

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 3 July 2007

Public Authority: Her Majesty's Revenue & Customs ('HMRC')
(formerly Her Majesty's Customs & Excise
'HMCE')

Address of Public Authority: 4th Floor East
100 Parliament Street
London
SW1A 2BQ

Summary

The Commissioner has determined that HMCE failed to comply with section 1(1)(a) of the Act as it did not explain to the complainant that it did not hold sales data broken down month by month as requested. In addition, HMCE failed to explain why the public interest favoured maintaining the exemptions cited in its Refusal Notice, in breach of section 17(3) of the Act.

The Commissioner has concluded that a limited amount of information within the scope of the request was not exempt by virtue of section 44 of the Act. Therefore in failing to supply that limited material to the complainant HMCE breached section 1(1)(b) of the Act. However, the Commissioner has not ordered any steps in this regard as this information is publicly available in the Treasury Minutes on the First to Third Reports from the Committee of Public Accounts 2002-2003 mentioned in the body of this decision notice. The Commissioner also considers that the remainder of the material sought by the complaint is exempt by virtue of section 44 and therefore HMCE appropriately refused to provide that information to the complainant on the basis that it was not under an obligation to supply under section 1(1)(b).

The Commissioner's Role

1. The Commissioner's role is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

The Request

2. On 4 January 2005 the complainant requested the following information from Her Majesty's Customs and Excise ("HMCE") under section 1 of the Freedom of Information Act 2000 (the "Act"):
 - i. Information relating to any Red or Yellow Cards given to Imperial or Gallaher since 14 June 2002, including distributor, date, country and reason;
 - ii. Analysis of the licit and illicit UK tobacco market for 2003 and 2004 broken down by brand, manufacturer and percent licit and percent illicit;
 - iii. The number of Regal and Superking cigarette exports to Latvia; Russia; Afghanistan; Moldova and Andorra since April 2002, broken down by month;
 - iv. The number of Regal and Superking cigarette exports to Kaliningrad from April 2002 to December 2004, broken down by month;
 - v. Any information relating to the arrest of Imperial employees in 2002;
 - vi. A copy of any World Customs Reports published into cigarette smuggling since 2000.
3. On 5 January 2005 the complainant was advised that section vi of the requested information was exempt from disclosure under section 21 of the Act because that material was already in the public domain. HMCE referred the complainant to the World Customs Organisation website.
4. HMCE wrote to the complainant on 28 January 2005 to advise that details of the licit and illicit UK tobacco market for 2003 and 2004 were already available in the public domain. The complainant was referred to the Annual Report and Accounts for 2003-04 on the HMCE website. The letter also stated that the remainder of the information may have been exempt by virtue of sections 30, 31 or 43. HMCE informed the complainant that it would need additional time to consider the public interest test and undertook to provide a response by 15 February 2005.
5. On 14 February 2005 the complainant was notified that the outstanding information was exempt by virtue of sections 43 and 41 of the Act. These relate to commercial interests and information provided in confidence respectively. The letter also advised that in HMCE's view the harm that would arise if the information were released "firmly outweighs any interest in making this information available". No explanation was given of the public interest arguments considered when reaching this decision.
6. The complainant requested an internal review on 21 February 2005 and was informed of the outcome on 15 March. In that letter, the complainant was informed that no Imperial employees were arrested in 2002. The remainder of the

requested information was withheld on the basis that it was exempt by virtue of section 43(2) because it would prejudice the commercial interests of third parties. HMCE also stated that it had concluded that, “to release the information would undermine the ability of HM Customs and Excise to fulfil its strategic role to tackle tobacco smuggling”.

The Investigation

Scope of the investigation

7. On 17 March 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether HMCE made the right decision in refusing to provide the following information (“the requested information”) on the basis that it is exempt under section 43:
 - Information relating to any Red or Yellow Cards given to Imperial or Gallaher since 14 June 2002, including distributor, date, country and reason;
 - The number of Regal and Superking cigarette exports to Latvia; Russia; Afghanistan; Moldova and Andorra since April 2002, broken down by month;
 - The number of Regal and Superking cigarette exports to Kaliningrad from April 2002 to December 2004, broken down by month.
8. The Commissioner has not investigated whether section 21 has been correctly applied to the World Customs Organisation reports or the licit and illicit UK tobacco market information in view of the fact that the complainant has not expressed any dissatisfaction with HMCE’s response on those matters.
9. It is also important to clarify that the complainant submitted a request to HMCE and it dealt with the request and conducted the internal review. However, at the point that the Commissioner began investigating this complaint the HMCE’s functions had been transferred to Her Majesty’s Revenue and Customs (“HMRC”) which was established on 18 April 2005. Therefore the Commissioner has corresponded with HMRC about this case. The Commissioner is satisfied that it is appropriate to issue a decision notice to HMRC in this matter as the responsible public authority.
10. After taking over responsibility for this case, HMRC sought to rely upon the exemption in section 44 of the Act. Where a public authority has claimed that an absolute exemption such as section 44(1)(a) applies, the Commissioner generally takes the view that it is appropriate to address those exemptions in the first instance. If the Commissioner concludes that the exemption has been inappropriately applied he will then go on to consider any qualified exemptions cited as necessary. At the point that the section 44 exemption was introduced

HMRC stated that it did not consider that it was necessary to simultaneously rely upon the qualified exemptions previously cited.

