

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 April 2016

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

Decision (including any steps ordered)

1. The complainant submitted a request for details of the calculations relied on by the public authority to support the estimated cost to the Exchequer of maintaining current rules for tax relief on travel and subsistence expenses on home to work travel for temporary workers.
2. The Commissioner's decision is that the public authority was entitled to withhold the information described as "the disputed information" in the body of this notice on the basis of the exemption at section 35(1)(a) FOIA.
3. No steps are required.

Request and response

4. On 27 August 2015 the complainant submitted a request for information to the public authority in the following terms:

'Following the Employment Intermediaries and Tax relief for Travel and Subsistence consultation document, published by HM Revenue and Customs on 8th July 2015 with the closing date for responses of 30th September 2015.....we formally request.....the following:

[The complainant] attended the roundtable stakeholder event hosted by HMRC which took place on 4th August 2015 at 13:30, during which he received a printed copy of a HMRC presentation. On page 2 of the presentation title 'Why a change to the rules is needed?' there are four

reasons laid out, one of which states there is an "Estimated cost to the tax payer of £265 million".....

We request full details of the calculations that support the figure of an estimated cost to the tax payer of £265 million.

Under Section 5, titled 'Summary of Impacts', of the Employment Intermediaries and Tax relief for Travel and Subsistence consultation document it is noted that the estimated impact to the Exchequer for the year 2016/17 is £155 million.....

We would like full details of the calculations that arrive at the figure of a £155 million estimated impact to the Exchequer during 2016/17.

We would be happy to receive the information in email or paper format.'

5. On 25 September 2015 the public authority informed the complainant that it considered the information within the scope of his request exempt from disclosure on the basis of section 35(1)(a) FOIA.
6. On 28 September 2015 the complainant requested an internal review of the public authority's decision. He also stated:

'If HMRC cannot give the detail of the calculations, i.e. the formula of how the figures were calculated, perhaps they could disclose the sources of the information and the data that was used to arrive at the two different figures instead?'

7. The public authority wrote to the complainant with details of the outcome of the review on 26 October 2015. It confirmed the original decision in the following terms:

'The detail of the calculations relating to the total cost of this tax relief for the year 2016/17 (£265 million) and the amount of additional yield we anticipate will be brought in by the changes in 2016/17 (£155 million), relates to the formulation and development of government policy and is therefore exempt under section 35(1)(a).....' It also upheld the original decision with regards to the balance of the public interest being in favour of maintaining the exemption.

8. The public authority treated the complainant's revised request of 28 September as a separate request for information and provided the following response:

'The underlying data informing HMRC's estimates for the total cost of this tax relief for the year 2016/17 (£265 million) and the amount of additional yield we anticipate will be brought in by changes in 2016/17

(£155 million), relates to the formulation and development of government policy and is therefore exempt under section 35(1)(a)...'

9. The public authority consequently advised the complainant that he could initially appeal its decision directly to the authority by requesting an internal review within two months of the decision.

Scope of the case

10. The complainant contacted the Commissioner on 18 November 2015 and set out arguments in support of his view that the information he requested ought to have been disclosed by the public authority. The Commissioner has addressed the complainant's submissions further below.
11. The complainant submitted his complaint without first appealing the public authority's response in respect of his request of 28 September via an internal review as the authority had advised him to. As mentioned, this request was handled separately by the public authority. Therefore, in line with the provision in section 50(2)(a) FOIA¹, the Commissioner advised the complainant that his investigation would not extend to the revised request in view of the fact that he had not asked the public authority to conduct an internal review of its decision with regards to that part of his request.
12. However, without prejudice to his position above, the Commissioner notes that the request is more or less a subset of the original request which the public authority had previously denied on the basis of the exemption at section 35(1)(a).
13. The scope of the Commissioner's investigation therefore was to determine whether the public authority was entitled to withhold information within the scope of the request above of 27 August 2015 on the basis of the exemption at section 35(1)(a).

¹ Section 50(2)(a) states: 'On receiving an application under this section, the Commissioner shall make a decision unless it appears to him that the complainant has not exhausted any complaints procedure which is provided by the public authority in conformity with the code of practice under section 45.'

Reasons for decision

Background

14. By way of background, the public authority explained that at the Autumn Statement 2014, the government published a discussion document looking at the issue of employment intermediaries and eligibility for tax and National Insurance Contributions relief on travel and subsistence. Following this, the government announced at the March Budget 2015 that it intended to consult on proposals to remove tax relief for those working through certain employment intermediaries and under the right of supervision, direction or control of any person, in the manner they undertake their work.
15. The Commissioner understands that under the current arrangement, temporary workers supplied to an end-user (ie a work place/business) through an employment intermediary (including a Personal service Company) and under the supervision, direction and control of the end-user can claim tax relief on travel and subsistence expenses on home to work travel (T&S relief). In other words, these employees are able to claim that each workplace is a temporary workplace and therefore T&S relief is due on any expenses incurred from commuting to the workplace and subsistence expenses can also be paid tax free.
16. The public authority published a consultation document on 8 July 2015 on the government's proposals to change the current arrangement. As can be seen from the terms of his request, the complainant made his request having seen the consultation document and attended a stakeholder event. The consultation closed on 30 September 2015 and in his Autumn Statement on 25 November 2015, the Chancellor of the Exchequer confirmed that the government intended to legislate on the government's proposals.
17. A summary of the consultation responses was published on 9 December 2015. Draft legislation was also published on 9 December 2015 and the public have had the opportunity to comment on it.² It is expected to be legislated for in the Finance Bill 2016. Subject to Parliamentary scrutiny and approval, the changes will come into force on 6 April 2016.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/483389/Employment_Intermediaries_and_Tax_Relief_for_Travel_and_Subsistence_-_Summary_of_Responses_M7057_.pdf

Disputed information

18. The public authority withheld a Costings Explanatory Note, which is an internal document setting out details of the calculations in support of the estimated cost (for 2016/17) of the current policy on tax relief on travel and subsistence expenses on home to work travel for temporary workers. The disputed information also includes an email from the public authority to HM Treasury regarding the figure of £155 million.
19. The public authority explained that the figure of £265 million referred to in the first part of the request represents the government's estimate of the amount of tax that the public authority could collect if the proposed policy change on T&S relief was introduced, and those affected did not make any changes to their behaviour. In other words, it is the amount of tax that the government estimates is being lost to the public purse as a result of the current arrangement.
20. It further explained that the figure of £155 million referred to in the second part of the request represents the government's estimate of the amount of tax that the public authority could collect if the proposed change was introduced, allowing for any behavioural change made by those affected.

Section 35(1)(a)

21. Section 35(1)(a) states:

'Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to the formulation or development of government policy.'

22. The public authority explained that the disputed information relates to the government's income tax and national insurance contributions policy in respect of employment intermediaries and tax relief for travel and subsistence.
23. Section 35(1)(a) is one of the class-based exemptions in the FOIA. This means that there is no need to show any harm in order to engage the exemption. The information simply has to fall within the class described. Furthermore, the term '*relates to*' (ie to the formulation or development of government policy) can be interpreted broadly. This means that the information does not itself have to be created as part of the formulation or development of government policy. Any significant link between the information and those activities is enough.
24. The Commissioner finds that the exemption was correctly engaged. He is satisfied that the disputed information relates to the formulation of government policy with regards to tax relief for travel and subsistence in

respect of temporary workers supplied to end-users through an employment intermediary.

Public interest test

25. The exemption at section 35(1)(a) is subject to the public interest test set out in section 2(2)(b) FOIA. Therefore, the Commissioner has also considered whether in all the circumstances of this case, the public interest in maintaining the exemption at section 35(1)(a) outweighs the public interest in disclosing the disputed information.

Complainant's arguments

26. The complainant's arguments are summarised below.
27. Generally, disclosing information serves the public interest in transparency and accountability, to promote public understanding and to safeguard democratic processes. There is also a public interest in good decision making by public bodies in upholding standards of integrity, in ensuring justice and fair treatment for all.
28. More specifically, given the likelihood that critical decisions will be made following the consultations³ that would impact all stakeholders, there is a strong public interest in ensuring that the process is transparent so that the public can fully understand the proposals and the rationale for their introduction.
29. Finally, he stressed that if the proposals were to be implemented, those who make a living working in the temporary labour market, employment intermediaries, and end-users whose businesses survive through working with temporary labour, would suffer detrimental consequences. Therefore, there was a strong public interest in publishing the disputed information in view of the impact of the proposals.

Public authority's arguments

30. The public authority's arguments are summarised below.
31. It accepted that there was a strong public interest in ensuring that it is held accountable for its decisions and is as transparent as possible about the ways in which it reaches them. It also acknowledged that there was a general public interest in the public being aware of and being able to challenge its decisions.

³ The complaint preceded the Autumn Statement on 25 November 2015.

