

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 May 2023

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

Decision (including any steps ordered)

1. The complainant requested the OBR [Office for Budget Responsibility] reports relating to a statement by the then Chancellor Kwasi Kwarteng.
2. HM Treasury refused to provide the requested information citing sections 35(1) (formulation of government policy), 29(1) (the economy) and 41(1) (information provided in confidence) of FOIA.
3. The Commissioner's decision is that HM Treasury was entitled to apply section 41(1) to withhold the information.
4. The Commissioner requires no steps to be taken as a result of this decision.

Background

5. The OBR was created in 2010 to provide independent and authoritative analysis of the UK's public finances¹.

¹ <https://obr.uk/about-the-obr/what-we-do/>

Request and response

6. On 9 October 2022, the complainant wrote to HM Treasury and requested information in the following terms:

“I would like to see the OBR reports on the impact of the statement of 23 September 2022. It is vital to the democracy of the country that we as citizens are allowed to see the impact of fiscal policies introduced by the government, so hiding these documents from inspection is immoral at best.”
7. The request was made using the 'whatdotheyknow' website.
8. HM Treasury responded on 4 November 2022. It confirmed that it holds information within the scope of the request. However, it refused to provide that information, citing the following exemptions:
 - section 35(1) (formulation and development of Government policy);
 - section 29(1)(a) (prejudice to UK's economic interests); and
 - section 29(1)(b) (prejudice to the financial interests of the UK).
9. Following an internal review HM Treasury wrote to the complainant on 16 November 2022. It maintained its position.

Scope of the case

10. The complainant contacted the Commissioner to complain about the way their request for information had been handled. He disputes that the public interest favours maintaining the exemptions.
11. While acknowledging the appointment of a new Chancellor since the date of his request, the complainant told the Commissioner that he remains of the view that the public has a right to know what the OBR projected the impacts would be if the then Chancellor implemented his plans.
12. During the course of the Commissioner's investigation, HM Treasury additionally cited section 41 (information provided in confidence) of FOIA. It wrote to the complainant accordingly.
13. The Commissioner accepts that a public authority has the right to claim an exemption for the first time before the Commissioner or the Tribunal. The Commissioner does not have discretion as to whether or not to consider a late claim.

14. As the complainant remained dissatisfied, the Commissioner progressed his investigation.
15. With regard to the disputed information in this case, the Commissioner recognises that, in correspondence with the complainant, HM Treasury clarified the nature of the information it considers to be in scope of the request. In that respect it told the complainant:

“We would also like to clarify a possible misunderstanding in your suggestion that the OBR produced an assessment of the Growth Plan prior to it being announced. The Chancellor did not commission a forecast to be produced alongside the Growth Plan and therefore the OBR did not provide an assessment of its impact prior to announcement”.
16. It went on to explain that the Chancellor formally commissioned the OBR to produce a forecast on 26 September [2022] and requested they produce the first draft of their forecast on 7 October [2022], which included an assessment of announced policies in the Growth Plan.
17. In its submission to the Commissioner, HM Treasury confirmed the clarification it had provided to the complainant, namely that, prior to the Growth Plan being announced, no forecast was commissioned and therefore there was no prior assessment of its impact.
18. HM Treasury explained that 23 September 2022, the date specified in the request, was the date the then Chancellor presented his Growth Plan fiscal statement to Parliament.
19. HM Treasury told the Commissioner that, on 7 October 2022, the OBR sent the then Chancellor a draft forecast round and that this draft round of an OBR forecast, referred to as Round 2 draft forecast, is the information deemed to be in scope of the request.
20. HM Treasury also confirmed that it considers that each of the exemptions cited relate to the withheld information in its entirety.
21. The following analysis explains why the Commissioner is satisfied that HM Treasury was entitled to apply section 41(1) to withhold the requested information.

Reasons for decision

Section 41 information provided in confidence

22. Section 41(1) of FOIA states that:

“(1) Information is exempt information if—

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.'

23. Therefore, for this exemption to be engaged two criteria have to be met; the public authority has to have obtained the information from a third party **and** the disclosure of that information has to constitute an actionable breach of confidence.

24. With regard to whether disclosure would constitute an actionable breach of confidence, the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd* [1968] FSR 415. This judgment suggested that the following three-limbed test should be considered in order to determine if information was confidential:

- whether the information had the necessary quality of confidence;
- whether the information was imparted in circumstances importing an obligation of confidence; and,
- whether an unauthorised use of the information would result in detriment to the confider.

