

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 April 2018

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

Decision (including any steps ordered)

1. The complainant has requested copies of emails sent and received by the Director General for Tax and Welfare within a specified period in relation to the changes announced in Spring Budget 2017 to National Insurance contributions paid by the self-employed. The public authority has withheld the information held within the scope of the request on the basis of the exemptions at sections 35(1)(a), 36(2)(b)(i) and (ii) and 40(2) FOIA.
2. The Commissioner's decision is that the public authority was entitled to rely on the exemption at section 35(1)(a) FOIA.
3. No steps required.

Request and response

4. The complainant submitted a request for information to the public authority on 7 April 2017 in the following terms:

"....Please provide copies of all emails sent and received by James Bowler¹ after 1pm on March 8, 2017, up to 6pm on March 9, 2017, which relate in any way to changes in National Insurance rates announced in Wednesday's budget. Please include all attachments sent and received with the emails...."
5. The public authority provided its response on 10 May 2017. It confirmed it held information within the scope of the request which it considered exempt from disclosure on the basis of section 35(1)(a) FOIA.
6. The complainant requested an internal review on 15 June 2017. He disagreed with the decision to rely on section 35(1)(a) particularly on the grounds that the withheld information ought to be disclosed in the public interest.
7. Following an internal review the public authority wrote to the complainant on 11 July 2017. The review upheld the application of section 35(1)(a) and additionally relied on the exemption at section 40(2) FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 19 July 2017 to complain about the way his request for information had been handled, specifically the decision to withhold the information held within the scope of his request. The Commissioner has referred to his submissions at the relevant parts of her analysis below.
9. During the course of the investigation the public authority sought to also rely on the exemptions at section 36(2)(b)(i), (ii) and 36(2)(c) FOIA in the alternative to the exemption at section 35(1)(a).²

¹ Director General for Tax and Welfare at HM Treasury

² The exemptions at section 35 and section 36 FOIA are mutually exclusive. However, by virtue of section 36(1)(a), the exemptions at section 36 can only apply to information which is not exempt under section 35.

10. The scope of the investigation therefore was to determine whether the public authority was entitled to rely on section 35(1)(a), section 36(2)(b) and (c), and section 40(2).

Reasons for decision

Background

11. The budget on 8 March 2017 announced that the main rate of Class 4 National Insurance Contributions (NICs) would increase from 9% to 10% in April 2018, and to 11% in April 2019. The rationale for the policy was to reduce the differential between the rates paid by employees and those paid by the self-employed in order to reflect that since April 2016 the self-employed also have access to the same State Pension as employees.
12. However, on 15 March 2017, faced with criticisms of the policy, the Chancellor of the Exchequer sent a letter to Conservative MPs informing them that the Government had decided not to proceed with the Class 4 NICs measure set out in the budget.³ He also made a statement to the House of Commons confirming same.⁴

Section 35(1)(a)

13. All of the information held within the scope of the request was withheld by the public authority on the basis of section 35(1)(a). The exemption states:
 1. "Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-
 - a. The formulation or development of government policy...."⁵

³ <http://www.bbc.co.uk/news/uk-politics-39281754>

⁴ <https://hansard.parliament.uk/Commons/2017-03-15/debates/8C87BBE6-1F11-44F8-A01E-1D99ECBD0ACA/Class4NationalInsuranceContributions>

⁵ The full text of section 35 can be found here:
<http://www.legislation.gov.uk/ukpga/2000/36/section/35>

Is the exemption engaged?

14. The complainant has not disputed the public authority's contention that the withheld information relates to government policy.
15. The public authority has submitted that the withheld information relates to the formulation and development of government policy on rates of NICs for the self-employed. It submitted that the information relates to the government's process in formulating a briefing about the policy which included fine-tuning the details of the policy and developing an official response in light of the reaction to the announcement.
16. The Commissioner considers that the term 'relates to' in section 35 can be interpreted broadly within the meaning of the class based exemption.⁶ This means that the information does not itself have to be created as part of the activity. Any significant link between the information and the activity is enough.
17. Having inspected the withheld information the Commissioner is satisfied it relates to the development of the policy on rates of NICs for the self-employed. The Commissioner therefore finds that the public authority was entitled to engage the exemption at section 35(1)(a).

Public interest test

18. The exemption is however qualified by the public interest test set out in section 2(2)(b) FOIA. The Commissioner has therefore considered whether in all the circumstances of the case, the public interest in maintaining the exemption at section 35(1)(a) outweighs the public interest in disclosing the withheld information.
19. The complainant's submission on the public interest in disclosure is summarised below.
20. He pointed out that the withheld information relates to the period very shortly before the Government's announcement (not to proceed with the policy to increase NICs rates for the self-employed) and shortly afterwards. Therefore, in his view, the policy had been formed "by the time of the first communication captured."

⁶ Classed based exemptions, as opposed to prejudiced based exemptions, do not require an element of harm before they can be engaged. The relevant information simply has to fall within the class described.

21. Furthermore, how the policy was dealt with is a matter of compelling and significant public interest. It was so controversial it had to be quickly altered "- one of several U-turns for the Government." It is paramount that the public has access to information showing how the most senior civil servant in this area dealt with the policy shortly before its announcement and how he reacted. How it was communicated, to whom and what was the reaction? There is a compelling public interest in transparency surrounding policy and this controversial decision which impacted millions of taxpayers must be subject to public scrutiny.
22. The public authority's submission on the balance of the public interest is summarised below.
23. Significant to its consideration of where the balance of the public interest lies is that in its view that the NICs measure was still live at the time of the request in April 2017. It submitted that the development of the policy was ongoing after it was announced in the Budget on 8 March 2017 and after the Chancellor's statement on 15 March 2017. It argued that it was clear from the statement that the Government would not simply be dropping the measure but that a further review was underway to consider it again. In support of this view, it drew the Commissioner's attention to the following excerpt from the statement:

"The measures I announced in the Budget sought to reflect more fairly the differences in entitlement in the contributions made by the self-employed. The Government continue to believe that addressing this unfairness is the right approach....."

I undertook in the Budget speech to consult over the summer on options to address the principal outstanding area of difference in benefit entitlement between the employed and the self-employed: parental benefits. We will go ahead with that review, but we now intend to widen the exercise to look at the other areas of difference in treatment, alongside the Government's consideration of the forthcoming report by Matthew Taylor, chief executive of the RSA, on the implications for employment rights of different ways of working in a rapidly changing economy. Once we have completed these pieces of work, the Government will set out how we intend to take forward and fund reforms in this area....."

24. In favour of disclosure, the public authority acknowledged the general public interest in promoting openness in the way in which public authorities manage high profile policy areas. More specifically, it acknowledged that there was a public interest in disclosure in view of the large number of people who were affected by the measure. Disclosure would also inform public debates on the how the tax base is funded.

25. In favour of withholding the information, the public authority pointed out that the exemption is designed to protect the internal deliberative process as it relates to policy making. It is designed to ensure that the possibility of public exposure does not deter from full, candid and proper deliberation of policy formulation and development, including the exploration of options, keeping of detailed records and the taking of difficult decisions.
26. It therefore argued that it was in the public interest for officials to have a private thinking space to discuss and consider all aspects of a policy in the immediate aftermath of a Budget announcement. This includes not only internal discussions within the public authority but also with officials in other parts of government. Premature disclosure could prejudice good working relationships, the neutrality of civil servants and, ultimately, the quality of decision making. It submitted that this safe space was required because the development of the policy remains ongoing following the Chancellor's statement.
27. Furthermore, disclosure of the withheld information would inhibit the free and frank exchange of views between officials and would inhibit the free and frank provision of advice to Ministers in future.
28. The public authority therefore concluded that on balance the public interest in maintaining the exemption outweighs that in favour of disclosure.

Balance of the public interest

29. The Commissioner considers the timing of the request to be very important in the circumstances of this case and more generally with respect to the balance of the public interest in relation to the application of section 35(1)(a). This is because, in her view, if information reveals details of policy options and the policy formulation or development process is still ongoing at the time a request for that information is received, the public interest in maintaining a safe space and in not inhibiting free and frank discussions⁷ will carry significant weight. The public interest in preserving a safe space for deliberation is however likely to carry less weight once the policy process is no longer live. The importance of maintaining a safe space starts to wane once the policy has been finalised and announced but that may not necessarily be the case with respect to a chilling effect on future related deliberations.

⁷ Otherwise referred to as a "chilling effect".

30. The key question for the Commissioner therefore is whether at the time of the request, the policy process with respect to the NICs measure was complete and the policy decision itself finalised. It is generally a question of fact, depending on the circumstances of each case, whether the policy formulation or development process is complete.
31. It is clear that the announcement of the measure in the Budget on 8 March 2017 meant that the decision had been finalised and consequently that the policy process had wound down considerably. Having seen the withheld information, in the Commissioner's view, development of the government's policy on the NICs measure was restarted on 8 March following the criticisms in the immediate aftermath of the announcement. More significantly, on 15 March 2017, the Chancellor, in announcing the decision not to proceed with the measure suggested that it would be included as part of a wider review to address areas of differences in the tax treatment and benefit entitlements of those who are employed and those who are self-employed.
32. The Chancellor's statement was not definitive that the NICs measure would form part of the review. Indeed, the Commissioner notes that the Chancellor also announced that there would be no increases in NICs rates in this Parliament. However, the statement does not specifically preclude a reconsideration of the measure in the wider review either. In the Commissioner's view, it is more probable than not that a review of the differentials between the tax treatment and benefit entitlements of the employed and the self-employed would include their rates of NICs. Therefore, in light of the Chancellor's statement, the Commissioner has concluded that the policy development process with respect to the NICs measure was not complete at the time of the request in April 2017. The announcement of the measure in the Budget signalled the completion of any significant aspects of the policy development process at the time because the announcement was a precursor to implementation. However, the decision to withdraw the measure and incorporate its policy objective into the wider review restarted the policy development process in the Commissioner's view.
33. In light of this conclusion the Commissioner accepts that there is a public interest in maintaining a safe space for officials to debate these issues away from external interference and distraction. The NICs measure was so controversial that it was reversed following its announcement. Therefore, disclosure of discussions by officials with respect to the development and implementation of the measure which are likely to be pertinent to the wider review announced by the Chancellor could be a source of distraction to the review. However, given that by all indications the review had not commenced its work in April 2017, the Commissioner does not consider that this public interest was significant. There was hardly a need for a safe space to deliberate

on a measure that had been withdrawn, and less need for a safe space to consider its objectives in the context of the wider review which it appears had yet to commence.

34. The Commissioner has however attached significant weight to the public interest in free and frank debates in relation to the issues pertinent to the review. The Commissioner is satisfied that releasing the withheld discussions is likely to inhibit further debates pursuant to the review. Given that for all intents and purposes the NICs measure remains a live issue, disclosure could have a chilling effect on further debates in the future. Officials are less likely to express themselves candidly pursuant to the review if they are criticised for their views following the negative reaction to the announcement of the measure. Such an outcome is highly likely given the controversy generated by the announcement. Inhibiting the ability of officials to express themselves freely and frankly will affect the quality of the review and consequently the quality of policy decisions taken pursuant to the outcome of the review.
35. Having balanced these factors against the strong public interest in transparency with regards to all of the factors considered before the decision was taken not to proceed with the measure, the Commissioner has concluded that there is a stronger public interest in not disclosing the withheld information particularly in view of the likelihood of a chilling effect on related discussions in future.
36. The public authority was therefore entitled to conclude that in all the circumstances of the case the public interest in maintaining the exemption outweighed the public interest in disclosing the withheld information.
37. In view of her decision, the Commissioner has not considered the applicability of the remaining exemptions.

Right of appeal

38. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

39. 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.
40. 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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