

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 June 2020

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

Decision (including any steps ordered)

1. The complainant has requested information on 50p commemorative coins to mark the United Kingdom's ('UK') withdrawal from the European Union ('EU').
2. The Commissioner's decision is that HM Treasury ('HMT') is entitled to rely on section 35(1) – Formulation of government policy and section 43(1) – Commercial interests, to withhold some of the information within the scope of the request. The Commissioner also finds that, on the balance of probabilities, some of the requested information was not held at the time of the request.
3. The Commissioner requires no steps to be taken.

Background

4. In October 2018 at the Budget the Chancellor announced that The Royal Mint would produce a coin to mark the UK's withdrawal from the European Union, to be sold commemoratively and not issued into circulation.

5. Parliamentary questions were asked on 17 January 2019¹ [PQ 208268/9] regarding how much had been spent on designing the commemorative 50p coin to mark the UK leaving the EU and what plans The Royal Mint had for the commemorative 50p coin to mark the UK leaving the EU in the event that the date of the UK leaving the EU was postponed.
6. The Exchequer Secretary to the Treasury responded advising that the cost of designing coins is met by the Royal Mint out of its own revenues, which is expected to be met by the revenues raised from the coin's sale. The Secretary explained that the government's policy was for the UK to leave the EU on 29 March 2019 and confirmed that the commemorative 50p to mark the UK leaving the EU would become available following the UK's departure.
7. A Royal Proclamation published on 11 October 2019 confirmed that the coin would bear the date 31 October 2019, this was subsequently changed in a further Royal Proclamation². On 5 November 2019 the Economic Secretary to the Treasury responded to questions on how many 50p coins were minted to mark the exit of the UK from the EU on (1) 29 March, and (2) 31 October; what was the cost of those operations; and what had been done with the coins so minted. [HL388]³
8. The response advised that approximately 1 million coins were minted in October 2019 to mark the UK's exit from the European Union, in addition to 1,000 trial coins that were struck before 29 March 2019. Coins bearing these dates would be recycled and the value from the materials recouped by the Exchequer. The response also stated that the cost of minting these coins was commercially sensitive.

Request and response

¹ <https://qnadailyreport.blob.core.windows.net/qnadailyreportxml/Written-Questions-Answers-Statements-Daily-Report-Commons-2019-01-17.pdf>

² <https://www.thegazette.co.uk/notice/3450939>

³ <https://qnadailyreport.blob.core.windows.net/qnadailyreportxml/Written-Questions-Answers-Statements-Daily-Report-Lords-2019-11-05.pdf>

9. On 22 March 2019, the complainant wrote to HMT and requested information in the following terms:

"Under the Freedom of Information Act, please can you provide me with:

- 1. How many of the Brexit commemorative 50p coins announced by the chancellor have been minted to date?*
 - 2. The estimated cost of minting said coins.*
 - 3. The estimated cost of designing the coin.*
 - 4. What plans the department has for any coins that have already been minted.*
 - 5. Any correspondence between staff in the chancellor's private office and other staff in the civil service or government bodies regarding the coins.*
 - 6. Any documents or drawings referring to a new design for the coin not featuring the date '29 March'."*
10. HMT responded on 30 April 2019 with a refusal notice in reliance of section 35(1)(a) FOIA advising that it would be taking the extra time allowed to consider the public interest test. HMT wrote again on 22 May 2019, 20 June 2019, 18 July 2019 before providing a partial response on 26 July 2019. The response of 26 July 2019 advised that no information was held on points 1, 2 & 4; refused point 3 in reliance of section 43(2) with the PIT favouring withholding the information; stated that no information was held on point 6 and advised that HMT had still not completed the PIT in respect of its application of section 35(1)(a) to point 5 of the request but advised that a substantive response would be provided on 15 August 2019.
11. On 26 July 2019 the complainant wrote to HMT and queried its interpretation of his request. He explained:
- "Nowhere in my request did I refer to coins "minted for sale". I want to know how much it has cost etc for **any** of these coins that have been minted, for whatever purpose, whether as samples, prototypes, for sale or for any other purpose."
12. The Treasury responded on 26 July 2019 stating that it considered its interpretation to be reasonable but following the complainant's clarification, would reconsider its response.
13. HMT finally responded on 7 January 2020 with its internal review. It explained that it did not hold information in respect of questions 1 & 2

and referred the complainant to the Royal Mint. The Treasury confirmed its initial responses in respect of questions 3, 4 & 6 and provided some information in respect of question 5 whilst withholding other information in reliance of sections 35(1)(a), 36(2)(b)(i), (ii) & (c), section 37(1)(a) and 40(2).

Scope of the case

14. The complainant contacted the Commissioner on 12 September 2019 to complain about the way his request for information had been handled. The complainant explained:

"The department has delayed its response three times, before finally answering with what I regard to be a willful misunderstanding of my original request. Despite being promised a new response on 26 July 2019, I have heard nothing since."

15. The Commissioner contacted HMT on 6 January 2020, it provided a further response to the complainant on 7 January 2020 which included substantial disclosures.

16. Following the disclosures the Commissioner contacted the complainant on 13 January 2020 to determine whether he still wished to pursue his complaint. On 28 January 2020 the complainant explained that he remained dissatisfied and advised:

"I have set out my remaining concerns with the department's disclosure below and would be very grateful if the complaint could proceed on these points."

17. The scope of the Commissioner's investigation therefore focusses on the complainant's points, which comprise:

- The application of section 43(2) to the estimated cost of designing the coin.
- The plans the department has for any coins that have already been minted.
- Regarding point 5 of the request the complainant explained:

"The disclosures made by HMT following the ICO's intervention have redacted any information relating to the government's brief for the design of the Brexit 50p coins, claiming an exemption on the basis that this concerns the formulation of government policy. I think this is totally inappropriate given that the brief handed by the government to the Royal Mint is the product of the department's policy formulation, not part of the policy formulation

process. It is also a matter of public interest what the government hoped to convey in minting the new coins, especially given that it is likely to have cost significant time and funds.”

- Regarding the point 6 response HM Treasury upheld its initial response that it does not hold any documents or drawings that fall within the scope of the request. The complainant notes the fact that the government has begun minting a new version of the coin with an amended design and therefore considers this response: “a totally illegitimate reason for withholding the information and in fact appears to be misleading.”
18. The Commissioner, guided by the complainant’s remaining concerns, considers the scope of her investigation to be the matters covered in paragraph 16 above. As the complainant has not questioned HMT’s reliance on section 37 – Communications with Her Majesty or section 40(2) – Personal information, the Commissioner has not considered the application of these exemptions as part of her investigation.

Reasons for decision

19. Section 43(2) of FOIA states:

“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).”⁴

20. In order for a prejudice based exemption, such as section 43, to be engaged the Commissioner believes 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 to be real, actual or of substance; and

⁴ The full text of section 43 is available here:
<http://www.legislation.gov.uk/ukpga/2000/36/section/43>

- 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 or 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring 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.

20. HMT explained to the Commissioner its view that the information withheld in reliance of section 43(2) would harm the commercial interests of The Royal Mint and HMT. It drew the Commissioner's attention to a previous decision notice concerning the costs of producing particular coins⁵. The Commissioner acknowledges The Royal Mint's explanation that the withheld information would be of significant commercial advantage to both its competitors and/or its customers. It argued that the withheld information would lead to inferences of its pricing structures and would undoubtedly give these third parties an inequitable edge in bidding for future work from HM Treasury, and any other third party with whom Royal Mint has contracts.
21. As explained above in paragraph 16, the Commissioner is addressing the complainant's particular concerns in this case. His concern in respect of the application of section 43(2) is focussed on the cost of designing the 50p coin. HMT explained that The Royal Mint uses a wide pool of artists for designs associated with coinage and enters into Artist Commission Agreements which detail payment provisions and include confidentiality obligations. HMT added that disclosure of the sums paid by The Royal Mint for the designer's work would be likely to have a significant impact on The Royal Mint's ability to negotiate the best price possible in respect of designs for other coins and with other designers.
22. HMT also explained that The Royal Mint competes with domestic and international companies that produce and sell commemorative coins. This is a highly competitive, commercial environment with the design costs being one of the key cost components in the overall cost of coins.
23. HMT advised the Commissioner that because The Royal Mint is a government company wholly owned by HMT, the harm caused by

