

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 July 2013

Public Authority: Her Majesty's Treasury
Address: 100 Horse Guards Road
London, SW1A 2HQ

Decision (including any steps ordered)

1. The complainant has requested information relating to the changes made to Child Benefit for Higher Rate Taxpayers.
2. The Commissioner's decision is that HM Treasury (the Treasury) has correctly applied section 42(1) to the withheld information.
3. The Commissioner does not require the Treasury to take any steps as a result of this decision notice.

Background

4. The Treasury has explained that as part of its deficit reduction strategy the Government reviewed a number of welfare payments, including Child Benefit. It concluded that it was not fair to tax people on low incomes to pay for the receipt of Child Benefit by those earning much more. This led to the introduction of the High Income Child Benefit Charge. The policy was initially announced in October 2010, but changes were announced at Budget 2012. At the time of the request and internal review the Treasury explained that HMRC was writing to households liable to the tax charge to inform them of the changes. However at this point the policy had not been implemented, rather discussions were ongoing about implementing the policy. The tax charge was finally implemented in January 2013 pursuant to the Finance Act 2012.

Request and response

5. On 16 October 2012, the complainant wrote to the Treasury and requested information in the following terms:

"Please can you let me have all relevant background information that relates to the decision that the (High Income Child Benefit Charge) HICBC is (Human Rights Act) HRA compliant".

6. The Treasury responded on 13 November 2012. It confirmed that it did hold some information within the scope of the request, however it considered it was exempt under section 35(1)(a) and section 42(1) of the FOIA.
7. Following an internal review the Treasury wrote to the complainant on 12 December 2012. It maintained its original position.

Scope of the case

8. The complainant contacted the Commissioner on 13 December 2012 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of this case to be to determine if the Treasury has correctly applied the exemptions it has cited to the withheld information.

Reasons for decision

Section 42 – Legal professional privilege

10. 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.
11. There are two categories of legal professional privilege, those categories are advice privilege where no litigation is contemplated or pending and litigation privilege where litigation is contemplated or pending.
12. HM Treasury has confirmed that in this case the category of privilege it is relying upon is advice privilege. This privilege applies to communications between a client and their legal advisers where there is no pending or contemplated litigation. Furthermore the information must be communicated in a professional capacity.

13. The communication in question must also 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, which can usually be determined by inspecting the relevant information.
14. The Commissioner has obtained and considered a copy of the requested information and is satisfied that it is subject to legal professional privilege.
15. Section 42 is a qualified exemption and therefore subject to the public interest test. The Commissioner has 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.

Public interest arguments in favour of disclosing the requested information

16. There is an inherent public interest in ensuring that public authorities are transparent in the decisions they make in order to promote accountability and improve the quality of their decision making. Placing an obligation on authorities to provide reasoned explanations for decisions made improves the quality of decisions and administration. Part of that accountability and transparency includes ensuring that, where appropriate, legal advice has been sought and that good quality legal advice has been obtained.
17. The Commissioner recognises that there is a strong public interest in disclosing information which would demonstrate whether public authorities have acted appropriately. This is especially true where there are concerns over whether legislation accords with the principles contained in the HRA. The disclosure of the advice would have assisted the public in ascertaining whether there was any incompatibility between the Bill and the HRA and, also, whether any advice that had been provided was followed by the Government.
18. There is also a public interest in the public knowing that the legislature's sign off procedure for assessing the human rights compatibility of proposed legislation is genuine, objective and based on sound legal advice. The disclosure of the advice would have been of value in relation to this.
19. The Commissioner recognises that there is an inherent public interest in Government being transparent and accountable in relation to the advice it has received. He considers that it is beneficial if views and representations which influence the legislative process are open to public scrutiny. He also recognises that in this case the issue does affect

a significant amount of people and the sum of money involved is quite large which adds weight to this public interest factor.

20. The Commissioner therefore acknowledges that there is a strong public interest in disclosure of the information requested.

