

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 May 2023

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

Decision (including any steps ordered)

1. The complainant has requested information about Public Funding and Business Interruption insurance claims. HM Treasury ("HMT") refused to provide it citing exemptions at section 35 (formulation/development of government policy), section 42 (legal professional privilege) and section 43 (commercial interests) as its basis for doing so. It amended this position at internal review by disclosing some information and by withdrawing reliance on section 43.
2. The Commissioner's decision is that HMT is entitled to rely on section 35(1)(a) and section 42(1) as its basis for withholding the remainder of the requested information.
3. The Commissioner does not require further steps.

Request and response

4. On 23 November 2021, following previous broader requests, the complainant requested information of the following description:

"To facilitate the FOIA search, we refer to the following correspondence (copies attached):

1. Letter from Mr Huw Evans (Director General of the Association of British Insurers) to Mr John Glenn MP (Economic Secretary to the Treasury) dated 25 September 2020.
2. Letter from Mr John Glenn to Mr Huw Edwards dated 25 September 2020.

Request: Please disclose any recorded information created between 1 April 2020 and 31 December 2020 that you hold in the form of:

1. Minutes of meetings;
2. Notes of telephone conversations; and
3. Letters to which Mr John Glenn MP (Economic Secretary to the Treasury) was party concerning all or any of:
 - a) discussions between HM Treasury and the Association of British Insurers
 - b) discussions between HM Treasury and insurance companies
 - c) discussions between HM Treasury and the Financial Conduct Authority in respect of the treatment of monies paid or payable under the Coronavirus Job Retention Scheme in business interruption insurance claim settlements.

Please provide the information requested in electronic format."

5. On 17 December 2021, HM Treasury responded. It confirmed it held information within the scope of the request but argued that it was not obliged to provide it.
6. It cited the following exemptions as its basis for doing so: - section 35(1)(a) development of government policy - section 42 (legal professional privilege) - section 43 (prejudice to commercial interests).
7. The complainant requested an internal review on 10 February 2022. HM Treasury sent them the outcome of its internal review on 4 April 2022. It revised its position. It withdrew reliance on section 43 and disclosed some information to the complainant. However, it upheld its use of section 35 and section 42 in respect of the remainder of the information it held within the scope of the request.

Scope of the case

8. The complainant contacted the Commissioner on 17 May 2022 to complain about the way their request for information had been handled.
9. The Commissioner considers that the scope of his investigation is to determine whether and to what extent HMT is entitled to rely on section 35(1)(a) and section 42(1) as its basis for withholding the remainder of the information that it holds within the scope of the request.

Reasons for decision

Background

10. HMT provided the following background information

“Following the outbreak of the Covid-19 pandemic in March 2020 there was significant uncertainty about whether and to what extent business interruption insurance policies responded to government-imposed restrictions on business activity. This resulted in significant and ongoing litigation, and a Supreme Court judgment in relation to a dispute between the Financial Conduct Authority (FCA) and a group of insurers was handed down in January 2021.

In addition, there was the related question of how business interruption insurance policies interacted with the various government business grants and support provided during the Covid-19 pandemic. A number of insurers were deducting the value of these government support payments from insurance policy payouts. The FCA, working closely with HM Treasury, considered this issue and sought independent legal advice on whether insurers, under the terms of their insurance contracts, were permitted to deduct government support from business interruption insurance payouts.

Following conversations with insurers, Huw Evans (former Director General of the Association British Insurers (ABI)) wrote to the then Economic Secretary to the Treasury, John Glen MP, confirming that a large number of insurers had committed not to deduct certain multi-purpose government grants from payouts. In September 2020, HM Treasury published a response from the Economic Secretary to the Treasury welcoming this commitment from insurers.

However, insurers continue, subject to individual policy wordings, to deduct certain other government support payments that relate to

specific business expenses including the Coronavirus Jobs Retention Scheme (furlough).

Following the exchange of letters between HM Treasury and the ABI, both the FCA and the Treasury continued to monitor progress of business interruption payouts and consider whether any further policy response is needed.

The issue of deductions of certain government support payments remains the subject of ongoing litigation, such as Stonegate v MS Amlin. In this particular case, the High Court handed down its judgment, which found largely in favour of insurers, in October 2022 with the case expected to be the subject of further appeals in 2023. The government and FCA continue to monitor developments in this area".

Section 35: Formulation or development of Government policy

11. Section 35(1)(a) states: "(1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to – (a) the formulation or development of government policy".
12. The Commissioner's view is that the formulation of government policy relates to the early stages of the policy process. This covers the period of time in which options are collated, risks are identified, and consultation occurs whereby recommendations and submissions are presented to a Minister. Development of government policy, however, goes beyond this stage to improving or altering existing policy such as monitoring, reviewing or analysing the effects of the policy.
13. The Commissioner considers that the purpose of section 35(1)(a) is to protect the integrity of the policy making process, and to prevent disclosures which would undermine this process and result in less robust, well considered and effective policies. In particular, it ensures a safe space to consider policy options in private. His guidance advises that a public announcement of the decision is likely to mark the end of the policy formulation process.¹
14. This exemption is a class based one which means that, unlike a prejudice-based exemption, there is no requirement to show harm in

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/>

order for it to be engaged. The relevant information simply has to fall within the description set out in the exemption.

HMT's position

15. HMT explained that:

"The in-scope information relates to the development of government policy regarding deductions of government Covid-19 business support payment, such as furlough payments, from business interruption insurance payouts".

16. It added that:

"Policy work on this matter has been ongoing since the middle of 2020, as the situation regarding deductions became clearer. This work continues, with the FCA and government continuing to evaluate our policy position in relation to deductions. There remains ongoing litigation on the matter, the results of which could potentially prompt further policy changes. The government considers that this remains a live area of policy".

17. The complainant expressed scepticism that section 35 could apply. They said:

"HMT has neither explained nor provided any details of the specific government policy which it asserts was being formulated or developed. It remains the case that there has been no White Paper, legislation or public announcement on the issue.

It is unclear how HMT can maintain an argument that there is public interest in 'protecting the Government's ability to discuss and develop policies and to reach well-formed conclusions and judgements'² in the applicable context, when the Government does not appear to have developed any such policy or reached any conclusions and/or judgements on the matter which have been made available to the public. The case for disclosure in this regard is strengthened by the finding in Stonegate that there is no evidence in the public domain of the Government's intention as to the treatment of CJRS payments in business interruption insurance cases."

18. The Commissioner acknowledges that HMT did not explain in further detail to the complainant what policy the information could relate to. It

² [this is a quote from an HMT letter to them dated 4 April 2022]

would have been helpful to the complainant had it done so. By virtue of section 17(4), a public authority is not obliged to provide to a requester further explanation of exemptions it seeks to rely on if doing so would disclose withheld information.³ However, the Commissioner believes it would have been possible to avoid such a disclosure in its explanation to the complainant in this case.

19. Nevertheless, having seen the withheld information and having considered the arguments of both parties, the Commissioner is satisfied that section 35(1)(a) is engaged in relation to the withheld information. HMT were monitoring the legal effects of an existing policy and, in the Commissioner's view, this relates sufficiently to the development of policy such that, in the circumstances of this case, section 35(1)(a) is engaged.

Public interest test

20. Section 35 is a qualified exemption by virtue of section 2(2). HMT can only rely on it in this case (even if it is engaged) if, 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.

The complainant's arguments

21. The complainant reiterated that HMT had failed to explain what policy making it was referring to. Referring to the Commissioner's own guidance, they argued that the public was entitled to know the source of their legal obligations and any legal restrictions on their rights.
22. The complainant stressed what they felt was an important point from the aforementioned Stonegate judgment.⁴

"As to the intention of the Government in paying, Stonegate has not shown that this was with the intention of benefitting Stonegate alone to the exclusion of insurers. There is no express statement by the Government to that effect. The Government did not indicate that the payment was being made only in respect of uninsured losses. This is notwithstanding that, unsurprisingly, the Government was aware that

³ <https://www.legislation.gov.uk/ukpga/2000/36/section/17>

⁴ [Stonegate Pub Company -v- MS Amlin and others / Various Eateries Trading -v- Allianz Insurance / Greggs -v- Zurich Insurance - Courts and Tribunals Judiciary](#)

some companies had BI [Business Interruption] Insurance, as evidenced by the Treasury's Fact Sheet of 18 March 2020".

23. The complainant, in essence, asserts that that because the intention of the payments was unclear, it is difficult to conclude that furlough payment amounts should be deducted from insurance payouts. They seek access to the withheld information in order to greater understand the government's intention.

24. The complainant made the following additional points:

"a) it is known that discussions were taking place behind closed doors between HMT and both the ABI and insurance companies;

b) the ICO section 35 Guidance advises at paragraph 198 that the importance of maintaining a "safe space" for the development of ideas carries less weight where external organisations have been invited to contribute (as opposed to internal-only discussions);

c) the ICO section 35 Guidance advises at paragraphs 225 and 226 that there is a need for transparency in relation to lobbyists where certain interest groups have been given access to government while the opportunity to influence public policy has not been extended to others;

d) the lack of publicly available information as to the Government's intention was a factor in the Court's finding that sums received under the CJRS should be taken into account when calculating sums recoverable under a business interruption insurance policy. However, following that same judgment (Butcher J at paragraph 284 (3)), what is relevant is the intention of Government and not whether that intention has been publicly expressed or indeed communicated to insurers. The relevant intention is as to the exclusivity of benefit for the donees;

e) unless and until the information requested is made publicly available, insured parties are unable to understand their legal rights and obligations in respect of the treatment of monies paid under the CJRS;

f) lack of disclosure from HMT will result in the issue being litigated separately between insurers and policyholders which may place significant pressure on the justice system;

g) the lack of transparency will contribute to taxpayer monies paid under the CJRS ending up in the hands of insurers in circumstances where Mr Glenn has previously expressed a concern about such funds

'being channelled into savings for insurers, rather than supporting businesses to ride out the disruption brought on by this pandemic''⁵

HMT's arguments

25. HMT acknowledged a general public interest in openness and transparency. It added:

"We also recognise that this is an issue which affected a large number of people, particularly small and medium sized business owners, with business interruption insurance policies. In some cases, whether insurers can deduct payments or not will have a significant financial impact on affected individuals and businesses. There were also calls from business groups, Parliamentarians and others for the government and the regulator to change policy towards deductions."

26. HMT stressed the public interest in "protecting the internal deliberative process". It said "the exemption is intended to ensure that officials and ministers are not deterred as a result of the release of the information from engaging in full, candid and proper deliberation, including the exploration of all options, the keeping of detailed records and the taking of difficult decisions".

27. It drew attention to the pace at which policy solutions were developed during the pandemic and the importance of examining a full range of policy options as it did so.

28. It also stressed that that this was still a live policy area and that there was ongoing litigation in the Courts around this subject. It said:

"Given the ongoing nature of the issue, there is a significant risk that further disclosure would have a negative impact on future decision-making, by undermining the safe space that allows for full and frank policy deliberations [HMT added further detail about the content of the withheld information]. As such, the public interest in maintaining the exemption is therefore especially weighty in this case".

29. It added: "There is ongoing litigation in the Courts on the subject of deductions, the result of which may require either the government or the regulator to modify its policy position. The premature disclosure of this information is likely to present an unhelpful view of the issues at

5

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/921682/EST_letter_to_Huw_Evans.pdf

hand, which are complex and the subject of ongoing litigation. As set out below, the government has also clearly stated its position publicly on this matter. Premature disclosure may also have a negative impact on future decision-making. [It added detail about the content of the withheld information].”

