

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 October 2023

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

Decision (including any steps ordered)

1. The complainant made a request to HM Treasury (HMT) for information relating to a meeting between HMT and Binance. HMT refused to provide some of the requested information, citing sections 35(1)(a) (formulation and development of government policy, 40(2) (personal data of third parties) and 43(2) (commercial interests) of FOIA.
2. The Commissioner's decision is that HMT has correctly relied on sections 35(1)(a) and 43(2) of FOIA.
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 15 March 2023 the complainant requested information in the following terms:

“Please provide a copy of the minutes of, and the civil service briefing issued to ministers ahead of, the following meeting as per FOI2023/00463.

Meeting: UK Country Manager, Binance – 9 February 2022.”
5. HMT responded on 14 April 2023 and provided some information within the scope of the request but refused to provide the remainder, citing sections 35(1)(a), 40(2) and 43(2) as a basis for non-disclosure.
6. HMT provided an internal review response on 17 May 2023 in which it revised its position and disclosed some additional information within the scope of the complainant's request. However, it maintained its position

that the exemptions previously cited were applicable to the remaining withheld information.

Scope of the case

7. The complainant contacted the Commissioner on 31 May 2023 to complain about the way their request for information had been handled.
8. The Commissioner has considered HMT's application of sections 35(1)(a) and 43(2) of FOIA to the requested information as the complainant is not contesting HMT's application of section 40(2).

Reasons for decision

Section 35(1)(a) – formulation of government policy

9. Section 35(1)(a) FOIA provides an exemption from the duty to disclose information to the extent that it requires the disclosure of information relating to the formulation and development of government policy. The Commissioner understands 'formulation' to broadly refer to the design of new policy, and 'development' to the process of reviewing or improving existing policy.
10. The purpose of subsection 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 policy options in private.
11. The exemption is class based and so it is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged – there is no need to consider its sensitivity. However, the exemption is subject to the public interest test.
12. In accordance with the Tribunal decision in *DfES v Information Commissioner and the Evening Standard* (EA/2006/0006, 19 February 2007) the term 'relates to' is interpreted broadly. Any significant link between the information and the process by which government either formulates or develops its policy will be sufficient to engage the exemption.

13. HMT considers that the exemption in section 35(1)(a) is engaged because there is information within the scope of the request which relates to the formulation and development of the following Government policies: the policy approach to cryptoasset regulation and the positioning of the UK as a place open for cryptoasset businesses. The majority of the minutes of the meeting concern the Government's approach to the regulation of cryptoassets and the UK's positioning in relation to that.
14. These are live areas of Government policy development, and Government officials and Ministers have been seeking views from a broad range of stakeholders with an interest in these policy areas; this includes organisations like Binance. The open consultation closed on 30 April 2023, and the Government is now considering feedback and working to set out its consultation response. After the response has been issued, policy development will continue in relation to these policy areas in respect of the formulation and development of relevant legislative instruments.

What Government policy or policies does the requested information relate to?

15. The Commissioner's guidance for the Section 35 exemption is as follows¹:-

"The important point is that government policy is ultimately signed off by the Cabinet or Executive Committee or the relevant Minister. This is because only Ministers have the mandate to make policy. If the final decision is taken by someone other than a Minister, that decision does not itself constitute government policy".

Does the information relate to the development or formulation of government policy and not the implementation?

16. The Commissioner's guidance confirms that:-

¹ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>.

“to be exempt, the information must relate to the formulation or development of government policy.”

17. The Commissioner understands these terms to refer to the design of new policy and the process of reviewing or improving existing policy. It does not cover information relating purely to the application or implementation of established policy.
18. HMT states that the open consultation closed on 30 April 2023, and the Government is now considering feedback and working to set out its consultation response. After the response has been issued, policy development will continue in relation to these policy areas in respect of the formulation and development of relevant legislative instruments.

The Commissioner's conclusion

19. The purpose of the exemption in Section 35 (1) (a) is to provide a safe space to protect the integrity of the policy-making process.
20. Having regard to paragraphs 9-18 above, and to the information withheld under section 35(1)(a), the Commissioner is satisfied that the exemption is engaged. The withheld information is information generated by considering options in relation to the development of government policy on cryptoassets.
21. As section 35 is a qualified exemption, the Commissioner has also considered the balance of public interest arguments.

Public interest arguments in favour of disclosing the requested information

22. HMT recognises that there is an inherent public interest in transparency and accountability of public authorities. In this specific case, it also recognises that there is a public interest in the Government's approach to cryptoasset regulation and in upholding public confidence that HMT stays in touch with developments in financial services in the UK
23. HMT also recognises that there is a public interest in providing assurance that ministers treat financial services businesses fairly; and in ensuring that money is spent correctly on maintaining contact with financial services businesses.
24. HMT is also aware that Binance has been subject to media attention and regulatory action globally, including in the UK, and there is a public interest in how this has been carried out.

Public interest arguments in favour of maintaining the exemption

25. HMT states that there is a strong public interest in maintaining the safe space for it to engage with other bodies and international organisations on the development of policy. This is crucial for it to operate effectively as an economics and finance ministry and reach well-formed conclusions.
26. HMT considers that disclosing information which contributes to an ongoing decision-making process would inhibit future discussions.
27. In this specific case, HMT first considered the ongoing policy-making and consultative process on the Government's approach to regulating cryptoassets. The recently closed consultation covers a broad suite of activities, including exchanges, custody, and lending platforms and sets other the broad requirements that firms will need to meet (e.g. prudential and consumer protection).
28. Section 35(1)(a) is intended to ensure that the possibility of public exposure does not deter from full, timely and effective deliberation of policy formulation and development, including the exploration of all options. Releasing the information at the time the request was made, and any subsequent debate in the media, may have prevented or prejudiced the development of policy by causing undue distraction or hindered the consideration of all options. This would have not been in the public interest.
29. HMT has also considered the Government plans to make the UK a global cryptoasset technology hub. This includes exploring ways of enhancing the competitiveness of the UK tax system to encourage further development of the cryptoasset market. The information within scope of the complainant's request discusses multiple states, their approach to cryptocurrency and regulation as well as interaction between those states and Binance as part of these plans to make the UK a global cryptoasset technology hub. There is ongoing policymaking across the globe in relation to cryptoassets and various states' positioning in relation to them as well as live areas of Government policy development on cryptoassets (as outlined above). As such, there are ongoing sensitivity issues that could arise.

The balance of the public interest arguments

30. The Commissioner recognises that policy development needs some degree of freedom to enable the process to work effectively. HMT considers that there is a strong public interest in protecting information where release would be likely to have a detrimental impact on the ongoing development of policy.
31. HMT relies on information provided by a range of stakeholders to better understand the impact of policy proposals on different sectors across the economy. Engagement and feedback with representatives across different industries is central to economic policy decision-making because business is a crucial partner to Government in the UK's economic policy development, and meetings with third parties provide a crucial commercial perspective on delivery of Government policy.
32. Businesses like Binance share frank advice and feedback on the UK's approach to regulating cryptoassets. The requested information contains open and frank views from Binance employees which were shared on a confidential basis. Should this information be made public, it could deter stakeholders from similar future engagement with HMT, which could negatively impact policy development by limiting the range of views that officials can consider. This could undermine the subsequent development of policies by weakening the ability of Government to be fully informed.
33. Finally, the ongoing consultation and future response document, alongside regular engagement across the financial services industry, including with the cryptoasset sector, provides the public with confidence that HMT is in touch with developments in financial services across the UK. It also demonstrates that ministers treat businesses across the financial services sector fairly – showing due regard to the public interest. On balance, and with these considerations in mind, HMT has concluded that the public interest is in favour of withholding the this information.
34. The Commissioner has considered the withheld information and the arguments put forward by both parties. He accords significant weight to the public interest in the accountability and transparency of public authorities and in this case, in the Government's approach to the regulation of cryptoassets. He also accords significant weight to the public interest in knowing that financial service businesses are being treated fairly by Government and that the correct amount of money is being spent on maintaining contact with these businesses.

35. However, the Commissioner also accords significant weight to the public interest in not disclosing confidential information regarding businesses and thereby potentially negatively impacting policy development around financial regulation, in particular cryptoassets. The Commissioner is also mindful of the fact that the public interest as outlined in paragraph 34 is served in large part by the ongoing consultation and future response document, alongside regular government engagement across the financial services sector.
36. The Commissioner therefore finds that the public interest in maintaining the exemption at section 35(1)(a) outweighs the public interest in disclosure at the time of the request.

Section 43 – commercial interests

37. HMT considers some information within the scope of the complainant's request to be exempt under section 43(2) of FOIA.
38. Section 43(2) of FOIA provides that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
39. For section 43(2) to be engaged the Commissioner considers that three criteria must be met:-
- First, the actual harm that the public authority alleges would, or would be likely, to occur if the withheld information was disclosed must relate to the applicable interests within the relevant exemption.
 - Second, 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 that is alleged must be real, actual or of substance.
 - Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – eg disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
40. HMT considers that section 43(2) is engaged because disclosing the information in scope of this exemption would be likely to prejudice the commercial interests of Binance, for reasons provided in confidence to the Commissioner.

41. HMT considers that disclosing the withheld information would have a prejudicial effect on Binance's commercial interests and create a competitive disadvantage to the company.
42. The Commissioner, having perused the withheld information and HMT's arguments which cannot be reproduced in this notice, considers that HMT's concern is credible and that a position that the envisioned prejudice would be likely to occur is reasonable. The Commissioner is satisfied that the chance of the envisioned prejudice occurring is more than a hypothetical possibility and poses a real and significant risk.
43. Since the three criteria have been met, the Commissioner's decision is that some of the information the complainant has requested engages the exemption under section 43(2) of the FOIA. As section 43 is a qualified exemption, the Commissioner has considered the balance of the public interest test.

Public interest arguments in favour of disclosure

44. As the exemption in section 43(2) is a qualified exemption, HMT carried out a public interest test to establish whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. As stated above, in favour of releasing the information, HMT recognises that the inherent public in transparency and accountability of public authorities as well as furthering public understanding of the issues which public authorities deal with.
45. In this specific case, HMT recognises that Binance, the company in attendance at the meeting concerned, has been subject to media attention and regulatory action globally, including in the UK. Openness and transparency about information relating to Binance's commercial interests may therefore be in the public interest, particularly as it relates to regulatory action.

Public interest arguments in favour of maintaining the exemption

46. HMT states that it relies on information provided by a range of stakeholders to better understand the impact of economic policy proposals on different sectors. It considers that disclosing information which is likely to have a negative impact on the commercial interests of particular companies would be likely to inhibit not only their future engagement with HMT but also the future engagement of other companies.

47. HMT recognises that Binance has been subject to media attention and regulatory action globally. However, if HMT were to release commercially sensitive information concerning Binance, it could deter other stakeholders from future engagement with HMT, which could negatively impact policy development by limiting the range of views that officials can consider.
48. HMT also considers that prejudicing the commercial interests of a key market participant could distort competition in the market. Binance is one of the largest cryptoasset exchanges in the UK market, therefore, any impact to them commercially could cause a highly significant distortion in the market. This is heightened when considering that some of the information seemingly reflects HMT's views on the company and HMT's position of authority and influence in the financial services sector.
49. HMT also considers that its ongoing policy work satisfies to some degree the public interest in disclosure, in particular the public interest in the Government's approach to cryptoasset regulation. Its policy work upholds confidence that HMT stays in touch with developments in financial services in the UK and ensures the accountability of firms like Binance in relation to regulatory action.

Balance of public interest arguments

50. The Commissioner considers that there is a clear public interest in ensuring that the fairness of competition in the financial market is not undermined. He considers that this outweighs the public interest in transparency and accountability of the government in financial regulation, particularly as the public interest is satisfied to some degree by HMT's ongoing policy work.
51. The Commissioner therefore considers that the public interest is in favour of maintaining the exemption and that HMT is entitled to withhold the information falling within the scope of the request to which it has applied section 43(2).

Right of appeal

53. 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

54. 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.
55. 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

Deirdre Collins
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