

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 9 June 2011

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

Summary

The complainant requested the costings behind the capital gains tax rate change proposed in the emergency budget of 2010. HMT withheld the information under section 35(1)(a). The Commissioner considers that section 35(1)(a) has been applied appropriately.

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 10 July 2010 the complainant requested the following information:

'Please let me have information and calculations on the costings behind the capital gains tax rate change proposed in the recent emergency budget. The published costings, as I have explored with the press office, do not enable one to get to the bottom of the figures, in particular why the proposed rate of 28% is 'revenue-maximising'. I would like to be able to analyse that further using the other information you hold'.

3. On 21 July 2010 Her Majesty's Treasury (HMT) issued a refusal notice, withholding some information under section 35(1)(a). It also explained the broad methodology and assumptions were publicly available in a

document called "Budget 2010 Policy Costings". However, it explained that it was not publishing the specific rate-setting calculations and formulae used as these were still current as the policy process had not ended with a single announcement.

4. On 30 July 2010 the complainant requested an internal review; on 18 October 2010 HMT confirmed it had carried out an internal review. It provided him with some more information and withheld the rest under section 35(1)(a).

The Investigation

Scope of the case

5. On 6 December 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

Chronology

6. On 15 February 2011 the Commissioner requested the withheld information.
7. On 3 March 2011 HMT responded providing the requested information and further additional arguments.

Analysis

Exemptions

Section 35(1)(a)

8. Section 35(1)(a) states that information held by a government department is exempt if it relates to the formulation or development of government policy. As this is a class based exemption if the information relates to the formulation or development of government policy it falls under this exemption.
9. The full text of section 35 can be found in the Legal Annex at the end of this Notice.
10. The Commissioner must consider whether the withheld information relates to the formulation and development of government policy.
11. In the Commissioner's view, the term 'relates to' should be interpreted broadly to include any information which is concerned with the

formulation or development of the policy in question. It does not have to be information specifically on the formulation or development of that policy.

12. HMT explained that at the time of the request, the withheld information i.e. information about the capital gains tax (CGT) measure was still subject to change. The measure became law on 21 July 2010, when the proposed Finance Bill 2010 received Royal Assent. HMT went on to explain that before the Bill received Royal Assent, it went through three readings in the House of Commons, with committee sittings in between, during which amendments could be proposed and debated. HMT argued therefore that up to the point of the Royal Assent the Budget proposals were still subject to change and therefore the formulation and development of policy was still in progress.
13. The Commissioner has considered the withheld information and is satisfied that it relates to the CGT measure in relation to the 2010 Budget. He therefore finds that section 35(1)(a) can be applied to the information. He also accepts that at the time of the request, Royal Assent had not been granted; therefore albeit that the policy making process was at its final stage, it was still ongoing.

Public interest arguments in favour of disclosing the requested information

14. The Commissioner accepts that there is a strong public interest in transparency and in understanding CGT which is a tax on the gain or profit made when people sell, give away or otherwise dispose of something they own, such as shares or property. He also accepts that disclosure could help build public confidence in the way in which CGT is calculated and applied.
15. The complainant argued that as the policy in question was a settled one and had been on the statute books for some months, the information should be disclosed.
16. Further, the complainant argued that it was in the public interest to be able to test the assertion that 28% was revenue-maximising. In order to do this however, the evidence behind the assertion needed to be disclosed. The complainant also explained that it was hard to see how the policy-making process would be harmed if the requested information was disclosed. He also argued that the policy-making process would be improved if policy makers knew that once policy had been decided, their assumptions and assertions would be tested.

