

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 April 2012

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

Decision (including any steps ordered)

1. The complainant requested information from HM Treasury ("the Treasury") relating to the change in the bank levy announced in the Chancellor of the Exchequer's Budget 2011 speech and his claim that this change would offset the gains to banks from the reduction in Corporation Tax. The Treasury applied section 35(1)(a) (formulation and development of government policy) to all of the information that it withheld and also applied section 43(2) (prejudice to commercial interests) to part of it. The Commissioner's decision is that the Treasury has correctly applied section 35(1)(a) to all of the withheld information. He therefore does not require the Treasury to take any further steps to ensure compliance with the legislation.

Request and response

2. On 26 April 2011, the complainant wrote to the Treasury and requested information in the following terms:
 - (i) all records on the Chancellor of the Exchequer's claim in his Budget 2011 speech that the adjustment to the bank levy rate will offset the gains to banks from the cut in Corporation Tax announced in Budget 2011.*
 - (ii) all records relating to the change in the bank levy announced in Budget 2011, including all correspondence between HM Treasury ministers, officials and advisors.*
3. The Treasury responded on 26 May 2011. It refused the request under section 35(1)(a) of FOIA.

4. The complainant requested an internal review on 6 June 2011. The Treasury wrote to the complainant on 27 October 2011 with the outcome of the review. It upheld its decision to refuse to disclose the requested information under section 35(1)(a). In addition, the review concluded that some of the information was also exempt under section 43(2).

Scope of the case

5. The complainant contacted the Commissioner to complain about the Treasury's failure to disclose the information that he had requested.
6. The Commissioner considered whether the Treasury was entitled to withhold the requested information.

Reasons for decision

Section 35(1)(a)

7. Section 35(1)(a) of FOIA states 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

8. The Commissioner initially considered whether the withheld information relates to the formulation or development of government policy.
9. 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 relevant policy. It does not have to be information specifically on the formulation or development of that policy.
10. The Treasury explained that at Budget 2010, the Government announced staged cuts in the rates of Corporation Tax between 2011 and 2014. In the same Budget, the Government announced a plan to introduce a levy on banks' balance sheets ("the bank levy") from January 2011. As a consequence of the combined effect of these two measures, the banking sector was expected to face a higher overall tax burden.

11. In Budget 2011, the Chancellor announced an additional one pence reduction in the rate of Corporation Tax in 2011. This rate cut was only agreed late in the Budget process. In the same Budget statement, the Chancellor stated his intention to increase the bank levy rate to offset the lower amount of tax being paid by the banking sector as a result of the reduction in the rate of Corporation Tax.
12. The Treasury claimed that the withheld information related to the formulation and development of tax policy in the context of Budget 2011. Having viewed the information, the Commissioner accepts that this is the case and that therefore the exemption in section 35(1)(a) is engaged. As this is a qualified exemption, he went on to consider whether the public interest in maintaining the exemption outweighed the public interest in disclosing the information at the time that the request was made.

Public interest arguments in favour of disclosing the information

13. The Commissioner acknowledges that there is a strong public interest in transparency in relation to the decisions taken by government and also in the public being able to understand the basis on which those decisions have been taken. The financial support provided in recent years to the banking sector and the levels of tax being paid by banks is clearly an issue that has aroused a lot of public debate.
14. As regards the information in question in this case, there is a significant public interest in the public understanding how the Government has formulated its policy in this area and being able to scrutinise the basis for the Government's statement that the amount of additional tax that it expected to receive as a result of the proposed change to the bank levy would offset the impact on banks of the proposed reductions in Corporation Tax. This could be helpful in ensuring that the proposed policy is properly planned, sufficiently robust and takes into account all the relevant factors.
15. There is also a public interest in ensuring that Government Ministers can be held to account for public statements that they make. Disclosure of the withheld information would allow the public to form its own view as to the Government's statement that the impact of the increase in the bank levy would offset the tax benefits that the banks received from the reductions in Corporation Tax.

Public interest arguments in favour of maintaining the exemption

16. The Treasury argued that the information related to the formulation and development of government policy in relation to the bank levy in the context of Budget 2011. The final outcome of the proposed measures

regarding the bank levy was not determined until the Finance Bill became law.

17. The Treasury explained that before it receives the Royal Assent, the Finance Bill goes through three readings in the House of Commons, with Committee stages in between, during which amendments can be proposed and debated. Therefore, up to the point of Royal Assent, proposals are still potentially subject to change. The last amendments to the Bill, including amendments to schedule 19, which provided for the bank levy, were not tabled until 8 July 2011. The Bill received the Royal Assent on 19 July 2011, nearly three months after the request was received. The Treasury therefore argued that the policy development process in relation to the bank levy was still very much live at the time of the request.
18. The Treasury referred to a decision notice issued by the Commissioner (FS50363547) in relation to a request to it for information related to changes to Capital Gains Tax proposed in Budget 2010. The Commissioner had upheld its application of section 35 to the requested information and had accepted that as the legislation for the proposed changes had yet to receive the Royal Assent, and amendments were still being tabled to the legislation at the time of the request, the relevant policy was still under development.
19. In applying section 35, the Treasury explained that it was seeking to protect the policy space needed for the effective consideration of Budget tax policy options. This is sometimes referred to as a 'safe space' argument which concerns the need for Ministers and officials to have a safe space to formulate policy, debate live issues and reach decisions without being hindered by external and/or media comment.
20. In addition, it argued that as the requested information is in close proximity to ongoing policy streams, it considered that its release would be likely to have a chilling effect on the further development of policy in these areas. Release of the information could lead to officials discussing options in a more guarded way or could impact on the quality of advice being provided.
21. The Treasury was of the view that the disclosure of information on this aspect of tax policy would not only impact on future policy development in this specific area, but would also impact adversely on free and frank consideration of tax and benefit policies more widely. In its view, it is essential, and in the public interest, that government is able to plan and deliver its tax and benefit policies efficiently and effectively, linking initiatives in different areas together as appropriate. There is a strong public interest in effective policy making which it considered outweighed the public interest in release in this case. It also took the view that the

quality of policy advice to Ministers generally is likely to be weakened by disclosure, thus undermining the Government's ability to plan its tax and fiscal policies effectively.

22. The Treasury also considered that there were particular sensitivities regarding the release of this information as it would put undue pressure on the Government to further develop policy in relation to the sensitive area of the tax treatment of banks, against the background of public debate, rather than on the basis of reasoned analysis.

Balance of the public interest arguments

23. When applying the public interest test, the Commissioner has to consider the circumstances that existed at the time that the request was made. He notes that at that time provisions contained in the Finance Bill related to the bank levy were still subject to possible amendment and it would have been anticipated that it would be a considerable time before they would receive the Royal Assent.
24. The Commissioner recognises the public interest in openness, transparency and accountability regarding tax issues, particularly where information relates to an issue which has created a lot of public debate, in this case the overall contribution that the banks are making to tax revenues.
25. The Treasury has argued that there is a significant public interest in protecting a safe space to allow it to consider the options in formulating and developing its policy in this area and also in preventing the chilling effect on free and frank discussions that might occur from disclosure.
26. The Commissioner notes the views of the Information Tribunal in *Department for Education and Skills v ICO and The Evening Standard (EA/2006/0006)* in relation to the safe space argument that:

"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)

27. In light of the above, when considering the safe space argument, the Commissioner will 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.

28. As regard the age of the requested information, the Commissioner notes that the documents falling within the scope of the request came into existence only a short time before the Chancellor of the Exchequer made his Budget 2011 speech on 23 March 2011 and only a relatively short time before the request was made on 26 April 2011.
29. The Commissioner also considered whether the policy making process was live at the time of the request and whether the requested information related directly to that process.
30. The complainant argued that the request did not relate to the drafting of the Finance Act 2011 but to an announcement that was made public in March 2011 which subsequently formed a small part of the Finance Act 2011.
31. He also argued that the amendments made to the Finance Bill in 2011 between the Budget speech and its receipt of the Royal Assent that related to the bank levy were purely for clarification purposes, designed to ensure that the policy announced in Budget 2011 operated as originally intended. He made reference to the Treasury's citation of the Commissioner's decision notice FS50363547, which related to the formulation of Capital Gains Tax policy in 2010, and argued that this should be treated as being specific to its facts and not as general authority that no policy of whatever nature can be considered fully formed and developed until the enacting bill becomes law. He pointed out that the tax changes dealt with in FS50363547 were much wider in scope requiring significant Parliamentary time whilst the bank levy was, as a matter of fact (and on the basis of publicly available information), fully developed and formed by the time of the request in April 2011, and certainly by the time of the Treasury's refusal notice.
32. In relation to the Treasury's reliance on the "safe space" argument, the complainant pointed to the decision of the Information Tribunal in the *DBERR v ICO and Friends of the Earth (EA/2007/0072)* in which it stated in relation to the need for a private thinking space that:

"This public interest is strongest at the early stage 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."
33. The complainant contended that, as the policy in question was made public prior to the request, the Treasury had applied undue weight to the safe space argument.
34. It could be argued, as the complainant has done, that the policy making process in relation to the bank levy was complete when the Chancellor

made his announcement in his Budget 2011 speech proposing to change the bank levy to offset any reduction in Corporation Tax payable by banks. However, the Commissioner notes that any such proposal could not be introduced and implemented until it had become law through the passing of the Finance Bill. On the day of the request, the Finance Bill had just passed its second reading in the House of Commons. At that point, the policy might still have had to go through significant further development and change before becoming law. The Commissioner therefore regards the policy making process in this particular case as still very much live at the time of the request and that it continued to be so until the Finance Bill received the Royal Assent on 19 July 2011.

35. The Commissioner, having reviewed the withheld information, also accepts that it relates directly to the formulation and development of the policy in question. He is therefore satisfied that the argument that a safe space was still needed at the time of the request to protect the policy making process is a relevant one.
36. The Commissioner believes that there is a significant public interest in government having a safe space to formulate policy, debate “live issues” and reach decisions without being hindered by external comment and media involvement.
37. The Commissioner accepts that the timing of a request is of paramount importance when determining whether information that relates to the formulation and development of government policy should be released. He notes that in this case the request was made only a relatively short time after the documents falling within the scope of the request were created and well before the Finance Bill would have been expected to receive the Royal Assent. He has therefore concluded that the policy process was still live at the time of the request. In light of this, he has determined that the public interest in protecting the safe space at that time was sufficient to outweigh the public interest in disclosure. Consequently, he has determined that the Treasury were entitled to withhold the requested information under section 35(1)(a).
38. As the Commissioner has accepted that in this case the public interest in protecting a safe space for the formulation and development of government policy justified the withholding of the requested information, he has not gone on to consider the merits of the Treasury’s arguments about the potential chilling effect of disclosure. In addition, as he has concluded that section 35 was correctly applied to all of the withheld information, he has not considered the Treasury’s application of section 43 to part of that information.

Other matters

39. The Commissioner's guidance on internal reviews is that public authorities should ensure that they take no longer than 20 working days to complete in most cases or 40 working days in exceptional circumstances. The Commissioner notes that the complainant requested that the Treasury carry out an internal review on 6 June 2011. The Treasury provided its response on 27 October 2011. It therefore took over four months to complete the internal review.
40. The Commissioner notes the Treasury has acknowledged that the time taken to conclude the internal review was unacceptable. It explained that the delay was caused by resource pressures and that it had recently introduced changes to the review process which it anticipated will result in more timely review responses. The Commissioner expects that it will ensure that in future internal reviews are normally carried out within 20 working days and that none take longer than 40 working days to complete.

Right of appeal

41. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

42. 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.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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