

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 23 August 2011

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

Summary

The complainant requested that Her Majesty's Revenue and Customs ('HMRC') should provide him with information concerning its 'loan back' policy concerning the transfer of staff between HMRC and the United Kingdom Borders Agency ('UKBA'). He also asked for his terms and conditions of employment which addressed the issue of 'loan back'. HMRC explained that it did not hold a 'loan back' policy. It referred the complainant to information about the support role of transferred staff that was on its intranet, therefore applying section 21(1) of the Freedom of Information Act 2000 (the 'Act') to this part of the request. HMRC also applied section 42(1) to legal advice documents which it held and confirmed that it did not hold any terms and conditions with respect to the 'loan back' arrangement. The Commissioner finds that HMRC was correct to apply section 21(1) and section 42(1) and is satisfied that HMRC does not hold terms and conditions which refer to the policy of 'loan back'. The Commissioner finds a number of procedural breaches.

The Commissioner's Role

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

2. On 9 December 2009 a number of HMRC staff and cases were transferred from HMRC to the UKBA. It was arranged that a small number of officers who had transferred to the UKBA would spend some of their time continuing to support a small number of complex and sensitive cases which had remained with HMRC. Likewise a small number of officers who stayed with HMRC would spend some of their time continuing to support cases which transferred to the UKBA. This support role was previously referred to as a 'loan back'.
3. The complainant believes that the transfer of staff between HMRC and UKBA did not comply with the Cabinet Office Statement of Practice ('COSOP') for staff transfers in the public sector.
4. The complainant said he was verbally informed on 26 October 2009 that he was to be 'loaned back' in accordance with current policy at that time. He believes that this was done in contravention of his terms and conditions and has asked to see the 'loan back' policy which he was told applied to him.

The Request

5. On 11 December 2009 the complainant made an information request to HMRC. This concerned the transfer of staff from HMRC to the UKBA and the 'loaning back' of such staff. The request is summarised below:

'I would like the information held by HMRC about the "clear and consistent policy for the treatment of staff" in respect of those staff to be loaned back.'

- 1.1. *Does the HMRC / UKBA agreement announced in <http://bus1.hmce.gov.uk/le/news/Oct2009/ci20091014a.shtml> constitute the clear and consistent policy for the treatment of those members of staff, or not?*
- 1.2. *If not, what policy does and where can I find it?*
- 1.3. *How can the policy, whichever policy, be audited to assure complete transparency? This would be in accordance with HMRC's statement found at <http://bus1.hmce.gov.uk/le/ci/content/ci0181.shtml> which states*

that a transfer must comply fully with the Cabinet Office Statement of Practice (COSOP).

- 2. I would like the information held by HMRC about the terms and conditions of employment of those members of staff to be loaned back. I don't request all the terms and conditions of employment, only those in respect of the "loaning back" because that process appears to affect the duties and responsibilities of those members of staff and thereby change the terms and conditions of employment of those members of staff.*

 - 2.1. I would like any information held by HMRC which goes to demonstrate whether such a change constitutes a change in the terms and conditions of the affected employees or not.'*
6. On 5 February 2010 HMRC responded to this request. It informed the complainant that it was likely that HMRC would wish to apply exemptions to some of the requested information and that it may redact some material. It did not specify which exemptions applied or provide further explanation.
7. HMRC informed the complainant that some of the information was available on HMRC's intranet site and that staff who had transferred to UKBA had full access to this. This information was therefore exempt under section 21(1) of the Act (information reasonably accessible by other means).
8. HMRC informed the complainant that the internet links he had referred to appeared to provide the information he was seeking.
9. On 26 March 2010 the complainant asked HMRC for an internal review.
10. On 15 June 2010 the complainant complained to the Commissioner about the failure of HMRC to provide an internal review.
11. On 22 June 2010 HMRC responded to the request for a review. However this review only considered HMRC's handling of the request and its failure to deal with it under the Act.
12. On 24 September 2010, following the Commissioner's intervention, HMRC provided the complainant with an internal review of its initial response.
13. HMRC explained the purpose of the agreement of 9 December 2009 (the date of the staff transfer). The agreement addressed the support role of transferred staff with respect to complex and sensitive cases. HMRC explained that this support role was previously referred to as a 'loan back'.

14. HMRC explained that it considered that there was information on the HMRC / UKBA intranet which set out and reiterated the policy for support roles in respect of sensitive and complex casework. These were specifically the announcements of 14 October 2009 and 9 December 2009.
15. HMRC therefore considered that section 21(1) of Act applied to the policy of 'loaning back' staff.
16. HMRC explained that the complainant had also been provided with the template of a letter for officers undertaking the support role, which stated that only the role title had changed (from 'loan back').
17. HMRC also provided the complainant with a document dated October 2009 which concerned the 'Transfer of Complex and Sensitive Casework'. It explained that this document contained information already available to the complainant ie. subsequently published in the announcements.
18. HMRC explained that the issue was one of continuing support and that no 'loan back' agreement existed. There were therefore no changes to terms and conditions of employment.
19. HMRC also explained that 'some' information was being withheld from the complainant under section 42(1) of the Act. It explained that the exemption applied to information which fell under Legal Professional Privilege and was covered by advice privilege.
20. As section 42 is a qualified exemption, HMRC went on to provide the complainant with its public interest arguments in favour of withholding the specific information. It explained that in all circumstances of the case, it considered that the public interest in maintaining the exemption outweighed the public interest in disclosing it.

The Investigation

Scope of the case

21. On 30 October 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
22. On 17 November 2010, the complainant confirmed the scope of his complaint.
 1. HMRC explained that the policy regarding the loan back of staff was accessible on the HMRC / UKBA intranet. It had therefore

applied section 21 of the Act to that part of this request.

The complainant believed he was treated in accordance with a policy which is not accessible to him and he therefore did not accept HMRC's application of section 21.

2. HMRC explained that it was withholding some information under section 42 of the Act ('Legal Professional Privilege').

The complainant pointed out that HMRC did not explain exactly what information was being withheld under section 42 or which part of the request this applied to.

He did not accept HMRC's application of section 42.

3. HMRC had not explained why it was withholding information about the terms and conditions of his employment.
4. HMRC had failed to address the original request for information or to properly state to which of his requests the exemptions had been applied.

Chronology

23. On 14 January 2011 the Commissioner wrote to HMRC and asked it to confirm its position with respect to the information it said it did not hold. He also asked it to provide further detail regarding its application of section 42.
24. On 11 February 2011 HMRC responded to this request.
25. On 18 February 2011 the Commissioner wrote to the complainant and provided him with HMRC's further arguments.
26. On 25 February, 27 February and 1 March 2011, the complainant submitted further arguments to the Commissioner to explain why he did not accept HMRC's position.
27. On 2 March 2011 the Commissioner asked HMRC to confirm that it did not hold a 'loan back' policy on 11 December 2009 (the date of the request) and that it did not hold an equivalent policy which had applied to the complainant in October 2009.
28. The Commissioner also asked HMRC to provide the complainant with his terms and conditions if they were generic (and applied to many civil servants) or to inform the complainant that he could make a subject

access request for his personal terms and conditions under the Data Protection Act 1998 (the 'DPA').

29. HMRC responded on 16 March 2011 confirming it did not hold (nor had ever held) any other policies regarding the 'loan back' of staff.
30. With regard to the terms and conditions, HMRC suggested that the complainant should make a new request for this information. It did not consider that the complainant had asked for his full terms and conditions in this request. It confirmed it would then either provide this information under the Act or under the DPA, as appropriate.
31. On 8 April 2011 the Commissioner suggested to the complainant that if he wished to be provided with this information, he should request his terms and conditions in full from HMRC.

Analysis

Substantive Procedural Matters

32. The full text of section 1(1)(a) and (b), section 10(1), section 17(1), section 21(1) and section 42(1) is available in the Legal Annex at the end of this Notice.

Section 1

Terms and conditions of employment

33. 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."

34. The complainant asked for *"the information held by HMRC about the terms and conditions of employment of those members of staff to be loaned back"*. He specifically stated that he was not requesting *"all the terms and conditions of employment, only those in respect of the 'loaning back'."*

35. On 24 September 2010, HMRC explained that there is no 'loan back' arrangement and therefore no different terms and conditions which apply. No changes have been made to terms and conditions regarding this issue.
36. On 11 February 2011, HMRC explained to the Commissioner that if held, the information would be exempt under section 40(1). However, it repeated that it did not accept the premise that a 'loan back' arrangement existed. As this was its position, it therefore considered that it could not confirm or deny that it held this information.
37. The complainant informed the Commissioner that when he joined the Civil Service, he was not given a personal contract of employment but a generic set of terms and conditions that applied to many thousands of civil servants. He explained that he required a copy of the definite terms and conditions of his employment.
38. On 2 March 2011, in an effort to informally resolve this issue, the Commissioner asked HMRC to provide the complainant with a copy of these generic terms and conditions under the Act or ask him to submit a subject access request (a 'SAR') under the DPA for a copy of his personal terms and conditions.
39. However, HMRC has argued that in his original request the complainant specifically stated: *"I don't request all the terms and conditions of employment, only those in respect of the loaning back"*.
40. HMRC has pointed out that it identified the information requested by the complainant in its review of 22 June 2010. In this letter, it had emphasised that the complainant had asked for information regarding terms and conditions only in respect of the 'loaning back'. HMRC maintains that the complainant did not question this or suggest that it was a misinterpretation.
41. In addition, HMRC has argued that in an email dated 1 April 2010, the complainant indicated to HMRC that he would request his contract of employment under the Act and also make a SAR to obtain it. He implied that this approach would enable him to obtain his contract of employment under either the Act or the DPA.
42. HMRC has therefore argued that the complainant did not consider his original request had asked for his full terms and conditions and he understood that he would have to make a further request to obtain it.

43. On 16 March 2011, HMRC suggested that the complainant should make a new request for his full terms and conditions and that it would consider this either under the Act or the DPA, whichever was appropriate.
44. The Commissioner appreciates that the complainant's original request did not ask for the full terms and conditions of his employment contract but considers that HMRC might have provided this information as part of an informal resolution to this aspect of the complaint. As this has not proved to be possible, the Commissioner has advised the complainant that he should submit a further request to HMRC if he wants this information.
45. The Commissioner is satisfied that HMRC does not hold terms and conditions of employment which relate the issue of 'loan back' as it does not have a 'loan back' policy.

Exemptions

Section 21

Policy regarding the 'loan back' of staff

46. Section 21(1) of the Act provides that a public authority does not need to provide information under section 1 of the Act if that information is reasonably accessible to the applicant by other means.
47. The first part of the complainant's request asked whether HMRC's policy as given on the website in October "constituted the clear and consistent policy for the treatment of those members of staff" who had been 'loaned back'. He wanted to know where he could find this policy and how it could be audited to assure complete transparency.
48. HMRC's initial response informed the complainant that some of the information he had requested was on HMRC's intranet site and that this information was exempt from disclosure under section 21 of the Act.
49. At internal review HMRC confirmed that there was information on the HMRC / UKBA intranet which set out and reiterated the policy for support roles in respect of sensitive and complex casework. This was specifically the announcements of 14 October 2009 and 9 December 2009. HMRC therefore considered that this part of the request was exempt from disclosure under section 21(1) of the Act.

50. HMRC also provided the complainant with a document dated October 2009 which concerned the 'Transfer of Complex and Sensitive Casework'.
51. HMRC explained that the actual agreement at the date of transfer of 9 December 2009 was that a small number of officers who had transferred to the UKBA would spend some of their time continuing to support a small number of complex and sensitive cases which had remained with HMRC and that a small number of officers who stayed in HMRC would spend some of their time continuing to support cases which transferred to the UKBA. This support role was previously referred to as 'loan back'. However there was no "loan back' arrangement'.
52. Although it was never explicitly stated, HMRC's response to the complainant implies that as there was no 'loan back' policy, there could be no method of auditing it.
53. On 11 February 2011 HMRC confirmed to the Commissioner that it had provided the complainant with all the information that it holds with respect to this aspect of the request. It reiterated that there is no 'loan back' arrangement. It confirmed that it had provided the document of October 2009 as it related to the relevant support arrangement in respect of the transfer of complex and sensitive casework. It confirmed that the 2 intranet links which were identified by the complainant and confirmed by HMRC on 5 February 2010 were links to the information that it held and that therefore this part of the request fell under section 21 of the Act.
54. For completeness, HMRC explained that within the link of December 2009 there is a further link to the wider Transitional Service Level Agreement between HMRC and UKBA regarding transfer of staff. HMRC explained that the casework section of this would be within the scope of the request but that it simply restated the policy regarding complex casework as already advised in the links. This was the same information but in a different document.
55. The Commissioner is satisfied that the information HMRC holds and which the complainant requires is reasonably accessible to him via other means. HMRC has explained that it does not have a 'loan back' arrangement but that its policy regarding support roles in respect of sensitive and complex casework can be found on the HMRC / UKBA intranet in announcements dated 14 October 2009 and 9 December 2009.

56. HMRC also confirmed that it had sent the complainant the template of a letter which was sent to all officers who were going to undertake the support arrangement in March 2010.
57. The Commissioner is satisfied that HMRC was correct to apply section 21(1) to this part of the request.

Section 42(1)

58. In its initial response to the complainant HMRC did not apply section 42(1) to any part of the request. However at internal review HMRC explained that 'some' information was being withheld under section 42(1) of the Act. On 11 February 2011 HMRC confirmed to the Commissioner that this exemption was being applied to emails which contained legal advice HMRC had received on the subject of the secondment of staff.
59. Legal Professional Privilege (LPP) protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v the Information Commissioner and the DTI (EA/2005/0023; 4 April 2006)* ('Bellamy') as:

"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation."

60. There are two types of privilege – litigation privilege and legal advice privilege. Advice privilege may apply where no litigation is in progress or being contemplated. In these cases, the communications must be:
 - confidential,
 - made between a client and professional legal adviser acting in their professional capacity and;
 - made for the sole or dominant purpose of obtaining legal advice.

Communications made between adviser and client in a relevant legal context will attract privilege.

61. For the avoidance of doubt, the Tribunal in the case of *Calland v the Financial Services Authority (EA/2007/013)* also confirmed that in-house

legal advice or communications between in-house lawyers and external solicitors or barristers also attracts LPP.

62. In this case, managers within HMRC (the clients) sought legal advice from HMRC's internal lawyers on a professional basis (the professional legal adviser) concerning the subject of the secondment of staff.
63. The advice was provided and discussed in a series of email documents. The advice was confidential and the sole purpose of the communications was to obtain and provide legal advice.
64. The legal advice contained in the three documents meets all three above conditions and the Commissioner is therefore satisfied that it is subject to advice privilege. In addition, this information has not been shared without restriction with any third party.
65. Since section 42(1) is a qualified exemption it is subject to the public interest test under section (2)(2)(b) of the Act. This states that the duty to provide information in section 1(1)(b) does not apply, if or to the extent that "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information". The Commissioner has therefore considered the public interest arguments in favour of maintaining the exemption and in favour of disclosing the information below.

Public interest arguments in favour of disclosing the requested information

66. The Commissioner considers that there is a public interest in HMRC being accountable and transparent about the decisions it has made regarding the secondment of its staff. In this case disclosure would show HMRC's legal considerations in making decisions regarding its staff.
67. HMRC acknowledges that disclosure of the legal advice could increase public confidence in the way it dealt with staff transferring to UKBA.
68. The complainant has argued that HMRC has introduced new terms and conditions to the terms of his employment. He has argued that if HMRC received legal advice before it changed his terms and conditions and introduced a policy which is "very very wrong", then the advice should be disclosed.
69. The complainant has argued that HMRC is deliberately misleading him as he believes that it did have a 'loan back' arrangement on 26 October 2009 which he was told applied to him. He understands that HMRC may have renamed its 'loan back policy' to the 'continuing support policy' but

he still wishes to see the policy that applied to him on 26 October 2009 and he believes that the legal advice should be disclosed to him.

70. The complainant has also argued that he has concerns about the independence of HMRC's lawyers. He has argued that there were similar concerns about the retained lawyers directly employed by HMRC's predecessor Her Majesty's Customs and Excise (HMC&E) and that this led to many of HMC&E's lawyers being removed from the department's payroll and to the setting up of a independent prosecution office which has since been absorbed into the Crown Prosecution Service.
71. The complainant believes that his concerns about the independence of HMRC's lawyers should have an effect upon its claim to legal privilege.
72. However, the Commissioner considers that LPP can, in principle, be legitimately applied to advice provided by HMRC lawyers to HMRC staff.
73. It is clear that the complainant is dissatisfied with the way he has been treated by HMRC. The Commissioner therefore considers the argument that HMRC should be transparent in the advice it has received concerning the secondment of its staff to have some weight. This would promote accountability and give the public confidence that the organisation was run in accordance with its own policies and the law.

Public interest arguments in favour of maintaining the exemption

74. HMRC has argued that there is a strong public interest in protecting the established principle of confidentiality in communications between legal advisors and their clients. There must be reasonable certainty relating to confidentiality and the disclosure of legal advice. If there was a risk that it would be disclosed in the future, the principle of confidentiality might be undermined and the legal advice less full and frank than it should be.
75. The above argument is supported by the comments made by the Tribunal in the *Bellamy* case in which it stated that disclosure was unlikely to be justified in most cases as:

'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...'
76. In this particular case HMRC has argued that there is a public interest in preserving its ability to seek and obtain full and frank advice regarding the effective conduct of its business.

77. It has argued that it is strongly in the public interest that government action should respect the rule of law, which makes it imperative that clear, fully informed, fully reasoned and balanced legal advice should be available to the decision-makers.
78. If the advice provided to government were liable to be put into the public domain, the great pressure of public debate and criticism are such that the advice (and possibly the instructions underpinning that advice) might come to be tailored to take into account the public impact they would have.
79. If legal advice were to be routinely disclosed, difficult issues would arise in relation to caveats, qualifications or provisional expressions of opinion which might be contained in such advice. (HMRC stressed that this argument should not be taken to imply anything about the legal advice it had received in this case).
80. HMRC has argued that the complainant has recently issued legal proceedings against it and that this underlines the importance of the privilege to HMRC.

Balance of the public interest arguments

81. The Commissioner has considered whether the arguments in favour of disclosure are outweighed by those in favour of maintaining the exemption. In carrying out the balancing exercise he has borne in mind that there is an assumption in favour of disclosure in the Act.
82. The Commissioner considers that the complainant's points lend some weight to the argument that disclosure of the legal advice would result in greater accountability and transparency.
83. However, when considering the significance of this argument he has also noted the Information Tribunal's comments in the case of the *Foreign and Commonwealth Office v the Information Commissioner (EA/2007/0092)*. In that case the Tribunal stated that the public interest in favour of disclosure must be "*more than curiosity as to what advice the public authority has received*". The cases where transparency and accountability were significant factors must be those where:

"there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice".
84. The Commissioner does not consider that these points are relevant to this case. There is no suggestion that HMRC has ignored unequivocal

advice and, although the complainant is not satisfied with the transfer policy which has been applied to him, there is nothing in the information he has provided which suggests that HMRC is pursuing a policy which is unlawful.

85. Although the Commissioner has attributed some significance to the arguments in favour of releasing the withheld information he has also taken into account the comments of the Information Tribunal in the *Bellamy* case in which it stated 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'.

86. The Commissioner agrees with the Tribunal's comments and in this case has attributed considerable weight to the argument that there is a public interest in preserving the concept of LPP. This preserves the ability of people and organisations to obtain full and frank legal advice.
87. There is a particular public interest in ensuring that a government department can obtain full and informed legal advice so that it can make decisions that are compliant with its legal obligations.
88. HMRC has argued in general terms that a government department should be able to obtain advice in the knowledge that it will not routinely be placed in the public domain. It has argued that if legal advice was routinely disclosed, it would be subject to public scrutiny and this may raise issues concerning provisional expressions of opinion within any advice given.
89. In this case the advice provided to HMRC concerned the subject of the secondment of staff and the Commissioner considers that it should be able to obtain confidential legal advice about its policies with respect to its employees. If there was a risk of disclosure, this principle of confidentiality might be undermined and the legal advice less full and frank than it should be.
90. There have been relatively few occasions in cases where LPP has been claimed when the Commissioner or Tribunal have considered that in all the circumstances, the public interest in disclosure was strong enough to outweigh the public interest in maintaining the exemption; however one such case was that of the *Mersey Tunnel Users Association v Information Commissioner and Merseytravel (EA/2007/0052)* (*'Merseytravel'*).

91. In that case, the Information Tribunal outlined some of the factors which weighed in favour of disclosing the information. The Tribunal judged that the number of people affected in that case was significant as the advice affected 80,000 drivers every weekday and could also affect around 1.5 million residents. There was also a large amount of money at stake: around £70 million.
92. In this case there is no large amount of public money at stake and only a small number of people are affected. These are not significant factors to weigh in favour of disclosure.
93. In the *Merseytravel* case, the Tribunal judged that the countervailing considerations in favour of disclosure were strong enough to override the strong public interest arguments in favour of maintaining the exemption. In giving less weight to the arguments inherent in the exemption the Tribunal noted that the advice received was not recent (it was over 10 years old).
94. However in this case the Commissioner notes that at the time of the request the advice was both recent and 'live'. The advice was current when the request was made. In the Commissioner's view the fact that the advice was recent means that should the information be released, it is more likely in the future that both lawyer and client would feel inhibited from providing the full circumstances of a case and from giving frank legal advice. He considers that the fact that the advice was recent adds further weight to the arguments in favour of maintaining the exemption in this case.
95. The Commissioner acknowledges that in the *Merseytravel* case the Tribunal also afforded less weight to protecting LPP because the advice was concerned with matters of public administration rather than "significant private interests". However in his view there is still a public interest in preserving the ability of public authorities to obtain legal advice in connection with their duties and responsibilities. The Commissioner considers that support for this approach can be taken from the Tribunal's findings in the case of *Fuller v the Ministry of Justice (EA/2008/005)* which stated that the principles behind LPP "*are as weighty in the case of a public authority as for a private citizen seeking advice on his position at law...*"
96. In this case, the advice concerned the secondment of staff and the Commissioner considers that HMRC should be able to take legal advice concerning its policies with respect to its employees in confidence. If there was a risk of disclosure, this principle of confidentiality might be undermined and the legal advice less full and frank than it should be. The Commissioner considers that the strong public interest in protecting

the established principle of confidentiality in communications between legal advisors and their clients carries significant weight in this argument.

Conclusion

97. In view of all the above, the Commissioner is satisfied that in this case the arguments in favour of maintaining the exemption outweigh those in favour of disclosure. In reaching this conclusion the Commissioner has judged that the arguments in favour of disclosure are not strong enough to override the strong public interest arguments in favour of maintaining the exemption. The legal advice is recent and does not affect a significant number of people. There is no large amount of money involved. There is no suspicion of misrepresentation or unlawful behaviour. The Commissioner is therefore satisfied that the public interest arguments in favour of maintaining the exemption outweigh those in favour of disclosure.

Procedural Requirements

98. Section 10(1) of the Act states the following:

"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."

99. The request was dated 11 December 2009. HMRC provided an initial response to the complainant 38 working days after this date, on 5 February 2010.

100. The Commissioner therefore finds that HMRC failed to comply with section 10(1) as it did not inform the complainant whether it held the requested information within 20 working days.

Section 17

101. The request was dated 11 December 2009. HMRC provided a response to the complainant 38 working days after this date, on 2 February 2010. However, this response informed the complainant that it was likely HMRC would wish to apply exemptions to some of the requested information and that it may redact some material. It explained that some of the requested information was exempt from disclosure under section 21 of the Act as it could be accessed via the website links which had been identified.

102. The Commissioner therefore finds that HMRC failed to issue a refusal notice to the complainant within the statutory time period for

compliance with section 1(1). HMRC is therefore found to be in breach of section 17(1).

103. At internal review HMRC likewise informed the complainant that 'some' information was exempt under section 42(1) of the Act but was not specific about which part of the requested information this applied to.

104. In failing to specify which information was exempt under section 42(1) the Commissioner finds HMRC to be in breach of section 17(1)(a).

The Decision

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

- In informing the complainant that it does not hold terms and conditions of employment which relate to the issue of 'loan back' and that it does not have a 'loan back' policy, HMRC acted in accordance with section 1(1)(a).
- HMRC correctly applied section 21(1) to that part of the information request which asked for the 'loan back' policy.
- HMRC correctly applied section 42(1) to that part of the information request which asked for the legal advice.

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

- HMRC failed to provide a response to the complainant within the statutory time period contained within the provisions set out in section 10(1).
- HMRC failed to provide a refusal notice to the complainant within the statutory time period contained within the provisions set out in section 17(1).
- HMRC failed to specify which information was exempt under section 42(1) within the provisions set out in section 17(1)(a).

Steps Required

106. The Commissioner requires no steps to be taken.

Other matters

107. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

108. The complainant asked HMRC for an internal review on 26 March 2010.

109. On 22 June 2010 HMRC responded to this request. This review considered HMRC's handling of the request. It explained that it had failed to deal with the request in accordance with the Act as it was made as part of an ongoing correspondence on the question of staff transfers to UKBA.

110. HMRC recognised its failure to comply with the Act and identified the information that it understood was required. However, the Commissioner is concerned that this first internal review only considered procedural matters.

111. Paragraph 39 of the section 45 code of practice states:

"The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue."

112. The internal review which did examine HMRC's response to the request was conducted on 24 September 2010, following the intervention of the Commissioner.

113. 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. 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 is concerned that it took 123 days for an internal review to be completed, well in excess of the time allowed in his guidance.

Right of Appeal

114. 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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

115. 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.

116. 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 23rd day of August 2011

Signed

**Faye Spencer
Group Manager
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.”

Time for Compliance

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.”

Refusal of Request

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.”

Information Accessible by other Means

Section 21(1) provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

Legal Professional Privilege

Section 42 provides that –

- (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.