Public interest arguments in favour of maintaining the exemption

17. HMT argued that the information should not be disclosed as it relates to the formulation and development of government policy, in this instance the formulation of tax policy in the context of the 2010 Budget.
18. HMT also argued that as the CGT measure was subject to change at the time of the request this meant that the policy development process was still live. It pointed out that the CGT measure did not become law until 21 July 2010 (though having checked the Parliament website the Commissioner believes this to be 27 July¹), when the Bill received Royal Assent, as explained in paragraph 12.
19. HMT also explained that although there were some tables of figures in the advice provided to the Chancellor, these were numerical representations of officials' judgements rather than statistical information.
20. HMT argued that both Ministers and officials have to be able to do some policy thinking in private. The Commissioner considers this to be a 'safe space' argument. These arguments are about the need for a safe space to formulate policy, debate live issues and reach decisions without being hindered by external comment and/or media comment.
21. With regard to the effect of disclosing the requested information, HMT also argued disclosure would have a 'chilling effect'. It recognised that there was a strong public interest in ensuring that policy formulation and development in relation to taxation decisions is effective. However HMT argued that the disclosure of sensitive policy advice poses dangers for good decision-making; and given the importance of the Budget process the public interest in officials being able to discuss options and provide frank advice in confidence and in an uninhibited manner is of critical importance.
22. It went on to explain that if this was not the case, Ministers and their officials could become more risk-adverse, less innovative in policy formulation and less likely to challenge accepted wisdom or vested interests. HMT also argued that disclosure would mean that Ministers and their officials would be less likely to propose options that interest groups might object to.

¹ <http://services.parliament.uk/bills/2010-11/finance/stages.html>

23. HMT also explained that in the context of the Budget, which is of critical importance to the health of the economy, it considered that the potential harm from any 'chilling effect' is greater than in day to day policy making.
24. Furthermore, HMT also explained that Ministers continue to keep CGT under review from Budget to Budget with a view to striking the best possible balance between the revenue-raising focus and the Government's objectives for growth.
25. HMT also argued that while it was reasonable to publish any factual analysis underpinning the decisions announced, which it had done by publishing the Budget 2010 costings, publishing the policy advice would prejudice continuing policy development.
26. With regard to the scrutiny of decisions, HMT explained that taxation decisions are subject to both scrutiny and comment where Ministers and officials have to defend and/or promote the overall packages of measures.

Balance of the public interest arguments

27. The Commissioner notes the complainant's comment that at the time of his complaint, the Bill had been on the statute books for some months. However, the Commissioner has to consider the circumstances at the time of the request and notes that at that time the Bill had not yet received Royal Assent and was therefore not on the statute books.
28. The Commissioner recognises that there is a public interest in openness and accountability regarding tax issues. In this particular case, the Commissioner accepts that there is a strong public interest in knowing more about CGT as it potentially affects a large number of people. CGT is also an important tool in balancing the nation's finances.
29. The Commissioner notes that HMT initially explained to the complainant that it had published relevant information in the form of a document on its website called "Budget 2010 Policy Costings". It went on to explain that the document contained the assumptions and methodologies underlying the costings.
30. Further the Commissioner notes HMT's arguments regarding both the need for a safe space to consider various options and the chilling effect of disclosure of the requested information.

31. When considering the safe space argument, the Commissioner noted the views of the First-tier Tribunal (the Tribunal) in *Department for Education and Skills v the ICO & The Evening Standard (EA/2006/0006)*. This case dealt with the importance of the safe space argument and stated:

"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. Ministers and officials are entitled to time and space, in some instances considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy." (para 75).

32. Therefore when considering the safe space argument, it is the Commissioner's view that he needs to look at the age of the requested information and whether the formulation and development of the policy in question was still underway at the time of the request.
33. In this case the Commissioner notes that the withheld information was created close to the time of the request – one document is dated 14 May 2010, the other document is dated 11 June 2010.
34. The Commissioner then considered whether the policy making process was live and whether the requested information related directly to that policy making. He noted the comments from the Tribunal in *Department for Business, Enterprise and Regulatory Reform v the ICO & Friends of the Earth (EA/2007/0072)* regarding the need for a private 'thinking' space:

"This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public".