11. At the point the request was made HMCE was operating in accordance with the Finance Act 1989. Therefore the Commissioner has considered whether the statutory prohibition within that legislation applied at the time that the request was made. Notwithstanding the Commissioner's obligations in this regard he has, for the sake of completeness, also commented on the relevance of the Commissioners for Revenue and Customs Act 2005 ('CRCA') in the other matters section of this Decision Notice. This is because HMRC has indicated that, irrespective of the transfer of functions from HMCE, it still considers the requested information exempt under section 44.

Chronology

12. Although the Commissioner has decided to focus his analysis on section 44 first, the following chronology refers to the qualified exemptions which were originally relied upon by HMCE as they were the subject of the early correspondence during the investigation. On 1 June 2005 the Commissioner wrote to the public authority to request further detail about the application of the exemption in section 43(2) and copies of the withheld information. He also asked for an explanation of the public interest test undertaken by the public authority.
13. Replies to the aforementioned letter were provided on 27 and 29 June 2005. At that point further correspondence was exchanged about the applicability of section 43 and a number of other exemptions. On 22 August HMRC attempted to informally resolve this complaint by supplying the Commissioner with an update report on Tobacco Smuggling to be passed on to the complainant. The complainant considered this information but did not feel that it was sufficient for his purposes and opted to pursue his complaint.
14. On 6 October 2005 HMRC wrote to the Commissioner explaining that it had reviewed the request and had determined that in fact a different exemption to those previously cited should have been applied. HMRC explained that in its view section 44(1)(a) applied to the information. Further correspondence was exchanged between the Commissioner and HMRC in which it was confirmed that in its view the exemption applied to HMCE at the time that the request was received and continues to apply irrespective of the transfer of functions to HMRC.
15. In the course of the investigation the Commissioner has consulted a number of sources to assist his consideration of the application of the exemption. These include the following:
 - Minutes of Evidence to the Public Accounts Committee Wednesday 19 June 2002 – Third Report of the Public Accounts Committee – Tobacco Smuggling
 - HMCE's Accounts and Financial Statements for 2003-2004

- HMRC's Accounts and Financial Statements for 2004-2005
 - HM Treasury and HMCE Report Tackling Tobacco Smuggling March 2000
 - Treasury Minutes on the First to Third Reports from the Committee of Public Accounts 2002-2003
 - House of Commons Treasury Committee – Excise Duty Fraud- Fourth Report of Session 2004-2005 9 March 2005 ('Excise Duty Fraud Report')
 - Commissioners for Customs and Revenue Act 2005
 - Finance Act 1989
16. The Commissioner considered the interpretation of the aforementioned legislation and the interaction with the section 44(1)(a) exemption in the Act.

Findings of fact

17. In an email received on 18 January 2006 HMRC confirmed that it does not in fact hold part of the requested information in the amount of detail sought by the complainant. The complainant requested details of the number of Regal and Superkings exported to Latvia, Russia, Afghanistan, Moldova, Andorra and Kaliningrad, broken down month by month. HMRC has confirmed that it only holds this data by financial year as opposed to monthly breakdowns. The Commissioner notes that the HMCE submission published by the Public Accounts Committee in 2002 did not detail exports month by month but included annual figures. Nevertheless, the annual figures are still relevant to the request and as such the Commissioner has considered whether they would be subject to section 44 of the Act.

Analysis

Background

18. In 2000 HMCE announced a new strategy for tackling tobacco smuggling which includes suppressing the supply of UK produced cigarettes to smugglers. One way that HMCE aimed to achieve this was via greater co-operation with tobacco manufacturers. The Treasury Committee Report, Excise Duty Fraud, describes how that co-operation was formalised into Memorandums of Understanding as follows:

“...Customs entered into Memoranda of Understanding with all three UK tobacco manufacturers. These agreements were designed to reinforce co-operation in tackling tobacco smuggling into the UK, particularly the large-scale organised freight smuggling that dominates the illicit supply. Customs signed Memorandums of Understanding with Gallaher in April

2002, with British American Tobacco in October 2002 and with Imperial in June 2003.

Under these agreements Customs look to the manufacturers to ensure that they supply product only where there is a legitimate demand for it in the intended final market, sharing their understanding of that demand with Customs as necessary. Customs also look to the manufacturers to help identify the supply routes of any suspect export trade and to refuse sales where the end-sale (consumption) destination is in doubt. Where it is discovered that any particular distributor has been shown to be behaving improperly, Customs expect that manufacturer to re-visit the trading relationship in question with a view to discontinuing it”.

19. The report also explained the red and yellow card system to which some of the requested information relates. It stated that,

“Customs also introduced a voluntary system, which was not part of the memoranda of understanding, to raise concerns about particular customers of tobacco manufacturers. This involved Customs notifying the manufacturers of cases where repeated seizures were made of stock originally supplied to specific distributors and which appeared disproportionate. This process and the resultant requests that manufacturers take action to address those particular supplies by either restricting or ceasing future supply was known as the yellow and red card system. Cards have been issued where Customs believe that there is a serious risk of a high proportion of further supplies to a specific customer illegally re-entering the UK market. Customs expect manufacturers to take action against such customers and would fully expect customers who are given a yellow card to be the subject of enquiries by the manufacturer”.

Exemption

20. HMRC has asserted that all of the requested information that has been withheld from the complainant is exempt by virtue of section 44(1)(a). This states that,

“(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

(a) is prohibited by or under any enactment”.

