

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 29 November 2006

Public Authority: HM Treasury
Address: 1 Horse Guards Road
London
SW1A 2HQ

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.

The Request

2. On 24 February 2005, the complainant made a request to Her Majesty's Treasury ("HMT") for "all the relevant papers relating to the decision to reduce income tax by one pence in the pound announced in the budget in 1999." The complainant clarified this request by adding, "I would appreciate it if you could provide me with all the relevant documentation covering the decision in principle, timing of implementation, economic impact, etc."
3. HMT apparently sent the complainant a holding letter in April 2005. This is referred to in the substantive refusal sent on 3 October. The Commissioner has not been provided with a copy of the holding letter by either the complainant or HMT. HMT does not assert, however, that this holding letter constituted a refusal notice.
4. On 3 October 2005 the complainant's request was refused by email. HMT apologised for the delay and advised the complainant that his request was being refused by virtue of section 35(1)(a) of the Act. It was explained that this constitutes a qualified exemption but that HMT had concluded that the public interest in disclosure was not served by releasing the requested information. (The refusal notice and the arguments it presents are considered in further detail below.)

5. The email offered the opportunity for the complainant to seek an internal review of the refusal and provided details of the right of appeal to the Information Commissioner.

The Investigation

Scope

6. On 2 November 2005, the complainant contacted the Commissioner to request “a ruling” on two points, namely the delay in the provision of a substantive response to his request and as to whether HM had been entitled to refuse the request. The complainant highlighted the fact that the information he had requested related to a decision taken some 7 years previously.
7. In addition to these matters, the Commissioner's investigation also considered whether HMT had complied with various other requirements of the Act, in particular:
 - The duty under section 1(1)(a) to inform an applicant for information whether it held information of the description specified in the request;
 - The duty under section 16 to provide advice and assistance to an applicant;
 - The requirement under section 17 to explain the basis for the refusal of a request.
8. In considering these matters, the Commissioner has had regard to the requirements of the non-statutory Code of Practice issued by the Secretary of State under section 45 of the Act.

Chronology

9. The case officer to whom the complaint was allocated contacted HMT by email on 17 February 2006. Section 35(2) of the Act provides that statistical information used to provide an informed background as to the taking of a decision as to government policy ceases to be exempt once that decision has been taken. Section 35(4) meanwhile recognises the particular public interest in the disclosure of factual information which has been used to provide an informed background to decision taking. The case officer therefore sought confirmation that none of the requested information was of a statistical or a purely factual nature. The case officer further sought comment upon the proposition advanced by the complainant that the sensitivity of the requested information must have diminished significantly over time. Finally the case officer asked HMT to describe the prejudice that it considered might arise through the disclosure of advice to Ministers in this particular instance. (The refusal notice given to the complainant had described the chilling effect of such disclosures in somewhat general terms).
10. HMT responded to this email on 13 March 2006. It indicated that the information falling within the request had been identified and also acknowledged that there

had been an unacceptable delay in providing the complainant with a response to his request. Although the case officer had asked for a substantive response within 20 days of his email, HMT requested an extension to 5 April to allow officials who at that time were engaged in work around the 2006 budget to review the basis of the earlier refusal.

11. HMT failed to provide a substantive response to the case officer's email of 17 February despite further messages chasing progress on 6 April and 3 May 2006, and on 8 June 2006, the Commissioner issued an Information Notice under section 51 of the Act requiring a response. By coincidence a response was in fact sent by HMT on the same date.
12. The HMT letter of 8 June explained that in 1999 the Inland Revenue (now HM Revenue and Customs) had been responsible for tax policy and that HMT itself therefore only held a limited amount of information. The letter went on to describe the four documents held by HMT, setting out the public interest arguments against disclosure, while acknowledging the general public interest in greater transparency. HMT's commitment to greater openness was illustrated by reference to various documents published in connection with the 1999 and other annual Budgets. It was confirmed that none of the withheld information was of a statistical nature. Arguments were also presented as to why the requested information remained sensitive, despite its age. The original refusal of the complainant's request was confirmed. (Further detail of the arguments presented by HMT is given in the Analysis section below.)
13. The case officer requested a copy of the information which had been withheld on 21 June 2006. This was supplied after a short delay by email on 13 July.
14. The case officer then requested a meeting with HMT to discuss the case. This took place on 26 September 2006. The case officer was accompanied at this meeting by a colleague who had previously worked at HMT and who was therefore able to explore the reasons why so little information relating to a significant change in taxation policy appeared to be held. (This issue is explained below). At the meeting HMT provided an account of the key measures announced in the 1999 Budget which gave rise to the complainant's request together with a detailed account of where it considered that the public interest lay in this case. It also gave some helpful background information about the budgetary process relevant to this and other cases.

Findings of fact

15. The Commissioner's investigation has confirmed that the delay between the submission of the request for information and HMT's response was as described by the complainant. No explanation has been provided for this although at the meeting at the Treasury on 26 September it was acknowledged that this and other requests received shortly after the full implementation of the Act had not been handled well. HMT was able to point to recent statistics which suggested that its performance in this regard had improved and that it was now one of the more efficient central government departments as regards promptness of response.

16. The information falling within this request which was identified by HMT proved to be extremely limited. The Commissioner was provided with extracts from four documents. HMT explained that three of these documents in fact originated with the Inland Revenue and that it was to a large extent accidental that HMT held these rather than any other documents containing information which would have fallen within the terms of the request. The first and longest - an Inland Revenue document - concerns the *practicalities* of introducing the 10p rate band for income tax from 6 April 1999 and of reducing the basic rate by 1p in the pound. The other extracts are much shorter and effectively only summarise the proposals ultimately adopted and announced by the Chancellor in his Budget statement. None of the information contained in the extracts could reasonably be described as “covering the decision in principle” or assessing “the economic impact” which was the particular information specified by the complainant.
17. HMT made clear that the reason so little information was held was that in 1999 responsibility of tax policy lay with the Inland Revenue rather than itself. In the course of the meeting on 26 September, the case officer and his colleague pressed HMT officials on the thoroughness of the search for information falling within the scope of the request but were assured that no relevant information had been discovered.

Analysis

18. The full text of the relevant sections of the Act and of the sections of the Code of Practice issued by the Secretary of State under section 45 of the Act is given in the Legal Annex. The key elements are summarised in the analysis below.

The Duty to Confirm or Deny

19. Section 1(1)(a) of the Act places a duty on public authorities to confirm in writing whether or not it holds information of the description specified in the request. The complainant asked specifically for three categories of information relating to the decision to reduce the basic rate of income tax, namely information as to the principle involved, the timing and the economic impact. The information held by HMT relates only to the timing of the implementation and even that information is concerned with practicalities. It seems clear to the Commissioner, in other words, that HMT holds only a limited amount of information of the description specified in the request.
20. Of course, had HMT released the information which it did hold, the complainant would himself have been able to draw the conclusion that less extensive information than he might have expected was held. The appropriate response in circumstances under which only limited information of the description specified in a request is discussed further under the heading “Advice and Assistance” (below).

Procedural Matters

Section 10 (Time for Compliance)

21. Section 10 of the Act provides that a response to a request for information must be given promptly or, in any event, within 20 working days. A response may take the form of the supply of the requested information, confirmation that the information is not held, a formal refusal or an indication that additional time is required to consider the public interest in relation to specific exemptions.
22. The complainant's request was submitted on 24 February 2005 and a substantive response was not provided until 3 October 2005, clearly well outside the 20 working days allowed by the Act.

Section 16 & the Section 45 Code of Practice (Advice and Assistance)

23. Section 16 of the Act places a duty on public authorities to provide advice and assistance, so far as it would be reasonable to expect, to persons who have made requests for information. The Act itself does not specify what forms of advice and assistance should be given. However, the section refers to the Code of Practice issued by the Secretary of State under section 45 and provides that where a public authority acts in conformity with the Code, it is deemed to have complied with the duty to provide advice and assistance. Section 45 specifies that the Code must, among other things, include provisions relating to the transfer of requests from one public authority to another by which the requested information is or may be held.
24. The transfer of requests is dealt with in paragraphs 16-24 of the Code. Paragraph 16 makes clear that the provisions of this section include cases in which a public authority is unable to comply in full to a request because it does not hold the requested information. The remainder of the section gives advice on two possible approaches. These are either to assist an applicant in making a fresh request to the second public authority or transferring the request on behalf of the applicant.
25. It is clear that HMT took neither of the courses of action advised by the Code.
26. The refusal notice given to the complainant contains the statement. "The Treasury already makes a great deal of information publicly available." In the presentation given to the case officer on 26 September 2006, it was asserted that "HMT pointed [the complainant] to significant information already in the public domain." The Commissioner accepts that HMT does indeed make public a considerable amount of information in relation to the Budget and acknowledges the important role which the Code for Fiscal Stability plays in ensuring openness of the budgetary process.
27. There is no evidence that HMT pointed the complainant to any particular information relating to the decision to reduce the basic rate of income tax. Although the Code does not advise public authorities to direct an applicant to publicly available information falling within his or her request, it seems common sense that they should do so. Section 21 of the Act, upon which HMT does not

seek to rely, of course provides and exemption for information which is reasonably accessible to an applicant by other means.

