

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 January 2023

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

Decision (including any steps ordered)

1. The complainant has requested reports by Hanbury Strategy. HM Treasury ("HMT") refused to provide these citing the FOIA exemptions at section 35 (formulation/development of government policy) and section 43 (prejudice to commercial interests) as its basis for doing so. It upheld this at internal review.
2. The Commissioner's decision is that HMT is entitled to rely on section 35 as its basis for withholding the requested information.
3. No steps are required.

Request and response

4. On 30 March 2021 the complainant requested information of the following description:

"Copies of reports delivered to the Treasury by Hanbury Strategy in the periods 10/6/2020 to 08/07/2020 and 10/1/2021 to 11/03/2021 that were based on focus groups and polling conducted by that company". For ease of future reference, I will refer to these as the "reports".
5. On 29 April 2021 HMT responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:
 - section 35(1)(a) (formulation/development of government policy)
 - section 43(2) (prejudice to commercial interests).

6. The complainant requested an internal review on 30 April 2021. They set out their arguments as to why the public interest favoured disclosure. They focussed on what they saw as a potential conflict of interest in respect of Hanbury Strategy's lobbying activity. They said: "A lobbying firm has been brought into government to devise policy, whilst simultaneously lobbying on behalf of its clients".
7. HMT sent them the outcome of its internal review on 26 May 2021. It upheld its original position and set out the basis for doing so.

Scope of the case

8. The complainant contacted the Commissioner on 1 June 2021 to complain about the way their request for information had been handled.
9. The Commissioner has considered whether HMT is correct when it says it is entitled to withhold the reports that the complainant requested.

Reasons for decision

10. HMT drew the Commissioner's attention to two previous cases where similar information was requested:

IC-98076-B5L7¹ and IC-111495-T5W4²
11. In IC-98076-B5L7, the request was for: "the full list of questions asked each week during the weekly public polling conducted by Hanbury Strategy [under its contract with HMT]".
12. In IC-111495-T5W4, the request was for: "the list of questions that the Treasury required Hanbury Strategy to ask of the public through focus groups/panels/polls etc as part of its two 2020 contracts (references CCZZ20A32 and CCZZ20A50) – as well as the questions of any other further contracts with opinion polling firms since February 2020. Please also furnish me with a list of the answers".

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/4019178/ic-98076-b5l7.pdf>

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4020500/ic-111495-t5w4.pdf>

13. These compare with the request in this case, which is for: “Copies of reports delivered to the Treasury by Hanbury Strategy in the periods 10/6/2020 to 08/07/2020 and 10/1/2021 to 11/03/2021 that were based on focus groups and polling conducted by that company”.
14. In other words, rather than the questions and answers themselves, the complainant has requested the reports generated following the polling exercises that Hanbury Strategy were asked to conduct. The Commissioner must consider each case on its merits.
15. HMT considers two reports from 2020 and 2021 respectively to be within the scope of the request. It has provided this information to the Commissioner.

Section 35(1)(a)

16. Section 35(1)(a) FOIA states: “Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to - (a) The formulation or development of government policy”.
17. This exemption is a class-based one which means that, unlike a prejudice-based exemption, there is no requirement to show harm in order for it to be engaged. The relevant information simply has to fall within the description set out in the exemption.
18. The Commissioner considers that the purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well considered or effective policies. In particular, it ensures a safe space to consider policy options in private. His guidance advises that a public announcement of the decision is likely to mark the end of the policy formulation process. The classic and most formal policy process involves turning a White Paper into legislation. In such cases, policy formulation can continue all the way up to the point the Bill finally receives royal assent and becomes legislation. The Commissioner understands the term ‘development’ of policy to include the process of reviewing, improving or adjusting existing policy.
19. The Commissioner considers that the term ‘relates to’ in section 35 can be interpreted broadly within the meaning of the class based exemption. This means that the information itself does not have to be created as

part of the activity. Any significant link between the information and the activity is sufficient.³

20. HMT identified a number of policies which, it argued, the withheld information related to. It explained how the withheld reports fed into different strands of policy formulation and development and why these policies were ongoing at the time of the request. It said "The ideas tested [in the reports] are an integral mechanism in the policy making process and help to shape how the department makes good policy". It also confirmed that any statistical information in the withheld reports related to live policy areas.
21. The Commissioner is unable to set out the detail of these arguments, including providing a description of the policies in question, because, to do so, would involve specific reference to the content of the withheld information.
22. Having considered the withheld information and HMT's explanation of specific detail, the Commissioner is satisfied that that it clearly comprises information relating to the formulation or development of government policy in relation to a number of policy areas. The Commissioner is satisfied that the exemption at section 35(1)(a) is engaged.
23. He has therefore gone on to consider the public interest and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The public interest

