

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 14 July 2008

**Public Authority:** HM Revenue & Customs  
**Address:** 100 Parliament Street  
London  
SW1A 2BQ

### Summary

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The complainant asked the public authority for: a report following an investigation into allegations about a proposed amnesty to United Kingdom tobacco producers; and information about the investigator. The public authority provided information about the investigator but withheld the report, citing sections 31, 40(2) and 40(3)(a)(i), 41 and 44 of the Freedom of Information Act 2000 ('the Act'). During the Commissioner's investigation it also identified some information as falling within section 21 of the Act. The Commissioner decided that the public authority had not complied with its obligations under section 1(1) by failing to communicate to the complainant information to which he was entitled, on the mistaken basis that it was exempt from disclosure under sections 31, 40(2) and 40(3)(a)(i), 41 and 44 of the Act. It also acted in breach of section 21 of the Act in failing to advise the complainant that some of the information was already in the public domain. Furthermore, in only disclosing some information to the complainant after he had made a complaint to the Commissioner, the public authority did not comply within the time limit in section 10(1) of the Act, a breach of sections 1(1)(b) and 17(1). The Commissioner required the public authority to disclose the information which it had improperly withheld.

### The Commissioner's Role

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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

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2. The complainant emailed HM Revenue and Customs (HMRC) on 25 October 2005 to request the following information:

*' - the report referred to in paragraph 83 chapter 2 of the National Audit Office's recent report on Customs and Excise  
- the name of the Inland Revenue board member who conducted the investigation referred to  
- a list of his or her duties in the year leading up to the merger of the Revenue and Customs and in the period since then.'*

(The public authority which had generated the information was HM Customs & Excise; HMRC was formed on 18 April 2005 from a merger of HM Customs and Excise and the Inland Revenue.)

3. The Director General of HMRC replied on 23 November 2005. He stated that he himself had carried out the investigation and subsequently produced the report requested in the first point (what shall be referred to in this Decision Notice as 'the Inland Revenue Board report'). He claimed that this Inland Revenue Board report itself was exempt under section 40(2) and 40(3)(a)(i) of the Act, since disclosure would contravene the Data Protection Principles in the Data Protection Act. He also claimed that much of the information used in the report had been provided in confidence and disclosure would therefore constitute a breach of section 41. Furthermore, he pointed out that HMRC had a statutory duty of confidentiality laid down in section 18 of the Commissioners for Revenue and Customs Act 2005, *'which makes it an offence to release information held in connection with a function of the Revenue and Customs about identifiable persons'*, and that this statutory bar therefore gave rise to an exemption under section 44 of the Freedom of Information Act. In relation to the part of the request relating to his duties, he gave a short résumé of his responsibilities in the relevant period, including Director General *'with responsibility for the Anti Avoidance Group, Central Compliance, Large Businesses and Employers and Customer Contact'*. He advised the complainant of his right to request an internal review or to complain to the Information Commissioner.
4. The complainant replied on 24 November 2005, requesting some follow-up information. There was further communication between the complainant and HMRC regarding what elements of the request remained outstanding.
5. On 1 December 2005 the complainant specified some further information that he required.
6. The complainant sent a reminder on 9 December 2005, when he also indicated that he wanted HMRC to conduct an internal review of his request.
7. The internal review decision was issued on 19 June 2006. HMRC apologised for the delay in responding, which it claimed was due to confusion as to whether the complainant was going to write further with specific comments on the grounds for refusal. It stated that it still considered that the exemptions were properly applied.

## The Investigation

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### Scope of the case

8. On 2 August 2006 the complainant contacted the Commissioner to complain about HMRC's response to his first request.

### Chronology

9. The Commissioner asked the complainant on 24 August 2006 to provide a copy of the internal review decision, which he did on 12 September.
10. On 29 January 2007 the Commissioner asked HMRC to provide a copy of the report requested by the complainant.
11. HMRC did so on 21 February 2007. It stated that, upon reviewing the request further, it had decided that section 21 applied to some of the information in addition to the other exemptions already cited, since the conclusions of the report were contained in an anonymous format at paragraph 84 of a National Audit Office Report.
12. The Commissioner wrote to the complainant and HMRC on 27 November 2007. He asked HMRC for its comments on a number of issues.
13. HMRC replied on 21 December 2007. It stated that it now considered that section 31 applied to some of the information.
14. HMRC wrote again on 25 January 2008, specifying which exemptions applied to each part of the report. It indicated that it now believed that some of the information could be released.

### Findings of fact

15. The Inland Revenue Board report comprising the information in the first point of the complainant's request was referred to in the *'Comptroller and Auditor General's Standard Report on the Accounts of HM Customs and Excise 2004-05'* (the 'National Audit Office Report'). The relevant paragraphs of the National Audit Office Report follow.

#### ***'Allegations of a proposed amnesty with tobacco manufacturers***

**81** *In February 2005, the Sunday Times published allegations that in 1999-2000 the Department had instructed a major accountancy firm to approach the UK's largest tobacco producers, and discuss a proposal whereby the producers would agree to pay VAT and excise duty allegedly lost to the Exchequer as a result of cigarette smuggling, in return for an amnesty from prosecution. These allegations were denied by the Department.*

**82** *In response, the Chairman asked for an investigation to be carried out by a member of the Inland Revenue Board independent of the operational areas affected.*

**83** *As this was not a tax investigation, the Department had to rely on the goodwill of the tobacco industry and their advisers in gathering evidence for the report.*

**84** *The resultant report concluded that:*

- *Discussions were held between the Department and the firm about how tobacco companies could be encouraged to prevent the smuggling of their products;*
- *All of the available evidence suggested that the idea of an amnesty as described in the Sunday Times was a marketing initiative of the firm although it seems that the word “amnesty” was first used by a Customs official. One of the then employees of the accountancy firm suggested Customs saw the ‘amnesty scenario’ as a strategic initiative but there is no independent evidence to support this;*
- *There was no evidence that Customs were willing to offer immunity from prosecution in return for payment of substantial duties; and*
- *There was no evidence that Customs were acting in any way as agents for HM Treasury, or that HM Treasury played any role at all in discussions between the parties concerned in late 1999 and early 2000.*

**85** *The National Audit Office examined the report, along with supporting documentation. The evidence gathered by the Department supports the conclusions drawn in the report; namely that the Department did not propose or sanction an amnesty. The Department’s approach was instead to work to engage with tobacco manufacturers to prevent smuggling.*

**86** *Nevertheless, the National Audit Office considered there to be some weaknesses which emerged as a result of the investigation, which the Department needs to address:*

- *The Department was unable to produce records of meetings held with the advisers of tobacco manufacturers. The investigation carried out by the Department had been reliant on recreating records through interview, and obtaining copies of records retained by tobacco manufacturers, the Tobacco Manufacturers’ Association and other third parties.*
- *The Department’s investigation was delayed because one officer, currently on secondment overseas, had difficulty in recalling, without access to records, details of meetings at which he was present which were key to the allegations made by the Sunday Times. The Department should ensure that notes of key meetings are made and retained to provide a chain of evidence to demonstrate how decisions are taken.*
- *The Department found that one official involved was at least a close acquaintance and possibly a personal friend of one of the employees of the accountancy firm developing the amnesty proposal. The official should have disclosed that to his managers and the Department should*

*now consider the adequacy of its guidance on potential conflicts of interest.'*

## Analysis

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16. The information which remains at issue in this case is the Inland Revenue Board report. HMRC originally applied the exemptions in sections 40, 41 and 44 of the Act to this information, and during the Commissioner's investigation it added section 31. It also informed the Commissioner that it had taken the view that some of the information could be released, while other elements of it were already in the public domain so that section 21 applied.

### Procedural matters – section 1(1)(b)

17. Section 1(1) of the Act 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.'*

Section 10(1) of the Act states:

*'Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.'*

18. The Commissioner notes that in this case HMRC has accepted in its correspondence with the Commissioner that some parts of the requested report were not exempt from disclosure. However, it did not provide that information to the complainant. The Commissioner has decided that HMRC therefore breached section 1(1) in this regard, and he has also concluded that the relevant information should now be disclosed. Furthermore, the failure to comply with the time limit in section 10(1) of the Act constitutes a breach of sections 1(1)(b) and 17(1).

### Exemption – section 21

19. At the Commissioner's request, HMRC specified for each element of the withheld information which exemption(s) it believed applied. For some of the information HMRC accepted that it was already in the public domain, and that *'technically'* section 21 therefore applied. Section 21 states:

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

20. The Commissioner takes the view that the failure to inform the complainant that the information was otherwise reasonably accessible constituted a breach of section 21 of the Act. He also considers that, at the time of the original request, it would have been helpful had HMRC provided him with details of where it might be accessed.
21. Since HMRC has not provided any advice to the complainant about where this information can be accessed, the Commissioner suggests that, when it provides him with the information which the Commissioner has identified as being disclosable, it also includes those parts of the report to which it believes section 21 applied.

#### **Exemption – section 44**

##### *Engagement of the exemption*

22. Section 44(1) of the Act provides that:

*'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...'*

Such an enactment is said to constitute a 'statutory bar'.

23. HMRC claimed that such a statutory bar was produced by section 18(1) of the Commissioners for Revenue and Customs Act 2005 (CRCA):

*'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.'*

24. However, HMRC did not make any reference to another section of the CRCA, section 23. This states:

*'(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.'*



25. Section 19(2) specifies that:

*“revenue and customs information relating to a person” means 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).’*

26. The Commissioner is satisfied that section 23(2) of the CRCA invalidates the ostensible statutory bar constituted by section 18(1) of the same Act, except where information has the following features: it is (i) information about (acquired from, held in connection with) the (ii) exercise of an HMRC ‘function’ relating to (iii) a person, the disclosure of which would (iv) specify (allow deduction of) the identity of (v) the person to whom the information relates. It does not apply to any information about internal administrative arrangements of HMRC. The Commissioner has considered each of the qualifying features.

(i) *Information about (etc)*

27. The Commissioner is satisfied that the requested information was about, acquired from, or held in connection with the exercise of HMRC’s disciplinary investigation.

