

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 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 a meeting between the Chancellor of the Exchequer and representatives of Coinbase, a cryptocurrency exchange platform, in June 2022. HM Treasury disclosed some information, but withheld the remainder, citing sections 35(1)(a) (Formulation of government policy etc) and 40(2) (Personal information) of FOIA.
2. The Commissioner's decision is that HM Treasury was entitled to rely on the cited exemptions to withhold the remaining information.
3. No steps are required as a result of this decision.

Request and response

4. On 14 February 2023, the complainant wrote to HM Treasury and requested information in the following terms:

"Please would you let me know in writing if you hold information of the following description:

Concerning the meeting between the then Chancellor of the Exchequer Rishi Sunak and Coinbase on June 29 2022,

- Minutes of the meeting;

- Communications between Mr Sunak and his office with Coinbase about the meeting before and after it was held.

Please may I see the information.”

5. HM Treasury responded on 14 March 2023. It disclosed meeting minutes and an exchange of emails setting up the meeting, with redactions made for information which it said was exempt under sections 35(1)(a) and 40(2) of FOIA. It also withheld some information under section 43(2) (Commercial interests) although it did not explain why that exemption had been applied.
6. At internal review, it maintained these exemptions were correctly applied.

Scope of the case

7. The complainant contacted the Commissioner on 31 March 2023 to complain about the way his request for information had been handled. He disagreed with HM Treasury’s decision to withhold information under the cited exemptions.
8. During the Commissioner’s investigation, HM Treasury revised its position. It withdrew reliance on section 43 and disclosed the small amount of information it had previously withheld under that exemption. It disclosed the identities of Coinbase employees which had previously been withheld under section 40(2). It also disclosed a suggested topic for discussion at the meeting, which had been withheld under section 35(1)(a). It continued to withhold part of the meeting note (section 35(1)(a)), the identities of non-senior HM Treasury staff and the email address of a named Coinbase employee (section 40(2)).
9. The analysis below considers whether HM Treasury was entitled to apply sections 35 and 40 of FOIA to refuse to disclose the remainder of the withheld information.

Reasons for decision

Section 35 – Formulation of government policy

10. HM Treasury applied section 35(1)(a) to withhold a small amount of information summarising the discussions at the meeting.
11. Section 35(1)(a) of FOIA states that:

"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. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
13. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations/submissions are put to a minister or decision makers.
14. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
15. Ultimately, whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
16. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - the final decision will be made either by the Cabinet or the relevant minister;
 - the Government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.
17. HM Treasury explained to the Commissioner that the information related to an area of live policy development regarding the Government's proposals to bring cryptoassets into the financial services regulatory framework. As part of this work, it has been actively engaging with industry and relevant stakeholders to better understand the sector and its challenges:

"...Rishi Sunak met with senior stakeholders at Coinbase for a discussion on the Government's approach to cryptoasset regulation. This meeting, which is the subject of the present FOI request, was one element of the wider programme of engagement being undertaken by Government Ministers and officials with the cryptoasset industry. Engagement and feedback with representatives across the industry in this way is central to economic policy decision making."

18. HM Treasury explained that the redacted minutes of the meeting concern the UK Government's approach to the regulation of cryptoassets. At the time the request was made, officials were working on the public consultation on the future regulatory regime for cryptoassets, (which opened¹ on 1 February 2023), and cryptoasset financial promotions legislation, which was laid before Parliament on 27 March 2023 and debated on 2 May 2023².

"The proposed measures in the consultation paper and proposed financial promotions legislation will ensure crypto exchanges (like Coinbase) need to comply with fair and robust standards that are equivalent, or very similar, to existing regulatory standards and requirements for similar risk traditional financial assets. When in force, the Government expects that entities like Coinbase will follow all regulations; it is therefore also important that they are engaged in the consultation and policy formulation process.

The consultation paper closed on 30 April 2023, and the Government is now considering feedback and working to set out its consultation response. Policy decisions relating to the wider framework are not made in a silo and are highly interrelated.

All the above policies were (and continue to be) under development at the time the complainant submitted this request."

19. Having viewed the withheld information (and mindful of the purpose of the exemption) the Commissioner is satisfied that, at the time of the request, it related directly to the formulation of government policy on cryptoasset regulation and that each of the criteria set out in paragraph 16 is met. The exemption at section 35(1)(a) of FOIA is therefore engaged.

Public interest test

20. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

¹ <https://www.gov.uk/government/news/uk-sets-out-plans-to-regulate-crypto-and-protect-consumers>

² <https://www.gov.uk/government/consultations/cryptoasset-promotions>

Public interest arguments in favour of disclosure

21. The complainant argued that disclosure was in the public interest. He believed Coinbase to have been engaged in lobbying on the subject of future regulation and said that it was:

"...a cryptocurrency platform which has encountered various troubles including regulatory compliance concerns over its money laundering prevention...The fact that Coinbase...had to reach a \$100 million settlement with New York's Department of Financial Services adds to the importance that the public should know about the its [sic] engagement with the Chancellor".

22. HM Treasury set out the following arguments:

"We recognise that there is an inherent public interest in transparency, accountability and in furthering public understanding of the issues with which public authorities deal, including on cryptoassets.

In this specific case, we also recognise there is public interest in the Government's approach to cryptoasset regulation; in upholding confidence that HM Treasury stays in touch with developments in financial services in the UK; in providing assurance that ministers treat financial services businesses fairly; and in ensuring that money is spent correctly on maintaining contact with financial services businesses. We also recognise that Coinbase, the company in attendance at the meeting concerned, has been subject to media attention and regulatory action in the US."

Public interest arguments in favour of maintaining the exemption

23. HM Treasury set out the following arguments:

"...there is a strong public interest in maintaining the safe space for HM Treasury to engage with other bodies and international organisations on the development of policy, which is crucial for it to operate effectively as an economics and finance ministry and reach well-formed conclusions. We consider that the disclosure of information which contributes to an ongoing decision-making process would inhibit future discussions. The Information Commissioner has recognised that policy development needs some degree of freedom to enable the process to work effectively and we consider that there is a strong public interest in protecting information where release would be likely to have a detrimental impact on the ongoing development of policy.

In this specific case, we have considered the ongoing policy-making and consultative process on the Government's approach to regulating cryptoassets. The recently closed consultation covers a broad suite of activities, including exchanges, custody, and lending platforms and sets other [sic] the broad requirements that firms will need to meet (e.g. prudential and consumer protection). Section 35(1)(a) is intended to ensure that the possibility of public exposure does not deter from full, timely and effective deliberation of policy formulation and development, including the exploration of all options. The release of the information at the time the request was made, and any subsequent debate in the media, may have prevented or prejudiced the development of policy by causing undue distraction or hindered the consideration of all options. This would have not been in the public interest.

...the information which engaged section 35(1)(a) was not withheld with Coinbase specifically in mind. HM Treasury relies on information provided by a range of stakeholders to better understand the impact of policy proposals on different sectors across the economy. Engagement and feedback with representatives across different industries is central to economic policy decision-making. This is because business is a crucial partner to Government in the UK's economic policy development, and meetings with third parties provide a crucial commercial perspective on delivery of Government policy.

Businesses like Coinbase share frank advice and feedback on the UK's approach to regulating cryptoassets. The [withheld information] contains open and frank views...which were shared on a confidential basis. Should this information be made public, it could deter stakeholders from similar future engagement with HM Treasury, which could negatively impact policy development by limiting the range of views that officials can consider. This could undermine the subsequent development of policies by weakening the ability of Government to be fully informed.

Finally, the ongoing consultation and future response document, alongside regular engagement across the financial services industry, including with the cryptoasset sector, provides the public with confidence that HM Treasury is in touch with developments in financial services across the UK, and that ministers treat businesses across the financial services sector fairly – showing due regard to the public interest.”

Balance of the public interest

24. The Commissioner accepts that there is a public interest in the disclosure of information which can inform public understanding of how

Government is developing policy on an important and emerging area of technology and finance. The question for the Commissioner to consider is whether the arguments in favour of maintaining the exemption are stronger.

25. The relevance and weight of public interest arguments will depend on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case. Once a policy decision has been finalised and the policy process is complete, the sensitivity of information relating to that policy will generally start to wane, and public interest arguments for protecting the policy process become weaker. If the request is made after the policy process is complete, that particular process can no longer be harmed. As such, the exact timing of a request will be very important.
26. In this case, the Commissioner notes that the withheld information summarises confidential discussions with Coinbase about the cryptoasset sector. The withheld information was a little over seven months old when the request for it was received, and the formulation of policy on cryptoassets was still in its early stages. It was clearly a 'live' matter then, and it remains so at the time of this notice. As such, the Commissioner considers that there is a clear and strong public interest in protecting this policymaking process.
27. The Government's stated aim is to place the UK's financial services sector at the forefront of cryptoasset technology and innovation and create the conditions for cryptoasset service providers to operate and grow in the UK, whilst managing potential consumer and stability risks³. 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 on this matter. The disclosure of the withheld information at an early stage of policy development would hinder the ability of officials to explore and discuss all available options in a free and frank manner, and to understand all possible implications. The withheld information would, to some extent, reveal details of policy discussions and options being considered. A safe space is required to prevent disclosure resulting in policy makers being unduly distracted or side-tracked by external debate on the matter, which would be harmful to the process of effective, informed decision making.
28. The Commissioner also considers it likely that, in future, key stakeholders could be less willing to share sensitive information if they

³ <https://www.gov.uk/government/consultations/future-financial-services-regulatory-regime-for-cryptoassets>

believe it may be disclosed in response to an FOIA request. Clearly, any action which may result in a lack of willing cooperation, and valuable input, from those who can provide expertise from a wide range of backgrounds, would result in poorer, less well informed policymaking.

