

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 May 2022

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

Decision (including any steps ordered)

1. The complainant has requested information associated with HM Treasury's contracts with opinion polling firms. HM Treasury (HMT) withheld the requested information under section 35(1)(a) and section 43(2) of FOIA, which concern the formulation and development of government policy and commercial interests respectively. HMT has subsequently also applied section 36(2)(c) to the information, which concerns prejudice to the effective conduct of public affairs.
2. The Commissioner's decision is as follows:
 - The requested information is exempt information under section 43(2) of FOIA and the public interest favours maintaining this exemption.
3. The Commissioner does not require HMT to take any remedial steps.

Background

4. In its submission to the Commissioner, HMT has provided the following background.
5. HMT has conducted regular polling activity over a number of years to support the department to gain a better understanding of public opinion and to assist and inform the development of good policy making. In June 2020 the department increased the frequency of its polling activity

to a weekly rhythm, appointing Hanbury Strategy and Communications Limited as our polling provider for this project.

6. The department uses polling activity to test and consider potential policy interventions across a range of issues including taxation, public spending and market intervention. Polling is one of the many tools the department uses to robustly consider policy ideas and how the public may respond or change their behaviour in light of these potential interventions.
7. At the time of the request, April 2021, the department's contract for regular polling and focus group activity was held by Hanbury Strategy and Communications Limited. The department worked with the company over the course of three separate contracts, which were published on the Government's Contracts Finder website. The department worked with IPSOS Mori in February and March 2020, the value of this work was under £10,000, so in accordance with Cabinet Office procurement guidance no contract has been published. The department also held a contract with YouGov between May 2020 and August 2021, which was published on the Government's Contracts Finder website.

Request and response

8. On 6 April 2021 the complainant requested information of the following description:

"Please send me the list of questions that the Treasury required Hanbury Strategy to ask of the public through focus groups/panels/polls etc as part of its two 2020 contracts (references CCZZ20A32 and CCZZ20A50) – as well as the questions of any other further contracts with opinion polling firms since February 2020.

Please also furnish me with a list of the answers."
9. On 5 May 2021 HMT responded to the request. It withheld the requested information under section 35(1)(a) and section 43(2) of FOIA and explained why it considered these exemptions are engaged.
10. HMT provided an internal review on 2 June 2021. It upheld its refusal.

Scope of the case

11. The complainant contacted the Commissioner on 9 June 2021 to complain about the way their request for information had been handled.

12. In its submission to the Commissioner HMT advised that it considered that the requested information should also be withheld under section 36(2)(c) of FOIA.
13. The Commissioner's investigation has focussed on HMT's application of section 43(2) of FOIA to the requested information, and the associated public interest test. If necessary, he will consider HMT's reliance on section 35(1)(a) and/or section 36(2)(c).

Reasons for decision

Section 43 – commercial interests

14. HMT considers the polling questions and the response options asked on behalf of the department in the outlined agreements at paragraph 7 between 1 February 2020 and 6 April 2021 to be within the scope of the request. It has provided this information to the Commissioner.
15. Section 43(2) of FOIA says that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). Section 43(2) is subject to the public interest test. In cases where information is exempt from disclosure the information may still be disclosed if the public interest in releasing the information is greater than in maintaining the exemption.
16. For section 43(2) to be engaged the Commissioner considers that three criteria must be met. First, the actual harm that the public authority alleges would, or would be likely, to occur if the withheld information was disclosed must relate to the applicable interests within the relevant exemption. Second, 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 that is alleged must be real, actual or of substance. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – eg disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
17. HMT considers that there are three distinct groups whose commercial interests would be seriously impacted through releasing the polling questions within the scope of this request: the supplier[s], HM Treasury and businesses and other economic actors. HMT goes on to explain these in turn.
18. **Commercial interests of the supplier:** The questionnaires and answer options in the scope of this request are the supplier's work

product. Topics which HMT would like to cover in weekly polling were discussed verbally on a weekly basis at a regular catch up between the department and the supplier. Twenty-four hours following this meeting, the supplier produced a comprehensive discussion guide which the department provided comments on and helped to refine. As such, the questionnaires and answer options are the supplier's intellectual property.

19. Designing and producing polling and focus group questions is a specialist and skilled activity, a core product offering of the provider and an integral part of the service that the supplier provides to the department. There is considerable skill and experience required in designing questions in a way which is not leading, and which encourages people to reveal their true opinions. Releasing the supplier's work product, which it provided to HMT under strict confidentiality agreements, would provide clear unfair commercial advantage to their competitors, who would gain insight into the provider's practices, ways of working and techniques – particularly given that once information is released under FOIA, it is effectively released to the world. Disclosure could undermine the supplier's reputation and consumer confidence and provide its competitors with an unfair advantage. HMT believes this would undermine the provider's ability to compete on a level playing field in the future.
20. **Commercial interests of the department:** Should the questions be released, the department would expect there to be a chilling effect on future procurement for this type of activity. It would undermine the integrity of the process, the confidentiality agreements in place between the supplier and the department and disincentivise established and skilled providers from bidding for similar work in the future for fear of their intellectual property being routinely released. Ultimately, exit of such providers from the market would lead to a smaller pool of companies for the department to choose from. This would be likely to result in worse value for money for the taxpayer and limit the information available to Ministers and Government officials to make the decisions with the widest possible breadth of information. The department's commercial interests would not be served by releasing information that could undermine its ability to procure crucial work in the future.
21. Trust and effective stakeholder relationships between HMT and external suppliers are essential to successful partnership working. HMT believes that trust between the department and suppliers would be eroded if this information were released into the public domain.
22. **Commercial interests of businesses and other economic actors:** As the United Kingdom's economics and finance ministry, HMT considers a wide range of potential options and policy levers available to it. These

would have far-reaching consequences across the economy via many means, including through its polling questions. Releasing the requested material could have negative consequential commercial impacts on businesses that would be impacted by the policies which were the subject of polling activity. Should economic actors gain insight into the policy options under consideration by the Government, HMT would expect this to have “market moving” consequences. HMT provided the Commissioner with an example of one potential such consequence which he has not reproduced in this notice. To do so would reveal information that HMT is withholding.

23. HMT has confirmed to the Commissioner that it has had correspondence with the supplier of the majority of the polling work which is covered by the scope of this contract, Hanbury Strategy and Communications Limited. The company has indicated its strong opposition to the release of this information due to the direct impact this would have on its commercial interests.

The Commissioner’s conclusion

24. With regard to the first of the criteria at paragraph 16, the Commissioner is satisfied that the harm HMT envisions if the withheld information was disclosed relates to the interests relevant to section 43(2). This is because it relates to the commercial interests of the suppliers (the Commissioner understands Hanbury Strategy, IPSOS Mori and YouGov to be caught by the request), its own commercial interests and those of businesses and other economic actors.
25. Regarding the second of the criteria, the Commissioner has focussed on the suppliers but has taken into account the other commercial interests HMT has referred to. The Commissioner understands that pollsters are semi-regulated by the rules of the British Polling Council. If the results of their polls are published, they are required to make the full dataset available – including the exact questions asked. Therefore, whilst question-setting is a skill, the Commissioner is not wholly convinced of the extent to which there is genuine originality or confidentiality within the industry.
26. However, the Commissioner is nonetheless satisfied that a causal relationship exists between releasing the withheld information and prejudice to the suppliers’ commercial interests. This is because disclosing the information would reveal the suppliers’ practices, ways of working and techniques to the suppliers’ competitors. The Commissioner is satisfied that such commercial prejudice is not trivial and would be of substance.
27. Regarding the third of the criteria, from its correspondence to the complainant and its submission HMT’s position appears to be that the

prejudice it envisions **would** occur. However, the Commissioner does not consider that HMT has presented a persuasive case that the envisioned prejudice would (definitely) happen. That said, he considers that HMT's concern is credible and that a position that the envisioned prejudice **would be likely to** occur is reasonable. The Commissioner is satisfied that the chance of the envisioned prejudice occurring is more than a hypothetical possibility and poses a real and significant risk.

28. Since the three criteria have been met, the Commissioner's decision is that the information the complainant has requested engages the exemption under section 43(2) of the FOIA. This decision is in line with the Commissioner's decision in IC-98076-B5L7¹, which also concerned HMT and a request for information about polling questions. The Commissioner has gone on to consider the public interest test.

Public interest test

Public interest in disclosing the information

29. HMT has acknowledged that interventions and policies it implements can and do have wide ranging consequences on individuals, families, businesses and financial markets. It therefore recognises the public interest in transparency and accountability and acknowledges that disclosing the requested information would give insight into the government's thinking in relation to a number of policy issues, and the manner in which public money is spent.
30. HMT recognises that transparency of information can increase public trust. There is also a broad public interest in furthering public understanding of the issues with which public authorities deal, and in opening the department up to scrutiny to increase diligence and understanding of the issues with which the department deals.
31. HMT also says that disclosing this information would offer insight into the Government's thinking as it responded to the COVID-19 pandemic.
32. The complainant has not presented any arguments for disclosure in their request for a review or correspondence to the Commissioner.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/4019178/ic-98076-b5l7.pdf>

Public interest in withholding the information

33. HMT has confirmed that it believes that releasing this information would materially harm the commercial interest of the suppliers, the department and wider economic actors. HMT does not believe it is in the public interest to harm the commercial interest of the suppliers whose work product is covered by this request. The companies involved entered into a contract with the department in good faith. Releasing the information would put their work product out into the public domain, giving considerable commercial advantage to their competitors. A release of this nature would damage the department's relationship with the suppliers involved and breach the terms of the working relationship and confidentiality agreements in place. HMT strongly believes this would make it less likely that both the suppliers covered by this request (who make up a considerable portion of market actors), and other companies who undertake work of this nature, would bid for similar work in the future. This would reduce the pool of available companies, increase costs and reduce value for money for the taxpayer.
34. Neither can it be in the public interest, HMT argues, to harm the commercial interests of companies who could be affected by the release of these questions. These companies, their employees, their shareholders and their customers could all be harmed by the potential market moving impacts of such a release, which HMT believes would be unfair and disproportionate.
35. Finally, HMT argues that releasing the information - polling questions - rather than detailed policy discussion, would also put partial and incomplete information without context into the public domain. This could lead to an escalation of misinformation and misunderstanding rather than the full transparency intended.

Balance of the public interest

36. As in IC-98076-B5L7, the Commissioner's decision is that the balance of the public interest favours maintaining the section 43(2) exemption. He notes that that request had been submitted to HMT, and refused, in September 2020 ie the time period and circumstances were broadly the same as in this case.
37. While disclosure in this case would give an insight into government thinking and further the public's understanding, the degree to which that understanding would be furthered would be limited. This is because disclosing simply the polling questions would only provide an insight into those questions, not the policy making process that followed this. It is possible that policy areas which are polled on are not taken forward as policy options.

38. The Commissioner considers there is greater public interest in HMT maintaining good relationships with its suppliers and in having a wide pool of suppliers to approach for polling contracts. Ultimately, the Commissioner again finds that the fact that disclosing the withheld information risks harming the commercial interests of three separate and distinct groups provides a more compelling reason to withhold the information.
39. Since the Commissioner has found the information to be exempt under section 43(2) of FOIA, and the public interest to favour maintaining that exemption, it has not been necessary for him to consider HMT's reliance on section 35 or 36.

Right of appeal

40. 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

41. 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.
42. 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

Cressida Woodall
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