

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 22 August 2011

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

Summary

HM Revenue & Customs was asked to disclose any information it held in respect of a retrospective measure announced in Budget Note 66 dealing with double taxation treaty abuse. HMRC refused the request citing sections 35(1)(a), 42(1), 31(1)(d) and 44(1)(a) of the Act and during the Commissioner's investigation introduced section 40(2) in respect of certain junior officials named in the withheld information.

The Commissioner has concluded that the withheld information in this case was exempt under the provisions of section 35(1)(a) of the Act and that the public interest favoured maintenance of the exemption.

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.

Background

2. The request in this case relates to information produced between 1 October 2007 and 31 December 2007 to address double taxation treaty abuse through retrospective legislation introduced in the Finance Bill 2008 and announced in Budget Note 66 on 12 March 2008.

3. Budget Note 66 is published on the HMRC website¹ and such notes are described by HMRC as follows:

"Budget Notes contain technical information additional to the press notices issued by HM Treasury with the Budget. They are not the same as press notices, which are primarily used as brief explanations of new policy for the media, but rather contain additional, more detailed information on the changes to tax law announced in the Budget. As such they are designed to assist businesses that may be immediately affected by the changes, and to provide more technical information to those with a specialist interest such as tax consultants and advisers, City financial institutions and local HM Revenue & Customs²."

The Request

4. On 4 May 2010, the complainant made the following information request:

"This request relates to the following Budget Note:

<http://www.hmrc.gov.uk/budget2008/bn66.pdf>

Please can you provide any information you hold on the retrospective measure, announced in this Budget Note, which was produced between 1/10/07 and 31/12/07 by Martin Brooks or Simon Davis who are named in the above.

To keep costs down, please can you exclude the following sources of information from your search:

a) drafts and comments on drafts

b) e-mails and contributions to e-mail chains."

5. HMRC wrote to the complainant on 28 May 2010 and whilst confirming it held information falling within the scope of his request, advised that the requested information was being withheld on the grounds of the exemptions contained in sections 35(1)(a), 42(1), 31(1)(d) and section

¹ <http://www.hmrc.gov.uk/budget2008/bn66.pdf>

² http://www.hm-treasury.gov.uk/d/junebudget_notes.pdf

- 44(1)(a) of the Act and that the balance of the public interest favoured maintaining the exemptions.
6. On 28 May 2010, the complainant requested an internal review of HMRC's decision not to disclose the information requested.
 7. On 9 July 2010, HMRC wrote to the complainant to advise the internal review had upheld HMRC's original decision to withhold the requested information on the basis of the exemptions at sections 35(1)(a), 42(1), 31(1)(d) and section 44(1)(a) of the Act and again advised that the public interest (where appropriate) favoured non-disclosure.

The Investigation

Scope of the case

8. On 16 July 2010, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to review HMRC's grounds for refusing his request.
9. The withheld information in this case is contained in seven documents, however, documents three and four have since been dealt with in Decision Notice FS50323899 where the Commissioner upheld the HMRC's decision to withhold the information under section 42 of the Act. The Commissioner has therefore removed documents three and four from the scope of this investigation.
10. During the Commissioner's investigation it was established that a two page document forming part of document six of the withheld information had previously been published by HMRC and was in the public domain. HMRC advised the Commissioner that had it picked this up at an earlier stage it would have exempted the information under section 21(1) (Information accessible to applicant by other means) and provided the complainant with a link to the information on its website. The information has since been provided to the complainant and as such, has been removed from the scope of the Commissioner's investigation.

Chronology

11. On 11 August 2010, the Commissioner wrote to HMRC advising that a complaint had been received and requested a copy of the withheld information that was marked to show where each exemption had been applied.

12. On 10 September 2010, HMRC provided the Commissioner with a copy of the withheld information, advising that all the withheld information within the scope of this request was exempt from disclosure under section 35(1)(a). HMRC also advised that some of the withheld information was also exempt under sections 42(1) and 31(1)(d) of the Act. Furthermore, during the Commissioner's investigation HMRC introduced an additional exemption to the withheld information, advising that it would also be relying on section 40(2) of the Act to withhold the names of junior officials that fell within the scope of this request.
13. On 1 June 2011, the Commissioner wrote to HMRC and sought further information on the application of section 40(2) in relation to the names of junior officials along with further clarification on HMRC's application of section 31(d), 35(1)(a) and 42(1) of the Act.
14. On 28 June 2011, HMRC provided the Commissioner with the further clarification requested.

Analysis

Exemptions

Section 35(1)(a)

15. Section 35(1)(a) provides that:

"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to:

(a) the formulation or development of government policy."

16. Section 35 is a class based exemption; therefore if information falls within the scope of a particular sub-section of 35(1) then this information will be exempt. There is no need for the public authority to demonstrate prejudice to these purposes.
17. HMRC maintains that that the withheld information in this case relates to the formulation and development of government policy to end a tax avoidance scheme and informed HMRC's recommendations to Ministers regarding legislative changes. These were subsequently debated by Parliament and later became law in section 58 of the Finance Act 2008.
18. HMRC stated that whilst there is no definition of government policy in the Act, it does include proposals, as in this case, to create legislation and that the Tribunal and the Courts have found that information

falling within the scope of the exemption can be found in a wide variety of documents ranging from officials' emails to submissions to Ministers. Providing the information was created and held in the course of policy development it will be covered by the exemption.

19. The Commissioner takes the view that for the purposes of this exemption the 'formulation' of government policy means the output from the early stages of the policy process where options are generated and sorted, risks are identified, consultation occurs, and recommendations or submissions are put to a minister. 'Development' may go beyond this stage. It may refer to the processes involved in improving on or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. At the very least, 'formulation or development' suggests something dynamic – that is, something must be happening to the policy. The exemption cannot apply to a finished product or a policy which is agreed to, in operation, or already implemented.
20. The Commissioner, having viewed and considered the withheld information in this case agrees with HMRC's assertion that the information contains early discussions, proposals and advice to create legislation to address a tax avoidance scheme. The Commissioner is therefore satisfied that the section 35(1)(a) is engaged in relation to the withheld information within the scope of this complaint.

Public interest test

21. Section 2(2)(b) of the Act states that where a qualified exemption is engaged, a public authority may refuse to disclose information requested if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
22. Section 35(1)(a) is a qualified exemption and 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.
23. In *DfES v the Evening Standard (EA/2006/006)*, the Tribunal set out 11 guiding principles for considering the public interest in relation to section 35(1)(a) of the Act. The Commissioner has been mindful of these principles when considering the public interest in this case.

Public interest arguments in favour of disclosing the requested information

24. HMRC recognised there is a public interest argument for providing greater transparency surrounding policy decisions, which would increase the public's trust in government as well as making it more accountable. HMRC considers this point is particularly relevant when decisions to introduce retrospective legislation are made. HMRC pointed out to the Commissioner that in the Twentieth Report of the 2008-09 session, the Joint Committee on Human Rights recommended that in the future, a memorandum be provided by HM Treasury to the Committee indentifying provisions in the Finance Bill which had retrospective effect. HM Treasury Minister Stephen Timms issued such a memorandum in respect of the Finance Bill 2010³ on 1 April 2010.
25. HMRC further advised that it considered the public interest in openness was part mitigated by information already published in relation to this particular issue and considers that such releases provide a necessary platform for the government to update its economic assessment and response in a measured and holistic way - with Parliamentary and media scrutiny ensuring that accountability requirements are addressed. This argument was supported by a reference to a Parliamentary debate on the Budget Measure⁴.
26. The Commissioner agrees with HMRC's public interest arguments in favour of disclosure relating to transparency, accountability and openness about the way it proposes to deal with tax avoidance schemes. He considers this to be particularly relevant in this case where the introduction of retrospective measures have the potential to impact on an individual's future tax liabilities as well as their historic liabilities which may not have been anticipated or indeed budgeted for.
27. The Commissioner also considers that disclosure of the withheld information would give the public an insight into the thinking process within government on how it makes decisions that impact on the compliance issues with UK tax obligations and how this process

³ <http://www.parliament.uk/deposits/depositedpapers/2010/DEP2010-1004.pdf>

⁴

<http://www.publications.parliament.uk/pa/cm200708/cmpublic/finance/080522/am/80522s03.htm>

happens. This would allow the public to review the quality of advice being given to Ministers as well as leading to more informed public debate.

Public interest arguments in favour of maintaining the exemption

28. The Commissioner recognises that it may be argued that it is in the public interest for government to have a private “safe space” away from public scrutiny to carry out the policy making process effectively. This includes protecting the government’s ability to gather free and frank input from others to inform its decisions. The Commissioner considers it is in the public interest that options are fully considered and that people are not deterred from providing full and frank suggestions and input to ensure that the best options are put forward.
29. HMRC argued that there is a strong public interest in conducting a thorough and secure Budget process which balances the necessary openness with the need to discuss Budget options within government to enable a set of balanced decisions to be presented to Ministers for decisions. HMRC considers it to be important that decision making, particularly in relation to Budget measures, are based on the best advice available and only after a full consideration of all the available options. HMRC considers there is a strong public interest in protecting this policy space whilst Budget proposals are being developed and believes that if this ‘space’ to seek advice and consider and develop ideas is conducted in public it would have a negative impact on the rigorous and candid assessment needed as part of the Budget.
30. A further consideration which strengthens the public interest in maintaining the exemption is the fact that the issues remain current and the subject of ongoing litigation by way of a judicial review.
31. HMRC accepted that the public interest in withholding information under section 35(1) is often lessened with the passage of time, and in this case, the policy decision was made over two years prior to the complainant’s request. However, HMRC considers that the information dealing with the wider considerations is pertinent to the formulation of future policy in respect of tax avoidance schemes and therefore does not believe the public interest considerations in maintaining the exemption have reduced.
32. HMRC also argued that disclosure of the withheld information might close off discussions of present and future Budget options as well as reducing the willingness of participants to record discussion and interim policy decisions implying there would be a “chilling effect” on such

expressions of opinion resulting in the risk of damage or inhibition to the ongoing Budgetary policy and decision making process.

