

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 June 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 information to the public authority in relation to the Government's decision to introduce the High Income Benefit Charge which imposes a tax charge on high-income households claiming Child Benefit. The public authority withheld all of the disputed information on the basis of the exemption at section 35(1)(a) FOIA (formulation or development of government policy). It additionally withheld various parts of the disputed information on the basis of the exemptions at sections 31(1)(d) FOIA (prejudice to the assessment or collection of tax), and 42(1) FOIA (legal professional privilege).
2. The Commissioner's decision is that the public authority was not entitled to rely on the exemption at section 35(1)(a). However, the public authority was entitled to rely on the exemptions at sections 31(1)(d) and 42(1) to withhold the specific parts of the disputed information additionally considered exempt on the basis of the provisions in those sections of the FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose copies of the briefings/submissions save the information withheld on the basis of sections 31(1)(d) and 42(1) which should be redacted from the disclosed documents.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 3 September 2015 the complainant submitted a request for information to the public authority in the following terms:

`[In relation to the High Income Child Benefit Charge]

Who was involved in making the decision to enact this policy? The briefing presented to those making the decision to adopt this policy; the data used in the decision making process to enact the policy; How the above disparity was justified, and; Why total household income was not made the basis of tapering.'
6. On 30 September 2015 the public authority informed the complainant that it considered the information held (ie briefing documents) within the scope of his request exempt from disclosure on the basis of section 35(1)(a) FOIA. The Commissioner understands that the public authority also informed the complainant that Parliament had confirmed the decision to enact the policy. It also included a link to the published Tax Information and Impact Note on the measure because it considered that it contained information within the scope of the request.
7. On 16 October 2015 the complainant requested an internal review of the public authority's decision.
8. The public authority wrote to the complainant with details of the outcome of the review on 16 November 2015. It confirmed the original decision to withhold the briefing documents in reliance on the exemption at section 35(1)(a).

Scope of the case

9. The complainant contacted the Commissioner on 26 January 2016 and specifically complained about the public authority's decision to withhold the briefing documents.
10. During the course of the investigation, the public authority additionally relied on the exemptions at sections 31(1)(d) and 42(1) FOIA to withhold various parts of the briefing documents.
11. The scope of the Commissioner's investigation therefore was to determine whether the public authority was entitled to withhold the

briefing documents in reliance on the exemptions at sections 35(1)(a), 31(1)(d) and 42(1).

Reasons for decision

Background

12. The High Income Child Benefit Charge (HICBC) was introduced in January 2013 following the Government's decision to withdraw child benefit from high-income households. However, rather than cancelling the payments, the policy requires individuals with an income of over £50,000 and who claim child benefit, or whose partner claims child benefit, to register for Self-Assessment (SA) and to declare the amount of child benefit entitlement on their SA tax return. The public authority then calculates the amount of tax charge they are liable for and the individual then pays the tax charge. A taxable income between £50,000-60,000 means paying a charge of 1% of the child benefit for every £100 earned over £50,000, reaching 100% at £60,000. For example, an income of £57,000 would incur a tax charge of 70% of the child benefit received and those with an income of £60,000 or more would incur a tax charge equal to the whole of their household's child benefit. If families do not wish to pay the tax charge, they can choose not to receive the child benefit payments. Because it applies to individual, rather than household income, a household with a sole earner on a taxable income of over £50,000 would be liable to pay the tax charge, while a family where two people both have an income of say £45,000 (or a total household income of £90,000) would not be liable for the charge.

Disputed information

13. The disputed information comprise of four separate briefings/submissions presented by the public authority and HM Treasury officials in 2010 to HM Treasury Ministers following requests for advice from Ministers in relation to enacting the HICBC policy.
14. Paragraph 3 of one of the briefing documents dated 8 October 2010 refers to "Table 1" which was enclosed as part of that briefing. The public authority was however unable to locate this Table following searches. It explained that as this briefing was provided by HM Treasury, it was possible that the official who provided it had forgotten to include the Table, or it was possible that the public authority did at one point have the Table and it has since been disposed of. It explained that the Central Policy support team responsible for formal issue and receipt of policy submissions between the public authority and the Treasury currently retain records going back five years so if the briefing had come to the authority via that route, the Table would no longer be

held in their records. It also explained that the lead policy official who would have held and had access to all the briefings had now retired so it has not been possible to state conclusively whether the Table had in fact been provided to the public authority. Officials were nevertheless confident that the Table was not held at the time of the request. The authority has made enquiries of the Treasury policy officials currently responsible for this area of work, to ascertain if they still hold the relevant Table but had yet to receive a response at the time of drafting this notice.

