

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 23 August 2010**

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

### Summary

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HM Treasury was asked to disclose all documentation generated by its consideration and formulation of Section 58 of the Finance Act 2008 (retrospective legislation that sought to end a scheme that the government considered to be a “highly artificial and aggressive tax avoidance scheme”). The public authority relied upon sections 21, 29(1)(a), 35(1)(a) and (b), 36 (2) and 42(1) to withhold the information. The Commissioner concluded that all the withheld information was exempt either under the provisions of section 35(1) (a) or under the provisions of 36 (2) (b) (i) and that the public interest favoured the maintenance of the exemptions.

### The Commissioner’s Role

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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

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2. Section 58 of the Finance Act 2008 is retrospective legislation that sought to end what the government considered to be a “highly artificial and aggressive tax avoidance scheme”. During its passage through Parliament section 58 was clause 55 of the Finance Bill 2008.

## The Request

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3. By way of an email dated 16 April 2009 the complainant requested from HM Treasury ("the public authority"), in the context of Budget Note 66 (given on 12 March 2008, regarding clause 55 of the Finance Bill 2008), the following information;

"copies of all documentation that the Treasury holds on this measure, including memoranda, reports, minutes of meetings etc".
4. The public authority wrote to the complainant on 15 May 2009, directing him to requested information that was already in the public domain. The public authority also explained that it needed to give further consideration to the balance of the public interest test with regard to the further information it held which engaged exemptions within the Act. These were the exemptions provided by sections 27(1)(a), 29(1) (a), 35(1)(a) and (b) and 42(1) of the Act.
5. The public authority next wrote to the complainant on 11 June 2009 when it disclosed part of the information requested but withheld the remainder on the basis of the exemptions contained in sections 21, 27(1)(a), 29(1)(a), 35(1)(a) and (b), 36(2) and 42(1) of the Act.
6. The complainant requested an internal review of the decision on 16 June 2009. On 15 September 2009 the public authority wrote to him with the result of the internal review it had carried out. The outcome of the review was that information would continue to be withheld on the basis of the exemptions contained in sections 21, 29(1)(a), 35(1)(a) and (b), and in the alternative to section 35, sections 36(2) and 42(1) of the Act. The public authority also stated that it was no longer relying on the exemption provided by section 27(1)(a).
7. In a letter dated 24 June 2010 the public authority informed the Commissioner that it had recently discovered further information that fell within the ambit of the complainant's request. This recently discovered information consisted of a one-page press brief including a Question & Answer briefing, a legal advice and a briefing note on the Finance Bill's clauses. The public authority averred that a small portion the press briefing note could be released to the complainant but the remainder was exempt from disclosure by virtue of section 35 (1) (a) . The legal advice was exempt from disclosure by virtue of section 35 (1) (a) and/or 42. The briefing note was exempt from disclosure by virtue of sections 35(1) (a) and/or 42. The public authority informed the Commissioner on the 8 July 2010 that it had

communicated to the complainant the "small portion" of the press briefing note referred to above in this paragraph.

## The Investigation

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### Scope of the case

8. On 17 September 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

### Chronology

9. In a letter dated the 13th October 2009 the Commissioner asked the public authority to provide him with a copy of the withheld information that was marked to show where each exemption had been applied. On the 27 October 2009 the public authority provided the Commissioner with a copy of the withheld information which they had marked as requested.
10. By way of a letter dated 22 March 2010, the Commissioner asked the public authority for clarification on its use of the exemptions and as regards its reliance on section 36 the Commissioner said

"In order for the ICO to determine whether section 36 was correctly applied please provide a copy of the submissions given to the qualified person in order for them to reach their opinion **and** a copy of the opinion which was subsequently provided. If either the submissions or opinion were not written down please describe the nature of the submissions and the opinion itself.

Furthermore, if in providing such documents, the following is not clear, please provide a response to the following questions:

- When was this opinion sought and when was it given?
- What information did the qualified person have access to when giving this opinion?
- For example, did the qualified person have access to the information itself or just a summary of the information that had been withheld?
- Was the qualified person provided with any submissions supporting a recommendation that the exemption was engaged?