(ii) *Exercise of an HMRC ‘function’*

28. The Commissioner asked HMRC to explain why it considered that the statutory duty of confidentiality laid down in the CRCA applied to an internal HMRC investigation into its own alleged maladministration, and in particular why such an investigation would constitute a ‘function’ of HMRC. HMRC referred to section 51(2) of the CRCA in support of its view:

*‘In this Act—*

*(a) “function” means any power or duty (including a power or duty that is ancillary to another power or duty), and*

*(b) a reference to the functions of the Commissioners or of officers of Revenue and Customs is a reference to the functions conferred—*

*(i) by or by virtue of this Act, or*

*(ii) by or by virtue of any enactment passed or made after the commencement of this Act.’*

It also referred to section 9(1) of the CRCA:

*‘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.’*

29. On the basis of these provisions of the CRCA, HMRC concluded that:

*'Disciplinary investigations into alleged serious misconduct by officers in the execution of their primary duties are absolutely essential to assuring the integrity of HMRC's officers and maintaining public confidence. As such they are properly "ancillary" to, "necessary or expedient in connection with," and "incidental or conducive to" HMRC's main statutory functions of collection and management of the revenue. Such disciplinary investigations are much more than internal administrative arrangements of HMRC.'*

30. The Commissioner is not convinced by HMRC's explanation. Section 51(2)(a) of the CRCA provides that a 'function' of HMRC is *'any power or duty (including a power or duty that is ancillary to another power or duty)'*. In determining whether an investigation into alleged serious misconduct by HMRC officers amounts to a 'function' (ie 'power or duty') of HMRC, the Commissioner has had particular regard to two points. First, paragraph 83 of the National Audit Office Report, which pointed out that:

*'As this [the report] was not a tax investigation, the Department had to rely on the goodwill of the tobacco industry and their advisers in gathering evidence for the report'.*

The Commissioner takes the view that, if the investigation were indeed one of HMRC's functions (powers or duties), then it would have been likely to have had the necessary formal powers to exercise the function adequately. Secondly, section 19(2) of the CRCA specifically distinguishes between *'the exercise of a function'* of HMRC and its *'internal administrative arrangements'*. While HMRC has claimed that disciplinary investigations are *'much more than'* internal administrative arrangements, the Commissioner does not consider that it has demonstrated that to be the case. The Commissioner's conclusion is that the investigation to which the requested report relates was not a 'function' of HMRC capable of engaging section 18(1) of the CRCA.

(iii) *'Person'*

31. The Commissioner has considered how the term 'person' should be interpreted. As there is no specific definition within the CRCA 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. The Commissioner is satisfied that the requested information relates to 'persons', in this case the tobacco manufacturers, individuals employed by those manufacturers, and individual officials of HMRC.

(iv) *Disclosure would specify (etc) identity*

32. The Commissioner is satisfied that the nature of the information was such that disclosure would have specified the identity of the individuals in HMRC who were subject to investigation. Even had parts of the information been redacted, the Commissioner believes that their identities could still have been deduced, owing to the specific roles which they had in the events under scrutiny.



(v) *The person to whom the information relates*

33. Section 19(2) specifies that “*information relating to a person*” means *information about, acquired as a result of, or held in connection with the **exercise of a function of [HMRC] in respect of the person***’ (emphasis added). The Commissioner notes that HMRC’s investigation and report related to an allegation that officials from HMRC (at the time, HM Customs & Excise), acting on behalf of HM Treasury, had used a major accountancy firm to offer an amnesty to certain tobacco companies that HMRC knew to be involved in smuggling. The Commissioner considers that the subject of this investigation was therefore the relevant officials of HMRC, rather than the accountancy firm, the tobacco companies or officials of the Treasury. Consequently, if HMRC were exercising one of its functions in this case it would only be in respect of those officials of HMRC, and only information relating to those officials would be subject to the statutory bar.
34. Since the Commissioner has decided that the investigation to which the requested report relates was not a ‘function’ of HMRC capable of engaging section 18(1) of the CRCA, there is no statutory bar to disclosure of the information and section 44 does not apply.

### **Exemption – section 31(1)(g) and 31(2)(b)**

#### *Engagement of the exemption*

35. During the course of the Commissioner’s investigation, HMRC claimed that some of the information was exempt by virtue of section 31(1)(g), which states:

*‘Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-...*

*(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)...’.*

HMRC indicated that the relevant part of subsection (2) was paragraph (b):

*‘the purpose of ascertaining whether any person is responsible for any conduct which is improper...’.*

36. While section 31(1)(g) refers to the exercise of the public authority’s ‘functions’, the definition of functions in that section of the Freedom of Information Act need not be identical to the one specifically provided in the CRCA for the purposes of that Act. The Commissioner considers that ‘functions’ in section 31(1)(g) should be interpreted more broadly than the definition ‘powers or duties’ in the CRCA, albeit that the ambit of the exemption will be considerably narrowed through the qualification imposed by particular ‘purposes’. The Commissioner has concluded that an internal disciplinary investigation is indeed the exercise of a function by HMRC for the purpose of *‘ascertaining whether any person is responsible for any conduct which is improper’*.

### *The prejudice test*

37. To engage the section 31(1)(g) exemption it is also necessary for the public authority to demonstrate that disclosure of the requested information would, or would be likely to, cause some relevant prejudice. The Commissioner's interpretation of 'likely to prejudice' is that there should be evidence of a significant risk of prejudice to the subject of the exemption. The degree of risk must be such that there 'may very well' be prejudice to those interests. Whether prejudice exists is to be decided on a case by case basis.
38. HMRC indicated that the relevant prejudice in this case was the possibility that disclosure would deter taxpayers and others from cooperating in future internal investigations where compulsory powers were not available. The Commissioner has decided that this was a reasonable conclusion. It seems likely that external parties might not wish to cooperate in an investigation which might, for example, reveal to the world at large their own part in events which allegedly included misconduct on the part of HMRC officials. Accordingly, the Commissioner accepts that disclosure of the information to which HMRC applied section 31(1)(g) would be likely to cause some prejudice to future investigations and that the exemption is therefore engaged.

### *The public interest test*

39. Since section 31(1)(g) is a qualified exemption it is subject to a public interest test under section (2)(2)(b) of the Act. This favours disclosure unless, *'in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information'*.
40. HMRC accepted that there is a strong public interest in ensuring the integrity of HMRC's officers in carrying out their duties. However, it expressed the view that this public interest was already served by the published National Audit Office report, which reviewed the Inland Revenue Board report requested in this case and summarised the evidence in anonymised form. (That summary is reproduced above in the 'Findings of fact' section of this Decision Notice.)
41. In favour of maintaining the exemption, HMRC identified a strong countervailing public interest in maintaining the willingness of taxpayers and others to cooperate in internal investigations where compulsory powers are not available, a cooperation which might not be forthcoming if information about those parties' evidence were to be disclosed. Furthermore, HMRC has informed the Commissioner that its investigator had confirmed that *'he gave an oral undertaking to those he interviewed in the course of his investigation that the information they provided to him would not be made public...'*
42. The Commissioner agrees with HMRC that there is a strong public interest in disclosing the information in order to promote the accountability of officials in HMRC, and to facilitate the transparency of decisions taken by HMRC as a result of the investigation in this particular case. While the summary of the investigation provided in the National Audit Office report goes some way to achieving these objectives, however, the Commissioner does not believe that it serves the public interest as effectively as would publication of the original report. The Commissioner has also taken account of the fact that, at the time of the

complainant's request, HMRC's investigation had been concluded. For that reason, disclosure would not interfere with the investigator's conclusions or any action which resulted.

43. On the other hand, the Commissioner also accepts that there is a strong public interest in maintaining the section 31 exemption where that is necessary to ensure the participation of parties whose cooperation HMRC is not able to compel, and also in complying with any confidentiality undertakings it might have given. Furthermore, the Commissioner has considered the sensitivity of the information. He accepts that disclosure could have a seriously prejudicial impact, particularly in terms of career prospects, on individuals participating in the investigated events.
44. The Commissioner notes that the report is comprised of the following broad categories of information:
- a) details of the allegation and technical details of the investigation process;
  - b) summaries of evidence given by officials still employed by HMRC at the time of interview;
  - c) summaries of evidence given by individuals other than officials still employed by HMRC (eg officials who had left HMRC's employment, and employees of private companies), and evidential documents provided by them;
  - d) the investigators' analysis and conclusions.

Having weighed up the public interest factors, the Commissioner takes the view that disclosure of technical details of the investigation (a) and the investigators' analysis and conclusions (d) would not have the detrimental public interest effects identified above. As a consequence, the Commissioner's view is that the public interest in maintaining the section 31 exemption does not outweigh that in disclosing this information. In relation to the summaries of evidence – (b) and (c) – the Commissioner believes that HMRC would have had avenues available to require its own current employees to cooperate with the investigation (for instance, as part of their explicit or implicit terms and conditions of employment). Therefore, he considers that in respect of this information too the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

45. Regarding the remaining summaries of evidence, from third parties and former (at the time of interview) employees of HMRC, the Commissioner has decided that the public interest in maintaining the exemption under sections 31(1)(g) and 31(2)(b) outweighs the public interest in disclosure. He has drawn that conclusion because it is clear that, were the information to be disclosed in this case, the participation of such parties in future investigations would be threatened and the credibility of HMRC's confidentiality undertakings undermined. The Commissioner has provided HMRC separately with a Schedule indicating what information is to be withheld.

#### **Exemption – section 40(2) and 40(3)(a)(i)**

46. In its letter of 23 November 2005 HMRC claimed that disclosure of some of the information would contravene the Data Protection Principles in the Data Protection Act and was therefore exempt under section 40(2) of the Act. Some of this information was also withheld as exempt under section 31, and where the Commissioner has agreed that the section 31 exemption should be upheld in relation to this information he has not gone on to consider whether the information is also exempt under section 40(2).
47. The Commissioner has considered whether the relevant information in fact comprises 'personal data'. That term is defined in the Data Protection Act 1998, as amended by the Freedom of Information Act, and amounts to information about a living individual from which that individual can be identified. The relevant withheld information comprises the following:
- a) names and employment positions of individuals in HMRC, the accountancy firm and the tobacco industry;
  - b) opinions/recollections of these individuals, including speculation and comments on character and approach, contained within their evidence to the investigator;
  - c) a reference to a separate disciplinary matter relating to an HMRC employee;
  - d) a reference to an aspect of an HMRC employee's private life.

The Commissioner is satisfied that all the information constitutes personal data for the purposes of the Act.

48. Section 40(2) of the Act provides an exemption for information that constitutes the personal data of third parties:

*'Any information to which a request for information relates is also exempt information if—*

*(a) it constitutes personal data which do not fall within subsection (1), and*

*(b) either the first or the second condition below is satisfied.'*

49. The first and second conditions are set out in section 40(3) and (4). The relevant condition in this case is at section 40(3)(a)(i), where disclosure would breach any of the Data Protection Principles. The Data Protection Principles are set out in schedule 1 of the Data Protection Act 1998. In this case HMRC has stated that disclosure of personal data would breach the First Data Protection Principle, which provides:

*'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—*

*(a) at least one of the conditions in Schedule 2 is met...'*

50. Accordingly, personal data may not be disclosed unless to do so would be fair, lawful and would satisfy at least one of the conditions in Schedule 2. The relevant condition in this case is 6(1):

*'The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'*

51. This issue was addressed in the Information Tribunal case of *House of Commons v the Information Commissioner and Leapman, Brooke, Thomas* (EA/2007/0060, 0061, 0062, 0063, 0122, 0123, 0131). The Tribunal decided that the 6<sup>th</sup> Condition created a two-part test: first, disclosure must be necessary for a legitimate interest of the public; secondly, it must not cause unwarranted prejudice to the rights and freedoms or legitimate interests of the data subject. The case involved requests to the House of Commons for details of the expenses that MPs had claimed for their second homes. The Tribunal accepted that the word 'necessary' carried connotations from the European Convention on Human Rights:

*'Interference with private life can only be justified where it is in accordance with the law, is necessary in a democratic society for the pursuit of legitimate aims, and is not disproportionate to the objective pursued.'*

In other words, interference with private life could only be justified where it is in accordance with the law, is necessary in a democratic society for the pursuit of legitimate aims, and is not disproportionate to the objective pursued (a pressing social need is involved and the measure employed is proportionate to the aim). The Tribunal identified two questions to test this approach in the specific case:

*'(A) whether the legitimate aims pursued by the applicants can be achieved by means that interfere less with the privacy of the MPs (and, so far as affected, their families or other individuals),*

*'(B) if we are satisfied that the aims cannot be achieved by means that involve less interference, whether the disclosure would have an excessive or disproportionate adverse effect on the legitimate interests of the MPs (or anyone else).'*

52. The Commissioner has considered the elements (a) to (d) of the information at issue and the arguments put forward HMRC to decide whether disclosure would be unfair or unlawful. Where it would not be, he has then considered whether Condition 6(1) would be satisfied in the event of disclosure.
53. HMRC's argument was that, even though the investigation related to the conduct of the individuals concerned in their business capacity, the allegations addressed *'the professional integrity of the individuals concerned and have the potential to affect their employment prospects'*. It took the view that, as the investigation had concluded that there was no independent evidence of wrongdoing, disclosure would be unfair *'because it could damage the reputation and employment prospects of the individuals concerned, without foundation or justification'*. It pointed out that the National Audit Office had reviewed the report and agreed with



its conclusions, and had published its own report and conclusions, which summarised the evidence in anonymised form.

(a) *Names and employment positions*

54. Regarding the names and employment positions of individuals in HMRC, the accountancy firm and the tobacco industry, the Commissioner does not consider that it would be unfair or unlawful to release this personal data. Information which is about the family or personal life of an individual is likely to deserve protection, but this information relates to their professional lives and the data subjects were all in relatively senior positions in their respective organisations. Individuals in such positions should – and no doubt do – expect a degree of public scrutiny of their actions. In relation to public officials, the Information Tribunal in the case of *House of Commons v ICO & Norman Baker MP* (EA/2006/0015 and 0016) stated that it was possible to draw a distinction between personal data related to an individual's public and private life. Furthermore, the interests of the data subject are '*no longer first or paramount*' where the requested data relates to a public official and '*the purposes for which the data are processed arise through the performance of a public function*'. Although the data subject's interests still had importance, where they '*carry out public functions, hold elective office or spend public funds they must have the expectation that their public actions will be subject to greater scrutiny than would be the case in respect of their private lives*'. The Tribunal indicated that this would apply even where '*a few aspects of their private lives are intertwined with their public lives but where the vast majority of processing of personal data relates to a data subject's public life*'. The Commissioner is satisfied that, in this case, the nature of the professional role of the individuals (from both the public and private sectors) who were identified in the report was sufficiently senior that it would not be unfair or unlawful to disclose information which merely refers to their identity and role. Regarding Condition 6(1), the Commissioner is satisfied that the legitimate interests of the public in having knowledge of this information could not be satisfied in some other way than disclosure of it. Further, he does not consider that disclosure would have an excessive or disproportionate adverse effect on the legitimate interests of the relatively senior individuals within HMRC, the accountancy firm and the tobacco industry. Accordingly, the 6<sup>th</sup> Condition provided by Schedule 2 was met for the purposes of the 1st Data Protection Principle.

(b) *Opinions/recollections given in evidence*

55. The Commissioner has considered the personal data contained within the report. He notes that all of the opinions, recollections and speculation given in evidence by individuals other than those who were officials of HMRC at the time of interview, together with supporting documentary evidence, falls within the information which he has already identified as being exempt by virtue of section 31, so he does not propose to decide whether section 40 applies to that information as well.

56. The Commissioner notes that only one of the officials appears to have still been employed by HMRC at the time of interview. In relation to his evidence, the Commissioner notes that the investigation concerned events in which he was involved in a professional capacity, and in respect of which he was accountable as both a public official and an employee. The Commissioner's general view, as



made clear in his *'Freedom of Information Act Awareness Guidance No 1: Personal Information'*, is that information about an individual in their official or work capacity is normally disclosable unless there is some particular risk of damage or distress to the individual concerned. In considering whether there was any particular potential prejudice to the data subject here, the Commissioner has taken note of the fact that the report essentially exonerated those against whom the allegation had been made. Furthermore, he notes that his general position regarding data about individuals in their official capacity was adopted by the Information Tribunal in the *Baker* case cited above.

57. In light of these considerations, the Commissioner has decided that it would not be unfair or unlawful to the data subject in this case for the reporting of his evidence at interview to be disclosed. The Commissioner takes this view notwithstanding the fact that, according to HMRC, those interviewed were given *'an oral undertaking [by the investigator]...that the information they provided to him would not be made public...'* Although this might have induced in them an expectation that their evidence would not be disclosed to a wider audience, given the new presumption of disclosure created by the Freedom of Information Act (as well as other countervailing (legal) obligations) the Commissioner does not believe that individuals could reasonably expect such assurances to act as infallible guarantees. Regarding Condition 6(1), the Commissioner considers that the public had a legitimate interest in knowing what evidence had been provided by an official of HMRC during the investigation of an allegation of unlawful actions by senior officials of the public authority, and that this could not have been fully satisfied in any other way than disclosure of the evidence itself. Further, the Commissioner does not consider that disclosure would have an excessive or disproportionate adverse effect on the legitimate interests of the official, notwithstanding the oral undertaking given not to make the evidence public, because his continuing role as an official of HMRC at the time of the investigation would mean that he was obliged to cooperate with the investigation in any event. Accordingly, the 6<sup>th</sup> Condition provided by Schedule 2 was met for the purposes of the 1st Data Protection Principle, and this information should be disclosed.

*(c) Disciplinary matter and (d) reference to aspect of private life*

58. The information includes reference to a separate disciplinary matter relating to an HMRC employee, and another reference to an aspect of an HMRC employee's private life. In respect of the first reference, the Commissioner does not consider that it would be unfair or unlawful to disclose it because the fact of the suspension is already in the public domain, and in addition the data subject was a senior official of HMRC. The Commissioner is also satisfied that the legitimate interests of the public in having knowledge of this information could not be satisfied in some other way than disclosure, and that disclosure would not have an excessive or disproportionate adverse effect on the legitimate interests of the employee, since the suspension is already public knowledge. Accordingly, the 6<sup>th</sup> Condition provided by Schedule 2 was met for the purposes of the 1st Data Protection Principle.

59. In relation to the reference to the aspect of an HMRC employee's private life, the Commissioner considers that this information did not concern the individual's professional or public role, and he could legitimately have expected that the information would be treated as a private matter. Consequently, the

Commissioner's decision is that it would be unfair to disclose this information and it was therefore reasonable for HMRC to have withheld it.

60. The Commissioner has identified in a separate Schedule to HMRC which of the information to which section 40 was applied should now be disclosed.

### **Exemption – section 41**

61. HMRC claimed that some of the information was exempt under section 41 of the Act. The Commissioner has already decided that some of this is exempt by virtue of other exemptions, and so has not determined whether HMRC was correct in its application of section 41 to that information.

62. The remaining information relates to what HMRC has claimed was information in confidence provided by individuals who were HMRC officials at the time of the events under investigation and remained so at the time of the investigation (the Commissioner has already decided that the evidence of those no longer employed by HMRC at the time of the investigation is exempt by virtue of section 31). This only applies to one individual.

63. Section 41(1) of the Act states:

*'Information is exempt information if –*

*(a) it was obtained by the public authority from any other person (including another public authority), and*

*(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.'*

64. Under the provisions of section 41(1)(a) the exemption only applies to information which was obtained by the public authority from another person or public authority, and does not apply to information created by the public authority itself. The Commissioner is satisfied that the HMRC official was, in his capacity as a witness to events, separate from HMRC itself. Accordingly, the condition in section 41(1)(a) was satisfied.

65. Under section 41(1)(b), the exemption can only be engaged if disclosure of the information would give rise to an 'actionable breach of confidence', so that the provider or a third party could bring court proceedings against the public authority. An actionable breach will only arise when the following conditions are satisfied:

- a) the information has the necessary 'quality of confidence' – it need not be highly sensitive, but it must not be trivial;
- b) the circumstances in which the information was provided gave rise to an obligation of confidence, in that a 'confider' provided information to a 'confidant' in the expectation, whether explicit or implied, that the information would only be used in accordance with the wishes of the confider;

- c) disclosure of the information would be to the detriment of the person(s) to whom the duty of confidence is owed,
- d) the action would not fail on the grounds that disclosure of the information would be protected by a public interest defence.

*(a) Necessary quality to be confidential*

66. The Commissioner has considered whether the information had the necessary quality to be confidential. HMRC claimed that the information had the quality of confidence because *'it is of specific character, is not widely known and could not easily be found out'*. The Commissioner accepts that the information provided by the witness embodied a private interest worthy of protection, since it related to an investigation of alleged misconduct and had the potential to prove professionally embarrassing to those providing it. For this reason, the information has the necessary quality to be confidential.

*(b) Obligation of confidence*

67. The Commissioner has also considered whether the circumstances in which the information was provided gave rise to an obligation of confidence. In relation to this point HMRC pointed out that the investigator gave *'an oral undertaking to those he interviewed in the course of his investigation that the information they provided to him would not be made public...'* It also stated:

*'Everyone who provided information (including those working for HMRC) knew that this was an internal investigation that could potentially lead to disciplinary action against HMRC employees. Their reasonable expectation would have been that the information given would be used for that purpose and for no other. It is well established that information obtained using powers of compulsion cannot be used for any purpose other than that for which it was obtained: Marcel v Commissioner of Police [1992] Ch 225, Woolgar v Chief Constable of Sussex Police [2000] 1 W.L.R. 25. Whilst the Hartnett review was not carried out using HMRC's compulsory powers... The degree of compulsion felt by witnesses employed by HMRC would have been even stronger [than non-HMRC witnesses]. In any event, it has also been held that the Marcel principle applies in the case of a witness who gives voluntary information to the police: Taylor v Director of the Serious Fraud Office [1999] A.C. 177.'*

The Commissioner is satisfied that the 'oral undertaking' and the circumstances in which the interview took place gave rise to an obligation of confidence.

*(c) Detriment*

68. In determining whether disclosure would be to the detriment of the official, the Commissioner notes that HMRC claimed that:

*'much of the information given to [the investigator] in confidence would lead to specific detriment. For example, comments made in interview that reflect badly upon another individual's behaviour could expose the interviewee to a risk of a defamation action if made public. Comments that*

*reflect badly upon the speaker and/or his organisation may cause embarrassment and reputational damage. Disclosure of papers belonging to another might itself be a breach of confidence.'*

69. The Commissioner has considered HMRC's explanation of the potential detriment to the employee interviewed during the investigation, and compared it with the information provided by the witness. The Commissioner has concluded that disclosure might well result in some detriment, because of the relatively detailed nature of the evidence.
70. The Commissioner notes that HMRC has cited legal authority for the view that detriment is not a necessary element for an actionable breach of confidence. However, the Commissioner does not believe that this issue has a material bearing on this case.

*(d) Public interest defence*

71. The Commissioner has gone on to consider whether an action for breach of confidence would fail because disclosure of the information would be protected by a public interest defence – in other words, no duty of confidence would arise because it would not be in the public interest to prevent disclosure. HMRC addressed the public interest issue but only identified factors against disclosure in respect of the third party (ie non-HMRC) witnesses:

*'There is a strong public interest in ensuring the integrity of HMRC's officers in carrying out their duties. However, the NAO reviewed the report and the evidence and agreed with Mr Hartnett's conclusions. The NAO published its own report and conclusions, which summarised the evidence in anonymised form. The information already published is sufficient to serve that public interest. In addition, there is a strong countervailing public interest in maintaining the willingness of taxpayers and others to cooperate in internal investigations of this kind, where compulsory powers are not available. Disclosure of information provided in confidence would be likely to prejudice HMRC's ability to secure cooperation from third parties in future internal investigations.'*

HMRC claimed that internal disciplinary investigations constituted the exercise of its functions in respect of improper conduct – the section 31(1)(g) issue which has already been addressed in this Decision Notice.

72. The Commissioner notes that the courts have generally taken the view that the grounds for breaching confidentiality must be strong ones, since confidentiality is recognised as an important end in itself. He considers that, in balancing confidentiality against the public interest, the task is not to weigh up, against the good of society, the impact upon the individual, but rather the importance of preserving confidences. Thus, in a medical context, confidentiality is important because it reinforces the bond of trust between patients and doctors, without which people may be reluctant to seek medical advice. In this case, the public interest in withholding the information essentially lies in maintaining the ability of HMRC to conduct effective internal conduct investigations, by preserving the confidences of witnesses who might otherwise be reluctant to provide evidence.

For that reason, the public interest is very similar to that which applied to the section 31(1)(g) public interest test.

