

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 22 October 2009

Public Authority: Her Majesty's Revenue and Customs ('HMRC')
Address: 4th Floor
100 Parliament Street
London
SW1A 2BQ

Summary

The complainant asked for information concerning HMRC's Regional Review Programme, specifically in relation to the Leeds/Bradford/Shipley urban review centre. HMRC refused to disclose the requested information, citing the exemption in section 43 of the Act. The Commissioner found that the exemption was engaged and that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The Commissioner therefore found that HMRC had acted correctly in withholding the information.

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. As part of HMRC plans to modernise and transform its operations by matching work, offices and accommodation needs throughout the UK it instigated a Regional Review Programme. The programme of reviews started in November 2006 with a view to reducing HMRC's estate by 2010. Further detail is provided in the 'Findings of Fact section later in this Notice.
3. In order to undertake the reviews HMRC offices were divided into three categories of location: urban centres, clusters and 'individual locations'. Leeds/Bradford/Shipley was one of these designated urban centres and employed a significant number of permanent staff.

The Request

4. For clarity the public authority is referred to as HMRC throughout this notice.
5. On 9 February 2007 the complainant requested information from HMRC in relation to the Leeds/Bradford/Shipley urban review centre. The full detail of the request can be found in Annex A.
6. On 21 February HMRC contacted the complainant and asked for clarification regarding the request, in view of the fact that the office in Ripon was not part of the Leeds/Bradford/Shipley review.
7. On the same date the complainant confirmed that his request 'incorporated detail relevant to Ripon along with all the other offices included under the review'.
8. On 6 March 2007 HMRC responded to the complainant, providing information in relation to part 1 of the request and explaining that in relation to parts 3, 4, 5 and 7 of his request the information requested was not held. The information requested in parts 2 and 6 of the request, namely:
 - details of the costs for the calendar year 2006 for the Ripon Tax Office and the offices included in the Leeds/Bradford/Shipley urban centre review and
 - a detailed breakdown showing how the £3.1 million forecast savings from the Leeds/Bradford/Shipley urban centre review was arrived atwas withheld using s43(2), on the grounds that it was commercially sensitive.
9. On receipt of the HMRC's refusal the complainant requested an internal review of this decision, the result of which was provided on 23 March 2007. The internal review upheld the HMRC's original decision not to disclose.

The Investigation

Scope of the case

10. The Commissioner considered the HMRC's handling of this case, the application by the HMRC of the exemption claimed and the balance of the public interest as it applied to the qualified exemption cited by HMRC.

11. In particular, following clarification from the complainant that he was interested in information in relation to all 21 offices included in the Leeds/Bradford/Shipley review (not just the Harrogate and Ripon offices) the Commissioner's investigation focussed on the information requested in parts 2 and 6 of the request that related to cost savings associated with the proposed office closures.

Chronology

12. On 25 April 2007 the complainant contacted the Commissioner to complain about the way his request for information had been refused. Specifically the complainant wanted access to the information he had requested in parts 2 and 6 of his request, as detailed above, in order to provide informed input to a consultation exercise associated with the Regional Review programme.
13. The complainant was concerned that HMRC appeared to believe it was under an obligation to deny access to details of accommodation costs met from the public purse and in refusing him this information he could not 'genuinely engage in a consultative processdesigned to save future expense from that same public purse'.
14. On the 06 November the Commissioner wrote to both parties commencing his investigation and apologised for the delay owing to the backlog of cases at his office.
15. In the course of reviewing the case documentation and carrying out preliminary research into the Regional Review Programme the Commissioner established that the review process was complete and that decisions regarding the urban centre review had already been published.
16. In view of this the Commissioner contacted the complainant to ascertain if he wanted to pursue his complaint given that he had originally requested the information for the purpose of inputting into a review that was now complete.
17. On 8 January 2008 the complainant telephoned to state that although his request had concentrated on the Harrogate and Ripon offices which were being closed, he still wanted to pursue his complaint. His rationale was that other offices were facing rationalisation and if the information requested in relation to one office was released this would establish a principle/precedent for the release of information regarding other offices due to close.
18. The Commissioner explained that investigations were executed and decisions made on a case by case basis and that the release of requested information on one occasion would not establish precedent for the release of information on another occasion.

19. On 12 January 2008 the complainant confirmed his desire to pursue his complaint in respect of the information that had been withheld in writing, stating that although his request had focussed on two offices, he had also requested information on all 21 offices in the Regional Review around Bradford, Shipley and Leeds. Although HMRC had already decided to close 14 of those offices, many still remained open and he therefore still required the requested information in order to question HMRC's claims of cost savings associated with the offices that had already been closed.
20. In light of this confirmation the Commissioner wrote to HMRC and asked for its representations regarding withholding the information relating to the cost-savings element in parts 2 and 6 of his request. In particular clarification was sought as to how release of the requested information would prejudice the commercial interests of both HMRC and the private outsourcing partner.
21. On 13 February 2008 HMRC provided to the Commissioner, in confidence, information relevant to the cost-savings element of the request and confirmed that HMRC's view remained as set out in its internal review, the results of which had been conveyed to the complainant.
22. HMRC also indicated that they were content to release information to the complainant in relation to three out of the 22 offices, two held on direct leases by HMRC and the other held by HMRC by way of an inter-departmental arrangement.
23. HMRC also provided further comments in relation to its application of the exemption and details of its consideration of the public interest. In addition HMRC stressed that the cost-saving element of the Regional Review programme was only one factor in determining offices closures, the main determinant being business need.

Findings of fact

24. As part of HMRC plans to modernise and transform its operations by matching work, offices and accommodation needs throughout the UK it instigated a Regional Review Programme. The programme of reviews started in November 2006 and the 'feasibility' phase was completed in December 2008. The outcomes of the reviews were taken forward in an 'implementation' phase with the aim of reducing HMRC's estate by 2010.
25. The reviews looked at initial proposals for areas within each region, considered the impact on customers and included formal consultation with staff and unions.

26. In order to undertake the reviews HMRC offices were divided into three categories of location: urban centres, clusters and 'individual locations'. The urban centres were locations where HMRC already had a major presence across a number of business directorates and employed a significant number of permanent staff. Leeds/Bradford/ShIPLEY was one of these designated urban centres. Urban Centre Reviews were completed between August 2006 and April 2008.
27. 'Individual locations' are towns that are more than 15-16 miles (25km) from other HMRC offices, some of which were identified as being strategic because they provided a geographically based presence to service customers. Ripon was a designated individual location. Individual Location Reviews were completed between March 2008 and December 2008.

Analysis

Exemptions

Section 43(2) Prejudice to commercial interests

28. Section 43(2) provides an exemption from disclosure for information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
29. Section 43(3) provides that the duty to confirm or deny does not arise if compliance with that duty would itself prejudice, or be likely to prejudice, commercial interests.
30. The full text of the exemption can be found in the Legal Annex at the end of this Notice.
31. In its submission to the Commissioner HMRC explained that the Regional Review involved a Private Finance Initiative (PFI) outsourcing deal with a private sector partner. In relying upon section 43 HMRC argued that disclosure of such commercially sensitive information could weaken the competitive position of their outsourcing partner – a private company – and also harm the relationship between HMRC and their partner.
32. The Commissioner's approach when considering prejudice to a third parties commercial interests is that it will not be sufficient for the public authority to speculate regarding any prejudice that may be caused, rather arguments originating from the third party itself will need to be considered.

33. At the time of the complainant's request HMRC consulted with the PFI partner regarding release of the requested information and the partner confirmed that disclosure could prejudice their commercial interests.
34. The Commissioner's view is that the prejudice test is not a weak test and a public authority must be able to point to prejudice which is "real, actual or of substance" and to show some causal link between the potential disclosure and the prejudice. Accordingly the Commissioner's approach to assessing prejudice is as set out by the Tribunal in *Hogan v the ICO and Oxford City Council (EA/2005/0026 and EA/2005/0030)*.
35. In *Hogan* the Tribunal outlined three steps in the application of the prejudice test. Firstly, there is a need to identify the applicable interest(s) within the relevant exemption i.e. ensuring that the prejudice claimed is to the interest stated. In this case prejudice was being claimed to the commercial interests of HMRC's private partner.
36. Secondly, the nature of 'prejudice' being claimed must be considered ie the public authority must be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the latter is not trivial or insignificant. If the prejudice is trivial, for example if the information is already in the public domain, disclosure is unlikely to have any real detrimental or prejudicial effect, or if the nature of the prejudice claimed cannot be adequately linked backed to the disclosure of the information in question, then the exemption cannot be engaged.
37. Finally the likelihood of occurrence of prejudice must be considered. (para 28 to 34). "Likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote, whereas "would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not. Where the level of prejudice has not been specified then, unless there is clear evidence that the higher level should apply, the lower threshold should be used.
38. In relation to information regarding the annual cost per metre square of floor space for all offices included in the Leeds/Bradford/Shiplay urban centre review, that is building-specific cost information, HMRC explained that 19 out of the 22 offices were part of the PFI contract and argued that disclosure of cost information in relation to these offices would reveal the unitary charge paid under the PFI contract.
39. If the price paid for an individual office under the PFI contract was disclosed there would be a real risk that the private partner could not deal with the specific property on fair market terms with a subsequent adverse effect on their profitability.
40. In relation to the three remaining offices, two of which are on direct lease to HMRC and one which is subject to an inter-departmental

arrangement that is not subject to a PFI outsourcing deal, HMRC is content that this information can be disclosed.

41. With respect to the complainant's request for information relating to the detailed breakdown showing how £3.1 million forecast savings brought about by the Leeds/Bradford/Shingley review was arrived at, HMRC confirmed that an estimate of savings was held at the time of the request.
42. This was confirmed to the complainant but, given that this information comprised the annual estate running costs, again HMRC argued that its release would prejudice the commercial interests of its PFI partner. In view of this HMRC had withheld the information citing s43.
43. The Commissioner is aware that the involvement of private sector partners in the financing and delivering of public sector projects and services has become a common feature of public life. In this context public authorities are likely to hold a good deal of information both related to the particular project in which a private partner is involved and more generally to the private partner's business.
44. However just because a public authority holds commercially sensitive information does not always mean that such information will be exempt and it is therefore necessary to consider whether the release of the information would prejudice the private partner's commercial interests.
45. In determining whether or not the disclosure would be likely to cause prejudice, consideration needs to be given to the nature and likelihood of harm that would be caused.
46. The requested information in this instance relates to a PFI contract. PFI is an outsourcing approach where the public sector procures 'services' from the private sector for a long term (typically over 25 years) in return for an annual payment (unitary charge).
47. The PFI partner is engaged in a competitive business which relies to a significant extent on pricing strategies vis-à-vis unitary charges. Unitary charges fixed under a PFI estate contract are subject to negotiation between the public authority and the private partner and do not necessarily bear any relation to market terms in specific locations.
48. The Commissioner accepts that the requested information is commercially sensitive and that its release would be likely to weaken HMRC's PFI partner's position in a competitive environment by revealing its financial position in a way that is detrimental to its commercial interests.
49. Furthermore as HMRC would be likely to be engaging in similar transactions with similar commercial considerations, disclosure of such information relating to one financial transaction might prejudice

HMRC'S commercial interests in subsequent negotiations with a counterparty. This is in line with the Tribunal's findings in *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*.

50. The Commissioner therefore agrees that section 43(2) exemption is engaged in this case.

Public Interest in relation to section 43 exemption

51. Section 43(2) is a qualified exemption and is therefore subject to a public interest test. This requires the Commissioner to determine whether the public interest in maintaining the exemption outweighs that in releasing the information sought.
52. In this instance the complainant was of the view that the public interest served in releasing the requested information outweighed the commercial confidentiality claimed by HMRC under s43 (2).
53. HMRC accepted the need for transparency and accountability for decision making and the spending of public money. In view of this an extensive amount of detailed information had been published regarding the Leeds/Bradford/Shiopley urban centre review and more generally the Regional Review Programme, both within HMRC and externally via the website.
54. HMRC has also only engaged the s43 exemption to withhold annual cost information in relation to 19 of the 22 offices in the Leeds/Bradford/Shiopley review because these offices were under the PFI contract. With respect to information regarding the remaining three offices, HMRC are content for annual cost information to be disclosed.
55. HMRC argued that the requirement for transparency and accountability needs to be weighed against the harm to the commercial interests of their private partner and indeed HMRC, as release of details of the unitary charge could in turn prejudice the operation of the contract itself, potentially damaging HMRC's ability to gain best value for this specific PFI deal.
56. The Commissioner accepts that opinion and notes HMRC's release of information regarding offices not within the PFI contract. He acknowledges the wider interest of the general public in having access to information about how effectively public authorities operate PFI contracts and the more specific interests of the complainant in the cost saving element of this contract.
57. However the Commissioner recognises that there is also a strong public interest in encouraging the wider involvement of the private sector in public procurement, to increase competition. PFI Contracts

are intended to pass risk to the private sector if this provides good value for money.

58. The Commissioner accepts that Government is keen to obtain best value for money in relation to its estates portfolio. Value for money can be best obtained where there is a healthy competitive environment, coupled with mutual trust and confidence between private and public sectors.
59. The Commissioner has also considered the fact that the unitary charge figures in this instance could not be taken as indicative of what other PFI contractors would necessarily pay to HMRC. Therefore there is no wider public interest in disclosure on the basis that the relevant information in this case would inform future value for money decisions.
60. Although the Commissioner is aware that this Regional Review has now finished he considers that the individual costings and identification of unitary charges paid under PFI contracts could have commercial implications for both PFI providers and HMRC's ability to gain best value for money in the future.
61. In view of this, because of the potential damage that might be caused to the private partner in terms of their commercial interests by disclosing the requested information and the potential for a broader impact on the PFI contract as a whole, the greater public interest in this instance is served by maintaining the exemption.

The Decision

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

Steps Required

63. The Commissioner requires no steps to be taken.

Right of Appeal

64. 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

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 22nd day of October 2009

Signed

**Graham Smith
Deputy Commissioner**

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

ANNEX A

The Request

The complainant asked 'Can you please provide me with the following information under the provisions of the Freedom of Information Act:-

1. details of all the lease break possibilities for Ripon Tax Office and every other office included in the Leeds/Bradford/Shiopley urban review centre review.
2. 2006 year's annual cost per meter square floor-space of all of the offices mentioned in point 1.
3. the cost of breaking the leases for the department for all of the offices mentioned in point 1.
4. the cost savings of relocating Ripon staff, following the announced ambition to close that office, to Harrogate rather than Leeds.
5. a breakdown of the setting up and subsequent yearly running costs of points of HMRC face to face contact for each of the towns listed in the Leeds/Bradford/Shiopley urban review centre that are currently earmarked for potential closure
6. a detailed breakdown showing how the £3.1 million forecast savings brought about by the Leeds/Bradford/Shiopley urban review centre was arrived at.
7. what are the projections for excess fares and relocation costs associated with the closure of Harrogate Tax Office for the three years following the closure, and how have they been calculated.

Legal Annex

Section 43 – Trade Secrets and Commercial Interests

Section 43 (1) provides that:

“Information is exempt if it constitutes a trade secret”.

Section 43 (2) provides that:

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

Section 43 (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 the interests mentioned in subsection (2).”