutes the personal data of third parties the disclosure of which would contravene the Data Protection Act 1998. This is discussed in more detail in paragraphs 71 – 78 below.

Section 42(1)

36. Section 42(1) provides that information is exempt if it would be protected by legal professional privilege in legal proceedings.

37. The purpose of legal professional privilege is to protect an individual's ability to speak freely and frankly with their legal advisor in order to obtain appropriate legal advice. It recognises that individuals need to lay all the facts before their adviser so that the weaknesses and strengths of their position can be properly assessed. Therefore legal professional privilege evolved to ensure communications between a lawyer and their client remain confidential.
38. There are two forms of legal professional privilege, litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about pending or contemplated legal proceedings.
39. Advice privilege applies where there is no litigation contemplated or in progress. It also protects confidential communications between a lawyer and their client and those communications have to be made for the dominant purpose of obtaining or providing legal advice.
40. BIS has argued that all the information apart that contained in one email is protected by litigation privilege. However upon inspecting the material the Commissioner has identified redactions from three emails which are only capable of attracting advice privilege. The Commissioner will first consider the application of section 42 to these emails.

Advice privilege

41. One of the pieces of information is contained in an email between two officials at BIS. Although neither of them are lawyers the email informs the recipient of the steps that are required when handling a freedom of information request. These steps are based on the advice of BIS's lawyers and effectively repeats the advice that was provided.
42. The Commissioner is satisfied that the information contained in the email constitutes legal advice. As both the sender and recipient of the email are officials involved with the issue to which the advice relates, the Commissioner is also satisfied that the advice has remained confidential to the lawyers' client. Therefore the Commissioner is satisfied that the information is capable of attracting legal professional privilege and therefore is exempt information under section 42(1).
43. The second email from which information could only have been redacted on the basis that it attracts advice privilege is from an official at BIS to the bank which made the disputed loan. Again the email deals with BIS's response to a freedom of information request. The Commissioner is satisfied that the information reveals the contents of legal advice. The next question is whether that advice is still confidential following BIS referring to that advice in correspondence with the bank.

44. The Commissioner considers that the legal advice will remain confidential if it has only been shared with a limited number of people on a restricted basis. The Commissioner is satisfied that in this case the bank would have recognised that the content of the email was confidential and would have treated it accordingly. As the Commissioner considers that the information is still capable of attracting legal advice privilege in these circumstances he finds that section 42(1) is engaged.
45. The final email potentially subject to advice privilege has been withheld in its entirety. The email is from one of BIS's in-house legal advisers to one of the Department's officials. It advises the official on the Department's obligations under the FOIA when responding a freedom of information request. The Commissioner is satisfied that it contains legal advice and has no reason to think that the advice has lost its confidentiality. He finds that the email is exempt under section 42(1).
46. The exemption is subject to the public interest test. Once the Commissioner has considered all the information withheld under section 42 he will then go onto to apply the public interest test to all the information which he finds is exempt.

Litigation privilege

47. BIS has claimed that the remainder of the information withheld under section 42(1) attracts litigation privilege. For litigation privilege to apply the legal advice must relate to legal proceedings that were either in progress or contemplated. The Commissioner is satisfied that the owner of the named company did seek a judicial review of BIS's handling of his complaint about the loan. It is very clear therefore that there was a real prospect of litigation.
48. The vast majority of information withheld under litigation privilege is contained in emails between BIS officials, their in-house legal advisers or lawyers from the Treasury Solicitor's Department. Some of those emails have attachments which BIS also claim attract litigation privilege. The Commissioner will consider the application of section 42(1) to the email and their attachments separately. First however he will consider the application of litigation privilege to one email between BIS officials who are not themselves legal advisers.

The one email between BIS officials who are not legal advisers

49. The email discusses the Department's response to the continuing concerns of the owner of the named company regarding the investigation into the loan. Two lines have been redacted from the email. The Commissioner has viewed the redacted information. It clearly sets out, albeit briefly, the gist of the legal advice obtained in relation of

the prospective judicial review. As both the sender and recipient of the advice are officials involved with the issue to which the advice relates, the Commissioner is satisfied that the advice has remained confidential to the lawyers' client. He finds that the redacted information attracts litigation privilege and is therefore exempt under section 42(1).

Emails between BIS officials, their legal advisers and lawyers from the Treasury Solicitor's Department

50. It is now necessary to consider the emails between BIS, its in-house advisers and advisers from the Treasury Solicitor's Department. The Commissioner has viewed all the emails between BIS and its legal advisers, including those from the Treasury Solicitor's Department. He is satisfied that they consist of communications between a client and its legal advisers and were made for the dominant purpose of seeking or providing legal advice. Furthermore that legal advice relates to prospective legal proceedings in the form of the judicial review. The emails include advice on grounds of defence and strategy. The Commissioner finds that the contents of the email do attract litigation privilege.

The attachments to the emails between BIS officials and their legal advisers

51. The emails referred to directly above also contained attachments. BIS has claimed that these attachments are also capable of attracting litigation privilege with one exception. That exception being a brochure which was used to explain and promote the Small Firms Loan Guarantee scheme at the time it was in operation. The Department has now disclosed this brochure to the complainant.

52. The rest of these attachments are either copies of letters sent to BIS by solicitors acting for the owner of the named company, in connection with his application to the courts for a judicial review, or are drafts of BIS's response to those letters. Briefly, the individual seeking a judicial review need to apply to the courts for permission to pursue the matter. Before they can do so there is a formal procedure that has to be followed referred to as the 'Pre Action Protocol'. This requires the claimant (in this case the owner of the named company) to inform the defendant (BIS) of their intention to seek a judicial review and to set out their grounds. The defendant then has to respond to those grounds.

53. In respect of the letters sent by claimant's lawyers the Commissioner is satisfied that these are capable of attracting litigation privilege. His approach when applying section 42 is that legal professional privilege can extend to correspondence between the parties to litigation, or proposed litigation. However that correspondence still needs to be confidential to qualify for legal professional privilege. The Commissioner

accepts that any correspondence that is solely between the claimant and BIS should be regarded as confidential. This is because in light of both the context in which those letters were sent and the content of those letters, both parties would have recognised them as being confidential.

54. The claimant also forwarded BIS copies of correspondence they had sent to another party. This correspondence was about legal proceedings that the claimant was taking against that other party. The legal proceedings were connected with the loan that was the subject of the proposed judicial review. This means that there are three parties privy to this correspondence. However the Commissioner considers that the claimant has disclosed the information on a restricted basis to both BIS and the other party. That is, both parties would have understood the need to respect the confidentiality of the correspondence received from the claimant. Therefore the correspondence does attract legal professional privilege.
55. Some of this correspondence from the claimant also had attached to it copies of the auditor's report which had already been disclosed under a previous freedom of information request. As a disclosure under the FOIA is taken to be a disclosure to the world at large, this report cannot be regarded as confidential. Therefore it is not capable of attracting legal professional privilege. However as the Commissioner is aware that the complainant already has a copy of that report and has indicated that he is not interested in information that he already has, the Commissioner has not pursued this matter.
56. There is another attachment which the Commissioner also finds is not capable of attracting legal professional privilege. The explanation of why the Commissioner has reached this conclusion is set out in the confidential annex. This is because it references the withheld information. Having concluded that the document does not attract litigation privilege, and is therefore not exempt under section 42(1), the Commissioner finds that the information should be disclosed.

Pre- action responses

57. The remaining attachments to the emails between BIS officials, their in-house lawyers and Treasury Solicitor lawyers, all relate to BIS's response to the claimant's proposed application for judicial review. As explained above in paragraph 52 the process for seeking a judicial review is a formal one. Once BIS had been informed of the claimant's intention, they were required to respond. That response is known as 'pre action response. The remaining attachments consist of a copy of the final response sent to the claimant and copies of drafts of that response that have been withheld under section 42. All these documents were created in the expectation of legal proceedings. Clearly all the unsent

drafts can also be regarded as confidential. Furthermore, in line with the Commissioner's approach to the application of section 42, correspondence between opposing parties to the proceedings can be regarded as confidential. The Commissioner therefore finds that these attachments are exempt under section 42(1).

58. Section 42(1) is a qualified exemption. Therefore in respect of the information which the Commissioner has found does attract legal professional privilege it is necessary to consider the public interest test. That information includes information from the three emails which attract advice privilege, the one email between BIS officials reciting the litigation advice that had been received, the main emails between BIS officials and their legal advisers, the correspondence from the claimant attached to some of those emails, and both the final and draft pre action responses attached to those emails.

Public interest test

59. The public interest test requires the public interest in favour of maintaining the exemption to be weighed against the public interest in disclosing the information. The information can only be withheld if the public interest in favour of maintaining the exemption outweighs the public interest in favour of disclosure.
60. It is accepted by the Commissioner, the Tribunal and the Courts that there is a strong inherent public interest in preserving the concept of legal professional privilege. This reflects the importance given to people being able to consult with their legal adviser in a full and frank manner. The need to safeguard the openness of these communications is fundamental to the British legal system.
61. The public interest in preserving legal professional privilege in this instance is increased due to the fact that at the time of the request the legal advice was very recent, much of having been provided within a couple of months of the request being made. Most of it was also live advice in that it related to the judicial review proceedings that were ongoing at the time of the request. There is therefore a weighty public interest in maintaining the exemption. The Commissioner accepts that the public interest in withholding the information attracting advice privilege is less. Although the advice was still recent it was not live as it related to a previous freedom of information request which had already been dealt with.
62. When considering the public interest in favour of disclosing the legal advice the Commissioner has taken account of the general public

interest in increased accountability and transparency of public authorities.