⁵ <https://icosearch.ico.org.uk/s/search.html?collection=ico-meta&profile=decisions&query&query=FS50804925>

disclosure of the information would also prejudice HMT's commercial interests.

24. With regard to the first criterion of the three limb test set out in paragraph 20, the Commissioner accepts that the harm alleged to occur, as described above, relates to the commercial interests which the exemption contained at section 43(2) is designed to protect.
25. The Commissioner is satisfied that the second criterion of the test is met because disclosure of the withheld information has the potential to undermine both HMT's and The Royal Mint's positions and thus their commercial interests. The Commissioner has reached this conclusion given the potential insight the information would provide to designers about costings.
26. In its submission to the Commissioner HMT did not specify a level of the likelihood of prejudice. The Commissioner has therefore applied the lower threshold of 'would be likely' to result in prejudice. The Commissioner accepts this level of prejudice based on her own determination that the chance of prejudice occurring is a real and significant risk.
27. The Commissioner therefore considers that section 43(2) is engaged in regard to this information.

Public interest test

28. Section 43 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information

Public interest in favour of disclosing the information

29. HMT noted the general public interest in transparency around the use of public funds and in particular concerning the cost of minting the commemorative 50p coin.
30. The complainant explained to the Commissioner:

"It is unclear how releasing this information would prejudice the commercial interests of the mint, and in any case the concern is surely outweighed by the public interest in knowing how much it cost to design the coins."

Public interest in favour of maintaining the exemption

31. HMT considers there to be a clear public interest in not prejudicing the commercial interests of The Royal Mint. It explained that disclosure of

the design costs would be likely to cause detriment to The Royal Mint's business model and its ability to compete in a competitive global market. As set out in paragraph 23 this would in turn prejudice HMT's commercial interests and ultimately the public purse.

The Commissioner's view

32. In the Commissioner's opinion there is a significant and weighty public interest in ensuring that HMT's commercial interests are not undermined given that any such outcome will also impact on The Royal Mint and ultimately the tax payer. The Commissioner also considers it to be very clearly against the public interest to undermine HMT's ability to achieve value for money in future tendering processes for coinage designs.
33. In reaching this view the Commissioner must disagree with the complainant's opinion. Whilst the Commissioner accepts that disclosure of the withheld information could further inform the public on the cost of the design, she is satisfied that such a benefit is clearly outweighed by the public interest in withholding the information given the negative consequences of disclosure both for the HMT and Royal Mint.
34. Section 35(1) of FOIA states:

"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to –

 - (a) The formulation or development of government policy"
35. This exemption is a class-based one which means that, unlike a prejudice-based exemption, there is no requirement to show harm in order for it to be engaged. The relevant information simply has to fall within the description set out in the exemption.
36. The Commissioner considers 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 effective policies. In particular, it ensures a safe space to consider policy options in private. Her guidance advises that a public announcement of the decision is likely to mark the end of the policy formulation process.
37. The Commissioner considers that the term 'relates to' in section 35 can be interpreted broadly within the meaning of the class based exemption. This means that the information itself does not have to be created as part of the activity. Any significant link between the information and the activity is sufficient.
38. The complainant considers that the information disclosed by HMT in respect of point 5 of his request has been redacted inappropriately. He

has concluded that the correspondence does not relate to policy formulation or development, particularly in relation to; "the government's brief for the design of the Brexit 50p coins".

