

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 25 March 2024

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested correspondence exchanged between Rt Hon Rishi Sunak MP (when he was Chancellor of the Exchequer) and Theleme Partners (including named individuals). HM Treasury ("HMT") refused to provide it citing section 35(1)(d) (operation of ministerial private office), section 40(2) (personal data), section 41(1)(b) (information provided in confidence) and section 43(2) (commercial interests) as its basis for doing so. It upheld this at internal review.
2. The Commissioner's decision is that HMT is not entitled to rely on section 35(1)(d) in respect of some of the requested information. It is, however, entitled to rely on section 40(2), section 41(1)(b) and section 43(2) in respect of the remainder.
3. The Commissioner requires HMT to take the following steps to ensure compliance with the legislation.
  - Disclose the information identified as correspondence from Rishi Sunak in this Notice. This does not include any email addresses contained in that correspondence. HMT is entitled to withhold these under section 35(1)(d) or section 40(2) as explained in this Notice.
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

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5. On 9 February 2023, the complainant wrote to HMT and requested information in the following terms:

"Please can you answer the following FOI request

1 - Do you hold any email, whatsapp or text message correspondence between the Rishi Sunak and the following companies/individuals: - Theleme Partners - John Sheridan (Partner at Theleme) - Patrick Degorce (Director at Theleme)

2 - If the answer to question 1 is yes, please provide a copy of all relevant correspondence.

Note: Please limit the date range of your search for relevant correspondence to 01 March 2020 and 30 June 2020.

Note: Please limit the subject of your search for relevant correspondence to Covid related matters and/or the appointment of Mr Sheridan as an advisor in HMT."

6. On 9 March 2023, HMT wrote to advise that it needed further time to consider the balance of public interest in relation to section 43 (commercial interests). It reiterated this in a letter of 6 April 2023.
7. On 5 June 2023, HMT provided a substantive response. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:
- section 35(1)(d) (operation of ministerial private office);
  - section 40(2) (personal data);
  - section 41(1)(b) (information provided in confidence); and
  - section 43(2) (commercial interests).
8. The complainant requested an internal review on 16 June 2023.
9. HMT sent them the outcome of its internal review on 13 July 2023. It upheld its original position. It explained that it held only a small amount of information within the scope of the request and that John Sheridan was not appointed as an adviser to HMT.

## Scope of the case

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10. The complainant contacted the Commissioner on 15 September 2023 to complain about the way their request for information had been handled.
11. Having considered the grounds of complaint, the Commissioner considers that the scope of his investigation is to decide whether HMT is entitled to rely on the four exemptions it has cited as its basis for withholding the requested information.

## Reasons for decision

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### Background

12. HMT provided the following background information:

"The Coronavirus Business Interruption Loan Scheme (CBILS) was a significant Government policy in response to the coronavirus pandemic. The scheme, alongside the Bounce Back Loan Scheme (BBLs) and Coronavirus Large Business Interruption Scheme (CLBILS) collectively supported more than £79 billion worth of finance to UK businesses of all sizes through the pandemic.

The scheme operated UK-wide, and accredited lenders to offer term loans, overdrafts, and invoice and asset finance with a generous 80% Government guarantee – in exchange for a fee which lenders paid the British Business Bank. Each lender paid this "scheme lender fee" in respect of each CBILS facility for each day that facility is outstanding.

The pricing of that fee was a key policy consideration; balancing the need to not overcharge lenders and thus disincentivise the utilisation of the scheme, against the need to ensure value for money for the taxpayer. In addition, the pricing of each facility (including interest and other amounts charged to the borrower) was required to align with the EU State Aid requirements to 1) to pass on to the borrower, the economic benefit of the guarantee (including any reduced costs to the lender in respect of credit risk and regulatory capital that a lender may obtain, as well as any reduction in risk and capital requirements) to the lender; and 2) for the scheme to be self-financing.

As such, a wide range of information was considered when formulating our policy response...."

13. The Commissioner has divided the withheld information into two parts. The first is correspondence from the then Chancellor Rishi Sunak MP

("correspondence from RS"). HMT cited section 35(1)(d) as its basis for withholding this information. The remainder is correspondence to the then Chancellor Rishi Sunak ("correspondence to RS"). HMT cited section 41 and section 43(2) as its basis for withholding this information. Both the correspondence from RS and the correspondence to RS include the personal data of junior officials – these are individuals who are identifiable from their email addresses or other reference to them. The correspondence to RS includes an email attachment.

## Section 40

14. HMT applied section 40 to the personal data of junior officials. The Commissioner is satisfied that the personal data of junior officials in this case is exempt from disclosure under section 40 of the FOIA. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
15. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
16. It is common practice for a public authority to argue that the names of junior officials are exempt from disclosure under FOIA on the basis of section 40(2) as disclosure would contravene the principles set out in Article 5 of the UK GDPR. Furthermore, unless there are case specific circumstances, the Commissioner accepts that the names of the junior officials are generally exempt from disclosure on the basis of section 40(2) of FOIA. In the circumstances of this case the Commissioner adopts the reasoning set out in these previous decision notices which found that the names of junior officials were exempt from disclosure on the basis of section 40(2) of FOIA.<sup>1</sup>
17. HMT has also applied section 40(2) to contact information relating to another named individual who is not an official. Using the analysis referred to in the decision notices linked in Note 1 (namely whether there is a lawful basis for disclosure), the Commissioner has considered whether there is a legitimate interest in disclosure of this information

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022310/ic-114449-b7p7.pdf> (paras 49-71) and <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022447/ic-110922-t9r1.pdf> (paras 39-62)

and whether disclosure of this information is necessary to satisfy that legitimate interest.

18. The Commissioner is satisfied that there is little legitimate interest in accessing what is clearly private contact information. It would add very little to the public's understanding of that named individual's connection to the request correspondence were such information to be disclosed. Disclosure of the contact information is not necessary to satisfy what little legitimate interest there is.
19. On balance, the Commissioner is satisfied that there is no lawful basis for the disclosure of this contact information. Where there is no lawful basis for making a disclosure of personal data, it can properly be withheld under section 40(2)

### **Section 35(1)(d) (operation of ministerial private office)**

20. HMT argued that correspondence from RS was exempt from disclosure under section 35(1)(d).
21. Section 35(1)(d) states that: "Information held by a government department or by the Welsh Government is exempt information if it relates to... ..(d) the operation of any Ministerial private office'.
22. Section 35(5) of FOIA defines a 'Ministerial private office' as meaning: 'any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister, or any part of the administration of the Welsh Government providing personal administrative support to the members of the Welsh Government.'
23. The exemption covers information that 'relates to' the operation of the private office with the phrase being interpreted broadly. However, it does not mean that all information with any link to a Ministerial private office is covered. Section 35(1)(d) refers specifically to the operation of a Ministerial private office, which itself is defined as providing administrative support. In other words, it covers information relating to the administrative support provided to a Minister.
24. As a consequence, this exemption is interpreted fairly narrowly. In effect, it is limited to information about routine administrative and management processes, the allocation of responsibilities, internal decisions about Ministerial priorities and similar issues.
25. The exemption is likely to cover information such as routine emails, circulation lists, procedures for handling Ministerial papers or prioritising issues, travel expenses, information about staffing, the Minister's diary,

and any purely internal documents or discussions that have not been circulated outside the private office.

26. In this case, HMT described the correspondence from RS as administrative. HMT's description made specific reference to the correspondence which the Commissioner will not set out here because it discloses its content.
27. The complainant queried whether the withheld information in question could fall within the category of information described in section 35(1)(d) particularly given the narrow interpretation of the exemption set out above. They referred to the Commissioner's own guidance on this.<sup>2</sup>
28. Having reviewed the information withheld on the basis of section 35(1)(d), the Commissioner is satisfied that it falls within the scope of this exemption.

### **Public interest test**

29. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(d) outweighs the public interest in disclosing the information.

### **Public interest in maintaining the exemption**

30. HMT argued that "private offices need a 'safe space' to focus on managing the minister's work efficiently without external interference and distraction". It explained that "The information was shared within a safe space environment, with the expectation that it would remain so. We also considered that a Private Office requires a safe space to avoid distraction and possible disruption to its operations. There is a strong public interest in a minister being able to rely on information they share with Private Office staff remaining in a protected space. A minister needs to be confident that their staff do not allow external considerations, such as media speculation to affect their judgement in the administrative tasks that form a large part of their day-to-day work".
31. It further argued that:

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<sup>2</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/#exemptionministerial2>

"We consider that a minister needs to have a candid relationship with their Private Office staff and in this case, we believed release would harm this important relationship by preventing the Minister from being fully open with their office, thereby restricting that relationship's effectiveness and reducing the candour between the minister and the Private Office, and the overall efficiency of the office. It is important that a Private Office runs smoothly, with two-way trust being an essential part of that working relationship. Private Offices must be able to rely on these arrangements and must be confident that Private Office administration can continue unhindered. We believe that this information on its own will not add any additional public value to the understanding of considerations the government made when setting up the CBILs scheme or to the understanding of how ministerial private offices are run. We would note that we have already addressed the public interest to some extent by releasing some information relating to this issue to a different requester".

32. This was a reference to an informal disclosure made during the course of a different investigation by the Commissioner. The information disclosed was related to the subject of this request although the information was not the same.

### **Public interest in favour of disclosing the information**

33. HMT acknowledged a public interest in transparency with particular reference to the circumstances of this case. It said:

"HM Treasury recognises the general public interest in transparency and accountability in the work of government and particularly to the response of HM Treasury and the Chancellor to the Covid-19 pandemic. There is also a general public interest in understanding how engagement between public authorities and external stakeholders take place."

34. As noted above, the complainant was sceptical that section 35(1)(d) would even apply. However, where it did, they argued that the "request concerns historical correspondence in relation to past decisions. It is therefore difficult to see how it would be harmful to disclose with the amount of time that has passed". They cited the Commissioner's own guidance in support of this point. They stressed that "there is a clear public interest in the transparency and accountability of government, and therefore in disclosure".

### **Balance of public interest test**

35. The Commissioner recognises that there is a clear public interest in protecting ministerial private office correspondence. A ministerial private office depends upon confidentiality and efficiency to work effectively.



36. However, section 35(1)(d) is not an absolute exemption. The Commissioner has looked at the specific circumstances of this case when considering the balance of public interest. Specifically he has considered whether the public interest in protecting the confidentiality of the ministerial private office outweighs the public interest in disclosure.
37. The correspondence in question took place right at the beginning of the period when the UK went into lockdown because of the Covid-19 pandemic. There is a public interest in knowing more about how HMT conducted itself throughout the pandemic, particularly in its early stages. This was an unprecedented and unpredictable situation where the national economy was put under tremendous strain. There is clearly a public interest in protecting the safe space in which such matters are dealt with at the highest level while that situation is live. However, once it is over, that public interest factor lessens.
38. The individuals mentioned in the request are former colleagues of Rt Hon Rishi Sunak MP from the period of time when he worked in the private sector. He worked at the hedge fund partnership referred to in the request<sup>3</sup>. Further comments regarding the balance of public interest are set out in the Confidential Annex to this notice. These make specific reference to the content of the withheld information.
39. The Commissioner recognises that, to an extent, disclosure of private office communications may have a chilling effect on future such communications. However, he does not believe that is a particularly strong factor in favour of maintaining the exemption in this case. The communication in question took place in a very unique period. There is a strong public interest in increasing the public's understanding of how HMT operated in the Covid-19 pandemic crisis.

