

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 20 September 2022

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested information regarding communications between a named individual and Her Majesty's Treasury (HMT). Referring to its response to an earlier related request, HMT confirmed that it held three emails within the scope of this request. It argued that this information was exempt under section 35(1)(a) (formulation/development of government policy). It also argued that it was not obliged on the grounds of section 12 (cost exemption) to respond to other elements of the request. The complainant requested an internal review of HMT's use of section 35 in respect of the three emails referred to.
2. The Commissioner's decision is that HMT is entitled to rely on section 35(1)(a) as its basis for refusing to provide the three emails described in its response to the complainant.
3. No steps are required.

#### **Request and response**

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4. On 29 October 2020, the complainant requested information of the following description:

"Under the Freedom of Information Act I would like to request the following information relating to [Individual A], who earlier this year contacted HM Treasury to offer to build, and then subsequently built, a pricing model for the government's CBILS loan scheme:

- Copies of all communication between [Individual A] and Chancellor Rishi Sunak
- Copies of all communication between [Individual A] and HM Treasury officials
- Copies of all communication between Chancellor Rishi Sunak and HM Treasury officials relating to [Individual A], to his offer to build a pricing model or the pricing model he built.

In each case I would like to request copies of all communications including, but not limited to, paper documents, emails, texts, WhatsApp and other electronic messages.

I also request a log of the times of all phone calls made between the parties above, as well as any notes or minutes made about these calls.”

5. On 26 November 2020, HMT responded. It referred to its previous response to the complainant regarding an earlier request and said it had no records of subsequent contact between [Individual A] and HMT officials after the Chancellor had suggested that they send [Individual A] public domain information. HMT said that within the scope of this request, it held three emails: one from [Individual A] to the Chancellor; one from an HMT official to the Chancellor and [Individual A]; and one from the Chancellor to HMT officials relating to [Individual A]. It argued that this information was exempt under section 35 (formulation/development of government policy).
6. It also explained that this information was previously considered in an earlier request made by the complainant.<sup>1</sup>
7. HMT also explained that it was not obliged to search for all the information within the scope of the request e.g. WhatsApp messages or similar because of the time it would take to do so. It said that it would exceed the appropriate limit of £600 for doing so and, as such, section 12 of FOIA applied.
8. The complainant requested an internal review on 11 December 2020 via letter. He specifically focussed on HMT’s refusal to provide the three emails referred to above. He said:

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<sup>1</sup> The Commissioner notes the passage of time between the request made in the earlier case (19 May 2020) and the request made in this case (29 October 2020)

"I would like to request a review of that decision, on the grounds that these interactions present huge dangers of conflicts of interest. Because [Individual A], who made the offer of help, works at a hedge fund, there is a danger that any information disclosed to him about the Chancellor's plans for the Coronavirus Business Interruption Loan Scheme, or even the timing or nature of any communication from the Treasury, could provide some clue of a potentially market-sensitive nature. Unlike investment banks, which are used to undertaking such work and which have definite Chinese walls<sup>2</sup>, hedge funds do not have such demarcations in their business, meaning there is a far greater chance that any information passed on, in whatever form and however large, could be helpful in forming a trading decision. Therefore, to preserve public trust in this process, it is essential that such communication is disclosed."

9. The Commissioner notes that, in correspondence with him, HMT has referred to this letter as the request although the Commissioner explained to it that this was the complainant's letter requesting an internal review. In view of the focus of the internal review request, the Commissioner had written to the complainant to explain that his investigation would look at HMT's refusal to provide the three emails described in his request for review of 11 December 2020 and the complainant acknowledged this.
10. On 13 January 2021, HMT sent the complainant the outcome of its internal review. It upheld its original position.

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<sup>2</sup> This term is now superseded by other terms such as "firewall" to describe a virtual barrier to block the sharing of market-sensitive information, where such sharing might allow someone with insider market-sensitive knowledge to conduct market activity which enables them to profit from that insider knowledge. Such activity is referred to as "insider trading".

## Scope of the case

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11. The complainant contacted the Commissioner on 21 January 2021 to complain about the way his request for information had been handled. The Commissioner has considered whether HMT is entitled to rely on section 35(1)(a) as its basis for withholding the three emails referred to in its response.

## Reasons for decision

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### Background

12. Individual A has experience in banking and investment and exchanges correspondence with Rt Hon Rishi Sunak MP on friendly terms. The Commissioner understands that they are a former colleague of Mr Sunak's from when Mr Sunak worked in the private sector. The complainant is a journalist who has relevant knowledge about the operation of hedge funds.
13. A hedge fund is an actively managed investment pool which uses a range of strategies, often with borrowed assets, to achieve increased investment returns for its clients. It is a higher risk approach to investment in financial markets. For example, it would involve taking the opposite position to an investment in a particular asset in order to offset any losses that might be made by investment in that asset which did not, of itself, yield positive returns. Such mechanisms are subject to a certain amount of regulation including rules to avoid insider trading – using non-public information to gain a trading advantage - although the complainant contends that, in the UK, these are insufficient to prevent speculation based on insider information.

### Section 35(1)(a): formulation or development of government policy

14. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation or development of government policy.
15. The Commissioner is of the opinion 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. This may include monitoring, reviewing or analysing the effects of the policy.

16. HMT explained that the information relates to the formulation and development of the Coronavirus Business Interruption Loan Scheme ("CBILS").

17. HMT described CBILS as follows:

"The Coronavirus Business Interruption Loan Scheme (CBILS) was a significant Government policy in response to the coronavirus pandemic. The scheme, alongside the Bounce Back Loan Scheme (BBL) and Coronavirus Large Business Interruption Scheme (CLBILS) has collectively supported more than £79 billion worth of finance to UK businesses of all sizes through the pandemic.

The scheme operated UK-wide, and accredited lenders offered term loans, overdrafts, and invoice and asset finance with a generous 80% Government guarantee – in exchange for a fee which lenders pay the British Business Bank. Each lender pays this "scheme lender fee" in respect of each CBILS facility for each day that facility is outstanding.

The pricing of that fee was a key policy consideration, balancing the need to not overcharge lenders, and thus disincentivise the utilisation of the scheme, against the need to ensure value for money for the taxpayer. In addition, the pricing of each facility (including interest and other amounts charged to the borrower) was required to align with the EU State aid requirements 1) to pass on to the borrower, the economic benefit of the guarantee (including any reduced costs to the lender in respect of credit risk and regulatory capital that a lender may obtain, as well as any reduction in risk and capital requirements) to the lender; and 2) for the scheme to be self-financing. As such, a wide range of information was considered when formulating our policy response – including a pricing model shared by [Individual A] with the Chancellor."

18. Having considered the information the Commissioner agrees that it relates to the development of government policy. In the Commissioner's opinion "relates to" should be interpreted broadly, but it is relevant only to the question of whether the exemption is engaged. In reaching this view, the Commissioner has also had regard for his own guidance<sup>3</sup>.

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<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

19. Accordingly the Commissioner is satisfied that the exemption at section 35(1)(a) is engaged in respect of the withheld information.

### **The public interest test**

20. The Commissioner has gone on to consider the public interest. Information that is exempt by virtue of section 35(1)(a) may therefore only be withheld if the public interest in maintaining that exemption outweighs the public interest in disclosure.

### **Public interest in disclosure**

21. HMT recognised a clear public interest in the work of the Treasury and accepted that scrutiny “drives increased diligence – particularly in the design of major policy interventions like CBILS”.
22. The complainant argued the following:

“[Individual A] is a partner at [a named hedge fund], which trades financial markets and which would obviously find any market-sensitive information about the loan scheme highly valuable. This is a very different situation from HM Treasury using an investment bank or accounting firm, which would have strong Chinese walls in place. While HM Treasury says the Chancellor “suggested officials could send [Individual A] relevant information that was already in the public domain”, it is nevertheless the case that any interactions between HM Treasury or Mr Sunak and [Individual A] could still give extremely valuable clues about HM Treasury's thinking or timing of a decision to [Individual A] and [a named hedge fund], particularly about such a highly sensitive and market-moving event such as the CBILS. I therefore strongly believe it is in the public interest for the three emails to be disclosed”.

23. In his letter to HMT requesting an internal review, he said:

“... these interactions present huge dangers of conflicts of interest. Because [Individual A], who made the offer of help, works at a hedge fund, there is a danger that any information disclosed to him about the Chancellor's plans for the Coronavirus Business Interruption Loan Scheme, or even the timing or nature of any communication from the Treasury, could provide some clue of a potentially market-sensitive nature. Unlike investment banks, which are used to undertaking such work and which have definite Chinese walls, hedge funds do not have such demarcations in their business, meaning there is a far greater chance that any information passed on, in whatever form and however large, could be helpful in forming a trading decision. Therefore, to

preserve public trust in this process, it is essential that such communication is disclosed”.

### **Public interest in maintaining the exemption**

24. HMT argued that there was a strong public interest in protecting the safe space in which policy was discussed and developed. It said:

“The formulation of good public policy requires a degree of freedom to ensure there is space for any and all options to be considered and thoroughly tested. There is a clear public interest in protecting the Government’s ability to discuss and develop policies and to reach well-formed conclusions and judgements.

As an economics and finance ministry HM Treasury relies on information provided by a range of stakeholders to better understand the impact of economic policy proposals on different sectors. External stakeholders often provide valuable insights and advice that may be considered as part of the economic policy making process, particularly in the context of a national crisis. When stakeholders share their views, it is important that a safe space is maintained for them to provide open and candid comments and feedback since the expectation is that their suggestions would be protected.”

25. The Commissioner noticed that the above paragraphs and subsequent sections of HMT’s arguments were cut and pasted from a previous letter it had sent to him regarding the earlier case. This, of itself, is not problematic provided it remains relevant to the request under consideration. However, it also copied text from the previous letter which were not as relevant to this matter where it was seeking to argue the significance of the circumstances prevailing at the time of the request. It said:

“at the time of [the complainant’s] request in May 2020 the CBILS had been in place for less than two months, so we were still paying close attention to feedback from stakeholders across the economy and considering whether changes to the scheme needed to be made to ensure it functioned as effectively as possible.”

