

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 11 March 2010**

**Public Authority:** Her Majesty's Revenue and Customs ('HMRC')  
**Address:** 4th Floor  
100 Parliament Street  
London  
SW1A 2BQ

### Summary

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The complainant asked for information concerning HMRC's Regional Review Programme, specifically in relation to the potential annual savings relating to the closure of the Custom House Greenock. HMRC refused to disclose this information, citing the exemption under section 43 of the Act. The Commissioner found that the exemption was engaged and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Commissioner therefore found that HMRC had acted correctly in withholding the information. However, the Commissioner decided that HMRC breached section 10(1) by failing to confirm within 20 working days that it held the information requested and failed to comply with its duty to issue the refusal notice within the time limit set out in section 10(1), which constitutes a breach of section 17(1) of the Act.

### 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.

## Background

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2. Between 2006 and 2008 HMRC implemented a Regional Review Programme designed to take forward the consolidation of its estate and the re-location of its staff nationwide in line with current business plans. The overall aim was to deliver a more efficient and effective service to customers - businesses and individuals. The reviews looked at initial proposals for areas within each region, considered the impact on customers and included formal consultation with staff and unions.
3. In order to undertake the reviews HMRC offices were divided into three categories of location: urban centres, clusters and 'individual locations'. Custom House Greenock was part of a cluster ie a group of towns or cities outside the main urban centres, but within 25 kilometres of each other.
4. By December 2008 HMRC had reviewed and published decisions on the future of its estate. The closure of Custom House Greenock was announced internally to HMRC on 4 December 2008. To take forward the implementation of these review decisions, ie the relocation/redeployment of staff and the vacation of buildings, HMRC set up a Business Workforce Change Team.

## The Request

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5. On 11 June 2008 the complainant requested information from HMRC in relation to Cluster 30 – Custom House Greenock – which was earmarked for closure as part of the review process. The full detail of the request is as follows:

'I work for HMRC and today we received notification that under Workforce Change, Cluster Reviews our Cluster (30) was earmarked for closure. In the information published, there is a statement that there are potential savings of £625K per year if the three offices that make up cluster 30 were closed. How was this figure arrived at and is there a separate figure for the potential savings if Greenock Custom House was closed? It also states that the travelling time by car between Greenock and Portcullis House in Glasgow was 40 minutes. How was this time calculated and did it take into account travel at peak times? Could I please have an answer as a matter of urgency as we only have until the end of August before the consultancy period ends.'

6. HMRC numbered the complainant's request for ease of reference as follows:
  - 1a. How the figure for potential savings quoted in relation to cluster 30 (£625K) was arrived at
  - 1b. Is there a separate figure for the potential savings if Greenock Custom House was closed?
  - 2a. How the travelling time of 40 minutes by car between Greenock and Portcullis House in Glasgow was calculated
  - 2b. Did it take into account travel at peak times?
7. On 28 July 2008 the complainant sent an email reminder regarding his request and was advised the same day that staff absence due to illness had delayed a response.
8. On 31 July 2008 the complainant again chased a response to his request and asked if he could lodge a formal complaint regarding the delay. HMRC explained that there was no formal complaint process for delay but that his request was receiving attention.
9. On 20 August 2008 the complainant wrote to HMRC asking why the twenty day deadline for responding to his request had not been met. HMRC's response was that the delay had been caused partly by the absence of staff due to illness and partly by the need to discuss an approach to the complainant's request and other similar requests with a number of colleagues. HMRC also indicated that a formal response would be issued the following week.
10. On 17 September 2008 HMRC responded to the complainant, providing information in relation to all of the request except part 1b, which was withheld using s43(2), on the grounds that it was commercially sensitive.
11. On 22 September 2008 the complainant requested an internal review of HMRC's refusal regarding part 1b of his request, stating that he required this information to challenge the possible estimated savings from the closure of Custom House Greenock if the figures were not realistic. The complainant also formally complained regarding the length of time taken to respond to his request. The result of the internal review was provided to the complainant on 2 December 2008 and upheld HMRC's original decision not to disclose.

## The Investigation

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### Scope of the case

12. On 12 December 2008 the complainant contacted the Commissioner to complain about the way his request for information had been refused. Specifically the complainant wanted access to the information he had requested in part 1b of his request, as detailed above. The complainant required this information in order to provide informed input to a consultation exercise associated with the review of the Custom House Greenock, his place of work, as part of the Workforce Change Programme.

### Chronology

13. On 25 September 2009 the Commissioner wrote to both parties commencing his investigation. The Commissioner apologised for the delay owing to his backlog of cases.
14. With respect to HMRC, the Commissioner asked for its representations regarding withholding the information relating to the cost-savings associated with the closure of Custom House Greenock. In particular clarification was sought as to how release of this information would prejudice the commercial interests of both HMRC and the private outsourcing partner.
15. HMRC provided to the Commissioner, in confidence, information relevant to the potential savings and confirmed that HMRC's view remained as set out in its internal review, the results of which had been conveyed to the complainant.
16. In addition HMRC stressed that the cost-saving element of the Workforce Change Programme was only one factor in determining office closures. HMRC explained that the main purpose was to align its estate with future business needs in order to achieve the required long term efficiency savings and customer service improvements.

## Analysis

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### Exemptions

#### Section 43(2) Prejudice to commercial Interests

17. Section 43(2) provides an exemption from disclosure for information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
18. The full text of the exemption can be found in the Legal Annex at the end of this Notice.
19. In its submission to the Commissioner HMRC explained that the Work Change Programme involved a Private Finance Initiative (PFI) outsourcing deal with a private sector partner. In relying upon section 43 HMRC argued that the requested information was commercially sensitive and as such its disclosure could weaken the competitive position of their outsourcing partner – a private company – and also harm the relationship between HMRC and their partner.
20. The Commissioner's approach when considering prejudice to a third party's commercial interests is that it will not be sufficient for the public authority to speculate regarding any prejudice that may be caused, rather arguments originating from the third party itself will need to be considered.
21. HMRC had consulted with the PFI partner regarding release of the requested information and the partner confirmed that disclosure could prejudice their commercial interests.
22. The Commissioner's view is that the prejudice test is not a weak test and a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some causal link between the potential disclosure and the prejudice. Accordingly the Commissioner's approach to assessing prejudice is as set out by the Tribunal in *Hogan v the ICO and Oxford City Council (EA/2005/0026 and EA/2005/0030)*.
23. In *Hogan* the Tribunal outlined three steps in the application of the prejudice test. Firstly, there is a need to identify the applicable interest(s) within the relevant exemption ie ensuring that the prejudice claimed is to the interest stated. In this case prejudice was being claimed to the commercial interests of both HMRC and its private partner.

24. Secondly, the nature of 'prejudice' being claimed must be considered ie the public authority must be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the latter is not trivial or insignificant. If the prejudice is trivial eg the information is already in the public domain, disclosure is unlikely to have any real detrimental or prejudicial effect, or if the nature of the prejudice claimed cannot be adequately linked backed to the disclosure of the information in question, then the exemption cannot be engaged.
25. Finally the likelihood of occurrence of prejudice must be considered. (para 28 to 34). "Likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote, whereas "would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not. Where the level of prejudice has not been specified then, unless there is clear evidence that the higher level should apply, the lower threshold should be used.
26. HMRC argued that disclosure of potential cost savings arising from the closure of Custom House Greenock would reveal the annual estate running cost and this would allow competitors to deduce the PFI partner's unitary charge, thus prejudicing their commercial interests in relation to that specific property.
27. Furthermore HMRC had also argued that any disclosure that would adversely affect its private partner would also prejudice HMRC as it would damage the relationship between the two parties and weaken the ability to obtain value for money from the PFI contract.
28. The Commissioner is aware that the involvement of private sector partners in the financing and delivering of public sector projects and services has become a common feature of public life. In this context public authorities are likely to hold a good deal of information both related to the particular project in which a private partner is involved and more generally to the private partner's business.
29. However the fact that a public authority holds commercially sensitive information does not always mean that such information will be exempt. It is therefore necessary to consider whether the release of the information would prejudice the private partner's commercial interests. In determining whether or not the disclosure would cause prejudice, consideration needs to be given to the nature and likelihood of harm that would be caused.
30. The requested information in this instance relates to a PFI contract. PFI is an outsourcing approach where the public sector procures 'services'

from the private sector for a long term (typically over 25 years) in return for an annual payment (unitary charge).

31. The PFI partner is engaged in a competitive business which relies to a significant extent on pricing strategies with regard to unitary charges. Unitary charges fixed under a PFI estate contract are subject to negotiation between the public authority and the private partner and do not necessarily bear any relation to market terms in specific locations.
32. The Commissioner therefore accepts that the requested information is commercially sensitive and that its release would weaken HMRC's PFI partner's position in a competitive environment by revealing its financial position in a way that is detrimental to its commercial interests.
33. As HMRC would be engaging in similar transactions with similar commercial considerations, disclosure of such information relating to one financial transaction would prejudice HMRC'S commercial interests in subsequent negotiations with a counter party. This is in line with the Tribunal's findings in *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*.
34. For the reasons set out above the Commissioner is satisfied that section 43(2) exemption is engaged in this case.

### **Public interest test**

35. Section 43(2) is a qualified exemption and is therefore subject to a public interest test. This requires the Commissioner to determine whether the public interest is best served by maintaining the exemption or by releasing the information sought.
36. In this instance the complainant made no reference to the public interest being served in releasing the requested information. Instead he stressed his need to obtain the information for personal reasons, namely to challenge the potential closure of his place of work.
37. HMRC recognised the need for transparency and accountability for decision making and the spending of public money as public interest factors in favour of disclosure of the information. In view of this an extensive amount of detailed information had been publicised regarding Work Change Programme in general and the review of Cluster 30 in particular, both within HMRC and externally via the website.
38. However HMRC argued that the requirement for transparency and accountability needs to be weighed against the harm to the commercial

interests of their private partner and indeed HMRC itself. The public interest in disclosure lies in the costs and efficacy of the PFI contract as a whole. In relation to property specific information, it was argued that the public interest in disclosing this information was not sufficiently strong to override the real risk to the commercial interests of the parties involved.

39. The Commissioner accepts that opinion. He acknowledges the wider interest of the general public in having access to information about how effectively public authorities operate PFI contracts and the more specific interests of the complainant in the cost saving element of this office closure.
40. However the Commissioner recognises that there is also a strong public interest in encouraging the wider involvement of the private sector in public procurement, to increase competition. PFI contracts are intended to pass risk to the private sector if this provides good value for money.
41. The Commissioner is aware that Government is keen to obtain best value for money in relation to its estates portfolio. Value for money can be best obtained where there is a healthy competitive environment, coupled with mutual trust and respect between private and public sectors.
42. Although the Commissioner is aware that the Custom House Greenock has now closed he considers that the identification of specific cost savings under PFI contracts could have commercial implications for both PFI providers and HMRC's ability to gain best value for money.
43. The Commissioner also notes that the key factor in determining the closure or retention of buildings was whether or not there was a long term business need to be there. Consequently estate savings should not be looked at in isolation but as part of a wider picture.
44. In view of this, because of the potential damage that might be caused to the private partner in terms of their commercial interests by disclosing the requested information and the potential for a broader impact on the PFI contract as a whole, the greater public interest in this instance is served by maintaining the exemption.

## **Procedural Requirements**

### **Section 1 – general right of access**

#### **Section 10(1) – time for response**

45. Section 1(1)(a) of the Act provides that a public authority must usually confirm or deny whether information is held in response to a request. Section 1(1)(b) provides that the authority must provide the information unless it can be withheld under an exemption. Public authorities must comply with section 1 promptly, and in any event within the statutory time limit set out at section 10(1) of the Act. The time limit is twenty working days from the day after the request is received.
46. In this case the original request was made on 11 June 2008. HMRC did not respond to the request until 17 September 2008, despite the complainant sending chasing emails on 28 July 2008, 31 July and 20 August 2008 asking why the twenty day deadline had not been met.
47. The Commissioner takes the view that a request was properly made on 11 June 2008 and HMRC should have responded within 20 working days. The Commissioner notes that HMRC advised that the delay was the result of staffing issues, however the Act makes no provision for extending the time limit for this reason. The Commissioner therefore concludes that that HMRC clearly failed to comply with 10(1) in failing to confirm that it held the information requested within the statutory time limit.

#### **Section 17 – refusal notice**

48. Where a public authority refuses a request for information in reliance on any exemption it is required under section 17(1) of the Act to provide the applicant with a 'refusal notice' explaining the exemption or exemptions relied upon. This notice should be provided to the applicant within twenty working days.
49. In this case HMRC issued a refusal notice on 17 September 2008. Therefore the Commissioner finds that HMRC breached the requirements of section 17(1) in that it failed to provide a refusal notice within the statutory time limit.

## The Decision

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50. The Commissioner's decision is that HMRC was correct to refuse to disclose the requested information on the basis that it was exempt by virtue of section 43 (2) of the Act.
51. However, the Commissioner has also concluded that HMRC breached section 10(1) by failing to confirm within 20 working days that the information requested was held and section 17(1) by failing to issue a refusal notice within 20 working days.

## Steps Required

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52. The Commissioner requires no steps to be taken.

## Other Matters

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### Delay in conducting internal review

53. Although it does not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern. There is no timescale laid down in the Act for a public authority to complete an internal review. However, as he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that internal reviews should be completed as promptly as possible.
54. In the absence of exceptional circumstances, a reasonable time for completing an internal review is 20 working days from the date of the request for review. 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.
55. In this case the complainant's internal review request was made on 22 September 2008 and the HMRC issued its decision on 2 December 2008. The HMRC therefore took 52 working days to complete the review.
56. The Commissioner notes that the HMRC's internal review in this case was conducted after the issuing of the *'Good Practice Guidance No 5'* in February 2007. Furthermore he does not believe that any exceptional circumstances existed in this case to justify that delay, and he

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therefore wishes to register his view that the HMRC fell short of the standards of good practice in failing to complete its internal review within a reasonable timescale.

## Right of Appeal

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57. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

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 11<sup>th</sup> day of March 2010**

**Signed .....**

**Gerrard Tracey  
Assistant Commissioner**

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

## Legal Annex

### **Section 1(1)** provides that:

(1) 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)** provides that:

(1) ... 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.

### **Section 17(1)** provides that:

A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

### **Section 43(2)** provides that:

Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).