

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 September 2022

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

Decision (including any steps ordered)

1. The complainant has requested information from HM Treasury about breaches of supply chain security during the reclamation and disposal of the old £1 coin by the Royal Mint.
2. HM Treasury relied on the exemption at section 31(3) FOIA (law enforcement) as its basis for neither confirming nor denying ('NCND') whether it held information within the scope of the request.
3. The Commissioner's decision is that section 31(3) is not engaged. HM Treasury was not entitled to NCND holding information within scope of the request.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - issue a fresh response which must confirm or deny whether it holds information within the scope of the request, and disclose or refuse any information identified.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Request and response

6. On 26 June 2021, the complainant wrote to HM Treasury and requested information in the following terms:

“Is HM Treasury aware of any breaches of the supply chain security during the reclamation and disposal of the old series £1 coins, as performed by your delivery partner The Royal Mint?”

7. HM Treasury responded on 23 July 2021. It stated that HM Treasury could NCND that it holds the information by virtue of section 31(1)(a) FOIA - law enforcement and the prevention or detection of crime¹.

8. The complainant requested an internal review on 26 July 2021, stating:

“I have evidence to suggest that many old £1 coin were not securely disposed, nor used for the recasting of new coins, but rather were sold for scrap but then re-entered into circulation, submitted to the UK banking system, and redeemed for full credit. This lack of management has caused significant hardship to many stakeholders and requires a transparent explanation and assurance that this cannot be repeated in the future.”

9. Following an internal review on 20 August 2021 HM Treasury maintained its reliance on s31(1)(a) FOIA to NCND whether it held information within the scope of the request.

Scope of the case

10. The complainant contacted the Commissioner on 23 October 2021 to complain about the way his request for information had been handled.

11. His initial grounds of complaint were:

“HM Treasury refuses to disclose details of a breach of security that occurred between April- July 2017 concerning the disposal of the old £1 coin that has led to millions of coins re-entering the circulated coin

¹ As per paragraph 13 below, HM Treasury later clarified that it meant section 31(3) by virtue of section 31(1)(a) FOIA.

market and being submitted to the Royal Mint twice and credited twice.”

12. In further arguments to support the complaint, the complainant said:

“Confirming [the breach] would give confidence to me and all current old £1 coin holders in the UK that HM Treasury has good visibility and management of its wholly owned subsidiary The Royal Mint.

...Confirmation from HM Treasury that they hold data on the breach means that the public can have confidence that they have investigated it and have satisfied themselves that no fraud contributed to the breach, or that reporting of any fraudulent activity was made to the relevant authorities.

... Withholding information on the breach that occurred in 2017 led to millions of pounds of losses by a retail bank (or its insurance company most likely) and millions of old £1 coins have yet to be returned.

...Similar threats are now emerging for the new £1 coin, and the public interest is best served by being made aware of breaches in the old £1 coin reclamation programme that will empower them to support the detection of crime now and in the future across all denominations.”

13. During the course of the Commissioner’s investigation HM Treasury accepted that it should in fact have cited section 31(3) FOIA, by virtue of section 31(1)(a). Section 31(3) provides an exclusion from the requirement to NCND whether information described in a request is held if to do so would, or would be likely to, prejudice any of the functions in sections 31(1).

14. The decision to use a NCND response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.

15. The scope of the Commissioner’s investigation therefore was to determine whether HM Treasury was entitled to NCND holding information within the scope of the request on the basis of section 31(3) FOIA. The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held, it is solely the issue of whether or not HM Treasury is entitled to NCND whether it holds the information requested namely, whether HM Treasury were aware of any breaches of supply chain security during the reclamation and disposal of the old series £1 coin.

Reasons for decision

Section 31(3) law enforcement

16. Section 31 FOIA provides a prejudice-based exemption which protects a variety of law enforcement interests. That means that, in order to engage the exemption, there must be a likelihood that disclosure would cause prejudice to the interest that the exemption protects.
17. HM Treasury has taken the position of NCND whether it holds any of the requested information, citing section 31(3) FOIA. Section 31(3) excludes a public authority from complying with the duty to confirm or deny in relation to information if to do so would, or would be likely to, prejudice any of the functions in sections 31(1). In legal terms, the word 'prejudice' is commonly understood to mean harm. To say that disclosure would or would be likely to prejudice the interests specified in the exemption implies that it would (or would be likely to) harm those interests.
18. HM Treasury has relied on section 31(1)(a) on the basis that confirming or denying whether it holds information within the scope of the request would be likely to prejudice the prevention or detection of crime.
19. Consideration of the section 31 exemption is a two-stage process. First, the exemption must be engaged as a result of prejudice occurring or being likely to occur. Secondly, the exemption is qualified by the public interest, which means that, unless the public interest in the maintenance of the exemption outweighs the public interest in disclosure, the information should be disclosed.

