

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 10 April 2007

Public Authority: HM Revenue and Customs (HMRC)
Address: 100 Parliament Street
London
SW1A 2BQ

Summary

The complainant requested DTI guidance held by HMRC supporting the withdrawal of the professional trustee measure. HMRC responded to confirm it held information but that it was exempt from disclosure as the documentation was legal advice and so section 42 of the Act, 'legal professional privilege', was engaged, and that section 35 'formulation of government policy' also applied to some of the information. HMRC argued that the public interest favoured maintaining the exemption. The Commissioner investigated HMRC's application of section 42 and found that the information requested is legal advice and is therefore covered by the exemption and that the public interest does favour maintaining the exemption. The Commissioner found section 42 applied to all the information requested and so did not investigate the application of section 35. The Commissioner's decision is that HMRC dealt with the request in accordance with the Act and require no steps to be taken.

The Commissioner's Role

1. The Commissioner's duty 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. The Complainant has advised that on the 3 April 2006 he requested the following from HM Revenue and Customs (HMRC):

"I note that the Department of Trade and Industry have confirmed that the proposed rules dealing with the residence of professional trustees in the draft legislation published 31st January 2006 would

constitute a State Aid, and in view of this the measure has had to be withdrawn.

I would be very grateful if you could supply me with a copy of the DTI Guidance, pursuant to the Freedom of Information Act 2000."

3. HMRC responded to this request on the 12 April 2006. In the response HMRC stated it was assuming the information requested was the legal advice HMRC had received from DTI solicitors relating to the rules dealing with the residence of professional trustees rather than the general guidance on what constitutes a State Aid.
4. HMRC stated that this information was exempt from disclosure under section 42 of the Act as the information constituted legal advice. HMRC also stated that it had considered the public interest arguments and in all circumstances of the case the public interest in maintaining the exemption outweighed the public interest in disclosing the advice. HMRC also stated that some of the information was also covered by the exemption at section 35 of the Act, formulation of government policy.
5. On the 10 May 2006 the complainant wrote to HMRC to request an internal review of its decision to withhold the information under section 42 and 35 of the Act. The complainant also confirmed that the information he was seeking was legal advice received from the DTI solicitors and not the general guidance on what constitutes state aid.
6. HMRC completed the internal review and communicated its findings to the complainant on the 16 June 2006. The internal review upheld the original decision to withhold the information.

The Investigation

Scope of the case

7. On 21 July 2006 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 the public interest arguments for disclosure as well as the applicability of the exemptions under 42 and 35 of the Act.

Chronology

8. The Commissioner contacted HMRC on the 29 January 2007 to ask for a copy of the information being withheld and any further representations HMRC wished to make regarding the applicability of sections 42 and 35
9. HMRC responded on the 27 February enclosing a copy of the withheld information which consists of the advice and a letter requesting the advice.

HMRC clarified the purpose of the advice received and referred the Commissioner to its previous responses to the complainant for its arguments in maintaining the exemptions.

Findings of fact

10. The information withheld comprises of:
 - Letter requesting legal advice
 - Copy of the legal advice requested.

Analysis

Exemption 42 – Legal Professional Privilege

11. Section 42 of the Act provides that information is exempt from disclosure if a claim to legal professional privilege could be maintained in legal proceedings. There are two types of privilege, legal advice privilege and litigation privilege. Legal professional privilege protects confidential communications between professional legal advisers (including an in-house legal adviser) and clients from being disclosed.
12. HMRC have argued that the information is legal advice obtained from DTI solicitors in confidence for the sole purpose of obtaining advice and therefore the exemption at section 42 of the Act is engaged.
13. The Commissioner is satisfied that all the information withheld in response to the complainant's request is confidential legal advice obtained by HMRC from DTI solicitor.
14. On 22 March 2006 HMRC made an announcement stating that after consultation with the DTI that the professional trustee measure would constitute state aid and that the measure was therefore withdrawn. The Commissioner also considered whether HMRC'S announcement of the 22 March 2006 constituted a waiver or partial waiver of privilege. The reference to consultation with the DTI in the announcement does not mention that legal advice on the point has been obtained from the DTI and it was the legal advice that concluded that the measure would amount to state aid. The reference is very general and is not sufficiently specific to amount to a waiver of legal professional privilege in respect of the request for legal advice and the advice provided.
15. The Commissioner is therefore satisfied that a claim to legal professional privilege could be maintained so that the exemption at section 42 of the Act is engaged.

Public Interest Test

16. Section 42 is a qualified exemption and is therefore subject to the public interest test. HMRC acknowledged that there is a public interest in ensuring that there is

transparency in the decision making process and for the public to know whether legal advice is being followed.

17. In balancing the public interest factors HMRC concluded that the public interest favoured maintaining the exemption for the following reasons:

- There is strong public interest in a person seeking access to legal advice being able to communicate freely with his legal advisors in confidence and being able to receive advice in confidence;
- If legal advice were routinely disclosed, caveats, qualifications or professional expressions of opinion might be given in advice which would therefore prevent free and frank correspondence between government and its legal advisors
- there is a strong public interest in ensuring the legal advice relating to policy matters is made with the risk of that advice being prematurely disclosed;
- it is important that legal advice includes a full assessment of all aspects of an issue, this may include arguments both for and against a conclusion, publication of this information may undermine public confidence in decision making and without comprehensive advice the quality of decision-making would be reduced because if would not be fully informed and balanced.
- There is a significant risk that the value placed on legal advice will be diminished if we are not confidence that it has been provided without fear that it might be disclosed

18. The complainant offered the following public interest arguments in favour of disclosure as it would:

- further the understanding of and participation in the public debate of issues of the day
- promote accountability and transparency
- allow individuals and companies to understand how decisions are reached by public authorities.
- generate an informed public debate into the necessity of the measures

19. The Commissioner recognises that there are strong public interest arguments for disclosing the information as disclosure would allow the public to understand the basis for HMRC's decision making and outline any legal justification it has for certain decisions. However, The Commissioner is mindful that there is a strong element of public interest inherent in legal professional privilege which must be taken into account when considering the application of section 42. The Commissioner notes the tribunal case of *'Bellamy vs. the Information Commissioner and the DTI'* in which the Tribunal concluded that:

"there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest... it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and

obligations with those advising them without fear of intrusion, save in the most clear cut cases”

20. In reaching his decision as to where the public interest lies, the Commissioner has considered the arguments put forward by HMRC and feels these reasons demonstrate a strong argument for maintaining the exemption. These reinforce the strong public interest inherent in the notion of legal professional privilege. Whilst the Commissioner is mindful of the strong public interest in greater public understanding of how HMRC reach decisions, there is a risk that disclosing confidential legal advice could undermine HMRC's ability to obtain this advice in a timely fashion and have confidence that the advice given is done so freely without the consideration of its wider disclosure.
21. For these reasons, the Commissioner has concluded that the public interest in maintaining the section 42 exemption in all the circumstances of this case outweighs the public interest in disclosure. Accordingly, the information requested is exempt from disclosure.
22. The Commissioner has not investigated the application of section 35 as section 42 applies to all the information being withheld.

The Decision

23. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

Steps Required

24. The Commissioner requires no steps to be taken.

Right of Appeal

25. Either party has the right to appeal against this Decision Notice to the Information 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

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

Dated the 10th day of April 2007

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annex

General Right of Access

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Legal Professional Privilege

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

Section 42(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”