24. The key public interest arguments for this exemption will usually relate to preserving a 'safe space' to debate live policy issues away from external interference and distraction. There are often related arguments about preventing a 'chilling effect' on free and frank debate in future.
25. The Commissioner accepts that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This can carry significant weight depending on the circumstances of the case. The need for a safe space will be strongest when the issue is still live. The timing of the request is therefore an important factor.

³ <https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i70/DFES.pdf>

Public interest in favour of disclosure

26. The complainant asserted that Hanbury Strategy is a lobbying company and cited the Official Registrar of Consultant Lobbyists⁴ in support of this assertion. The complainant explained that all of that company's clients would be affected by Treasury Policy decisions. They commented that according to official transparency declarations the then Chancellor, Rt Hon Rishi Sunak MP had met representatives of the client companies on a number of occasions.⁵ They said that it is of extreme public interest to establish whether Hanbury "has not been working in policy areas that would overlap with its clients' interests as this would represent a serious conflict of interest". Only disclosure would, in the complainant's view, satisfy that public interest.
27. He added that "[a] lobbying firm has been brought into government to devise policy, whilst simultaneously lobbying on behalf of its clients" and "[it] is absolutely imperative that the Treasury releases these documents so that the public can independently assess the extent of this conflict of interest".
28. HMT also acknowledged a number of public interest factors. It recognised the direct impact that policies which it implemented had on both individuals and businesses. It also recognised that transparency can increase public trust and understanding of government decisions. It said "Disclosure of this information would offer insight into some of the Government's thinking as it responded to different challenges, one of the ways it was seeking opinions and information from the public and policy options which it was testing".

Public interest in maintaining the exemption

29. HMT stressed the importance of a safe space for policy making and the chilling effect on the free and frank exchange of views that disclosure would cause. Referring specifically to the withheld information it emphasised the distracting from the work in that space where there was the "non-contextualised or inadequately explained release of

⁴ [ORCL \(registrarofconsultantlobbyists.org.uk\)](https://www.registrarofconsultantlobbyists.org.uk)

<https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fregistrarofconsultantlobbyists.org.uk%2Fwp-content%2Fuploads%2F2022%2F01%2FJanuary-March-2021-Lobbying>Returns.xlsx&wdOrigin=BROWSELINK> – for example

⁵ This complaint to the Commissioner pre-dated Rishi Sunak MP becoming UK Prime Minister

information". It said that this would reduce the effectiveness of polling and focus groups as a means of testing policy proposals. This would, it argued, lead to inferior decision making. It explained that understanding public opinion was vital to making good policies which served the public.

Balance of the public interest

30. The Commissioner recognises the strength of the complainant's arguments. While there is a public interest in protecting the safe space in which policy is discussed and assessed, the use of a lobbying company to carry out the polling work in question does raise questions of potential conflicts of interest. The example information at Note 4 shows that the company in question is also paid to lobby on behalf of business who may well be affected by HMT's policy decision making.
31. The Commissioner also recognises the importance of maintaining the safe space in which different policy ideas are tested and considered as they are being formulated. While he does not give particular weight to the concept of the continuous cycle of decision making, he does accept that a number of different policies were being formulated at the time of the request. He acknowledges that the matters were under consideration were live. In the circumstances of this case, he recognises a greater public interest in protecting the safe space in which live matters are formulated and tested. Had the matters not been live at the time of the request, he would have given less weight to this argument given the strong public interest in disclosure that the complainant identified.

Conclusion

32. In light of the above, the Commissioner has concluded that, by a narrow margin, the public interest favours maintaining the exemption. In reaching this view, the Commissioner has given particular weight to the fact that the information would not enable the public to conduct further scrutiny or provide reasoning not already available. He does not find that the content of the information will actually add to public debate. In balancing the public interest the Commissioner has taken into account the timing of the request. He has given particular weight to the fact the requested information related to matters which were live at the time of the request.
33. Having concluded that HMT is entitled to rely on section 35(1)(a) as its basis for withholding all the requested information, the Commissioner has not gone on to consider whether it is also entitled to rely on section 43.

Right of appeal

34. 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

35. 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.
36. 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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