

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

As a follow on to a previous information request about a tax avoidance scheme referred to in Budget Note 66, the complainant requested information from HM Revenue & Customs (HMRC) relating to the use of retrospective legislation that was first broached at a meeting on 1 November 2007. HMRC refused the request citing sections 35(1)(a) and 42(1) 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 all of the information is exempt under section 42(1) and has therefore not considered the application of sections 35(1)(a) and 40(2).

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 a meeting 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 11 May 2010, and as a follow up to an HMRC response dated 24 November 2009 in relation a previous request through the 'What do they know' website, the complainant made the following information request:

"My request concerns item (2), the meeting which took place on 1 November 2007.

Please can you supply information from the meeting about the scheme referred to in Budget Note 66 (12 March 2008)."

5. HMRC wrote to the complainant on 9 June 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) and 42(1) of the Act and that the balance of the public interest favoured maintaining the exemption.
6. On 10 June 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 that the internal review had upheld HMRC's original decision to withhold the requested information on the basis of the exemptions at sections

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

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

35(1)(a) and 42(1) of the Act and again advised that the public interest favoured maintaining the exemption.

The Investigation

Scope of the case

8. On 16 July 2010, the complainant complained to the Commissioner 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. During the Commissioner's investigation it was established that a two page document forming part 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

10. 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.
11. 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 covered by both exemptions previously cited, namely section 35(1)(a) and section 42(1) of the Act. Furthermore, 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.
12. 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. He also sought further clarification on HMRC's application of section 35(1)(a) and section 42(1) of the Act and its application of the public interest test.

13. On 24 June 2011, HMRC provided the Commissioner with the further clarification requested in relation to its application of exemptions and the public interest test.

Analysis

Exemptions

14. The withheld information in this case (following the release of the aforementioned two page document) is contained in three documents. HMRC maintain that all the withheld information is exempt from disclosure by virtue of section 35(1)(a), and section 42(1) of the Act. During the Commissioner's investigation, HMRC introduced section 40(2) as an additional exemption in relation to the names of certain junior officials named within the withheld information.

Section 42(1)

15. Section 42(1) of the Act provides that information is exempt from disclosure if a claim to legal professional privilege could be maintained in legal proceedings. There are two types of privilege, legal advice privilege and litigation privilege. Legal professional privilege protects confidential communications between professional legal advisers (including an in-house legal adviser) and clients from being disclosed.
16. The common law principle of legal professional privilege protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal *in the case of Bellamy v the Information Commissioner and the DTI (EA/2005/0023; 4 April 2006)* as:

"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 communication or exchanges come into being for the purpose of preparing for litigation."
(paragraph 9)
17. HMRC has applied section 42(1) in relation to all the withheld information in this case on the basis that the information is subject to legal advice privilege, as the information had originally been created at a time when HMRC was seeking legal advice with a view to recommending legislative changes to Ministers. Having examined the information in question, the Commissioner is satisfied that it falls

within the terms of legal advice privilege, in that the relevant communications fall within the categories as set out in *Bellamy*. Having satisfied himself that the dominant purpose of all the communications being withheld related to the provision of legal advice, the Commissioner went on to consider whether there were any circumstances in which privilege may be considered to have been waived or lost. HMRC have told the Commissioner that privilege has not been waived and the Commissioner has not seen any evidence to suggest that HMRC has waived privilege in this case.

18. For the reasons set out above, the Commissioner is satisfied that the exemption under section 42(1) is engaged.

Public interest test

19. Section 42 is, however, a qualified exemption and under section 2(2) of the Act, exempt information must still be disclosed unless, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
20. It is important to note from the outset that the Act's default position favours disclosure. Therefore in the event that the public interest factors are of equal weight, the information should be communicated. However, it is clear that just because some members of the public may be interested in the information, this does not necessarily mean that releasing the information would be in the public interest. The "*public interest*" signifies something that is in the interests of the public.

Public interest arguments in favour of disclosing the requested information

21. HMRC recognised there is public interest argument for providing openness and greater transparency which as well as making the government more accountable, would improve the public's understanding of the law making process.
22. The Commissioner agrees with HMRC's public interest arguments in favour of disclosure relating to transparency and accountability about the way it proposes to deal with tax avoidance schemes and in particular, the introduction of retrospective measures that have the potential to impact on individuals' future tax liabilities as well as their historic liabilities which may not have been anticipated or indeed budgeted for.
23. The Commissioner considers that disclosure of the withheld information in this case 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 happens.