15. When a public authority claims that information is not held, the Commissioner will decide whether this is the case on the balance of probabilities. He will reach a decision based on the adequacy of the public authority's search for the information and any other reasons explaining why the information is not held. It is also pertinent to mention that unless the relevant information is held on its behalf elsewhere, it has to be in the physical custody of the public authority for it to be held by the authority.
16. The Commissioner is satisfied with the public authority's explanations as to why it does not hold a copy of the Table in question. He is also satisfied with the adequacy and rigour of the searches to locate it. He notes that a copy of the Table might still exist and could be held by the Treasury. However, that is not fatal to the claim that it is not held by the public authority. Therefore, he has concluded that on the balance of probabilities, the public authority did not hold a copy of "Table 1" referred to in paragraph 3 of the briefing document dated 8 October 2010, at the time of the request.

Section 35(1)(a)

17. The public authority considers all of the disputed information exempt on the basis of this exemption.
18. 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.'
19. The Commissioner finds that the disputed information relates to the formulation of government policy. The information specifically relates to the HICBC policy which was conceived by the Government to discourage high-income households from claiming child benefit as part of the Government's wider fiscal policy.
20. 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.

21. The Commissioner has therefore concluded that the exemption was correctly engaged.

Public interest test

22. The exemption is however 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.
23. The public authority's arguments are summarised below.
24. It acknowledged that there is a general public interest in ensuring that it is held accountable for its activities and is as transparent as possible about the way the Government applies its resources. It further recognised that there is a public interest in understanding the decisions that Ministers take in relation to formulating policy, and pointed out that it had directed the complainant to records of the Parliamentary debates on HICBC which cover why the policy was enacted in its current form.
25. The public authority however argued that there is a stronger public interest in maintaining a safe space for discussions because '*HICBC is still discussed fairly often in the media, especially in light of ongoing discussions about austerity and increase in personal allowances and tax thresholds.*'
26. It further argued that there is a stronger public interest in preventing a chilling effect because disclosure of the briefings would '*give HMT and HMRC officials pause in the future when developing revenue-raising policies that are likely to be unpopular with those affected because it would be less likely that officials would provide ministers with all of their options and evidence and risks for them....*'
27. Although the HICBC was introduced in January 2013, the public authority stressed that the policy implementation was still ongoing for the following reasons: the public authority is still developing its compliance approach to people who have not complied with the policy, '*policy development around the entitlement of EU nationals to benefits, including Child benefit, is ongoing and is a highly sensitive topic linked to the EU referendum in June 2016*', and '*HICBC itself continues to be a*

live policy in terms of the threshold at which the charge is set, due to the government's commitment to increase the Higher Rate Threshold for income tax to £50,000 by 2020.'

28. It also explained that the HICBC was a highly complicated policy to develop and design, with the process spanning several years and encompassing policy choices and suggestions that were not selected at the time but may be revisited and taken forward in the future.

Balance of the public interest

29. The Commissioner does not disagree that the public authority is still monitoring compliance with the HICBC policy given that it is still relatively new and also complex to administer. However, he does not share the view the formulation or development of the policy is still ongoing as a result. As mentioned, the HICBC was enacted three years ago in 2013. More often than not, the enactment of a policy signals the end of the policy formulation or development process in the Commissioner's view. He considers that in most cases, the formulation or development of policy is likely to happen as a series of discrete stages, each with a beginning and end, with periods of implementation in between. He does not accept that there is inevitably a continuous process or seamless web of policy review and development. Clearly, significant discussions specifically relating to the formulation and implementation of the HICBC as Government policy would have concluded prior to its introduction in 2013. The fact that compliance with the policy itself remains under review does not automatically mean that the policy formulation or development process is still ongoing with regard to the HICBC.
30. Similarly, the Commissioner does not share the view that discussions around the entitlement of EU nationals to benefits, including child benefit relate specifically to the HICBC policy which is not about who is, or isn't entitled to claim child benefit. Therefore, those discussions are unlikely to have any significant impact on the HICBC which although it relates to the Government's wider policy on access and entitlement to benefits, is specifically to do with a form of means-testing so that high-income households are discouraged from claiming child benefit. Furthermore, it is unclear how the Government's commitment to increase the Higher Rate Threshold to £50,000 by 2020 constitutes a significant policy development in relation to the HICBC such that the policy development process could be said to be ongoing. There is no clear indication that the HICBC is going to be amended or abandoned anytime soon. The Commissioner has therefore attached very little weight to the view that the policy formulation or development process with regard to the HICBC was still ongoing at the time of the request.