25. The Commissioner considers that, in its correspondence with the complainant about its application of section 41, HM Treasury relied to a large degree on the requested material being self-evidently exempt. However, it provided more detail in its submission to the Commissioner.

Was the information obtained from another person?

26. HM Treasury described the information in scope of the request as "the draft economic forecast produced by the OBR".

27. The Commissioner is satisfied that the information was obtained from another person.

Does the information have the necessary quality of confidence?

28. In the Commissioner's view, information will have the necessary quality of confidence if it is not otherwise accessible and it is more than trivial.

29. HM Treasury described the information as "clearly more than trivial" in that it contains "a draft assessment of the economic impacts of (what was at that point) government policy". It also confirmed that it was not otherwise accessible to the public.

30. The Commissioner is satisfied that the requested information has the necessary quality of confidence. The information is not trivial, nor is it in the public domain.

Was the information imparted in circumstances importing an obligation of confidence?

31. In support of its view that the information was imparted in circumstances importing an obligation of confidence, HM Treasury referred to the Memorandum of Understanding (MoU) between the OBR and HM Treasury. Specifically it referred the Commissioner to where it addresses the confidentiality involved in drafts of OBR reports and forecasts.
32. It also advised that it had consulted with the OBR regarding the information in scope. Based on its consultation, it told the Commissioner that it is clear that the OBR provided the draft forecast (as opposed to a final version of the forecast) to HM Treasury with the expectation that it would be used solely for the purposes of internal policy-making and not published or otherwise disclosed.

Would disclosure be of detriment to the confider?

33. HM Treasury did not provide the Commissioner with detailed arguments in relation to this criterion – detriment to the confider. However, it advised that it had consulted with the OBR who confirmed that the draft forecast round was sent in confidence to HM Treasury. Based on its consultation with the OBR, HM Treasury argued that disclosure would have a detrimental impact on the ability of the OBR to conduct its work without fearing that early drafts of its forecasts would be released.
34. The Commissioner is prepared to accept that it would be detrimental to the OBR if its ability to conduct its work was negatively impacted. He also accepts that a breakdown of trust between the parties would be detrimental to both parties.

Is there a public interest defence to the disclosure of the information?

35. Section 41 is an absolute exemption and so there is no requirement for an application of the conventional public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under FOIA). British courts have historically recognised the importance of maintaining a duty of confidence, so it follows that strong public interest grounds would be required to outweigh such a duty.

36. However, disclosure of confidential information where there is an overriding public interest is a defence to an action for breach of confidentiality. The Commissioner is therefore required to consider whether HM Treasury could successfully rely on such a public interest defence to an action for breach of confidence in this case.
37. The complainant's arguments recognise the public interest in accountability. Although not required to explain the reason for making his request, he stated that the purpose of his enquiry was to determine whether the then Chancellor made decisions on the Budget without, or in spite of, projections, and what those projections actually showed.
38. He also told HM Treasury:

".. it is abundantly clear that this is not an issue where confidentiality is in the public interest".
39. While acknowledging the public interest in promoting transparency through the release of information in response to an FOI request, HM Treasury considered that any public interest in release would be outweighed by the obligation of confidence owed by HM Treasury to the OBR.
40. It argued that there are extremely weighty grounds for preserving the confidence in this case, both from the point of view of the OBR and the wider public interest. For example, it considered that, by affecting the work of the OBR, disclosure could undermine the quality of the forecasts received by HM Treasury which would in turn undermine the policy-making process. It argued that this would clearly not be in the public interest.

The Commissioner's view

41. The role of the Commissioner is to regulate access to recorded information under FOIA. His role in this case is simply to consider if, at the time of the request, the public interest in disclosure outweighs the competing public interest in maintaining a confidence.
42. The Commissioner acknowledges that there is a public interest in disclosure of the withheld information as it would promote transparency and accountability with regard to fiscal matters.
43. However, in weighing the above public interest arguments for and against disclosure, the Commissioner has taken account of the wider public interest in preserving the principle of confidentiality. He is mindful of the need to protect the relationship of trust between confider and confidant and not to discourage, or otherwise hamper, a degree of public certainty that such confidences will be respected by a public authority.

44. Having considered all the circumstances of this case, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information.
45. Therefore the Commissioner finds that the information was correctly withheld under section 41(1) of FOIA.
46. In light of this decision, the Commissioner has not found it necessary to consider the other exemptions applied to the same information.

Right of appeal

47. 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

48. 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.

49. 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

**Laura Tomkinson
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