

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 26 March 2007

**Public Authority:** HM Revenue and Customs (HMRC)  
**Address:** 100 Parliament Street  
London  
SW1A 2BQ

### Summary

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The complainant requested documentation held by HMRC to support its interpretation of a particular piece of legislation. HMRC responded to confirm it held information but that it was exempt from disclosure as the documentation was legal advice and so section 42 of the Act, 'legal professional privilege', was engaged. HMRC also argued that the public interest favoured maintaining the exemption. The Commissioner investigated HMRC's application of section 42 and found that the information requested is legal advice and is therefore covered by the exemption and that the public interest does favour maintaining the exemption. The Commissioner's decision is that HMRC dealt with the request in accordance with the Act and require no steps to be taken.

### 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.

### The Request

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2. The Complainant has advised that on the 20 April 2006 he requested the following from HM Revenue and Customs (HMRC):
  - "1. A copy of the relevant section of the HMRC manual or other guidance notes that you have used to determine the penalty that you are seeking to impose.*
  - 2. Documentation to support HMRC's interpretation of the tax difference as defined by S95 (2) TMA (Taxes Management Act)*

*1970 that a repayment (whether or not actually made) represents a negative amount of tax payable.*

*3. The number of income tax self assessment complaints received by you (ie Wolverhampton) from 2003-2005 inclusive, the number of complaints upheld and the number of complaints rejected.”*

3. HMRC responded to this request on the 18 May 2006. HMRC refused to provide information relating to points one and two of the complainants request and supplied the information it held in relation to point three.
4. The information in point one of the complainants request was withheld under section 21 as the information could be accessed on HMRC's internet site. HMRC advised the complainant where the information was located and offered to supply a paper copy if requested.
5. In relation to the second point of the complainants request, HMRC explained that their interpretation of TMA 1970 S95 (2) is based on advice from HMRC's solicitors and as such falls under the exemption at section 42 of the Act, Legal Professional Privilege. As the exemption under this section is a qualified exemption and therefore subject to the public interest test, HMRC also informed the complainant that the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
6. On the 7 June 2006 the complainant wrote to HMRC to request an internal review of its decision to withhold the information relating to the second point of his request under section 42 of the Act.
7. HMRC completed the internal review and communicated its findings to the complainant on the 31 July 2006. The internal review upheld the original decision to withhold the information.
8. The complainant wrote again to HMRC on the 8 August 2006 asking that they again reconsider the decision and disclose the information.
9. HMRC responded on the 29 August 2006 once more upholding their original decision that the information was exempt from disclosure under section 42 of the Act and that the public interest in maintaining the exemption outweighed the public interest in disclosure.

## **The Investigation**

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### **Scope of the case**

10. On 18 September 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to investigate the refusal by HMRC to

disclose the information they hold supporting their interpretation of the Taxes Management Act 1970 S95 (2) that a repayment (whether actually made or not) represents a negative amount of tax payable, under section 42 of the Act.

## Chronology

11. The Commissioner contacted HMRC on the 29 January 2007 to ask for a copy of the information being withheld and any further representations HMRC wished to make regarding the applicability of section 42
12. HMRC responded on the 7 February 2007 enclosing a copy of the withheld information which consists of the advice, an email chain and worked examples to clarify the advice given. HMRC clarified the purpose of the advice received and referred the Commissioner to its previous responses to the complainant for its arguments in maintaining the exemption.

## Findings of fact

13. The information withheld comprises of:
  - Legal advice provided by Inland Revenue Solicitors to the Inland Revenue Policy Team regarding section 95 (2) of the TMA
  - Email chain between the Inland Revenue Solicitor and policy advisor.
  - Three examples of tax calculations referred to in the above email chain.

## Analysis

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### Section 42 – Legal Professional Privilege

14. Section 42 of the Act provides that information is exempt from disclosure if a claim to legal professional privilege could be maintained in legal proceedings. There are two types of privilege, legal advice privilege and litigation privilege. Legal professional privilege protects confidential communications between professional legal advisers (including an in-house legal adviser) and clients from being disclosed.
15. HMRC have argued that the information being withheld is legal advice obtained from its solicitors in confidence for the sole purpose of interpreting s95 of the Taxes Management Act 1970, emails between HMRC and its solicitors for the dominant purposes of obtaining legal advice and worked examples of tax calculations provided by the solicitor to support its advice and therefore the exemption at section 42 of the Act is engaged.
16. The Commissioner is satisfied that all the information withheld in response to the complainant's request is confidential legal advice and related communications between HMRC officials and their in-house solicitors. He is therefore satisfied that a claim to legal professional privilege could be maintained so that the exemption at section 42 of the Act is engaged.

17. Section 42 is a qualified exemption and is therefore subject to the public interest test. HMRC acknowledged that there is a public interest in ensuring that there is transparency in the decision making process and for the public to know whether legal advice is being followed.
18. In balancing the public interest factors HMRC concluded that the public interest favoured maintaining the exemption as it is in the public interest that policy decisions taken by HMRC are fully informed and that legal advice in support of these decisions is sought and given in a timely fashion and based on all the relevant facts. Disclosure of the legal advice would undermine the policy making process and adversely affect the quality of its decision making. HMRC also asserted that disclosure of legal advice is not in the public interest as it would prejudice HMRC's ability to defend its legal interests, disclosure could give consequential losses and a waste of resources in defending unnecessary challenges, neither of which are in the public interest. HMRC also acknowledged the courts recognition of the importance of a person being able to consult his lawyer in confidence.
19. The Commissioner recognises that there are public interest arguments for disclosing the information as disclosure would allow the public to understand the basis for HMRC's decision making with the legal justification it has for certain decisions. However, the Commissioner is mindful that there is a strong element of public interest inherent in legal professional privilege which must be taken into account when considering the application of section 42. The Commissioner notes the tribunal case of *'Bellamy vs. the Information Commissioner and the DTI'* in which the Tribunal concluded that:

*“there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest... it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut cases”*
20. In reaching his decision as to where the public interest lies, the Commissioner has considered the arguments put forward by HMRC and feels these reasons demonstrate a strong argument for maintaining the exemption. These reinforce the strong public interest inherent in the notion of legal professional privilege. Whilst the Commissioner is mindful of the strong public interest in greater public understanding of how HMRC reach decisions, there is a risk that disclosing confidential legal advice could undermine HMRC's ability to obtain this advice in a timely fashion and have confidence that the advice given is done so freely without the consideration of its wider disclosure.
21. For these reasons, the Commissioner has concluded that the public interest in maintaining the section 42 exemption in the circumstances of this case outweigh the public interest in disclosure. Accordingly, the information requested is exempt from disclosure.

## The Decision

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22. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## Steps Required

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23. The Commissioner requires no steps to be taken.

## Right of Appeal

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24. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

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

**Dated the 26<sup>th</sup> day of March 2007**

**Signed .....**

**Richard Thomas  
Information Commissioner**

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