63. The Commissioner has had particular regard for the issue to which much of the advice relates. This includes not just whether the loan made to the named company complied with the rules of the scheme and the subsequent investigation, but the broader allegation that the scheme was being abused by banks. This issue was the subject of press interest.
64. It is alleged that a far greater percentage of the loans made under the Small Firm Loan Guarantee scheme are defaulted on compared to other loans. The suggestion is that banks are in effect passing the risk of these loans onto the government and thereby onto the tax payer. This is a serious matter and could potentially involve a large amount of public money. As well as the cost involved there is an issue about the behaviour of the banks at time when public confidence in the integrity of these institutions has been damaged. However it is important to remember that these allegations have not been accepted by BIS and have not been proven.
65. Very importantly, the Commissioner has viewed the legal advice in question. It does not actually shed any light onto whether the loan complied with the Small Company Loan Guarantee scheme. Nor does it directly address whether BIS handled the subsequent complaint about that loan in an appropriate manner or whether the outcome of the investigation in to that loan was robust. Therefore there is only a limited public interest in disclosing the legal advice.
66. When balancing the public interest in respect of section 42 the Commissioner finds that the public interest in preserving the concept of legal professional privilege together with the fact that all the advice was relatively recent and most of it was still live, is sufficient to outweigh the public interest in disclosure. Therefore section 42(1) can be relied on to withhold all the information which the Commissioner is satisfied does attract legal professional privilege.

Section 40(2)

67. Section 40(2) provides that a public authority can withhold personal data relating to someone other than the applicant if its disclosure would contravene any of the data protection principles set out in the Data Protection Act 1998. The first of those data protection principles states that the processing of personal data will be fair and lawful and in particular must satisfy at least one of the conditions set out in Schedule 2.

68. When BIS originally responded to the complainant they provided a number of emails from which personal data had been redacted. The personal data in question was mainly the names of BIS officials, bank officials and others connected to the loan that was investigated together with other information which could identify those individuals. The complainant did not challenge the application of section 40(2) to this information. Nevertheless outstanding section 40(2) issues did emerge during the Commissioner's investigation.
69. The first issue relates to the personal data contained in the ministerial brief referred to in paragraphs 17 – 35. Having withheld one entire document under section 35 BIS had, understandably, not felt it necessary to also apply section 40(2) to the personal data. When the Commissioner advised BIS that he did not consider section 35 could be relied on to withhold the brief, BIS took the opportunity to present arguments why some of that information should be withheld under section 40(2).
70. Also during the investigation other information was identified as falling within the scope of the request. These were attachments that were referred to in some of the emails that had already been released. Following discussions, the complainant advised the Commissioner which of those attachments he was interested in having access to. The attachments had been referred to in various ways by the authors of the emails to which they were attached. Ultimately the documents attached to two emails were identified of being of interest to the complainant. The documents in question are those attached to an email from the bank which made the loan to BIS, sent on 19 October 2012 at 13:20. The other consists of one document attached to an email sent between BIS officials on 30 November 2012 at 13:05. The attachments to both these emails were subsequently withheld in their entirety by BIS under section 40(2).

Ministerial briefing document

71. The Commissioner will first consider the application of section 40(2) to the information contained in the ministerial briefing document.
72. BIS has applied section 40(2) to the names of certain BIS official contained in the report. The Commissioner recognises that these individuals are named in the context of their professional lives and that therefore the disclosure of this information would not intrude upon the private or personnel life of those individuals. Nevertheless the Commissioner recognises that unless an official holds a relatively senior position within their organisation they would not expect their names to be disclosed in response to a freedom of information request. On this basis the Commissioner finds that disclosing the information would be

unfair and so contravene the first data protection principle. These names can be withheld.

73. BIS has also withheld the name of the individual who owned the company to which the loan was made. Although the loan was made to the company rather than the individual the whole debate around whether this particular loan conformed to the rules of the Small Firm Loan Scheme involved that individual's personal financial standing. The Commissioner is satisfied that an individual would not reasonably expect information to be released that identified them and connected them with other information about their personal finances.
74. The Commissioner is aware that the individual concerned has made certain information available to the press and therefore has to some extent potentially placed information about his business affairs in the public domain. However without clear evidence as to exactly what information has been disclosed to the press, or fully understanding the basis on which that information was provided the Commissioner considers it appropriate to be cautious before ordering further disclosures. In light of this the Commissioner finds that it would be unfair to disclose the name of the owner of the named company. This information can be withheld.
75. BIS has also withheld the name of an MP who also raised concerns about the loan. The Commissioner has visited the MP's website which contains articles in which the MP outlines his concerns and reveal the steps he has taken to raise the matter with the government. In light of this and the public role performed by MPs the Commissioner finds that it would not be unfair to disclose the name of the MP.
76. Other information has also been withheld from the briefing including the name of a firm of solicitors. The Commissioner finds that the information itself is not personal data. Furthermore the identity of those solicitors is contained in emails already released by BIS in response to the complainant's request. The Commissioner therefore finds that the information can be disclosed.
77. The remaining information withheld from the brief consists of the second bullet point on page one and paragraph 5 from the summary. The Commissioner understands that the information in paragraph 5 is already in the public domain. It is contained within the body of the first version of the report into the investigation. This had already been disclosed under a previous freedom of information request by the time of the request. The Commissioner is satisfied that it would not be unfair to disclose the information in response to this request.

78. In respect of the redactions from the second bullet point the Commissioner again finds the information, or at least the gist of that information, was already in the public domain at the time of the request. It appeared in a newspaper article published before the request was made. From reading the article the Commissioner is satisfied that the information was volunteered by the individual to whom it relates. It is also contained in the second version of the report of the investigation. BIS has informed the Commissioner that this was released to the complainant in response to his request with only very limited redactions. In light of this the Commissioner finds it would not be unfair to disclose this information.

Attachment to email between BIS officials 30 November 2012 sent at 13:05

79. The Commissioner will now consider the single document attached to the email of 30 November 2012 sent between officials at BIS on 30 November 2012 at 13:05. The attachment is a copy of an email that was originally to the bank from one of its advisers. The Commissioner accepts that the names of the sender, the recipient and three other individuals referred on the email can be redacted. Four of them are employees and the other is associated with the company which is the subject of the email. The Commissioner does not consider they would reasonably expect their names would be released to the public. He accepts that it would be unfair to disclose these names.
80. In respect of the actual content of the email the Commissioner does not accept that it constitutes personal data. Rather he finds that the focus of the information is a limited company. Therefore the Commissioner's decision is that the remainder of the email cannot be withheld under section 40(2). In the absence of the application of any other exemptions the Commissioner finds that this information should be released.

Attachments to emails between the bank and BIS sent 19 October 2012 at 13:20

81. The Commissioner will now consider the attachments to the email between the bank and BIS sent on 19 October 2012 at 13:20. One of those attachments was a publicly available court judgement which BIS has now released to the complainant.
82. One of the other attachments comprises of information that is publicly available from Companies House. The Commissioner accepts that the information in question is personal data however it would not be unfair to disclose information that is already in the public domain. This information should be disclosed.

83. The Commissioner accepts that the remaining attachments also constitute personal data. They consist of a covering letter and a number of enclosures. In broad terms it concerns a bank's consideration of an application for a personal loan including the financial assets of that individual. It identifies the individual and is very clearly of biographical significance. Although it refers to a number of limited companies, the focus of the information is on the individuals' overall wealth and business assets. Certainly at the time the data subject provided the information to the bank he would have expected the information to be treated as confidential. Normally the disclosure of such information would clearly be unfair. However in this case the consideration of fairness must take account of the information already disclosed in response to freedom of information requests and to what extent any of the information that has already been volunteered to the press by the data subject.
84. The Commissioner has considered the information contained in the remaining attachments is more detailed than that in any of the previously disclosed documents. Nor is he aware of any similarly detailed information having been volunteered by the data subject to the press. Therefore the Commissioner finds that it would be unfair to disclose this information to the public. The Commissioner concludes that the remaining attachments can be withheld under section 40(2).

Confidential Annex

85. The Commissioner has produced a confidential annex which will be made available to BIS only. It identifies certain emails and attachments referred to in this notice. Where necessary it also identifies the information that should be redacted from documents which the Commissioner is otherwise ordering the disclosure of. Where relevant the confidential annex will also identify other documents referred to. Finally the confidential annex contains Commissioner's analysis of the weight to be attributed to the safe space arguments in respect of the public interest in maintaining section 35 (see paragraph 30) and why one document (referred to in paragraph 56) does not attract litigation privilege. The reason for including this analysis in the annex is that it discusses the content of the withheld information in some detail and therefore cannot be included in the main body of the notice without effectively revealing the information itself.

Other matters

86. Although not part of the formal decision notice, the Commissioner considers it is important to comment on the fact that BIS did not initially recognise that the attachments to the requested correspondence fell within the scope of the request. It was only after the Commissioner had studied the covering emails and queried the matter with BIS that they consider these attachments.
87. In many cases attachments can contain important information. It is important that such attachments are not overlooked when responding to requests.

Right of appeal

88. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

89. 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.
90. 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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