Section 17 (Refusal Notice)

28. Section 17 of the Act requires that a public authority which refuses a request for information give an applicant a refusal notice. Such a notice must specify any exemption upon which a public authority has relied in refusing all or part of a request, explain why an exemption applies if this is not obvious and, if additional time is required to consider the public interest in relation of a qualified exemption, provide an estimated date by which the authority will have completed that exercise.
29. The relevant passage from the refusal notice given to the complainant is:

“We have concluded that [the requested information] should be withheld under section 35(1)(a) of the FOI Act. This is a qualified exemption, and in applying it we have had to balance the public interest in withholding the information against the public interest in disclosing the information.”
30. Although technically this specifies the exemption relied upon, it would clearly be more helpful to the complainant if it had been explained that the exemption in question is for information held by a government department relating to the formulation of development of government policy. Without such information it may be difficult for a complainant without any knowledge of the Act to understand the explanation of why the exemption is considered to apply.
31. The delay in issuing the refusal notice should be seen as a failure to comply with section 10 (see above). However, it may be worth noting that the Act requires notice of additional time to consider the public interest to be given in advance of any extension to the 20 working day period for response.

Exemptions

Section 35(1)(a)

32. Section 35(1)(a) provides an exemption for information held by a central government department if it relates to the formulation of government policy. As discussed above, HMT does not hold a great deal of information of the description specified in the request. However it does hold *some* information.
33. Section 35 is a class-based exemption. That is to say, for information to be exempt there is no requirement that its disclosure would or would be likely to cause any particular prejudice to an interest identified in the exemption. The documents containing the information identified by HMT as falling within the terms of the requests are each submissions to the Chancellor. Self-evidently the information thus falls within the terms of the exemption.

The public interest

34. Section 35 is a qualified exemption. Section 2 of the Act provides that, where a request is for information to which such an exemption applies, a public authority must consider whether the public interest in disclosing the information is equal or greater than that in maintaining the exemption.
35. In the refusal notice given to the complainant and in its submissions to the Commissioner, HMT accepts that there is a general public interest argument in favour of disclosure, namely the public interest in being open about policy development and in facilitating the understanding of the budgetary process by the public. However, it also identifies a number of public interest factors in favour of maintaining the exemption. These may be summarised as follows:
- There is a public interest in allowing free and frank discussion involving officials and Ministers. Such private thinking space is important for effective policy making.
 - The budgetary process is a continuous one. Proposals advanced one year but rejected may be revisited in future years.
 - Criteria and information relating to decisions about the levels of taxation in one year are likely to apply in others. Disclosure of the criteria would thus be likely to reveal Ministers' hands.
 - Submissions by officials are likely to be phrased in the knowledge of the approach taken by Ministers. Given the relative stability of the current Ministerial team, disclosure might allow the approach of Ministers to be guessed. This would reduce the private thinking space described above.
 - Officials may express opinions as to the feasibility of particular proposals. Disclosure would be likely to inhibit the expression of similar views in the future which, in turn, would undermine effective policy making.
 - Disclosure of one piece of information in isolation may create a misleading impression. For instance an official may comment upon the impact that a particular tax proposal might have in one area of the economy. This may give rise to the impression that there is an enduring link between a policy and a sector of the economy where none in fact exists.
36. The interest which the exemption is designed to protect is the obvious public interest in effective policy making. The Commissioner accepts a number of the arguments advanced by HMT in principle. He accepts, for instance, that the budgetary process is indeed ongoing and that proposals submitted by officials in one year may be revisited in subsequent years. He also accepts that there are many situations in which private thinking space, the opportunity for Ministers and officials to "think the unthinkable" and to reflect frankly upon options, will be essential elements of the process of policy development. He also accepts that, particularly where, as at the Treasury, there is a settled team of Ministers and officials, advice may unconsciously reveal the private thinking of Ministers in the way in which that advice is framed. The Commissioner is somewhat more

- sceptical about the proposition that disclosure of information in isolation may create a misleading impression since it seems to him that it is always open to a public authority to accompany the release of information with a qualifying statement.
37. Although the Commissioner accepts many of these arguments in principle, he is not persuaded that they apply in the circumstances of this particular request.
 38. Although HMT has identified parts of four documents as falling within the terms of the request, three of these (the second, third and fourth) do no more than make reference to the changes which were in fact announced in the 1999 Budget namely a halving of the starting rate of income tax to 10%, meaning a 10/23/40% rate structure from 6 April 1999, and a reduction of the standard rate to 22% from 6 April 2000, meaning a 10/22/40% rate structure. The Commissioner can see no public interest in withholding information which is now in the public domain and which is evidently also in the possession of the complainant.
 39. The extract from the first document is much longer and the arguments more finely balanced. However, the Commissioner considers that it is important to bear in mind that the decision to reduce the basic rate of income tax is one that has been taken and announced and that the arguments that proposals which do not find favour one year may be revisited in future years is therefore less compelling. Similarly, since the decision has been taken, there are fewer concerns that the advice may incidentally reveal the private thinking of Ministers. The Commissioner also thinks that it is significant that the submission concerns the *practicalities* of the implementation of the changes to the tax regime which was subsequently announced rather than the principles involved. Had the matters covered by the submission been ones of principle, the Commissioner would find it easier to accept that disclosure might make officials less likely to express their views frankly. It seems to the Commissioner, however, that the possibility that views regarding the practicalities of proposals would be more likely to encourage officials to set out their views, including any reservations, more carefully. In the Commissioner's view this would promote rather than undermine effective policy making.
 40. The Commissioner is also sympathetic to the argument advanced by the complainant that the requested information was, at the time of the request, some seven years old. Notwithstanding the sensitivities around the Budget and taxation policy, it seems to the Commissioner that the requested information is considerable less sensitive than at the time it was first recorded. In the final analysis he is not persuaded that disclosure would result in less frank advice being given to Ministers in the future.

The Decision

41. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the requirements of the Act. In particular, the Commissioner finds that there was a failure to respond to the request within the timescales provided by the Act and to provide appropriate advice and assistance to the complainant. The Commissioner also found that the refusal notice given to the complainant was less helpful than he would hope is generally the case, although he notes that in this instance the complainant does not appear to have been disadvantaged as a result.
42. The Commissioner is particularly critical of the fact that the public authority gave the impression to the applicant that significantly more information was held than was the case. The Commissioner finds, moreover, that although HMT was correct to regard the requested information as falling within the terms of the exemption at section 35(1)(a) of the Act, he does not consider that the public interest favoured the maintenance of the exemption.

Steps Required

43. The Commissioner requires the public authority to release to the complainant the extracts from the four documents previously supplied to the Commissioner.
44. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

45. Failure to comply with the steps described above 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.

Right of Appeal

46. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

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 29 day of November 2006

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annex

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.”

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”

Section 10(1) provides that –

“Subject to subsections (2) and (3), 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 16(1) provides that -

“It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it”.

Section 17(1) provides that -

“A public authority which ... 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 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.”

Section 35(2) provides that –

“Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-
(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or

- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.”

Section 35(4) provides that –

“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.”

Code of Practice Section 45 (16-24)

III Transferring requests for information

16. The following paragraphs apply in any case in which a public authority is not able to comply with a request (or to comply with it in full) because it does not hold the information requested, and proposes, in accordance with section 1(1)(a), to confirm that it does not hold that information.
17. If the authority has reason to believe that some or all of the information requested, but which it does not hold, is held by another public authority, the authority should consider what would be the most helpful way of assisting the applicant with his or her request.
18. In most cases this is likely to involve:
 - o contacting the applicant and informing him or her that the information requested may be held by another public authority;
 - o suggesting that the applicant re-applies to the authority which the original authority believes may hold the information; and
 - o providing him or her with contact details for that authority.
19. However, in some cases the authority to which the original request is made may consider it to be more appropriate to transfer the request to another authority in respect of the information which it does not hold. In such cases, the authority should consult the other authority with a view to ascertaining whether it does in fact hold the information and, if so, whether it is obliged to confirm this under section 1(1) of the Act. If that is the case, the first authority should proceed to consider transferring the request. A request (or part of a request) should not be transferred without confirmation by the second authority that it holds the information, and will confirm as much to the applicant on receipt of a request.
20. Before transferring a request for information to another authority, the original authority should consider:
 - o whether a transfer is appropriate; and if so
 - o whether the applicant is likely to have any grounds to object to the transfer. If the authority reasonably concludes that the applicant is not likely to object, it may transfer the request without going back to the applicant, but should tell him or her it has done so.
21. Where there are reasonable grounds to believe an applicant is likely to object, the authority should only transfer the request to another authority with his or her consent. If the authority is in any doubt, it may prefer to advise the applicant to make a new request to the other authority, and to inform the applicant that the other authority has confirmed that it holds the information.
22. Where a request or part of a request is transferred from one public authority to another, the receiving authority should comply with its obligations under Part I of

the Act in the same way as it would in the case of a request that is received direct from an applicant. The time for complying with such a request should be calculated by regarding the date of transfer as the date of receipt of the request.

23. All transfers of requests should take place as soon as is practicable, and the applicant must be informed as soon as possible once this has been done.
24. Where a public authority is unable either to advise the applicant which public authority holds, or may hold, the requested information or to facilitate the transfer of the request to another authority (or considers it inappropriate to do so) it should consider what advice, if any, it can provide to the applicant to enable him or her to pursue his or her request.