

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 3 November 2009

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

#### Summary

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The complainant made a request for the legal advice obtained by HMRC on the sale of Crown estates to Mapeley Steps Limited and any further information generated by the advice. HMRC refused to disclose the information requested, originally relying upon the exemption provided by section 42 and then latterly also on 36(2)(b)(i) and (c). The Commissioner finds that that the exemptions are engaged and that the public interest under section 42 favours the maintenance of the exemption. However, the Commissioner has concluded that the public interest, with regard to the information withheld under s36(2)(b)(i) and (c), favours disclosure. In failing to disclose this information, HMRC breached section 1(1)(b), and in failing to disclose it within the statutory time limit it also breached section 10(1). The late reliance on section 36(2)(b)(i) and (c) was also in breach of section 17 of the Act.

#### The Commissioner's Role

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1. The Commissioner's role 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 18 November 2005, the complainant made a request to Her Majesty's Revenue and Customs (HMRC) for the following information-

"copy of the legal advice obtained by the Inland Revenue and/or Customs on the sale of the departments' estates to Mapeley Steps Limited and the position in Europe and WTO, as referred to at the Treasury sub-committee hearing in

December 2002 and in subsequent reports...” and for correspondence asking for the advice or related to it.

3. In a refusal notice dated 14 December 2005, HMRC refused the request relying upon the exemption provided by section 42 of the Act. The complainant requested a review of the decision in a letter soon after. HMRC conducted a review, the outcome of which was the upholding of the original decision. This finding was conveyed to the complainant in letters dated 4 and 26 January 2006.

## The Investigation

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### Scope of the case

4. On 14 March 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 consider HMRC's application of the public interest test.

### Chronology of the case

5. On commencing the investigation, the Commissioner, in a letter dated 29 January 2007, sought from HMRC, a copy of the information requested by the complainant.
6. In a letter dated 18 April 2007, HMRC provided the Commissioner with copies of two documents; an email dated 9 October 2002 and a legal advice from counsel.
7. In its letter of 18 April 2007, HMRC also informed the Commissioner that further relevant documents had been identified as falling within the scope of the complainant's request and these were to follow once the HMRC had had the opportunity to consider them. These documents followed under cover of a letter dated 9 May 2007. They were indexed by reference to the exemptions under which HMRC considered them to be exempt from disclosure, and were as follows:

#### (A) Legal Professional Privilege (Section 42)

- (i) Legal advice provided by BD, a solicitor at the Inland Revenue, dated 8 October 2002.
- (ii) Legal advice provided by Counsel to HMRC dated 26 March 2003 and documents seeking that advice.
- (iii) Legal advice provided by PR, a solicitor at the Inland Revenue, dated the 28 May 2003 and documents seeking that advice.

(iv) Legal advice provided by GW, a lawyer at the Office of Government Commerce (an independent office of HM Treasury) and documents seeking that advice.

(v) A bundle of documents which HMRC considers to contain information attracting legal professional privilege since they comment on the circumstances surrounding the obtaining of advice or on the legal advice itself. This consisted of ;

(a) An email from SH noting the basis on which Counsel at (ii) above had been instructed

(b) A minute from RB to MH

(c) Paragraphs 11 to 13 of the advice of PR (at (iii) above) which discusses the advice of Counsel at (ii) above

(d) Minute from JH to SH and EB

(B) Prejudice to the Effective Conduct of Public Affairs (Section 36)

Documents containing information from various requests for legal advice, not covered by legal professional privilege because the documents were not originally created to obtain the legal advices but for some other primary purpose. These comprised the following exchanges of correspondence between civil servants;

(vi) An email from JH (Custom and Excise) to KH (Government Commerce)

(vii) An email from JH to CT (Tax Practice)

(viii) A minute from a LC to DM (Custom and Excise)

(ix) A minute from JH TO EB, SH (Inland Revenue)

8. On 15 November 2007, the Commissioner wrote to HMRC regarding its reliance on section 36. The Commissioner asked HMRC to inform him who had given the opinion required to engage the exemption, and on what date.
9. On 30 November 2007, HMRC wrote to the Commissioner regarding the opinion required by section 36. It explained that Paul Gray and Dave Hartnett were the two of its Commissioners who approved the use of the exemption at section 36 of the Act and did so on 9 May 2007.
10. The Commissioner next asked, on 7 May 2008, HMRC to demonstrate how the opinions given by Paul Gray and Dave Hartnett were opinions reasonably arrived at.

11. The HMRC reply, dated the 2 June 2007, was that Paul Gray and Dave Hartnett were provided with the draft of the comprehensive letter that was sent to the Commissioner on the 9 May 2007, referred to at paragraph 7 above. Prior to giving their opinion they were therefore provided with the following information:
- The precise terms of the request and the exemptions relied upon;
  - The documents, and their contextual relevance, upon which the opinion was sought;
  - Reasons why the disclosure of the information would be likely to inhibit the free and frank provision of advice; and
  - Reasons why the disclosure of the information would prejudice or would be likely to prejudice the effective conduct of public affairs (specifying the particular area that would be prejudiced).

### Findings of the case

12. In March 1999 HM Customs and Excise, the Inland Revenue and the Valuation Office Agency (an agency of the Inland Revenue) (“the Departments”) announced the start of a joint procurement exercise to establish a long-term partnership with the private sector for the provision of serviced accommodation to meet the Departments’ needs for a period of 20 years. In August 2000, following a competition, the Departments announced that the “Mapeley Group” had been selected as the preferred bidder.
13. In March 2001, the Departments signed the contract to transfer ownership and management of the majority of their estates to a private sector consortium of companies within the Mapeley Group; the contract commenced on 2 April 2001. The deal will last for 20 years and comprises the following key elements:
- a) The transfer for £220 million of the Departments' freehold and long leasehold buildings to a subsidiary of Mapeley (Mapeley STEPS Limited). The remaining estate comprised liabilities under short-term leases, which were transferred to both Mapeley STEPS Limited and Mapeley STEPS Contractor Limited, a different subsidiary of Mapeley.
  - b) In return for operating the estate and taking responsibility for rental and other costs, the Departments will pay Mapeley STEPS Contractor Limited an average annual charge of £170 million, equating to some £1,500 million over the period of the contract.
  - c) At the end of the contract, the Departments will not own the estate, but will retain a right to occupy the buildings that they wish to remain in, with leases based on market terms obtaining at the time<sup>1</sup>.

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<sup>1</sup> (Extracted from “Report by the Comptroller and Auditor General HC 530 Session 2003-2004: 7 May 2004”)

14. The Parliamentary Treasury Committee established a sub-committee in July 2001 to scrutinise the work of the various bodies for which Treasury Ministers are accountable. As part of its work, it undertook an inquiry into the HM Customs and Excise and Inland Revenue handling of the procurement process that led to the agreement with the Mapeley Group.
15. On 8 October 2002, BD provides a written legal advice to colleagues.
16. SK, of Counsel provides a written legal opinion, dated 26 March 2003 to HM Customs and Excise.
17. Between March and May 2003 there was an exchange of correspondence between civil servants regarding issues surrounding contracts between government departments and suppliers.
18. On 18 April 2005, the Inland Revenue was merged with HM Customs and Excise to form a new department, HM Revenue and Customs, pursuant to the Commissioners for Revenue and Customs Act 2005.

## Analysis

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19. The Commissioner has considered the public authority's response to the complainant's request for information. Referred to sections of the Act are laid out in the legal annex.

## Procedural breaches

### **Section 1 – General right of access to information held by public authorities**

### **Section 10 – Time for compliance with request**

### **Section 17 – Refusal of request**

20. HMRC first relied on the exemption afforded by section 36 in correspondence with the Commissioner dated 9 May 2007. In *Bowbrick v The ICO* (EA/2005/0006) the Tribunal stated that "If a public authority does not raise an exemption until after the section 17(1) time period, it is in breach of the provisions of the Act in respect to giving a proper notice because, in effect it is giving part of its notice too late. Accordingly, the Commissioner finds that the HMRC, by its late reliance on section 36, acted in breach of section 17 when read together with section 10 of the Act.

## Exemptions

21. The Act as a whole involves a presumption of disclosure and that unless there is an applicable exemption the requested information, if held, should be released.

## Section 42(1) – Legal Professional Privilege

22. Section 42(1) of the Act provides that information is exempt from disclosure if a claim to legal professional privilege would be maintainable in legal proceedings and it is in the public interest to maintain that exemption.
23. Legal professional privilege protects confidential communications between professional legal advisers (including an in-house legal adviser) and clients from disclosure. There are two types of privilege; legal advice privilege and litigation privilege.
24. The Commissioner believes that information which comments on legal advice or discusses the circumstances surrounding the obtaining of that legal advice is capable of attracting legal professional privilege. This is only to the extent that the comment or discussion, if disclosed, would be disclosing legally privileged information (*USP Strategies plc v London General Holdings Ltd [2004] EWHC 373 (Ch), [2004] All ER (D) 132 (Mar)*).
25. The Commissioner, having viewed the information, is satisfied that the following attracts legal advice professional privilege maintainable in legal proceedings because it is legal advice between a lawyer and their clients or information such as the instructions seeking that advice:
  - (i) Legal Advice provided by BD a lawyer at the Solicitors Office 8 October 2002.
  - (ii) Legal advice provided by Counsel to HMRC dated 26 March 2003 and documents seeking that advice
  - (iii) Legal advice provided by PR, a solicitor at the Inland Revenue, dated the 28 May 2003 and documents seeking that advice.
  - (iv) Legal advice provided by GW a lawyer at the Government Office and documents seeking that advice
26. The Commissioner having viewed the following information is satisfied it attracts legal professional privilege because it reveals the legal advice upon which it comments:
  - (v) A bundle of documents containing information attracting legal professional privilege since they comment on the circumstances surrounding the obtaining of advice or on the legal advice itself which consisted of:
    - (a) An email from SH noting the basis on which Counsel at (ii) above had been instructed
    - (b) A minute from RB to MH
    - (c) Paragraphs 11 to 13 of the advice of PR (at (iii) above) which discusses

the advice of Counsel at (ii) above

(d) Minute from JH to SH and EB

### **Public Interest Test**

27. As section 42 is a qualified exemption it is necessary 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.
28. In the case of *Bellamy v the Information Commissioner and the DTI* (EA/2005/0023), the Information Tribunal (at paragraph 8) observed that “there is no doubt that under English law the privilege is equated with, if not elevated to, a fundamental right at least insofar as the administration of justice is concerned”.
29. In summing up, it stated, “there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest”. It concluded that “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 case...”
30. The Information Tribunal, in *James Kessler QC v Information Commissioner* (EA/2007/0043), laid out with clarity (at paragraph 60) the following public interest factors in favour of maintaining the exemption:
  - a. There is a strong public interest in maintaining legal professional privilege. That is, to an individual or body seeking access to legal advice being able to communicate freely with legal advisors in confidence and being able to receive advice in confidence.
  - b. If legal advice were routinely disclosed, there would be disincentive to such advice being sought and/or as a disincentive to seeking advice based on full and frank instructions.
  - c. If legal advice were routinely disclosed, caveats, qualifications or professional expressions of opinion might be given in advice which would therefore prevent free and frank correspondence between government and its legal advisers.
  - d. Legal advice in relation to policy matters should be obtained without the risk of that advice being prematurely disclosed.
  - e. It is important that legal advice includes a full assessment of all aspects of an issue, which may include arguments both for and against a conclusion, publication of this information may undermine public confidence in decision making and without comprehensive advice the quality of decision making would be reduced because it would not be fully informed and balanced.

f. There is a significant risk that the value placed on legal advice would be diminished if there is a lack of confidence that it had been provided without fear that it might be disclosed.”

31. However, the Commissioner considers the following countervailing factors, supporting the public interest in the disclosure of this information, to be as follows:

a. It may aid and add to the public's knowledge of the government's contract with Mapeley Steps Limited and the bidding process by establishing what some of the legal issues were surrounding those issues.

b. It would add to the public's knowledge and understanding of the select committee process and the role of civil servants therein as the information examples how civil servants may view and prepare for appearances before the select committee.

c. It will aid the public scrutiny and accountability of decision makers by enabling the public to view decisions made in the context of the legal advice known (and what advice was sought) to the decision makers at the time.

d. It would assist the public in understanding the obtaining, purpose and use of legal advice in government and public affairs by exemplifying these processes.

e. The promotion of transparency, accountability, public understanding and involvement in the democratic process by providing further insight into the legal issues and considerations concerned with the Mapeley contract.

32. Regarding the factors favouring disclosure the Commissioner, having regard to the information sought and the circumstances which gave rise to their existence, considers they will not particularly advance the public's knowledge of the Mapeley Steps contract or the ensuing involvement of the select committee. While disclosure would to a greater degree assist the public in understanding the obtaining, purpose and use of legal advice in government and public affairs it does not tip the public interest in favour of disclosure.

33. One of the areas of controversy, with the agreement, was whether the Departments should have entered into an agreement with a party who may have structured their affairs to avoid tax; government policy is to reduce tax avoidance. The Departments told the select committee that: the company which tendered for the contract was Mapeley Limited, registered in the UK; the main contracting party is Mapeley STEPS Contractor Limited, also registered in the UK; and that the majority of the assets are held by Mapeley STEPS Limited, registered in Bermuda. Mapeley told the select committee in PFI contracting the private sector contractor is typically a special purpose, bankruptcy remote, corporate vehicle. In the case of STEPS, that vehicle is Mapeley STEPS Contractor Limited, a UK company. Mapeley advised the Departments' project team that the valuable freehold and long leasehold properties would be transferred to its investment company, Mapeley STEPS Limited, a Bermuda registered company. The Departments told the select committee that the STEPS



procurement followed standard arrangements which provided for the exclusion of bidders where they have not paid their tax or are (or have been) involved in tax evasion and there are no other grounds on which bidders can be excluded. The procurement process, the select committee were told was subject to three community law provisions and one World Trade Organisation agreement:

- Article 83 of the EC Treaty (freedom of establishment),
- Article 49 of the EC Treaty (freedom to provide services),
- Public Services Contracts Regulations 1993 (SI 1993 No.3228), which implemented an EC Directive on public procurement,
  
- Under the auspices of the World Trade Organisation, the Government Procurement Agreement 1994.

34. Returning to the tax avoidance issue the Commissioner notes that the Inland Revenue told the select committee that it was not correct to describe the offshore structure adopted by Mapeley for the contract as tax avoidance. However the select committee said that given "Mapeley's own evidence to the Committee it had "structured its tax affairs to minimise exposure to Capital Gains Tax ..." Tax avoidance was clearly one of Mapeley's objectives in the way the deal was structured". The Commissioner is not in a position to make a determination on this point. However he notes that the legal advices that are the subject matter of this information were generated after the agreement had been reached and signed and in that context shed little light on the process up to and including the agreement being reached. Accordingly they could not have been a factor or an item of consideration in that process. Given that the information has limited usefulness in addressing the controversy the inherent public factors that favour the maintenance of the exemption prevail over the public interest factors that favour release.
35. The Commissioner notes that the only case to date where the Tribunal has found that the public interest factors in maintaining the exemption were outweighed by those in favour of disclosure is the case of the Mersey Tunnel Users Association and the Information Commissioner and Merseytravel (2008). In that case the tribunal found that there were striking circumstances that favoured the disclosure of legal advice rather than not. These striking factors included the public authority relying on counsel's advice to pursue a contentious course of action, a lack of transparency concerned with public funds and a financial favouring of one part of the public over another. Such striking factors (and any others) are not present or apparent in this case. The HMRC have not sought to pursue a contentious course of action solely or essentially underpinned by advice emanating from one counsel. The Mapeley agreement was subject to public scrutiny via the select committee enquiry and there is no direct financial favouritism of one part of the public as against another.
36. Taking all the above matters into consideration the Commissioner finds that the inherently strong public interest in maintaining the exemption does outweigh the public interest in disclosure of the information and that the public authority correctly applied the exemption contained in section 42 of the Act.

**Section 36(2)(b)(i) and (c) – Prejudice to effective conduct of public affairs**

37. HMRC did not seek to rely on the exemptions provided by sections 36(2)(b)(i) and (c) in its correspondence with the complainant but raised it in its letter to the Commissioner dated 9 May 2007.
38. The Information Tribunal in *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth (EA/2005/0003)* considered “whether a new exemption can be claimed for the first time before the Commissioner”. It concluded that a tribunal (and thus presumably the Commissioner) “may decide on a case by case basis whether an exemption can be claimed outside the time limits set by [sections] 10 and 17 depending on the circumstances of the particular case”.
39. The Tribunal also added, “...it was not the intention of Parliament that public authorities should be able to claim late and/or new exemptions without reasonable justification otherwise there is a risk that the complaint or appeal process could become cumbersome, uncertain and could lead public authorities to take a cavalier attitude towards their obligations”.
40. The Commissioner, having regard to the tribunal comments, has decided to consider HMRC reliance on the exemptions provided by section 36(2). The reason for this decision is based on the following particular circumstances of this case. The existence of this late discovered information, for which HMRC asserts the applicability of the section 36(2) exemption, was confirmed to the Commissioner in their letters dated the 18 April and 9 May 2007. HMRC explained the delay in locating the information as being caused by the change of staff since the merging of departments (paragraph 18 above) and that the information was created in 2002 but requested in 2005.
41. The Commissioner is of the view that it is acceptable to claim more than one limb of section 36(2) for the same information, as long as arguments can be made in support of the claim for each individual subsection.
42. The information, that HMRC believes is exempted from disclosure by section 36, is contained in the documents referred to at paragraph 7 (B) above. The information comprises the views and opinions of civil servants as to the law surrounding the awarding of government contracts to companies registered outside the United Kingdom. The information was primarily generated in the preparation of answers to questions asked by a Member of Parliament as part of the parliamentary process
43. For information to engage section 36(2) (b)(i) or (c) it must be the reasonable opinion of a qualified person that its disclosure would or would be likely to inhibit the free and frank provision of advice or would be likely to otherwise prejudice the effective conduct of public affairs. The Information Tribunal at paragraph 64 in *Guardian & Brooke v The Information Commissioner (EA/2006/0011 and EA/2006/0013)* held that the opinion “... must be both reasonable in substance and reasonably arrived at”.

44. The Commissioner has also been guided by the Guardian & Brooke Tribunal's decision in which it indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant'. Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion the Commissioner is restricted, focusing on the likelihood of that inhibition or harm occurring, rather than making an assessment as the severity, extent and frequency of prejudice or inhibition of any disclosure.
45. HMRC has informed the Commissioner that on 7 May 2007 Paul Gray and Dave Hartnett were the two HMRC Commissioners who approved the use of the exemption at section 36.
46. HMRC is a non-ministerial government department and therefore the "qualified person" are its commissioners (section 36 (5)(c)). The Commissioner accepts that Paul Gray and Dave Hartnett, on the 7 May 2007, as Commissioners of HMRC were both therefore a "qualified person" for the purposes of the Act.
47. Prior to giving their opinion, they considered the information requested by the complainant and the draft of a letter sent to the Information Commissioner dated 9 May 2007. The Commissioner therefore accepts that prior to giving their opinion the HMRC Commissioners had before them:
  - the terms of the information request
  - the terms of the exemption relied upon
  - the requested information and an explanation as to its contextual relevancy
  - reasons why disclosure would be likely to inhibit the free and frank provision of advice
  - reasons why disclosure would or would be likely to prejudice the effective conduct of public affairs
48. The Commissioner accepts that this was a basis upon which allowed the HMRC Commissioners to reasonably arrive at their opinion. The next steps for the Commissioner to consider is whether the opinion was a reasonable one and does the public interest favour the maintenance of the exemption or in disclosing the information in respect of section 36(2)(b)(i) and/or (c).
49. The reasonable basis for this opinion of the HMRC Commissioners, under section 36(2)(b)(i), is that such disclosure would be likely to decrease the freedom with which members of the civil service would contribute to the advice provided for the purpose of preparing replies to questions asked by Members of Parliament. This is because this advice must consider all the options that go beyond the ultimate reply to the Member of Parliament's question.
50. The reasonable basis for this opinion of the HMRC Commissioners, under section 36(2)(c), is that such disclosure would be likely to affect the effective operation of government policy. This arises as the disclosure of this information

would amount to only a partial disclosure of information relating to government procurements and tax avoidance. This partial public dissemination may precipitate legal challenge of government policy by those who are or may become participants in the public procurement process. The meeting of these ill informed legal challenges would place an unnecessary and avoidable strain on the public purse, so the HMRC Commissioners believed.

51. Having considered the circumstances in which the opinion was given and the information to which it relates the Commissioner is of the view that the opinion given by the two HMRC Commissioners is a reasonable one reasonably arrived at. In reaching his view on the reasonableness of the qualified person's opinion the Commissioner recognises that it is possible that there may be different opinions on this matter which may also be considered reasonable.
52. Having concluded that the opinion (and the way it was arrived at) was reasonable the Commissioner next considered the public interest test. This arises as section 36(2) (b) and (c) are qualified exemptions and therefore it is necessary to consider whether in all the circumstances of the case the public interest in maintaining the exemptions outweighs the public interest in disclosing the information.
53. The Commissioner has noted previously (Decision Notice FS50122585) that the Information Tribunal in *Guardian & Heather Brooke v the Information Commissioner* (EA/2006/0011 and 0013) held that the application of the public interest test in section 36 cases entails a consideration of the following factors:
  - a) The lower the likelihood is shown to be that the free and frank exchange of views would be inhibited, the lower the chance that the balance of the public interest will favour maintaining the exemption.
  - b) Since the public interest in maintaining the exemption must be assessed in all the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought. The authority may have a general policy that the public interest is likely to be in favour of maintaining the exemption in respect of a specific type of information, but any such policy must be flexibly applied, with genuine consideration being given to the circumstances of the particular request.
  - c) The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a rule, the public interest in maintaining the exemption will diminish over time.
  - d) In considering factors that militate against disclosure, the focus should be on the particular interest that the exemption is designed to protect, in this case the effective conduct of public affairs through the free and frank provision of advice and the free and frank exchange of views by public officials for the purposes of deliberation.
  - e) While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of

disclosure are broad ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in the promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation by the public in the democratic process.

54. However, the Tribunal in the Guardian decision qualified the first of these tests, (a), by stating that it was for the qualified person to decide whether prejudice was likely, and thereby whether the exemption was engaged. However, in making a decision on the balance of the public interest, the Tribunal (and therefore the Commissioner) would need to make a decision as to the severity, frequency, or extent of any prejudice that would or might occur.

#### Section 36(2)(b)(i) - Public Interest Test

55. In its letter to the Commissioner dated 9 May 2007, HMRC explained the issues that it considered in its application of the public interest test. These included the “generic” public interest in transparency of government and more specifically in the operation of the public procurement rules. However, there was also a public interest in ensuring the effectiveness of the parliamentary system (parliamentary questions generated the relevant information here). In some situations, the preparations needed to reply to questions raised by a Member of Parliament would entail consideration of a wide area of information and views thereon. This process would be hampered if it could not be conducted in confidence.
56. The Information Tribunal in *DfES v the Commissioner and the Evening Standard (EA/2006/0006)*, was unimpressed with the argument that the threat of disclosure of civil servants’ advice would cause them to be less candid when offering their opinions. It concluded that *‘we are entitled to expect of [civil servants] the courage and independence that... [is]...the hallmark of our civil service’*, since civil servants are *‘highly educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions’* and should not be easily discouraged from doing their job properly. The Commissioner is of the same view in this matter and believes that middle to senior ranking civil servants are rightly assumed to have a high degree of professional robustness.
57. The Commissioner notes that the information was created in 2002; it was requested in 2005 whilst HMRC decision not to communicate it to the complainant was made in 2007. As stated above with the passing of time the public interest in maintaining the exemption wanes.
58. The Commissioner believes that the public interest in releasing the information is not outweighed by the public interest in maintaining the exemption. The reasons for reaching this conclusion in this case are that the disclosure of the information will;
- Increase the transparency of government by allowing public scrutiny of its relationship with its advising civil servants

- Aid the public understanding of how answers are compiled in reply to questions asked of government departments by members of parliament by exemplifying the same
  - Promote accountability and transparency in the spending of public money by enabling the public to scrutinise the pertinent information
  - Aid scrutiny of and accountability of senior officials
  - Not inhibit the free and frank provision of advice provided by civil servants to ministers in the context of parliamentary questions given their professional robustness
59. These factors outweigh those that are (and which in any event were themselves diminished by the passage of time) in favour of retaining the exemption as laid out in paragraph 55 above. Having decided that the exemption provided by section 36(2)(b)(i) did not exempt the disclosure of the information the Commissioner next considered if section 36(2)(c) would.

#### Section 36(2)(c) Public Interest Test

60. The HMRC in its letter to the Commissioner dated the 9 May 2007, explained that the public interest test deliberations for section 36(2)(b)(i) were equally valid for section 36(2)(c). Those are the public interest test deliberations as laid out at paragraph 55 above. HMRC further averred that disclosure of the information would undermine public decision making as it, without a full understanding of its contextually, would be misleading.
61. The Commissioner, having viewed the information, is of the view that the public interest is better served by the release of the information than by maintaining the section 36(2)(c) exemption. The information itself is authored by civil servants and provides advice on the reply to a question posed by a Member of Parliament. As stated more fully above (paragraph 56) the Commissioner believes in the professional robustness of middle to senior ranking civil servants. In any event the Commissioner is conscious that HMRC has not adduced any evidence that would contradict this belief.
62. Additionally the disclosure of the information would add to the public's knowledge of how government works and its work practices with the civil service as the information examples these processes. The degree of robustness and expertise of the Civil Service will also be better understood if this information is disclosed as the information will shed light on this and any resulting evaluation and scrutiny is in the public interest. It is for the reasons expressed above that the Commissioner believes that the public interest favours the release of the information rather than the maintenance of the exemption in the circumstances of this case.

## The Decision

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63. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

(a) Correctly applied the section 42 exemption to some of the information requested in this case as explained in paragraphs 36 above.

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

(b) The public authority breached sections section 1(1)(b), 10(1) and 17(1) (b) of the Act as explained in paragraphs 20 above.

(c) Some of the information requested is exempt under section 36 – (prejudice to the conduct of public affairs), however the exemption could not be maintained in the public interest.

## Steps Required

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64. The Commissioner requires the following steps to be taken:

- Disclose the information (as laid out in paragraph 7(B) above) withheld by the HMRC from the complainant under section 36 of the Act.

65. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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66. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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67. 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 3rd day of November 2009**

**Signed .....**

**Gerrard Tracey  
Assistant Commissioner**

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



## **Legal Annex**

Section 1 provides -

- (1) 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 provides -

- (1) 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 17 provides –

- (1) 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 36 provides –

- (2) 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

Section 42 provides –

(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.