

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 October 2024

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

Decision (including any steps ordered)

1. The complainant has requested minutes, action logs and briefing materials from a meeting between HM Treasury ("HMT") and Copper held in February 2022, as well as other materials shared in the meeting. HMT disclosed some information but cited section 40 (personal data), section 43(1) (trade secret), section 43(2) (commercial interests) and section 27 (international relations) as its basis for refusing to provide the remaining requested information. The complainant did not challenge section 40 but did challenge the other exemptions. HMT upheld its position at internal review. HMT withdrew reliance on section 27 during the Commissioner's investigation. It also made a further disclosure during the Commissioner's investigation.
2. The Commissioner's decision is that HMT is entitled to rely on section 43(1) and section 43(2) as its basis for withholding the requested information.
3. The Commissioner does not require further steps.

Request and response

4. On 14 November 2023 the complainant requested information of the following description:

"Under the Freedom of Information Act 2000 I wish to see all minutes, agendas, action logs and briefing materials for the meeting between

HMT and Copper held in February 2022:

<https://www.ft.com/content/53ea6108-a9dc-4437-ac0e-8f215d78867b>¹

Please also include any other materials that were handed out or received during the meeting, such as presentations, reports, etc..

5. On 13 December 2023 HMT responded. It provided some information within the scope of the request but refused to provide the remainder. It cited the following exemptions as its basis for doing so:
 - section 40(2) - personal data
 - section 43(2) – commercial interests
 - section 27(1)(a) – international relations.
6. The complainant requested an internal review on 14 December 2023. They did not query HMT's use of section 40(2) but did query its reliance on section 43(2) and section 27(1)(a).
7. HMT sent them the outcome of its internal review on 7 February 2024. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 18 February 2024 to complain about the way their request for information had been handled.
9. During the course of the Commissioner's investigation, HMT made a further limited disclosure to the complainant. It explained that
"HM Treasury are continuing to withhold information in reliance on the following exemptions:
 - Section 40(2) (personal data)
 - Section 43(1) and 43(2) (commercial interests)
10. Given that the complainant did not seek to dispute HMT's use of section 40, the Commissioner has considered section 43(1) and section 43(2) for the information it continues to withhold.

¹ This article is behind a paywall but the headline is "Crypto firm Copper met UK officials after Philip Hammond phonecall"

11. Concurrently with this investigation, the Commissioner was investigating another case (IC-285726-Q0D5)² where the information in dispute – which was requested on 10 July 2023 - included the information which has been withheld in this case. HMT had provided detailed submissions for that case. The Commissioner asked HMT to clarify which exemptions it was relying on (it had previously relied upon section 27), whether it had any other information and whether it was relying on the submissions it had made in the earlier case.
12. HMT confirmed that it was relying on section 43(1) and section 43(2) and that its arguments were the same as those which it had submitted in the earlier case.³

Reasons for decision

13. HMT set out the following information as background when it responded to the Commissioner on the related request referred to above:

“Over recent years, cryptoassets (or ‘crypto’) and the activities underpinning their use have evolved into an extensive and complex ecosystem. HM Treasury, along with regulators and policymakers globally, are considering how to respond to the challenges and opportunities posed by these developments.

The previous Government set out the view that the technology underpinning this innovation could bring a number of benefits for financial markets and consumers, with appropriate regulation and safeguards.

The Government and financial services regulators (including the Financial Conduct Authority (FCA)) have taken steps to bring cryptoassets into the regimes for financial promotions, and anti-money laundering and counter-terrorist financing. However, currently most cryptoasset activities, such as operating a cryptoasset exchange, are not subject to broader financial services regulation. Therefore, the Government and the regulators have been developing a set of proposals for bringing cryptoasset activities into the existing financial services regulatory framework. As part of this work, we have been actively

² <https://icosearch.ico.org.uk/s/search.html?collection=ico-meta&profile=decisions&query=&f.By+authority|publicAuthority=HM%20Treasury>

³ It also explained that it was relying on section 40 for some of the withheld information but the complainant did not dispute its use of that exemption either in his letter of internal review dated 14 December 2023 or in his correspondence with the Commissioner.

engaging with industry and relevant stakeholders to better understand the sector and its challenges.

As is common in emerging technology markets, the crypto sector continues to experience high levels of market volatility and a number of recent failures (such as the failure of FTX, one of the largest cryptoasset exchanges, in November 2022) have exposed the structural vulnerability of some business models in the sector. The Government considers that these events have reinforced the need for timely, clear and effective regulation.

In 2022, when the information in scope was created, the then EST [Economic Secretary to the Treasury], John Glen MP, was meeting with stakeholders for discussions on the Government's approach to cryptoasset regulation. For example, HM Treasury's engagement with the firm Binance in 2022 was subject to an FOI request. HM Treasury's response to this FOI request was considered by the ICO under the reference IC-236007-C1C9⁴. Engagement with the firm Copper, which is the subject of the present FOI request, was one element of the wider programme of engagement being undertaken by Government Ministers and officials with the cryptoasset industry. Engagement and feedback with representatives across the industry in this way is central to economic policy decision making.

