

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date 23 July 2008

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

### Summary

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The complainant asked the public authority for information relating to draft regulations referred by the public authority to the Social Security Advisory Committee, and to the Committee's consequent advice and reports to the public authority. The public authority provided information about the draft regulations, and required an extension of time to consider the public interest test regarding the advice and reports, after which it concluded that that information was exempt under section 36(2)(b) and (c). During the course of the Commissioner's investigation the public authority decided that the balance of the public interest now favoured disclosure of the remaining information. However, the Commissioner decided that the public authority failed to comply with its duty to issue the refusal notice within the time limit set out in section 10(1), which constitutes a breach of section 17(1) of the Act, and also extended the time to consider the public interest test unreasonably, a breach of section 17(3).

### 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. On 16 May 2005 the complainant, representing the Child Poverty Action Group, had requested from HM Revenue and Customs (HMRC) information about draft regulations relating to tax credits, child benefit and guardian's allowance which had been referred to the Social Security Advisory Committee (SSAC) by HMRC in

April 2005. HMRC had replied on 16 June 2005, withholding relevant information under section 35 of the Act.

3. The complainant then made a further request on 23 September 2005, which is the subject of this Decision Notice. He asked for the following information covered by a Memorandum of Understanding between HMRC and the Social Security Advisory Committee (SSAC):

- (i) what draft regulations relating to tax credits, child benefit and guardian's allowance had been referred by HMRC to the SSAC;

- (ii) on which draft regulations had the SSAC provided advice or reports to HMRC;

- (iii) of the regulations in (ii), which had been laid before Parliament or passed into law; and

- '(iv) of the regulations falling under (iii), please provide me with copies of the advice and/or reports from the SSAC to HMRC on those regulations when they were in draft form.'*

4. HMRC did not reply and the complainant sent a chasing email on 6 January 2006. During a telephone conversation on the same day, the complainant agreed that HMRC could revise the date of the request to 6 January 2006.
5. HMRC wrote to the complainant on 3 February 2006. It apologised for its oversight in not responding to the letter of 23 September 2005. It provided the information identified in points (i) – (iii) of the request. In relation to point (iv), it stated that it required an extension of time to consider the application of the exemption in section 36, and planned to provide a response by 31 March 2006, but would advise him if it was going to take longer. It informed the complainant of his right to request an internal review or to complain to the Commissioner.
6. On 31 March 2006 HMRC wrote again to the complainant. It expressed its regret that it had not yet reached a decision, and indicated that it hoped to do so by 31 May 2006.
7. HMRC sent its decision to the complainant on 26 May 2006, stating that the information in point (iv) of the complainant's request was exempt by virtue of section 36(2)(b) and (c) of the Act. Its conclusion was that advice and reports provided by the SSAC to HMRC were confidential under the terms of the Memorandum of Understanding between them, and disclosure of the information would therefore prejudice, or be likely to prejudice, the effective conduct of public affairs. It concluded that the balance of the public interest test was in favour of maintaining the exemption under section 36(2)(b) and (c). It reminded the complainant of his right to request an internal review and to complain to the Commissioner.
8. The complainant requested an internal review on 28 June 2006 on the grounds that disclosure of the withheld information would not prejudice free and frank

discussion or the effective conduct of public affairs. He indicated that he would appreciate a prompt reply in light of the time which it had already taken HMRC to deal with the matter.

9. HMRC acknowledged the result on 29 June 2006, stating that it would let the complainant know when it would be able to provide a substantive response. It informed him on 7 July that it hoped to provide a response by the end of July. On 31 July it revised the date to 11 August. It apologised on 10 August that it would not be able to meet this deadline, since a number of individuals who needed to be consulted were not currently available, but hoped to respond by 30 September.
10. The internal review decision was not in fact sent to the complainant until 21 December 2006. HMRC apologised for the delay. It upheld the original decision and reminded the complainant of the Commissioner's role.

## The Investigation

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### Scope of the case

11. On 9 February 2007 the complainant wrote to the Commissioner. He complained about HMRC's decision and about the length of time which it had take to deal with the matter.

### Chronology

12. The Commissioner wrote to the complainant and HMRC on 14 January 2008. He asked HMRC to comment on various issues and to provide him with the withheld information.
13. HMRC replied on 8 February 2008, enclosing the withheld information.
14. It wrote again on 20 March 2008 stating that it considered that the balance of the public interest now lay in favour of disclosing the information which had been withheld. However:

*'as the terms of the memorandum of understanding between the Social Security Advisory Committee (SSAC) and HMRC stipulates that they provide their advice to us in confidence, we need to alert SSAC to our intention to release the information, to give them the opportunity to make representations...'*

It indicated that it expected to complete this consultation by 11 April 2008.

15. On 22 April 2008 the Commissioner asked HMRC for an update.
16. HMRC informed the Commissioner on 25 April 2008 that it had that day sent the withheld information to the complainant, and provided a copy of the covering letter.

## Findings of fact

17. The SSAC is the main United Kingdom advisory body on social security matters. In that capacity it provides and publishes advice on a statutory basis. The Committee's remit does not extend to subjects which might interrelate with social security benefits but are not the responsibility of the Department for Work and Pensions (DWP), such as tax credits. However, while it has no statutory advisory responsibility, a Memorandum of Understanding between the Committee and the Inland Revenue was signed in July 2004 which creates formal arrangements under which the Committee can be invited to comment on matters within the Inland Revenue's responsibility and to provide advice to Treasury Ministers. The Memorandum indicates that such advice is to be confidential.
18. Under the Tax Credits Act 2002, HMRC took responsibility for child benefit, guardian's allowance and tax credits from the DWP. In this case, the withheld information relates to advice which the SSAC provided to HMRC (the successor to the Inland Revenue) in respect of these transferred benefits. Before the transfer the Committee's advice to the DWP regarding these benefits would have been publicly available; the advice to HMRC is now subject to the confidentiality provisions of the Memorandum of Understanding agreed between the Inland Revenue/HMRC and the SSAC.
19. From the complainant's perspective, the import of this transfer is that, whereas previously *'most delegated social security legislation [could] not be put into effect by the Secretary of State without members of both Houses of Parliament being informed of the SSAC's views on the draft legislation'*, with *'the legislature benefiting from the same advice which the Minister has had'*, now the SSAC is reduced *'to being some private advisor to the Government alone'*.
20. The relevant section of the Memorandum of Understanding states:

***'Confidentiality***

*The Committee will not make public any comments or advice that they provide to Treasury Ministers, nor the responses they receive, without express permission to do so. In providing advice to DWP Ministers in relation to DWP benefits, the Committee may refer to the approach adopted by IR [Inland Revenue] in a similar area. Such advice remains advice to DWP Ministers and will either be published under statutory requirements or released in line with DWP and SSAC publication schemes. The Committee Secretariat will make IR aware that advice has been provided which cross-refers to IR matters.'*

## Analysis

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21. Since HMRC have now disclosed the requested information to the complainant, the Commissioner has not made any assessment of whether it was justified in applying the section 36 exemption in this case.

## Procedural matters

### Section 17: refusal notice

22. The complainant pointed out that HMRC had exceeded the statutory time limit of 20 working days in providing its initial decision, and had then taken six months to deal with the internal review, even though he had asked for a prompt reply.

23. Section 10(1) of the Act provides that:

*'Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.'*

The Commissioner has provided guidance on this issue in his *'Good Practice Guidance No 4'*. A response may take the form of the supply of the requested information, confirmation that the information is not held, a formal refusal or an indication that additional time is required to consider the public interest in relation to specific exemptions.

24. In this case the original request was made on 23 September 2005. HMRC did not make any response to the request until the complainant sent a chasing email on 6 January 2006. Although the complainant agreed with HMRC in a telephone conversation on that date that the request could be 'redated' to 6 January 2006, the Commissioner takes the view that a request was properly made on 23 September 2005 and HMRC should have responded within 20 working days. While he recognises that these events occurred prior to the issuing of his *'Good Practice Guidance No 4'* in February 2007, he considers that HMRC clearly failed to comply with its duty to issue the refusal notice within the time limit set out in section 10(1). This constitutes a breach of section 17(1) of the Act.