Public interest arguments in favour of maintaining the exemption

21. The Commissioner has taken into account the inbuilt public interest in the concept of legal professional privilege, as well as what the particular factors in this case suggest about the balance of public interest. This includes what harm may result, and what benefit to the public interest may result, through disclosure of the information in question. The inbuilt public interest in legal professional privilege was noted by the Information Tribunal in the case *Bellamy and Secretary of State for Trade and Industry* (EA/2005/0023):

"...there is a strong element of public interest inbuilt in to the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...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 case..." (paragraph 35).

22. It is very important that public authorities should be able to consult with their lawyers in confidence and to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter them from seeking legal advice. The Commissioner's published guidance on legal professional privilege states the following:

"Legal professional privilege is intended to provide confidentiality between professional legal advisers and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice".

23. The Treasury has argued that it is in the public interest that the decisions taken by government are taken in a fully informed legal context. Government departments therefore need high-quality comprehensive legal advice for the effective conduct of their business. That advice needs to be given in context, and with full appreciation of relevant facts, taking account of both strengths and weaknesses in the Government's case.

24. The Treasury further argued that without such comprehensive advice the quality of the Government's decision-making would be much reduced since it would not be fully informed. This would be contrary to the public interest.

Balance of the public interest arguments

25. Although there will always be an initial weighting in terms of maintaining this exemption because of the in-built public interest in this exemption; the Commissioner recognises that this should not mean that section 42(1) is, in effect, elevated to an absolute exemption. This means that, whilst the inbuilt weight in favour of the maintenance of legal professional privilege is a weighty factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is outweighed by the factors favouring disclosure.. In order to determine whether this is the case, the Commissioner has considered the following factors:
- how recent the advice is; and
 - whether it is still live
26. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner has considered:
- 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
27. With regard to the age of the advice the Commissioner accepts the argument advanced on a number of occasions by the Information 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 serviced its purpose and the less likely it is to still be used as part of a decision making process.
28. 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.

29. The advice dates from October 2010. The Commissioner accepts that at the time of the request in October 2012, the advice was still relatively recent taking into account the time taken for Government to formulate and implement the policy based on that advice. The policy was not implemented until January 2013.
30. The Commissioner is aware that there is a strong public interest in protecting the established principle of confidentiality in communications between lawyers and their clients, a view previously supported by the Information Tribunal.
31. There is a need for reasonable certainty relating to confidentiality and the disclosure of legal advice. Without this, the principle of confidentiality would be undermined and the quality of legal advice may not be as full and frank as it would to be, if there was a risk that it would be disclosed in the future.
32. It is vital that public authorities are able to obtain full and frank legal advice in confidence. Legal advice necessarily highlights the strengths and weaknesses of a particular position, and so, if legal advice obtained were to be routinely disclosed, public authorities would potentially be in a weakened position compared to other persons not bound by FOIA.
33. The Commissioner notes that the Tribunal, in *Mersey Tunnel Users Associates v Information Commissioner and Merseytravel* (EA/2007/0052), felt that a key reason why the disclosure of the requested legal advice was necessary in that case was because of the crucial lack of transparency by the public authority in question. In this case the Commissioner does not consider that such a fundamental lack of transparency is apparent: the policy was initially announced in the 2010 Budget, with changes being announced in the 2012 Budget prior to implementation in January 2013.
34. The Commissioner has carefully considered all the public interest arguments outlined above and viewed the information itself. He understands that the complainant has legitimate reasons for wanting the legal advice to be put in the public domain and recognises the importance of transparency particularly in decisions which affect a significant amount of the public and he has taken this into account. He is satisfied that in this case there is however a stronger public interest in maintaining the exemption. He has concluded that the inherent public interest in protecting the established convention of legal professional privilege is not countered by at least equally strong arguments in favour of disclosure. He is also satisfied that there is nothing in the legal advice itself that would justify legal privilege being overridden on this occasion.

He has concluded that the potential harm that disclosure would have on limiting the effectiveness of the current system of legal professional privilege outweighs the factors in favour of disclosure.

35. The Commissioner therefore considers that the Treasury has correctly applied section 42(1) to the withheld information. As such he has not gone on to consider the application of section 35(1)(a).

Right of appeal

36. 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

37. 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.
38. 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

Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF