

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 November 2021

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

Decision (including any steps ordered)

1. The complainant submitted a request to HM Treasury (HMT) seeking copies of the weekly public polling questions conducted by Hanbury Strategy and Communications on behalf of HMT. HMT withheld the information on the basis of sections 35(1)(a) (formulation and development of government policy) and 43(2) (commercial interests) of FOIA. It subsequently argued that if section 35(1)(a) was found not to apply then it would to seek to rely, in the alternative, on section 36(2)(c) (effective conduct of public affairs).
2. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of section 43(2) and that in all the circumstances of the request the public interest favours maintaining the exemption.
3. No steps are required.

Request and response

4. The complainant submitted the following request to HMT on 9 September 2020:

'in relation to the weekly public polling conducted by Hanbury Strategy under their contract with the Treasury. Please could you provide the following information: the full list of questions asked each week during the weekly public polling conducted by Hanbury Strategy.'

5. HMT responded on 30 September 2020 and confirmed that it held information falling within the scope of the request but that it considered this to be exempt from disclosure on the basis of section 35(1)(a) (formulation and development of government policy) of FOIA.
6. The complainant contacted HMT on 8 October 2020 and asked for an internal review of this decision.
7. HMT informed him of the outcome of the review on 8 March 2021. The review upheld the application of section 35(1)(a) and explained that it had also concluded that the information was exempt from disclosure on the basis of section 43(2) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 1 April 2021 in order to complain about HMT's decision to withhold the information falling within the scope of his request. He argued that neither exemption provided a basis to withhold the information, and in any event the public interest favoured its disclosure.
9. During the course of the Commissioner's investigation HMT explained that to the extent that any of the withheld information was not considered to be exempt from disclosure on the basis of section 35(1)(a), in the alternative it would seek to argue that it was exempt from disclosure on the basis of section 36(2)(c) (the effective conduct of public affairs).¹

¹ Sections 35(1)(a) and 36(2)(c) are mutually exclusive exemptions and cannot be applied to the same information.

Reasons for decision

Section 43(2) – commercial interests

10. Section 43(2) of FOIA states that:

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

The complainant's position

11. In his submissions to the Commissioner the complainant argued that HMT's reliance on section 43(2), based on its submissions in the internal review response, was impossible to justify. Rather, he argued that on the face of it HMT's position that disclosure would be prejudicial to any parties' commercial interests and negotiating positions was so tenuous that it cannot be seriously accepted as an argument to avoid disclosure under FOIA.

HMT's position

12. HMT provided the Commissioner with more detailed arguments to support its position that section 43(2) applied to the withheld information. In these submissions it argued that the commercial interests of three distinct groups would be seriously impacted by release of the polling questions: the supplier, HMT, and businesses and other economic actors.

13. With regard to the first group, HMT explained that it had consulted the supplier who created the requested questions, Hanbury Strategy and Communications, and they indicated their strong opposition to the disclosure of this information on the basis that in their view it would harm their commercial interests.

14. In support of this position HMT explained that topics which it would like to cover in weekly polling are discussed verbally on a weekly basis at a regular catch up between it and the supplier. Twenty-four hours following this meeting, the supplier produces a comprehensive discussion guide which HMT provides comments on and refines. As such, the HMT explained that the questionnaires are the supplier's work product and intellectual property.

15. HMT argued that the design and production of polling and focus group questions is a specialist and skilled activity, a core product offering of the provider and an integral part of the service that the supplier provides to the department. HMT further argued that there is considerable skill and experience required in designing questions in a

way which is not leading, and which encourages people to reveal their true opinions. As a result HMT argued that release of the supplier's work product, which is created under strict confidentiality agreements, would clearly provide an unfair commercial advantage to the supplier's competitors, who would gain insight into the supplier's practices, ways of working and techniques. HMT emphasised that this was particularly the case given that once information is released under FOIA, it is effectively released to the world. HMT argued that disclosure could undermine its suppliers' reputation and consumer confidence and provide their competitors with an unfair advantage. HMT explained that in its view this would undermine the provider's ability to compete on a level playing field in the future.

16. With regard to its own commercial interests, HMT argued that disclosure of the withheld information would be likely to result in a chilling effect on its future procurement for this type of activity. This was on the basis that disclosure would undermine the integrity of the process, breach confidentiality agreements in place between the supplier and the department and as a result disincentivise established and skilled providers from bidding for similar work in the future for fear of their intellectual property being routinely released. HMT argued that ultimately the exit of such providers from the market would lead to a smaller pool of companies for it to choose from, which would be likely to result in worse value for money for the taxpayer and limiting the information available to Ministers and Government officials to make the decisions with the widest possible breadth of information. HMT argued that its commercial interests would not be served by releasing information that could undermine its ability to procure crucial work in the future. It also emphasised that trust and effective stakeholder relationships between HMT and external suppliers are essential to successful partnership working. HMT argued that such trust between the department, supplier and this type of supplier would be eroded if this information were released into the public domain.
17. Finally, HMT explained that as would be expected as the UK's economics and finance ministry, it considers a wide range of potential options and policy levers available to it which would have far reaching consequences across the economy via many means, including through its polling questions. It argued that release of the withheld information could have negative consequential commercial impacts on businesses that would be impacted by the policies which were the subject of polling activity. HMT argued that should economic actors gain insight into the policy options under consideration by the Government this could have market moving consequences.
18. In order to support this line of argument HMT provided the Commissioner with a specific example which referred to the questions

contained in the withheld information. As such the Commissioner has not included these submissions in this decision notice.

The Commissioner's position

19. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
20. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by HMT – to all three distinct groups - does relate to the interests which the exemption contained at section 43(2) is designed to protect.
21. With regard to the second and third criteria, the Commissioner is satisfied that the disclosure of the withheld information has the potential to harm the supplier's commercial interests in the manner described above. The Commissioner has reached this view because she accepts that the withheld information represents the supplier's work product and that disclosure of this would clearly provide its competitors with an insight into their ways of working and techniques. In the Commissioner's opinion it is plausible to argue that this would provide the supplier's competitors within an unfair advantage and this in turn risks harming the supplier's commercial interests. The Commissioner therefore accepts that there is a more than hypothetical risk of prejudice occurring to the supplier's commercial interests, and in relation to this party, the second and third criteria are met.

22. In reaching this finding, the Commissioner wishes to emphasise that she has taken into account the fact that questions are used with the public. However, in her view this does not equate to the questions being in the public domain. This is because only a small sample of individuals will have been polled using these questions, and although this means that the withheld information will have been shared outside HMT and its supplier, this clearly does not provide the supplier's competitors with access to such information.
23. In terms of HMT's commercial interests, given the nature of the withheld information, ie it constitutes the supplier's own work and they are firmly of the view that the information should not be disclosed under FOIA, the Commissioner accepts that HMT's concerns about a chilling effect on the future procurement of such services is plausible. Furthermore, she accepts that if this (and other) suppliers are dissuaded from offering their services to HMT in what is a relatively small and specialised market then there is a real risk for HMT's commercial interests to be harmed with regard to the procurement of such services in the future. She is therefore satisfied that there is a causal link between disclosure of the withheld information and HMT's commercial interests and moreover that there is a real risk of such prejudice occurring. The second and third criteria in relation to this party are therefore also met.
24. With regard to the impact on the commercial interests of other economic actors, in the Commissioner's view this is harder to quantify. However, she accepts that in light of HMT's submissions, in particular the part of it which she cannot include in this notice, that there is a causal link between disclosure of the withheld information and a potential impact on the commercial interests of other economic actors, and as a result the second criterion is therefore met. In respect of the third criterion, having carefully considered the nature of the questions contained in the withheld information, and taking into account the number of economic actors potentially impacted by disclosure of the information, the Commissioner is persuaded that disclosure of withheld information risks having more than just a hypothetical impact on these actors. As a result the third criterion is met in respect of this group's commercial interests as well.
25. To summarise the above, the Commissioner is satisfied that section 43(2) is engaged because disclosure of the withheld information would be likely to harm the commercial interests of the supplier, HMT, and businesses and other economic actors. For the avoidance of doubt, the Commissioner does not need to have determined that prejudice would be likely to occur to all three groups for the exemption to be engaged. Even if just one of these groups' commercial interests were harmed then the Commissioner would still have concluded that section 43(2) applied.

Public interest test

26. Section 43(2) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of the FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Public interest in disclosing the withheld information

27. HMT acknowledged that interventions and policies implemented by it can, and do, have wide ranging consequences on individuals, families, businesses and financial markets. It explained that it therefore recognised the public interest in transparency and accountability and acknowledged that disclosure of withheld information would give an insight into the government's thinking in relation to a number of policy issues and the manner in which public money is spent.