26. The complainant’s request in this case was, in fact, dated 29 October 2020. The Commissioner recognises that CBILS was introduced a few months earlier in 2020 but that the circumstances prevailing at the time of the request were somewhat different. HMT argued that in May 2020 “we were still paying close attention to feedback from stakeholders across the economy and considering whether changes to the scheme needed to be made to ensure it functioned as effectively as possible. As

a direct result of such feedback, for example, we removed the forward-looking viability test that required businesses to provide detailed projections of future activity, recognising that this was both challenging and time-consuming at a time of acute economic distress; we also removed the per-lender portfolio cap, giving lenders the full 80% government guarantee across each individual CBILS facility”.

27. The Commissioner notes that HMT did not make any arguments about the circumstances prevailing in October 2020 and therefore, although HMT’s arguments about the attention being paid to stakeholder feedback would still carry some weight in October 2020, it is not as compelling an argument as it would have been in May 2020 because of the passage of time.
28. Moving away from specific arguments it chose to make about May 2020, HMT further argued that “that the release of details at any time would mean that third parties would be less willing to submit suggestions or give their views in future which would mean that the Government would be less well-informed. In this case, we consider that disclosing the information held would be likely to prevent officials from conducting rigorous and candid assessments of the options available to them, and that disclosure might close off discussions with third-party experts and, consequently, the development of better options in the future.”
29. It also added: “releasing the information at this time could have led to distracting public debate at a time when delivering effective policy options in the face of a pandemic was the government’s key objective. This would not be in the public interest. We must stress here that [Individual A]’s work was only one model under consideration at the time.”
30. It then made specific arguments in respect of one of the emails. The Commissioner will not reproduce them because they make specific reference to the information in that record. It also made additional background comments related to the formulation and development of policy in this area although it acknowledged that these were not strictly relevant to the Commissioner’s decision.

### **Balance of the public interest**

31. The Commissioner is of the established view that the public interest relating to section 35(1)(a) should focus on protecting the policymaking process. HMT put forward a “safe space” argument, based on the premise that it is in the public interest for ministers and officials to be able to have a full and open debate away from external scrutiny so as to enable them to reach a reasoned position. There is no inherent public



interest in withholding the information; the public authority must consider the content and sensitivity of the particular information in question.

32. Once government has successfully determined an issue and agreed a collective position, the Commissioner's view is that "safe space" arguments will no longer apply. In this case, the Commissioner acknowledges that CBILS was still being reviewed at the time of the request although it had been in operation longer than it had been at the time of the complainant's earlier request.
33. The Commissioner notes HMT's comment that "releasing the information at this time could have led to distracting public debate at a time when delivering effective policy options in the face of a pandemic was the government's key objective". In the Commissioner's view, the reality of the pandemic created a unique situation whereby extra weight might be given to the public interest in avoiding distracting discourse at the time of the request. This would allow the government to focus on managing the country's response to the pandemic which would be in the public interest. However, given the importance of CBILS to the UK economy, there is an equally weighty counter argument in favour of ensuring transparency regarding the perceived economic advantage private individuals might gain from - or the influence they might have in - the formulation and development of government policy. This is particularly the case where the individual contacting the then Chancellor Rt. Hon. Rishi Sunak MP is a partner in a hedge fund with an apparent personal connection to the former Chancellor. The Commissioner notes the complainant's view that there is insufficient regulation of hedge funds when considering this point.
34. The Commissioner has concluded, by a narrow margin, that the balance of public interest at the time of the request, while the government (and specifically HM Treasury) was still dealing with the immediate economic impact of the pandemic, favours maintaining the exemption. In reaching this view, he has had particular regard to protecting the safe space in which the policy in question was formulated and developed in those circumstances.
35. The Commissioner recognises that the importance of a safe space can fluctuate, depending on how fixed the policy is at the time in question. Protecting a safe space for the formulation and development of policy in the unique circumstances of the pandemic was particularly important. The Commissioner considers that if this request for information is made at a later date, such as when the policy is no longer in operation or has been superseded by a different policy, his view may well be different.

36. In reaching his conclusion by a narrow margin, the Commissioner also recognises that there is considerable public interest in knowing more about information sharing between hedge fund managers and government organisations or individuals within those organisations. Obviously there are rules and expectations in place for those in the public sector which govern their communications with the private sector regarding market sensitive matters. However, there is a clear public interest in knowing more about how this operates in practice with specific examples. In doing so, regard should be had for a public authority's obligations under data protection legislation to ensure the lawful and fair processing of any personal data it considers for disclosure. Information which, for example, identifies individual hedge fund managers is likely to be those individuals' personal data.
37. In light of the above, the Commissioner finds that the public interest in maintaining the exemption at section 35(1)(a) outweighed the public interest in disclosure at the time of the request.

## Right of appeal

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38. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

39. 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.
40. 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 .....**

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
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