### **Section 35(1)(d) - Conclusion**

40. Having considered the withheld information, the arguments of each party and what information is available in the public domain, the Commissioner has concluded that the public interest favours disclosure of the information to which HMT has applied section 35(1)(d).
41. That said, HMT can rely on section 35(1)(d) in respect of a particular HMT email address. While it is not personal data (no named individual can be identified from it), there is little public interest in disclosing it and it clearly has an important function for the smooth operation of the

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<sup>3</sup> <https://www.prnewswire.co.uk/news-releases/statement-on-behalf-of-theleme-partners-llp-301736308.html>



minister's private office. Were it to be disclosed, the Commissioner recognises that this could have a disruptive outcome for the function of the office which is not in the public interest.

### **Section 41 – Information provided in confidence**

42. 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.'

43. 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.

44. 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.

45. However, further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

46. The Commissioner has assessed each of these criteria in turn, taking into account the submissions provided to him by both HMT and the complainant. The information under consideration here is correspondence to RS.

### **Was the information obtained from another person?**

47. Correspondence to RS is correspondence sent from an external party to Rishi Sunak. It is information obtained from another person. Therefore

the Commissioner is satisfied that section 41(1)(a) of FOIA is clearly met.

**Does the information have the necessary quality of confidence?**

48. In the Commissioner's view, information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial. Having examined the withheld information in question, the Commissioner is satisfied that it is not trivial and it is not otherwise accessible.
49. The Commissioner therefore accepts that the information has the necessary quality of confidence.

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

50. HMT provided a letter from the individual in question which asserted that they had provided the information to HMT in confidence.
51. Given the nature of this information, the Commissioner accepts that disclosure of it was imparted in circumstances importing an obligation of confidence.

**Would unauthorised use of the information result in detriment to the confider?**

52. Disclosure under FOIA is disclosure to the world at large. HMT explained, with reference to submissions provided by the confider, how disclosure under FOIA would result in detriment to them. As part of its explanation, it said that the information is that individual's intellectual capital and that, if disclosed, other individuals could use it for their own benefit. The Commissioner accepts this explanation.

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

53. 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.

54. However, disclosure of confidential information where there is an overriding public interest is a defence to an action for breach of confidence.
55. The complainant was sceptical about HMT's reliance on section 41. He drew attention to the lack of explanation in its refusal notice or letter of internal review about the information. A public authority is expected under section 17(1)(c) to explain in a refusal notice why it is relying on a particular exemption. However, under section 17(4), it is not obliged to do so "if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information".<sup>4</sup> The Commissioner recognises that, in this case, the brevity and content of the information makes it difficult describe why its disclosure would be prejudicial without disclosing the information itself. The Commissioner recognises that this puts the complainant somewhat at a disadvantage in this case, particularly with regard to the provision of arguments about the public interest defence.
56. The Commissioner has proceeded to consider whether HMT could successfully rely on such a public interest defence to an action for breach of confidence in this case.
57. When considering the public interest in disclosure, the Commissioner has noted the points made above and other points considered in the Confidential Annex to this Notice.
58. However, the Commissioner recognises a strong public interest in protecting confidential submissions which outweighs factors favouring disclosure in the circumstances of this case. He does not agree that disclosure is necessary in this case to increase transparency about the submissions and has determined that the public interest in maintaining the duty of confidence is not outweighed. In reaching this view, the Commissioner has had regard for his own guidance on the factors which would constitute a public interest defence.<sup>5</sup>
59. The Commissioner has therefore concluded that the correspondence to RS is exempt from disclosure under section 41.
60. The correspondence to RS includes an attachment to an email that forms that correspondence. HMT applied section 43 to that information

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<sup>4</sup> <https://www.legislation.gov.uk/ukpga/2000/36/section/17>