Public interest in maintaining the exemption

28. However, HMT argued that it was not in the public interest to harm the commercial interests of its supplier, its own interests or those of wider economic actors. Nor was it in the public interest to produce poorer value for money for the taxpayer.
29. In support of this position, HMT argued that it was against the public interest to harm the commercial interests of companies who could be affected by the release of the withheld information. These companies, their employees, their shareholders and their customers could all be harmed by the potential market moving impacts of such a release, which HMT argued would be unfair and disproportionate.
30. HMT also argued that release of withheld information, ie simply polling questions, rather than detailed policy discussions, would also put partial and incomplete information without context into the public domain. HMT argued that this could lead to an escalation of misinformation and misunderstanding rather than the full transparency intended.
31. HMT argued that it did not believe that the public interest in transparency is strong in this instance because disclosure of the information would not provide proper insight into its decision-making processes and could have the unintended harmful consequences of commercial disadvantage. In contrast, HMT argued that release will lead to both potential and actual damage to the commercial interests of a wide number of actors – not least the tax payer and independent actors with no knowledge of this action or ability to have their arguments heard in this debate. HMT argued that the public interest therefore remained on the side of maintaining the exemption and preventing the harm to its

policy-making capacity and the commercial interests of the supplier, the department and businesses.

Balance of the public interest test

32. With regard to the public interest arguments in favour of maintaining the exemption, the Commissioner considers it important to note that the arguments considered must relate specifically to the exemption in question, that is to say the public interest in preventing harm to commercial interests. She notes that HMT has implied that there is a public interest in withholding the information in order to protect its policy-making capacity. That may well be the case, but such arguments are not relevant to the balance of the public interest in relation to the section 43 exemption (albeit they would obviously be relevant to any consideration of the public interest under section 35).
33. However, the Commissioner agrees with HMT that there are some strong public interest arguments for maintaining section 43(2) in the circumstances of this case. Firstly, in the Commissioner's opinion there is a very strong public interest in ensuring fairness of competition and in her view it would be firmly against the public interest if a company's commercial interests are harmed, in this case Hanbury Strategy and Communications, simply because they have engaged in business with a public authority. Secondly, the Commissioner agrees that there is a clear public interest in ensuring that the best value for money for the taxpayer is secured. Thirdly, the Commissioner acknowledges that there is the potential for a range of economic actors across different sectors of economy to have their commercial interests impacted as a result of the disclosure of the withheld information and that such a broad ranging outcome is also firmly against the public interest.
34. In relation to the public interest arguments in favour of disclosure, the Commissioner agrees that there is a clear public interest in HMT being open and transparent about the policy options that it is considering in relation to the economic management of the country. This is particularly so when the options being considered have the potential to impact numerous sectors, and as a consequence, millions of businesses, consumers and individuals. Disclosure of the withheld information would undoubtedly provide an insight into issues that HMT was sufficiently interested in to conduct polling on in the period covered by the withheld information.
35. However, the Commissioner accepts the validity of HMT's line of argument that the extent to which disclosure of simply the polling questions would actually provide the public with an insight into policy making is arguably limited. That is to say, it would only provide an insight into polling questions, not the policy making process that followed this, and it is possible that policy areas which are polled on are

not taken forward as policy options. Nevertheless, it would still provide the public with a direct insight into the early stages of the policy making. Moreover, the Commissioner is not persuaded by HMT's argument that there is a public interest in withholding the information to ensure that it is not misunderstood. Rather, in the Commissioner's view, when disclosing information under FOIA public authorities can set that information into a broader context to offset such a misunderstanding.

36. On balance the Commissioner has concluded that the public interest favours maintaining the exemption. She has reached this conclusion because in her view the fact that the disclosure of the withheld information risks harming the commercial interests of three separate and distinct groups provides very a significant, and ultimately compelling reason, to withhold the information.
37. In light of this decision the Commissioner has not considered HMT's reliance on section 35(1)(a) to withhold the information or its alternative position that section 36(2)(c) applies.

Other matters

38. FOIA does not impose a statutory time within which internal reviews must be completed albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe.² In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days. In the circumstances of this case HMT took 104 working days. The Commissioner expects HMT to ensure that internal reviews in future cases are completed within the timelines set out above.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

39. 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

40. 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.

41. 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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