Public interest arguments in favour of maintaining the exemption

24. HMRC argued that there is a strong public interest in allowing a person seeking access to legal advice to be able to communicate freely with, and receive advice from his legal advisors in confidence. HMRC pointed out to the Commissioner that the importance of this public interest was reaffirmed by the House of Lords in *Three Rivers DC v Bank of England (No. 6) [2005] 1 AC 610* i.e. the underlying rationale for having a strong rule against disclosure is that it encourages full and frank exchanges between clients and their legal advisors, which is judicially recognised as being something strongly in the public interest.

25. This above is supported by comments made by the Tribunal in the *Bellamy case* in which it stated that disclosure was unlikely to be justified in most cases as:

'it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case...'

26. HMRC argued this applied with particular force in relation to legal advice concerning governmental policies arguing that it was strongly in the public interest for governmental action to respect the rule of law, which makes it imperative that clear, fully informed and fully reasoned legal advice should be available to the decision-makers with responsibility for such decisions.

27. HMRC further argued that if such advice was put into the public domain, the pressures of public debate and criticism would be such that that the advice, and possibly the instructions underpinning that advice, could end up being tailored to take in to account the impact they would have in public debate in which they would feature - which would directly undermine the above argument as set out in paragraph 24.

28. HMRC explained that if legal advice were to be routinely disclosed, difficult issues would arise in relation to caveats, qualifications or provisional expressions of opinion which might be contained in such advice. HMRC considered there would be generally a good reason not to publish advice which contains such matters but equally a decision to publish only legal advice which contains no caveats or the like would raise obvious inferences as to the contents of the advice received in other cases where there had been a refusal to publish the advice.

29. HMRC argued that a further consideration which strengthens the public interest in not disclosing the information is the fact that the issues are still current and the subject of ongoing litigation by way of a judicial review.

Balance of the public interest arguments

30. The Commissioner has considered whether the arguments in favour of disclosure are outweighed by those in favour of maintaining the exemption. Whilst attributing some significance to the arguments in favour of releasing the information he has also taken into account the comments of the Tribunal in the *Bellamy* case in which it stated:

'there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest'

31. The Commissioner agrees with the Tribunal's comments and has attributed considerable weight to the argument that there is a public interest in preserving the concept of legal professional privilege. This preserves the ability of people and organisations to obtain full and frank legal advice, including the provision of instructions to advisers for legal advice and ensures that decisions made are fully informed and lawful.
32. The Commissioner has also looked at the age of the information in this case which was more than two years old at the time of the request. He notes that with the exception of the Tribunal in the case of Frank Adlam and HM Treasury in November 2007 which said that the principle of LPP was undiminished with age (para 72), a number of differently constituted Tribunals have indicated that the passage of time does favour disclosure. This is based on the principle that if advice has been recently obtained, it is likely to be used in a variety of decision-making processes (i.e. allowing the client to determine a course of action/issue court proceedings/raise challenges through other channels, e.g. ombudsman). The Commissioner recognises that these processes would be likely to be affected by disclosure.
33. However, the older the advice, the more likely it is to have served its purpose and the less likely it is to be used as part of a decision making process. This may mean that any harm to the privilege holder is slight and gives weight to arguments in favour of disclosure. In this case however, HMRC has advised the issues are still currently under consideration in the Courts.

34. The Commissioner has placed considerable weight on the argument that the matter is still live and subject to an ongoing judicial review and is of the view that to disclose legal advice where litigation is underway would be to upset the delicate balance of fairness between legal adversaries.
35. The Commissioner, having found that section 42(1) 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

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

Steps Required

37. The Commissioner requires no steps to be taken.

Right of Appeal

38. 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

39. 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.
40. 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
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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."

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 –

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

Section 21(1) provides that –

"Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt 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-

- (e) the formulation or development of government policy,
- (f) Ministerial communications,
- (g) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (h) 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."

Section 40(2) provides that –

"Any information to which a request for information relates is also exempt information if-

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

Section 40(3) provides that –

"The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

1. any of the data protection principles, or
2. section 10 of that Act (right to prevent processing likely to cause damage or distress), and

in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate

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.”