<sup>5</sup> <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

### **Section 43 – commercial interests**

61. Section 43(2) of FOIA states 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. The exemption is qualified by the public interest test under section 2 of FOIA.
62. HMT explained that the disclosure of the information referred to would be likely to prejudice the commercial interests of one of the named individuals. It was, HMT explained, his intellectual capital and provided correspondence from this individual to support this as well as a copy of the information itself.
63. The Commissioner is satisfied first that the harm HMT envisages by citing section 43 relates to the individual's commercial interests. The Commissioner also accepts that a causal link exists between disclosure and commercial prejudice. The Commissioner accepts HMT's argument that the envisioned prejudice would be likely to happen i.e. it is more than a remote, hypothetical possibility.
64. The Commissioner acknowledges that the complainant disagrees that section 43 can apply but has reached his decision based on sight of the information itself and HMT's submissions including supporting evidence of correspondence from the individual regarding his view on disclosure in this case. When considering section 43 cases where the potential prejudice to third parties' commercial interests is envisaged, the Commissioner is not satisfied with speculative arguments from a public authority as to the potential for prejudice. He usually expects public authorities to show that they have consulted the third parties in question and, preferably, to see evidence of that third party's view. This was supplied in this case.
65. On the basis of his consideration of the evidence, the Commissioner's decision is that the exemption at section 43(2) is engaged. He has, therefore, gone on to consider whether the public interest in maintaining that exemption outweighs the public interest in disclosure.

### **Public interest in maintaining the exemption**

66. HMT said that it "relied on information provided by a range of stakeholders to develop sound and effective policy. Engagement and feedback with representatives of different industries is central to economic policy decision making. We consider that the disclosure of this information, which is [a third party's] intellectual property, is likely to have a negative impact on his commercial interests and would also be highly likely to inhibit his future engagement with the department.

Significantly, it would also be likely to lead other third parties from sharing commercially sensitive information with the Treasury if they believed there was a possibility the Treasury could release it. As stated above, confidential engagement with third parties – often including high profile businesses – is crucial to policy development. Any disclosure that would jeopardise these important relationships and subsequently the government's ability to develop effective policies based on relevant information would not be in the public interest."

67. It further argued that

"HM Treasury has been open with the fact that Mr Sheridan offered to supply the information and then did so. However, the information in itself would not greatly add to the general public interest but could be used by others working in Mr Sheridan's field to gain a competitive advantage. We also strongly believe that the damage that could occur to future stakeholder engagement outweighs the public interest in transparency in this case".

### **Public interest in disclosure**

68. HMT recognised "the general public interest in transparency in the work of government. In this particular case, we recognise that there is a public interest in the interactions between a third party and government officials/a minister in relation to the development of a Covid-19 support scheme for businesses".

69. The complainant argued that

"There is a general requirement for transparency in public life. Further, there is a specific interest in transparency in relation to government decision-making in respect of Covid-related matters. This affected the public at large and is clearly a matter of public interest, and one where disclosure will demonstrate accountability. These objectives of transparency and accountability underpin the pressing social need for disclosure, along with preserving the health of our democracy. As highlighted, the Information is likely to shine a light on the decision-making process and the factors influencing this process, and disclosure under FOIA is necessary to achieve this".

### **Balance of public interest**

70. Each request has to be considered on its own merits on a case-by-case basis. The Commissioner acknowledges the complainant's arguments about the importance of transparency, particularly with regard to the government's handling of the Covid-19 pandemic. However, he is not persuaded, with respect to this information, that disclosure would serve that interest to any particular degree. The countervailing argument

about the likely prejudice to the individual's commercial interests are, in the Commissioner's view, stronger in this case. The Commissioner has also given some weight to HMT's argument that disclosure would deter third parties from engaging with it.

71. On balance therefore, the Commissioner finds that the public interest favours maintaining the section 43 exemption with respect to the attachment in question.

## Right of appeal

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72. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

73. 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.
74. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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