# Freedom of Information Act 2000 (FOIA)

# Decision notice

**Date:** 21 March 2023

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

## Decision (including any steps ordered)

1. The complainant has requested distributional and equality analyses associated with the Spring Statement 2022.

2. HM Treasury (HMT) withheld the information citing section 35(1)(a). During the Commissioner's investigation, HMT confirmed that due to the passage of time, it was content to disclose some of the requested information. Following this, the complainant disputed that HMT had identified all of the information falling within the scope of the request.

3. The Commissioner's decision is that, on the balance of probabilities, HMT has identified all of the information falling within the scope of the request. He also finds that HMT is entitled to rely on section 35(1)(a) to withhold the remaining information.

4. The Commissioner does not require further steps.

## Request and response

5. On 26 March 2022, the complainant wrote to HMT and requested information in the following terms:

   "At this week's spring statement there was no distributional analysis published which looked solely at the impact on households of the new measures. The analysis published looked only at all measures taken since 2019.

   Therefore, please provide me with any
   a) distributional analysis examining the impact on households and
   b) equalities impact assessment carried out solely on the measures in the spring statement 2022".

6. HMT provide its response on 26 April 2022 and confirmed that it held the requested information.

7. HMT confirmed that section 35(1)(a), formulation or development of government policy, was engaged in relation to all of the requested information. HMT explained that the information related to government taxation and spending in the years up to and including 2023/24.

8. HMT provided its public interest considerations, which are included in the Commissioner's decision below, and confirmed that it considered the balance of the public interest lay in maintaining the exemption.

9. HMT also provided an explanation of the process followed for the purpose of discharging its obligations under section 149 of the Equalities Act 2010 in relation to the Spring Statement 2022.

10. The complainant requested an internal review on 4 May 2022 and disputed the balance of the public interest.

11. HMT provided the outcome of its internal review on 13 July 2022 and upheld its position that section 35(1)(a) was engaged and the public interest favoured maintaining the exemption.

## Scope of the case

12. The complainant contacted the Commissioner on 15 July 2022 to complain about the way their request for information had been handled. Specifically, HMT's refusal to disclose the requested information.

13. During the course of the investigation, HMT disclosed some of the requested information as it considered that the passage of time meant that the balance of the public interest now lay in disclosure.

14. Following this disclosure, the complainant confirmed to the Commissioner that they disputed that HMT had identified all of the information falling within the scope of the request.

15. The Commissioner therefore considers that the scope of this investigation is to firstly determine whether, on the balance of probabilities, HMT holds further information to that identified. The Commissioner will then go on to determine whether section 35(1)(a) is engaged to the withheld information and where the balance of the public interest lies.

## Reasons for decision

### Section 1: General right of access

16. Section 1(1) of FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information relevant to the request and, if so, to have that information communicated to them. This is subject to any procedural sections or exemptions that may apply. A public authority is not obliged under FOIA to create new information in order to answer a request.

17. Where there is a dispute between the amount of information located by a public authority and the information a complainant believes should be held, the Commissioner, following the lead of a number of First-Tier Tribunal (Information Rights) decisions applies the civil standard of proof- ie on the balance of probabilities.

18. In the specific circumstances of this case, the Commissioner will determine whether, on the balance of probabilities, HMT has identified all of the information falling within the scope of the request.

### The complainant's position

19. The complainant set out that they would expect HMT to have conducted a wider distributional analysis examining the impact on households of all the measures in the Spring Statement, and an equalities impact assessment carried out solely on all the measures in the Spring Statement.

**HMT's position**

20. In its original response to the request, HMT explained to the complainant that all Government departments are required to comply with their legal requirement to consider equalities for all financial decisions. HMT set out that to support decision making at the Spring Statement 2022, it was required to set out:

    a. how the current pattern of taxation or spending affects groups with any of the protected characteristics, in other words, the equalities profile of the main areas of departmental policy decisions;

    b. any significant impacts for any of the protected groups of new taxation or spending proposals, including relevant opportunities for the positive promotion of equality or for the mitigation of potential negative impacts; and

    c. high level assessments of the quality of the data sources underpinning the assessments, as well as the scope to improve data quality and detail any plans to do so.

21. HMT explained to the complainant that it carefully considers the impact of its decisions on those with protected characteristics in line with both its legal obligations and with its strong commitment to promoting fairness. HMT explained that policy leads' advice to Ministers is informed by an assessment of equalities impacts. This must be considered as part of ministerial decision making. HMT explained that for decisions made at the Spring Statement 2022, policy leads and Ministers would have considered the equalities impact for all individuals with protected characteristics under the Equality Act 2010.

22. HMT explained that, with limited exceptions, all Ministers of the Crown, and Government Departments (including their executive agencies) are subject to the Public Sector Equality Duty (PSED) and Treasury Ministers and officials are all fully aware of the obligations placed upon them by the PSED to pay due regard to the impacts on those sharing protected characteristics when making policy decisions. HMT set out that the intent of the PSED is to investigate consideration of equalities into the policy making process.

23. HMT explained that it has rigorous processes in place to ensure that it complies with its legal requirements under the Equality Act 2010. It set out that every policy is different, so the level of work will vary accordingly and what matters is that equality considerations are placed side-by-side with all other pressing circumstances. HMT explained that whilst there is no legal requirement to publish equalities impact

assessments in respect of policy formulation, there is a requirement to set out information relating to how it ensures that the PSED is followed.

24. HMT explained that in support of this, it directed the complainant to published information on the care taken to ensure that Ministerial decisions are informed by assessments of the impact for those from protected characteristics as an integral part of the process for providing advice to Ministers. HMT included a link to a published summary form for tax and welfare measures[1].

25. In its submissions to the Commissioner, HMT confirmed that the information requested is a collection of extracts from a large number of documents that formed the basis of advice given to Ministers for the Spring Statement 2022.

26. HMT confirmed that it had interpreted the request as follows:

    a. In relation to part I of the request – the distributional analysis as information of a statistical nature that quantifies average impacts by income decile. Further, the distributional analysis that is in scope should exclusively relate to Spring Statement 2022 measures.

    b. In relation to part II of the request – Documentation provided to assist Treasury Ministers pay 'due regard' to the equality impacts of decisions as part of the Spring Statement 2022; and any equalities analysis conducted as part of the earlier formulation of policies subsequently considered by Ministers as part of the Spring Statement 2022.

27. HMT explained to the Commissioner that the legal requirement in the Equality Act 2010 is to pay "due regard" to equality considerations, which means consciously thinking about the three aims of the PSED (section 149 of the Equality Act 2010) in the exercise of its functions and the carrying out of any services it provides. HMT set out that this means that it is required to pay due regard to:

    a. eliminating unlawful discrimination and other prohibited acts in the legislation;

[1] https://www.gov.uk/government/collections/tax-information-and-impact-notes-tiins#spring-statement-2022

b. promoting equality of opportunity between people who share a protected characteristic and people who do not share it; and

c. fostering good relations between people who share a protected characteristic and people who do not share it.

28. HMT explained that there is no specified format for conducting such an assessment. The duty is on the decision maker personally and it cannot be delegated, so this means the equality impacts of any particular policy under consideration, including at the Spring Statement, must be drawn to the Minister's attention.

29. HMT stated that there is not a single Equality Impact Assessment covering Spring Statement 2022 or the policies contained in the announcement. HMT explained that in order to ensure that policy is compliant with the legal requirements of the PSED, advice is provided to Ministers in submissions sent to them with advice on each particular policy issue.

30. HMT explained that the level of detailed work required will vary. HMT set out that it could range from a simple assessment succinctly summarised in the appropriate submissions to Treasury Ministers, for example where relevance and scale of the impact of the policy is not high, all the way up to a full in-depth assessment and detailed outline for Treasury Ministers, for example, where relevance or scale of impact on the policy to the equality group in question is very high or where assessing impacts is complex. HMT gave examples of where the advice was minimal as no equalities impacts were anticipated.

31. HMT explained that it is its usual practice in published distributional analysis to demonstrate the cumulative impact of decisions made since a nominated baseline year. Over the past three years, it has published analysis alongside fiscal events showing the combined effects of decisions since Spending Review 2019. HMT explained that looking at the combined impact across multiple fiscal events ensures that its analysis is representative of the overall impact of government policies in the round, rather than focussing on the partial impact of specific measures. It is the case that the Spring Statement 2022 was not formally regarded to be a fiscal event and therefore did not contain the announcement of significant new policy. HMT explained that this therefore means that its approach was much more minimalistic in comparison to the Autumn Budget 2021.