73. The Commissioner concluded that the balance of the test in that exemption favoured disclosure of the information relating to witnesses who were employees of HMRC at the time of the interview, since HMRC would have had avenues available to require its own current employees to cooperate with the investigation (for instance, as part of their explicit or implicit terms and conditions of employment). Disclosure of the information would therefore be unlikely to deter existing employees from cooperating with such investigations in the future. On the other hand, the Commissioner considers that there is a strong public interest in the accountability and transparency of investigations into alleged misconduct in office of public officials. He also notes that case law shows that the courts have been prepared to require disclosure in the public interest of confidential information where the information concerns misconduct, illegality or gross immorality. In the circumstances, the Commissioner is satisfied that the public interest test favours disclosure of this information.
74. (The Commissioner is mindful of the fact that the balance of the public interest test is slightly different with respect to the law of confidentiality than it is in relation to freedom of information legislation, in that the former dictates that confidential information should be withheld unless the balance of the public interest favours disclosure, whereas in the latter information can only be withheld when the public interest in maintaining the exemption outweighs that in disclosure. However, the Commissioner does not consider that this difference has any practical impact in this case.)

## The Decision

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75. The Commissioner's decision is that HMRC did not deal with the request for information in accordance with the Act:
- in disclosing some information to the complainant only after he had made a complaint to the Commissioner, HMRC breached section 1(1) of the Act, and also failed to comply with the time limit in section 10(1), which constitutes a breach of section 17(1) and 1(1)(b) of the Act;
  - HMRC did not comply with its obligations under section 1(1) in that it failed to communicate to the complainant information to which he was entitled, on the mistaken basis that it was exempt from disclosure under sections 31, 40(2) and 40(3)(a)(i), 41 and 44 of the Act;
  - HMRC breached section 21 of the Act by failing to advise the complainant that some of the information was already in the public domain.



## Steps Required

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76. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- HMRC should provide the complainant with the information identified in the separate Schedule which has been provided to it.

The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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77. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Other matters

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### *Internal review delay*

78. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern. Section VI of the Code of Practice (provided for by section 45 of the Act) makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. As he has made clear in his '*Good Practice Guidance No 5*', the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review.

79. In exceptional circumstances it may be reasonable to take longer, but the total time taken should not exceed 40 working days, and as a matter of good practice the public authority should explain to the requester why more time is needed. Furthermore, in such cases the Commissioner expects a public authority to be able to demonstrate that it has commenced the review procedure promptly following receipt of the request for review and has actively worked on the review throughout that period.

80. The complainant's internal review request was made on 9 December 2005, and the decision was issued on 19 June 2006. The Commissioner recognises that HMRC's internal review in this case was conducted prior to the issuing of the aforementioned guidance in February 2007. However, he considers that the 136 working days that HMRC took to complete this internal review does not constitute a reasonable timescale and would like to take this opportunity to remind the authority of the expected standards in this regard.



## Right of Appeal

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81. 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@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.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 14<sup>th</sup> day of July 2008**

**Signed .....**

**Richard Thomas  
Information Commissioner**

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

## Legal Annex

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### Freedom of Information Act 2000

**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.'

**Section 1(2)** provides that -

'Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.'

**Section 1(3)** provides that -

'Where a public authority -

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.'

**Section 1(4)** provides that -

'The information -

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.'

**Section 1(5)** provides that -

'A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).'

**Section 1(6)** provides that -

'In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as 'the duty to confirm or deny'.'

**Section 21(1)** provides that –  
'Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.'

**Section 40(1)** provides that –  
'Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.'

**Section 40(2)** provides that –  
'Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.'

**Section 40(3)** provides that –  
'The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of 'data' in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
  - (i) any of the data protection principles, or
  - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.'

**Section 40(6)** provides that –  
'In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.'

**Section 40(7)** provides that –  
In this section-

'the data protection principles' means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;  
'data subject' has the same meaning as in section 1(1) of that Act;  
'personal data' has the same meaning as in section 1(1) of that Act.

**Section 41(1)** provides that –

'Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.'

**Section 44(1)** provides that –

'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.'

**Section 44(2)** provides that –

'The duty to confirm or deny does not arise if the confirmation or 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).'

<b>Data Protection Act 1998</b>
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**SCHEDULE 2 CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE:  
PROCESSING OF ANY PERSONAL DATA**

**SCHEDULE 2** provides that –

'1 The data subject has given his consent to the processing.

2 The processing is necessary—

- (a) for the performance of a contract to which the data subject is a party, or
- (b) for the taking of steps at the request of the data subject with a view to entering into a contract.

3 The processing is necessary for compliance with any legal obligation to which the data controller is subject, other than an obligation imposed by contract.

4 The processing is necessary in order to protect the vital interests of the data subject.

5 The processing is necessary—

- (a) for the administration of justice,
- (b) for the exercise of any functions conferred on any person by or under any enactment,

(c) for the exercise of any functions of the Crown, a Minister of the Crown or a government department, or

(d) for the exercise of any other functions of a public nature exercised in the public interest by any person.

6 (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

(2) The Secretary of State may by order specify particular circumstances in which this condition is, or is not, to be taken to be satisfied.'