

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 July 2024

Public Authority: HM Treasury
Address: 1 Horse Guards Road
Westminster
London
SWA1 2HQ

Decision (including any steps ordered)

1. The complainant made a request for information relating to the consultation on the 'buy now, pay later' (BNPL) scheme from HM Treasury (HMT). HMT refused to disclose the requested information, on the basis of section 35(1)(a) (the exemption for the formulation or development of government policy) and section 43(2) (commercial interests) of FOIA.
2. The Commissioner's decision is that HMT was entitled to withhold the requested information, under section 35(1)(a) of FOIA.
3. The Commissioner does not require further steps.

Request and response

4. On 17 October 2023, the complainant wrote to HMT and requested information in the following terms:

"1) Please provide a copy of all submissions made to ministers from 1st January 2023 by
 - Klarna
 - Zilch

- Laybuy
- Clearpay
- Splitit

Or their lobbyists on the topic of regulation of the buy now pay later industry.

2) If any other formal submissions or position statements have been made by these firms to the department, but not via ministerial office, on the topic of regulation and these are disclosable within the FOI cost limit, please provide them.”

5. HMT responded on 13 November 2023 and refused the request under section 35(1)(a) of FOIA.
6. HMT conducted an internal review on 15 December 2023, maintaining this position.

Scope of the case

7. The complainant contacted the Commissioner on 13 December 2023 to complain about the way his request for information had been handled.
8. During the Commissioner’s investigation, HMT also applied section 43(2) (commercial interests) to the withheld information.
9. The Commissioner considers the scope of this case to be to determine whether HMT is able to rely on section 35(1)(a) and/or section 43(2) of FOIA to refuse the requests.

Reasons for decision

Section 35 – formulation or development of government policy

10. Section 35(1)(a) of FOIA provides an exemption from the duty to disclose information to the extent that it requires the disclosure of information relating to the formulation or 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.
11. 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.

12. Section 35 is class-based, meaning that a public authority does not need to consider the sensitivity of the information in order to engage the exemption. It must simply fall within the class of information described. The classes are interpreted broadly and catch a wide range of information.
13. However, the exemption is subject to the public interest test.
14. In its submission to the Commissioner, HMT provided a background on the regulation of BNPL and the consultation carried out in 2023:

“Buy-Now-Pay-Later (BNPL) is a type of short-term, interest-free credit of periods of less than 12 months that has become increasingly popular globally in recent years. Recent data from the Financial Conduct Authority (FCA) indicates that in the six months to January 2023, around 14 million UK adults used BNPL.

BNPL is currently unregulated in the UK, meaning that agreements are not subject to the typical regulatory controls that apply to consumer credit agreements. The Woolard Review, published in February 2021, set out the potential detriment that unregulated BNPL may present as the market grew, particularly in relation to understanding of the product, lack of a requirement for affordability assessments when borrowers take out the product, and the treatment of customers in financial difficulty.

In early 2021, partly in response to the issues raised in the Woolard Review, the Government committed to bringing BNPL into FCA regulation to prevent potential detriment materialising. It first published a consultation on the proposed broad policy approach in October 2021 and subsequently consulted on the draft statutory instrument that would bring BNPL into regulation in February 2023. The consultation on legislation for bringing BNPL into regulation (‘Regulation of Buy-Now Pay-Later: consultation on draft legislation’) is available online here:

www.gov.uk/government/consultations/regulation-of-buy-now-pay-later-consultation-on-draft-legislation

The consultation on draft legislation closed for response in April 2023. The Government received 54 responses to this consultation, many of which were substantive and detailed. These have required careful consideration to ensure that the Government’s approach to regulation is proportionate and delivers on the Government’s intention to protect BNPL borrowers without unduly restricting access to these useful interest-free products. Klarna, Zilch, and Clearpay all submitted responses to the consultation, which fall in scope of this FOI request.

The key trade association for BNPL firms—Innovate Finance—also submitted a response to the consultation, which is available publicly and can be accessed online here:

www.innovatefinance.com/consultation/hm-treasury-consultation-on-draft-legislation-regulation-of-buy-now-pay-later-innovate-finance-response."

15. HMT stated that the documents in scope of the request are key to policy development which is ongoing whilst it develops and considers proposals that create a satisfactory regulatory regime for BNPL. It explained that these proposals may differ from the draft legislation that was consulted on in February 2023.
16. In his internal review request, the complainant referred to reports in the media suggesting the government will not proceed with the regulation of BNPL.
17. HMT stated that it has been clear in its response that it is still carefully considering stakeholder feedback to the consultation on draft legislation as part of its ongoing policy development on the regulation of BNPL and that these consultations constitute information which relates to development of a live area of government policy.
18. In its submission to the Commissioner, HMT stated that at the time the request was received in October 2023, the Government was still considering the material submitted in the responses to the consultation, as well as subsequent submissions by stakeholders as part of policy development for the regulation of BNPL.
19. HMT referred to the Commissioner's guidance on section 35(1)(a), which cites the case of *Cabinet Office v Information Commissioner and Morland* [2018], where the Upper Tribunal affirmed the approach of taking a "broad" interpretation when considering the meaning of "relates to" under FOIA.
20. HMT confirmed to the Commissioner that releasing the submissions from BNPL stakeholders now could interfere with on-going policy development as they are currently being used to finalise policy decisions.
21. It clarified that policy development for BNPL regulation is live and the Government sought views from a broad range of stakeholders in its February 2023 consultation on draft legislation for bringing BNPL into regulation, including the firms specified by the complainant in his request.
22. HMT explained that having received substantive and detailed feedback to this consultation, the Government is carefully considering the next