- Similarly, was the qualified person in fact provided with any contrary arguments supporting the position that the exemption was not engaged?
  - Please clarify which limb(s) of section 36(2) the qualified person considered to be engaged; please note the limbs are not mutually exclusive, but the qualified person does need to specify which limb or limbs they consider to be engaged.
  - If HMT is relying on section 36(2)(c) – i.e. ‘otherwise prejudice effective conduct of public affairs’ – please clarify what the nature of this prejudice is.”
11. By way of correspondence sent on the 30 April 2010 the public authority informed the Commissioner that as regards the application of section 36, a submission (copy provided) was sent to the qualified person on 10 September 2009 and the qualified person’s office stated that it was the qualified person’s opinion that section 36 was engaged. The public authority also responded to the queries raised by the Commissioner in his letter to it dated 22 March 2010

## Analysis

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### Exemptions

12. The withheld information falls in the following three broad categories:
- a) Submissions to, and replies from, the Financial Secretary to the Treasury;
  - b) Email trails and exchanges;
  - c) Budget Notes.
13. The public authority maintains that the withheld information is exempt from disclosure solely by virtue of section 35(1)(a) of the Act. If, and where, the Commissioner decides otherwise they further rely on, in the alternative, exemptions afforded by sections 21, 29 (1)(a), 36(2) (b)(i) and (ii), 36(2)(c) and 42 of the Act.

### Section 35(1) (a)

14. 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."

15. Section 35 is a class based exemption, therefore if information falls within the scope of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
16. The public authority maintains that the withheld information contains detailed submissions to government ministers regarding the drafting of legislation to end financial arrangements that the government deemed to be an "aggressive" tax avoidance scheme. These submissions weighed up various for and against arguments about possible legislation to end the tax avoidance scheme.
17. The Commissioner takes the view that for the purposes of this exemption the 'formulation' of government policy comprises the early stages of the policy process where options are generated and sorted, risks are identified, consultation occurs, and recommendations or submissions are put to a Minister. 'Development' may go beyond this stage, to the processes altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. As a general principle, however, he considers that the development of government policy is about the development of options and priorities for Ministers, who determine which options, should be translated into political action. It is unlikely to extend to purely operational or administrative matters. The exemption is unlikely to apply to information which relates to matters occurring after a policy has already been agreed or implemented.
18. The Commissioner also takes cognisance of the Information Tribunal's conclusions in *DfES v Information Commissioner & the Evening Standard (EA/2006/0006)* where it was considering information that had been withheld under section 35(1)(a). The Tribunal's approach was that where the majority of information relates to the formulation or development of government policy then any associated or incidental information that informs a policy debate should also be regarded as relating to the section 35(1)(a) purpose. In accordance with the Tribunal's decision, the Commissioner considers that the term 'relates to' in section 35(1) can safely be interpreted broadly. Although this has the potential to capture a lot of information, the fact that the exemption is qualified means that public authorities are obliged to

adopt a common sense approach, disclosing any information which causes no, or no significant, harm to the public interest.

19. The Commissioner having viewed and considered the withheld information concurs with the public authority's assertion that it comprises information considering legislative changes to end a tax avoidance scheme. The information considers the possible ways to do this with their varying advantages and disadvantages. Consequently the Commissioner is satisfied that section 35(1)(a) is engaged for the majority of the withheld information. The Commissioner considers later on in this Decision Notice the withheld information he believes does not engage the section 35 exemption.
20. Section 35(1)(a) is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. That the releasable information falls within the class specified in the exemption is not, however, of relevance to the balance of the public interest. This is in line with the approach taken by the Information Tribunal in *DfES v the Commissioner & the Evening Standard (EA/2006/0006)*, where it stated in connection with section 35(1)(a) that "the weighing [of the public interest] exercise begins with both pans empty and therefore level" (paragraph 65).
21. The Commissioner will, when considering the application of the public interest tests, do so in the context of the time the information request was made. This view reflects that taken by the Information Tribunal in *DBERR v the Information Commissioner and the Friends of the Earth (EA/2007/0072)*.

### **Public interest arguments in favour of disclosing the withheld information**

22. The public authority highlighted a number of arguments in favour of disclosing the withheld information, namely:
  - There is a generic public interest in disclosure of information which would make the government more accountable for, and transparent about, decisions it had taken; this can increase trust in the government.
  - Disclosure of the information could contribute to the public's understanding of how government works and could improve the public's contribution to the policy making process and in doing so

make the policy making process more effective and broadly based.

- There is a public interest in the public being able to assess the quality of the advice being given to Ministers and the subsequent decision making.

### **Public Interest arguments in favour of maintaining the exemption**

23. The public authority highlighted a number of arguments in favour of maintaining the exemption, namely:

- Decisions should be based on comprehensive advice which is not fettered by the fear of undue public exposure
- Disclosure of the information may facilitate future aggressive tax avoidance schemes.

24. The Commissioner gives due weight to the public interest factors that favour the release of the withheld information. Increased government accountability and transparency are eminently desirable for a democratic society and therefore must be weighed accordingly in the balancing exercise. The Commissioner is of the view that good decision making is greatly based upon open good advice and discussion where even unpalatable or unpopular measures are postulated and discussed. The Commissioner further takes into account, though in itself not decisively so, that the releasing of the information may be beneficial to those who would engage in what the public authority considers to be an artificial and aggressive tax avoidance schemes. The information being beneficial as it indicates what factors are taken into account when the authorities determine which tax schemes are to be investigated to determine their legality.

25. Balancing and considering the varying public interest factors the Commissioner's decision is that the public interest in maintaining the exemption outweighs the public interest in releasing the information.

26. As stated at paragraph 15 above the Commissioner considers that not all of the information withheld by HMT is exempt by reference to section 35 of the Act. The information which, in the Commissioner's view, cannot be withheld by section 35 is contained in a document titled "Defensive Notes". On reading this document it is clear that the information contained therein is preparation for Ministers so they

can meet parliamentary questions or challenges about the then proposed legislative changes. It is therefore post policy formulation or development being concerned with, as the document's name suggests, defending a newly established policy. The Commissioner therefore finds that the exemption afforded by section 35 is not engaged. The Commissioner therefore went on to consider whether section 36(2) (b) (i) in the first instance, was applicable, in the alternative, as asserted by the public authority.

### **Section 36**

27. Section 36(2) (b) provides that:

'Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act - ...

... (b) would, or would be likely to, inhibit –

- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation...'

28. The Information Tribunal has decided (*Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC* (EA/2006/0011 and EA 2006/0013)) that a qualified person's opinion under section 36 is reasonable if it is both 'reasonable in substance and reasonably arrived at'. It elaborated that the opinion must therefore be 'objectively reasonable' and based on good faith and the proper exercise of judgement, and not simply 'an opinion within a range of reasonable opinions'. However, it also accepted that 'there may (depending on the facts) be room for conflicting opinions, both of which are reasonable'.

29. In considering whether an opinion was reasonably arrived at, the Information Tribunal in *McIntyre v Ministry of Defence* (EA/2007/0068) proposed that the qualified person should only take into account relevant matters and that the *process* of reaching a reasonable opinion should be supported by evidence, although it also accepted that materials which may assist in the making of a judgement will vary from case to case and that conclusions about the future are necessarily hypothetical.

30. The public authority has provided the Commissioner with a copy of the note that was presented to the qualified person prior to the opinion being reached regarding section 36. The note suggests factors the



qualified person may wish to consider prior to giving their decision as to whether section 36 was engaged. By way of an email (dated 10 September 2009) from the Minister's office the public authority recorded that in the qualifying person's opinion the exemptions afforded by section 36 were engaged. The Commissioner has not been able to identify or otherwise discern evidence that the qualified person took account of irrelevant factors or ignored those that were relevant.

31. The Commissioner notes that the qualified person failed to designate whether, in his opinion, the prejudice "would" or "would be likely" to occur. The Information Tribunal in *McIntyre v The Information Commissioner and the Ministry of Defence* commented at paragraph 45 that "We consider that where the qualified person does not designate the level of prejudice, that Parliament still intended that the reasonableness of the opinion should be assessed by the Commissioner but in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level". The Commissioner has not seen evidence that the higher test should apply and thus considered the matter on the lower threshold basis. This approach is consistent with the language used by the public authority in its correspondence to the Commissioner dated 22 April 2010. Assessing the matter on a "would be likely" basis and upon considering the submissions given to the Minister, the Commissioner concludes that the opinion was a reasonable one that was reasonably arrived at.
32. Section 36 is a qualified exemption. Therefore, even though the qualified person has concluded that the exemption applies, the public interest test must be applied to determine whether the information should nevertheless be disclosed. It is only where the public interest in maintaining the exemption outweighs the public interest in disclosure that the information should be withheld. The Commissioner has therefore gone on to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information in question.
33. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's decision in *Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC* (supra) where the Tribunal considered the law relating to the balance of public interest in cases where section 36 applied. The Commissioner has followed the interpretation of the law relating to the public interest test, as set out in that decision, and notes and adopts in particular the following conclusions:

- Unless there is any relevant exemption under the Act then the section 1 duties will operate. The “default setting” in the Act is in favour of compliance – requested information held by a public authority must be disclosed except where the Act provides otherwise.
  - The public interest in maintaining the exemption must outweigh the public interest in disclosure as the ‘presumption’ of disclosure in the Act will operate where the respective public interests are equally balanced.
  - There is an assumption built in to the Act that the disclosure of information by public authorities on request is in itself of value and in the public interest so as to promote transparency and accountability in relation to the activities of public authorities. The strength of that interest, and the strength of the competing interest in maintaining any relevant exclusion or exemption, must be assessed on a case by case basis.
34. When it comes to weighing the balance of public interest, it is impossible for the Commissioner to make the required judgement without forming a view on the severity, frequency and extent of any prejudice and the Commissioner notes the limits of the reasonable person’s opinion required by section 36(2). The opinion is that disclosure of the information would have (or would be likely to have) the stated detrimental effect. That means that the qualified person has made a judgement about the degree of *likelihood* that the detrimental effect would occur and does not necessarily imply any particular view as to the severity or extent of such inhibition or the frequency with which it will or may occur.
35. The right approach, consistent with the language of the Act, is that the Commissioner, having accepted the reasonableness of the qualified person’s opinion that disclosure of the information would, or would be likely to, have the stated detrimental effect, must give weight to that opinion as an important piece of evidence in his assessment of the balance of public interest. However, in order to form the balancing judgment required by section 2(2) (b), the Commissioner is entitled, and will need, to form his own view on the severity, extent and frequency with which the detrimental effect will or may occur.
36. Whilst considering whether the public interest in maintaining the exemption outweighs the public interest in disclosure, the Commissioner recognises that there are competing public interest arguments. He has gone on to consider these arguments in turn.

### 37. **Public interest arguments in favour of releasing the information**

The public authority highlighted a number of arguments in favour of disclosing the withheld information, namely:

- Satisfying the specific public interest in understanding how the Government prepares to defend the measure in Parliamentary debate.
- Giving an insight into government process for managing situations of this kind which would improve and enrich the public's understanding.
- Showing the government's commitment to openness under the FOI Act.
- The request relates to a matter where government action is being challenged. The scope for such a challenge is an important democratic principle

### 38. **Public Interest Arguments in favour of maintaining the exemption**

The public authority highlighted a number of arguments in favour of maintaining the exemption, namely:

- Officials need to plan for situations where a range of questions will be put to ministers. The provision of defensive briefings on sensitive topics would likely be inhibited by release and could add pressure on officials to present information more subtly, hampering the ability to identify the best way forward in sensitive areas and limiting the effectiveness of public records
- Officials should be able to freely and frankly brief ministers on the potential strengths and weaknesses of a particular policy. Disclosing the information would be likely to make officials over-cautious to the detriment of the quality of the briefing.
- Ministers may adapt suggested answers or prefer to take a different line of argument to that set out in the briefing. Ministers should be accountable for the arguments they pursue and not in relation to background briefing.

### **Balance of the public interest arguments**

39. The Commissioner acknowledges that the public interest is well served by releasing information that provides light on the democratic process. However the democratic process is also served by allowing civil

servants the space to consider matters and thus being able to ensure that ministers are properly and comprehensively advised. On balance, on the facts and issues of this particular matter, the Commissioner view is that the public interest in maintaining the exemption outweighs the public interest in releasing the information. In particular the Commissioner was swayed by the advantages to the democratic process by facilitating the ability of civil servants to prepare comprehensive defensive briefs on (as was the case here) a complicated and contentious matter. The Commissioner view is that the likely extent and frequency of the harm to the democratic process is such as not to be discounted. Ministers, particularly because of the role they play in the democratic process, need to rely on and have confidence in the briefings prepared and provided by civil servants. Additionally the Commissioner is also aware that the answers given by a Minister in Parliament are on the public record (Hansard) and therefore the government position is known.

40. The Commissioner, having found that either section 35(1)(a) or 36(2)(b)(i) is engaged in respect of the totality of the withheld information and, in both cases the public interest favoured the maintenance of the exemption, did not go on to consider the other exemptions cited by the public authority.

### **Procedural Requirements**

41. The public authority only informed the applicant that it was relying on section 35(1)(a) on 11 June 2008. This is outside the 20 working days allowed (from receipt of the information request) under section 17(1) and therefore was a breach of section 17(1).
42. The public authority's late discovery of information (detailed at paragraph 7 above) places it in breach of sections 1(1)(a) and 17(1)(a) as it is required by the Act to notify the complainant within section 17(1), as it failed to identify within 20 working days of the request the exemptions upon which it relied in respect of certain documents falling within the scope of the request.

### **The Decision**

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43. The Commissioner's decision is that, apart from the procedural breaches recorded in paragraphs 41 and 42 above, the public authority dealt with the request for information in accordance with the Act.

## Steps Required

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44. The Commissioner requires no steps to be taken.

## Other Matters

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### Late Review

45. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner therefore expresses his concerns that it took the public authority over 89 days for an internal review to be completed.

## Right of Appeal

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46. 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: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://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 sent.

**Dated the 23<sup>rd</sup> day of August 2010**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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

## Legal Annex

### General Right of Access

**Section 1(1)** provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

### Effect of Exemptions

**Section 2(2)** provides that –

"In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

### Formulation of Government Policy

**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.

### **Prejudice to effective conduct of public affairs**

**Section 36(2)** provides that –

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(b) would, or would be likely to, inhibit-

- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.