39. HMT explained that a large amount of information has been disclosed to the complainant with some information relating to policy withheld. HMT advised that the policy concerned the government's decision regarding the issue of a 50p coin to mark the UK's exit from the EU.
40. At the time of the request the information relates to a commemorative coin and the UK had, on 20 March 2019, written to the EU asking to formally extend Article 50 and delay the UK's departure from the EU. By the time of HMT's final response to the complainant (7 January 2020) a decision had been taken to release a 50p coin for circulation on 31 January 2020. HMT advised the Commissioner that this development demonstrates that the policy on this issue was clearly live at the time of the request and remained so for some time. Therefore, Ministers and officials continued to hold free and frank discussions which HMT considers would likely to have been inhibited by the disclosure of the withheld information.
41. The Commissioner notes that the withheld content includes internal advice, discussion and communication between government departments and Ministers. Having viewed the withheld information she is satisfied that it relates to the formulation and development of government policy with respect to the production of a commemorative coin and therefore the exemption at section 35(1)(a) is engaged in this case.

The public interest test

42. The exemption is subject to the public interest test as set out above in paragraph 28.

Public interest in favour of disclosing the information

43. HMT acknowledged the inherent public interest in the transparency and accountability of public authorities, which may be promoted by the disclosure of information. It also acknowledged the clear public interest in:

"arrangements made by Government to mark the UK's Exit from the EU. To this end, a great deal of information has been released in response to this request. There is also already information in the public domain on the 50p coin. For example the initial announcement was made at Budget 2018 – see 2.23 <https://www.gov.uk/government/publications/budget-2018-documents/budget-2018> and see here for further information about the 31 January 2020 coin:

<https://www.gov.uk/government/news/first-images-of-brex-it-coin-reveal>"

44. The Commissioner has quoted in full the complainant's view in paragraph 16 above, that the public interest favours disclosure in order to understand the Government's reasoning regarding any message it wished to convey by the issue of a commemorative coin to mark the UK's exit from the EU.

Public interest in maintaining the exemption

45. HMT explained its view that there is a weighty public interest in preserving and protecting the safe space required to discuss and develop good policy which in itself is in the public interest. It added that the public interest is served by not disclosing information which would undermine the policy process and result in less robust, well-considered or effective policies.

The Commissioner's view

46. The Commissioner considers that there is significant public interest in the disclosure of information which can inform public debate around matters concerning Brexit, in this instance, the issue of marking the UK's departure from the EU. Notwithstanding this she is aware of the amount of information already in the public domain concerning the 50p coin in addition to the information finally disclosed by HMT in response to this request.
47. The Commissioner notes the complainant's description of the redactions relying on section 35(1)(a) made by HMT in respect of point 5 of the request as: "any information relating to the government's brief for the design of the Brexit 50p coins". The Commissioner has considered the complainant's specific complaint with regard to this. The information withheld in respect of point 5 covers the broad nature of his original request, that being correspondence between the Chancellor's private office and others within government departments or the civil service rather than only a design brief. Having viewed the withheld information, the Commissioner can confirm this includes advice and discussion of HMT's policy regarding decisions on the production of the commemorative coin. She notes that HMT considers this to be a high-profile policy decision.
48. In addition the Commissioner notes that the policy regarding the coin falls within policy making in the broader context of the UK's exit of the EU and its significance as part of these plans was at the time of the request part of a live policy discussion.
49. HMT provided the Commissioner with detailed submissions on the application of section 35. With regard to the arguments advanced by

HMT, the Commissioner considers that these can be categorised as arguments generally known as safe space and chilling effect arguments.

50. Consideration of section 35 often includes discussion of the need for a safe space. The Commissioner accepts that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. The need for a safe space will be strongest when the issue is still live. Once a decision is made arguments for a safe space for deliberation will carry less weight. The timing of the request is therefore an important factor.
51. With regard to attributing weight to chilling effect arguments, the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight.
52. As noted above, the Commissioner accepts that the policy making in relation to this issue remained ongoing at the time of the request. She accepts the need, at the time of the request, for ministers and officials to have free and frank discussions about the coin without those discussions being inhibited or restricted.
53. Notwithstanding her acknowledgment of the public interest in the Brexit commemorative 50p coin, the Commissioner considers that, on balance, the public interest favours withholding the information identified by HMT as exempt in reliance of section 35(1)(a).
54. She has reached this conclusion having seen the content of the withheld information and given the weight she believes should be attributed to the safe space and chilling effect arguments. The Commissioner agrees that there is a clear public interest in the disclosure of information which would inform the public about government policy making on many aspects of Brexit including the decisions taken with regard to a commemorative coin. However, ultimately she believes that there is a weightier public interest in ensuring policy making has the best opportunity to reach well informed conclusions by protecting Government's ability to discuss and develop policies in a safe space.
55. The Commissioner's decision is, therefore, to uphold the application of section 35(1)(a) to the withheld information.
56. Section 36(2) of FOIA states:

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (b) Would or would be likely to, inhibit-
 - (i) The free and frank provision of advice, or
 - (ii) The free and frank exchange of views for the purposes of deliberation, or
- (c) Would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

57. The Commissioner notes that HMT has also relied on section 36(2), in the alternative, to withhold the information withheld under section 35(1). As the Commissioner is satisfied that section 35(1) applies she has not gone on to consider the application of section 36(2).

Section 1 – information not held

58. Section 1(1) of the FOIA states that:

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

59. Where there is a dispute between the information located by a public authority, and the information a complainant believes should be held, the Commissioner follows the lead of a number of First-tier Tribunal (Information Rights) decisions in applying the civil standard of the balance of probabilities.

60. With regard to points 1 and 2 of the request HMT confirmed that it did not hold the requested information and advised that the complainant could contact The Royal Mint for this information. The complainant did not request the Commissioner to consider this response any further.

61. With regard to point 4 of the request the complainant reiterated to the Commissioner his interest in HMT's plans for the coins minted with the an earlier date.

62. HMT explained to the Commissioner that at the time of the request it did not hold any information in the scope of point 4. The Commissioner acknowledges that at the time of the request no plans for the trial coins had been recorded. However, in its submission to the Commissioner,

HMT advised that on 5 November 2019 the Economic Secretary to the Treasury confirmed, in response to a Parliamentary Question, that:

“Approximately 1 million coins were minted in October to mark the UK’s exit from the European Union, in addition to 1000 trial coins that were struck before March 29.

Coins bearing these dates will now be recycled and the value from the materials will be recouped by the Exchequer.”

This decision notice contains a link at paragraph 7 to this response.

63. With regard to point 6 of the request the complainant explained to the Commissioner his view (set out in paragraph 16 above) that HMT cannot claim that it does not hold any information referring to a new design for the 50p coin not featuring the date of 29 March 2019.
64. HMT explained to the Commissioner that at the time of the request, it did not hold images of the coin with a different date. The subsequently announced new coins, initially due for release on 31 October 2019 and the coin released on 31 January 2020 featured the same design as the coin featuring the date 29 March, with the date amended to state the relevant date.
65. The Commissioner notes that an image contained in an email of 26 October 2018 has been provided to the complainant. The image shows the same design as the coin released on 31 January 2020.
66. In consideration of the above explanation from HMT the Commissioner is satisfied that on the balance of probabilities no other information in the scope of points 4 and 6 of the request was held by HMT.

Other matters

67. FOIA does not impose a statutory time within which internal reviews must be completed albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe. In the Commissioner’s view it is reasonable to expect most reviews to be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days.
68. The complainant asked for an internal review of the outcome of his request on 26 July 2019. HMT did not provide the results of its review, including the delayed public interest considerations in respect of point 5 of the request, until 7 January 2020, almost six calendar months later.

69. HMT did not offer an explanation for this delay, save an apology. The Commissioner considers that the period of six calendar months to conduct the internal review was excessive and not in accordance with the section 45 code. She considers this to be an unsatisfactory period of time.

Right of appeal

70. 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: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

71. 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.

72. 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

Susan Hughes
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