31. In light of the above the Commissioner does not consider that there was a strong public interest in maintaining a safe space for discussions in relation to the policy formulation or development process with regard to the HICBC at the time of the request in September 2015. The briefing documents were produced approximately 5 years prior to the request and the policy was introduced nearly three years prior. The Commissioner has generally acknowledged that officials should be afforded the private thinking space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. Therefore, he considers that the need for safe space will be strongest when the relevant issue is still live. However, once the Government has made a decision, the argument for a safe space for deliberation will no longer be required and consequently carry little weight.
32. Similarly, he does not consider that disclosure would be likely to result in a chilling effect on discussions in relation to fiscal policies in future. He specifically disagrees with the view that officials would be less likely to advise Ministers about all possible options and related risks. The submissions relevant to this request relate to a specific policy which had been introduced and was (and still is) being implemented at the time of the request. The Commissioner appreciates that the HICBC would almost certainly relate to other ongoing and possibly future fiscal policies specifically targeted at reducing expenditure on welfare. However, other Government policies are bound to also relate to a wider Government objective. Given the age of the disputed information, the Commissioner considers it highly unlikely that officials could be deterred from providing independent and robust advice to Ministers in future in relation to similar fiscal policies.
33. On the other hand, he considers that there is a strong public interest in disclosure because, amongst other things, the briefings include information on the various options considered with regard to the HICBC policy. There is a strong public interest in the public, especially those affected by the change, in knowing the other options considered and more importantly, in understanding why the Government chose the option that was ultimately introduced.
34. Furthermore, given the concern that the policy could potentially result in inequitable outcomes because it applies to individual, rather than household income, there is a strong public interest in understanding the factors taken into account by the Government before it went ahead with the HICBC in its current form.
35. Consequently, the Commissioner finds that on balance, the public interest in maintaining the exemption does not outweigh the public interest in disclosing the disputed information.

Section 31(1)(d)

36. The public authority additionally considers some of the disputed information exempt on the basis of this exemption.

37. Section 31(1)(d) 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 the assessment or collection of tax or duty or of any imposition of a similar nature.'

38. The public authority has argued that disclosing parts of the disputed information withheld in reliance on this exemption would be likely to enable a person intent on avoiding the charge to escape being identified by the authority as being liable to pay the charge. The Commissioner has only partially reproduced the public authority's submissions in this notice in order not to reveal disputed information and consequently defeat the purpose of relying on the exemption in the first place.

39. In order to engage a prejudice based exemption¹ such as section 31(1)(d), the applicable interest within the exemption must be identified, the nature of the prejudice must be considered and the likelihood of the prejudice occurring must be considered.

40. The Commissioner is satisfied that the public authority's submissions in support of its reliance on this exemption to withhold parts of the disputed information are applicable to the assessment or collection of tax. With regards to the likelihood of prejudice, the Commissioner has considered whether there is a real and significant risk that disclosure of the relevant parts of the disputed information would prejudice the assessment or collection of the HICBC.² Having inspected the disputed information in question, he is satisfied that the public authority was entitled to engage the exemption at section 31(1)(d) on the basis that disclosure would pose a real and significant risk to the authority's ability to assess and collect the HICBC.

¹ A prejudice based exemption requires an element or the likelihood of "harm" to be established before it can be engaged.

² The Commissioner considers that "would be likely to prejudice" which is the threshold of likelihood that the public authority has relied on, means that there must be a real and significant risk of prejudice.

Public interest test

41. The exemption is however 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 31(1)(d) outweighs the public interest in disclosing the disputed information in question.
42. The public authority acknowledged that there was a general public interest in disclosure for the same reasons previously acknowledged in relation to the exemption at section 35(1)(a).
43. However, it argued that there was a strong public interest in maintaining the exemption given the real and significant risk that disclosure would pose to its ability to ensure compliance with the HICBC.
44. The Commissioner has previously explained why he considers that there is a strong public interest in disclosing the disputed information. However, he is persuaded that there is a significant public interest in withholding the small part of the disputed information which if disclosed, would be likely to prejudice the public authority's ability to assess and collect tax due on child benefit. He considers that on balance, the public interest in withholding this information is stronger than that in disclosure because of the significant prejudice disclosure is likely to cause to the public authority's ability to assess and collect tax due on child benefit.
45. He has consequently concluded that the public authority was entitled to rely on the exemption at section 31(1)(d).

Section 42(1)

46. The public authority additionally considers some of the disputed information exempt on the basis of this exemption.
47. Section 42(1) states:

'Information in respect of which a claim to legal professional privilege.....could be maintained in legal proceedings is exempt information.'
48. The public authority has argued that parts of the disputed information withheld in reliance on this exemption are subject to legal professional privilege (LPP). It considers that the relevant information is legal advice in respect of which a claim to LPP could be maintained in legal proceedings.
49. The Commissioner's interpretation of LPP is guided by the Information Tribunal's description of the meaning of the concept in *Bellamy v the*

Information Commissioner and the Secretary of State for Trade and Industry (EA/2005/0023). The Tribunal described LPP as follows:

'...a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communications or exchanges come into being for the purposes of preparing for litigation.'

50. There are two types of privilege within the concept of LPP; litigation privilege and advice privilege. Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant purpose of seeking or giving legal advice. Having inspected the disputed information in question, the Commissioner is satisfied that it is legal advice in respect of which a claim to LPP could be maintained in legal proceedings. The public authority was therefore entitled to engage the exemption at section 42(1) in respect of paragraphs 7 – 10 (inclusive) and Appendix A of the submission dated 28 September and paragraphs 10 – 12 (inclusive) and Appendix A of the submission dated 29 September 2010.

Public interest test

51. The exemption is however 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 42(1) outweighs the public interest in disclosing the disputed information in question.
52. In addition to the general public interest previously acknowledged by the public authority, it recognised that there was also a specific public interest in knowing whether or not the legal advice received by the Government had been followed.
53. However, it argued that disclosure could diminish the quality of legal advice in future and consequently affect the quality of the Government's decision making and that would not be in the public interest.
54. It stressed that it was in the public interest for decisions taken by the Government to be taken in a fully informed legal context where relevant. Legal advisers need to be able to present the full picture, which includes arguments in support of their final conclusions and those that could be made against. It therefore argued that legal advisers

might be less willing to provide comprehensive advice to Ministers in future if the legal advice in this case is disclosed.

55. The Commissioner has previously explained why he considers that there is a strong public interest in disclosing the disputed information. He agrees with the public authority that there is also a public interest in knowing to what extent the Government followed the legal advice it was given in relation to the introduction of the HICBC.
56. However, the public interest inherent in maintaining LPP will always be strong due to the importance of the principle behind LPP; safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice. In the *Bellamy* case, the Tribunal commented that '*at least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest.*'
57. Although in the Commissioner's view there is a strong public interest in disclosing the disputed information because it would enhance public understanding of the factors that the Government took into account before introducing the HICBC (especially in view of concerns expressed by some regarding the potentially unfair outcome), he considers that there is a significant public interest in not revealing the legal advice. There is no indication that the Government did not consider the legal advice provided or that it has been less than transparent with regards to the reasons for introducing the HICBC.
58. On the other hand, given the complexity and controversial nature of the policy, it is important that the Government is able to obtain free and frank legal advice in relation to similar initiatives in future. Disclosing the legal advice obtained in relation to the HICBC is likely to have serious ramifications on the ability to obtain free and frank legal advice in relation to similar complex and controversial policies in future and that would not be in the public interest. There is a very strong public interest in the Government receiving comprehensive legal advice which covers the pros and cons of introducing a policy. There is also a very strong public interest in not revealing that advice especially if the policy could be subject to legal challenge even if that was not a real prospect at the time the advice was issued. Revealing the legal advice would be likely to undermine the Government's ability to mount a strong defence in respect of a legal action against the introduction of the HICBC and that would not be in the public interest.
59. The Commissioner has therefore concluded that the public authority was entitled to rely on the exemption at section 42(1).

Right of appeal

60. 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

61. 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.
62. 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

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