

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 January 2014

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

Decision (including any steps ordered)

1. The complainant has requested HMT to disclose all details and copies of the government's projections of the likely behavioural effects on companies of the controlled foreign company (CFC) reforms introduced in Budget 2012. HMT responded and refused to disclose the requested information under section 35 of the FOIA.
2. The Commissioner has reviewed the requested information and he has concluded that HMT has acted appropriately by refusing to disclose it under section 35 of the FOIA.
3. As he is satisfied that section 35 of the FOIA applies, he requires no further action to be taken.

Request and response

4. On 4 April 2012, the complainant wrote to HMT and requested information in the following terms:

"...all details and copies of the government's projections of the likely behavioural effects on companies of the CFC reforms introduced in Budget 2012. Please break these projections down by sector where possible.

In particular...figures for the number of firms expected to either a) stay in the UK when they were at risk of leaving and/or b) move to the UK as a result of the CFC reforms.

I am particularly looking for figures relating to the insurance sector and/or financial services generally if these are available.

If you have not worked out your costings by numbers of firms but by predicted revenue from stayers or immigrant firms please supply these figures by sector.”

5. HMT responded on 8 May 2012 informing the complainant that it considered the requested information was exempt from disclosure under section 35 of the FOIA. However, it required further time to consider the public interest and advised the complainant that it would write to her again in due course.
6. Despite reminders of 20 July, 26 September and a complaint to the Commissioner on 27 September 2012, HMT did not respond.
7. HMT finally responded on 10 January 2013. It informed the complainant that it considered the requested information was exempt from disclosure under section 35 of the FOIA. With regards to the public interest test, it advised the complainant that it had considered the arguments for and against disclosure but felt the public interest rested in maintaining the exemption.
8. The complainant requested an internal review on 17 January 2013.
9. HMT responded on 15 April 2013. It upheld its previous decision to refuse the request under section 35 of the FOIA.

Scope of the case

10. The complainant made a second complaint to the Commissioner on 28 June 2013. The complainant specifically stated that she was unhappy with the length of time HMT had taken to respond to her request and felt HMT had inappropriately relied on section 35 of FOIA. She confirmed that she believes there is a huge public interest in the requested information and therefore it should be disclosed.
11. HMT confirmed that it hold extracts from two notes prepared by HMRC setting out the final costings and underlying methodology for the Budget 2012 CFC reforms. These extracts have been supplied to the Commissioner – one is 16 pages long and one is 12 pages long.
12. The Commissioner has considered the application of section 35 of the FOIA to these two documents.

Background

13. A controlled foreign company (CFC) is an overseas company controlled by United Kingdom resident companies or individuals. The CFC rules were first introduced in the UK in 1984 and are anti-avoidance rules designed to protect the UK Exchequer. They are targeted at companies which artificially divert UK profits to low tax/no tax territories or to other favourable overseas tax regimes to reduce their UK tax liabilities. Over the years governments have amended the UK CFC rules to close loopholes and to keep the scope of the legislation in step with changes in how multinational businesses operate and are organised.
14. The rules introduced in Budget 2012 are intended to reflect the way that business operates in the current global economy. The notes HMT holds (withheld information) detail the methodology and key assumptions used to produce the Budget 2012 costing for this measure. The notes were prepared by HMRC in January and March 2012 for discussion with the Office of Budget Responsibility (OBR) (OBR was set up in 2010 to analyse the UK's public finances) to inform OBR's forecast of public finances and the economy. The notes were amended by the OBR in March 2012.

Reasons for decision

15. Section 35 of the FOIA 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 classed based exemption, if the information relates to the formulation or development of government policy it falls under this exemption.
16. The Commissioner must consider whether the withheld information relates to the formulation and development of government policy.
17. It is the Commissioner's view that 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.
18. HMT confirmed that the requested information relates to the formulation of tax policy in the context of Budget 2012 and that the development of the CFC policy was still in progress at the time of the complainant's request. HMT said that the changes to the CFC regime proposed in Budget 2012 did not become law until 17 July 2012, when the 2012 Finance Bill received Royal Assent. Before the Bill received Royal Assent,

it went through readings in both the House of Commons and the House of Lords, with committee sitting between, during which amendments were proposed and debated. Up to the point of Royal Assent, Budget proposals are subject to change.

19. HMT referred to a previous decision the Commissioner made on a similar case – case reference FS50363547. It stated that the Commissioner agreed in this case that as Royal Assent had not been granted, the policy making process was still ongoing even though this process was in its final stages.
20. The Commissioner has reviewed the requested information. He is satisfied that the withheld information relates to the CFC reforms proposed in Budget 2012 and the development of revised CFC policy. He therefore finds that section 35(1) of the FOIA can be applied to this information. As he previously outlined in his decision notice for case reference FS50363547, the Commissioner also accepts that at the time of this request, Royal Assent had not been granted. Therefore, although the policy making process was in its final stages, it was still ongoing.
21. The decision notice for case reference FS50363547 is available on the Commissioner's website and via the following link:
http://search.ico.org.uk/ico/search/decisionnotice#dn_searchTop
22. As the Commissioner is satisfied that section 35(1) of the FOIA applies in this case, it is now necessary to go on to consider the public interest test.

Public interest test

23. HMT stated that it recognised the general public interest in transparency and accountability around government decisions and the public interest in information being released to enable the general public to understand more clearly why particular decisions have been made. It also acknowledged that disclosure can aid public engagement which can in turn ensure the quality and successful implementation of policy.
24. HMT confirmed that it also accepted that there is a strong public interest in the release of information regarding tax and spending decisions and the need to account for Budget decision. It said that it felt this was particularly acute in relation to matters of public finance and taxation.
25. However, it advised that it has already published detailed information to account for its actions in the form of a Tax Information and Impact Note. This note includes the key elements of the proposed changes and a summary of impacts which includes the economic impact and the impact of business and on the Exchequer. It explained that the

information in the internal costing notes is summarised and presented in a standardised format for each policy in the overall policy costing document that it published alongside the Budget.

26. HMT argued that it considers the published information satisfies to a large extent the public interest in understanding the effectiveness of these measures.
27. It also argued that it felt the public interest in maintaining this exemption is more prevalent in this case. HMT stated that it considered there is a strong public interest in ensuring that the policy development process is effective. It felt this is particularly important in cases relating to the development of policies to combat tax avoidance schemes. Disclosure of the requested information would pose great dangers for good decision making as well as more specific detriment in relation to the activities the government is trying to prevent.
28. Taxation impacts on the competitiveness of the UK as a location for international business. The release of advice covering the behavioural impact of tax measures would be detrimental, as disclosure would identify concerns that HMRC have over the behaviour of certain sectors and indicate vulnerabilities in the new CFC rules in these areas. Companies would be made aware of the detailed thinking behind the policy costings, which would be likely to influence their behaviour and assist them in avoiding present and future tax liabilities. HMT stated that such consequences of disclosure are not in the public interest.
29. HMT also felt that disclosure would inhibit the free and open discussions between HMRC and OBR about the cost of such policies. Safe space to discuss such issues openly and frankly is crucial if OBR are to do its job properly and to bottom out the underlying assumptions such notes contain. HMR said that the OBR's forecasts underpin, and are inextricably linked to, the public finance projections. In order to ensure that the government's forecasts and related policy decisions are of the highest quality, it is essential that they are based on and represent sound advice reflecting full and frank discussion and analysis. Disclosure would therefore be likely, in future, to inhibit officials in providing sufficiently free and frank advice, which would in turn weaken the quality of the forecasts.
30. HMT confirmed that it was also of the view that disclosure would have a 'chilling effect' – it considers disclosure of 'policy space' information in this case even after the event would prejudice the effectiveness of such work in the future. The request relates to a policy that was still ongoing at the time it was made and which continues to be developed. Disclosure of developing policies in relation to the Budget could impact on future processes and not the process in question.

31. The complainant does not agree with HMT's decision in respect of the public interest test. She believes the huge public interest in tax policy warrants disclosure. She stated that large tax cuts have been granted to insurance companies as a result of these reforms to encourage them to stay in the UK or to return to it. The complainant is of the view that such decisions should be publicly scrutinised. She said that she does not believe officials acting more cautiously in the future as a result of the disclosure of this information would be a bad thing. In fact, the complainant believes that due to the large sums at stake, this would be a positive outcome.
32. The Commissioner has given the arguments for and against disclosure detailed consideration. He has concluded that in this case that the public interest in favour of disclosure is outweighed by the public interest in maintaining this exemption and he will now explain why.
33. The Commissioner acknowledges there is a public interest in openness and accountability regarding tax issues. In this particular case, he accepts there is a strong public interest in knowing more about CFC reforms and the government's specific plans to combat tax avoidance. He is aware that the issue of tax avoidance always attracts a considerable amount of public interest, particularly in the current economic climate.
34. He is also of the view that disclosure of information which enables the public to understand more clearly why government decisions have been made encourages public debate and engagement which can assist in ensuring quality and successful policies are implemented.
35. However, he notes that when this request was made the policy making process was still live. The withheld information was created close to the time of the request – in January and March 2012 and was still subject to readings in the House of Commons and the House of Lords, with committee meetings in between these readings. Although the CFC regime was close to gaining Royal Assent at the time of the request, the important issue here is that it had not and therefore the reforms were still open for further debate and amendments.
36. It is the Commissioner's view that there is a strong public interest in allowing HMT the safe space to deliberate and discuss candidly policy options without the fear of public scrutiny at this stage in the policy formulation process. This view is supported by the First-tier Tribunal hearing (the tribunal) of the *Department for Education and Skills v 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, it would expose wrongdoing within the 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 merely broached as agreed policy." (Para 75).

37. The tribunal stated that it was highly unlikely that it would be in the public interest to disclose policy options during the process of policy formulation unless it would expose for example wrongdoing on behalf of the government. The Commissioner notes in this case that there has been no suggestion or evidence submitted to him of any wrongdoing.

38. The Commissioner has also considered the arguments HMT presented with regards to disclosure causing a chilling effect. He notes the comments made by the tribunal in the hearing of the *Department for Education and Skills V ICO & the Evening Standard (EA/2006/0006)* on the chilling effect concept:

"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."

39. Chilling effect arguments will often be rejected when they are deployed in a general manner with little reference to the specifics of the case. However, in this case, the Commissioner notes that the policy process was still ongoing. He also acknowledges HMT's comments about the ongoing nature of CFC policy issues related to the budget. It is noted that CFC reforms are often changed to reflect how businesses are currently operating and to close any identified loopholes with the current rules. The Commissioner considers in this case that HMT has explained how such reforms are ever evolving and therefore how disclosure of this information would impact on future processes and not just the process in question here.

40. The Commissioner accepts that in order for any such package to be construed as a Budget, Ministers and their officials have to be able to provide advice in confidence on policy matters. The Commissioner also acknowledges the importance of the 2012 Budget to the economic stability of the UK.

41. In conclusion, given the timing of the request and the nature of the information requested, the Commissioner has decided in this case that

the public interest in favour of disclosure is outweighed by the public interest in maintaining this exemption.

Procedural issues

42. The Commissioner notes that HMT did not issue a full refusal notice outlining its consideration of the public interest until 10 January 2013. As the complainant's request was first made on 7 April 2012 it is evident that HMT took just over nine months to provide this response.
43. Although a partial refusal notice was issued within 20 working days, HMT failed to issue a further notice outlining its consideration of the public interest test within a reasonable amount of time. The Commissioner does not consider nine months is a reasonable amount of time – in fact it is excessive considering the nature of the request and its complexity.
44. The Commissioner has therefore found HMT in breach of section 17(3)(b) of the Act in this case.

Other matters

1. Although the complainant requested HMT to carry out an internal review on 17 January 2013, this was not completed until 15 April 2013.
2. Although there is no statutory time set out in the FOIA within which public authorities must complete a review, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review, and in no case should the total time taken exceed 40 working days. Where it is apparent that determination of the complaint will take longer than the target time, the authority should inform the applicant and explain the reason for the delay. The Section 45 Code of Practice contains comprehensive information on how an internal review should be conducted.

3. Right of appeal
4. 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: GRC@hmcts.gsi.gov.uk

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

5. 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.
6. 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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