21. HMRC claims that at the time the request was received, section 182 of the Finance Act 1989 prohibited HMCE from disclosing the withheld information. The full text of section 182 is detailed in the legal annex to this notice, however subsection (1) provides that-

“A person who discloses any information which he holds or has held in the exercise of tax functions is guilty of an offence if it is information about any matter relevant, for the purposes of those functions, to tax or duty in the case of any identifiable person”.

22. In the first instance the Commissioner has therefore looked at whether, in his opinion, the withheld information would fall within section 182 of the Finance Act. In doing so he has considered the following questions:
1. How broadly should section 182 be interpreted?
 2. What are tax functions?
 3. Is the requested information held in exercise of tax functions?
 4. Is the requested information about any matter relevant to tax or duty in the case of any identifiable person?
 5. Do any of the exceptions within section 182(5) apply?

How broadly should section 182 be interpreted?

23. In order to reach a decision on whether section 182 prohibits the disclosure of the requested information, the Commissioner has considered the assertion by HMRC that the bar should be read widely. HMRC specifically referred to comments that the Chief Secretary to the Treasury, Norman Lamont MP made regarding the clause during the Standing Committee debate of 20 June 1989. He stated that,

“The clause is carefully drawn to cover any information provided for the purposes of tax even though it might not, as disclosed, be relevant to tax. The “for the purposes of those functions” is meant to ensure that “relevant” has this wider meaning. Thus the address or status of a taxpayer may not on the face of it be relevant to tax, but because it is supplied for tax purposes it is protected”.

24. In light of Mr Lamont’s statements, HMRC argues that it was Parliament’s clear intention that the broadest interpretation should apply and that this is borne out by the wording of the 1989 legislation.
25. The Commissioner agrees that, given the drafting and the preceding debate by the Standing Committee, it is reasonable to conclude that section 182 can be interpreted broadly.

What are tax functions?

26. The term “tax functions” is defined in section 182(2) as:

“functions relating to tax or duty –

- (a) of the Commissioners, the Board and their officers,*
- (b) of any person carrying out the administrative work of any tribunal mentioned in subsection (3) below, and*
- (c) of any other person providing, or employed in the provision of, services to any person mentioned in paragraph (a) or (b)”.*

27. Section 182(10) further defines tax or duty as, “any tax or duty within the general responsibility of the Commissioner or the Board”.

28. The Commissioner understands that HMCE had responsibility for collecting indirect taxes and enforcing laws relating to the movement of goods into and out of the United Kingdom. Excise duties are payable on goods imported or produced and consumed within the state, as opposed to customs duties which are charges imposed by the European Union ("EU") on goods exported from or imported to the EU. Responsibility for the collection of revenue, including indirect taxes and duties and in particular Value Added Tax, was vested in HMCE principally under the Customs and Excise Management Act 1979 ("CEMA") as amended by the Value Added Tax Act 1994.
29. Section 6(2) of the CEMA identifies the primary responsibility of the Commissioners as follows,

"The Commissioners shall, subject to the general control of the Treasury, be charged with the duty of collecting and accounting for, and otherwise managing, the revenues of customs and excise".
30. HMRC has asserted that 'accounting for' and 'managing' revenue is a common theme of much of the legislation that defines both its role and functions as well as that of HMCE before it. This coupled with the enforcement powers that Parliament has given it, required HMCE and now requires HMRC, to interpret its functions and role widely. Therefore it considers that tax functions includes the administration of tax, enforcing compliance with regulations, the prevention, detection and deterrence of fraud and the development of systems to collect the right amount of tax in the most efficient way.
31. The Commissioner is satisfied that the broad definition of tax functions should be considered when determining whether or not information is covered by section 182.

Is the requested information held in exercise of tax functions?

32. The red and yellow card system which HMCE introduced in 2001 is the method adopted to flag up customers (i.e. distributors) of tobacco manufacturers about whom Customs have serious concerns. HMCE developed this voluntary system together with the tobacco manufacturers as a means of denying tobacco smugglers access to stocks. These stocks are generally products which have been legitimately exported outside the UK but have then been smuggled back into the country.
33. In addition, under the terms of the MoUs, tobacco manufacturers agreed to supply HMCE (and now HMRC) with information such as export sales data to assist in tackling tobacco smuggling.
34. The MoUs and the red and yellow card system are voluntary; HMRC explained that none of the manufacturers are under any legal compunction to co-operate or to supply information. The Commissioner understands that distributors outside of the UK market were outside of HMCE's regulatory jurisdiction. Therefore the department was only able to assert pressure on the manufacturers operating in the UK, who themselves are engaged in legitimate business activity.

35. In the course of his investigation the Commissioner questioned whether such a voluntary system could be deemed part of HMCE's statutory functions. HMRC explained that whilst legislation helps to identify its role and provides the parameters in which it operates, it is not very prescriptive and allows the Commissioners considerable latitude to determine how best to fulfil their responsibilities. It gave the example that section 9(1) of the CRCA states that,

“ (1) The Commissioners may do anything which they think-

(a) necessary or expedient in connection with the exercise of their functions, or

(b) incidental or conducive to the exercise of their functions”.

36. In addition HMRC highlighted that its Public Service Agreement, which sets out the targets set by central government, includes a requirement to reduce the illicit market share for tobacco, though it does not stipulate how this is to be achieved.
37. HMRC argues that it would be incorrect to draw a distinction between the voluntary card system and tax functions. Though the assistance given by the tobacco manufacturers may be voluntary, it was nevertheless provided in order that HMCE could pursue its obligation to protect revenue and aid its collection. The information provided in accordance with the MoUs assisted HMCE to prevent and restrict revenue loss which is directly within its remit and functions. To date the MoUs have enabled HMCE (now HMRC) to reduce the overall size of the illicit market from 16 billion to 10.5 billion. It has also estimated that in the first four years of its operation the system has protected some £5.8 billion of revenue for the Exchequer.
38. The Commissioner is satisfied, on the basis of the information provided by HMRC and explained above, that the red and yellow card system and the MoUs were two of the mechanisms used by HMCE to fulfil its functions in relation to the prevention and deterrence of fraud and the collection of tax revenue. He is further satisfied that the requested information was held by HMCE (and continues to be held by HMRC) in exercise of those tax functions.

Is the requested information about any matter relevant to tax or duty in the case of any identifiable person?

39. As explained above, the Commissioner has concluded that the requested information was held by HMCE in exercise of its tax functions. However the prohibition in section 182 of the Finance Act only prohibits the disclosure of information about any matter relevant to tax or duty in the case of any identifiable person. Therefore it is also necessary to assess whether the information withheld from the complainant fits this description.
40. The Commissioner has considered how the phrase, “any matter relevant to tax or duty” should be interpreted. It is arguable that it is intended to cover information about the specific tax or duty payable by an identifiable individual. However, the drafting is more general in its terminology, specifying “tax or duty...in the case of

an identifiable person". In the Commissioner's opinion this can be read more widely as being akin to, "information about, acquired as a result of or held in connection with the exercise of a function", in line with section 19(2) of the CRCA.

41. The use of the phrase, "any matter relevant" in relation to the information supports a wider interpretation, i.e. that it is not just information relating to the specific tax on a particular individual. In addition the comments made by Norman Lamont also support this interpretation.
42. Having satisfied himself that the requested information is relevant to tax or duty, the Commissioner also considered how the term 'person' should be interpreted. As there is no specific definition within the 1989 Act he has referred to Schedule 1 of the Interpretation Act 1978. This states that a 'person' includes a body of persons corporate or unincorporated which would include companies.
43. The complainant has requested information about red or yellow cards issued to two named companies together with details of their distributors. He has also asked for export information about two brands of one particular manufacturer. Therefore the Commissioner is satisfied that the requested information relates to an identifiable person, in this case the relevant tobacco manufacturers.

Do any of the exceptions in section 182(5) apply?

44. Section 182(5) provides that subsections (1) to (4),

"do not apply to any disclosure of information -

- (a) with lawful authority,*
- (b) with the consent of any person in whose case the information is about a matter relevant to tax or duty, or*
- (c) which has been lawfully made available to the public before the disclosure is made".*

45. In light of the above, the Commissioner has considered whether any of the exceptions to the prohibition may have applied at the time that the request was received. He has addressed each of the three elements in turn below.

Lawful authority

46. Section 182(6) provides further explanation of when a disclosure is made with lawful authority as follows:

"For the purposes of this section a disclosure of any information is made with lawful authority if, and only if, it is made –

- (a) by a Crown servant in accordance with his official duty,*
- (b) by any other person for the purposes of the function in the exercise of which he holds the information and without contravening any restriction duly imposed by the person responsible,*

- (c) to, or in accordance with an authorisation duly given by, the person responsible,*
- (d) in pursuance of any enactment or of any order of a court, or*
- (e) in connection with the institution of or otherwise for the purposes of any proceedings relating to any matter within the general responsibility of the Commissioners or, as the case requires, the Board, and in this subsection "the person responsible" means the Commissioners, the Board, the Comptroller or the Parliamentary Commissioner, as the case requires".*

47. The Commissioner does not consider that disclosure of the requested information under the Act would constitute a disclosure with lawful authority. He has given particular consideration to points (a) and (d) within the subsection and has concluded that although public authority employees are required to comply with the Act, disclosing information under it does not comprise an official duty of a Crown servant for the purposes of this section. Further, he does not consider that a disclosure under the Act falls within subsection 6(d). Section 44 of the Act refers to information being exempt,

"if its disclosure (otherwise than under this Act) by a public authority holding it –

(a) is prohibited by or under any enactment".

48. In the Commissioner's view, the inclusion of the phrase "otherwise than under this Act" means that the right of access under the Act does not override any prohibition on disclosure in a particular enactment. He notes that this interpretation accords with the Ministry of Justice's (formerly DCA) published guidance on this section of the Act which can be viewed at, <http://www.foi.gov.uk/guidance/exguide/sec44/chap02.htm>.

Consent

49. The Commissioner pursued the possibility of HMRC gaining consent to the disclosure from the tobacco manufacturers in the course of his investigation. In the letter dated 7 November 2005, HMRC indicated that it had specifically raised this possibility with the manufacturers but that they had unequivocally stated that the information should not be disclosed. The Commissioner is satisfied therefore, that the exception in section 182(5)(b) is not applicable in this case.

Previously published information

50. The complainant has argued that information similar to that which has been requested has been disclosed to the Public Accounts Committee (PAC) in the past and therefore HMCE was not prevented from disclosing it.

51. The Commissioner would point out that not only is the information the complainant has requested different to that previously published by the PAC because it relates to a later period of time but it is also more detailed. In addition, HMRC has explained that where it (or HMCE) is asked to provide submissions to

a parliamentary committee, such as the PAC, it is obliged to do so. The Commissioner also notes that the decision to publish the earlier information was actually taken by the PAC which he understands is not subject to the prohibition in section 182. Therefore, the Commissioner does not consider the complainant's assertions in this regard to be persuasive.