32. It explained that it had published a summary of the consultation exercise and a summary of the government's responses including details of amendments to the proposals in response to specific concerns from stakeholders.⁴ It therefore argued that the public interest in transparency and accountability have been addressed to a significant degree by the consultation process itself.
33. The public authority also explained that it had considered the particular public interest in the disclosure of factual information as required by section 35(4) FOIA.⁵ However, it did not consider that the disputed information consists purely of factual information but were based on assumptions and modelling. As such, the figures represent judgements based upon the interpretation of data by experienced economists.
34. It however submitted that there was a significant public interest in maintaining the exemption for reasons explained below.
35. It argued that the timing of the request was significant and increases the weight of the public interest in preserving a safe space for officials to debate proposals in relation to an issue which remains live, away from external interference and distraction. It would not be in the public interest to disclose the disputed information given that it could continue to inform ongoing discussions in relation to the proposed policy on T&S relief.
36. Furthermore, disclosure could also give rise to a chilling effect on free and frank discussions regarding the proposals. It argued that the timing of the request was also significant in this context. Officials were more likely to be less candid in expressing views regarding the proposals if the disputed information had been made available at the time of the request and indeed before they have undergone legislative scrutiny.

⁴https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/483389/Employment_Intermediaries_and_Tax_Relief_for_Travel_and_Subsistence_-_Summary_of_Responses_M7057_.pdf

⁵ Which states: 'In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.'

Balance of the public interest

37. The Commissioner considers that there are strong public interest factors in favour of maintaining the exemption as well in favour of disclosing the disputed information in the circumstances of this case.
38. The disputed information would increase public understanding with regards to how the government arrived at the estimated cost to the public purse from continuing with T&S relief in its current form, including the estimated yield from the proposed change allowing for behavioural changes.
39. Disclosure would also serve the public interest in the transparency of, and accountability for, decisions relating to the proposed change to the current policy. Although the public authority refers to the publication of a summary of the consultation exercise and the government's response, the Commissioner notes that the publication in December 2015 post-dates the request by a number of months. The Commissioner's decision is generally based on the circumstances at the time of the request. Therefore, in view of the fact that the published information would not have been available to stakeholders including the complainant at the time of the request, the Commissioner does not consider that it adds weight to the public authority's submission in respect of satisfying the public interest in transparency and accountability.
40. The proposals would have a financial impact on a significant number of temporary workers and businesses. The Commissioner therefore shares the view that some weight must be given to the public interest in disclosing details of the calculations which informed public statements regarding the estimated financial impact of current policy on T&S relief as well as the estimated financial impact of the proposed change. The disputed information is clearly an important piece of evidence the government has partly relied on in support of the proposed change. As such, there was a strong public interest in publishing it during the public consultation. It would have increased the information available to stakeholders and the general public with regards to a significant rationale for the proposed change and consequently better inform their response in that respect.
41. In the circumstances, the Commissioner considers that significant weight should also be given to the public interest in preserving a safe space for officials to discuss various options for the proposed change free from the distraction of external interference. The assumptions and modelling which informed the estimated figures are unlikely to have been met with universal approval. Such calculations are hardly an exact science and there are likely to be those who might take a slightly or completely different view, especially in light of the financial impact of

the proposed change to a significant number of people and businesses. It is not inconceivable therefore that, officials would have had to devote a significant amount of time and resources in clarifying and defending their calculations, at the cost of working effectively on other aspects of the proposed change in policy. While there is a strong public interest in subjecting details of the calculations to public scrutiny, the fact that the assumptions and modelling used would not be acceptable to all (especially those who oppose the proposed change), increases the weight of the public interest in maintaining a private thinking space for officials while discussions are ongoing.

42. Furthermore, the public authority was right to attach considerable weight to the public interest in not giving rise to a chilling effect on ongoing discussions regarding the proposed policy. In view of the timing of the request, the Commissioner accepts such an outcome cannot be disregarded. While he generally shares the view that the public is entitled to expect officials to have the courage and independence to continue to give robust and independent advice even in the face of a risk of publicity, he is equally not completely dismissive of chilling effect arguments and instead considers each case on its own merits. At the time of the request, officials were actively considering the proposed changes and in the middle of a public consultation. On that basis, he accepts that adverse publicity would be likely to affect how candidly officials express and present their opinions with regards to the proposed policy, internally and externally. Given the impact of the proposed change, it is reasonable to assume that officials would be less likely to express their opinions candidly if they felt that they would be exposed to premature public scrutiny. The strength and thoroughness of their deliberations in future in respect of the proposed policy is clearly likely to be affected as a result and that would not be in the public interest.
43. The arguments in this case are finely balanced in the Commissioner's view. He considers that a strong case has been made in favour of disclosing the disputed information. However, taking into account all of the circumstances, especially the timing of the request, he finds, by a narrow margin, that the public interest in maintaining the exemption is stronger.

Right of appeal

44. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

**Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
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SK9 5AF**