### Delay in considering public interest test following extension

25. Following the telephone conversation on 6 January 2006 HMRC wrote to the complainant on 3 February 2006, providing some of the requested information and stating that it required further time to consider the public interest test in respect of its application of section 36 to the remainder. It indicated that it planned to do this by 31 March 2006, but on that day it again extended the timescale. It eventually provided its substantive response on 26 May 2006.

26. While section 10(1) of the Act provides that a public authority must respond to a freedom of information request within 20 working days, section 17(2) allows a public authority to extend the time limit where it is still considering the public interest as long as certain measures are taken. The refusal notice:

*'must indicate that no decision...has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached'.*

If the final decision is to withhold the requested information, a second notice must then be issued providing the reasons for the decision on the public interest. Under the terms of section 17(3) of the Act, this second notice should be issued '*within such time as is reasonable in the circumstances*'.

27. As he has explained in his '*Good Practice Guidance 4*', the Commissioner takes the view that public authorities should aim to conduct the public interest test within 20 working days. In cases where the public interest considerations are exceptionally complex it may be reasonable to take longer but in the Commissioner's view the total time taken should in no case exceed 40 working days. In this case, notification of the extension to the time limit was given on 3 February 2006 but the final refusal notice was not issued until 26 May 2006. The Commissioner recognises that this case was dealt with prior to the issuing of his '*Good Practice Guidance No 4*' in February 2007. However, he considers that the extension of 77 working days which the HMRC applied in order to deal with the public interest test was not a reasonable timescale and therefore constitutes a breach of section 17(3) of the Act.

## The Decision

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28. The Commissioner's decision is that HMRC did not deal with the request for information in accordance with the Act. It failed to comply with its duty to issue the refusal notice within the time limit set out in section 10(1), which constitutes a breach of section 17(1) of the Act. It also extended the time to consider the public interest test unreasonably, a breach of section 17(3) of the Act.

## Steps Required

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29. The Commissioner requires no steps to be taken.

## Other matters

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### *Delay in conducting internal review*

30. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matter of concern. There is no timescale laid down in the Act for a public authority to complete an internal review. However, as he has made clear in his '*Good Practice Guidance No 5*', the Commissioner considers that these internal reviews should be completed as promptly as possible. In the absence of exceptional circumstances, 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 the total time taken should not exceed 40 working days, and as a matter of good practice the public authority should explain to the requester why more time is needed.

31. In this case the complainant's internal review request was made on 28 June 2006 and the HMRC issued its decision on 21 December 2006. The HMRC therefore took 125 working days to complete the review. The Commissioner recognises that the HMRC's internal review in this case was conducted prior to the issuing of the *'Good Practice Guidance No 5'* in February 2007. However, he does not believe that any exceptional circumstances existed in this case to justify that delay, and he therefore wishes to register his view that the HMRC fell short of the standards of good practice in failing to complete its internal review within a reasonable timescale.
32. The Commissioner also notes that HMRC failed to meet a number of revised timescales which it gave the complainant to complete the internal review, and that when it missed the last estimate it failed to provide an update to the complainant. He therefore wishes to register his view that the HMRC fell short of the standards of good practice in failing to meet its timescales or to provide appropriate updates to the complainant.

## Right of Appeal

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33. 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@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 served.

**Dated the 23<sup>rd</sup> day of July 2008**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

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



## Legal Annex

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**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.'

**Section 10(1)** provides that -

'Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.'

**Section 10(2)** provides that -

'Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.'

**Section 10(3)** provides that -

'If, and to the extent that -

(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.'

**Section 10(4)** provides that -

'The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.'

**Section 10(5)** provides that -

'Regulations under subsection (4) may -

(a) prescribe different days in relation to different cases, and

(b) confer a discretion on the Commissioner.'

**Section 10(6)** provides that –  
'In this section –  
'the date of receipt' means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

'working day' means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom.'

**Section 17(1)** provides that -

'A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.'

**Section 17(2)** states –

'Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
  - (i) that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
  - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2, the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.'

**Section 17(3)** provides that -

‘A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.’

**Section 17(4)** provides that -

‘A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

**Section 17(5)** provides that –

‘A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.’

**Section 36(1)** provides that –

‘This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

**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-

- (a) would, or would be likely to, prejudice-
  - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
  - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
  - (iii) the work of the executive committee of the National Assembly for Wales,
- (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.