29. It has been generally accepted by both the Commissioner and the First-tier Tribunal that significant weight should be given to maintaining the exemption where a valid need for a safe space is identified. A compelling public interest in favour of disclosure is required when a need for safe space is demonstrated. The Commissioner has seen no such compelling arguments in this case, although he acknowledges the complainant's point that Coinbase has been the subject of regulatory intervention in the USA. On that point, the GOV.UK website states:

"Cryptoassets – commonly known as 'crypto' – are a relatively new, diverse and constantly evolving class of assets that have a range of potential benefits, as well as posing risks to the consumer.

As is common in emerging technology markets, the crypto sector continues to experience high levels of volatility and a number of recent failures have exposed the structural vulnerability of some business models in the sector.

Our robust approach to regulation mitigates the most significant risks, while harnessing the advantages of crypto technologies. This enables a new and exciting sector to safely flourish and grow, boosting jobs and investment."⁴

30. The Commissioner considers that in order to develop effective, well informed Government policy on cryptoassets, it will be desirable to obtain a wide range of feedback, including from stakeholders that have experienced particular challenges and who would be well placed to provide insight on them. He has therefore not attached significant weight to the concerns the complainant has expressed in that regard.
31. HM Treasury has confirmed that it has met with Coinbase and it has disclosed the wider points that were discussed. The Government's subsequent proposals for regulation of cryptoassets activities were set out in the consultation document. The Commissioner is satisfied that these actions satisfy the public interest in transparency to a considerable degree.

⁴ <https://www.gov.uk/government/news/uk-sets-out-plans-to-regulate-crypto-and-protect-consumers>

32. The public interest in the Government being able to develop effective and well designed policies on cryptoassets, without being subject to unnecessary disruption when doing so, is the overwhelming factor in maintaining the exemption in the circumstances of this case. The Commissioner therefore considers that greater weight can be afforded to the public interest argument in favour of protecting the safe space in which policy matters are discussed.
33. The Commissioner's decision is therefore that, in the circumstances of this case, the public interest favours maintaining the exemption. The Commissioner is satisfied that, at the time of the request, the information related to live policy formulation and that there is a stronger public interest in protecting the space in which that policy is being developed. It follows that HM Treasury was entitled to rely on section 35(1)(a) to withhold the information in question.

Section 40 – Personal information

34. HM Treasury initially withheld the names of all Coinbase attendees but, during the Commissioner's investigation, it disclosed them. However, it continues to withhold the email address of one named Coinbase employee and the names and email addresses of non-senior HM Treasury staff who attended the meeting, under section 40(2).
35. When making his complaint, the complainant told the Commissioner:

“If some of the individuals are admin staff rather than executives, middle- or high-ranking civil servants or policymakers then it is fair to withhold their names.”
36. HM Treasury has confirmed to the Commissioner that the HM Treasury staff in question are all below senior civil servant level, stating that:

“...they are junior officials who do not have a public-facing role. This is in line with the Information Commissioner's advice that such officials would not reasonably expect their work details to be made known and that they do not normally carry individual public accountability for their official activities.”
37. The Commissioner has conducted internet searches using their names and “HM Treasury” and did not locate any information about them other than their own social media. He therefore has no reason to doubt that they are not senior decision-making staff and that they do not have public facing roles; accordingly he has excluded them from the scope of his investigation, in accordance with the complainant's comments.
38. The Commissioner has therefore considered whether HM Treasury was entitled to withhold the email address of the named Coinbase employee under section 40(2).

39. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
40. In this case, the relevant condition is contained in section 40(3A)(a)⁵. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
41. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
42. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

43. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

44. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
45. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
46. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
47. The information under consideration here is the email address of the member of Coinbase staff who liaised with HM Treasury regarding the meeting arrangements. As it contains their name, the Commissioner is satisfied that it both relates to, and identifies, the individual concerned.

⁵ As amended by Schedule 19 Paragraph 58(3) DPA.

This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

48. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
49. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

50. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

51. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
52. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

53. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”⁶.

⁶ Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the

54. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
55. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

56. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
57. The complainant has not offered any specific reasons as to why the email address should be disclosed. However, the Commissioner considers that the legitimate interest in transparency surrounding stakeholder consultation on a high profile topic is being pursued in the request.

Is disclosure necessary?

58. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
59. The Commissioner notes that HM Treasury has already disclosed the name of the employee in question. He does not consider that any further benefit would flow from disclosing their email address into the public domain - if the complainant wishes to contact them, he may approach

disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

Coinbase centrally, in the first instance – and that they would have no reasonable expectation that this information would be disclosed.

60. The Commissioner is satisfied in this case that disclosing the email address is not necessary to meet the legitimate interests identified above. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
61. The Commissioner has therefore decided that HM Treasury was entitled to withhold the email address of the Coinbase employee under section 40(2), by way of section 40(3A)(a) of FOIA.

Right of appeal

62. 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

63. 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.

64. 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

Samantha Bracegirdle
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