

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 13 June 2007

Public Authority: HM Revenue and Customs (HMRC)
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Summary

The Complainant made requests for information to HMRC under two headings: Tax Gap and EC Treaty Challenges. HMRC withheld all the information, with sections 29, 31 and 35 being applied individually to various different areas of the information. The Commissioner investigated the application of all the exemptions. Under the Tax Gap heading, the Commissioner found that section 29 was not engaged, section 31 was not engaged and 35 was engaged and the public interest favoured disclosing the information. Under EC Treaty Challenges the Commissioner found that section 29 was engaged and that the public interest favoured maintaining the exemption. As section 29 was engaged the Commissioner did not investigate the application of sections 31 and 35. The Commissioner requires HMRC to disclose the information under the Tax Gap heading within 35 calendar days from date of this notice.

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. The complainant has advised that on the 24 May 2005 he made the following request for information to HMRC:

"1. Disclosure of avoidance schemes under FS2004 legislation

- a. *The number of schemes disclosed under each category of tax avoidance – employment products, financial instruments etc – for the period up to 31 March 2005 and since then.*
- b. *A brief description of the types of schemes by reference to the area of tax law exploited and the number of each type.*
- c. *The identities of the promoters of the schemes disclosed under the rules for promoters and the number of disclosures made by each promoter.*
- d. *Any estimates made of the potential costs to the exchequer from any scheme or group of schemes.*

2. Tax Gap

- a. *Details of estimates made, however speculatively, of the direct tax 'tax gap' as referred to in HMRC's PSA target 3, in each case showing –
 - the degree of confidence associated with the estimate
 - the date it was made
 - as far as possible, how it breaks down according to different types of tax loss (fraud, avoidance etc) and according to different categories of tax payer
 - a summary of the methodology employed to arrive at the estimate.*
- b. *Copies of advice given to ministers on the size and / or nature of the tax gap. (If this is contained within policy advice that is exempt from disclosure it will presumably be possible to redact the relevant exempt material).*
- c. *If and how, in assessing HMRC's performance against PSA target 3, any increases in tax loss through avoidance or evasion are to be measured. (The technical note does not address these).*

3. EC Treaty challenges to UK tax legislation.

- a. *Details of estimates made of the actual or potential costs to the exchequer (tax repaid or forgone, interest, compensation or any other amounts) from any aspect of UK tax law having been or at some point being found to be in breach of the EC Treaty, including but not limited to those aspects currently being challenged under group litigation orders.*
- b. *Copies of advice given to ministers on the above potential costs (if contained within exempt policy advice, with the relevant exempt materials redacted).*

3. HMRC responded to the complainant on the 15 July 2005. HMRC broke down its response in relation to each point of the original request.
4. In response to part 1(a) of the request HMRC disclosed the information it held. In relation to part 1(b) HMRC confirmed it held the information requested but refused to disclose as it considered section 29 'The economy' and sections 31 'Law enforcement' applied. In relation to part 1(c) of the request HMRC confirmed it held information of the type covered by the request but refused to disclose this under section 31, 41 'Information Provided in confidence', 42 'Commercial Interests' and 44 'Prohibitions on disclosure'. As regards part 1(d) of the request HMRC confirmed it held the information but explained that the information is

available in the Red Book where it is scored according to the Red Book conventions and it is therefore exempt from disclosure under section 21 'Information accessible by other means'.

5. In response to part 2 (a) of the complainants request HMRC confirmed it held information covered by the request but refused to disclose this information by virtue of sections 29 and 31. In relation to point 2(b) HMRC confirmed it held information relevant to the request but refused to disclose the information as it considered the information was exempt by virtue of section 29, 31 and 35 'formulation of government policy'. In relation to part 2(c) of the request HMRC informed the complainant that it considered this information related to how it intended to measure the direct tax gap because assessing its performance in relation to PSA target 3 does not involve measuring any increases in tax loss through avoidance or evasion and on this basis that the information was also exempt by virtue of sections 29 and 31.
6. In relation to the 3(a) of the request HMRC considered that the request has to be answered by breaking the request down into 3 categories:
 - i. cases, including some where aspects of UK tax law have been referred to the CJEC (Court of Justice of the European Communities), where all points are either now settled or sufficiently progressed that calculation or estimation of actual costs is possible.
 - ii. cases involving aspects of UK tax law which one or more taxpayers have been challenged (or indicated an intention to challenge) on grounds of EC law and litigation including referral to the CJEC has not yet commenced or has not progressed sufficiently for the outcome to be regarded as sufficiently certain to enable usefully accurate calculation or estimations of costs to be made.
 - iii. other aspects where a challenge to aspects of UK tax law on grounds of EC law might at some time be made.

HMRC also explained that it had taken the request as relating to direct tax (income tax, corporation tax, capital gains tax, inheritance tax and stamp duty) and indirect tax (VAT).

7. HMRC confirmed it held information in relation to points (i) and provided this information to the complainant. In relation to point (ii) HMRC confirmed it held information relevant to the request but that this was exempt by virtue of section 29, 31 and 35. In relation to point (iii) HMRC stated it did not hold information of the type specified in the request.
8. As regards the request under point 3(b) HMRC confirmed it held information relevant to the request and informed the complainant that it had also split the request down into the above three categories. In relation to part (i) the information was provided, in relation to part (ii) HMRC explained the information was exempt by virtue of sections 29, 31 and 35 and that it held no information relating to part (iii).

9. In its response HMRC attached 6 Appendices explaining in detail how each of the exemptions applied to each part of the information request.
10. The complainant requested an internal review of this decision on the 20 July 2005. The complainant asked HMRC to reconsider its decision to withhold all the information it held and to reconsider the public interest test.
11. HMRC completed its internal review and communicated its findings to the complainant on the 12 October 2005. The internal review concluded that it was satisfied that sections 29, 31, 35, 41 and 44 had been applied correctly and that in relation to section 29, 31 and 35 the public interest balance in all circumstances of the case was properly conducted and due consideration was given to all factors. In relation to part 2 of the request the internal review found that section 35 also now applied but was not originally cited.
12. In relation to part 1 of the request the internal review found that further information regarding the number of avoidance scheme by reference to areas of law could now be disclosed and enclosed this information.

The Investigation

Scope of the case

13. The complainant contacted the Commissioner on the 16 November 2005 to complain about HMRC's refusal to disclose the information. The complainant informed the Commissioner that point 1 of this request had been answered in all but one point so he did not propose to pursue this refusal but in relation to the other two points he was asking the Commissioner to investigate.
14. The complainant also wished to complain about the time taken to conduct the internal review.
15. The Commissioner set out to investigate the application of all the exemptions and to consider whether the refusal notice was in accordance with part 1 of the Act. The Commissioner has not investigated the full detail behind the length of time to undertake the review at this time as it is not appropriate within this section 50 Decision Notice. The Commissioner has recently issued guidance to public authorities as to the expected time it should take to complete internal reviews; this can be found at the Information Commissioner's Office (ICO) website www.ico.gov.uk.

Chronology

16. The Commissioner began his investigation by contacting HMRC on the 10 July 2006, where the Commissioner clarified with HMRC that the complaint only related to points two and three of the request. The Commissioner asked HMRC to supply a copy of the withheld information, annotated to indicate where each

exemption applies. The Commissioner also sought to clarify a further point and asked HMRC to explain why details of the methodologies were not provided to the complainant.

17. HMRC responded on the 10 October 2006, HMRC provided the Commissioner with a copy of the information being withheld and indicated that the letter to the complainant dated 15 July 2005 provides details as to where the exemptions apply. HMRC also explained that the methodologies were not disclosed as they are still being developed and will then have to be tested and disclosure could be misleading, HMRC stated they were exempt from disclosure under section 29, 31 and 35.
18. The Commissioner wrote again to HMRC on the 25 January 2007 asking HMRC to expand on the public interest arguments as applied in relation to each exemption and each piece of requested information. The Commissioner also asked, in relation to the information requested under the header 'Tax Gap', for HMRC to demonstrate where possible how disclosure of the information would, or would be likely to prejudice: the economic interest of the UK and the assessment collection of any tax. The Commissioner also asked some specific questions relating to the HMRC's position regarding the development of the estimates and associated methodologies.
19. In relation to the information withheld under part 3 of the request entitled 'EC Treaty Challenges' the Commissioner also asked HMRC to expand on the public interest arguments for each exemption and to demonstrate of disclosure would or would be likely to prejudice: the economic interests of the UK; the assessment or collection of tax and the formulation or development of government policy.

Findings of fact

20. The information being withheld comes under two headings: Tax Gap and EC Treaty Challenges to UK tax legislation.
21. The tax gap measures the amount of tax HMRC ultimately fails to collect. It is the difference between the amount of tax that is due on a given volume of economic activity if taxpayers comply with both the letter and the spirit of the law and the amount of tax HMRC actually collect from that economic activity; both routinely through the operation of the normal tax collection process and subsequently through various kinds of recovery activities.
22. The information requested in parts 2(a) and 2(b) of the request is being withheld under sections 29, 31 and 35 part 2 of the request. The information requested in 2(c) of the request is the same as that in part 2(a). The information consists of a document entitled 'Estimates of tax gap for direct taxes'.
23. The information requested in part 2 of the request details estimates and methodologies under two heading, tax evasion and tax avoidance. Tax evasion is the avoidance of paying tax illegally i.e. through undeclared income and tax

avoidance is the legal utilising of the tax system to a person's advantage e.g.. through the identification and exploitation of loopholes.

24. The information held in relation to the heading EC Treaty Challenges to UK tax legislation is a request for information in relation to cases where UK tax law has been challenged in the courts on the grounds of EC law. The information held by HMRC is estimates made by officers responsible for the cases of the theoretical maximum tax at stake on the assumption that the claims succeed.
25. Sections 29, 31 and 35 have been applied to the information withheld under the heading EC Treaty Challenges.

Analysis – Tax Gap

Exemption – Section 29 'The Economy'

26. Section 29 provides that information is exempt if its disclosure under this Act would, or would be likely to; prejudice the economic interest of the United Kingdom or of any part of the United Kingdom.
27. HMRC explained to the complainant that it is making an effort to develop methodologies for measuring levels of non-compliance and tax gaps for direct taxes. Due to the various techniques that are used it has to devise a series of estimates and these derive from a mixture of different methodologies. HMRC state that this work is useful in helping to formulate compliance policy and strategy but has not yet given it a robust overall estimate of the direct tax gap.
28. HMRC makes the point that it is continuing to develop the methodologies and there is a strong probability that its view of the amounts of tax at stake will change as more robust methodologies are developed. For these reasons HMRC state that publication of the 'tax gap estimates' at the current time would be misleading for two reasons:
 - It is sure that its current view of amounts of tax at stake from non compliance are not correct and could give a false impression of both the total and relativity between different components;
 - Changes to these figures as it subsequently firms up its estimates are likely to give a false picture of changes in the level of compliance with direct taxes.
29. In its response to the Commissioner, HMRC went on to explain that the methodologies are not developed to the point that they could apply them year on year and so the estimate figures could be wrong. HMRC state that if they were to publish the wrong figures for large listed companies, the negative impact on share prices quoted on the international stock exchange could be damaging. However, the Commissioner notes that the request is not for information relating to specific estimates for targeted companies but for the methodologies and estimates by sector.

30. HMRC also claim that publishing the information too early could be damaging to its reputation, as it improves the methodologies and publishes subsequent data, it could be criticised for previously publishing incorrect information. HMRC do state that it expects to make available direct tax gaps estimates when the research to establish robust measurement methodologies across the direct taxes is in a comparable position. HMRC explained that once it has tested the methodologies over a number of years and checked the data against subsequent years to ensure comparability and credibility this would give it confidence that the methodologies were robust, reliable data. HMRC state that there are currently problems with doing this as the data sources are very varied, do not cover matching periods and are not all available with the same regularity as others. HMRC state it is still exploring how it can reliably use the current data it holds for direct taxes.
31. HMRC explained that to be confident in its direct tax gap estimates it would want to run the data through a number of years to evaluate and stress its findings, evaluating the first year's data against subsequent years for comparison and credibility checking. This would enable them to have confidence in the methodologies and put the 'direct tax' methodologies in a comparable position with the 'indirect tax' methodologies which have already been tested over a number of years.
32. HMRC also argue that essential to the operation of a successful economy is an efficient tax system and that any information disclosed would provide potential tax avoiders with an assessment of the strengths and weaknesses of the tax system. This could result in an increasing number of tax payers seeking to avoid taxation or not paying tax at the correct time by emboldening them to exploit areas of vulnerability. HMRC state that the release of the methodologies used to calculate the tax gap could lead to groups making systematic attacks on the direct tax system. However, in reviewing the information the Commissioner notes that the information relating to both avoidance and evasion details how HMRC attempt to understand and measure the gap in different categories – for example through random enquiries - but it is not any sort of manual which anyone could use to avoid paying tax in any given category.
33. In reaching a decision as to whether section 29 is engaged in respect of the information request, the Commissioner has considered all the arguments put forward by HMRC. The Commissioner has also taken into account the Information Tribunal decision on the interpretation of 'prejudice'. The decision EA2005/005 "*John Connor Press Associates vs. Information Commissioner*" found that the term 'would, or would be likely to prejudice' meant that the 'chance of prejudice being suffered should be more than a hypothetical possibility; there must be a real and significant risk'.
34. The Commissioner is mindful that many of the arguments put forward by HMRC in applying this exemption focus on the fact that the methodologies and estimates of the direct tax gap are not yet 'robust' and that disclosure at this time would give a false picture. Whilst the Commissioner recognises HMRC's concerns about publication of the estimates, these do not demonstrate a prejudice to the

- economic interest of the UK. To engage the exemption HMRC need to demonstrate how disclosure of the information would do this.
35. HMRC have further argued that disclosure of the information about methodologies could lead to vulnerabilities in the tax system being exploited and therefore a decrease in the revenue generated from tax collection. However, the Commissioner notes that the information does not suggest or otherwise indicate to an individual or company how to exploit any area; it does highlight areas in which HMRC have found instances of tax evasion and the Commissioner accepts this could create confidence in those already exploiting these areas to continue doing so. However the information does not outline what HMRC are doing to close the gap and so would not inform those avoiding or evading tax how to continue doing so.
 36. The Commissioner has considered HMRC's arguments regarding disclosure and the impact on the economy. In particular the Commissioner has considered HMRC's assertion that disclosure of the information identifies areas which are currently vulnerable. HMRC explained to the Commissioner that there are a number of areas it looks at using different methods and that these methodologies show how HMRC uses previous information, new information and information from other sources to try and identify common areas in which tax avoidance and evasion occurs. Disclosure of this information, HMRC claims shows two things: it identifies the areas HMRC is currently aware of in which people and or companies are avoiding tax; and it could highlight to those with a desire to avoid paying tax, any gaps in HMRC's current understanding of tax evasion.
 37. The concern of HMRC is that disclosure could encourage individual or companies to take advantage of identified loopholes in tax law or encourage those already exploiting 'loopholes' to look for new ones that HMRC may not yet be aware of. This argument relates to the methodologies under the heading 'avoidance'. Whilst the information makes reference to the existence of avoidance schemes it does not detail what these schemes are.
 38. HMRC also argues that disclosure could jeopardise its future measures to address the direct tax gap and therefore future collection of taxes. HMRC state that its purpose in trying to establish the direct tax gap is to use the information to address any gaps and take steps to close them; premature disclosure of information which HMRC is still developing could undermine any steps HMRC plans to take. The Commissioner again notes that the information requested does not show the steps being taken to address the gap.
 39. The Commissioner has considered HMRC's arguments around the prejudice and risk to the economy. He recognises that a fair tax system in which everyone contributes the right amounts of tax is essential to ensuring a successful economy. The Commissioner recognises that there is a possibility that disclosure could encourage those not already exploiting an area of evasion to do so on the basis that the methodology and estimates indicate widespread exploitation of this gap already occurring. But revealing that a particular area of tax payment is being evaded would not be new or easily-exploitable information. The Commissioner

considers that it is likely that those determined to evade paying tax will do so regardless of the publication of this document.

40. The Commissioner is also mindful that avoidance is legal utilisation of the tax system and involves accountants or others with extensive knowledge of tax legislation identifying 'loopholes' in the law and exploiting them. Whilst the Commissioner acknowledges that HMRC would not want to encourage this and will use the information informing the estimate methodologies to try and close the 'loopholes', the information does not disclose what these 'loopholes' are.
41. For all these reasons the Commissioner finds that HMRC have failed to demonstrate that disclosure of the methodologies and estimates would, or would be likely to prejudice the economy and that the exemption at section 29 is not engaged.

Exemption: Section 31 'Law Enforcement'

42. HMRC has stated that the 'Tax Gap' information is also exempt by virtue of section 31(1)(d). This provides that information is exempt if its disclosure would, or would be likely to; prejudice the assessment or collection of any tax, or duty or of any imposition of a similar nature.
43. In its refusal notice and internal review to the complainant HMRC stated that the analysis is insufficiently developed to give a useful and accurate measure of size and nature of the tax gap and to make public understanding of elements of direct tax gap size could prejudice Exchequer receipts.
44. HMRC also argue that if it is wrong and the tax gap estimates are too high it may undermine any sense of fairness in the application of policy and in the administration or assessment of taxes. If its estimates are too low it may embolden tax payers who are not fully compliant to take further risks assuming that HMRC does not have a full understanding of the extent of their non-compliance.
45. HMRC state that its current estimates are based on risk assessments in areas where there are a small number of entities involved: therefore premature release of these estimates and methodology could result in companies, or individuals deciding not to pay the right amount of tax at the right time.
46. HMRC explained that disclosure of information about how a tax system works has a part to play in promoting greater public awareness and this makes it simpler for people and business to pay tax. HMRC state that publishing information about the tax gap does not achieve this but instead releasing details of which methodology it has considered and has either piloted or rejected would result in the disclosure of information that could aid those intent on defrauding the tax system. Someone intent on avoiding or evading payment of tax could use this information to identify shortcomings in the tax gap and use this knowledge to develop schemes that would counter any measure that HMRC puts in place to address its perceptions of the tax gap.

47. In order to engage the exemption HMRC must demonstrate that disclosure would or would be likely to prejudice the assessment or collection of tax. The Commissioner, as noted under the section 29 analysis (above), takes the interpretation of prejudice from the Information Tribunal. HMRC therefore need to demonstrate that the risk of prejudice is real or significant.
48. The Commissioner notes that HMRC's arguments focus on how disclosure could reveal information that would aid those who wished to defraud the tax system. However the wording of the exemption emphasises the impact of disclosure on the assessment or collection of tax. The Commissioner does not consider the information requested would give tax payers information on how to defraud the tax system either by avoidance or evasions
49. HMRC is responsible for assessing the amount of tax due from any individual or company. As elaborated above, although disclosure of the information could give those intent on evading tax the confidence to either continue or begin doing so, it does not suggest or indicate how to do so. Equally the information does not suggest or indicate methods available to those wishing to avoid tax legitimately. The Commissioner also considers that the information is unlikely to give anyone enough information to be able to assess the risk of getting caught evading tax. This weakens HMRC's argument that disclosure would embolden tax payers to evade tax.
50. If HMRC are aware of some of the potential methods used in tax avoidance disclosure of this information to the public would not alter their ability to assess the amount of tax due from taxpayers as legally there is no tax to collect. It is also possible that disclosure of HMRC's knowledge of the extent of its understanding of evasion of tax could result in a reduction of evasion and increased revenue.
51. HMRC's functions in relation to the collection of tax require HMRC to collect the amount of tax due once it has been assessed. HMRC's ability to collect tax is not at threat by disclosing information that identifies possible methods for tax avoidance.
52. HMRC have argued that individuals could use the information to identify shortcomings on its view of the tax gap and develop schemes that would counter any measure the HMRC puts in place to address its perception of the tax gap. However, it is not the measures HMRC puts in place to address the perception of the tax gap which is important in improving the amount of tax assessed and collected, but the measure it puts in place to actually close the tax gap. The information does not highlight these.
53. The Commissioner agrees that having a fair tax system is important, and that disclosure of information about how the tax system works has a part to play in promoting public awareness and can facilitate compliance with the tax system. The Commissioner believes that contrary to HMRC's assertions, disclosure of this information could assist in facilitating compliance. At present there is uncertainty in the public as to the degree and scope of the direct tax gap, and what is being done to address this. Disclosure could in fact encourage more compliance with

tax obligations: for those tax payers who are already compliant disclosure would provide reassurance that the issue of direct tax gap is being addressed and enable them to see the work undertaken to date by HMRC, and thus encourage on-going compliance.

- 54 The Commissioner accepts that if the information disclosed how to avoid or evade paying tax then the prejudice to the assessment or collection of tax would be significant, However, whilst the information details how each area of known evasion is measured and how avoidance is measured it does not in any way act as a manual for tax avoidance and evasion. For the reasons the Commissioner finds that the exemption at section 31(1)(d) is not engaged as HMRC have failed to demonstrate that disclosure of the information would, or would be likely to prejudice the assessment or collection of any tax or duty.

Exemption: Section 35 'Formulation of government policy'

55. Section 35 states that information is exempt if it relates to the formulation of government policy.
56. HMRC has explained that the estimates and underlying data within the document are used as one of a suite of indicators to inform economic policy, operational strategy and resource deployment. They have been used in the formulation of strategy and policy, however there are still policy elements in the development of the direct taxes gap estimates that are still being developed. HMRC state it would not want them to be released yet for the reason that it is constantly defining and refining the methodology used to calculate the estimates. Given the diverse nature of tax gap in terms of policy issues, taxes, customers and economic developments, this is an area in which it is constantly developing and refining its strategic response, which is reflected in the continuing development of tax gap methodology.
57. HMRC's arguments focus on the fact that the methodologies and estimates have been used to develop compliance policy and that the information therefore relates to the formulation of government policy.
58. The Commissioner accepts that the information contains estimates and methodologies used to inform on going policy. The Commissioner notes that the document was created in 2005 and whilst this would suggest that the information is 'stale', this was not the case at the time the request was made. The Commission accepts that the ongoing battle to close the tax gap is one in which policy is still being developed and so accepts that the methodologies and estimates do relate to the formulation of government policy and that the exemption at section 35 is engaged.

Public Interest Test

59. Section 35 is a qualified exemption and is therefore subject to the public interest test. In the recent Information Tribunal Decision *EA/2006/006 'DfES v The Information Commissioner'*, the Tribunal laid down a set of principles that should

guide the weighing of the public interest in relation to section 35, all those have been considered and those applicable to this case are discussed below.

60. In considering where the public interest lies, the Commissioner has paid particular weight to the status of the policy development. Whilst the Commissioner acknowledges that there is a public interest in more open and transparent decision making and in the public being able to scrutinise decisions taken on policy this should not be at the detriment to ongoing policy discussions.
61. HMRC has informed the Commissioner that the policy is still evolving. The nature of the direct tax gap is that streams of information that could impact upon the calculations are large and varied. A number of these streams produce results that have not been fully tested for reliability in establishing the level of any tax gap and therefore the policy going forward is still undecided.
62. The Commissioner notes the Tribunal conclusion that whilst policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure.

“The timing of a request is of paramount importance to the decision.....disclosure of discussions of policy options, whilst policy is in the process of formulation is highly unlikely to be in the public interest, unless, for example it would expose wrongdoing within government.”

63. The Commissioner notes that the emphasis placed by HMRC is that the methodologies and not the policy are still evolving. HMRC state that there are policy elements in the tax gap which are still being developed and the information requested feeds into these. However, the Commissioner has considered that the document was created following research into the different avoidance and evasion areas and methodologies were created, estimates made and that therefore the document produced was HMRC's current understanding of the situation.
64. HMRC has acknowledged that policy issues around the direct tax gap are constantly developing as is reflected in their continuing development of the methodologies. However, the document does not reflect 'continuing development' but reflects the thinking at the time of production and whilst policy around the tackling of the tax gap is subject to change this document has not. HMRC have indicated that this is due to be rewritten which suggest that work has been continuing to refine and test the current theories. Additionally HMRC have not been clear as to the policy that the document relates and so the Commissioner has had to assume that the document is a tool used to inform policy decisions regarding the addressing of the tax gap.
65. HMRC have also indicated that this document is only one of a 'suite of indicators' used to inform policy development. The Commissioner considers that the public interest in maintaining the exemption is weakened given it is difficult to see how disclosure of this document in isolation would significantly jeopardise or prejudice HMRC's ability to formulate policy.

66. The Commissioner has also considered the information itself. The information as mentioned previously does not identify steps taken to close tax gaps but details the areas HMRC has identified, how it is measured non-compliance in those areas and therefore the estimates made. Whilst the Commissioner accepts this has, and is continuing to, feed into policy development, disclosure of the information itself would not undermine the policy making process as it is unlikely that it would change the focus on any decisions taken by HMRC.
67. The Commissioner has also considered the degree to which disclosure would harm the free and frank exchange of view necessary for the purpose of good policy formulation. In considering this the Commissioner is mindful of HMRC's assertion that the document is only one of a 'suite of indicators' used to feed into policy development. In light of this the Commissioner does not consider that the degree of harm is significant to maintain the exemption but counters that disclosure would create more informed public debate.
68. HMRC confirmed that once the methodologies are in a comparable position it would consider publication. HMRC explained that the methodologies surrounding indirect tax are well established and had been tried and tested over a number of years before they were published. Before publishing information on direct taxes it needs to be equally confident in the methodologies and estimates.
69. The Commissioner has accepted that the document has fed into the formulation of policy and that this policy development is ongoing and that there are strong public interest arguments for maintaining the exemption. However the Commissioner also considers that there are strong public interest arguments for disclosure..
70. There is a strong public interest argument in knowing how much tax the government considers is being lost, how this is being addressed and how this figure has been arrived at. Disclosure of estimates and methodologies also relates to the public being able to assess the performance of the department in fulfilling its functions. The Commissioner has also considered that if the public realised the extent to which tax evasion is a drain on the economy it could create an atmosphere in which evasion and avoidance would be less socially acceptable.
71. HMRC argue that disclosure is not in the public interest because the policy is still being formed and whilst the methodology is still being tested for reliability in establishing the level of any tax gap and therefore the policy going forward is still undecided. This argument has some merit, but it is not strong, especially HMRC has in effect conceded that it would consider publication once the methodologies have been tested over a number of years. Moreover, the Commissioner would question how, if the methodology has not been tested and the level of tax gap not fully established, the information can feed into any meaningful policy formation at this stage. The Commissioner also considers that disclosure at this stage is in fact less likely to prejudice any policy making decisions than at the later stage when the methodologies and estimates are more robust.

72. To sum up, in reaching a decision on the public interest the Commissioner has considered all the arguments and acknowledges that there strong arguments have been put forward by HMRC. However, the Commissioner finds that there are equally strong countervailing arguments: disclosure facilitates public debate; enables the public to assess HMRC's performance; the document is only one of a suite of indicators; the information does not contain information which would obviously prejudice the formulation of policy and the information is largely statistical. He has weighed the competing arguments. The balance has been tipped by the fact that it is fully open to HMRC to publish the information with whatever explanations – or further information - it chooses to provide full context about its status, timing and untested nature.
73. The Commissioner concludes that the public interest in maintaining the section 35 exemption does not outweigh the public interest in disclosing this part of the requested information.

Analysis – EC Treaty Challenges

Exemption: Section 29 'The Economy'

74. Section 29 provides that information is exempt if its disclosure would, or would be likely to prejudice the economy of the United Kingdom.
75. HMRC explained that in order to understand why release of the information would be likely to prejudice the economy it is important to understand on what basis the estimates of potential costs to the Exchequer are made. The estimates are vulnerability assessments that take into account the maximum possible exposure.
76. HMRC explained that the estimates are worst case estimate which are extremely uncertain because: the cases involved are extremely complicated and typically involve several points of law; there are several stages to each strand of litigation and the case and the fiscal risks are interdependent.
77. HMRC state that is unlikely that any estimate figure will prove to bear much correspondence to reality even as a worst case estimate, they are used only as an early warning mechanism which is acknowledged by all internally.
78. HMRC argues that if the estimates were disclosed it would be impossible to control how they are used. HMRC detailed four specific prejudices to the economic interest of the UK which would be likely to result from disclosure of the information:
- I. Release of the estimates could lead to speculation as to the Government's cash flows and future borrowing requirements. They could be used to call into question the Government's adherence to its own fiscal rules, which could increase the cost of Government borrowing. This could equally cause uncertainty in the financial markets.
 - II. Disclosure might lead to speculation as the Government's future tax policy. One of the significant advantages of the UK economy is the microeconomic stability and certainty it provides for existing business and to attract new business.

Speculation that the Government will be forced to raise taxation levels would clearly harm this by deterring less well-informed investors from investing in the UK as well as causing existing business to reconsider their position.

- III. Release of the information could undermine people's confidence in the ability of the Government to manage the economy. This would cause political instability.
 - IV. It could lead to a press campaign against the UK involvement in Europe and the reach of the European Courts of Justice. Overall, the Government is clear that the economic benefits of EU membership far outweigh the disadvantages. Also specific provisions of the Treaty guaranteed by the European Courts of Justice, those that concern the Single Market, are part of the underpinning for successful growth of the UK economy since 1992.
79. The Commissioner has considered the arguments put forward by HMRC and is aware that the estimates are very unstable as HMRC has no indication either to the likely success of the cases, the degree to which they may or may not be successful and the impact on other claims arising. HMRC have also indicated through previous disclosure, that once the litigation is final it will disclose its estimates.
 80. The Commissioner considers the degree of instability in the estimates is key to assessing the prejudice. The Commissioner does not accept that the reaction of the press can be treated on its own as a valid argument for engaging prejudice. However he does consider that the potential impact on investors could well involve potential or actual prejudice to UK economic interests. Investors could be encouraged by HMRC's estimates into making investments in each company undertaking an action in the hope that the action is successful. This would have an artificial and distorting effect upon financial markets. Moreover, there is a real risk that should HMRC's estimates be inaccurate (which bearing in mind its assertion that the estimates are a worst case scenario is likely) there could be further artificial and distorting effect upon the markets when the true figures are established. Such effects would be undesirable and would have a detrimental effect on the economy. Additionally, those involved in the litigation may see over inflated estimates as indicators as to their likelihood of success and make inappropriate commercial decisions as a result. Again, this would, or would be likely to, prejudice UK economic interests.
 81. The Commissioner has also recognises the importance of the estimates and the effect on the government's borrowing. Were lenders to the government to be have concerns that the government was predicting that large amounts of tax may have to be repaid, this could have adverse effects on the bond markets, pressure on interest rates and consequent damage to the economy.
 82. The Commissioner recognises that, to some extent these arguments are hypothetical and that the precise effect(s) of disclosure must be uncertain. However, disclosure of such sensitive information, which is very much a 'worst case' scenario, could cause any number of reactions from investors, the firms themselves and members of the public. There may be other effects upon the economy which have not been touched on. The Commissioner considers that the

economy is sensitive to even small changes in investor confidence and disclosure of the information would constitute more than just a small change in either increasing or decreasing investor confidence.

83. The Commissioner is satisfied that HMRC have demonstrated how disclosure of the information would pose a real or significant risk to the UK economy. The estimates, as they are, are little more than guesses and are highly uncertain. The Commissioner is satisfied that disclosure of such unsubstantiated figures would present a real risk of prejudice to the economic interests of the UK.
84. The exemption at section 29 of the Act is therefore engaged in relation to part 3 of the complainant's request.

Public Interest Test

85. Section 29 is a qualified exemption and therefore the Commissioner must consider if the balance of public interest lies in maintaining the exemption or in disclosure.
86. HMRC state that they recognise that there is a legitimate public interest in transparency and for scrutiny for the Government's fiscal policy, and the impact of the UK's involvement in Europe. However, HMRC consider that the public interest in release of this information is outweighed by the public interest in non-disclosure of this information. Even if the worst case figures at risk could be estimated with any degree of certainty factors such as the speculation this would generate as detailed above on the economy and involvement in Europe suggest there are strong public interest reasons not to disclose.
87. HMRC state that, given that the uncertainty is extreme and unquantifiable, it would be irresponsible to release the estimates. HMRC also point out that these cases are still going through court and disclosure of the information could generate press speculation which could have a prejudicial effect on court proceedings. The Commissioner acknowledges this argument but does not consider it relevant to this exemption.
88. The complainant has argued that there is significant public interest in the issue and information on potential costs held by the public department responsible for the issues making an important addition to political, economic and technical debates. He also argues that there is a public interest in the financial markets knowing likely future government costs, which would be in the long-term interests of a stable financial market, they would prefer to see the estimates published than ignored in government's fiscal projections.
89. The Commissioner has considered these arguments but is mindful that in considering the benefits to the public and financial markets of publishing the estimates that this benefit could be undermined by the uncertain nature of the estimates.
90. In deciding where the public interest lies in this case, the Commissioner feels it important to note that the public interest cannot be served by disclosing

information which would have a detrimental impact on the economy. In this case the Commissioner notes that HMRC have published information relating to the EC Treaty Challenges when the challenges have been heard and payments are still being made. The Commissioner feels that in this case HMRC is, correctly, reassessing the public interest in disclosure with the passage of time

91. The Commissioner has weighed the arguments for and against maintaining this exemption and finds that in this case, the public interest for maintaining the exemption outweighs the public interest in disclosure.
92. The Commissioner finds that the information requested in point 3 of the complainants request is exempt under section 29 of the Act. The Commissioner has therefore not investigated the application of sections 31 and 35 in relation to the EC Treaty Challenge information.

The Decision

93. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

EC Treaty Challenges
(i) The Application of section 29

94. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

Tax Gap
(i) The Application of section 29, 31 and 35

Steps Required

95. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

(i) Disclose the information from part 2 of the complainants request

96. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

97. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session

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

Right of Appeal

98. 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 13th day of June 2007

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annex

General Right of Access

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 1(3) provides that –

“Where a public authority –

(a) reasonably requires further information in order to identify and locate the information requested, and

(b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.”

Section 1(4) provides that –

“The information –

(a) in respect of which the applicant is to be informed under subsection (1)(a), or

(b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.”

The economy

Section 29(1) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the economic interests of the United Kingdom or of any part of the United Kingdom, or
- (b) the financial interests of any administration in the United Kingdom, as defined by section 28(2).”

Section 29(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).”

Law enforcement

Section 31(1) provides that –

“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-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment.”

Section 31(2) provides that –

“The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,
- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work.”

Section 31(3) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).”

Formulation of Government Policy

Section 35(1) provides that –

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

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

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(3) provides that –

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).”

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.”

Section 35(5) provides that –

“In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998.”