30. It acknowledged the public interest in transparency but argued that this had to some extent been satisfied by the publication of the government's position and the FCA's position. It supplied links to that information.⁶

The Commissioner's decision – section 35(1)(a)

31. In considering the application of the public interest test in this case, the Commissioner has had regard for his own guidance as well as the arguments of the two parties.
32. The Commissioner acknowledges the important public interest points raised by the complainant. They raised what they saw as the lack of clarity in the government's position on the relevance of furlough payments in relation to insurance claims. The Commissioner notes that, at the time of the request, the Stonegate case was still ongoing. The complainant has interpreted comments by the judge in that case in support of the public interest in disclosure. In short, the complainant argues that elements of this judgement (which came after the request) reinforce their position that greater clarity is needed about the government's intention with regard to furlough payments. They argue that there is a public interest in doing so and that disclosure in this case would serve that interest.
33. The Commissioner also recognises that there is a strong public interest in insured parties knowing more about their legal rights and obligations as asserted by the complainant. One factor of the pandemic was the financial impact on businesses, particularly small businesses, and their employees.
34. The Commissioner cannot include in his consideration of the public interest test those factors which occurred after the time for compliance with the request, namely judge's comments made in the outcome of the Stonegate case. However, he is satisfied that that complainant's points are well made without them.

⁶ <https://www.fca.org.uk/firms/business-interruption-insurance> . See Note 5 above for the government reply referred to in HMT's public interest arguments.

35. However, the Commissioner thinks that HMT's arguments regarding the safe space need for discussion on a live matter are stronger. The Commissioner is satisfied that the matter was live at the time of the request and that there was ongoing litigation (albeit a case to which HMT was not a party).
36. The Commissioner accepts that significant weight should be given to safe space arguments – ie the concept that the Government needs a safe space to develop ideas, 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.
37. The Commissioner accepts that disclosure of the information at the time of the request would have had a direct and detrimental impact on the policy development process related to a live matter. In his view, the safe space arguments therefore need to be given notable weight.
38. Despite the benefits of disclosure, the Commissioner has concluded that the balance of the public interest favours maintaining the exemption. He has reached this conclusion given the significant, and – in the particular circumstances of this case - ultimately compelling, weight that he considers should be given to the safe space arguments, particularly in regard to live matters. He has therefore concluded that HMT is entitled to rely on section 35(1)(a).

Section 42 – legal professional privilege

39. Section 42(1) states that:

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

40. Section 42 is also a qualified by a balance of public interest test by virtue of section 2(2). The Commissioner has had regard for his own guidance when considering the application of this exemption in this case.⁷

41. HMT applied section 42 to particular parts of the withheld information. It explained that this information was subject to advice privilege rather than litigation privilege. It explained why this was the case with specific reference to the detail of the withheld information. Having seen the

⁷ [legal_professional_privilege_exemption_s42.pdf \(ico.org.uk\)](#)

information, the Commissioner is satisfied that it is subject to advice privilege. He does not propose to explain in more detail why this is the case because, to do so, would reveal the content of the information. He is, however, satisfied that the exemption at section 42 is engaged.

42. As noted above, information which is exempt under section 42 can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.
43. While acknowledging the public interest in transparency, HMT argued that in order to evaluate policy options, it was important that it could have access to full and frank legal advice and that such advice is treated confidentially. Premature disclosure of such information could "limit the government's ability to consider the implications of all potential policy options". HMT stressed that the public interest in protecting the safe space in which legal advice is given was particularly important where the matter was live.
44. It should be noted that the complainant acknowledged that there was a public interest in protecting information subject to legal professional privilege but queried whether the matter could be considered live. They also queried whether it would be possible to disclose some of the information to which section 42 applied in redacted form.
45. In balancing the opposing public interest factors under section 42(1), the Commissioner considers that it is necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of legal professional privilege. The general public interest inherent in this exemption will always be strong due to the importance of the principle behind legal professional privilege: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. A weakening of the confidence that parties have, that communications will remain confidential, undermines the ability of parties to seek or provide legal advice appropriately and thus erodes the rule of law and the individual rights it guarantees.
46. The Commissioner considers, in the circumstances of this case, that the balance of public interest lies in withholding all the information to which section 42 has been applied. There is a strong public interest in protecting HMT's ability to obtain and consider legal advice without the fear of premature disclosure. Whilst the Commissioner has considered the complainant's public interest arguments, he does not consider that they justify disclosure in this case. For the avoidance of doubt, the Commissioner does not consider partial disclosure of redacted information to which section 42 has been applied (as suggested by the complainant) is appropriate in this case.

47. The Commissioner has therefore concluded that the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure.

Right of appeal

48. 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

49. 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.
50. 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

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