52. However, the Commissioner has investigated whether any of the material sought by the complainant had been made public at the point the request was received. He has established that some material relevant to the request is available in the Treasury Minutes on the First to Third Reports from the Committee of Public Accounts 2002-2003, published in March 2003. The minutes contain a copy of the progress report provided by HMCE to the Public Accounts Committee. This includes details about exports of Superkings and Regals to the countries of interest to the complainant as well as information about red and yellow cards. The full minutes can be viewed at the following link, <http://www.archive2.official-documents.co.uk/document/cm57/5770/5770.pdf>.
53. Paragraph 14 of the aforementioned minutes states that,
- “In Customs’ previous Memorandum to the Committee five destinations that accounted for almost a third of Imperial’s exports (around 3 billion cigarettes) were highlighted: Moldova, Latvia, Russia (including Kaliningrad), Afghanistan and Andorra. Since May 2002 exports of Superkings and Regals to these countries have reduced to only 15 million cigarettes almost exclusively to Andorra and three of the destinations (Moldova, Afghanistan and Latvia) have not received any Imperial cigarettes at all”.
54. The Commissioner notes that this is not all of the information requested by the complainant. It is not as detailed as the information he requested nor does it cover the total timescale, i.e. the period up until January 2005 when the request was submitted. Nevertheless, the Commissioner considers this information to be relevant to and within the scope of the request. This information was published in March 2003.
55. Paragraph 15 of the minutes states that,
- “Since concerns over exports were raised in the Public Accounts Committee last year, Customs have not issued any further red or yellow cards to Imperial or any other Tobacco Manufacturer in order to help regularise their export market. One red card previously issued to Imperial has been downgraded to a yellow card following further discussions with Imperial”.
56. As mentioned above, this information is relevant to and within the scope of the complainant’s request, albeit that it does not cover the total period up to and including 4 January 2005.
57. As the Commissioner has concluded that the information available in the Treasury Minutes is within the scope of the request, he does not consider that it is

exempt under section 44 by virtue of section 182. In his view, that information had already been made available to the public at the date that the request was received. Therefore, he has concluded that the exception in section 182(5) would apply to that material.

58. The Commissioner is satisfied that the remaining information relevant to the request i.e. material covering the period 2003 to 2005 which was not included in the Treasury Minutes, has not been made publicly available and therefore section 182(5) does not apply as an exception to the prohibition in section 182.

Section 182 Conclusions

59. The Commissioner has determined that certain limited information relevant to the request and outlined above, was published in Treasury Minutes in 2003. He has concluded that section 182 does not therefore apply to that material because one of the exceptions in section 182(5) is relevant. In view of this he also concludes that section 44 of the Act does not apply to the published material.
60. However, the request covered the period up to and including 4 January 2005. The Commissioner is satisfied that material about export data and details of any red or yellow cards for the period between March 2003 and 4 January 2005 has not been published. He is further satisfied that such information is relevant to the request and that HMCE were prohibited from disclosing it by virtue of section 182. Therefore he has concluded that section 44 of the Act applied to that material.

Procedural Issues

61. In failing to explain why the public interest favoured maintaining the exemptions cited in its letter dated 14 February 2005, HMCE did not comply with section 17 (3) of the Act.

The Decision

62. As explained in the findings of fact section above, HMRC has confirmed that it does not hold the export data requested by the complainant broken down month by month. This information is provided to HMRC on a voluntary basis and in the form of annual statistics. The Commissioner considers that HMCE should have informed the complainant that it did not hold the information requested by the complainant in the level of detail required. In failing to do so, the Commissioner considers that HMCE did not comply with section 1(1)(a).
63. In failing to explain why the public interest favoured maintaining the exemptions cited in the initial refusal notice, HMCE did not comply with section 17(3) of the Act.
64. The Commissioner has considered the information that HMCE held which was within the scope of the request, including the annual sales data. He has concluded that information relevant to the request which was detailed in Treasury

Minutes and published in 2003 is not exempt under section 44. Therefore HMCE breached section 1(1)(b) in failing to supply that information to the complainant.

65. The Commissioner has also concluded that the remainder of the material held by HMCE which was within the scope of the request was exempt under section 44. Therefore HMCE appropriately refused to provide that information as it was under no obligation under section 1(1)(b) of the Act.

Steps Required

66. The Commissioner has not ordered any remedial steps in relation to information not considered to fall within section 44 because that material is already publicly available in the Treasury Minutes mentioned in paragraph 52 of this notice.

Other matters

Section 21

67. The Commissioner is aware that HMCE did not cite section 21 in relation to any of the export data or the red and yellow card information. However, in the course of his investigation, the Commissioner has established that a limited amount of material relevant to this request was accessible in Treasury Minutes via the internet. Though he has not made a formal decision in relation to section 21, he considers that it would have been appropriate for HMCE to have relied upon that exemption in relation to the publicly available information and to have informed the complainant of where the material could be viewed.

The Commissioners for Revenue and Customs Act 2005 (CRCA)

68. As explained in the scope of the investigation section above, when considering this matter, the Commissioner has given some thought to whether section 23 of the CRCA applies to those parts of the requested information which he has determined are subject to section 182 of the Finance Act.
69. HMRC has asserted that the requested information continues to be exempt by virtue of section 44(1)(a) because of section 23 of the CRCA. This states that –

“Revenue and Customs information relating to a person, the disclosure of which is prohibited by section 18(1), is exempt information by virtue of section 44(1)(a) of the Freedom of Information Act 2000 if its disclosure –

- (a) would specify the identity of the person to whom the information relates, or*
- (b) would enable the identity of such a person to be deduced”.*

70. Section 18(1) provides that –

“Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs”.

71. The above prohibition is arguably more loosely defined than section 182 of the Finance Act. It covers any information held in connection with a function of Revenue and Customs. The Commissioner has considered the following questions when reaching a view on whether section 23 of the CRCA applies:

1. Is the information held in relation to the functions of the Commissioners for Revenue and Customs?
2. What constitutes a ‘person’ for the purposes of section 23 of the CRCA?
3. Does the information relate to a person and would releasing it specify their identity or enable their identity to be deduced?
4. Do any of the exceptions to section 18(1) apply?

Is the information held in relation to the functions of the Commissioners for Revenue and Customs?

72. The functions of the Commissioners for Revenue and Customs are relatively loosely defined. Section 5 of the CRCA states that the Commissioners shall be responsible for “the collection and management of revenue for which the Commissioners of Customs and Excise were responsible before the commencement of this section”.

73. The Commissioner is satisfied that HMRC has the power to operate the red and yellow card system in furtherance of its duty to prevent evasion of Excise Duty. Further, it also requires export data which is supplied on a voluntary basis by the tobacco manufacturers as part of its measures to ensure that tobacco products are only exported to markets where there is legitimate demand. In this case HMRC is able to manage and regulate fraud carried out in locations outside of its geographical remit by asserting pressure on those within its jurisdiction, namely the tobacco manufacturers. The result is that HMRC is able to tackle Excise Duty Fraud and ensure collection of optimum levels of revenue from the correct liable party. The Commissioner has considered the meaning of ‘functions’ and is satisfied that this incorporates any activity which the HMRC has the power and/or duty to carry out.

What constitutes a ‘person’ for the purposes of section 23 of the CRCA?

74. Section 19 of the CRCA defines, "revenue and customs information relating to a person" as, “information about, acquired as a result of, or held in connection with the exercise of a function of the Revenue and Customs (within the meaning given by section 18(4)(c)) in respect of the person; but it does not include information about internal administrative arrangements of Her Majesty's Revenue and Customs (whether relating to Commissioners, officers or others).

75. As already mentioned the Commissioner is satisfied that the requested information is held by HMRC in connection with the exercise of its functions. He is further satisfied that the term 'person' includes a legal person such as a limited company, in this case a tobacco manufacturer.

Does the information relate to a person and would releasing it specify their identity or enable their identity to be deduced?

76. The requested information constitutes export details of named brands of cigarettes made by one tobacco manufacturer as well as red and yellow cards issued against that and one other manufacturer. The Commissioner is therefore satisfied that the requested information relates to a person or persons. Further, the Commissioner is also satisfied that if the requested information were provided to the complainant it would specify the identity of the person to whom the material relates.

Do any of the exceptions to section 18(1) apply?

77. Subsection (2) of section 18 provides a number of exceptions to the prohibition. For example, where disclosure is made to a prosecuting authority in accordance with section 21, or is made in the public interest in accordance with prescribed conditions set down in section 20.
78. The Commissioner has reviewed whether any of the conditions in subsection (2) are applicable so that section 18(1) is not relevant. He is satisfied that none of the exceptions to section 18(1) are satisfied in this case. In particular, he understands that HMRC has approached the tobacco manufacturers to whom the requested information relates to try to obtain their consent to the disclosure and they have declined to provide it.

Conclusion

79. In light of the above, the Commissioner is satisfied that if the complainant made a request today for the information which is within the scope of the request and which has not already been published, that material would be exempt under section 44 of the Act by virtue of section 23 of the CRCA.

Right of Appeal

80. Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

81. Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

Dated the 3rd day of July 2007

Signed

**Gerrard Tracey
Assistant Commissioner**

**Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act 2000

Section 17

“(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming –

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”.

Section 21

“(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

- (2) For the purposes of subsection (1) –
 - (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
 - (b) information is taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment”.

Section 44

“(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

- (a) is prohibited by or under any enactment,
- (b) is incompatible with any Community obligation, or
- (c) would constitute or be punishable as a contempt of court.

(2) The duty to confirm or deny does not arise if the confirmation of denial that would have to be given to comply with section 1 (1) (a) would (apart from this Act) fall within any of paragraphs (a) to (c) of subsection (1)”.

The Finance Act 1989

Section 182

“(1) A person who discloses any information which he holds or has held in the exercise of tax functions is guilty of an offence if it is information about any matter relevant, for the purposes of those functions, to tax or duty in the case of any identifiable person.

(2) In this section "tax functions" means functions relating to tax or duty—

- (a) of the Commissioners, the Board and their officers,
- (b) of any person carrying out the administrative work of any tribunal mentioned in subsection (3) below, and
- (c) of any other person providing, or employed in the provision of, services to any person mentioned in paragraph (a) or (b) above.

(3) The tribunals referred to in subsection (2)(b) above are—

- (a) the General Commissioners and the Special Commissioners,
- (b) any value added tax tribunal,
- (c) any referee or board of referees appointed for the purposes of section 80(3) of the [1970 c. 9.] Taxes Management Act 1970 or under section 26(7) of the [1968 c. 3.] Capital Allowances Act 1968, and
- (d) any tribunal established under section 463 of the Taxes Act 1970 or section 706 of the Taxes Act 1988.