steps for regulation. It explained that it is working towards a consultation response, where it will set out these next steps. It confirmed that after the response has been issued, policy development will continue in respect of the formulation and development of relevant legislative instruments.

The Commissioner's decision

23. Having viewed the withheld information and considering the responses provided by HMT, the Commissioner is satisfied that it relates to the formulation of ongoing Government policy on the regulation of BNPL.
24. The Commissioner recognises 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 effectively policies. In particular, it ensures a safe space to consider policy options in private.
25. The Commissioner is therefore satisfied that the withheld information relates to the formulation and development of government policy and the exemption at section 35(1)(a) is therefore engaged.

Public interest test

26. 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 at section 35(1)(a) outweighs the public interest in disclosing the information.

Public interest in favour of disclosure

27. HMT acknowledged there is favour of releasing this information, as it recognises that there is an inherent public interest in transparency and accountability of public authorities.
28. HMT stated that in this specific case, it recognises there is public interest in the Government's approach to BNPL regulation. It stated that BNPL is a popular product and many members of the public will be interested to know what protections will be afforded to users when it is brought into regulation, especially given that the FCA has highlighted the need for such regulation.
29. HMT acknowledged that there is a public interest in ensuring that, as it develops its regulatory approach, the Government is not only listening to the BNPL industry, but also to consumer groups.
30. It also stated there is a public interest in ensuring the Government remains committed to introducing a proportionate regulatory regime for

BNPL that protects borrowers but still ensures complete access to these useful interest-free products.

31. In his internal review request the complainant stated the following:

"Firstly, this information has been exempted in a blanket manner, which is not permitted under FOIA. It is vanishingly unlikely that each piece of information in each document in the scope of this request is exempt. Please therefore review and provide at least a redacted version of these documents.

Secondly, you have failed to provide any specific reasons why civil servants would be meaningfully prejudiced by disclosure. Civil servants are not snowflakes, they are well trained, highly qualified officials used to giving robust policy advice to ministers."

32. In his internal review request the complainant also argued that the documents in practice constitute external lobbying from BNPL firms, who will have commercial incentives towards advocating for certain policy outcomes. He argued that firms will be aware of FOIA disclosure requirements, and will be unlikely to alter their submissions on the grounds that they might be disclosed, if making these arguments serves their commercial interests. He also argued that these submissions will have been made in the knowledge that previous equivalent documents have been disclosed.

33. The complainant wanted to raise that while this information might inform policy advice, his request is not for the policy advice itself and as such, the safe space for civil service policy formulation is not directly being breached. He claimed that the weight in favour of safe space protection through non-disclosure is accordingly smaller.

34. The complainant referred to the First-Tier Tribunal decision *Corderoy v Information Commissioner & Department for Exiting the European Union* (EA/2019/0109 & 0111) explaining that a firm lobbying government cannot have a reasonable expectation of secrecy in its lobbying correspondence. The FTT stated the following:

"Organisations which seek to influence policy formation can, under normal circumstances, expect to see their contributions summarised and publicly disclosed or disclosed by the organisations themselves as part of their own direct engagement with the public or their own widespread stakeholders from which it readily moves into the public domain."

35. The complainant argued that while HMT cites the fact that a response to the BNPL consultation will be published, in favour of non-disclosure, these documents tend to be anonymised, broad and high value, and

would not serve the same degree of transparency as publishing the original returns.

Public interest in favour of maintaining the exemption

36. HMT argued that there is a strong public interest in maintaining the safe space for HM Treasury to engage with external organisations on the development of policy, which is crucial for it to operate effectively as an economics and finance ministry and to reach well-formed conclusions.
37. It stated that it considers disclosure of information which contributes to an ongoing decision-making process would inhibit future discussions and argued that the Commissioner has recognised that policy development needs some degree of freedom to enable the process to work effectively.
38. HMT stated that it 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.
39. It argued that section 35(1)(a) of FOIA 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, and that in this specific case, the ability to undertake such deliberation is especially crucial given the substantive feedback which the Government received to its February 2023 consultation.
40. HMT stated that the release of the information at the time of the request and at present, is likely to prejudice the development of policy by causing distraction and a hinderance to the consideration of all options and that this would not be in the public interest.
41. It stated that the consultation response has not yet been issued, and it would plainly be inappropriate and unhelpful for HMT to publish any substantive consultation contributions before the formal response in full.
42. It explained that it relies on information provided by a range of stakeholders to better understand the impact of policy proposals on different sectors across the economy. It explained that engagement and feedback with representatives across different industries is central to economic policy decision-making. HMT also explained that submissions from third parties provide a crucial commercial perspective on delivery of Government policy.
43. HMT argued that businesses like those specified in the request share frank advice and feedback on the UK's approach to regulating BNPL and in this case did so as part of HM Treasury's invitation as per a consultation.

44. In response to the complainant's reference to the decision in the FTT *Corderoy v Information Commissioner & Department for Exiting the European Union* (EA/2019/0109 & 0111), it stated that the facts of that case, which involved the potential lobbying activities of a thinktank, are very different to this current case, which involves responses to a formal consultation.
45. It also noted that in paragraph 30 of the FTT judgment, it says "while many bodies volunteer their views to government and do so in condition of privacy, in a normal consultation process those views will be disclosed with the publication of a response to consultation."
46. HMT explained that the Government's response to the consultation, including a summary of responses to the consultation, will be published in due course in the normal way. It stated that the response will provide the public with a clear understanding of the arguments advanced by respondents and this will provide clarity over the factors the Government considered and balanced when reaching its policy judgements and transparency over the policymaking process.
47. HMT stated that while it appreciates that any information published on GOV.UK may not provide the same level of detail as the information requested, it does consider that this satisfies some of the public interest arguments in releasing the information requested, in that it will give the public an understanding of the broad arguments made by each of the respondents. HMT argued that there is a need for a safe space to consider consultation responses and contributions at least until the responses have been finalised.
48. HMT stated that although the complexity and political nature of this particular policy issue means it has taken longer than normal to respond to the consultation, this is compatible with the Gunning Principles. It explained that under these principles, HM Treasury needs to give adequate time and 'conscientious' consideration to consultation responses. The time taken will vary on a case-by-case basis depending on multiple factors, including the responses and the complexity of the issues raised in them.
49. It concluded that, on balance, given the potential risks to the policymaking process, and the fact that the substance of the information requested is expected to be released in due course, within the government's consultation response, the public interest favoured withholding the information.

Balance of the public interest

50. The Commissioner recognises a value in the public having access to information which would allow them to influence such policies and/or decide whether they can support government on the regulation in this area which will undoubtedly have great impact on both businesses and consumers for many years to come.
51. There is undoubtedly a public interest in the public understanding the implications of BNPL regulation as well as businesses lobbying the government in favour or against such regulation. However, the Commissioner acknowledges that there is a strong public interest in not publishing the withheld information before the HMT had time to consider the consultation responses.
52. In balancing the public interest, the Commissioner accepts that significant weight should be given to safe space arguments - to debate live issues, and reach decisions away from external interference and distraction – where the policy making is live and the requested information relates to that policy making.
53. The Commissioner also accepts that the sensitivity of the subject matter will require careful consideration by Ministers when reaching a final view on the regulation of BNPL. In this case, the Commissioner agrees that disclosure of the withheld information at this stage, would hinder the ability of officials to explore and discuss all available options in a free and frank manner, and to understand their possible implications for BNPL regulation.
54. The Commissioner agrees that if the withheld information was disclosed it could place in the public domain information which could be used to interfere with, disrupt or undermine those deliberations by those who disagree with the overarching aims of regulating BNPL. A safe space is therefore required to prevent policy makers getting unduly distracted or side-tracked, which would be harmful to the quality of the debate underlining effective decision making.
55. It has also been generally accepted by both the Commissioner and the First-tier Tribunal that significant weight should be given to maintaining the exemption where a valid need for a safe space is identified. The Commissioner's guidance states that the timing of the request is an important factor, this was confirmed by the Information Tribunal in *DBERR v Information Commissioner and Friends of the Earth* (EA/2007/0072, 29 April 2008¹ which states:

¹ [Microsoft Word - Document in Microsoft Internet Explorer \(tribunals.gov.uk\)](#)

“This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public.”

56. The Commissioner is satisfied that the information was informing live policy development at the time of the request, and publishing the responses to the consultation at this time could have become a source of distraction from policy deliberations relating to the design and implementation of BNPL regulation.
57. Given the significant weight of the public interest in preserving a safe space for the government to discuss and develop policies relating to the regulation of BNPL and its implications, the Commissioner finds that the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information. The Commissioner has therefore concluded that HMT was entitled to rely on section 35(1)(a) to withhold the requested information.
58. Going forward, where circumstances change, and the policy development surrounding the regulation of BNPL is no longer 'live', the balance of the public interest may also change.
59. As the Commissioner has concluded that HMT was entitled to rely on section 35(1)(a) to withhold the requested information, he has not gone on to consider its application of section 43(2).

Right of appeal

60. 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

61. 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.
62. 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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