Stage one: the prejudice test

20. The Commissioner has followed the approach as set out in his guidance with respect to the prejudice test, namely to:
 - identify the applicable interests within the relevant exemption;
 - identify the nature of the prejudice – the harm must be real, actual or of substance and demonstrate a causal link between the disclosure and the prejudice caused; and
 - decide on the likelihood of the occurrence of prejudice – i.e., confirming whether or not the information is held 'would be likely' to result in prejudice or 'would' result in prejudice.

Applicable interests

21. The relevant applicable interest in this case is 'the prevention or detection of crime' in section 31(1)(a) FOIA.
22. In the Commissioner's view, 'the prevention or detection of crime' is a broad term. He considers that it covers information held by public authorities without any specific law enforcement responsibilities. Amongst other interests, he accepts that the exemption will protect information that would make anyone, including the public authority itself, more vulnerable to crime.
23. HM Treasury explained to the Commissioner how confirmation or denial whether it holds the requested information would compromise the prevention or detection of crime. For example, it said that to confirm or deny whether it holds information could aid a criminal intent in reclamation and disposal of the old £1 coins or any other coins. Further it would provide criminals with information on the status of supply chain security at the Royal Mint, or aid criminals to understand activities that have been detected or not by the Royal Mint, enabling them to stay ahead of law enforcement.
24. The Commissioner is satisfied that the prejudice HM Treasury is envisaging in this case is relevant to the particular interest the exemption in section 31(1)(a) FOIA is designed to protect.

The nature of the prejudice

25. This step involves two parts. Firstly, the prejudice that the authority has envisaged must be real, actual or of substance. Secondly, there must be a "causal link" between the disclosure and the prejudice claimed.

Real, actual or of substance

26. In a case such as this, it is not enough for the information to relate to the interests protected by section 31(1)(a), its disclosure must also at least be likely to prejudice those interests. The onus is on the public authority to explain how that prejudice would arise and why it would occur.
27. The Commissioner considers that the prejudice test is not a weak test, and a public authority must be able to point to prejudice which is 'real, actual or of substance.' The disclosure must at least be capable of harming the interest in some way, i.e. have a damaging or detrimental

effect on it. If the consequences of disclosure would be trivial or insignificant there is no prejudice.

28. In relation to the actual prejudice which HM Treasury alleged would or would be likely to occur if a confirmation or denial was made, the Commissioner considers that the arguments it put forward were generic rather than specific to the actual information requested.
29. In addition, whilst criminal activities surrounding the reclamation and disposal of the old £1 coins clearly relate to the prevention or detection of crime, it is for the Commissioner to consider here only whether confirmation or denial as to whether HM Treasury were aware of any breaches of supply chain security during the reclamation and disposal of the £1 coin would in itself harm the law enforcement process.
30. In the Commissioner's opinion, a mere confirmation or denial of the information requested is unlikely to harm the prevention or detection of crime in a significant way and so cannot be considered realistic or of substance. The request uses the very general terms "breach" and "supply chain" and on their own these terms are not specific enough for a confirmation or denial to likely have a particular prejudicial effect.
31. Confirmation or denial of the information requested would be minimal help to criminals as it does not reveal the precise number of breaches detected, and the actual breaches used to penetrate the supply chain. Nor would it weaken the possibilities of counter measures or future arrests.

Causal link

32. Secondly, there must be a "causal link" between the confirmation/denial and the prejudice claimed. The causal link shows the circumstances, or the chain of events, which could lead to prejudice. HM Treasury must be able to show the chain of events and how the confirmation/denial of the specific information requested would or would be likely to lead to the prejudice. The Commissioner accepts that it is not usually possible to provide concrete proof that the prejudice would or would be likely to result. Nevertheless, there must be more than a mere assertion or belief that disclosure would lead to prejudice.
33. The Commissioner accepts that criminals and other malicious actors may try to circumvent Royal Mint's supply chain security during the reclamation of the old £1 coin, or other coins. With respect to protecting the law enforcement interests, the Commissioner recognises the importance of protecting information which, if disclosed, would undermine law enforcement activity or make someone more vulnerable to crime.

34. However, he does not consider that HM Treasury has provided realistic evidence to support its view that confirmation or denial of breaches caught within the scope of the request, would be likely to highlight to a criminal which crimes are likely to go undetected. Nor is he persuaded that confirmation/denial would be likely to encourage the committal of further similar offences or the modification of criminal behaviour to reduce the probability of being apprehended. In the Commissioner's view, the confirmation or denial would be of little use to those with criminal intent as there is insufficient detail about the supply chain breach for any crime related patterns to be ascertained.
35. Further, the complainant has not asked for any detail beyond HM Treasury's awareness of 'breaches' of the 'supply chain.' It is not under consideration in the request what counter measures are being taken to try to deter criminal activity of this type nor whether those measures are having an impact. There is no reference either to which part or location of the supply chain, how many breaches there have been, success of the breaches or actions taken as a result. The Commissioner can find no link between provision of the information requested and any plausible impact on the HM Treasury's ability to counteract a breach. HM Treasury appear to simply say that someone acting with illegal intent could use this information to find out whether they had got away with it. It is arguable that simply revealing this fact would be of little use to those with criminal intent without any further detail on the actual breaches - as its this extra information that would enable the criminals to stay ahead of the law/police.
36. The Commissioner therefore finds that HM Treasury has failed to demonstrate a causal relationship between the requested information and the harm envisaged.

The likelihood of prejudice

37. For completeness, the next step in engaging the exemption is to consider how *likely* the prejudice is to occur. Deciding whether the prejudice would occur or is only likely to occur is important. The onus is on the public authority to demonstrate that the specified prejudice test is met.
38. In establishing whether prejudice would or would be likely to occur, it is therefore necessary for a public authority to consider:
 - the range of circumstances in which prejudice could occur (for example, whether it would affect certain types of people or situations)
 - how frequently the opportunity for the prejudice arises (i.e. how likely it is for these circumstances to arise); and,

- how certain it is that the prejudice results in those circumstances.
39. In this context the term “would prejudice” means that it has to be more probable than not that the prejudice would occur. “Would be likely to prejudice” is a lower test; there must be a real and significant risk and more than a hypothetical or remote possibility of prejudice occurring, even if risk of prejudice occurring is less than 50 per cent.
 40. In its responses to the complainant and its correspondence with the Commissioner, HM Treasury did not specifically confirm on which level it is relying. An authority should always make a clear choice between would or would be likely to and state this in its refusal notice.
 41. Instead, the Commissioner notes that in its submissions, HM Treasury arguments pertained to both levels and said that if it were to issue a confirmation or denial it “would be likely that law enforcement would be prejudiced” and “would likely prejudice law enforcement in detecting and preventing crime. ”
 42. In the absence of a clear designation as to level of prejudice by HM Treasury, the Commissioner follows the approach of the Information Tribunal² that the lower threshold of prejudice applies (‘would be likely to result’). It should be noted however that this is our approach in exceptional circumstances. Situations in which the authority does not specify the level of prejudice should not arise; the authority should always be able to state whether it means ‘would’ or would be likely to.’
 43. The Commissioner finds that HM Treasury has failed to clearly designate the level of prejudice it is relying on in this case and to provide detailed reasons why. Therefore the onus to demonstrate that the specified prejudice test has not been met.

Mosaic and precedent effect

44. The Commissioner notes that HM Treasury made reference to the ‘mosaic effect’ in its submissions, saying that: “potential criminals would be able to use this information, in conjunction with other information that they possess, to facilitate further criminal actions.”
45. The Commissioner recognises that criminals and other malicious actors can be highly motivated and may go to great lengths to gather

² Ian Edward McIntyre v the Information Commissioner and the Ministry of Defence (EA/2007/0068, 4 February 2008)

intelligence. Account can be taken of any harm likely to arise if the requested information were put together with other information. However, in the Commissioner's opinion simply confirming or denying whether HM Treasury was aware of breaches of supply chain security, compared to information about the nature, and effects of those breaches, is not likely to materially assist malicious actors when pieced together with existing or prospectively available information whether gathered lawfully or not. On the contrary there is a compelling public interest in disclosure of information capable of allowing the public to scrutinise whether public money being spent by Royal Mint is adequate and provides sufficiently robust protection for reclaimed coin. It must also be pointed out that transparency will increase public confidence in coin security and in turn this improves confidence in the Treasury.

46. HM Treasury also referred to the 'precedent effect' advising that some requests can set a precedent, i.e. complying with one request would make it more difficult to refuse requests for similar information in the future. The Commissioner notes that in 2019, HM Treasury received the same FOI request from the complainant. HM Treasury's response to this request was to NCND that it holds the information requested.
47. However, in the Commissioner's opinion simply confirming or denying whether HM Treasury was aware of breaches of supply chain security would not set a precedent and make it harder to resist future requests for similar information. The request at issue is very general in nature using the terms 'breach' and 'supply chain.'
48. Therefore, in the Commissioner's view, the prejudicial effect of issuing a response which effectively confirms or denies whether it holds any information on supply chain breaches would be minimal. A confirmation that information is held for example may not give an indication to the success or otherwise of a breach. A denial on the other hand would not indicate vulnerabilities in the system or that a particular type of breach was unsuccessful.

Is the exemption engaged?

49. In light of the above, the Commissioner has concluded that section 31(3) is not engaged. In the Commissioner's view the effect of issuing a response which effectively confirms or denies whether there were 'breaches' of the 'supply chain' is not specific enough for a confirmation or denial in this context to likely have a particular prejudicial effect.

Stage two: the public interest test

50. Having found that section 31(3) was not engaged, there is no requirement for the Commissioner to consider where the public interest lies.

Right of appeal

51. 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

52. 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.
53. 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

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF