

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 October 2024

Public Authority: HM Treasury

Address: 1 Horse Guards Road
Westminster
London

Decision (including any steps ordered)

1. The complainant has requested from HM Treasury ("HMT") a Deed of Indemnity between HMT and the Bank of England. HMT has applied the exemptions under sections 29(1)(a), 29(1)(b), 31(1)(a), 31(1)(b) and 40(2) of FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that HMT has correctly applied sections 29(1)(a) and (b) to part of the requested information ("the withheld information").
3. The Commissioner requires HMT to take the following step to ensure compliance with the legislation:-
 - Disclose the part of the requested information which is not highlighted.
4. The public authority must take these steps within 30 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 an contempt of court.

Request and response

5. On 22 December 2023 the complainant requested the following from HMT:-

"I would like to request the following document:

— The 'deed of indemnity' for the Asset Purchase Facility (APF) as agreed between the Bank of England and HM Treasury (referred to in paragraphs 153–157 here:

https://publications.parliament.uk/pa/ld5802/ldselect/ldeconaf/42/4207.htm#_idTextAnchor063).

Please could this be supplied in electronic form."

6. HMT responded to the request on 25 January 2024. It stated that it held the requested information but refused to disclose it, citing sections 29, 31 and 40 with the relevant subsections of FOIA.
7. The complainant sought an internal review of HMT's handling of the request on 29 January 2024. A response to this was provided on 15 April 2024. The reviewer upheld the application of the above exemptions.

Scope of the case

8. The complainant contacted the Commissioner on 29 April 2024 to complain about the way their request for information had been handled. Having perused the requested information, the Commissioner did not consider that all of it was covered by the exemptions specified by HMT.
9. Following correspondence from the Commissioner, HMT sent the Commissioner a copy of the requested information, with the relevant sections highlighted to which it considered that the above exemptions applied.
10. The Commissioner considers that the scope of his investigation is to assess HMT's handling of the complainant's request, in particular its application of the exemptions as set out at sections 29 and 31 of FOIA to the information highlighted by HMT. The complainant stated that they are not complaining about limited personal information being redacted under section 40 of FOIA, so the Commissioner has not considered section 40 in his analysis.

11. The Commissioner also notes that some limited information is highlighted in purple and agrees with HMT that it is outside the scope of the complainant's request.

Reasons for decision

Section 29 – the economy

12. HMT has argued that all of the information highlighted in yellow in the copy it provided to the Commissioner ("the withheld information") is exempt from disclosure on the basis of sections 29(1)(a) and (b) of FOIA.

These exemptions state that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice —

(a) the economic interests of the United Kingdom or of any part of the United Kingdom, or

(b) the financial interests of any administration in the United Kingdom, as defined by section 28(2).'

13. In order for a prejudice-based exemption, such those provided by section 29(1), 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 potential disclosure of 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 – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold of likelihood the Commissioner takes the view 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.

HMT's position

14. HMT provided the Commissioner with detailed submissions to support its position that sections 29(1)(a) and (b) were engaged.
15. HMT considers that the exemptions under sections 29(1)(a) and 29(1)(b) apply because disclosure of the requested information would expose operationally sensitive information relating to Government cash management practices. Quarterly cash transfer amounts from HMT to the APF are already made public through Office for National Statistics (ONS) public sector finance data releases in arrears, and projections for future cashflows are published by the Office for Budget Responsibility ("OBR") at each fiscal event on an annual basis. However, the deed contains additional operational details relating to these transfers, disclosure of which would reveal detailed workings of Government cashflow mechanisms (specifically how the Government manages its daily cash needs across departments and accounts) and HMT considers that this would cause harm to the Government's ability to protect the economic and financial interests of the UK.
16. HMT has informed the Commissioner that the Government's cash management objective is to ensure that sufficient funds are always available to meet any net daily central government cash shortfall and, on any day when there is a cash surplus, to ensure this is used to best advantage. The Government raises these funds through financial markets using a variety of cash management tools. To meet its cash requirements, alongside other income streams, the Government borrows and lends bilaterally with counterparties in the open market where it is a price taker, operating across a range of dates in advance to smooth out, over time, cumulative imbalances in the daily net cash profile. To meet each APF cash transfer, the Government must raise the funds in the market. The expected amount due to be transferred will fluctuate over the course of each quarter due to market movements (specifically the level of Bank Rate, gilt prices, and previously the price of sterling investment grade corporate bonds). As a result, the actual quarterly cash transfer figure (that is, the amount HMT is legally required to pay the APF each quarter to fund cash shortfalls within the portfolio) is frequently different to its forecast amount. This requires the Government to revise its day-to-day cash needs (the amount of cash required to meet its needs on a daily basis) at short notice to fulfil the APF cash transfer.

17. HMT considers a reasonable and likely outcome of disclosure to be that, as the Government enters the market as a price taker, market participants would likely use knowledge of the Government's cash requirements for commercial gain when lending to the Government. By increasing the cost of the UK Government's borrowing, this would be detrimental to the Government's ability to protect the economic and financial interests of the UK.
18. With regard to the threshold of likelihood upon which HMT was relying, ie 'would' or 'would be likely to', HMT has not specifically stated which threshold it is relying upon, however the language used throughout its correspondence indicates that it is relying upon the lower threshold, i.e. that disclosure of the requested information 'would be likely to' prejudice the economic and financial interests of the United Kingdom.

The Commissioner's position

19. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential harm envisaged by HMT as a result of disclosure of the withheld information fits within the scope of both sections 29(1)(a) and (b).
20. With regard to the second criterion, the Commissioner is satisfied that there is clear causal link between disclosure of the withheld information and prejudice to the economic and financial interests of the UK for each of the reasons set out by HMT. Moreover, the nature of the prejudice envisaged is clearly of substance.
21. Turning to the third criterion, the Commissioner accepts that the likelihood of prejudice occurring to the UK's economic and financial interests is clearly more than hypothetical; rather there is a real and significant risk of prejudice occurring. The Commissioner has reached this conclusion in light of the fact that HMT has outlined what the Commissioner agrees is a reasonable and likely outcome of disclosure of the withheld information.
22. Therefore, the Commissioner is satisfied that the exemptions provided by sections 29(1)(a) and (b) are engaged on the basis of the lower limb of likelihood, i.e. that prejudice would be likely to occur.

Public interest test

23. Section 29 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining each exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the withheld information

24. HMT recognises that there is an inherent public interest in transparency and accountability of public authorities and there is an especially clear public interest in the work of government departments being transparent and open to scrutiny.
25. HMT also recognises the wider public interest in furthering public understanding of the issues which public authorities deal with, and how the issues impact on taxpayers and the UK economy, including the governance arrangements for unconventional monetary policy measures and the cost effectiveness of these measures.

Public interest arguments in favour of maintaining the exemptions

26. In favour of withholding the information, HMT argues that the details regarding the size and timing of individual quarterly cash transfers between the two known parties (HM Treasury and Bank of England) would be likely to prejudice the economic interests of the UK or any constituent part.
27. HMT considers that, should the public be aware of the potential timing of quarterly cash transfers, it could reasonably be expected to, over time, be detrimental to value for money in relation to the Government's cash management practices, which would not be in the public interest.

Balance of the public interest arguments

28. The Commissioner accords significant weight to the public interest in openness, transparency and accountability in public authorities. This is especially relevant in cases involving the use and expenditure of public money, and the Commissioner agrees that government departments such as HMT should be transparent and open to public scrutiny.
29. The Commissioner also places significant weight on HMT's concerns about the risk of disclosure leading to less value for money as the relevant parties would be likely to increase the Government's borrowing rate, which would not be in the public interest.
30. With regard to transparency and openness, the Commissioner notes that a high level of transparency already exists in relation to the UK's Quantitative-Easing ("QE") programme and the APF, while the UK's approach of indemnifying the APF is in line with best practice as set out in an International Monetary Fund ("IMF") working paper, Quasi-Fiscal Implications of Central Bank Crisis Interventions 2023, relating to several areas of governance, accountability, and transparency.

31. HMT has provided the Commissioner with regular reporting on the operations, cashflows, and governance of the scheme including the publication of the Whole of Government Accounts (WGA). Government Ministers and officials routinely appear before parliamentary committees to talk about various aspects of fiscal and debt management policy, which has included discussions on the APF indemnity arrangements. The Bank's use of resources to discharge its functions is subject to audits by the National Audit Office (NAO), who also review and sign off the APF's annual report and accounts. As noted in the IMF working paper above regarding the APF, "Disclosure, information-sharing and accountability practices [in the UK] are strong".
32. The Commissioner considers that the public interest in disclosure is met to a large extent by the myriad information which has been published online by HMT, Parliament and other public authorities, supplemented by the routine appearance of Government Ministers and officials before parliamentary committees concerning a range of fiscal issues, including HMT's indemnity arrangements, the overall strength of which has been outlined in the IMF paper as mentioned in paragraph 27 above.
33. Beyond the information about the Deed of Indemnity which has been made publicly available, the withheld information sets out specific details regarding the size and timing of cash transfers which would not materially enhance the public's understanding of the indemnity arrangements in relation to public sector finances and the impact on the taxpayer. However, disclosure of these details would be likely to affect the Government's ability to protect the UK's economic and financial interests, as the likely outcome is that this will lead to an increase in Government debt. On balance, and with these considerations in mind, the Commissioner has concluded that the public interest is weighted in favour of maintaining the exemptions.
34. In light of his decision regarding sections 29(1)(a) and (b), the Commissioner has not gone to consider HMT's reliance on the exemptions as set out in section 31(1)(a) and (b) of FOIA as HMT considered that sections 29 and 31 applied to the same part of the requested information.

Right of appeal

35. 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

36. 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.
37. 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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