35. The Commissioner is satisfied that in this case the policy making process was live as Royal Assent was not granted until 27 July 2010. The Commissioner notes that amendment papers related to the Bill were still being published on 15 July², clearly indicating that amendments, and therefore policy activity, was still live. He is also satisfied that the requested information relates directly to the

² <http://services.parliament.uk/bills/2010-11/finance/documents.html>

formulation and development of policy making process. The argument that a safe space was still needed to protect the policy making process is a relevant one

36. The Commissioner considered the argument put forward by HMT that figures included in the withheld information, were numerical representations rather than statistical information. Although some of the information may be statistical information the Commissioner has not made a decision on this point as he notes the wording in section 35(2) which provides that once a decision has been taken about government policy, any statistical information used to provide an informed background to the decision cannot be regarded for the purposes of either section 35(1)(a) or (b). In this case as the Bill had not received Royal Assent, the Commissioner considers that the policy making process was live at the time of the request.
37. The Commissioner also notes the Tribunal decision in *Department for Education and Skills v the ICO & The Evening Standard (EA/2006/0006)* as discussed in paragraph 31. He notes that the Tribunal acknowledged that the timing of a request was of paramount importance when deciding whether information should be disclosed. The Tribunal also noted that it was 'highly unlikely' that it would be in the public interest to disclose discussions of policy options during the process of policy formulation unless it would expose for example wrongdoing within government. The Commissioner notes that there has been no suggestion of wrongdoing in the present case.
38. It is the Commissioner's view that it is in the public interest for government to be able to share and discuss relevant views and opinions. It should also be able to develop these views and opinions in a safe space, at the time it is formulating the policy in question. In this case the judgments that were feeding into the costings and the explanatory information were reflective of views and policy options being considered.
39. The Commissioner then went on to consider the chilling effect argument. He notes the comments made by the Tribunal in *Department for Education and Skills v ICO & The Evening Standard (EA/2006/0006)* which dealt with this:

"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case."

40. In the present case, the Commissioner notes that the withheld information is made up of two documents. He is satisfied that the information relates to the GCT measure and refers to the proposed rate of 28%.
41. The Commissioner accepts that there is a strong public interest in tax matters being open and transparent. However, he also accepts that there is a strong public interest in ensuring that policy formulation and development in relation to any tax matters should be effective.
42. The Commissioner will often reject 'chilling effect' arguments if they are deployed in a general manner with little reference to the specifics of the case. However, he notes that in this particular case the policy process was still ongoing. He further notes HMT's comments about the ongoing nature of CGT policy issues related to the budget, whilst this factor is not decisive it illustrates the ongoing importance of the policy issue and how disclosure might impact on future processes and not just the process in question. The Commissioner also accepts that in order for any such package to be constructed as a Budget, Ministers and their officials have to be able to provide advice in confidence on policy matters. The Commissioner also notes the importance of the 2010 Budget to the economic stability of the UK.
43. The Commissioner has considered all of the arguments. He also notes that in an earlier case concerning HMT and tax issues with regard to pensions and the 1997 Budget, he ordered disclosure of the requested information. However, the Commissioner also notes that in this case the information in question was approximately eight years old.
44. Given the timing of the request, the Commissioner accepts HMT's arguments regarding the need for a safe space and the chilling effect of disclosure at that time and has accorded them significant weight.
45. The Commissioner therefore accepts that in this case, the public interest in maintaining section 35(1)(a) outweighs the public interest in disclosure.

The Decision

46. The Commissioner's decision is that HMT dealt with the request for information in accordance with the Act.

Steps Required

47. The Commissioner requires no steps to be taken.

Other matters

48. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

- Internal review: The Commissioner notes that the complainant requested an internal review on 21 July 2010 and HMT did not confirm it had carried this out until 18 October 2010.

The Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. There may be a small number of cases which involve exceptional circumstances where it may be reasonable to take longer. In those circumstances, the public authority should, as a matter of good practice, notify the requester and explain why more time is needed.

It is the Commissioner's view that in no case should the total time taken exceed 40 working days. In such cases we would expect a public authority to be able to demonstrate that it had commenced the review procedure promptly following receipt of the request for review and had actively worked on the review throughout that period.

Right of Appeal

49. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

50. 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.

51. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 9th day of June 2011

Signed

Steve Wood
Head of Policy delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

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-

- (e) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (f) 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-

- (g) between Ministers of the Crown,
- (h) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (i) 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.