Following this, officials began formally working on the consultation paper on the future financial services regulatory regime for cryptoassets, which was published on 1 February 2023 and established a Technology Working Group of industry experts to gather further feedback. The consultation on the future financial services regulatory regime for cryptoassets is available online here:

<https://www.gov.uk/government/consultations/future-financial-services-regulatory-regime-for-cryptoassets>).⁵

Information on the Technology Working Group is available here:

<https://www.gov.uk/government/news/technology-working-group-publishes-report-on-fund-tokenisation>

As set out on GOV.UK

(<https://www.gov.uk/government/news/government-sets-out-plan-to-make-uk-a-global-cryptoasset-technology-hub>), the Government

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4027010/ic-236007-c1c9.pdf>

⁵ The link provided by HMT was broken but the Commissioner has found a link to the (now closed) consultation on the gov.uk website

previously published plans to make the UK a global cryptoasset technology hub.”

Section 43(1) – trade secret and section 43(2) – prejudice to commercial interests

14. Section 43(1) and (2) of FOIA state:

15. '(1) Information is exempt information if it constitutes a trade secret.

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).'

Section 43(1) - Trade secret

16. HMT identified which information was, in its view, a trade secret and therefore exempt under section 43(1). Having read the information the Commissioner is satisfied that it constitutes a trade secret. He does not propose to set out a description of it on the face of this notice because that would reveal what it is.

17. HMT also supplied detailed submissions from Copper explaining why, in its view, disclosure would be prejudicial to its commercial interest and which information was likely to constitute a trade secret.

Section 43(2) – prejudice to commercial interests

18. In its correspondence on the related case, HMT said:

“We consider that the exemption in section 43(2) is engaged because some of the information would be likely to prejudice the commercial interests of the companies concerned. This is because the information sets out, in a level of detail that is not publicly available, Copper’s current product suite”. It then provided comment with specific reference to the withheld information.

19. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the harm in disclosing the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
20. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
 21. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the HMT relates to the interests which the exemption contained at section 43(2) is designed to protect.
 22. With regard to the second criterion, the Commissioner is satisfied from the evidence provided by HMT, particularly the submissions supplied from Copper, that the information can reasonably be considered to be commercially sensitive to the company in question. The Commissioner therefore accepts that there is a causal link between disclosure of the information and prejudice such that the second criterion is met.
 23. In respect of the third criterion, having considered the evidence provided, the Commissioner is prepared to accept that there is more than a hypothetical likelihood of such prejudice occurring. Copper operates in a fast developing market and, as such, it is reasonable for it to be extremely careful about disclosing the detail of its product and business model. The third limb of this criterion is therefore met and the information in question is exempt from disclosure on the basis of section 43(2) of FOIA.

Public interest test

24. Section 43 is a qualified exemption and in line with the requirements of section 2 of FOIA the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption cited outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

25. In its submissions on the previous case, HMT said:

"[W]e recognise that the inherent public interest in transparency and accountability of public authorities as well as furthering public understanding of the issues which public authorities deal with. In this specific case, as stated above, we also recognise the public interest in

the Government's approach to cryptoasset regulation and in upholding confidence that HM Treasury stays in touch with developments in financial services in the UK. We also recognise that Copper in particular is an innovative firm in this area."

26. The complainant said "Copper has employed a former Chancellor (Philip Hammond) in a senior role at the firm so I believe the public interest lies in disclosing as much material as possible". While they welcomed the disclosure which HMT made during the course of the Commissioner's investigation, they considered these to be insufficient.

Public interest arguments in favour of maintaining the exemption

27. In submissions on the previous case, HMT said:

"HM Treasury relies on information provided by a range of stakeholders to better understand the impact of economic policy proposals on different sectors. We consider that the disclosure of information that 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 the department, but also, the future engagement of other companies. If HM Treasury were to release commercially sensitive information and therefore deter stakeholders from future engagement with HM Treasury, this could negatively impact policy development by limiting the range of views that officials can consider. This would not be in the public interest."

28. It also made specific comment with respect to Copper and referred to its consultation with Copper in support of its position. Given that this commentary makes specific reference to the withheld information, the Commissioner does not propose to set it out on the face of this notice.

Balance of the public interest arguments

29. The Commissioner recognises that there is strong public interest in ensuring that HMT is transparent and accountable in respect of the dealings it has with commercial enterprises. This is particularly the case where a leading figure in the commercial enterprise is a former Chancellor of the Exchequer (further consideration of which can be found in the decision notice on the related case). This does not, however, mean that HMT should disregard its obligations to protect commercial sensitivities. In the circumstances of this particular case there is, in the Commissioner's view, a stronger public interest in protecting commercially sensitive information (including trade secrets) than there is in disclosing that commercially sensitive information.
30. In conclusion, and taking into account the above considerations, the Commissioner has concluded that the public interest favours maintaining section 43(1) and section 43(2).

31. In reaching his conclusions, the Commissioner has had regard to the relatively short period of time between which the requests in this and the previous case were submitted. However, having done so, this did not make a difference to any of his assessments as to the exemptions in the circumstances of this case.

Right of appeal

32. 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

33. 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.
34. 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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