

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 April 2013

Public Authority: Her Majesty's Revenue & Customs (HMRC)

Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested information about the validity of the House of Lords decision in *Sharkey v Wernher*. HMRC refused to disclose the information it held relevant to the scope of this request under section 35(1)(a) and section 31(1)(d) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that HMRC has incorrectly applied section 35(1)(a) and section 31(1)(d) FOIA in this case.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information to which section 35(1)(a) and section 31(1)(d) FOIA has been applied.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 28 May 2012, the complainant wrote to HMRC and requested information in the following terms:

"1. All internal guidance not covered by legal professional privilege and not otherwise published on HMRC's website which advises officers how to respond to challenges made by taxpayers as to the correctness or continued validity of the House of Lords decision in Sharkey v Wernher.

2. All head office material not covered by legal professional privilege and not covered by 1 above outlining HMRC's policy position in relation to the correctness or continued validity of the House of Lords decision in Sharkey v Wernher in relation to appropriations made prior to 12 March 2008.

3. The number of cases since 1 January 2008 and the tax at stake which had been notified to the First Tier Tribunal or to the General or Special Commissioners in which HMRC had asserted that Sharkey v Wernher gave rise to additional taxable income in relation to appropriations made prior to 12 March 2008, but where the assertion was dropped prior to the case being argued (possibly with the result that the case did not proceed to a hearing at all)."

6. On 27 June 2012 HMRC responded. It provided the complainant with information relevant to part 1 of the request, it said the information requested at part 3 was not held, it said the information requested at part 2 was exempt from disclosure under section 35(1)(a) but it required further time to consider the public interest test. On 18 July 2012 HMRC wrote to the complainant to confirm that the public interest in this case favoured maintaining the exemption it also said that section 31(1)(d) FOIA was applicable in this case.
7. The complainant requested an internal review on 19 August 2012. HMRC sent the outcome of its internal review on 14 September 2012. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner 4 November 2012 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether HMRC has correctly applied section 35(1)(a) and section 31(1)(d) FOIA to the withheld information.

Reasons for decision

10. Section 35(1)(a) of FOIA states that, "Information held by a government department or by the National Assembly for Wales is exempt information if it relates to- (a) the formulation or development of government policy".
11. The Commissioner has first considered whether the information in question relates to the formulation or development of government policy.
12. The Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a minister. Development may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
13. HMRC has explained that the information relates to a Budget Measure on the income and corporation tax arising from the appropriation, not by way of trade, of trading stock to and from a business. In this case the withheld information is a submission to a Minister relating to the above. It is dated January 2008 and relates to potential additions to the then Finance Bill.
14. Upon viewing the withheld information the Commissioner is satisfied that it does relate to the formulation and development of government policy.

Public Interest Test

15. Section 35(1)(a) is a qualified exemption and accordingly subject to the public interest test. The Commissioner has therefore gone on 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. In *DfES v The Information Commissioner and the Evening Standard* (EA/2006/0006) the Tribunal set out 11 principles that should be used as a guide when weighing up the balance of the public interest in connection with section 35(1)(a). The Commissioner has considered the principles that are relevant to this case.

Public interest arguments in favour of disclosing the requested information

16. HMRC has not provided any public interest arguments in favour of disclosing the requested information.

17. The Commissioner considers that there is a public interest in the government working in an open and transparent way. There is a public interest in disclosing information which increases public awareness, provides the public with a better understanding behind the decision making process and why decisions were made. Furthermore there is a public interest in the government being accountable for decisions made.

Public interest arguments in favour of maintaining the exemption

18. HMRC has explained that it believes the following public interest arguments favour maintaining the exemption:

- Good policy making depends on good decision making which in turn, depends not only on sound evidence but candid communications that allow a full consideration of all the options without any concern over premature disclosure.
- Evidence based policy is considered to be more robust. Experts or industry stakeholders may be reluctant to offer their opinions if there cannot be the assurance of non-disclosure.
- Government policy needs to be thoroughly evaluated before it can be properly implemented and this can only happen when both parties have the confidence that there is no risk that those exchanges will be disclosed.
- Disclosure would be highly detrimental to the process of good law making as it undermines the neutrality of the Civil Service by allowing officials to become the focus of political attention leading to pressure not to challenge ideas.
- There needs to be the free space to think the unthinkable and use imagination, without fear that policy proposals will be held up to ridicule.
- Policy makers need to be able to carry out very thorough road testing on emerging policies without risk of early disclosure that may adversely influence the choice of recommendation.
- The complainant has made clear his concerns over the extent to which external bodies influenced the decision to legislate. These documents contain no references to these opinions and therefore the public interest will not be served by disclosure.
- It explained that it considers all the above retain their validity long after the policy has been enacted and implemented. This carries even more weight for legislation such as tax law that is under

continuous evaluation and change such that documented comments can continue to have relevance.

Balance of the public interest arguments

19. The Commissioner accepts that HMRC's various arguments in favour of maintaining the exemption have validity. However he does not consider that HMRC has provided sufficient evidence to support its position that these arguments carry substantial weight in this particular case now that the policy has been implemented. In this case the Finance Bill became an Act of Parliament in 2009, therefore around 4 years has elapsed since the policy to which the withheld information relates was implemented.
20. HMRC has argued that tax law is continuously evolving and that the withheld information could continue to have relevance. Whilst the Commissioner accepts that tax law generally is under continuous evaluation, the withheld information in this case relates to a very specific area, which was incorporated into statute in 2009. As HMRC has not indicated that this particular area is likely to be re-evaluated in the near future this does reduce the weight the Commissioner has attributed to HMRC's arguments in favour of maintaining the exemption.
21. The Commissioner considers there is a public interest in the government operating in an open and accountable manner. He considers that greater transparency leads to a better public understanding of particular issues. In this case an area of tax law. Having considered the content, the nature of the information and the effect of its disclosure the Commissioner concludes, due largely to the timing of the request, as the government policy in question had already been implemented, that the public interest arguments in favour of maintaining the exemption in the particular circumstance of this case are outweighed by the public interest arguments in favour of disclosure.

Section 31(1)(d)

22. Section 31(1) states that, "Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice – (d) the assessment or collection of any tax or duty or of any imposition of a similar nature".
23. HMRC said that the legislation to which the withheld information relates, is currently in force and like all tax measures is under constant scrutiny by the tax avoidance industry. It said that disclosure of HMRC's perceived weaknesses would be useful in the design of new tax avoidance schemes both by reference to the specifics of this legislation but also by reference to other tax legislation. It said that any avoidance scheme that operates by reference to other legislation, also incorporates

the Sharkey v Wernher legislation as a component of the scheme. Furthermore it explained that if the exemption does not apply, the designers of these schemes could use FOIA to undermine Parliament's taxation intention by routinely seeking out weakness in this way. It argued that the effect of disclosure should not be limited to the current issue but the future effect that it will have in this context to the taxation system and structure.

24. The Commissioner accepts that the withheld information relates to the assessment or collection of tax. He has therefore gone on to consider whether disclosure would or would be likely to prejudice this process.
25. In this case HMRC has argued that the Budget Measure discussed in the withheld information has now become statute and that disclosure of HMRC's perceived weaknesses would assist in the design of new tax avoidance schemes. After viewing the withheld information, whilst it does include a brief description of a potential challenge to the Sharkey v Werhner rule, this predated the enactment of the statute. As the rule set out in Sharkey v Wernher is now contained in the Finance Act 2009, this is something which must be complied with and is not open to challenge in the same way it would have been prior to this.
26. Furthermore HMRC has not explained how the information would or would be likely to be used in the design of new tax avoidance schemes when the principle is now clearly set out in the statute books.
27. HMRC has also argued that if the exemption does not apply, any information could be obtained under FOIA to seek out weaknesses in the government's taxation position. The Commissioner does not consider that any such information could be routinely obtained under FOIA as, in relation to any request for information, a public authority needs to consider and take account of all the particular circumstances of each individual case. In this case the withheld information relates back to a policy position about the Sharkey v Wernher rule in 2008 and this rule has now been incorporated into statute. The policy has therefore been implemented and is no longer ongoing. Whilst there may have been perceived weaknesses surrounding the Sharkey v Wernher rule and contained in the withheld information, as this is now statute it is not open to challenge in the same way as in 2008. There is therefore no causal link between the disclosure of the requested information in this case and the perceived prejudice to the assessment or collection of tax, as it would not be the position that information similar to this would be disclosed in every case when requested.
28. The Commissioner does not consider that HMRC has explained or demonstrated the causal link between disclosure of the withheld information and the prejudice claimed. The Commissioner does not

therefore consider that section 31(1)(d) was correctly engaged in this case.

Right of appeal

29. 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

30. 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.
31. 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

Gerrard Tracey
Principal Policy Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF