

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 November 2013

Public Authority: HM Treasury
Address: 1 Horses Guard Road
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant has requested speaking notes and preparatory notes for Minister's Finance Bill Committee debate on 20 May 2008. HM Treasury ("the Treasury") confirmed that information was held but was exempt on the basis of section 36(2)(b)(i) and (c) of the FOIA.
2. The Commissioner's decision is that the Treasury has correctly applied these exemptions and the balance of the public interest lies in maintaining the exemption.

Request and response

3. On 7 August 2012, the complainant wrote to the Treasury and requested information in the following terms:

"Please let me have copies of the following information relating to the Finance Bill Committee debate on 20 May 2008 concerning Schedule 15 to the Bill:

- 1) *Pre-printed speaking notes prepared for the minister (whether or not used in the course of the debate)*
- 2) *Speaking/advisory notes prepared for the minister in response to questions raised in the course of the debate."*

4. The Treasury responded on 25 September 2012. It stated that it did not hold information within the scope of the second part of the request as it had taken this to mean information created during the debate. The Treasury confirmed it did hold information within the scope of the first part of the request but it engaged the exemptions at section 36(2)(b)(i)

and 36(2)(c) of the FOIA. After considering the public interest, the Treasury concluded that the information should not be disclosed.

5. Following an internal review the Treasury wrote to the complainant on 1 May 2013. It stated that it had reconsidered the request but maintained that the information within the scope of the request should be withheld on the basis of section 36(2)(b)(i) and (c).

Scope of the case

6. The complainant contacted the Commissioner on 4 June 2013 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of his investigation to be to determine whether the information identified by the Treasury as within the scope of the request has been correctly withheld under sections 36(2)(b)(i) and (c) of the FOIA.

Background

8. The request relates to a briefing prepared for the Finance Bill debate on Schedule 15 of the Finance Act 2008 (FA2008) which received Royal Assent in July 2008.
9. Clause 37 and Schedule 15 of the FA2008 relate to a technical provision that codified an existing common law rule known as *Sharkey v Wernher* which was decided by the House of Lords in 1995. This is concerned with the tax treatment of items transferred to and from trading stock.

Reasons for decision

10. Section 36(2) of the FOIA states that:

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information –

(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."

11. The exemptions listed in section 36(2) are qualified exemptions so are subject to public interest tests. However, before considering the public interest the Commissioner must first consider whether any of the exemptions are engaged.
12. For any of the exemptions listed as section 36(2) to apply the qualified person for the public authority must give their reasonable opinion that the exemption is engaged. The qualified person of the Treasury is usually the Minister. However, in this case as the information requested consists of papers of a previous administration (PPA), under the convention related to Ministers current Ministers are not allowed to see PPAs. As such where judgements on the applicability of section 36 in relation to PPA are needed, the convention is for the Attorney General to act as the qualified person.
13. The Treasury has provided the Commissioner with evidence to demonstrate that the Attorney General's opinion has been sought and provided. The Commissioner has next gone on to consider whether the opinion of the qualified person was a reasonable one.
14. The Commissioner has recently issued guidance on section 36 of the FOIA. It states the following: "*The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason: not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable.*"¹
15. In order to determine whether any of the subsections of 36(2) is engaged the Commissioner will consider:
 - whether the prejudice claimed relates to the specific subsection of 36(2) that the Treasury is relying on;
 - the nature of the information and the timing of the request; and
 - the qualified person's knowledge of or involvement in the issue.

¹ Information Commissioner's section 36 FOIA guidance, http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx, November 2011, page 6.

16. The Treasury has identified information within the scope of the request, amounting to two speaking notes for use by the Minister at the Finance Bill Committee debate and defensive briefing notes in the form of possible questions that might have been asked of the Minister during the debate.
17. The Treasury considers that it is important to maintain the high quality of briefings that Ministers received for appearances, particularly before Parliament where the Minister is likely to be questioned in detail about proposed legislation. The Treasury therefore considers that a 'safe space' is needed to allow officials to provide frank and candid advice. To support this view the Treasury has stated that it considers the process of drafting legislation would become less effective if the process was 'watered down' by Ministers not having thorough briefings to allow for cross-examination of policies.
18. The Treasury also considered the 'chilling effect' on the quality of the briefings. In particular where the information relates to the development of policies and legislation to combat tax avoidance schemes, the disclosure of information may impact on the standard of decision-making. As such disclosure of the specific information in this case with the likely inhibitory effect on the free and frank provision of advice, may make Ministers less likely to explore innovative policy options and therefore impact on the quality of decisions about legislation.
19. With regard to the likely prejudice to the effective conduct of public affairs; the Treasury considers the information to be important to Government decision-making and to discussions surrounding proposed legislation and policies. The creation of defensive briefings is an ongoing requirement for officials and in this case the briefings relate to the Finance Bill. The Treasury has explained that Finance Bills are debated every year and disclosure would therefore be likely to impact on ongoing activities and inhibit the production of future briefings, undermining the effectiveness with which Ministers can defend policies and legislation in Parliament. This in turn would affect the quality of policy formulation and Government decision-making and thus the effective conduct of public affairs.
20. The Treasury has provided sufficient evidence to illustrate that the qualified person was provided with information explaining that he was required to form a reasonable opinion in relation to the application of section 36(2) of the FOIA to the information withheld by the Treasury in this case. It is clear having reviewed this information the qualified person formed the opinion that the disclosure of the withheld information would be likely to inhibit the free and frank provision of advice and the effective conduct of public affairs.

21. Having considered the points outlined above the Commissioner is satisfied that the opinion of the qualified person is a reasonable one. Therefore, he considers that sections 36(2)(b)(i) and (c) are engaged. He will now go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

22. The Treasury acknowledges the public interest in promoting transparency in the briefings that Ministers receive ahead of parliamentary debates and how the Government prepares to introduce a measure. This would improve the levels of accountability for public authorities. The Treasury is also aware that the age of the information could be seen to be important as it is over four years old so disclosure would demonstrate a commitment to transparency and openness.
23. The Treasury acknowledged the public interest in disclosing information that explains the basis on which legislation has been introduced. It therefore recognised that release of the information would aid the public's understanding of how the Government prepared to defend this measure in Parliamentary debate. A previous ICO decision, later heard by the Information Tribunal² (referred to in this Notice as *Gordon v Cabinet Office*) acknowledged this by stating that there is a public interest in disclosure "where this allows the public to understand the intentions of those who actually requested the legislative change."
24. In *Gordon v Cabinet Office* the complainant asked for the drafting papers for the Parliamentary Counsel regarding specific provisions in the Finance Act 1994 and 2008 which became section 37 and schedule 15 of the FA2008. Both the complainant and the Treasury have highlighted parts of the Commissioner's Decision Notice and the Information Tribunal's decision in this case to support their positions. In this case the Cabinet Office took this to be a request for the instructions given to the Parliamentary Counsel and refused the request on the basis of section 42 of the FOIA (legal professional privilege). As such there are obviously going to be clear differences between these two requests but the decision in *Gordon v Cabinet Office* does acknowledge the weighty public interest in the disclosure of drafting papers so that the public can understand the intentions of those who requested the legislative change.

Public interest arguments in favour of maintaining the exemption

² FS50424157 and EA/2010/115

25. When making a judgement about the weight of the public authority's arguments under section 36(2), the Commissioner will consider the severity, extent and frequency of prejudice to the effective conduct of public affairs.
26. As a counter to the public interest in disclosure to increase transparency, it can be argued this is a very high level, general argument which does not take account of the need to maintain a 'safe space' for the frank provision of advice.
27. The Treasury has also argued that there is information in the public domain on the Finance Bill Committee debate which is the subject of the complainant's request. The answers given by Ministers in Parliament are on the public record (Hansard)³.
28. Whilst the Treasury has recognised the age of the information may be a factor in favour of disclosure it also counters this argument by referencing the Commissioner's view in his decision on FS50424157 that information from 2008 "*could be correctly described as recent*" and that, therefore, disclosure would be likely to inhibit the legislative process.
29. The Treasury has also highlighted the Commissioner's comment in this case that the 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 in itself is essential to the legal system in a parliamentary democracy.
30. The Treasury also referenced another ICO decision⁴ in which the Commissioner considered whether a defensive note prepared for a Minister to meet questions raised by Parliament or challenges about the then proposed legislative changes should be disclosed. The Treasury has highlighted the Commissioner's comment that "*the advantages to the democratic process by facilitating the ability of civil servants to prepare comprehensive defensive briefs on a complicated and contentious matter ... the likely extent and frequency of the harm to the democratic*

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<http://www.publications.parliament.uk/pa/cm200708/cmpublic/finance/080520/am/80520s01.htm>

<http://www.publications.parliament.uk/pa/cm200708/cmpublic/finance/080520/pm/80520s01.htm>

⁴ FS50269514

process is such as not to be discounted. Ministers, particularly because of the role they play in the democratic process, need to rely on and have confidence in the briefings prepared and provided by civil servants."

31. The Treasury has also advanced the argument that there is a strong public interest in officials being able to freely and frankly brief Ministers on the potential strengths and weaknesses of a particular policy and on areas of potential criticism.

Balance of the public interest arguments

32. In considering the balance of the public interest arguments the Commissioner has been mindful of the previous decisions which have been referenced by both the complainant and the Treasury. He has put emphasis on the Tribunal's comments in *Gordon v Cabinet Office*, particularly with regard to the public interest test; and to his previous decision on defensive notes (which also involved HM Treasury).
33. However, the Commissioner must consider the individual circumstances of this case when making a decision on where the balance of the public interest lies.
34. The Treasury mentioned the need to maintain a safe space in its submissions to the Commissioner and he generally accepts that these arguments are applicable where there is a need to debate issues and make decisions away from public scrutiny. He recognises the public interest in serving the democratic process by allowing for Ministers to be comprehensively briefed.
35. The Commissioner recognised that officials need to plan for situations where a range of questions will be put to Ministers. The provision of defensive briefings would be likely to be inhibited by disclosure and could lead to officials providing less frank and robust information to Ministers.
36. With regard to the 'chilling effect' argued by the Treasury, the Commissioner generally gives weight to the argument that disclosing information that is used to influence decisions or debates, whether on the formulation and development of policy or legislation, could affect the frankness and candour with which briefings are presented. The weight that can be given is stronger when the public authority can demonstrate that the information clearly relates to a matter which is still effectively 'live'.
37. In this case, the information dates back to 2008 and to a Finance Bill Committee debate on provisions which later formed part of the FA2008. On face value, the Commissioner would therefore accept the matter is not still live. However, the Treasury has argued that Finance Bills are debated every year and amendments and secondary legislation made to

Finance Acts accordingly. As such the information does relate to an ongoing matter.

38. The Commissioner is mindful of decisions of the Information Tribunal⁵ where broad arguments that disclosure would affect the frankness and candour with which officials would provide information or contribute were rejected. However the Commissioner also accepts the need to consider the specific impact of disclosure in each case. As such the Commissioner does consider that there is some validity to the 'chilling effect' arguments in this case in relation to the briefings as they assisted in providing the Minister with comprehensive information on potential strengths and weaknesses with the proposed legislation so as to be in a position to fully engage in a debate which shaped the legislation.
39. The Treasury has also argued that whilst it is clear some of the tax professions may wish to re-discuss and debate the provisions of Schedule 15 incorporated into the FA2008, the Commissioner was not minded to accept this was a convincing argument in support of disclosure in the case of *Gordon v Cabinet Office* and maintains this position in this case.
40. Balanced against all of this, the Commissioner does find that there is a strong public interest in releasing information which assists in the public's understanding of the democratic process. However, the Commissioner is aware that the answers given by a Minister in Parliament are on the public record (Hansard) and therefore the Government position is known.
41. The complainant has previously argued that a Minister made an incorrect statement to Parliament during the passage of the Finance Bill 2008 and that this provides a strong public interest argument as disclosure of the briefings provided to the Minister would increase transparency and allow the public to understand how decisions were made. However, the Tribunal considered this point in *Gordon v Cabinet Office* and concluded that neither the Commissioner nor the Tribunal could consider public interest arguments that question the accuracy of Parliamentary proceedings or allege any impropriety or inadequacy in those proceedings.
42. The Commissioner has accepted the validity of the chilling effect and safe space arguments in relation to the information and these arguments do outweigh the public interest arguments in disclosure,

⁵ Office of Government Commerce v Information Commissioner [EA/2006/0068 & EA/2006/80]

which once the argument relating to the need to establish if an incorrect statement was made is removed, are general arguments in relation to section 36(2). The Commissioner therefore finds that the public interest in maintaining the section 36(2)(b)(i) and (c) exemptions outweighs the public interest in disclosure.

Right of appeal

43. 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

44. 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.
45. 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

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