(4) A person who discloses any information which—

- (a) he holds or has held in the exercise of functions—
 - (i) of the Comptroller and Auditor General and any member of the staff of the National Audit Office, or
 - (ii) of the Parliamentary Commissioner for Administration and his officers,
- (b) is, or is derived from, information which was held by any person in the exercise of tax functions, and
- (c) is information about any matter relevant, for the purposes of tax functions, to tax or duty in the case of any identifiable person, is guilty of an offence.

(5) Subsections (1) and (4) above do not apply to any disclosure of information—

- (a) with lawful authority,
- (b) with the consent of any person in whose case the information is about a matter relevant to tax or duty, or
- (c) which has been lawfully made available to the public before the disclosure is made.

(6) For the purposes of this section a disclosure of any information is made with lawful authority if, and only if, it is made—

- (a) by a Crown servant in accordance with his official duty,

- (b) by any other person for the purposes of the function in the exercise of which he holds the information and without contravening any restriction duly imposed by the person responsible,
- (c) to, or in accordance with an authorisation duly given by, the person responsible,
- (d) in pursuance of any enactment or of any order of a court, or
- (e) in connection with the institution of or otherwise for the purposes of any proceedings relating to any matter within the general responsibility of the Commissioners or, as the case requires, the Board,

and in this subsection "the person responsible" means the Commissioners, the Board, the Comptroller or the Parliamentary Commissioner, as the case requires.

- (7) It is a defence for a person charged with an offence under this section to prove that at the time of the alleged offence—
 - (a) he believed that he had lawful authority to make the disclosure in question and had no reasonable cause to believe otherwise, or
 - (b) he believed that the information in question had been lawfully made available to the public before the disclosure was made and had no reasonable cause to believe otherwise.
- (8) A person guilty of an offence under this section is liable—
 - (a) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine or both, and
 - (c) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both.
- (9) No prosecution for an offence under this section shall be instituted in England and Wales or in Northern Ireland except—
 - (a) by the Commissioners or the Board, as the case requires, or
 - (b) by or with the consent of the Director of Public Prosecutions or, in Northern Ireland, the Director of Public Prosecutions for Northern Ireland.
- (10) In this section—
 - "the Board" means the Commissioners of Inland Revenue,
 - "the Commissioners" means the Commissioners of Customs and Excise,
 - "Crown servant" has the same meaning as in the [\[1989 c. 6.\]](#) Official Secrets Act 1989, and
 - "tax or duty" means any tax or duty within the general responsibility of the Commissioners or the Board.
- (11) In this section—
 - (a) references to the Comptroller and Auditor General include the Comptroller and Auditor General for Northern Ireland,

- (b) references to the National Audit Office include the Northern Ireland Audit Office, and
 - (c) references to the Parliamentary Commissioner for Administration include the Health Service Commissioner for England, the Health Service Commissioner for Wales, the Health Service Commissioner for Scotland, the Northern Ireland Parliamentary Commissioner for Administration and the Northern Ireland Commissioner for Complaints.
- (12) This section shall come into force on the repeal of section 2 of the [1911 c. 28.] Official Secrets Act 1911

Commissioners for Revenue and Customs Act 2005

Section 18

- “(1) Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs.
- (2) But subsection (1) does not apply to a disclosure –
- (a) which –
 - (i) is made for the purposes of a function of the Revenue and Customs, and
 - (ii) does not contravene any restriction imposed by the Commissioners,
 - (b) which is made in accordance with section 20 or 21,
 - (c) which is made for the purposes of civil proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,
 - (d) which is made for the purposes of a criminal investigation or criminal proceedings (whether or not within the United Kingdom) relating to a matter in respect of which the Revenue and Customs have functions,
 - (e) which is made in pursuance of an order of a court,
 - (f) which is made to Her Majesty’s Inspectors of Constabulary , the Scottish inspectors or the Northern Ireland inspectors for the purpose of an inspection by virtue of section 27,
 - (g) which is made to the Independent Police Complaints Commission, or a person acting on its behalf, for the purpose of the exercise of a function by virtue of section 28, or
 - (h) which is made with the consent of each person to whom the information relates.

- (3) Subsection (1) is subject to any other enactment permitting disclosure.
- (4) In this section –
 - (a) a reference to the Revenue and Customs officials is a reference to any person who is or was –
 - (i) a Commissioner,
 - (ii) an officer of Revenue and Customs,
 - (iii) a person acting on behalf of the Commissioners or an officer of Revenue and Customs, or
 - (iv) a member of a committee established by the Commissioners,
 - (b) a reference to the Revenue and Customs has the same meaning as in section 17,
 - (c) a reference to a function of the Revenue and Customs is a reference to a function of –
 - (i) the Commissioners, or
 - (ii) an officer of Revenue and Customs,
 - (d) a reference to the Scottish inspectors or the Northern Ireland inspectors has the same meaning as in section 27, and
 - (e) a reference to an enactment does not include –
 - (i) an Act of the Scottish Parliament or an instrument made under such an Act, or
 - (ii) an Act of the Northern Ireland Assembly or an instrument made under such an Act”.

Section 20

- “ (1) Disclosure is in accordance with this section (as mentioned in section 18 (2) (b) if-
- (a) it is made on the instructions of the Commissioners (which may be general or specific),
 - (b) it is of a kind –
 - (i) to which any of subsections (2) to (7) applies, or
 - (ii) specified in regulations made by the Treasury, and
 - (c) the Commissioners are satisfied that it is the public interest.
- (2) This subsection applies to a disclosure made –
- (a) to a person exercising public functions (whether or not within the United Kingdom),
 - (b) for the purposes of the prevention or detection of crime, and

- (c) in order to comply with an obligation of the United Kingdom, or Her Majesty's Government, under an international or other agreement relating to the movement of persons, goods or services.

(3) This subsection applies to a disclosure if -

- (a) it is made to a body which has responsibility for the regulation of a profession,
- (b) it relates to misconduct on the part of a member of the profession, and
- (c) the misconduct relates to a function of the Revenue and Customs.

(4) This subsection applies to disclosure if –

- (d) it is made to a constable, and
- (e) either –
 - (i) the constable is exercising functions which relate to the movement of persons or goods into or out of the United Kingdom, or
 - (ii) the disclosure is made for the purposes of the prevention or detection of crime.

(5) This subsection applies to a disclosure if it is made -

- (a) to the National Criminal Intelligence Service, and
- (b) for a purpose connected with its functions under section 2 (2) of the Police Act 1997 (c.50) (criminal intelligence).

(6) This subsection applies to a disclosure if it is made -

- (a) to a person exercising public functions in relation to public safety or public health, and
- (b) for the purposes of those functions.

(7) This subsection applies to a disclosure -

- (a) is made to the Police Information Technology Organisation for the purpose of enabling information to be entered in a computerised database, and
- (b) relates to –
 - (i) a person suspected of an offence,
 - (ii) a person arrested for an offence,
 - (iii) the results of an investigation, or
 - (iv) anything seized.

(8) Regulations under subsection (1) (b) (ii) -

- (a) may specify a kind of disclosure only if the Treasury are satisfied that it relates to -
 - (i) national security,
 - (ii) public safety,
 - (iii) public health, or

- (v) the prevention or detection of crime;
 - (b) may make provision limiting or restricting the disclosures that may be made in reliance on the regulations; and that provision may, in particular, operate by reference to-
 - (i) the nature of the information,
 - (ii) the person or class of person to whom the disclosure is made,
 - (iii) the person or class of person by whom the disclosure is made,
 - (iv) any other factor, or
 - (vi) a combination of factors;
 - (c) shall be made by statutory instrument;
 - (d) may not be made unless a draft has been laid before and approved by resolution of each House of Parliament.
- (9) Information disclosed in reliance on this section may not be further disclosed without the consent of the Commissioners (which may be general or specific); (but the Commissioners shall be taken to have consented to further disclosure by use of the computerised database of information disclosed by virtue of subsection (7))”.

Section 21

- “ (1) Disclosure is in accordance with this section (as mentioned in section 18 (2) (b)) if made-
- (a) to a prosecuting authority, and
 - (b) for the purpose of enabling the authority-
 - (i) to consider whether to institute criminal proceedings in respect of a matter considered in the course of an investigation conducted by or on behalf of Her Majesty's Revenue and Customs, or
 - (ii) to give advice in connection with a criminal investigation (within the meaning of section 35 (5) (b)) or criminal proceedings.
- (2) In subsection (1) “prosecuting authority” means-
- (a) the Director of Revenue and Customs Prosecutions,
 - (b) in Scotland, the Lord Advocate or a procurator fiscal, and
 - (c) in Northern Ireland, the Director of Public Prosecutions for Northern Ireland.
- (3) Information disclosed to a prosecuting authority in accordance with this section may not be further disclosed except -
- (a) for a purpose connected with the exercise of the prosecuting authority's functions, or
 - (b) with the consent of the Commissioners (which may be general or specific).

- (4) A person commits an offence if he contravenes subsection (3).
- (5) It is a defence for a person charged with an offence under this section to prove that he reasonably believed -
 - (a) that the disclosure was lawful, or
 - (b) that the information had already and lawfully been made available to the public.
- (6) A person guilty of an offence under this section shall be liable -
 - (a) on conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both, or
 - (b) on summary conviction, to imprisonment for a term not exceeding 12 months, to a fine not exceeding the statutory maximum or to both.
- (7) A prosecution for an offence under this section may be instituted in England and Wales only -
 - (a) by the Director of Revenue and Customs Prosecutions, or
 - (b) with the consent of the Director of Public Prosecutions.
- (8) A prosecution for an offence under this section may be instituted in Northern Ireland only -
 - (a) by the Commissioners, or
 - (b) with the consent of the Director of Public Prosecutions for Northern Ireland.
- (9) In the application of this section to Scotland or Northern Ireland the reference in subsection (6) (b) to 12 months shall be taken as a reference to six months”.

Section 23

- “(1) Revenue and customs information relating to a person, the disclosure of which is prohibited by section 18 (1), is exempt information by virtue of section 44 (1) (a) of the Freedom of Information Act 2000 (c.36) (prohibitions on disclosure) if its disclosure –
 - (a) would specify the identity of the person to whom the information relates, or
 - (b) would enable the identity of such a person to be deduced.
- (2) Except as specified in subsection (1), information the disclosure of which is prohibited by section 18 (1) is not exempt information for the purposes of section 44 (1) (a) of the Freedom of Information Act 2000.
- (3) In subsection (1) “revenue and customs information relating to a person” has the same meaning as in section 19”.