33. HMRC maintained that whilst the information within the scope of the request relates to the specific Budget Measure and a particular tax avoidance scheme, the decision making process involved the consideration of wider issues relevant to tackling tax avoidance and was part of wider policy considerations in relation to future policy measures in respect of other avoidance schemes. HMRC believes that any premature disclosure of the withheld information could hinder the free and frank discussions and rigorous consideration of the expert advice required.

Balance of the public interest arguments

34. The withheld information in this case relates to information produced to address double taxation treaty abuse through retrospective legislation introduced in the Finance Bill 2008 and announced in Budget Note 66 on 12 March 2008. The Commissioner accepts that information that has the potential to impact on an individual's future tax liabilities as well as their historic tax liabilities is of significant public interest and that disclosure of the withheld information would better inform public debate on these potentially contentious Budgetary measures. The Commissioner therefore accepts that this argument in favour of disclosure carries some weight.
35. The Commissioner has attributed due weight to the arguments in favour of releasing the withheld information and considers promoting government accountability, transparency and openness are desirable goals for a democratic society and must be weighted accordingly. However, the Commissioner has placed less weight on HMRC's argument that the public interest in openness had been part mitigated by information already published in relation to this particular issue. This reflects the view taken by the Information Tribunal in *DfES* in which the Tribunal commented that if the information requested is not in the public domain, then the fact that other information on the same subject is already in the public domain is not a significant factor.
36. In considering the balance of the public interest arguments the Commissioner has taken into account the underlying principles involved in balancing the public interest test under section 35(1)(a) which were set out by the Tribunal in the *DfES* case. The Commissioner has focused on two of these principles in particular, the first being the timing of the request:

"The timing of a request is of paramount importance. Whilst policy is still in the process of formulation it is highly unlikely that the public interest would favour disclosure unless for example it would expose wrongdoing in government. Both ministers and officials are entitled to hammer out policy without the threat of lurid headlines depicting that which has been merely broached as agreed policy."

37. The second principle relates to the content on the information itself, on which the Tribunal commented:

"The central question in every case is the content of the information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant, indirect and wider consequences from the particular disclosure must be considered case by case."

38. In relation to the question of timing, HMRC has argued that that due to the sensitive nature of the information requested, premature disclosure could have a "chilling effect" in relation to the deliberation of future policies in this area and that it might reduce the willingness of civil servants to record discussion and interim policy decisions both now and in the future. The Commissioner considers that it is important that the Budgetary decision making process is not inhibited in debating fully all policy options based on the best advice available and has therefore attached considerable weight to this argument. However, the Commissioner is also mindful that far from producing a 'chilling effect' on the *advice* provided by civil servants, knowing that their advice might be subject to future disclosure under the Act could actually lead to better quality advice being provided. Therefore the Commissioner has attached only limited weight to that particular argument in this case.
39. The Commissioner has also looked at the age of the information in this case. Although it was more than two years old at the time of the request, he has placed considerable weight on the argument that the matter is still live and subject to an ongoing judicial review. The Commissioner considers that disclosure of the withheld information at the time of the request would have impacted on the safe space required for HMRC to debate the policy and reach decisions in a way that was not hindered by external comment.
40. HMRC advised that information has and will continue to be made public in the published decisions of the relevant Courts and the public interest in the policy information will be addressed in this way. However, the Commissioner has placed little weight on this argument, considering it

to be an adhoc and speculative approach to disclosure - given that section 22 of the Act provides a specific exemption should HMRC genuinely believe the information is intended for future publication.

41. The Commissioner, having assessed the withheld information and considered all HMRC's arguments is also mindful that disclosure of the withheld information may assist those persons considering or engaging in similar tax avoidance schemes. The disclosed information could be used to help them avoid tax in the future. The negative impact on the public purse of this may be significant and would not be in the public interest.
42. In view of all of the above, the Commissioner is satisfied that in this case the arguments in favour of maintaining the exemption outweigh those in favour of disclosure.
43. The Commissioner, having found that section 35(1)(a) is engaged in respect of the withheld information, and that the public interest favoured the maintenance of the exemption, did not go on to consider the other exemptions cited by HMRC.

The Decision

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

Steps Required

45. The Commissioner requires no steps to be taken.

Right of Appeal

46. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

47. 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.
48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 22nd day of August 2011

Signed

**Alexander Ganotis
Group Manager – Complaints Resolution
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."

Effect of Exemptions

Section 2(2) provides that –

"In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

Formulation of Government Policy

Section 35(1) provides that –

"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or

(d) the operation of any Ministerial private office.”

Personal 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.”

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.”

Prohibitions on disclosure

Section 44(1) provides that –

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

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