32. HMT explained that given this approach, this process of putting equalities advice to all ministers was more streamlined than would normally be the case.

33. HMT confirmed that the completion and publication of formal Equality Impact Assessment documents is not a legal or procedural requirement under the Equality Act 2010 but in the interests of transparency HMRC publishes a summary of equality impacts for tax measures within the Tax Information and Impact Notes alongside any associated legislation.

**The Commissioner's position**

34. On the basis of HMT's explanations, and having reviewed the information identified, the Commissioner is satisfied that, on the balance of probabilities, HMT does not hold any further information to that already identified.

35. The Commissioner understands why the complainant would believe that the information would be held in a specific format. However, the Commissioner accepts HMT's explanation that the level of detail and format of the equality considerations will differ depending on the proposed policy.

36. The Commissioner put HMT's interpretation of the requests to the complainant and they did not dispute either interpretation.

37. In light of HMT's requirement to demonstrate its considerations under the PSED, the Commissioner considers that it is unlikely that HMT would not be aware of what information is held. The Commissioner considers that this information is sufficiently important that it should not require in depth searches to locate, should it be held.

38. The Commissioner is therefore satisfied that, on the balance of probabilities, HMT has identified all the information within the scope of the request.

**Section 35: Formulation or development of Government policy**

39. Section 35 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"

40. 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.

41. 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[2] advises that a public announcement of the decision is likely to mark the end of the policy formulation process.

42. This exemption is a class based one which means that, unlike a prejudice-based exemption, there is no requirement to show harm in order for it to be engaged. The relevant information simply has to fall within the description set out in the exemption

**HMT's position**

43. HMT explained that for each of the measures that was announced in the Spring Statement 2022, ministers were provided with an assessment of the impact of that measure on protected groups. Officials and ministers consider these issues as part of the policy-making process and could choose not to follow a particular policy based on those assessments or to modify it to mitigate the impacts.

44. HMT explained that the requested information relates to all measures that were announced as part of the Spring Statement 2022[3].

45. HMT set out that whilst the Spring Statement marks the moment of announcement for a large number of the measures contained in the scorecard at that event, policy development will often continue after the date of the Spring Statement. This continued policy development comes in several forms, including continuing the design and development of the policy as originally announced at the Spring Statement 2022.

46. HMT explained that continued policy development was far more prevalent than usual throughout the Spring, Summer and Autumn of 2022 because of the increasing financial pressures that households would face as energy and food inflation began to erode living standards. HMT explained that its understanding of household's financial circumstances continued to evolve throughout 2022 and therefore the

[2] https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/
[3] HMT directed the Commissioner to table 3.1 in the Spring Statement 2022 document https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1062708/Spring_Statement_2022_Print.pdf

policies that were announced at the Spring Statement 2022 underwent revision quickly after that point.

47. HMT explained that the tax measures announced at the Spring Statement 2022 included the changes to National Insurance Contributions (NICs) thresholds, changes to Class 2 NICs, Income Tax basic rate reduction, Fuel Duty rates reduction, increase in the Employment Allowance, changing the scope of VAT reliefs, and changes to Business Rates. It explained that each of these tax policies is in a state of continual review, as these are the tools that it uses to respond to continuously changing political and economic circumstance.

48. HMT explained that over the past four years, there have been eight fiscal events at which announcements on these taxes have been made. For each of these fiscal events, many further policy options relating to these taxes were considered but not announced. HMT explained that the fast evolution of cost of living pressures over the course of spring 2022 meant that more than ever these measures remained under active consideration in the months following the Spring Statement.

49. HMT acknowledged that the Tribunal has made it clear that policy formulation and development is not a 'seamless web' however it believed that it is the case that certain parts of the UK's tax code are under constant review and therefore it cannot be said that an individual announcement of a change in these taxes marks the end of policy development.

50. HMT provided the Commissioner with explanations of how the policies had continued to develop after the Spring Statement 2022.

**The Commissioner's position**

51. Having reviewed HMT's submissions and the withheld information itself, the Commissioner is satisfied that the information relates to the formulation of government policy, specifically Tax and Spending policy. Section 35(1)(a) is therefore engaged in relation to the withheld information.

**Public interest test**

52. 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 at section 35(1)(a) outweighs the public interest in disclosing the information.

53. The complainant considers that there is a very strong public interest in disclosure so that disabled people can see the impact of the March

statement on them and other minority groups, particularly during a cost of living crisis.

54. HMT recognised that there is an inherent public interest in the Government being transparent and accountable regarding the impact of policies that are announced. It considers that there is a particular public interest in transparency of information in relation to the cost of living. HMT acknowledged that greater transparency of information allows for greater understanding of Government measures.

55. In HMT's original response to the complainant, it explained that there is a public interest in protecting the Government's ability to discuss and develop policies and to reach well-formed conclusions. It explained that the policy process is necessarily an iterative one, and the Information Commissioner has recognised that policy development needs some degree of freedom to enable the process to work effectively.

56. HMT considered 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. HMT explained that there is a strong public interest in protecting against encroachment on the ability of ministers and officials to develop policy options freely and frankly.

57. HMT explained that, in this case, the policy continues to be live as it relates to tax and spending decisions which continue to be considered over the next two years. HMT explained that the requested information sets out the expected impacts across this timeframe and is directly related to considerations which will be a part of this live, ongoing policy development.

58. In its internal review, HMT explained that the policies announced at the Spring Statement remain in live policy development. It explained that the reduction in the basic rate of Income Tax from 20% to 19% in April 2024 has yet to be legislated for and the Government's announcement made clear that it was committed to implementing this measure in a responsible and sustainable way. HMT explained that the Government has said in its Spring Statement 2022 documents that the measure will be implemented "provided that the fiscal principles set out above are met in future". HMT provided a link to this[4].

59. HMT explained that the Government also remains engaged in aspects of the policy design, in particular with elements of the announcement that relate to Class 2 NICs where low-earning self-employed individuals will

[4] https://www.gov.uk/government/publications/spring-statement-2022-documents

be able to build up National Insurance credits without paying Class 2 NICs.

60. HMT explained that releasing distributional or equalities analysis would be likely to have a 'chilling effect' on the future development of evidence to support policy making, which would in turn reduce the quality of advice and deliberation and lead to poorer decision making. HMT considered that there is a strong public interest in protecting against encroachment on the ability of ministers and officials to develop policy options freely and frankly. HMT considered that in this case, it believed that disclosure would result in less candour in policy development, resulting in less robust, well-considered and effective ministerial decisions.

61. HMT explained that the Government reviews a wide range of distributional and equalities analysis when developing policy. HMT confirmed that some of this analysis is already published alongside the fiscal event announcement, and it believed that this already serves a significant public interest in providing publicly available information about the distributional impacts of government policy.

62. HMT explained that the analysis considered in the policy making process that remains unpublished is of many types, and there are a variety of reasons that mean that publishing this analysis would not serve the public interest.

63. The Treasury stated that some of this analysis may be complex, or partial, or could be misleading for a general audience and be misinterpreted which would not be in the public interest. HMT considered that whilst this analysis may form a useful part of the evidence base for internal policy development, it would not be likely to further public understanding of the impact of government policy.

64. HMT acknowledged that the Information Commissioner has recognised that releasing information may have the effect of improving the quality of information that is used in policy development. HMT explained that the analysis produced is impartial and it has systems in place to monitor the robustness of the analysis that it produces. It considered that the production of analysis would not likely be improved by the possibility of disclosure.

65. In its submissions to the Commissioner, HMT explained that equalities impact assessments are currently treated by HMT officials as an opportunity to present fully honest and sometimes extremely frank and blunt assessments of the likely impact of policies on protected groups. HMT explained that the candour of these assessments is crucial to the efficacy of the public sector equality duty (PSED). HMT set out that

many of these measures relate to live policy or to policy that has only very recently been settled and relates closely to ongoing policy areas.

66. HMT explained that officials write these assessments in the knowledge that Ministers are legally obligated to consider these impacts as a part of their decision (Equality Act 2010) but also in the knowledge that the law stops short of requiring these assessments are made public. HMT considered that there is a clear benefit to the live policy making process in keeping these assessments internal to government, as it means that the incentives and objectives of officials are aligned towards effectively conveying the likely impacts on equalities of the policy decision, rather than considering issues of public presentation.

67. HMT explained that whilst its officials are impartial, honest and not easily deterred from sharing their views, it is unavoidably the case that the potential for the release of this information could become a factor in the writing of impact assessments, which would reduce the quality of these assessments. However, it acknowledged that where the policy making process has concluded, the case for continued withholding of information under section 35 is no longer strong.

68. HMT set out that the Information Commissioner has recognised that releasing information may have the effect of improving the quality of information that is used in policy development. However, it rejected that this may be the case in this instance. HMT explained that it is already under a specific legal duty to ensure that it considers the equalities impact of each decision that it makes, and has strong institutional safeguards to ensure that it fulfils this duty. HMT considers that disclosure of the assessments would not be likely to improve the assessments further, but does create a risk that other responsibilities and objectives of HMT come into conflict with the duty to frankly assess the equalities impacts of each policy decision.

69. HMT explained that the prospect of public release of large numbers of live equalities impact assessments would be a material change to the status quo in which officials consider these assessments to be confidential and frank assessments of equalities impacts. HMT considers that such a release may alter the way in which the Equality Act 2010 was designed to function as it will unavoidably lead to the introduction of a conflict between officials' duties under that Act and their responsibilities to support the government of the day.

70. HMT explained that while its officials are not easily deterred from presenting frank assessments to ministers, it believes that the release of this information would result in less candour in policy development, resulting in less robust, well-considered and effective ministerial decisions.

## The Commissioner's position

71. 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.

72. In the content of this request, the Commissioner accepts that the policy making process was clearly live and ongoing at the point the request was submitted. Furthermore, the Commissioner accepts that the analysis set out in the withheld information is one that would have attracted significant interest. As a result, the Commissioner accepts that disclosure of the information at the time of the request would have resulted in particular attention and comment on the analysis set out in it. The Commissioner accepts that this attention would have had a direct and detrimental impact on the policy development process. In his view, the safe space arguments therefore need to be given notable weight.

73. With regard to attributing weight to the chilling effect arguments, the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.

74. The Commissioner notes that the request was made very closely following the Spring Statement and, as set out above, the Tax and Spending Policy was an ongoing live issue as the policy was still being developed in light of the economic changes the UK was experiencing. The Commissioner therefore accepts that disclosure of the withheld information may present some potential risk of the candour of the advice provided to ministers being affected.

75. As a general position, the Commissioner does not accept that the fact that information disclosed under FOIA could be misunderstood or misrepresented is a valid basis on which to arrive that the public interest favours withholding information. This is because, in the Commissioner's view, public authorities should be able to publish some context or

explanation with the information that they release. The only circumstance in which this argument would be relevant in a section 35 case is if a public authority is unable to provide this explanation, or if the explanation would not limit any damage caused. In the circumstances of this case, the Commissioner has not been provided with any arguments regarding why HMT could not provide context or explanations to address any concerns regarding the information being misunderstood. The Commissioner does not accept that information being complex means that the public would not understand it.

76. Turning to the public interest arguments in favour of disclosing the information, in the Commissioner's view, the analysis of how the announced Tax and Spending policy would impact those with protected characteristics including some of the most vulnerable members of society, are clearly of direct interest to the public. As a result, in the Commissioner's opinion, there is a significant public interest in the disclosure of information as it would aid the public's understanding of policy considerations in these areas. Disclosure of the information would provide the public with sight of the analysis that the government had received and considered as part of its policy development and therefore disclosure would make the policy making process more transparent. In addition, disclosure of the withheld information would also provide interested stakeholders with an insight into the analysis of the issues in question which they could use to engage with the government.

77. Nevertheless, 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 ultimately compelling, weight that he considers should be given to the safe space arguments. In his view this, along with the smaller but still substantial weight that he thinks should be attached to the chilling effect arguments, means that the public interest favours withholding the information.

## Right of appeal

78. 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

79. 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.

80. 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**

**Victoria Parkinson**
**Senior Case Officer**
**Information Commissioner's Office**
**Wycliffe House**
**Water Lane**
**Wilmslow**
**Cheshire**
**SK9 5AF**