

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **8 May 2012**

Public Authority: **The Cabinet Office**

Address: **70 Whitehall
London
SW1A 2AS**

Decision (including any steps ordered)

1. The complainant has requested copies of the drafting papers (i.e. instructions to Parliamentary Counsel and correspondence with Parliamentary Counsel) regarding specific provisions within the Finance Act 1994 and the Finance Act 2008. The Cabinet Office withheld the information on the basis of the legal professional privilege exemption (section 42) and the government policy exemption (section 35) of the Freedom of Information Act.
2. The Commissioner's decision is that the Cabinet Office is entitled to withhold the requested information on the basis of section 42.

Request and response

3. On 7 September 2011 the complainant wrote to the Cabinet Office and requested information in the following terms:

'Please supply me with the following information.

- 1. Repeat request (previous one several years back was unanswered) – a copy of the drafting papers relating to the amendments made during the passage of the 1965 Finance Bill through Parliament to the provision that became FA 1965, s. 22(7).*
- 2. The drafting papers for the provision that became FA 1994, s. 191.*
- 3. The drafting papers for the provisions that became FA 2008, s. 37 and Sch. 15.'*

4. The Cabinet Office responded on 21 September 2011 and explained that it did not hold any information falling within the scope of request 1. In respect of requests 2 and 3 it confirmed that it held relevant information but it considered it to be exempt from disclosure on the basis of sections 35(1)(a) and 42(1) of the FOIA.
5. The complainant contacted the Cabinet Office on 22 September 2011 and asked it to conduct an internal review of this decision.
6. The Cabinet Office informed him of the outcome of the review on 29 September 2011. The review upheld the application of the exemptions set out in the refusal notice. The review also noted that it had interpreted the request for 'drafting papers' as referring to instructions to Parliamentary Counsel, correspondence with Parliamentary Counsel, and unpublished draft clauses or draft amendments (and thus not covering information included in Bills or amendment papers published by either House of Parliament).

Scope of the case

7. The complainant contacted the Commissioner on 19 December 2011 in order to complain about the way his requests for information had been handled. The complainant explained that he was dissatisfied with the Cabinet Office's decision to withhold the information he requested which fell within the scope of requests 2 and 3. Although he accepted that the information fell within the scope of the two exemptions cited by the Cabinet Office, he believed that the public interest favoured disclosure of the information. The complainant provided the Commissioner with detailed submissions to support this position; these submissions are referred to later in this notice. The complainant confirmed to the Commissioner that he did not wish to complain about the Cabinet Office's response to request 1.

Reasons for decision

8. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
9. There are two categories of legal professional privilege: advice privilege and litigation privilege.

10. In this case the category of privilege the Cabinet Office is relying on is advice privilege. This privilege is attached to confidential communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. The information must be communicated in a professional capacity; consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact and answer which can usually be found by inspecting the documents themselves.
11. In this case the information that has been withheld consists of instructions sent to Parliamentary Counsel by civil servants and the responses provided by Parliamentary Counsel. The Cabinet Office noted that a judgement by the House of Lords had explicitly confirmed that legal professional privilege applies to advice given to Parliamentary Counsel to government departments in relation to the drafting and preparation of public Bills.¹
12. The Commissioner has reviewed the withheld information and is satisfied that legal advice privilege applies; the dominant purpose of the documents is clearly the seeking, or provision of, legal advice. The Commissioner is therefore satisfied that all of the withheld information falls is exempt from disclosure on the basis of section 42(1).

Public interest test

13. However section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

14. The Cabinet Office emphasised that the Information Tribunal had recognised the strong element of public interest built into legal professional privilege. That is to say a person seeking access to legal

¹ Three Rivers DC v Bank of England (No. 6) [2004] UKHL 48, paragraph 41

advice must be able to communicate freely with legal advisers in confidence and be able to receive advice from legal advisers in confidence. The underlying rationale for having a strong rule against disclosure being that it encourages full and frank exchanges between clients and their legal advisers.

15. The Cabinet Office argued that if the drafting papers which had been requested were disclosed it was concerned that there could be a significant adverse effect on the process of preparing legislation in the future. This is because free and frank communication between lawyers in the Office of Parliamentary Counsel and those instructing them in government departments could be inhibited. The Cabinet Office explained that without such free and frank discussions the process of drafting legislation would become less effective resulting in a negative impact on the quality of the legislation that is produced.
16. The Cabinet Office explained that in its view the balance of the public interest was not altered by two of the complainant's counter arguments, namely that neither of the issues were currently subject to discussion for reform or change and that in the case of request 2 the information was nearly 20 years old. The Cabinet Office emphasised that communications such as those which are the focus of these requests take place on the understanding that they are likely to remain confidential until the information becomes a historical record given the strong element of public interest built into legal professional privilege.
17. The Cabinet Office highlighted the fact that it was not aware of any judicial decisions that might suggest that the drafting papers for a particular statutory provision could be relevant to the statutory interpretation. On the contrary, the courts have repeatedly stated that the views of Parliamentary Counsel and other officials in preparing legislation are not a legitimate aid to construction. Rather, what is relevant is the intention of Parliament, not the intention of officials who prepare the legislation. Published material such as explanatory notes or reports of debates in Parliament may, in certain circumstances, be relevant to statutory interpretation but such information was in the public domain anyway.

Public interest in favour of disclosing the information

18. The Cabinet Office acknowledged that there was a public interest in disclosing information about the preparation of legislation. It also acknowledged that there was a public interest in public authorities being accountable for the quality of their decision making and disclosure can allow people to assess whether or not decisions made by relevant public authorities have been made for sound reasons and on the basis of good quality advice.

19. The complainant argued that because of particular issues associated with the two provisions referred to in requests 2 and 3, he believed that the public interest favoured disclosure of the respective drafting papers. In doing so the complainant provided the Commissioner with a helpful description of the effect of relevant parts of the two Finance Acts and the Commissioner has summarised these descriptions below so that the complainant's public interest arguments can be seen in context.
20. With regard to request 2 the complainant explained to the Commissioner that section 191 of the Finance Act 1994 was enacted to deal with the introduction of Self Assessment in April 1996. Under Self Assessment taxpayers became more responsible for assessing their own tax liabilities. In order to monitor the effectiveness of the new regime, legislation was enacted to ensure that the former Inland Revenue (now HMRC) could make enquiries into taxpayers' returns. Such enquiries have to be commenced within a year of the filing date of return. After that period, or where an enquiry is opened, after any enquiry is formally concluded, HMRC's right to challenge a taxpayer's self assessment is by way of a 'discovery assessment' under the Taxes Management Act 1970. A discovery assessment requires an officer of HMRC to have discovered that tax has been under assessed. Section 191 of the Finance Act 1994 put further restrictions on the HMRC's right to raise such a discovery assessment.
21. The complainant explained that there had been considerable dispute between HMRC (and previously the Inland Revenue) and taxpayers about precisely when discovery assessment may be raised under the new rules. The complainant noted that this has led to a number of appeal cases being heard by the courts e.g. one case heard by the Court of Appeal in 2004, two more due to be heard in late 2011, and further high profile recent decisions by the First Tier Tribunal.
22. The complainant suggested that it was possible that the original interpretation of the legislation – as interpreted by those who framed the rules at the Inland Revenue – had been superseded over the course of time. The complainant noted that there had been significant public comment by tax practitioners and academics about the Court of Appeal decision of 2004 and that HMRC's interpretation of the relevant legislation since then had been even more 'extreme'.
23. The complainant accepted that HMRC was entitled to interpret legislation as it saw fit and he did not suggest that a previous interpretation of legislation would be binding on a Tribunal or Court as a relevant guide to the meaning of statutory words. However, the complainant explained that the 1994 changes were subject to much liaison with professional bodies in the accounting and legal sphere. If the practice had been

changed since then the tax profession might wish to seek a realignment of the rules to what was previously agreed.

24. Furthermore, the complainant explained that it was his understanding, based on HMRC's response to an FOI request, that there had been 77,000 such assessments in calendar year 2009 and a further 38,000 in the following four months alone. Therefore, he argued that it was clear that discovery assessments are not a minority interest and taxpayers are entitled to know the background to the drafting of the current rules, particular in light of the disagreements as to when discovery assessments could in fact be raised.
25. In relation to request 3 the complainant explained that the provisions contained at section 37 and schedule 15 of the Finance Act 2008 were introduced to place on a statutory footing a rule known as *Sharkey v Wernher* following a House of Lords decision in the case of that name in 1955. In summary, this rule concerns the adjustments that ought to be made for tax purposes if a trader takes goods of his/her/its stock for personal consumption. Under the rule a trader is required to take account for the profit that would have been made on the transaction had the stock been sold for its then market value (i.e. trader is required to pay tax on a profit that is not actually made).
26. The complainant explained over the past decade, and for a number of reasons, tax practitioners have started to question the correctness of the House of Lords' decision. Furthermore, taxpayers had started to take a more robust approach when challenged by HMRC under the *Sharkey v Wernher* rule, and this being the case the complainant assumed that this is why HMRC moved to place the rule on a firm statutory footing.
27. The complainant explained that, during the course of the passage of the Bill through Parliament, namely at the Finance Bill Standing Committee, the Economic Secretary to the Treasury alleged that one of the reasons for the change was because it had been requested by various representative bodies.² The complainant said that in response to these comments he had asked HM Treasury to clarify which body had requested such a change and had in fact submitted a number of FOI requests to HM Treasury on this topic. The complainant noted that although HM Treasury's responses to his general enquiries suggested that it was the Chartered Institute of Taxation that had requested this

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<http://www.publications.parliament.uk/pa/cm200708/cmpublic/finance/080520/am/80520s04.htm> - column 311

change, the actual responses provided to his FOI requests suggested that this was not in fact the case. (Indeed the responses to these FOI requests noted that the Chartered Institute of Taxation had in fact opposed the proposal when it was announced).

28. The complainant therefore alleged that in the absence of any other trade or professional body making such a request, in his view Parliament had been misled, albeit probably unintentionally. That is to say, despite the Minister's comments, no such body had requested such a change. (In order to support his view the complainant provided the Commissioner with a number of pieces of documentation, including the responses to his FOI request and letters from the Chartered Institute of Taxation to HM Treasury. Although the Commissioner has not described the content of these documents here he has considered their contents fully).
29. The complainant argued that this was an important issue because the taxation of businesses affects a large number of individuals and corporations and there is a considerable public interest in identifying the reasons for the change in the law. In the complainant's view disclosure of contemporaneous drafting documents would directly serve this interest and could help shed light on the whether the Minister's comments, as referenced above, were correct.
30. More broadly, the complainant disputed the Cabinet Office's assertion that disclosure of the requested information would result in less candour between officials. In support of this position the complainant noted that the information sought in request 2 related to information about the introduction of a system of taxation nearly 20 years ago that was non-political and subject to liaison with the professional bodies at the time. Furthermore, there was no suggestion that either of these issues is currently subject to discussion for reform or change by Ministers and therefore this cannot be a reason for not disclosing the requested information.

Balance of the public interest

31. In considering the balance of the public interest under section 42, although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, he does not accept, as previously argued by some public authorities that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) were clear:

'The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of

'disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption'. (Para 41).

32. Consequently, although there will always be an initial weighting in terms of maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice were disclosed by reference to the following criteria:
 - how recent the advice is; and
 - whether it is still live.
33. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner will consider the following criteria:
 - the number of people affected by the decision to which the advice relates;
 - the amount of money involved; and
 - the transparency of the public authority's actions.
34. With regard to the age of the advice the Commissioner accepts the argument advanced on a number of occasions by the Tribunal that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of any future decision making process.
35. In many cases the age of the advice is closely linked to whether the advice is still live. Advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.
36. With regard to request 3 the withheld information dates from 2008 – some three years before the request – and the Commissioner is satisfied that such advice could be correctly described as recent. With regard to request 2, as the complainant noted the withheld information in question is older dating as it does from 1993. However, the Commissioner notes the Cabinet Office's argument that those involved in requesting and providing this advice would have an expectation that it would be kept confidential until it became a historical record. Therefore

in the circumstances of request 2 the Commissioner does not believe that the principle of legal professional privilege has diminished significantly, if at all, despite the age of the withheld information. That is to say the Commissioner is satisfied that disclosure of the information relating to both requests would be very likely to lead to a loss of candour by officials requesting advice from Parliamentary Counsel and indeed those charged with providing such advice.

37. The Commissioner believes that this likely consequence of disclosure – i.e. a potential chilling effect on the Parliamentary drafting process – adds considerable weight to the public interest in maintaining the exemption. This is because the fullness of the instructions for the purpose of drafting legislation is essential to the legislative process, which itself is essential to the legal system in a parliamentary democracy. This is not to say that the Commissioner believes that the exemption contained at section 42 of FOIA should be treated as absolute when applied to information of the nature requested in this case. However, in his view it is vital to recognise that the rationale underlying legal professional privilege attracts particular and considerable weight when applied to instructions to, and advice from, Parliamentary Counsel.
38. With regard to whether the advice could be considered to be live the Commissioner notes the complainant's suggestion that neither of the issues would appear to be subject to discussion for reform or change. However, the Commissioner notes that whilst it might be difficult to argue that the advice is still being implemented - both Finance Acts having now been passed – he does accept that advice, is in effect, still being relied upon given that the advice is the basis upon which the provisions are based. Moreover, in respect of request 2, as noted by the complainant's submissions the application of the self assessment rules set out in the Finance Act 1994 continue to give rise challenges by taxpayers.
39. With regard to the public interest arguments in favour of disclosure the Commissioner agrees with the generic argument that there is a clear public interest in disclosure of information which would allow the public to assess the degree to which legislation has been produced on the basis of sound legal advice. Given the significant number of individuals and companies which are affected by the relevant provisions within both of the Finance Acts referenced in the requests, and indeed the value of the taxation collected under each provision, the Commissioner accepts that this argument attracts further weight.
40. Given the nature of the complainant's more specific arguments, the Commissioner has given particular consideration to issues which could be broadly described as ones relating to transparency. In respect of request 2 the Commissioner is prepared to accept that given the

apparent concern amongst taxpayers and their advisers regarding HMRC's use of discovery assessments it could be argued that there is a weighty public interest in disclosure of drafting papers so that the public can understand, as the complainant described it, the intentions of those who actually requested the legislative changes. However, although the Commissioner accepts that disclosure of the withheld information could go some way to addressing this aim, he notes that in light of the Cabinet Office's point that such information cannot be used as basis upon which to aid interpretation of a statutory provision, the actual value of any disclosure is limited. The fact that the tax profession may wish to re-discuss these provisions is not, for the Commissioner's purposes, a convincing argument in support of disclosure. The legislation is as it is.

41. Furthermore, the Commissioner notes that this particular aspect of the tax system is clearly not the only one where there is some dispute between HMRC and taxpayers (and their advisers) as to how taxes should be calculated and collected. In the Commissioner's opinion, any concern about the use of discovery assessments needs to be seen in a broader context. If too much weight is placed on the argument in relation to this issue, taken to its logical, if extreme, conclusion, in any similar scenario a compelling case could be made for the disclosure of drafting papers relating to any aspect of tax legislation over which there is a dispute. Such a position would not be sustainable because it would fundamentally undermine the role of Parliamentary Counsel and the drafting process. In summary, the Commissioner does not accept that simply because there is some controversy or dispute about an aspect of the tax system this means that there is a compelling public interest in disclosing the drafting papers relating to the provision in question.
42. In respect of request 3 the Commissioner is persuaded by the evidence provided to him by the complainant that there would appear to be, at the very least, a lack of clarity as to the extent to which a request from professional bodies influenced the decision to put *Sharkey v Wernher* on a statutory footing. Given this lack of clarity and indeed the potential seriousness of the complainant's allegations the Commissioner believes that there is weighty public interest in disclosure of any relevant information in order to aid transparency in respect of this specific issue and in particular to clarify the reasoning behind the provisions within section 37 and schedule 15.
43. In conclusion, for the information that falls within the scope of request 2 the Commissioner is firmly of the opinion that the public interest favours maintaining the exemption. This is on basis of the strong inbuilt weight in favour of maintaining legal professional privilege; an argument which the Commissioner believes attracts particular weight when the information in question relates to Parliamentary Counsel drafting papers for the reasons discussed at paragraph 37.

44. For the information which falls within the scope of request 3, the Commissioner believes that the balance of the public interest is finer given the issues discussed in the paragraph 42. Although disclosure of the requested information could go some way in revealing whether the complainant's concerns might be substantiated, this would not have any impact on the operation of the relevant provisions. For these reasons, and in light of the compelling arguments in favour of maintaining this exemption, the Commissioner has also decided that for request 3 the public interest favours maintaining the exemption.
45. In light of the Commissioner's findings in respect of section 42(1) he has not considered whether the requested information is also exempt from disclosure on the basis of section 35(1)(a) of FOIA.

Right of appeal

46. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
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

47. 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.
48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

**Graham Smith
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